

2004

Utah v. Kathleen Jo Workman : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Utah v. Workman*, No. 20040530 (Utah Court of Appeals, 2004).
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IN THE SUPREME COURT OF THE STATE OF UTAH

**UTAH SUPREME COURT
BRIEF**

THE STATE OF UTAH,	:	UTAH
	:	DOCUMENT
Plaintiff/Appellee,	:	K F U
	:	45.9
v.	:	.59
	:	DOCKET NO. <u>20040530-SC</u>
KATHLEEN JO WORKMAN,	:	Case No. 20040530-SC
	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for operating a clandestine laboratory, a first degree felony offense under Utah Code Ann. § 58-37d-5(1) (2002), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, Judge, presiding. Appellant is incarcerated.

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FILED
UTAH APPELLATE COURT
MAY

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
KATHLEEN JO WORKMAN, : Case No. 20040530-SC
Defendant/Appellant. :

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IN THE UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

KATHLEEN JO WORKMAN,
Defendant/Appellant.

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Case No. 20040530-SC

Kathleen Workman has challenged on appeal the admissibility at trial of toxicology reports. The state presented evidence of the reports through a supervising chemist, Jennifer McNair, rather than through the chemist who prepared the reports. The evidence constitutes hearsay and is specifically inadmissible under the rules. (Brief of Appellant, November 17, 2004.) Notwithstanding, the trial court admitted evidence of the reports at trial under the residual hearsay provision, Utah R. Evid. 804(b)(5).

The state does not deny that the trial court erred in relying on Rule 804(b)(5). Rather, it claims Workman failed to preserve parts of the issue for appeal. Also, it asks this Court to affirm the trial court ruling on alternative grounds raised first on appeal.

Inasmuch as the trial court relied on the hearsay rules to find the evidence admissible, the issue is properly before this Court for review on the merits. See infra, Point I.A. In addition, since the state does not dispute relevant parts of Workman's arguments on inadmissibility, this Court may reverse the conviction for a new trial. This Court is not required to reach the state's arguments for affirmance on alternative grounds raised for the first time on appeal, since the new grounds are not supported by the record. See infra, Point I.B.; State v. Topanotes, 2003 UT 30, ¶9, 76 P.3d 1159.

POINT I. THE STATE DOES NOT DISPUTE THAT THE TRIAL COURT'S RELIANCE ON RULE 804(b)(5) WAS ERROR.

The trial court allowed the state to admit two toxicology reports into evidence through the testimony of the supervising chemist at the Utah State Crime Laboratory, Jennifer McNair. The state identified the reports at trial as Exhibits 30 and 31.

McNair's job as supervisor entailed "administrative-type work," like reviewing the work of others reflected in reports. (R. 299:135-36, 139, 149-50; State's Exhibits 30 & 31.) She had no involvement in testing substances or preparing the reports here. (Id.) McNair was familiar with lab procedures, she reviewed reports to see if procedures were followed, and she described what tests would have been performed on substances. (R. 299:141-44.) She acknowledged that chemists used color tests and the gas chromatography mass spectrometer, but those tests were not precise for identifying substances. (R. 299:152-54.) McNair testified that chemists at the state crime lab based results on subjective information: the analyst's observations, training, and experience. (Id.)

McNair first reviewed the report identified as State's Exhibit 30 on June 3, 2002. (R. 299:149.) The report was dated May 31, 2002. (See State's Exhibit 30.) McNair first reviewed State's Exhibit 31 on the first day of trial, April 13, 2004. (R. 299:150.) McNair was not the original supervising chemist for Exhibit 31. Scott McDaniel was. (R. 299:139, 145.) He purportedly retested items in State's Exhibit 31. (R. 299:150; but see R. 183 (the prosecutor claimed there was no retesting).) McDaniel was not present at trial. The record is silent as to why. (R. 299.)

According to Exhibits 30 & 31, Christine Wright performed "any testing" on substances and she recorded results. (State's Exhibits 30 & 31.) She did not explain testing (see id.), or indicate if she prepared the reports during testing or later. (Id.) Wright did not testify at trial. (See Record, generally.)

On the first day of trial, the state asked to have McNair testify to Wright's test results in Exhibits 30 and 31. (R. 299:12-15.) The defense objected. (Id.) The court overruled the objections and found the evidence admissible under Utah R. Evid. 804(b)(5). (R. 299:15, 171-72.) The state presented evidence of the reports for the truth of the matter asserted. (R. 299:12-15.) Among other things, Exhibit 30 reflected pseudoephedrine, meth, iodine, and phosphorus; and Exhibit 31 reflected meth.

Workman maintains that evidence of the reports constituted inadmissible hearsay. (See Brief of Appellant, 9-31.) Where the state in relevant part does not dispute that argument, this Court may reverse the conviction and remand for a new trial.

A. THE HEARSAY ISSUE IS PROPERLY BEFORE THIS COURT AND APPROPRIATE FOR REVIEW ON THE MERITS.

The state asserts that Workman's hearsay issue was not preserved. (State's Brief, 15-17.) In State v. Holgate, 2000 UT 74, 10 P.3d 346, this Court discussed preservation. It stated that the preservation rule serves two important policies.

First, "in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it." Second, a defendant should not be permitted to forego making an objection with the strategy of "enhanc[ing] the defendant's chances of acquittal and then, if that strategy fails, ... claim[ing] on appeal that the Court should reverse."

Id. at ¶11 (cites omitted). The first policy of preservation is satisfied here.

When the state notified the defense on the first day of trial that it would rely on McNair to present the reports, Workman made timely, specific, repeated objections. (R. 299:12-15, 134, 145-48.) She objected to the second-hand nature of McNair's testimony on the reports, where McNair was not involved in testing here and did not have personal knowledge of the results. (R. 299:12-15.) Also, counsel argued the evidence was inadmissible because it denied Workman the opportunity to cross-examine the person who prepared the reports where the state failed to procure Wright's attendance, and counsel was not given adequate notice of the state's intent to call McNair as a witness. (Id.)¹

The objections went to the primary concerns that make hearsay inadmissible. See McCormick on Evidence, Vol. II, §245, p. 94 (5th ed. 1999) (lack of cross-examination justifies excluding hearsay); also E. Kimball & R. Boyce, Utah Evidence Law, 8-1 (1996) (lack of cross-examination casts "doubt on the reliability" of hearsay evidence); see also www.utcourts.gov/resources/glossary, (defining "hearsay" as "second-hand" evidence).

They comported with the preservation rules. They "direct[ed] the attention of the court to the claimed errors" so that the court "might have an opportunity to correct them." Tolman v. Winchester Hills Co., 912 P.2d 457, 460 (Utah Ct. App. 1996) (cites omitted).

¹ The state gave notice in February 2003 that Wright would provide testimony regarding tests she performed and the results. (R. 41.) Since Wright regularly performed tests in criminal cases (R. 299:136), attorneys at legal defenders had collected information over time pertinent to cross-examination of her. Indeed, defense counsel here specifically advised the trial court that she had prepared cross-examination for Wright. (R. 299:13-14.)

In this case, the trial court ruled on the objections. It granted the state's motion to have McNair testify to the reports. (R. 299:15.) The court determined that Wright was "unavailable" (R. 299:15, 172); the evidence was "material" and "probative" (R. 299:172); it was reliable (id.); the interests of justice supported admissibility (id.); and the reports and McNair's testimony were admissible for their substance under Utah R. Evid. 804(b)(5). (Id.) The objections together with the court's ruling satisfied the preservation rule. See State v. Johnson, 821 P.2d 1150, 1161 (Utah 1992) (preservation ensures that "the trial court has the first opportunity to address a claim that it erred. If the trial court already has had that opportunity, the justification for rigid waiver requirements is weakened considerably").

Also, where the trial court relied on Rule 804(b)(5) (R. 299:172), it is charged with knowing what the rule requires, and its ruling is subject to review. See State v. Edward S., 400 S.E.2d 843, 850 (W.Va. 1990) (courts confronting the residual hearsay exceptions must "determine whether the criteria identified in the residual rule have been met"); State v. Seale, 853 P.2d 862, 870 (Utah 1993) (where the court addressed the merits, defendant may raise it on appeal), cert. denied, 510 U.S. 865 (1993); Johnson, 821 P.2d at 1161 (where the court addressed the issue fully, "we consider the issue on appeal"). Due to the trial court's ruling, all aspects of Rule 804(b)(5) are subject to review on appeal.

With regard to the second policy consideration under Holgate, 2000 UT 74 at ¶11, Workman did not forego an objection to the evidence. Indeed, she specifically asked the trial court to find McNair's testimony on the reports to be inadmissible at trial. She

objected several times. (See Brief of Appellant, 9-12; R. 299:12-15, 134, 145, 148.) If the court had sustained the objections, the hearsay would not have been admitted.

To the extent Workman failed in any degree to object to the evidence, that was due to the state's failure to provide notice of the matter. Rule 804(b)(5) requires notice of hearsay evidence to allow the opponent to challenge its reliability. Utah R. Evid. 804(b)(5). Without proper notice, opposing counsel is precluded from preparing a challenge to admissibility. State v. Webster, 2001 UT App 238, ¶21, 32 P.3d 976 ("the very purpose of the notice provision *as acknowledged by the State in its brief [is]* 'to afford the adverse party an opportunity to attack the statement's trustworthiness'" (emphasis added)); Piva v. Xerox Corp., 654 F.2d 591, 595-96 (9th Cir. 1981); (State's Brief, 28 ("The prosecutor's duty of disclosure must be met in time to permit a defendant sufficient opportunity to meet the testimony or evidence included in the disclosure")). Where a proponent has failed to provide notice, opposing counsel has no opportunity to make an adequate challenge and should not be faulted. Webster, 2001 UT App 238 at ¶21.

In this case, Workman did not engage in gamesmanship by waiting until the appeal to challenge the evidence. She did all she could. She objected and the trial court ruled. This Court may find that the issue was properly preserved and it may decide the issue on the merits. S.L.C. v. Holtman, 806 P.2d 235, 237 (Utah Ct. App. 1991) (the purpose of a specific objection is to bring the issue to a trial court's attention for resolution. Here, "these objectives were met"). Any fault in the proceedings lies with the state; its failure to give notice should have been fatal to admissibility. (See Brief of Appellant, 25-28.)

Also, once the court ruled, Workman was not required to continue arguing about admissibility. See Utah R. Crim. P. 20 (stating exceptions are unnecessary: "It is sufficient that a party state his objections to the actions of the court and the reasons therefor"); State v. Burns, 2000 UT 56, ¶¶16-20, 4 P.3d 795 (recognizing that trial court ruling left defendant with no choice but to proceed pursuant to the ruling; that does not constitute a waiver of the issue on appeal); Holtman, 806 P.2d at 237 and n.2.

The purposes of the contemporaneous objection rule have been served in this case. The matter now may be addressed on the merits on appeal.

B. ON THE MERITS, THE STATE DOES NOT DISPUTE THAT EVIDENCE OF THE REPORTS, IN RELEVANT PART, VIOLATED THE HEARSAY RULES. INSTEAD, THE STATE MAKES ARGUMENTS FOR AFFIRMANCE THAT WERE NOT MADE IN THE TRIAL COURT.

In this case, the state acknowledges that certain aspects of the hearsay issue were properly preserved for appeal. The state asserts Workman preserved "her claims concerning an inability to cross-examine the author of the toxicology reports" (State's Brief, 15) and unavailability, and she "arguably preserv[ed] a notice claim under [R]ule 804." (State's Brief, 23 n.5, 27.) If this Court were to decide only those aspects of the hearsay issue, it would be justified in finding that the trial court erred in admitting the evidence of the reports at trial. See infra, Point I.B.(1) & I.B.(2), herein.

In addition, since the trial court ruled that Wright was unavailable and the hearsay evidence was reliable and admissible under Rule 804(b)(5) (R. 299:15, 172), this Court may review those rulings on the merits. Infra, Point I.B.(3), herein. As set forth in the

opening Brief and below, the trial court failed to properly apply Rule 804(b)(5). Its ruling on hearsay grounds constitutes an abuse of discretion. (See Brief of Appellant, 9-31.)

(1) The State Does Not Deny that the Prosecutor Failed to Give Notice as Required by the Hearsay Rules. Instead, the State Claims that Since McNair Was a Substitute for Wright, Notice Was Unnecessary. Yet McNair Served as a Conduit for Wright's Out-of-Court Statements. Thus, Notice Was Required.

Before a trial court may rely on Rule 804(b)(5) to support the admissibility of hearsay, it must ensure that the proponent of the evidence has given notice to the adverse party. Notice must provide the adverse party with "a fair opportunity to prepare to meet [the statement], the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant." Utah R. Evid. 804(b)(5). In Webster, the Court of Appeals stated the following regarding notice:

For us to hold that the State met the pretrial notice requirement in this case would be tantamount to saying that a party need not be given notice of the proponent's intent to offer specific hearsay evidence, but need only be on notice of the existence of the evidence the proponent may eventually attempt to offer, perhaps relying on the residual exception. The plain language of the rule requires that an opposing party have more than mere notice of the existence of particular evidence. It requires actual notice of a proponent's intent to offer specific hearsay evidence and the particulars of that evidence. The State here did not give [defendant] actual pretrial notice of its intent to offer his wife's hearsay statements made to [the investigating detective], nor did it provide notice of the particulars of those statements, especially as recollected by [the detective].

Webster, 2001 UT App 238 at ¶18. The lack of notice made the evidence inadmissible.

Here, the state seems to acknowledge that proper notice was not given: the state provided the reports and revealed that Wright prepared them. (State's Brief, 24.) Yet McNair testified to more than that (compare State's Exhibits 30 & 31 with 299:135-57).

The state failed to disclose the particulars as required. Utah R. Evid. 804(b)(5). Also, the state failed to provide notice that it would call McNair to testify to the reports and that it intended to rely on the residual provision. It failed to furnish Wright's current address since Workman would not have the opportunity to cross-examine Wright as intended. Id. Rule 804(b)(5) notice was lacking. See Kirk v. Raymark Industr., 61 F.3d 147, 167-68 (3d Cir. 1995) (error to admit without notice); U.S. v. Ruffin, 575 F.2d 346, 357-58 (2d Cir. 1978); State v. Arellano, 964 P.2d 1167, 1170 (Utah Ct. App. 1998).

Next, the state claims notice was unnecessary because McNair served as a substitute for Wright. (State's Brief, 24-25.) The state fails to recognize that if Wright had testified, she would have given direct evidence of her tests and results; that would not constitute hearsay. (See Brief of Appellant, 21-22 (citing cases that allow testing chemist to present reports).) Thus, the state would not be required to provide notice of hearsay. However, since McNair was a conduit for Wright, the evidence constitutes hearsay. Notice is required, not excused. Utah R. Evid. 804(b)(5). This Court may reverse the conviction where notice was lacking. Webster, 2001 UT App 238 at ¶23.

(2) The State Acknowledges It Failed to Establish Unavailability Under Rule 804. It Claims It Was Excused From That Showing Because McNair Was a Substitute for Wright, and the Reports Were so Credible that Cross-Examination of Wright Would Be of Marginal Utility. The State Did Not Make These Arguments Below and It Has Failed to Meet the Standard for Affirmance on Alternative Grounds.

Rule 804 requires the proponent of hearsay evidence to establish the unavailability of the declarant. Utah R. Evid. 804(a). The state admits that the prosecutor here failed to show unavailability under Rule 804. (State's Brief, 18.)

Indeed, even when the defense made repeated requests for discovery updates in the days before trial, the prosecutor failed to update his files. He failed to learn that Wright had moved to California a year before trial. (See R. 182-83; Brief of Appellant, 32-36.) He made no effort to procure her attendance, or to ascertain whether she would make the short flight from California or whether she would be available to talk to the defense since the defense would have no opportunity to cross-examine her as planned.

Yet Wright expected to testify. (See R. 299:136); Utah Code Ann. §§ 53-10-102(8), -402(2) (the forensics bureau provides testimony). Also, the state had resources and ability to bring her to trial. (R. 299:88 (the state brought in a witness from Nevada).)

"Unavailability is the all-important condition precedent to the admission of hearsay statements under the exceptions that are included in Rule 804(b)." 5 *Weinstein's Fed. Evid.* § 804.03[1] (2d ed. 2005). This Court has ruled that before a declarant may be "unavailable," the proponent must show that "[e]very reasonable effort" was made to procure her attendance. State v. Montoya, 2004 UT 5, ¶¶14-17, 84 P.3d 1183; see Kirk, 61 F.3d at 165. The state does not dispute that it failed to make that showing here. (State's Brief, 18.) Instead, it claims it was not required to establish unavailability because (i) McNair was a substitute for Wright, and (ii) cross-examination of Wright with respect to the testing here would have been of "marginal utility." (Id. at 18-23, 26-27.)

The state's first point seems to implicate Utah R. Evid. 703 and an expert's reliance on inadmissible evidence; the second point concerns the "marginal utility" doctrine. It is used to assess the trustworthiness of an out-of-court statement. See State

v. Calliham, 2002 UT 86, ¶44, 55 P.3d 573 (discussing "marginal utility" as going to trustworthiness). While the expert evidence rules and the "marginal utility" doctrine typically are separate analyses, the state has merged them here. (State's Brief, 18-27.) In the end, neither analysis explains why the prosecutor failed to update discovery, or why he failed to make any effort to procure Wright's attendance at trial, as he had the legal obligation to do. (See id.; Brief of Appellant, 26-37.)

Also, neither analysis was raised in the trial court. (See R. 182-85; 299:12-15, 171-72.) The state did not rely on Utah R. Evid. 703 there, and it did not argue "marginal utility." The state has raised those points for the first time here. It is asking this Court to affirm on alternative grounds raised for the first time on appeal.

In Topanotes, 2003 UT 30, this Court recognized it may affirm a judgment on an alternative ground not raised below if the ground is "apparent on the record," and it is "sustainable by the factual findings of the trial court." Id. at ¶9. In this case, the trial court made no findings regarding application of the expert rules as a back door to hearsay or to excuse the state from establishing unavailability. (See R. 299:15, 171-72.) Likewise the trial court made no mention of "marginal utility." (Id.) The state has failed to establish the requirements for affirming on alternative grounds. (State's Brief); Topanotes, 2003 UT 30 at ¶¶9, 22. This Court may reject the state's arguments on that basis. It also may reject the state's arguments on the merits. Infra, Point I.B.(2)(a) & I.B.(2)(b).

(a) *The Expert Rules Are Not a Back Door for Inadmissible Hearsay.*

The state claims that McNair testified to standard procedures in the lab, standards

used to ensure reliable test results, general testing procedures, and her familiarity with Wright's testing procedures. (State's Brief, 21.) It claims such matters may be addressed by the supervising chemist at the crime lab and it is not necessary to produce the person actually involved in testing. (Id.) Workman does not challenge the use of an expert—like McNair—to admit evidence of practices and procedures that are generally acceptable.²

However, in this case McNair also testified to the tests that Wright would have performed, the results, and the accuracy of Wright's testing and the results. (See R. 299:139-48; see State's Brief, 21, 26-27); but see Rimmasch, 775 P.2d at 406-07 (testimony that another's statement is truthful is inadmissible).

The state presented McNair's evidence of the reports for their substance. (R. 299:143-48.) The state claims that is an appropriate use of a substitute expert, and relies on Utah R. Evid. 703; State v. Kelley, 2000 UT 41, 1 P.3d 546; Kofford v. Flora, 744 P.2d 1343 (Utah 1987); State v. Moosman, 794 P.2d 474 (Utah 1990); and Green, 2001

2 To the extent the state's argument concerns the analysis applicable to a party establishing "inherent reliability" for expert testimony, that analysis is irrelevant. This Court has ruled that for *novel* science, the proponent of the expert evidence must satisfy a three part test. The proponent must show that (1) the scientific principles underlying the expert's testimony are "inherently reliable"; (2) a sufficiently qualified expert "properly applied" the principles in this case; and (3) the scientific evidence at issue is more probative than prejudicial. See State v. Rimmasch, 775 P.2d 388, 396 (Utah 1989); State v. Crosby, 927 P.2d 638, 641 (Utah 1996); Green v. Louder, 2001 UT 62, ¶16, 29 P.3d 638; State v. Butterfield, 2001 UT 59, ¶¶29-35, 27 P.3d 1133.

If the technique at issue is generally accepted, the proponent is not required to establish "inherent reliability" under Rimmasch. See State v. Adams, 2000 UT 42, ¶16, 5 P.3d 642. Since chemical testing is widely accepted, McNair would be qualified to testify to general, accepted procedures. That is not the issue here.

UT 62. (State's Brief, 18, 20, 26-27.) Those references do not support the state's claim.

Specifically, Utah R. Evid. 703 states the following:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

It is the federal rule in effect in 1999, verbatim. See Utah R. Evid. 703, comments.

For Rule 703 to apply, the trial court must find that the facts relied upon by the expert are of the type that experts reasonably rely on in the field. See Utah R. Evid. 703; 4 *Weinstein's Fed. Evid.*, § 703.04[1] (2d ed. 2005). The trial court here made no such finding (see R. 299:15, 171-72; Topanotes, 2003 UT 30 at ¶9).

In fact, the prosecutor acknowledged that the practice of having one chemist test substances, and another chemist testify, was new. The practice was adopted within four months before trial here. (R. 299:14.) By the state's admissions, it is not typical to have a designated chemist as surrogate for the declarant. See Arellano, 964 P.2d at 1170 (*state maintained toxicology reports may not be admitted absent preparer's testimony*). Thus, the Rule 703 requirement has not been established.

Next, cases interpreting rules comparable to Rule 703 have stated that while an expert may rely on inadmissible evidence to form an opinion, the evidence does not—by nature of that fact—become admissible.³ See Engbretsen v. Fairchild Aircraft Corp., 21

³ For example, an expert may review inadmissible reports prepared by an out-of-court declarant, and form an opinion based on her review and acceptable standards. The rule,

F.3d 721, 728-29 (6th Cir. 1994) ("Rules 702 and 703 do not, however, permit the admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible"); Edwards v. Didericksen, 597 P.2d 1328, 1332 & n.2 (Utah 1979) (ruling that hearsay "cloaked in the form of an expert opinion" would be impermissible and prejudicial; before an expert may rely on inadmissible facts, the facts must be of the type that an expert reasonably relies on to form an opinion); Utah R. Evid. 703, Advisory Committee Note (stating that Edwards recognizes the "position taken by this rule"); Miller v. State, 575 N.E.2d 272, 274 (Ind. 1991); Faulkner v. Markkay of Indiana, Inc., 663 N.E.2d 798, 801 (Ind. App. 1996); see also People v. Campos, 32 Cal. App. 4th 304, 307-08, 38 Cal. Rptr. 2d 113 (Cal. App. 1995); Erwin v. Todd, 699 So.2d 275, 276-78 (Fla. App. 1997).

The trial court must ensure that an expert is not being used as a conduit through which hearsay is brought to the jury. Maklakiewicz v. Berton, 652 So.2d 1208, 1209 (Fla. App. 1995). An expert witness "must rely on his own expertise in reaching his opinion and may not simply repeat opinions of others." Faulkner, 663 N.E.2d at 801. An expert who merely summarizes the content of a hearsay source is a hearsay witness.

Also, under the law, if the expert reveals inadmissible facts as a basis for his opinion, the facts are not admitted for their substance. Green, 2001 UT 62 at ¶¶32-33 (the

however, does not allow the expert to disclose the content of the reports for its substance as a back door to the hearsay rules, or to testify that the declarant's results are true and accurate. Utah R. Evid. 703; see e.g. Green, 2001 UT 62 at ¶¶32-33.

expert could rely on the deposition of another where "the contents of the deposition were not used; no inquiry was made regarding the veracity of [the] deposition testimony").

They are used for the limited purpose of demonstrating what the expert relied upon to formulate her opinion. *See e.g., Patey v. Lainhart*, 1999 UT 31, ¶¶29-33, 977 P.2d 1193 (allowing treating expert dentist to rely on medical records from others, where he did not adopt the opinion of others but formulated his own opinion; "Rule 703 cannot be used to introduce evidence through an expert for purposes other than the expert's conclusions and thus circumvent other rules of evidence"); *U. S. v. 0.59 Acres of Land*, 109 F.3d 1493 (9th Cir. 1997) ("When inadmissible evidence used by an expert is admitted to illustrate and explain the expert's opinion, [] it is 'necessary for the court to instruct the jury that the [otherwise inadmissible] evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence'" (cite omitted)).

Here, the state did not ask McNair to rely on the reports for the limited purpose of formulating an opinion as to whether they were prepared pursuant to lab procedures. In fact, the state used McNair to reveal the contents of the reports for their substance (R. 299:141-48), thereby defying the notion that the evidence was for expert purposes.

Before a proponent may admit the underlying information into evidence for its substance, the person who participated in the testing must testify. *See Arellano*, 964 P.2d at 1170 (the state maintained toxicology reports may not be admitted absent the preparer's testimony); *Moosman*, 794 P.2d at 479-80 (supervising pathologist could testify based on information from an assistant, where the supervisor observed the wounds and body, was

present throughout the autopsy, supervised over the procedure, and discussed the autopsy with the assistant at its conclusion);⁴ Kofford, 744 P.2d at 1356 (while an expert who was not involved in HLA blood testing may interpret the medical data, the persons who participated in testing *may be required to testify*); see also Reardon v. Manson, 806 F.2d 39, 41 (2d Cir. 1986) (the supervising chemist was allowed to present drug-identification testimony where he personally handled the substance and provided it to a chemist under his supervision, gave the chemist instructions for testing, obtained the results "promptly," and "examined them and drew his own conclusions as to the chemical nature of the substances in question"), cert. denied, 481 U.S. 1020 (1987); Kelley, 2000 UT 41 at ¶10-15 (the expert, who worked with a team to determine the medical and psychological abilities of the patient/victim, and who worked daily with the victim for two years, could testify to the victim's understanding of sexual concepts).⁵

In this case, the state does not dispute that the chemist's reports were inadmissible under the business records exception, and expressly inadmissible for their substance under Rule 803(8). (See Brief of Appellant, 9-23; State's Brief); Utah R. Evid. 803(8).

