7-14-2009

Cooke v. State Respondent's Supplemental Brief Dckt. 32447

IN THE SUPREME COURT OF THE STATE OF IDAHO

MAX RITCHIE COOKE,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 32447 & 34820

SUPPLEMENTAL BRIEF OF RESPONDENT

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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Nature Of The Case

Max Ritchie Cooke appeals from the judgment entered upon a jury verdict finding him guilty of second-degree kidnapping, aggravated battery, and assault. Cooke challenges the admission of prior threats against the victim and the prosecutor's reference to those threats. Cooke also appeals from the denial of post-conviction relief claiming the district court erred in concluding his counsel was not ineffective for failing to investigate or challenge the victim's competency to testify at trial.

Statement Of The Facts And Course Of Proceedings

The statement of facts and course of Cooke's criminal and post-conviction proceedings are set forth in the Respondent's Brief, filed October 10, 2008. (Respondent's Brief, pp.1-10.) On March 11, 2009, Cooke filed a motion to file a supplemental brief to "discuss the impact" of two opinions, State v. Grist, 147 Idaho 49, 205 P.3d 1185 (2009), and State v. Parmer, 147 Idaho 210, 207 P.3d 186 (Ct. App. 2009), in his claim that certain evidence was improperly admitted.[1] (Motion for Leave to File a Supplemental Brief and Statement in Support Thereof filed March 11, 2009.) The Court of Appeals granted Cooke's motion. (Order to Vacate Oral Argument and Allow Leave to File Supplemental Briefing filed March 17, 2009.) Cooke filed his supplemental brief on April 21, 2009. (Supplemental Appellant's Brief (hereinafter "Supplemental Brief").)

[1] Grist and Parmer were both decided after Cooke filed his opening brief.

The particular facts relevant to the issues raised in Cooke's supplemental brief are as follows. Prior to trial, the state filed a "Brief in Support of Idaho Rule 404(b) Evidence" in which it advised Cooke and the court of its "view of anticipated facts at trial, together with Idaho case law on the admissibility of Idaho Criminal Rule 404(b) misconduct, by the defendant." (R., pp.13-18.) Specifically, the state asserted:

> The facts will show that in the early morning hours of January 18, 2003, the defendant drove a pickup truck off of Ustick Road, through a fence, approximately 80 yards through a field, and into a tree. His wife, Alison Cooke, was the passenger in the pickup truck. She was seriously injured when the truck struck the tree. Ada County Sheriffs [sic] deputies [sic] observations at the scene were that the driver of the pickup had sufficient time to stop the truck before it traveled the approximately 80 yards through the field. They also observed that the tracks in the pasture grass in the field showed that the truck corrected its course to line up on the tree prior to striking the tree. Finally, and most important, the deputies observed that the tracks indicated that the pickup truck accelerated in the field prior to striking the tree.
>
> After the crash, the defendant was interviewed and gave various stories, but the central theme was that he left the road accidentally and apparently hit the gas pedal instead of the brake pedal prior to striking the tree. He maintains the crash into the tree was an accident.
>
> The State's evidence would show that the defendant made several threats to Alison Cooke in the approximately six weeks prior to the crash. The defendant was suspicious that his wife was calling or seeing another man. The threats made to Alison were that he would kill her if he found out that she was talking to another man or seeing another man. The defendant not only made these threats directly to Alison Cooke, but he also told other people that he would kill Alison if he found out that she was speaking to another man. He also threatened to kill himself.
>
> Due to the trouble in the marriage, Alison Cooke left the defendant and went to live with her brother in Meridian. . . . During November and December the defendant threatened that he would kill her if he found out that she was seeing another man.

. . .

> Immediately prior to kidnapping Alison, the defendant called the man that the defendant believed Alison was dating. The defendant told that man that if the defendant found out that Allison [sic] was speaking to that man, that the defendant would make "headline news." The crash took place within a couple of hours of that telephone call.
>
> The State believes that those statements made by the defendant are evidence that the defendant's crash into the tree was not an accident as the defendant claims, but rather show the defendant's intent and his lack of absence of mistake or accident. Idaho Rule of Evidence 404(b) together with Idaho case law permits the admission of evidence of other crimes, wrongs, or acts to prove what the defendant's intent was or to prove his absence of mistake or accident.

(#34820 R., pp.14-16.)

