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State v. Houser Appellant's Reply Brief Dckt. 41540

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. ERIC LAGRANDE HOUSER Defendant/Appellant.	)	APPELLANT'S REPLY BRIEF SUPREME COURT NO. 41540 CR-12-0019216

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN STEGNER
District Judge

JOHN M. ADAMS
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ISSUES PRESENTED IN VIEW OF STATE'S RESPONSE

I. Whether the factual dissimilarity and age of the complaining witness Mr. Manning's previous disciplinary proceeding go to the weight or to the admissibility of the evidence.

II. Whether the defendant waived any issues.

ARGUMENT

I.

The state argues in its response that the defendant's use of methamphetamine was both relevant and fairly prejudicial. The state argues that the record supports the fact that the defendant was under the influence of the methamphetamine at the time based on the defendant's testimony that he was affected by the methamphetamine. The state also points to the testimony of Dr. Paschall to illustrate how the methamphetamine may have affected the defendant.

The trouble with the state's argument is that none of that testimony was a part of the state's case in chief. The defendant had moved for the exclusion of the evidence from the state's case in chief as impermissible under I.R.E. 404(b). The judge's denial of the motion allowed the evidence of drug use into the case in chief, thereby requiring the defendant to answer, particularly because the Magistrate found that the evidence was not "other bad acts." *See State v. Parmer*, 147 Idaho 210, 214 (Ct.App.2009). Had the judge ruled against the state, the defendant would have had no reason to testify on the subject or put on Dr. Paschall. *See State v. Montoya*, 140 Idaho 160, 163–64 (Ct.App.2004); *State v. Gardiner*, 127 Idaho 156, 161–62 (Ct.App.1995). Instead, the jury would have simply been told he had overdosed on methamphetamine and had used marijuana, with no explanation as to how these things were related to the battery whatsoever.

More to the point, as stated in the defendant's brief, the idea that the influence the methamphetamine had on the defendant was somehow related to the battery was never established even during the defendant's case-in-chief. In the end, the subject of drug use simply

acted as a vehicle for the prosecutor to make spurious claims and compare the characters of the defendant and the complaining witness during the his closing.

The state made no argument as to the unfairness of the prejudice caused by the focus on drug use in this matter and simply argued that the Magistrate did not abuse his discretion. Thus, the defense will not repeat the evidence in the record supporting the overly prejudicial nature of evidence of drug use in this matter.

II.

The state argued in its response briefing that Mr. Manning's prior trouble with his employer was properly excluded on the grounds that it was too far removed in time and differed too much in subject matter. The state further argues that violating hospital policy by engaging in fisticuffs with patients is irrelevant do to the speculative nature of the consequences of such behavior vis-à-vis a person's employ.

These arguments are properly subjects for the jury, going to the weight of the evidence. This trial did not present a difficult factual scenario, and the defendant's intended subjects of cross-examination were well within the time honored traditions of uncovering motives to lie. The complaining witness violated protocol in this matter, and had a prior splotch on his record from two years prior. Thus, his had a motive to lie about the events so as to portray what occurred in a better light, both to save himself from disciplinary action, and to preserve his claim to restitution. As argued in the defendant's brief, these are age-old subjects that are ripe for cross-examination. The entire purpose of allowing for defense counsel in felony criminal trials in England in the 1700s was to give the accused a fighting chance to uncover the motives, often financial, of those set against him. *See* John H. Langbein, The Origins of Adversary Criminal

Trial 168 (2005)[1]. If the defense is to be shackled and muffled because the state and the court decide for themselves that the evidence the defendant wishes to present is somehow not good enough in their eyes to show a motive to lie, then there is no longer any need for trials. Or perhaps the state's argument is that in today's complex world it is simply too much trouble to allow the accused a chance to explore the strictures and covenants operative in his accuser's life that may have caused that person to lie. But then, a great many of the trials carried out in 18th century England which involved far more complex scenarios, and it was precisely because of that complexity that defense counsel was permitted to appear and cross-examine. *See* Langbein, *supra,* at 293 (discussing the work of William Garrow to reveal the various rewards prosecution witnesses expected for testifying against the accused).

