10-4-2011

State v. Mallory Appellant's 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

OPENING 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
Stephen Bywater
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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A. *Nature of the Case*

Charlene Mallory was driven home from the Alibi Tavern in Lewiston sometime around 11:00 p.m. on February 13, 2009. One of her house mates, Timothy James Feldman, dropped her off on his way to his girlfriend's house. Mr. Feldman's father, Timothy Lewis Feldman, was the only one home. Charlene's husband, Gary Mallory, and the other house mates, Amber Taylor and Carl Stanton, were still at the Alibi. Although Charlene was highly intoxicated, having passed out earlier in the evening, she was able to walk downstairs without assistance to her bedroom. Sometime between her arrival at home and 10:30 a.m. on February 14, 2009, Charlene was killed.

The forensic pathologist found the cause of death to be manual strangulation. There were no witnesses to the killing. The police found no signs of a struggle in the bedroom. None of the house mates, one or more of whom must have been at home when the death occurred, heard any unusual noises coming from downstairs during that time. There was no forensic evidence linking anyone to the murder. No one confessed to the offense.

Gary was charged with the First-Degree Murder and Felony Domestic Battery of Charlene. He was found guilty by a jury. The District Court sentenced him to a combined determinate term of 30 years with an indeterminate life sentence. This is an appeal from those judgments and sentences.

B. *Pre-Trial Proceedings*

An Information charging First-Degree Murder and Felony Domestic Battery was filed against Gary on May 27, 2009. R. 52-53. Gary pleaded not guilty the next day. R. 54.

Prior to trial, Gary filed a motion to exclude evidence of old injuries which were not related to the injuries which caused Charlene's death. The motion read:

> COMES NOW, Defendant, Gary Mallory, by and through his attorney, Neil P. Cox and MOVES this Court for an Order precluding the State from introducing evidence and/or comment concerning the decedent having evidence of injuries sustained prior to the February 14, 2009 incidents at issue in this case.
>
> Specifically, Defendant requests that Dr. Sally Aiken and any other State's witness be precluded from testifying that observation of the decedent's body revealed evidence of prior internal (rib) injuries.
>
> This motion is based upon Evidence Rules 403 and 404(b) and upon the United States and Idaho State Constitutions.
>
> Oral argument is requested.

R 197. At argument on the motion, Mr. Mallory noted that the forensic pathologist found there were prior as well as new injuries to Charlene's ribs. (The new injuries were part of the basis for the Felony Domestic Battery charge.) Counsel also noted that there was no witness as to who inflicted any of the old rib injuries: "Nobody says they observed an incident in the past in which her ribs were broken." T Vol. I, pg. 85, ln. 22-23. Counsel went on to argue:

> It's possible that somebody inflicted a deliberate injury upon her, and it's possible that Mr. Mallory was the one to do so. But that's all it is, it's a possibility with no foundational testimony as to when that would have occurred. There's no witness. And there's other possible explanations for her having the injury.
>
> So, there's a foundation problem with the testimony. And I believe under 403 – well, there's a 404(b) problem with it as well. But under 403, the balancing test, it might have some probative value. And I use the word "might." It might have some probative value given that there's an allegation that in the incident at issue her rib was injured.
>
> But there's a great deal of risk of confusing the jury and a risk of prejudice

in the admission of that testimony because, for one thing, how can the defense possibly even attempt to refute it in the absence of any specific testimony as to what happened, when it happened? Nobody's going to testify to any of that.

So, it just simply invites the jury to speculate and assume, well, Mr. Mallory must have done that in the past, and it's extremely prejudicial. So, I don't think the State will tell you they can lay a foundation as to how she sustained a prior injury to her ribs internally. But there's a lot of speculation about it.

I will tell the Court that when one of the witnesses, Amber Taylor, was interviewed by law enforcement, she said that the decedent had told her about a week before Mr. Mallory's arrest, the decedent had told her that in the past he had hurt her.

So, I think that runs into your prior ruling about 404(b). But it's not a witness testifying that they observed something. It's simply hearsay from the decedent about something that even predates the conversation.

So, I don't think the State has any evidence that is specific at all, and they want their medical examiner to say she had the prior injury, But it has a great deal of risk of prejudice and confusion of the jury.