At the hearing where the parties discussed the threats, the prosecutor further detailed the nature of the evidence the state intended to offer:

> And about November of 2002, particularly about Thanksgiving-time until the crash, which was the middle of January, so roughly six or seven weeks, the defendant made a number of statements about his intention to kill Alison Cooke if she attempted to leave him or if he found out that she was talking to a fellow on the telephone who he was suspicious of. That fellow's name is Shane. And he made those statements to her. And he made the statements to a couple of her friends and a couple of her relatives, her brother and sister.
>
> . . . .
>
> On the very night that [the wreck] happened, which was - - actually, it occurred early in the morning on Saturday, but it was Friday night - - the defendant made a call to this Shane, who he believed was - - or who he believed either was trying to have an affair with Alison or that Alison was talking to him on the telephone and said to this Shane on the telephone, "if I find out that Alison has been talking to you, I'll make headline news." That was within a couple of hours of the crash, itself.

(#34820 Tr., p.6, L.18 – p.7, L.18.)

The prosecutor further noted he was "not positive that those statements are other crimes or wrongs or misconduct" because "[t]hey seem to be all part and parcel of the same set of circumstances that led up to the crash" but, "[o]n the other hand, some of the -- some of the statements are separated by as much as six weeks, some just by a couple of hours." (#34820 Tr., p.8, Ls.3-8.)

Cooke objected to the admission of the statements, claiming admission of the statements would require proof of the "predicate 'ifs,'" *i.e.*, "if" Cooke ever found Alison was having an affair, which Cooke contended "would be unnecessarily belonging of the event here." (#34820 Tr., p.10, Ls.7-17.) Cooke also argued the statements would be unduly prejudicial. (#34820 Tr., p.10, L.17 – p.11, L.3.)

The court noted the admissibility of the prior threats was "committed to [its] discretion . . . based upon the provisions of 404" and concluded "any threats made to Alison Cooke are relevant, and . . . their probative value outweighs the prejudicial effect in this case." (#34820 Tr., p.12, Ls.12-25.) The court also indicated the state would be required to prove Cooke accelerated prior to hitting the tree before the court would permit Shane to testify regarding the threat Cooke communicated to him the evening of the collision. (#34820 Tr., p.15, Ls.21-25.)

At trial, Christine Heavin, Alison's sister, testified she overheard a telephone conversation between Cooke and Alison in which Cooke "was screaming . . . that if he found out [Alison] was talking to or seeing Shane, he would kill both of them." (#34820 Tr., p.114, Ls.22-25.) Christine further testified that Cooke also called and told her that "he felt that Alison and Shane had been

seeing each other and that if he found out they had been, he would kill Shane" and that "Alison [would] be sorry for what happens." (#34820 Tr., p.116, L.25 – p.117, L.5.) Stacy Wilson, Cooke's and Alison's neighbor, and Kathy Bosserman, a friend of Cooke's and Alison's, also both testified they heard Cooke threaten to kill Alison and/or Shane if he found out they were having a relationship. (#34820 Tr., p.127, Ls.10-18 (Cooke tells Stacy if he ever caught Alison "cheating" on him, he would "kill 'em"); p.275, Ls.121-13 (Kathy hears message from Cooke to Alison telling her he would "kill her" if "he ever caught her doing anything"); p.275, Ls.1-11 (same).)

Shane and Alison also testified regarding Cooke's threats. Specifically, Shane testified Cooke threatened his life and that on the night of the wreck, Cooke called him and said "if he found out [Shane] was even talking to [Alison], he was going to make headline news." (#34820 Tr., p.297, Ls.15-16.) Cooke called Shane a second time that same night and again threatened to kill Shane and told Shane if he found out he "had been with Ali that night that he would kill [him]." (#34820 Tr., p.298, Ls.19-24.)

Consistent with the testimony of the other witnesses, Alison testified that Cooke told her "[i]f he found [her] with anybody else, he would hurt [her] to make sure that [she] wouldn't be with anybody." (#34820 Tr., p.336, Ls.14-15.)

SUPPLEMENTAL ISSUES

Cooke states the supplemental issues on appeal as:

1. Should this Court adopt either a clear and convincing evidence standard, or a preponderance of the evidence standard, to the threshold determination of whether a prior bad act has been proved by the State for purposes of Rule 404(b)?

2. Under any standard of proof, was there sufficient evidence presented to support the admissibility of the prior bad acts evidence introduced by the State at trial, and did the district court make the requisite factual findings in support of the admissibility of this evidence?

(Supplemental Brief, p.4.)