Again: The accused is constitutionally entitled to explore a witness' motivation to testify against him under the Sixth Amendment of the Constitution of the United States. *Maryland v. Craig*, 497 U.S. 836 (1990). Effectively, a defendant's right of confrontation is violated when he is prohibited from pursuing areas of cross-examination that may undermine the credibility of the witness. *Olden v. Kentucky*, 488 U.S. 227 (1988).

The state in its response brief makes arguments that are perfectly rational and should have been made *to the jury*. It is unacceptable that a court in this country, in this state, in the tradition

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1 "By the 1730s experience with the new prosecutorial techniques canvassed in this chapter caused the judges to conclude that too many of the criminal trials over which they presided were ceasing to resemble Sir Thomas Smith's altercation of unaided victim and accused. Especially in London, prosecution for major property crimes was becoming ever more the province of (1) lawyers, (2) an unsavory corps of reward-seeking thieftakers, and (3) confessed culprits testifying as crown witnesses to save their necks. These determined operators increased the danger that the prosecution evidence coming before the courts could be unreliable.
By allowing defense counsel to cross-examine prosecution witnesses, the judges of the 1730s undertook to correct for the imbalance that had opened between the unaided accused and a criminal prosecution that increasingly reflected the hand of lawyers and quasi-professional thiefttakers. The bench was tacitly acknowledging that prosecution evidence coming before the courts could be unreliable."

of American common law, and under our constitutions, can simply, with a wave of its hand, invalidate and render mute a man's entire defense.

III.

The state argues in its response that there is nothing wrong with diverting the jury's attention to irrelevant and unfairly prejudicial facts, that in any case the objected to misconduct in this case was harmless, and that the defendant's argument as to unobjected to misconduct cannot succeed because the defendant waived the issues.

First, to repeat: The prosecutor may not appeal to the sympathies of the jury in order to secure a criminal conviction. *State v. Severson*, 147 Idaho 694, 719-20 (2009) *citing State v. Watlington*, 579 A.2d 490, 493 (Conn.1990). It is true that a "prosecutor may not appeal to the emotions, passions and prejudices of the jurors "because such appeals 'have the effect of diverting the jury's attention from their duty to decide the case on the evidence. '" *State v. Williams*, 529 A.2d 653 (Conn.1987) *quoting State v. Couture*, 482 A.2d 300 (Conn.1984). It is also improper for a prosecutor to inject extraneous issues into the case by encouraging the jury to identify with the victim. *Id.*

The state cannot proffer some other reason for the attention the prosecutor constantly drew to irrelevant issues. It simply points out that the jury knew those things anyway. Since that is not the issue, but rather the prosecutor's improper focus on those facts, the state apparently has no response.

The state recognizes that the error cause by those few times an objection occurred was harmless. The defendant does not deny it. The defendant argues to this Court, however, that this

trial was saturated with misconduct. The state, in response, relies on *State v. Zichko*, 129 Idaho 259 (1996), to argue that those various instances were not supported by argument or authority and thus waived.

The defendant provided the following in his brief:

> The case before this Court is saturated with prosecutorial misconduct, but almost all of it went without an objection. See Tr. Vol. I, p. 31, L. 2-17 (mischaracterizing state's burden during voir dire), Tr. Vol. I, *Id.* at L. 10-19, Vol. II, p. 145, L. 11-25, p. 173-174, p. 199, L. 20-25, p. 200, L. 4-8, p. 233-234, Vol. III, p. 352-353 (prejudicial focus on irrelevant restraint of defendant prior to incident), Vol. III, p. 334, L. 4-9 (mischaracterizing state's burden during closing argument), Vol. III, p. 335-336, 355 (focusing on irrelevant struggle after the incident during closing), Vol. III, p. 337, L. 12-21 (misstating the law by asking jury to find guilt based on whose fault it was that Mr. Manning bumped against the gurney), Vol. III, p. 354, L. 12-17 (irrelevant focus on defendant's attitude toward nurses), Vol. III, p. 356, L. 24-25 (arguing jury should not find defendant credible because he is the accused and may be convicted), Vol. III, p. 357, L. 13-14 (rhetorical question calculated to evoke sympathy with Mr. Manning), Vol. III, p. 357, L. 22-25, p. 358, L. 1-18 (improper argument based on lack of evidence of Mr. Manning's interest in outcome of case which prosecution had prevented from being presented to jury). This particular instance did raise an objection which was overruled. This case was, as the prosecutor acknowledged, entirely about the credibility of two people. Tr. Vol. III, p. 333, L. 8-23. As such, it was extremely important to refrain from injecting the case with irrelevant details that were only intended to cause the jury to dislike one witness or sympathize with the other. That is exactly what the prosecutor did here.