T Vol. I, pg. 85, ln. 16 - pg. 87, ln. 16.

The District Court responded:

Let me ask you this, Mr. Cox. And I would like to hear from Ms. Vowels on this. But the prior injury issue, you know, typically, if you have a pathologist testify, they're going to testify as to all their observations relative to the decedent and injuries.

And it would seem to the Court that part of those observations might be the timing of particular injuries, such that the expert may say that these injuries appear to be very recent injuries, may very well have been the cause of death, or whatever the opinion might be. The other injury, however, does not appear to have been a contributing factor in the cause of death. And it would seem to me that that would be appropriate testimony for an expert to give because that's part of the basis of their opinion on what caused the death of the decedent.

And I don't know if the State's wanting to go beyond simply that explanation, but that strikes the Court as being appropriate because that's what the pathologist is going to be called upon to do.

T Vol. I, pg. 87, ln. 19 - pg. 88, ln. 14. Defense counsel replied by arguing that the evidence was prejudicial because "this is a husband and wife situation. And so, it does invite the jury to do a lot of speculation that, perhaps, Mr. Mallory was abusive to this individual." T Vol. I. Pg. 89, ln. 15-17.

The District Court ruled as follows:

> The motion in limine relative to the prior injury is denied. And I guess my questions kind of shed some light on my thinking about that. I think anytime you get a pathologist to testify, they're going to have some testimony relative to maybe prior injuries that occurred to the decedent and why those don't bear on the pathologist's particular opinion as to maybe the case in question.
>
> It's my understanding there isn't going to be anything other than the observations that – made by the pathologist that those injuries are older than some injuries, some injuries being more recent. So, I don't find that to be unduly prejudicial and relevant in explaining that expert's testimony.

T Vol. I, pg. 120, ln. 3-16.

C. *Trial Proceedings*

On the evening of February 13, 2009, house mates Timothy James Feldman, Jr. ("Tim, Jr."), Charlene and Gary Mallory, Amber Taylor and Carl Stanton were all drinking and had ended up at a tavern in Lewiston. Charlene got very drunk and passed out, T. Vol. II, pg. 1126, ln. 1-2, so Tim, Jr., volunteered to take her home as he was leaving to go to his girlfriend's house. T Vol. II, pg. 858, ln. 1 - pg. 864, n. 2. He and Charlene arrived at the house around 11:00 p.m. and both of them went inside. Mr. Feldman's father, Timothy Lewis Feldman ("Tim, Sr."), was home, and saw Charlene go downstairs toward her bedroom. T Vol. II, pg. 1003, ln. 5 - pg. 1004, ln. 8.

Tim, Sr., testified that Tim, Jr., left around 11:30. He then went to sleep, but woke up

around midnight because someone entered the house. He didn't see who it was, but said that he assumed it was Gary. Amber Taylor and Tim, Sr., believed that Amber and Carl Stanton came home sometime after 2:00 a.m. T. Vol. II, pg. 1004, ln. 3 - pg. 1005, ln. 1. Carl thought he and Amber got home earlier because he saw Gary leave the house around 12:30 a.m. T Vol. II, pg. 1181, ln. 20-22. Tim, Jr., thought that he returned from his girlfriend's house at about the same time. T. Vol. II, pg. 881, ln. 13 - pg. 882, ln. 18. Tim, Sr., Tim, Jr., and Carl all slept in the living room. Amber went to sleep in her bedroom. T Vol. II, pg. 1127, ln. 11-13. Amber did not know when Gary left the tavern because they "weren't hanging together." T Vol. II, pg. 1126, ln. 6-10.