The state rephrases the supplemental issues on appeal as:

1. Should this Court decline to address the standard of proof required to admit evidence pursuant to Rule 404(b) since Cooke's threats do not constitute 404(b) evidence? Alternatively, should this Court reject Cooke's invitation to adopt a preponderance or clear and convincing evidence standard since the relevant standard for admissibility is already provided for in I.R.E. 104?

2. Has Cooke failed to establish the district court erred in admitting evidence of Cooke's threats?

ARGUMENT

Cooke Has Failed To Establish Error In Relation To The Admission Of His Prior Threats To Kill Alison And Shane

A. Introduction

In his Supplemental Brief, Cooke asks this Court to (1) determine the standard applicable to determining whether evidence is admissible under I.R.E. 404(b); and (2) conclude that under any standard, "the proof presented by the State [was] insufficient to establish" Cooke made any threats and, consequently, the district court abused its discretion in admitting the statements. (Supplemental Brief, pp.5-13.) Because Cooke's prior threats to kill Alison were part and parcel to the crimes charged, they are not properly characterized as prior bad acts subject to a Rule 404(b) analysis. Even if the threats are subject to Rule 404(b), the standards governing admissibility of the statements are set forth in I.R.E. 104. Application of the correct standards to Cooke's statements reveals the statements were properly admitted. Cooke has failed to establish otherwise.

B. Standard Of Review

Whether evidence is relevant is a question of law reviewed de novo. State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993) (citations omitted). However, the abuse of discretion standard applies to the district court's determination that the probative value of the evidence is not substantially outweighed by unfair prejudice. Id.

C. Cooke's Prior Threats Do Not Constitute 404(b) Evidence

As an initial matter, this Court should consider whether Cooke's threatening statements at issue in this appeal are the type of evidence subject to consideration under I.R.E. 404(b). The state submits they are not.

Rule 404(b), I.R.E., provides, in relevant part:

> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall file and serve notice reasonably in advance of trial, . . . , of the general nature of any such evidence it intends to introduce at trial.

(Bold in original.)

The Idaho Supreme Court explained the source of Rule 404(b) in Grist, stating:

> This rule has its source in the common law. The common law rule was that the doing of a criminal act, **not part of the issue**, is not admissible as evidence of the doing of the criminal act charged. The policy underlying the common law rule was the protection of the criminal defendant. *The prejudicial effect of character evidence* is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character. Character evidence, therefore, takes the jury away from their primary consideration of the guilt or innocence of the particular crime on trial.

Grist, 147 Idaho at ___, 205 P.3d at 1188 (emphasis added, citations and quotations omitted).

Thus, evidence is only properly considered "404(b) evidence" if it is evidence of "criminal character." However, where, as here, the evidence is not evidence of "criminal character," but is instead statements made by the

defendant that are, as the prosecutor described them, "part and parcel" of the alleged offenses, the evidence does not fit within the parameters of Rule 404(b). As explained in State v. Sheldon, 145 Idaho 225, 228, 178 P.3d 28, 31 (2008):

> The comments to the 1991 amendments to Fed.R.Evid. 404(b) state the notice requirement "does not extend to evidence of acts which are 'intrinsic' to the charged offense." Federal courts in several jurisdictions have discussed the nature of "intrinsic" evidence. "Evidence of an act is intrinsic when it and evidence of the crime charged are inextricably intertwined, or both acts are part of a single criminal episode, or it was a necessary preliminary to the crime charged." *U.S. v. Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007) (citing *United States v. Freeman*, 434 F.3d 369, 374 (5th Cir. 2005)); *accord U.S. v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995); *U.S. v. Alexander*, 331 F.3d 116, 125 (D.C. Cir. 2003).

Applying the foregoing principles to the facts before it, the Idaho Supreme Court concluded Sheldon's "possession of a large amount of cash is not a prior crime, wrong or other act." Sheldon, 145 Idaho at 228, 178 P.3d at 31. "It is physical, circumstantial evidence" which the jury could conclude "was part of Sheldon's alleged criminal activity," trafficking in methamphetamine. Id. The evidence was therefore properly admitted so long as it was relevant and not unduly prejudicial. Id.

