2-3-2012

State v. Mallory Appellant's Reply Brief Dckt. 37774

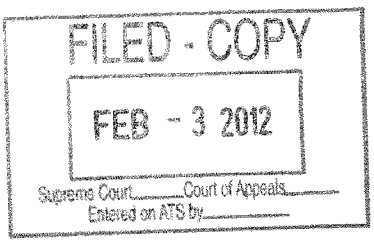
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. GARY WAYNE MALLORY, II, Defendant/Appellant.	)	S.Ct. No. 37774

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Second
Judicial District of the State of Idaho
In and For the County of Nez Perce

HONORABLE CARL B. KERRICK
Presiding Judge



Dennis Benjamin
ISB # 4199
NEVIN, BENJAMIN, McKAY
& BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Lawrence Wasden
IDAHO ATTORNEY GENERAL
Jessica Lorrello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

STATE CASES

OTHER

II. ARGUMENT IN REPLY

A. *The Evidence Was Not Admissible Under Both I.R.E. 403 And 404(b).*

In the Opening Brief, Appellant, Mr. Mallory ("Gary"), argued that the District Court abused its discretion in admitting the evidence of the old rib fractures. While the state says otherwise, its arguments in response are unpersuasive.

First, the state argues that "the plain language of I.R.E. 404(b)" forecloses Gary's argument. Brief of Respondent ("State's Brief"), pg. 6. Its theory is that since "there was no evidence presented that Mallory caused the injuries" the evidence cannot be evidence of a crime, wrong, or act committed by Gary. *Id.* But that is why the evidence is inadmissible. While there was no proof that Gary inflicted the old injuries, the state sought to introduce the evidence so that the jury would assume that he did so, and making it, in the jurors' minds, more likely that he inflicted the recent injuries. Excepting that improper purpose, there is no purpose for the state to introduce the evidence. Thus, the state's accusation that Gary "ignores this point," misses the true point. Prior bad acts evidence is relevant only if the jury can reasonably conclude the act occurred and the defendant was the actor. *State v. Grist*, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2009). The state sought to present evidence to plant in the minds of the jurors that Mr. Mallory committed a previous crime even though the logical force of its evidence couldn't make that case. Thus, the evidence is not admissible under *Grist* because the jury could not reasonably conclude that Gary inflicted the old rib injuries. But now, curiously, the state argues that the evidence was admissible because it didn't prove what the state presented the evidence to prove. That argument should be rejected by this Court.

The state's argument, moreover, is easily met by Mr. Mallory's previous argument that

the court abused its discretion when it admitted the evidence under I.R.E. 403. That is: the Court erred by concluding that the evidence was not unduly prejudicial because it did not realize that the evidence had no probative value other than the improper inference that Gary had a violent criminal character and was likely to have acted in conformity therewith on February 14, 2009. It is important to recall that the doctor noted that the fractures were caused by blunt force trauma. T Vol. II, pg. 793, ln. 6-10. And, in the absence of any suggestion that Charlene Mallory ("Charlene") could have received the old injuries from some accidental cause, the likely conclusion drawn from the evidence was that Charlene's husband, Gary, brutalized her. As previously argued, that is simply evidence of another crime to show a trait of Gary's character, *i.e.*, criminal brutality, to prove he acted in conformity therewith. Thus, while the state makes a good point when it argues that the evidence did not logically connect Gary to the old injuries, the point it proves is that the court erred when it failed to properly balance the probative value of the evidence (none) against the danger of unfair prejudice (great). *Grist*, 147 Idaho at 52, 205 P.3d at 1188.

The state's point is especially strong because both I.R.E. 403 and 404(b), the bases for Gary's objection below, require that balancing to be properly done. Thus, even if I.R.E. 404(b) were not implicated, the evidence still must be relevant to be admissible. *See State v. Sheldon*, 145 Idaho 225, 228, 178 P.3d 28, 31 (2008) (Where the Court turns to relevancy determination after finding possession of a large amount of cash is not a crime, wrong or other act under I.R.E. 404(b).). Therefore, the state's argument that "I.R.E. 404(b) was not implicated by the evidence that Charlene had old rib fractures," even if true, does not resolve the case because I.R.E. 402 and 403 were undoubtedly implicated. Because there was no probative value to the evidence, it was

inadmissible because: 1) it was not relevant, and 2) its prejudicial effect outweighed the nonexistent probative value.