There was much disagreement about where Gary was between 11:00 p.m. on February 13 and 10:30 a.m. on February 14. A taxi driver said he picked Gary up at the Alibi and dropped him off in the 1700 block of 17th Avenue. T Vol. II, 964, ln. 14-15. The address for Gary's home was 1835 Seventh Avenue. State's Exhibit 11-C. Carl testified that saw Gary leave the house around 12:30 a.m. T Vol. II, pg. 1181, ln. 20-22. Carl slept in the living room and he did not "hear anything during the night" and saw Gary return home and go downstairs in the morning. T Vol. II, pg. 1188, ln. 5 - 24. Tim, Sr., said that sometime during the night, possibly around 3:00 a.m., Gary asked Carl to call him a cab. (Carl did not remember Gary asking him to call a cab, T Vol. II, pg. 17-122, but admitted that he told the police that Gary had done so, that he did not call a cab and that he did not see Gary leave the house. T Vol II, pg. 1197, ln. 20 - pg. 1198, ln. 4.) Tim, Sr., went back to sleep and woke up around 6:45 a.m. when Gary asked Tim for the keys to Charlene's truck. Tim. Sr., also said that Gary left, telephoned him around about 9:00 a.m. and asked him to check in on Charlene. Tim, Sr., looked in on Charlene and said that

she appeared to be sleeping. T Vol. II, pg. 1008, ln. 5-11. Gary did not return until about 9:30 - 10:00 a.m. T. Vol. I, pg. 1005, ln. 17 - pg. 1007, ln. 23. Tim, Jr., said that he fell asleep in the living room and he did not hear anything during the night. When he woke up it was daylight out and Carl, his dad and Gary were all in the living room. Gary asked him for the keys to the truck. T Vol. II, pg. 885, ln. 1-25.

Gary went to the Lucky Inn at about 6:00-6:30 a.m. He told the bartender, Patrina McMasters, that he was going to lay some carpet for her aunt, but he needed the keys and that he would be back in an hour. He had Charlene's cell phone and was driving her truck. T Vol. II, pg. 955, ln. 1-24. Kathy Owen, the owner of the Lucky Inn, confirmed that Gary had a carpet laying job and that he had been paid in advance to do it. She also said that Gary had arranged to pick up the keys at 12:30 a.m., but never showed up and never did the job. T Vol. II, pg. 945, ln. 15 - pg. 946, ln. 24; 950, ln. 24 - pg. 952, ln. 2. Gary did not come back to the Lucky Inn. He went to the Overtime Tavern arriving there about 6:00-7:00 a.m. T Vol. II, pg. 976, ln. 1-9. Lee Mowery saw Gary there at about 9:00 a.m. and testified that Gary said something like "I think you know, I might have did something wrong." T Vol. II, pg. 969, ln. 1-21. Terri Bailey, a bartender at the Overtime, said that she overheard Gary saying something like "he thought he did something bad." T Vol. II, pg. 934, ln. 9-11. She saw Gary leave with his dad. T Vol. II, pg. 935, ln. 6-8.

Gary's dad said that he met Gary at the Overtime at about 10:30 a.m. on February 14. Gary borrowed $10 saying he needed to buy cigarettes for Charlene and got a ride home from him. T Vol. II, pg. 984, ln. 1-21. Gary was doing fine and "everything seemed to be great." Gary was excited that he and Charlene were going to move back to Texas in a week and he told

his dad about his plans to remodel his brother-in-law's house there. T Vol. II, pg. 989, ln. 1-24. Gary also mentioned that he hadn't gotten the carpet job done and he felt bad about it because he had been prepaid to do the job and he needed to pay the money back. T Vol. II, pg. 990, ln. 17 - pg. 991, ln. 2.

Amber did not see Gary again until approximately 10:30 a.m. when she was downstairs to pick up her laundry. The laundry room is directly across from the Mallory's bedroom. Amber looked in the room and saw that "Gary was at the end of the bed, and Charlene was covered up with the covers." T Vol. II, pg. 1128, ln. 21-25; pg. 1130, ln. 1-21. About 25 minutes after that, Gary came upstairs with a duffle bag, set it down and said, "I'm ready for my ride." T Vol. II, pg. 1136, ln. 14-pg. 8. Soon afterwards, he told Amber that she might want to check Charlene's pulse. T Vol. II, pg. 1139. Amber went downstairs and found that Charlene was dead. T Vol. II, pg. 1140, ln. 6-20. Amber came back upstairs, told Carl what she had seen, told Tim, Sr., to call the police and then left the house with her daughter. T Vol. II, pg. 1148, ln. 1-13.