4 Autopsy reports may be admissible in evidence under the hearsay rules. Such reports are prepared by medical examiners for death certificates, which qualify as vital records. See Utah Code Ann. §§ 26-2-2(11); 26-2-13; 26-2-22; 26-4-1, *et. seq.*; 26-4-10; 26-4-11; 26-4-13 (1998); Utah R. Evid. 803(9) (regarding admissibility of vital statistics), and 803(8) (regarding public records and reports).

5 Medical records are admissible under a hearsay exception: Utah R. Evid. 803(4).

Since the reports were specifically inadmissible, Rule 703 is not a proper back-door procedure for presenting the contents of the reports to the jury.

(b) *The "Marginal Utility" Doctrine Concerns the Question of Reliability.*

The state claims that "unavailability" does not apply to prevent the admissibility of hearsay evidence if cross-examination of the declarant would be of minimal or "marginal utility." (State's Brief, 19-23 (citing Ohio v. Roberts, 448 U.S. 56 (1980), overruled by Crawford v. Wash., 541 U.S. 36 (2004); Minner v. Kerby, 30 F.3d 1311 (10th Cir. 1994); Reardon 806 F.2d 39; State v. Hutto, 481 S.E.2d 432 (S.C. 1997).) The state also suggests that under the "marginal utility" doctrine, this Court will compare the declarant (*i.e.* Wright), with the surrogate (*i.e.*, McNair). (See State's Brief, 19-20.) Yet the "marginal utility" doctrine typically relates to the *reliability* of an out-of-court statement. It is separate from the question of unavailability. Also, the doctrine looks only to the out-of-court statement; it does not consider collateral or corroborating facts for reliability.

To explain, in State v. Calliham, 2002 UT 86, 55 P.3d 573, this Court considered "marginal utility." There, defendant moved for a mistrial after a witness testified to the out-of-court statements of another. Id. at ¶¶40, 44. Defendant claimed the testimony violated his confrontation rights. This Court ruled that before a statement raising confrontation concerns may be admitted, the proponent must show that "declarant is unavailable and that there are adequate indicia of reliability to support the statement." Id. at ¶44 (citing Roberts, 448 U.S. at 66). Reliability may be inferred if the statement falls within "a firmly rooted hearsay exception" or there is a showing of "particularized

guarantees of trustworthiness." Id. If such a showing cannot be made, the statement is *presumptively* unreliable. Id. The presumption may be rebutted "in an 'exceptional case' where 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.'" Id. (cites omitted).

This Court recognized that the "marginal utility" analysis typically goes to the issue of "reliability." Id.; Idaho v. Wright, 497 U.S. 805, 823 (1990). Also, a court will confine its assessment of the doctrine to the circumstances of the statement at issue. It will assess if the out-of-court statement—standing on its own—is impervious to attack or challenge. See Calliham, 2002 UT 86 at ¶44 n.15 (corroborating evidence will not be considered to determine if cross-examination of the statement would be of marginal utility); State v. Gurule, 82 P.3d 975, 981-82 (N.M. App. 2004). "This is a robust test with stringent controls." Gurule, 82 P.3d at 981; Edward S., 400 S.E.2d at 850. The court does not assess the matter with evidence from the substitute witness. See Gurule, 82 P.3d at 981.

Under the proper "marginal utility" test, the reports here would not support reliability where they are inadmissible under the hearsay rules (see Utah R. Evid. 803(8); Brief of Appellant, 9-31) and they do not contain enough information to make them impervious to cross-examination. In fact, the reports reflect minimal information: a property receipt; a list of suspects, items, and results; and Wright's name. (State's Exhibits 30 & 31.)

On their own, the reports fail to disclose *whether* testing/retesting was done on items (see State's Exhibits 30 & 31 (stating only that items were in a sealed condition at the time of testing "if any"); R. 299:140-41); *whether* or *what* observations were made

during testing; *whether/how* Wright checked equipment before testing; and *when* Wright prepared the reports in conjunction with any testing. (See State's Exhibits 30 & 31.)

The state does not look to the reports in its argument (see State's Brief, 18-22, 26-27). Instead, it assumes Wright's examination would be of marginal utility because she would have no recollection of testing or the results here. (See State's Brief, 22.)

Yet, the United States Supreme Court has recognized that a primary objective of confrontation and personal cross-examination is the opportunity to test the recollection and sift the conscience of the witness, and to give the jury the opportunity to look at the witness and assess whether she is worthy of belief. Mattox v. U.S., 156 U.S. 237, 242-43 (1895). "These means of testing accuracy are so important that the *absence* of proper confrontation at trial 'calls into question the ultimate "integrity of the fact-finding process."' " Roberts, 448 U.S. at 64 (emphasis added). Indeed, "the principal *purpose* of cross-examination [is] to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.'" Id. at 71. Thus, where the state believes cross-examination would of marginal utility if Wright did not remember testing here, faulty memory is justification for defendant's cross-examination of the witness.