Similarly, Cooke's threats were part and parcel and intrinsic to the crimes charged. The admissibility of the statements are, therefore, subject only to the requirements of I.R.E. 401 and 403 and were properly admitted in accordance with these rules. See, e.g., State v. Nez, 130 Idaho 950, 953-54, 950 P.2d 1289, 1292-93 (Ct. App. 1997) (concluding probation officer's testimony regarding Nez's conduct on probation was "all part and parcel of the probation violation for which he was charged" and was, therefore, "relevant and also not evidence of

'bad character' as contemplated by Rule 404(b)"); State v. Floyd, 125 Idaho 651, 653-54, 873 P.2d 905, 907-08 (Ct. App. 1994) (analyzing defendant's statements regarding sexual encounter with victim under I.R.E. 401 and 403 and concluding statements were "direct evidence of the rape charge," not "evidence of some 'other crimes, wrongs or acts'"). See also State v. Marlar, 94 Idaho 803, 498 P.2d 1276 (1972) (noting "Prior threats of the accused or evidence of previous trouble are always relevant to illustrate mental attitude of the accused toward the prosecuting witness at the time of the assault" and noting "prior threats may comprise part of the mosaic of the criminal event in that they may tend to establish an accused's attitude toward the victim or an intent to inflict harm upon him."). But see State v. Avila, 137 Idaho 410, 413, 49 P.3d 1260, 1264 (Ct. App. 2002) (analyzing statements made during sexual battery under Rule 404(b) and concluding the statements were not offered for an improper purpose since "Rule 404(b) does not prevent the introduction of other misconduct evidence if the misconduct was so interconnected with the charged offense that a complete account of the charged offense could not be given to the jury without disclosure of the uncharged misconduct"). Because Cooke's threats were part of the same criminal episode and intrinsic to the crime, I.R.E. 404(b) does not apply to evidence of those threats. Cooke's argument should be rejected on this basis.

D. And Even If Cooke's Prior Threats Constitute 404(b) Evidence, Cooke Has Failed To Establish The District Court Erred In Admitting Them

Even if Cooke's prior threats are subject to Rule 404(b), Cooke's request that this Court adopt a preponderance of the evidence or clear and convincing

evidence standard as a prerequisite to admission should be rejected just as it was rejected by the United States Supreme Court in Huddleston v. United States, 485 U.S. 681 (1988).

In Huddleston, the petitioner asserted that prior to admitting evidence under Rule 404(b), the trial court must determine the admissibility of evidence under Rule 104(a) based upon a preponderance of the evidence standard.[2] 485 U.S. at 687. The Supreme Court rejected Huddleston's argument as "inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b)." Id. Specifically, the Court reasoned:

> The text [of Rule 404(b)] contains no intimation . . . that any preliminary showing is necessary before such evidence may be introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.
>
> Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b).

Id. at 687-88.

The Court in Huddleston, therefore, "conclude[d] that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a)." Id. at 689. The Supreme Court

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[2] Huddleston initially argued in his briefing that the "Government was required to prove to the trial court the commission of the similar act by clear and convincing proof." 485 U.S. at 687 n.5. At oral argument, however, Huddleston "conceded that such a position [was] untenable in light of [the Court's] decision . . . in *Bourjaily v. United States*, . . ., in which [the Court] concluded that preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard." Id.

further stated, "In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence." Id. at 690. Rather, "[t]he court simply examines all the evidence in the case and decides whether **the jury** could reasonably find the conditional fact . . . by a preponderance of the evidence." Id. (emphasis added). Thus, the standard for admissibility of Rule 404(b) does not require the court to find, by a preponderance of the evidence, that the prior bad act occurred; it only requires the court to conclude "the jury could reasonably find," by a preponderance of the evidence, that the act occurred.

Although Cooke cites cases indicating some states[3] have declined to follow Huddleston (Supplemental Brief, pp.6-7), Idaho courts traditionally refer to federal courts for guidance regarding the appropriate interpretation of Idaho's rules where those rules mirror their federal counterparts. See, e.g., Herrerra v. Estay, 146 Idaho 674, 201 P.3d 647 (2009) ("Given the virtual identity between [I.R.C.P. 12(b)(4) and 12(b)(5)] and their counterparts in the Federal Rules of Civil Procedure, and the lack of case law in Idaho, it is appropriate for this Court to turn to federal authority to address the standard of review" (citations and footnote omitted)); Black v. Ameritel Inns, Inc., 139 Idaho 511, 515, 81 P.3d 416, 420 (2003) (referring to federal case law to interpret Idaho Rule 11(a)(1) because "the federal and Idaho rules are substantially similar"); State v. Parkinson, 128

[3] Cooke also cites an Eighth Circuit case, United States v. Shoffner, 71 F.3d 1429 (8th Cir. 1995), which purports to follow a preponderance of the evidence standard. (Supplemental Brief, p.6.) However, the applicable standard cited in that case traces back to the standard articulated in Huddleston.