Tim Sr., went outside to call 911 and, by coincidence, a patrol unit was driving by so he flagged the unit down. T Vol. II, pg. 603, ln. 19 - 604, ln. 20. Gary also called 911. When the patrol officer, Zackery Ward, found Charlene, Gary was with her. Gary told the officer that he had come home about 1:30 a.m. and found that Charlene was passed out from drinking. He left her to sleep it off and went out. When he returned she was unresponsive and he called 911. The officer said that Gary told him that Charlene had just made statements to him, but he observed that Charlene's arm was stiff and positioned at a 45-degree angle. She was also cold to the touch. T Vol. II, pg. 618, ln. 1-23. According to the officer, Gary then told him that he had not come home, but that he was at bars and that he had a carpet job that he had been asked to do. T

Vol. II, pg. 619, ln. 3-18. The officer also stated that Gary was acting "a bit unusual," in that he requested to have a cigarette before he was taken to jail, and that he put his hands behind his back and then he got down on his knees in what the officer called a surrendering position. T Vol. II, pg. 615, ln. 17 - pg. 616, ln. 25.

There was no evidence of a motive for anyone to kill Charlene. Larry Shafer, however, said that he saw Charlene and Gary leave either the Overtime or the Timber Inn on February 13 at about 2:00-3:00 p.m. T Vol. II, pg. 905, ln. 14-24; pg. 907, ln. 12-13. He then saw Gary "kind of push [Charlene] up against the pickup." Gary came back in and said that he was going to kill her if she "didn't straighten up." He just considered that to be "drunk talk" on Gary's part and told him "to go home, sleep it off and talk it out in the morning." He did not take Gary seriously. T Vol. II, pg. 908, ln. 23 - pg. 909, ln. 5. There was no testimony that Gary and Charlene were arguing the evening of February 13 or that Gary had any other motive, such as a life insurance on Charlene, to commit murder.

Detective Brian Birdsell inspected the bedroom and viewed Charlene's body at 12:46 p.m. He believed that rigor mortis had set in. He could not estimate a time of death but thought she "had been deceased for some time." T Vol. II, pg. 660, ln. 7-8, 17. Her body was cold to the touch. T Vol. II, pg. 696, ln. 21-23. The coroner estimated the time of death to be between 12:01 a.m to 6:00 a.m. on February 14. T Vol. II, pg. 2-5.

Gary was given his *Miranda* rights by Officer Ward and was placed in an interview room at the police station. An hour of the interview video recording was played for the jury. State's Exhibit 15. No transcript was prepared. A review of the exhibit will show that Gary did not confess to the offense.

The forensic pathologist, Sally Aiken, M.D., testified that the cause of death was manual strangulation. T Vol. II, pg. 769, ln. 16-18. With regard to the domestic violence charge, she testified that she observed bruises on Charlene's face which were blunt impact injuries. T Vol. II, pg. 772, ln. 23-24. She also observed a bruise on the inside of Charlene's cheek, as well as recent bruising on the inside of her scalp, head, torso, wrists, arms and legs. T Vol. II, pg. 773, ln. 10-13; pg 774, ln. 21 - pg. 774, ln. 5; pg. 797, ln. 1-2.

Dr. Aiken also noted multiple rib fractures both old and new. While the newer rib fractures were mainly on the left side, T Vol. II, pg. 791, ln. 1-4, the doctor described the presence of older fractures on the right side. She testified that:

> In addition to these fractures that didn't show any signs of healing, meaning that they were pretty new, they hadn't started to heal, there were some old fractures. And the ribs themselves had scar tissue, which in a bone you call a callus. So those had been there for some period of time and didn't directly reflect upon the death of this decedent. And they were on the opposite side.

T Vol. II, pg. 791, ln. 12-19. A rib fracture, she explained "is a blunt force injury. It takes some blunt force to break a bone. A rib's just like any other bone." T Vol. II, pg. 793, ln. 8-10. But she also testified that the rib injuries could not have caused the death. T Vol. II, pg. 791, ln. 1; pg. 792, ln. 19-21

The jury found Gary guilty of both counts. R 331.

D. *Post-Trial Proceedings*

The District Court, the Honorable Carl Kerrick, presiding, sentenced Gary to life imprisonment with 28 years fixed for the murder conviction and 10 years with two years fixed on the domestic violence conviction with the fixed terms to run consecutively. R 331.

A timely Notice of Appeal was filed. R 334.

