

4-11-2012

State v. Humphrey Respondent's Brief Dckt. 38509

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Humphrey Respondent's Brief Dckt. 38509" (2012). *Not Reported*. 180.
https://digitalcommons.law.uidaho.edu/not_reported/180

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 38509
)	
vs.)	
)	
DAWN MARIE HUMPHREY,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

HONORABLE FRED M. GIBLER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

GREG S. SILVEY
Silvey Law Office, Ltd.
Attorney at Law
PO Box 565
Star, Idaho 83669
(208) 286-7400

ATTORNEY FOR
DEFENDANT-APPELLANT

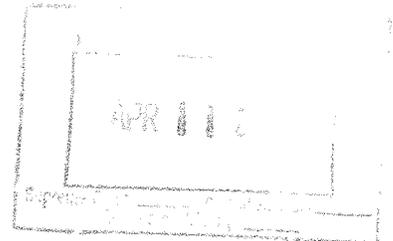


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUE	3
ARGUMENT	4
Humphrey's Claim Of Error Is Not Preserved For Appellate Review.....	4
A. Introduction.....	4
B. Standard Of Review	4
C. The Claim That The Court Erred By Admitting The Prior Bad Act Evidence Regarding The Tea Pot Is Not Preserved For Appellate Review.....	5
CONCLUSION	8
CERTIFICATE OF MAILING	8

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Atkinson</u> , 124 Idaho 816, 864 P.2d 654 (Ct. App. 1993)	5
<u>State v. Blake</u> , 133 Idaho 237, 985 P.2d 117 (1999).....	5
<u>State v. Brummett</u> , 150 Idaho 339, 247 P.3d 204 (Ct. App. 2011)	7
<u>State v. Carlson</u> , 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000)	4, 6
<u>State v. Caudill</u> , 109 Idaho 222, 706 P.2d 456 (1985).....	5
<u>State v. Grist</u> , 147 Idaho 49, 205 P.3d 1185 (2009)	5
<u>State v. Johnson</u> , 149 Idaho 259, 233 P.3d 190 (Ct. App. 2010)	6
<u>State v. Lee</u> , 131 Idaho 600, 961 P.2d 1203 (Ct. App. 1998).....	5
<u>State v. Norton</u> , 151 Idaho 176, 254 P.3d 77 (Ct. App. 2011).....	5
<u>State v. Perry</u> , 150 Idaho 209, 245 P.3d 961 (2010)	4, 6
<u>State v. Stevens</u> , 115 Idaho 457, 767 P.2d 832 (Ct. App. 1989).....	6
<u>State v. Zichko</u> , 129 Idaho 259, 923 P.2d 966 (1996).....	7

STATEMENT OF THE CASE

Nature Of The Case

Dawn Marie Humphrey appeals from her judgment and conviction for burglary and petit theft.

Statement Of The Facts And Course Of The Proceedings

Humphrey entered an antique store with Larry White.¹ (Tr., p. 118, Ls. 9-22; p. 130, L. 22 – p. 133, L. 4; p. 155, L. 14 – p. 158, L. 10.) While White went to the clothing area Humphrey approached the counter and tried to sell the clerk a teapot. (Tr., p. 133, L. 5 – p. 139, L. 25; p. 162, L. 20 – p. 168, L. 21.) A few minutes later White returned and the two left the store. (Tr., p. 140, L. 1 – p. 142, L. 10; p. 165, Ls. 19 – 23; p. 168, L. 8 – p. 169, L. 9.) The clerk noticed that part of a mink stole was hanging from White's jacket, which he was apparently trying to conceal. (Tr., p. 142, L. 11 – p. 144, L. 6; p. 170, L. 2 – p. 172, L. 17.) Employees of the store took the license plate number of the car White and Humphrey left in. (Tr., p. 144, L. 7 – p. 146, L. 6; p. 172, L. 20 – p. 176, L. 16.) Police contacted White and Humphrey and found the stolen stole and the teapot in their car. (Tr., p. 189, L. 6 – p. 210, L. 7.)

The state charged Humphrey with burglary and petit theft. (R., pp. 26-27.)

The state filed a motion in limine seeking a ruling on the admissibility of

¹ White's appeal is pending in docket no. 38473. Humphrey's counsel's assumption that White pled guilty prior to her trial (Appellant's brief, p. 2) is inaccurate. Both co-defendants were tried jointly. (Tr., p. 72, Ls. 10-20 (granting motion to join cases for trial); R., p. 137 (minutes of trial with both defendants and both case numbers).)

prior bad act evidence under I.R.E. 404(b). (R., pp. 119-21, 124.) The proffered evidence was that Humphrey and White had previously entered the same antiques mall and, while Humphrey distracted clerks with an offer to sell an antique plate, White stole a teapot; the same teapot Humphrey used to distract the clerk in the charged burglary and petit theft of the mink stole. (R., pp. 119-20; Tr., p. 75, L. 15 – p. 94, L. 8.) After hearing the state's offer of proof Humphrey's trial counsel represented that the defense was "not resisting the 404(b)." (Tr., p. 108, L. 23 – p. 109, L. 6; p. 113, Ls. 7-11.) The evidence was then admitted at trial, again without objection. (Tr., p. 228, L. 5 – p. 254, L. 3.) The trial court also instructed the jury that evidence of uncharged misconduct was not to be considered as character evidence but was only to be considered as evidence of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (R., p. 188.)