In this case, Wright prepared the reports. Nothing about the reports or McNair's testimony suggests that Wright's credibility, reputation, or technique would be impervious to cross-examination. (See State's Exhibits 30 & 31.) Also, the prosecutor

acknowledged that the defense must be allowed to cross-examine the reports. (R. 299:14.)

This is not an "exceptional case" for application of the "marginal utility" doctrine. See Calliham, 2002 UT 86 at ¶44. Also, the trial court made no findings to support the doctrine. (R. 299:15, 171-72.) This Court may reject the state's argument raised for the first time on appeal. Topanotes, 2003 UT 30 at ¶¶9, 22.⁶

(3) The Trial Court Ruled that the Reports and McNair's Testimony on the Reports Were Reliable. Reliability and Trustworthiness Must Be Established for Application of the Hearsay Rules. The State Does Not Dispute that the Record Fails to Support Reliability Under Rule 804(b)(5).

The trial court ruled that evidence of the reports was reliable and admissible under Rule 804(b)(5). (R. 299:172.) Based on that ruling, the trial court is charged with knowing the rule's admissibility requirements. See Utah R. Evid. 804(b)(5). The trial court here failed to properly consider reliability. (See Brief of Appellant, Argument, Point I.A. (arguing that the reports were inadmissible under the hearsay rules, and they

6 Cases cited by the state support that if two agents are involved in testing, both are not required to testify. (See State's Brief, 19 (citing Minner, 30 F.3d 1311, 1313-14 (where a trainee and second chemist performed tests and the second chemist testified, no error resulted in admitting the trainee's notes); Reardon, 806 F.2d 39, 41 (the supervising chemist testified that he handled the substance, gave it to a chemist with instructions, obtained results "promptly" after testing, and "*examined them and drew his own conclusions as to the chemical nature of the substances in question*" (emphasis added)); Hutto, 481 S.E.2d 432-33, 436 (where two agents performed tests on evidence and came to the same results, the proponent was allowed to call one agent to testify to the results he reached; also, the testifying agent did not rely on the "subjective opinion" of the non-testifying agent, and his "opinion regarding whether a match existed was totally his own"); see also Ohio v. Roberts, 448 U.S. at 73, 75 (the government showed unavailability where declarant's parents did not know her whereabouts, and the out-of-court statements were made at a preliminary hearing during defendant's examination).)

Those cases are not applicable here since no agent involved in testing testified.

lacked trustworthiness).) This Court may reverse the conviction on that basis.

Case law supports that reliability may be established where evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66; see also Utah R. Evid. 804(b)(5) (specifying that a statement "not specifically covered by any of the foregoing exceptions but having equivalent guarantees of trustworthiness" must also meet other conditions for admissibility). As set forth in this case, reports prepared by law enforcement officers—including state chemists—are specifically inadmissible at trial under the hearsay rules. (See Brief of Appellant, 9-31 (analyzing the inadmissibility of such reports under the hearsay rules).) The state does not dispute the law on that point. (See State's Brief.)

The reports were governed by Rule 803(8). (Brief of Appellant, 9-31.) While Workman did not cite to Rule 803(8) when she objected to the evidence below, that is of no consequence. Workman was not on notice under the hearsay rule to allow her to make a challenge to the matter. Supra, pp. 8-9. Also, the trial court was required to properly apply Rule 804(b)(5) when it relied on the rule. (R. 299:172.) Rule 804(b)(5) expressly required the court to consider whether the reports were "not specifically covered" by any other hearsay exception. Utah R. Evid. 804(b)(5). The trial court failed to do that here.

With respect to whether the evidence had "guarantees of trustworthiness," that was not established. (See Brief of Appellant, 23-25 (citing Kehl v. Schwendiman, 735 P.2d 413, 416-17 (Utah Ct. App. 1987); Harry v. Schwendiman, 740 P.2d 1344, 1346 (Utah Ct. App. 1987); Webster, 2001 UT App 238 at ¶27); see also State's Brief).

While McNair testified that Wright's work was professional, she did not describe and the reports did not reflect Wright's academic achievements or training for trustworthiness (see R. 299: 135-57). Also, the reports are silent with respect to any testing in the matter. They did not disclose operational conditions of equipment, whether Wright checked equipment, how she proceeded with testing, when/if she tested items here, what she observed, or whether she prepared the reports in conjunction with testing or later. (State's Exhibits 30 & 31): Arellano, 964 P.2d at 1170. The reports lack trustworthiness.

For the reasons set forth in the Brief of Appellant and here, this Court may find that the trial court erred in its ruling. The evidence lacked trustworthiness, and it was expressly inadmissible under other provisions of the hearsay rules. (Brief of Appellant, Argument, Point I.A.)

C. THE STATE DOES NOT DISPUTE THAT McNAIR'S EVIDENCE OF THE REPORTS WAS THE ONLY SCIENTIFIC EVIDENCE TO SUPPORT A FIRST DEGREE FELONY, AND IT INFLUENCED SENTENCING.

The state does not deny the harm resulting from the inadmissible evidence as set forth in the opening brief. (Brief of Appellant, 28-31; State's Brief, 26-27.) Here, McNair's evidence was the only scientific evidence of methamphetamine and precursor at the residence. (See R. 299; 300.) Without the evidence, there is a reasonable likelihood that the jury would not have rendered a verdict for a first degree felony offense. See Utah Code Ann. §§ 58-37d-4(1)(a), (e) (making it a first degree felony to possess or to conspire to possess a precursor); (R. 220-24 (instructing the jury to infer intent based on evidence of substances/precursor, and that such evidence supports a first degree felony)).

Also, the evidence prevented the trial court from exercising discretion in sentencing.

Utah Code Ann. § 58-37d-5(1)(e) and (2) (with precursor/substance evidence, the court may not grant probation, a suspended sentence, or a reduction in sentence).

In its brief, the state seems to claim that the prejudice analysis is irrelevant because if the trial court had prevented the state from presenting evidence of the reports, McNair would have defied the court order and testified to the test results anyway. (See State's Brief, 26-27.) Yet, McNair's testimony about the reports would still constitute hearsay. It would be inadmissible. See Utah R. Evid. 801, 802, 803(8), 804(b)(5), 805; (see also Brief of Appellant, 9-31); State's Brief (failing to defend the trial court's ruling on hearsay grounds)); Ruffin, 575 F.2d at 357-58. The state's argument is not a legitimate solution to inadmissible hearsay.

Also, the state seems to claim it should be excused from compliance with the hearsay rules because when chemists leave the state, it is impractical to retest items. (See State's Brief, 20-21.) Yet in this case, the state had options that would avoid further retesting and be consistent with the rules: the state could have updated discovery, contacted Wright, and brought her from California for the trial; or it could have called McDaniel to testify to his independent test results, where he purportedly retested the items. (See R. 299:150; but see 183 (claiming items were not retested).) Instead the state presented the evidence through a hearsay witness. That was improper. Workman requests that this Court reverse the conviction and remand for a new trial.

D. A RULE 16 VIOLATION ENTITLES A DEFENDANT TO A REMEDY.

The state acknowledges the prosecutor failed to supplement discovery requests in violation of Utah R. Crim. P. 16. (State's Brief, 27-29.) The state claims, however, Workman is not entitled to a remedy because she did not request relief. (Id. (citing State v. Rugebregt, 965 P.2d 518 (Utah Ct. App. 1998); State v. Perez, 2002 UT App 211, 52 P.3d 451).) Rule 16 requires only that the defendant bring the violation to the trial court's attention. Utah R. Crim. P. 16(g). Thereafter, the trial court may remedy the situation. Id.

In this case Workman requested "appropriate relief." Rugebregt, 965 P.2d at 522 (considering whether known witness presented unexpected testimony). She objected to McNair's testimony and to the evidence of the reports. The court overruled the objections (R. 299:12-15, 134, 145, 148). If the trial court had sustained the objections either as they related to McNair or her testimony on the reports, that would have eliminated McNair as a witness or limited her testimony. That would have been an appropriate remedy here, particularly where the evidence was otherwise inadmissible. (Brief of Appellant, 9-31.)

This case is distinguishable from Perez, 2002 UT App 211 at ¶37, where defense counsel there examined the surprise witness without objection and objected only on redirect to the expert nature of the evidence; and it is distinguishable from Rugebregt, 965 P.2d at 521-23, where the trial court there sustained objections for a remedy. See State v. Menzies, 889 P.2d 393, 401 (Utah 1994) (stating that a rule 16 violation was cured by striking witness's testimony).

Workman did all she was required to do for relief. Utah R. Crim. P. 16(g). The record is sufficient to allow this Court to determine if Workman may be entitled to

appropriate relief for the violation and a new trial without the inadmissible evidence.

POINT II. THE SUFFICIENCY ISSUE IS ADEQUATELY BRIEFED AND MAY BE DECIDED BY THIS COURT.


The state claims that Workman failed to properly marshal the evidence in favor of the verdict and in connection with her argument that the evidence was insufficient here. (State's Brief, 32-33.) The state does not identify how Workman failed in that task, or what more she should have identified to meet the marshaling requirement. (Id.); Utah R. App. P. 24(a)(9) (requiring adequate briefing). Indeed, in its sufficiency argument, the state has relied on essentially the same facts and circumstances that Workman relied on in her argument. (Compare Brief of Appellant, 44-49; and State's Brief, 34-39.) The state even acknowledges that facts were susceptible to varying interpretations. (See State's Brief, 37-38.) Thus, the issue here turns on application of the law.

Where Workman and the state have identified the critical facts to relate to whether a sufficient nexus exists between Workman and the unlawful substances and/or lab equipment found at the residence (Brief of Appellant, 47-50; State's Brief, 38-41), this Court may determine the issue on the merits. It may decide that the evidence is insufficient to support that Workman is guilty of constructive possession and operation of a clandestine laboratory under Utah Code Ann. §§ 58-37d-4, 58-37d-5 (2002).

CONCLUSION

Workman respectfully requests that on Point I, this Court reverse the conviction and remand this case for a new trial, and on Point II, this Court vacate the conviction.

SUBMITTED this 3rd day of May, 2005.


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CERTIFICATE OF DELIVERY

I, Linda M. Jones, hereby certify that I have caused to be hand delivered an original and 9 copies of the foregoing to the Utah Supreme Court, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 3rd day of May, 2005.


LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Supreme Court as indicated above this ___ day of _____, 2005.