III. ISSUE PRESENTED ON APPEAL

Did the District Court err by denying the motion in limine regarding the evidence of prior injuries?

IV. ARGUMENT

The Trial Court Erred in Permitting the Testimony of the Forensic Pathologist About Previous Rib Injuries.

Gary objected to the introduction of the evidence of old rib injuries under both I.R.E. 403 and 404(b). Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. I.R.E. 404(b); *State v. Grist*, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2009). However, such evidence may be admissible for other purposes such as proof of intent, plan, or absence of mistake or accident. I.R.E. 404(b); *State v. Avila*, 137 Idaho 410, 412, 49 P.3d 1260, 1262 (Ct.App.2002). When considering the admissibility of 404(b) evidence, the trial court must engage in a two-part analysis. *Grist*, 147 Idaho at 52, 205 P.3d at 1188. The first part of the analysis involves two separate questions involving foundation and relevancy: (1) is there sufficient evidence to establish the prior bad acts as fact, and (2) is the prior bad act relevant to a material disputed issue concerning the crime charged, other than propensity. *Grist*, 147 Idaho at 52, 205 P.3d at 1188; *Parmer*, 147 Idaho at 214, 207 P.3d at 190. The second part of the 404(b) analysis requires the court to balance whether the probative value is substantially outweighed by the danger of unfair prejudice. *Grist*, 147 Idaho at 52, 205 P.3d at 1188; *Parmer*, 147 Idaho at 214, 207 P.3d at 190.

In this case, the trial court's decision was erroneous under both parts of the *Grist* analysis.

1. The natural inference of the evidence was not shown to be fact and even had it been shown it would not have been relevant to a material disputed issue.

Prior bad acts evidence is relevant only if the jury can reasonably conclude the act occurred and the defendant was the actor. *Grist*, 147 Idaho at 52, 205 P.3d at 1188; *Parmer*, 147 Idaho at 215, 207 P.3d at 191. Even if that threshold is met, the evidence of the bad act must still tend to make the existence of a fact of consequence to the determination of the action more or less probable to be relevant under I.R.E. 401. On appeal, this Court will only defer to a trial court's factual findings if they are supported by substantial and competent evidence in the record. *State v. Porter*, 130 Idaho 772, 789, 948 P.2d 127, 144 (1997); *Parmer*, 147 Idaho at 214, 207 P.3d at 190. It exercises free review of the trial court's relevancy determination. *State v. Sheldon*, 145 Idaho 225, 229, 178 P.3d 28, 32 (2008).

There was no dispute that there were old rib fractures observed during the autopsy. Gary objected to this evidence because there was no foundation to show that the old injuries were intentionally inflicted or that Gary was the one who inflicted the injuries. If the injuries were accidental, *e.g.*, from an automobile accident, there is no possible relevance to the evidence, as there was no evidence presented that the new rib fractures could have been caused accidentally. If the old injuries were intentionally inflicted, there is no legal relevance because the state cannot point to Gary as the person who caused the injuries. Thus, the first section of the first part of the *Grist* analysis was not met here because there was not sufficient evidence to establish the prior bad acts as fact.

The second section was also not present because the prior bad act was not relevant to a material disputed issue concerning the crime charged, other than propensity. The trial court found

the evidence to be relevant because the older injuries "d[id] not appear to have been a contributing factor in the cause of death. And it would seem to me that that would be appropriate testimony for an expert to give because that's part of the basis of their opinion on what caused the death of the decedent." T Vol. I, pg. 88, ln. 5-10. However, that is not the case as the doctor testified under direct examination that the new rib fractures could not have been the cause of death. She stated:

> Q. And based upon your findings, could these [new rib fractures] have caused the death of Mrs. Mallory, the broken ribs?
>
> A. No, not in my opinion. Sometimes, not very commonly, a rib fracture can result in death if, say, an artery below the rib is injured or the lung is punctured, when you get blood in the chest wall or air. But that didn't happen here.
>
> And so, people – people, especially a person this age, survives rib fractures. I've had six or seven and survived them. And they're probably worse than these rib fractures. So no, in and of themselves. These were not lethal injuries.