Idaho 29, 34, 909 P.2d 647, 652 (Ct. App. 1996) (referring to United States Supreme Court precedent on the interpretation of I.R.E. 702). Indeed the Idaho State Bar Evidence Committee itself relied on federal precedent in adopting and explaining the meaning of I.R.E. 404(b). See Grist, 147 Idaho at ___, 205 P.3d at 1188 (citing M. CLARK, REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE, C 404, p.4, relying on United States v. Beechum, 282 F.2d 898 (5th Cir. 1978),[4] as authority for the requirement that "the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact" in determining its admissibility).

Because Rules 404 and 104, I.R.E., are identical to Federal Rules 404 and 104, there is no basis for adopting a different standard governing the admissibility of evidence under Idaho's rules than is required for the Federal Rules. To the extent Parmer can be read as requiring a different standard, this Court should disavow any such interpretation.

Regardless of the standard applied to Cooke's prior threats, Cooke has failed to establish the district court erred in admitting the statements. As explained in the Respondent's Brief, the statements were offered for a proper purpose, were relevant, and were not unduly prejudicial. (See Respondent's Brief, pp.12-15.) In its proffer, the state indicated some of its witnesses would testify that Cooke, prior to the crimes at issue, threatened to kill Alison and Shane. The court could conclude from this proffer that the jury could find, by a preponderance of the evidence, or even clear and convincing evidence, that

[4] The state notes the authority relied on in Grist predates the Supreme Court's decision in Huddleston.

Cooke in fact did so. Huddelston, 485 U.S. at 690; see also United States v. O'Brien, 618 F.2d 1234, 1239 (7th Cir. 1980) ("Direct testimony of the defendants' participation in the prior schemes is sufficient to meet the clear and convincing standard.") Although the court did not "articulate a separate finding that sufficient evidence exist[ed] to support a reasonable conclusion that the act occurred,"[5] the "court was acting without the benefit of the *Grist* opinion," much less the Court of Appeals' opinion in Parmer. Parmer, 147 Idaho at ___, 207 P.3d at 191. Nevertheless, the district court made the required findings when it "articulated the purpose other than propensity, for admission of the evidence." Id. Specifically, the court noted the evidence was relevant to show Cooke's intent. (#34820 Tr., p.12, Ls.16-22.) The court also expressly concluded the evidence was not unduly prejudicial. (#34820 Tr., p.13, Ls.5-8.) The court's conclusions in this

[5] The state disagrees with the Court of Appeals' conclusion in Parmer that Grist requires as much, but acknowledges review of this issue was denied. Contrary to the conclusion reached in Parmer, Grist does not "disfavor[ ] an implied acceptance that sufficient evidence exists to establish a prior bad act as fact by mere virtue of the trial court's determination of the probative value of the evidence," such that "a trial court must articulate a separate finding that sufficient evidence exists to support a reasonable conclusion that the act occurred." Parmer, 147 Idaho at ___, 207 P.3d at 191. It is unclear why the standard for admissibility determinations under I.R.E. 104 should be applied differently where the evidence is 404(b) evidence, and it does not appear the Court in Parmer analyzed why such a distinction should exist. "Rule 404(b) is a relevance rule." Avila, 137 Idaho at 412, 49 P.3d at 1262. As such, a finding that evidence is relevant and admissible pursuant to Rule 104 should, like other relevance determinations, suffice without the district court taking the extra step of making a "separate finding that sufficient evidence exists to support a reasonable conclusion that the act occurred." Parmer, 147 Idaho at ___, 207 P.3d at 191. A finding that the evidence is relevant necessarily includes a finding that there is sufficient evidence from which the jury could conclude the act alleged by the evidence occurred.

regard are sufficient under Grist and under the Court of Appeals' interpretation of Grist as articulated in Parmer. Cooke has failed to establish otherwise.

Because Cooke's prior threats are not properly characterized as 404(b) evidence, this Court need not decide what standard applies to the admissibility of 404(b) evidence. Even if this Court determines Cooke's threats do constitute 404(b) evidence, the applicable standard is that set forth in I.R.E. 104 and Huddleston, and Cooke has failed to establish that standard was not met. Cooke has, therefore, failed to establish error in relation to the admission of his prior threats.

CONCLUSION

The state respectfully requests this Court affirm Cooke's convictions for *second-degree kidnapping, aggravated battery, and assault and the district* court's order denying post-conviction relief.

DATED this 14th day of July 2009.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July 2009, I served a true and correct copy of the attached RESPONDENT'S SUPPLEMENTAL BRIEF by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defenders' basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General