The state, however, argues that the evidence "was relevant in that it provided the basis for [Dr. Aiken's] opinion on Charlene's cause of death and injuries she suffered near the time of death[.]" State's Brief, pg. 8. To the contrary, Dr. Aiken's testimony about the old rib injuries had nothing to do with either the cause of death (manual strangulation) or the other recent injuries. Even the trial court admitted that the older injuries "d[id] not appear to have been a contributing factor in the cause of death." T Vol. I, pg. 88, ln. 5-10; *see also* T Vol. II, pg. 792, ln. 19 - pg. 793, ln. 5 (where the doctor testifies that the new rib fractures could not have been the cause of death). Nor did it, as the state argues, provide "foundation for the entirety of the autopsy" or allow Dr. Aiken "to distinguish between the old and new fractures that formed the basis of the domestic battery charge." State's Brief, pg. 8. The old injuries in no way provided foundation for the new injuries. According to Professor Lewis, opinions by expert witnesses only require a foundation showing adequate expertise to render the opinions potentially helpful to the trier of fact. Idaho Trial Handbook § 14:6 (2d ed.). There was no dispute over whether the doctor possessed the requisite expertise to render an opinion and her opinion about the new injuries was not dependent upon the existence of the old injuries. In short, the state has not identified any proper purpose for the doctor to testify about the old injuries or distinguish between the old and new.

It is no answer to the problem of the inadmissible evidence to argue, as the state does, that the "jury was instructed . . . that its finding of guilt must be based 'only on the evidence admitted in this trial.'" State's Brief, pgs 8-9. The improper evidence was admitted and, by this

instruction, the jury was permitted to consider it and all the inferences which could be drawn from it. The quoted instruction goes on to say "[t]his evidence consisted of the *testimony of the witnesses*, the exhibited offered and received, and any stipulated or admitted facts." R 227 (emphasis added).

That same instruction goes on to tell the jury:

> There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations that you should apply in your deliberations.

R 278. Yet, the court's exhortation to the jury to use its collective commonsense in evaluating the testimony is another reason why it is important to limit the evidence before the jury to what is admissible under the rules of evidence. All of us, in our everyday affairs, give weight to evidence based upon inferences drawn upon it even when, under strict rules of logic, the evidence does not warrant such an inference. For example, some people believe that the stock market will go up if a team from the former National Football League wins the Super Bowl because there has been a correlation between such teams winning and the Standard and Poor's 500 gaining value in that year. See, Wall Street Wants The Patriots To Lose Super Bowl-Here's Why, http://www.cnbc.com/id/46252439. This type of "causalation" is a logical fallacy. Correlation does not prove causation. The same is true here, the existence of the old injuries does not logically link Gary to the new injuries, yet jurors in their everyday affairs often draw connections between unrelated events. Thus, the court's instruction did not cure the error in the admission of the old injury evidence. It exacerbated the error.

Finally, the state argues that the prejudicial effect of the evidence did not rise to the level of "unfair prejudice, which has been defined as evidence that inflames the jury and rouses them to overmasking hostility." State's Brief, pg. 9 (internal quotation marks omitted) *quoting State v. Gauna*, 117 Idaho 83, 88, 785 P.2d 647, 652 (Ct. App. 1989) *in turn quoting* E. CLEARY, McCORMICK ON EVIDENCE § 190 (3d ed. 1984). However, *Gauna* does not define "unfair prejudice" in that matter.[1] Further, "[w]hen the sole purpose of the other-crimes evidence is to show some propensity to commit the crime at trial, there is no room for ad hoc balancing. The evidence is then unequivocally inadmissible – this is the meaning of the rule against other crimes evidence." 1 McCormick On Evid. § 190 (6th ed.). Finally, when balancing the probative value against the unfair prejudice, there is nothing on the probative value side of the scale and it is outweighed by the prejudicial effect by necessity.

B. *The State Has Not Met Its Burden Of Proving The Error Was Harmless Beyond A Reasonable Doubt.*

The state has not met its burden of proving the error was harmless. It does not deny that its case was purely circumstantial. It does not deny there were no witnesses to the killing. It

---

[1] The full quote from McCormick's is set forth in the opinion:

> In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, *and the degree* to which the evidence probably will rouse the jury to overmastering hostility.

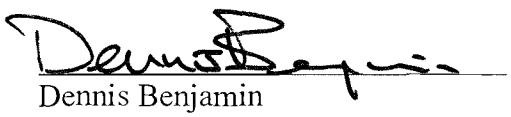
State v. Gauna, 117 Idaho at 87-88, 785 P.2d at 651-52 (emphasis added). Even though the Court goes on to misapply the test under the particular facts of the case, it does not define unfair prejudice as "evidence that 'inflames the jury' and rouses them to 'overmasking hostility,'" as argued by the state. Rather the *Gauna* Court appears to endorse the treatise's position.

does not deny there were no signs of a struggle or that no one heard any unusual noises coming from Gary and Charlene's bedroom. And it does not deny there was no forensic evidence linking Gary to the murder, no confession by him, or even a motive for him to kill his wife. In light of the above, the error cannot be deemed to be harmless beyond a reasonable doubt.

III. CONCLUSION

Gary Mallory respectfully asks that this Court reverse the District Court's Judgment of Conviction for Murder and Felony Domestic Battery and remand the case for a new trial.

Respectfully submitted this 3rd day of February, 2012.



Dennis Benjamin
Attorney for Gary Mallory

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 2012, I caused two true and correct copies of the foregoing to be mailed to: Jessica Lorello, Deputy Attorney General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010.

Dennis Benjamin