T Vol. II, pg. 792, ln. 19- pg. 793, ln. 5. Thus, contrary to the opinion of the trial court, there was no reason for the doctor to differentiate between the old rib injuries and the new ones as it related to the cause of death. The new ones were not the cause of death. The death was caused by manual strangulation. Therefore, the evidence was not relevant under I.R.E. 401 because it did not have "any tendency to make the existence of any fact that is consequence to the determination of the action" more or less probable. Consequently, it was not admissible as "[e]vidence which is not relevant is not admissible." I.R.E. 402.

In light of the above, the trial court's denial of the motion in limine was inconsistent with the first part of the two-part *Grist* analysis.

2. The court abused its discretion when conducting the I.R.E. 403 balancing.

The trial court's ruling also violated the second part of the *Grist* analysis because the court failed to correctly balance the probative value of the evidence against the danger of unfair prejudice. When reviewing the I.R.E. 403 balancing determination the Court applies an abuse of discretion standard. *Grist*, 147 Idaho at 52, 205 P.3d at 1188. In determining whether the trial court abused its discretion, the Court looks to: (1) whether the trial court correctly perceived the issue as a discretionary one, (2) whether the trial court acted within the bounds of its discretion and consistently with the applicable legal standards; and (3) whether the trial court reached its decision by an exercise of reason. *Grist*, 147 Idaho at 51, 205 P.3d at 1187; *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

Here, the trial court did not act consistently with applicable legal standards nor reach its decision by an exercise of reason. It admitted the evidence because it believed it was relevant because the pathologist would testify about the old rib fractures in order to explain her conclusion about the cause of death. T Vol. I, pg. 88, ln. 5-10. However, this was unreasonable because the trial court was aware from its review of the Amended Information that the state's theory of the case was that Charlene died by strangulation and the doctor testified that neither the new or old rib fractures could have been fatal and were not the cause of death.

The District Court then concluded that the evidence was not unduly prejudicial without realizing 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. Notwithstanding the absence of any legal relevance to the evidence, the jury no doubt concluded that Mr. Mallory was the one who inflicted the old injuries. The doctor noted that the

fractures must have occurred from some blunt force trauma. T Vol. II, pg. 793, ln. 6-10. But there was no evidence that Charlene received the old injuries from some accidental cause and Gary, as her husband, was the one in closest contact with her. Therefore, the doctor's testimony and the jury's inevitable inference therefrom was evidence of another crime to show a trait of Gary's character, *i.e.*, criminal brutality, to prove he acted in conformity therewith. Here, the evidence of the old rib fractures implicated Gary in the crime of Felony Domestic Battery, the same charge he was on trial for in Count II. The jury likely concluded that Gary was a "man of criminal character" and was more likely to have beat and strangled Charlene in this case because he had broken her ribs in the past. However, since the trial court did not see the issue as one implicating I.R.E. 404(b), it did not identify a proper purpose for the 404(b) character evidence and thus did not act consistently with the legal standards applicable to the specific choices available to it when it denied the motion in limine. Thus, the trial court abused its discretion by admitting that evidence.

3. The state cannot prove the error was harmless.

Since Gary made a proper objection to the erroneous admission of the evidence, the burden is now on the state to show that the error did not contribute to the verdict. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "In Idaho, the harmless error test established in *Chapman* is . . . applied to all objected-to error. *State v. Perry*, 150 Idaho 209, 245 P.3d 961, 973 (2010). Put another way, the *Chapman* harmless error standard requires reversal unless the state convinces the reviewing court beyond a reasonable doubt that the jury's finding of guilt surely would not have been different absent the error. *State v. Pepcorn*, No. 37314, ___ Idaho ___, ___ P.3d ___, 2011 WL 1366779 (Ct. App. 2011) (petition for review

pending).

The state cannot meet its burden in this case because its case was purely circumstantial. There were no witnesses to the killing. The police found no signs of a struggle in the bedroom and none of the house mates heard any unusual noises coming from downstairs when Gary and Charlene were together. There was no forensic evidence linking Gary to the murder nor did he confess to the offense. There was no motive for him to commit the offense. In light of the above, the Court should reverse the convictions and remand for a new trial.

V. 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 4th day of October, 2011.

Dennis Benjamin
Attorney for Gary Mallory

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2011, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.

Dennis Benjamin

Dennis Benjamin