10-20-2009

Cooke v. State Appellant's Supplemental Reply Brief Dckt. 32447

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 32447 & 34820
	)	
v.	)	
	)	
MAX RITCHIE COOKE,	)	SUPPLEMENTAL REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

In view of the arguments made in the Supplemental Respondent's Brief, this Court has granted Mr. Cooke permission to file a Supplemental Reply Brief in order to address the State's contention that statements allegedly made by Mr. Cooke, some of them made seven weeks prior to the charged offense, were not "other acts" as that term is used in I.R.E. 404.[1] This Supplemental Reply Brief is necessary to clarify that the State's argument appears to mistake the concept of purported relevance with the concept of identity – in other words, the State confuses the basis under which the alleged acts could be asserted to be material to the offense with the charged act itself. This argument misapprehends the basic framework and meaning of the analysis that applies to "other acts" evidence.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Cooke's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

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[1] Because Mr. Cooke requested leave to file a Supplemental Reply Brief in order to address the new issue raised by the State in its Supplemental Respondent's Brief, he will not herein address the State's arguments with regard to the appropriate standard of review to be applied regarding the sufficiency of the evidence required to find that the State has established the prior bad acts alleged as fact. Mr. Cooke will instead rely on the briefing of this issue that was presented in his Supplemental Appellant's Brief.

ISSUE

Do the statements and actions alleged by the State to have been undertaken by Mr. Cooke, during the course of several weeks prior to his charged offenses, constitute "other acts" or "prior bad acts" evidence as those terms are used under I.R.E. 404(b)?

ARGUMENT

The Statements And Actions Alleged By The State To Have Been Undertaken By Mr. Cooke, During The Course Of Several Weeks Prior To His Charged Offenses, Constitute "Other Acts" Or "Prior Bad Acts" Evidence As Those Terms Are Used Under I.R.E. 404(B)

The State has asserted in its Supplemental Respondent's Brief that the alleged statements and actions of Mr. Cooke, some of which were alleged to have been made seven weeks prior to charged offenses, do not constitute "other acts" evidence within the meaning of I.R.E. 404(b). A review of pertinent case law, including those authorities relied on by the State in positing this argument, and the plain text of I.R.E. 404(b) itself reveals this assertion to be without merit.

By its plain terms, I.R.E. 404(b) applies to all evidence of "other crimes, wrongs, or acts." I.R.E. 404(b). The State has argued that, unless the evidence is solely offered for proof of character of the person, evidence of other crimes, wrongs, or acts, it is not within the scope of I.R.E. 404(b). (Supplemental Respondent's Brief, p.8.) However, this is not what the rule, or the case law interpreting the rule, provides. The State appears to be confusing language within this rule regarding admissibility, or whether the evidence may be put before the jury at trial, with the concept of identity, which is the condition of being the same with something described or asserted. While I.R.E. 404(b) does provide that "other acts" or "prior bad acts" evidence *may be admissible* for purposes other than proof of propensity, it nowhere states that the potential admissibility of this type of evidence somehow eradicates the distinction between the "other act" and the charged offense. Idaho Rule 404(b) still applies to "other acts" evidence; but the rule may not necessarily operate to prohibit the admission of the evidence, depending upon the purpose for which the evidence is offered.

This is in accord with the manner in which Idaho case law has consistently reviewed admission of other acts evidence pursuant to I.R.E. 404(b). It is initially worth noting that numerous decisions from the Idaho Supreme Court and the Idaho Court of Appeals consistently recognize that prior threats fall within the purview of prior bad acts evidence. *See, e.g., State v. Araiza*, 124 Idaho 82, 94, 856 P.2d 872, 884 (1993); *State v. Hoak*, ___ Idaho ___, ___ P.3d ___, 2009 WL 1835331, *1-3 (Ct. App. 2009); *State v. Alsanea*, 138 Idaho 733, 737-740, 69 P.3d 153, 158-160 (Ct. App. 2003); *State v. Medina*, 128 Idaho 19, 24-25, 909 P.2d 637, 642-643 (Ct. App. 1996); *State v. Valasquez-Delacruz*, 125 Idaho 320, 322, 870 P.2d 673, 675 (Ct. App. 1994).

Moreover, the standard of review regarding evidence of other crimes makes clear that evidence is still "other acts" evidence even if it may otherwise be admissible for a non-propensity purpose. This standard is stated succinctly by the Idaho Court of Appeals in *State v. Blackstead*:

> Under Rule 404, evidence of prior crimes of wrongs is inadmissible to prove the defendant's character or propensity to commit such acts. *Evidence of other crimes* may be admitted, however, when relevant for other purposes including proof of knowledge, identity, plan, preparation, opportunity, notice, intent, or absence of mistake or accident.

State v. Blackstead, 126 Idaho 14, 17, 878 P.2d 188, 191 (Ct. App. 1994).

Under the plain language of the pertinent case law, evidence of extrinsic acts does not cease to be "other acts" evidence merely because the issue has some purported basis of relevance to the charged offense other than propensity.

In addition, the cases primarily relied on by the State do not stand for the proposition that evidence of alleged threats occurring during the course of seven weeks prior to the charged incidents are not "other acts" within the meaning of I.R.E. 404(b).

