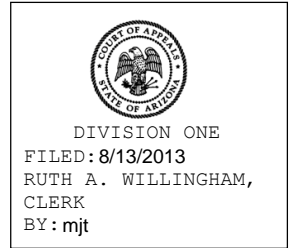


**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**



STATE OF ARIZONA, ) 1 CA-CR 12-0340  
)  
Appellee, ) DEPARTMENT B  
v. )  
) **MEMORANDUM DECISION**  
HAROLD LEZIL STUART, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-007637-001

The Honorable Susan M. Brnovich, Judge

**REVERSED**

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Thomas C. Horne, Attorney General Phoenix  
By Joseph T. Maziarz, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Robert A. Walsh, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Cory Engle, Deputy Public Defender  
Attorneys for Appellant

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**G O U L D**, Judge

¶1 Harold Lezil Stuart ("Stuart") appeals from his conviction and sentence for illegally conducting an enterprise

and money laundering, both class three felonies. Stuart's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, no arguable ground exists for reversal. We ordered additional briefing pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), as to whether Sergeant Mason's testimony constituted inadmissible drug courier profile evidence regarding the ultimate issue of Defendant's guilt in violation of the principles contained in *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1988). For the purposes of discussion, we have divided this query into two separate issues: (1) whether Sgt. Mason improperly testified regarding the ultimate issue of Defendant's guilt, and (2) whether Sgt. Mason's testimony constituted improper "drug courier profile" testimony in violation of the principles contained in *Lee*. Because we find reversible error as to the first issue, we do not reach the second issue.

### ***Facts and Procedural History***<sup>1</sup>

¶2 Stuart was driving a large semi-truck when he was pulled over by a police officer who had noticed an equipment violation. The police officer thought that Stuart seemed very

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<sup>1</sup> We view the evidence in the light most favorable to sustaining the convictions and resulting sentences. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

nervous and asked if Stuart would consent to a search of the truck. Stuart agreed. Before beginning the search, the police officer asked Stuart whether large amounts of U.S. currency were in the vehicle. Stuart replied negatively, although he averted his eyes when responding to the question.

¶3 Inside the truck, police officers found three cell phones, financial papers belonging to Stuart, and a duffel bag containing approximately \$170,000 wrapped in several packages of yellow duct tape. The duffel bag was found underneath the sleeping bunk, and Stuart said he did not know anything about it. A drug-sniffing dog alerted to the presence of drug residue on the money, and Stuart's fingerprints were found on the yellow wrapping.

¶4 Stuart was arrested and charged with illegally conducting an enterprise and money laundering, both class three felonies.

¶5 Prior to trial, Stuart moved in limine to exclude Sgt. Mason's expert testimony because it was not sufficiently reliable to be admissible as expert testimony under Rule of Evidence 702. In this motion, he also objected to Sgt. Mason offering expert testimony regarding the ultimate issue of guilt: "it is well settled that 'generally a witness may not indicate his belief in [the] defendant's guilt.'" Motion at 4, quoting *State v.*

*Williams*, 133 Ariz. 220, 229, (1982). The superior court denied this motion.

¶6 At trial, Sgt. Mason testified as an expert on the subject of illegal drugs and narcotics trafficking. Sgt. Mason stated that he had received advanced training in drug and racketeering investigations, and that he taught money laundering classes for the Department of Justice. He explained that he considered Arizona a gateway for narcotics to be smuggled from Mexico and South America into the United States, and that the price of any given drug increases as the drug is moved east. Mason further explained that because it would be risky to place large amounts of cash for the drugs in a bank, the typical practice was for the proceeds of such transactions to be converted into high denomination bills and transported back to organizational leaders in Arizona and Mexico.

¶7 Mason also explained that it was a typical practice to wrap bulk cash from these transactions in several layers of cellophane, plastic bags, and tape to prevent drug detection dogs from sensing the odor of drugs commingled with the money, and that the wrapping in this case was consistent with "hundreds of investigations in the past." Mason noted that it would be unusual to find both drugs and money in the same vehicle unless they were in a small quantity "in some kind of parking lot transaction."

¶8 He further testified that it was significant that the money was found in a duffel bag under the bunk rather than a void or hidden compartment within the truck. Mason explained that it is typical for drug organizations who do not trust their drivers to hide money or contraband so that the driver does not know where it is, and the fact that it was not hidden in this case meant that Stuart was "an entrusted member of an illegal enterprise."

¶9 Sgt. Mason further testified that in his experience, he had never in his life found anybody to say that they carried \$170,000 cash on them for a legitimate reason. He stated that based on his training and experience, "with the police dog alerting to the money, the presence of a narcotic odor, it was without question in [his] mind that Mr. Stuart knew the money was there and was transporting it to organizational leaders in southern Arizona." In addition, he testified that all of the drug investigations he had been involved in over the past ten years had involved two or three cell phones.

¶10 Another police officer who analyzed the financial documents obtained from the search of the truck opined that Stuart was "unable to support his lifestyle based on his income and expenses."

¶11 After Stuart was convicted of both charges, the trial court suspended his sentence and placed him on probation for three years on each count.

¶12 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and 13-4033(A)(1) (West 2012).<sup>2</sup>

### ***Discussion***

¶13 Arizona Rule of Evidence 704(b) specifically forbids an expert in a criminal case from stating an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged because these matters "are for the trier of fact alone."

¶14 Here, the State admits that "Sergeant Mason violated Arizona Rule of Evidence 704(b)'s prohibition against rendering direct opinions about the defendant's mental state by testifying . . . that Appellant 'knew' both the money's presence and contraband nature." The State attempts to avoid confessing error by asserting that because there was no objection to this testimony at trial, we may review for fundamental error only, and

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<sup>2</sup> Unless otherwise specified, we cite to the current version of the applicable statutes because no revisions material to this decision have occurred.

that Stuart has failed to meet his burden of proving fundamental error.

¶15 However, a properly-filed motion in limine preserves the issue for appeal even if the objection is not renewed during trial, as long as the trial court had the opportunity to sufficiently consider the issue. See *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975) (“A properly made motion in limine will preserve appellant’s objection on appeal without need for further objection if it contains specific grounds for the objection.”); *State v. Lindsey*, 149 Ariz. 472, 476, 720 P.2d 73, 77 (1986) (explaining that when a motion to preclude is made and ruled upon before trial, the objection raised in the motion is preserved for appeal despite the absence of a specific objection at trial).

¶16 Stuart’s motion in limine gave several grounds for excluding Mason’s testimony, including the assertion that “[b]ased on the information provided to the Defendant, the only testimony Sergeant Mason will be able to offer are statements about the Defendant’s innocence or guilt.” The motion further argued that

In his report, Sergeant Mason makes statements like “Mr. Stuart is a valuable member of the illegal enterprise and provides a specific skill, concealing and transporting bulk cash drug proceeds across the United States in his semi truck” and

"Sgt. Mason knows the \$169,670 was earned through a racketeering offense."

We find that these statements were sufficient to alert the court that Stuart was objecting to Mason testifying regarding the ultimate issue of Stuart's knowledge/mental state.<sup>3</sup>

¶17 Accordingly, we review this issue for harmless error. Harmless error review places the burden on the State to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence. See *State v. Wallace*, 219 Ariz. 1, 5, ¶¶ 20-23, 191 P.3d 164, 168 (2008). Thus, the burden is on the State to prove that Mason's testimony regarding Stuart's knowledge of the money laundering and participation in a criminal enterprise did not contribute to or affect the verdict or sentence.

¶18 The State has failed to meet this burden. To establish that Stuart was guilty of illegally conducting an enterprise, the State had to prove that Stuart was "employed by or associated with an enterprise" and that Stuart "participated directly or indirectly in the conduct of the enterprise *knowing* that the enterprise was being conducted through racketeering." A.R.S. § 13-2312(B); Rev. Ariz. Jury Instr. ("RAJI") Stat. Crim. 3d 23.12B

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<sup>3</sup> Further supporting this conclusion is the fact that the State responded to Stuart's motion by arguing that "Arizona's law enforcement officers are permitted to draw conclusions based on their investigation even if those conclusions *bear on an ultimate issue* for the jury's determination." (Emphasis added.)



at 282 (2012 Rev.) (emphasis added).<sup>4</sup> To establish that Stuart was guilty of money laundering in the second degree, the State had to prove that Stuart "acquired or maintained an interest in, transacted, transferred, transported, received or concealed the existence or nature of racketeering proceeds *knowing or having reason to know* that they were proceeds of an offense." A.R.S. § 13-2317(B)(1); RAJI Stat. Crim. 3d 23.17.B at 294-95 (2012 Rev.) (emphasis added).

¶19 The primary evidence tying Stuart to the alleged enterprise was Mason's testimony that "the defendant is an entrusted member of an illegal enterprise" because his fingerprints were found on the yellow wrapping and the money was not found in a concealed compartment. Mason further testified that "it was without question in my mind that Mr. Stuart *knew* the money was there and was transporting it to organizational leaders in southern Arizona." (Emphasis added.) He also stated, "I know that Mr. Stuart *knew* the cash was there," and that "I know it's a

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<sup>4</sup> "Racketeering" includes "any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred, and that would be punishable by imprisonment for more than one year under the laws of this state." A.R.S. § 13-2312(B); RAJI Stat. Crim. 3d 23.12B at 282 (2012 Rev.). "Enterprise" includes "any corporation, partnership, association, labor union or other legal entity or any group of persons associated in fact although not a legal entity." A.R.S. § 13-2312(B); RAJI Stat. Crim. 3d 23.12B at 282 (2012 Rev.).

drug proceed.” (Emphasis added.) These statements apply to the knowledge element of both counts.

¶20 One of the most important issues at trial was whether Stuart knew about the currency. Stuart testified that he discovered the duffel bag under his bunk during his trip from Atlanta to Arizona, that he had never seen it prior to his discovery of it, and that when he discovered it, he opened it to see what was inside, picked up the yellow package, and put it back inside (which is how his fingerprints got on the package). However, he testified that he did not know that the yellow package contained currency, that he had never seen such a package before, and that he just put it back and kept on driving. Under such circumstances, Sgt. Mason’s improper testimony regarding Stuart’s knowledge/mental state was highly prejudicial. We are unable to conclude beyond a reasonable doubt that this testimony did not affect the verdict.

¶21 Because we find the first issue case-dispositive, we do not reach whether Mason’s testimony also impermissibly provided “drug courier profile” testimony to the jury.

**Conclusion**

¶22 For the foregoing reasons, we reverse.

/s/  
ANDREW W. GOULD, Judge

CONCURRING:

/s/  
PATRICIA K. NORRIS, Presiding Judge

/s/  
RANDALL M. HOWE, Judge