The defense must admit that no long argument was made as to each of these issues. A citation was given to the record and a description of the type of misconduct that occurred was provided. The defense intended thereby to show that what appeared in the record was the misconduct described- a simple and direct argument. However, it is true that the defense gave no authority.

The reason no in-depth argument was provided was that the defendant was raising the issue of whether the misconduct complained of ought to be appealable in spite of the fact that

most of the instances were not objected to and were not, in and of themselves, fundamental error. Defense counsel admits that the idea that the argument in favor of changing *State v. Perry*, 150 Idaho 209 (2010), would lack necessary foundation due to the omission of authority for each instance had not occurred to him.

However, the defense will now present authority for the various issues:

1. Tr. Vol. I, p. 31, L. 2-17 (mischaracterizing state's burden during voir dire): *State v. Herrera*, 152 Idaho 24, 31 (Ct.App.2012) *citing State v. Phillips*, 144 Idaho 82, 86 (Ct.App.2007); *State v. Lovelace*, 133 Idaho 160, 168 (Ct.App.1999).
2. Tr. Vol. I, *Id.* at L. 10-19, Vol. II, p. 145, L. 11-25, p. 173-174, p. 199, L. 20-25, p. 200, L. 4-8, p. 233-234, Vol. III, p. 352-353 (prejudicial focus on irrelevant restraint of defendant prior to incident): *State v. Troutman*, 148 Idaho 904, 911 (2010).
3. Vol. III, p. 334, L. 4-9 (mischaracterizing state's burden during closing argument): *Herrera*, 152 Idaho at 31 *citing Phillips*, 144 Idaho at 86; *Lovelace*, 133 Idaho at 168.
4. Vol. III, p. 335-336, 355 (focusing on irrelevant struggle after the incident during closing): *Troutman*, 148 Idaho at 911.
5. Vol. III, p. 337, L. 12-21 (misstating the law by asking jury to find guilt based on whose fault it was that Mr. Manning bumped against the gurney): *State v. Iverson*, 155 Idaho 766, 316 P.3d 682, 687 (Ct.App.2014).
6. Vol. III, p. 354, L. 12-17 (irrelevant focus on defendant's attitude toward nurses): *Troutman*, 148 Idaho at 911.
7. Vol. III, p. 356, L. 24-25 (arguing jury should not find defendant credible because he is the accused and may be convicted): *Coffin v. U.S.* 156 U.S. 432, 455 (1895) ("'Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?'" *quoting* Rerum Gestarum, lib. 18, c. 1.); *Troutman*, 148 Idaho at 911.
8. Vol. III, p. 357, L. 13-14 (rhetorical question calculated to evoke sympathy with Mr. Manning): *State v. Felder*, 150 Idaho 269, 275 (Ct.App.2011) *citing State v. Porter*, 130 Idaho 772, 786 (1997); *Phillips*, 144 Idaho at 86; *State v. Gross*, 146 Idaho 15, 20-21 (Ct.App.2008); *State v. Beebe*, 145 Idaho 570, 576 (Ct.App.2007).
9. Vol. III, p. 357, L. 22-25, p. 358, L. 1-18 (improper argument based on lack of

evidence of Mr. Manning's interest in outcome of case which prosecution had prevented from being presented to jury): *State v. Moses*, --- P.3d ---, 2013 WL 1846550 at *9 (Idaho App.2013).

The defense apologizes to opposing counsel and the Court for this oversight, and hopes the Court will extend to the defendant the same courtesy extended to the defendant in *State v. Norton*, 151 Idaho 176, 189 (2011) and consider these authorities though belatedly supplied. The defense asks this Court to consider whether the record supports the descriptions provided.

In the alternative, should the Court determine that error and reversal may be recognized and modify *Perry*, the defense requests that this Court to remand to the District Judge to hear argument and reconsider whether a reversal is appropriate in this matter.

DATED this 17 day of June, 2014.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: _____
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 18th day of June, 2014, served a true and correct copy of the attached REPLY BRIEF SUPPORTING APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

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_____