The primary case relied on by the State is *State v. Sheldon*, 145 Idaho 225, 178 P.3d 28 (2008). The portion of the *Sheldon* Opinion relied on by the State dealt with Mr. Sheldon's assertion that approximately $7,000 found on his person at the time that police also located nearly a pound of methamphetamine was "other acts" evidence pursuant to I.R.E. 404(b). *Sheldon*, 145 Idaho at 227-228, 178 P.3d at 30-31. The Court sustained the earlier Court of Appeals' holding that the possession of the money that was discovered at the same time as the possession of the methamphetamine was not "other acts" evidence, but was rather physical, circumstantial evidence that was equivalent to the discovery of any other item that would tend to demonstrate that the person possessing the drugs was also engaged in drug dealing. *Id.* at 228, 178 P.3d at 31. Unlike this case, the possession of the money at issue in *Sheldon* was not prior to or a separate incident than the possession of the drugs and was arguably part of the charged act of the crime - trafficking in methamphetamine.

The State's reliance on *State v. Nez*[2] is similarly unavailing. First, and most important for this Court, the *Nez* Opinion arises out of the context of probation revocation proceedings – proceedings under which, as the *Nez* Opinion itself notes, the rules of evidence do not apply. *Nez*, 130 Idaho at 953, 950 P.2d at 1292. Moreover, the allegation of the probation violation at issue was his absconding and failing to contact his probation officers throughout the duration of the defendant's probation. *Id.* at 952-954, 950 P.2d at 951-953. By the very definition of the allegation of probation violation, this was a charge of an on-going course of conduct on the part of the

[2] *State v. Nez*, 130 Idaho 950, 950 P.2d 1289 (Ct. App. 1997).

defendant, such that each part of that course of conduct was subsumed in the allegation. *Id.*

Here, the charging document does not allege a course of conduct in the relevant charges of assault, aggravated battery, and kidnapping that would extend past the night in question. (30187 R., pp.25-26.) These were acts charged to have been solely initiated and completed on the evening of January 18, 2003. As such, the Opinion in *Nez* is irrelevant to this Court and does not support *any* contention regarding the application of I.R.E. 404(b), since this rule did not even apply to the context at issue in *Nez*.

The statements at issue in *State v. Floyd*[3], which is another case relied upon by the State, were not similar to those at issue in this case and are therefore not instructive for this Court. The statements in *Floyd* were the defendant's responses to questions by law enforcement about the actual charged crime itself, not statements that were made in a different context regarding a separate dispute at an earlier time than the actual charged offense. *Floyd*, 125 Idaho at 652-654, 873 P.2d at 906-908. In this case, many of Mr. Cooke's alleged statements were made seven weeks prior to the alleged offense, and therefore could not have been statements made directly regarding events which had not yet happened.

The last case relied on by the State, *State v. Marlar*[4], is similarly inapposite to the proposition that the State seeks to establish. *Marlar* was issued in 1972 – more than a decade before Idaho even adopted the rules of evidence in 1985. *See, e.g., State v. Meister*, ___ Idaho ___, ___ P.3d ___, 2009 WL 1931217, *3 (2009). Additionally, the

[3] *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994).

Marlar Opinion nowhere states that evidence of prior threats makes these threats synonymous or identical to the act charged itself, merely that such threats may be relevant to the charged offense. *Marlar*, 94 Idaho at 809, 498 P.2d 1282. As previously noted, the text of I.R.E. 404(b) recognizes that some extrinsic acts evidence may have logical bearing on the disputed issues at trial, but this does not, by itself, mean that it is not evidence of other acts.

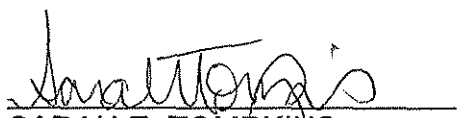
Finally, even under the State's own analysis, the State has failed to establish how the alleged statements, some of which were made seven weeks prior to the charged offense, are so closely related in time and relevance to the charges of assault, battery, and kidnapping occurring months later as to be "inextricably intertwined," "part of a single criminal episode," or "a necessary preliminary to the crime charged." (Respondent's Brief, pp.8-10.) The State provides no reasoned analysis, other than the bald and conclusory assertion that, "Cooke's threats were part and parcel and intrinsic to the crimes charged," to support its claim that these alleged prior incidents are not "other acts" evidence. (Respondent's Brief, p.9.) It is well-established that a party waives an issue on appeal if either argument or authority is lacking. *See State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). The State's blanket assertion fails on both prongs.

[4] *State v. Marlar*, 94 Idaho 803, 498 P.2d 1276 (1972).

CONCLUSION

Mr. Cooke respectfully requests that this Court vacate his judgment of conviction and sentence and remand his case for a new trial. Alternatively, he asks that this Court vacate the order denying him post-conviction relief.

DATED this 20th day of October, 2009.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of October, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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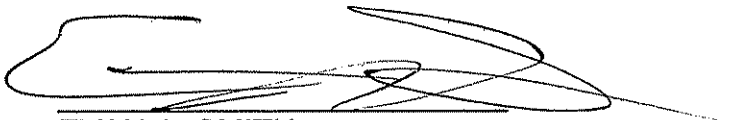

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