At the conclusion of the trial the jury returned a verdict of guilty on both counts. (R., p. 167.) The judge sentenced Humphrey to four years with one and one-half years determinate on the burglary and 90 days with credit for 90 days served on the petit theft, and retained jurisdiction. (R., pp. 217-20.) Humphrey filed a notice of appeal timely from entry of judgment. (R., pp. 223-26.)

ISSUE

Humphrey states the issue on appeal as:

Whether the court erred by admitting the 404(b) evidence of other crimes.

(Appellant's brief, p. 3 (capitalization altered).)

The state rephrases the issue as:

Has Humphrey failed to demonstrate that the admission of evidence, which admission she did "not resist[]," is preserved for appellate review?

ARGUMENT

Humphrey's Claim Of Error Is Not Preserved For Appellate Review

A. Introduction

Humphrey affirmatively represented to the trial court that she was “not resisting” admission of the prior bad act evidence regarding the tea pot. (Tr., p. 113, Ls. 7-11.) On appeal Humphrey asserts admission of that evidence was reversible error. (Appellant’s brief, pp. 4-9.) She does not claim that there was insufficient evidence to establish the prior bad act or that the evidence was irrelevant for a proper purpose other than propensity. (Appellant’s brief, p. 6.) She argues only that the district court abused its discretion by concluding that the potential for unfair prejudice did not substantially outweigh the probative value of the evidence. (Appellant’s brief, pp. 6-9.) This appellate issue is unpreserved, however, both under the invited error and the fundamental error standards.

B. Standard Of Review

“It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal.” State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Whether the probative value of evidence subject to I.R.E. 404(b) analysis is substantially outweighed by its potential for unfair prejudice is reviewed for an

abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009).

C. The Claim That The Court Erred By Admitting The Prior Bad Act Evidence Regarding The Tea Pot Is Not Preserved For Appellate Review

“The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error.” State v. Norton, 151 Idaho 176, 187, 254 P.3d 77, 88 (Ct. App. 2011) (citing State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993)). The purpose of the invited error doctrine is to prevent a party who “caused or played an important role in prompting a trial court” to take a particular action from “later challenging that decision on appeal.” State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). “One may not complain of errors one has consented to or acquiesced in.” Norton, 151 Idaho at 187, 254 P.3d at 88 (citing State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); State v. Lee, 131 Idaho 600, 605, 961 P.2d 1203, 1208 (Ct. App. 1998)).

In the trial court Humphrey stipulated that the evidence in question was admissible. (Tr., p. 113, Ls. 7-11.) On appeal Humphrey mentions the “odd phrasing” of the stipulation (Appellant’s brief, p. 6 n.2), but the record shows at least two other stipulations Humphrey entered with nearly identical phrasing (Tr., p. 72, Ls. 16-17; p. 256, Ls. 22-23). Because Humphrey “consented to or acquiesced in” the admission of the evidence, she may not challenge its admission on appeal.

Even if not estopped from raising the issue on appeal, Humphrey's action of affirmatively "not resisting" admission of the evidence failed to preserve any appellate issue. "It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989).

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Id. at 226, 245 P.3d at 978. Because Humphrey did not pose an objection, but instead proffered a specific non-objection, and because she has

failed to alleged, much less establish, that the error she claims is fundamental, Humphrey's claim of error in admitting the tea pot evidence cannot be reviewed on appeal.

Humphrey asserts that the issue was preserved because the "trial court made a ruling, which is the very point of the requirement that error be preserved." (Appellant's brief, p. 6 n.2.) Humphrey ignores the fact that although she waived her objection her co-defendant did not waive his. Humphrey's claim thus amounts to an assertion that a ruling on her co-defendant's objection, *that she specifically indicated she was not joining*, preserved this issue for appellate review in her appeal. This argument fails because it is unsupported by any legal authority whatsoever. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (issues in which "either authority or argument" is lacking are waived on appeal).

Humphrey stipulated in the trial court to the admission of the tea pot evidence she claims on appeal was erroneously admitted. Her stipulation estops her appellate argument under the invited error doctrine. Even if the invited error doctrine did not apply, Humphrey has failed to demonstrate that her co-defendant's objection, that she did not join, preserved this issue for her appeal.²

² Humphrey's claim would also fail had review of the merits been preserved. Humphrey's contends that it "strains credulity" to believe the jury applied the evidence to a proper purpose and "it cannot be seriously argued" that the evidence is not unduly prejudicial. (Appellant's brief, pp. 7-8.) In a case that Humphreys apparently overlooked, however, the Idaho Court of Appeals found nearly identical evidence properly admitted under indistinguishable circumstances. State v. Brummett, 150 Idaho 339, 341-44, 247 P.3d 204, 206-09 (Ct. App. 2011).

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction.

DATED this 11th day of April, 2012.


KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of April, 2012, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREG S. SILVEY
Silvey Law Office, Ltd.
Attorney at Law
PO Box 565
Star, Idaho 83669


KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm