

Case No. 20160995-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

CHRISTOPHER KIM LEECH,
Defendant/Appellant.

Appellant is incarcerated.

REPLY BRIEF OF APPELLANT

Appeal from convictions for one count of aggravated murder, a first degree felony, in violation of Utah Code §76-5-202; two counts of aggravated kidnapping, first degree felonies, in violation of Utah Code §76-5-302; two counts of aggravated robbery, first degree felonies, in violation of Utah Code §76-6-302; and one count of obstructing justice, a first degree felony, in violation of Utah Code §76-8-306(1), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Randall Skanchy 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. This Court should reverse Leech’s convictions because the record demonstrates that this is not one of those “rare” cases where defense counsel had a full opportunity at the preliminary hearing to challenge Myore’s credibility through cross-examination or where he possessed the same motive to develop Myore’s testimony as he would have had at trial.**

In his opening brief, Leech demonstrated that Theron Myore’s preliminary hearing testimony was inadmissible, as a matter of law, under rule 804 because defense counsel did not possess the same motive and did not have the same

alleged belief when conducting cross-examination made Myore's preliminary hearing testimony "reliable ...[meeting] the former-testimony exception's requirements." *Id.* at 21-24. It also argues that any error in admitting Myore's preliminary hearing testimony was harmless "because of the other overwhelming evidence of Leech's guilt." *Id.* at 16, 24-31. The State's arguments are not persuasive.

A. *Myore's preliminary hearing testimony was inadmissible because Leech neither possessed the same motive nor had the same opportunity to develop Myore's testimony during cross-examination as he would have had at trial.*

Contrary to the State's claims, Leech neither possessed the same motive nor had the same opportunity to develop Myore's preliminary testimony during cross-examination as he would have had at trial. Aplt. Br. 36-43; *see Goins*, 2017 UT 61 (holding preliminary testimony of unavailable witness inadmissible under hearsay exception where defendant did not have a similar motive to develop witness's testimony cross-examine as she would have had at trial). The State's citation to the "law in effect at the time," "the volume of questions" asked by defense counsel, and "the lack of limitations" placed on cross-examination by the magistrate does not support the required showing for the admission of Myore's preliminary hearing testimony—"an opportunity and similar motive to develop it." Aple. Br. 23; *see Utah R. Evid. 804(b)*. Rather, the court record, along with the analysis and holding in *Goins*, demonstrates the admission of Myore's

subsequent changes to the Utah Constitution,” our supreme court disavowed the *Brooks* holding and reversed Goins’s conviction relating to that admission of the unavailable witness’s testimony. *Id.* ¶¶2, 57. The Court determined that the record demonstrated “Goins’s counsel did not possess the same motive to develop testimony at the preliminary hearing that she would have had at trial.” *Id.* ¶46. And “[w]ithout *Brooks*’s per se rule, [the Court] ha[d] no basis to conclude that Goins’s counsel’s preliminary hearing motive to cross-examine was similar to what would have existed at trial.” *Id.*

Similarly, despite the State’s claim that Leech’s defense counsel had an opportunity to cross-examine Myore without objection or restriction, the record reflects that counsel “did not possess the same motive to develop Myore’s testimony” at the preliminary hearing as he would have had at trial. *Id.* And there is no basis in the record for this Court to conclude otherwise. *Id.*

The record demonstrates that Leech’s preliminary hearing was conducted in accordance with article I, section 12, which “limit[s] ‘the function of [preliminary] examination ... to determining whether probable cause exists.’” *Goins*, 2017 UT 61, ¶31. As argued in the opening brief, the magistrate explained to Leech and the co-defendants that the purpose of the preliminary hearing was limited to a probable cause determination. *Aplt. Br.* 40; R.832-33; see *Goins*, 2017 UT 61, ¶34; *Ellis*, 2018 UT 2, ¶38. When the specter of Myore not testifying at trial was raised, defense counsel objected to the admission of Myore’s preliminary hearing testimony. R. 832-33, 1763-64. Defense counsel argued that

statement”); R. 1770 (defense counsel noting that just a “week and a half [before trial, counsel received] more stuff about [Myore] from another interview [the State conducted] over the summer”).

Defense counsel argued that given all the subsequent discovery and statements made by Myore, he would have “absolutely” challenged his credibility through cross-examination at trial. R. 1764; *see also* R. 1772 (record reflecting defense counsel’s theory prepared “with the anticipation that Myore was going to take the stand”); R. 1768 (defense counsel scoured and investigated two years of discovery in order to gain “a deeper understanding of the case” in preparing defense theory); R.1768-70 (defense counsel noting he was prepared to challenge Myore’s credibility through cross-examination at trial with a binder full of Myore’s contradictory statements).

In addition, defense counsel was not given an adequate opportunity to cross-examine Myore on the extensive supplemental discovery provided because some was provided by the State less than a week before the preliminary hearing and some was provided after the hearing. R. 1767 (defense counsel noting that at the time of the preliminary hearing the State had turned over supplemental discovery no. 9 out of 22); R. 1767 (defense counsel noting he had not had a chance to review the large volume of supplemental discovery—revised transcripts of Myore’s previous statements, and a new interview between Myore, the district attorney’s office, and the detectives—filed by the State days before the preliminary hearing); Aplt. Br. 36-43.

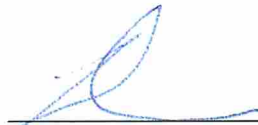
First, admission of Myore's testimony was prejudicial because undermining Myore's credibility through cross-examination of his inconsistent statements was critical to Leech's defense strategy. Aplt. Br. 44-48. Challenging Myore's credibility was critical to Leech's defense because "this was an aggravated murder trial where there is almost zero physical evidence." Aplt. Br. 45. And Leech was not only denied the ability to undermine Myore's testimony with the binder of contradictory statements he made, but also denied the jury's ability to observe Myore's overall demeanor during cross-examination. *Id.* Yet the State was allowed to rely heavily on Myore's prior testimony to bolster the testimony of the other witnesses as proof of Leech's guilt. *Id.* Without Myore's testimony, the jury would have been left to weigh the credibility of Andy's and the other State witnesses' testimony, which conflicted on key points critical to the State's case. *Id.* at 46.

Next, admission of Myore's testimony was prejudicial because the State relied on it heavily in its opening statement and closing arguments to prove Leech's guilt. Aplt. Br. 48-50. The State admitted that the majority of evidence to prove Leech's guilt was dependent on the witnesses' testimony because there was no physical evidence tying Leech to the offenses. *Id.* at 48-49. Yet all of the State's witnesses had serious credibility problems and conflicted with each other. *Id.* The State needed Myore's testimony to link Leech to the offenses and to corroborate and to bolster the conflicting testimony of the other witnesses. *Id.* at 49.

CONCLUSION

For the reasons above and in the opening brief, Leech respectfully requests that this Court reverse his convictions and remand for a new trial.

SUBMITTED this 4th day of March, 2019.

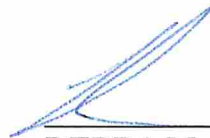


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CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2,442 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.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.



DEBRA M. NELSON