5-16-2013

State v. Ozuna Respondent's Brief Dckt. 40165

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 40165
Plaintiff-Respondent,	)	
	)	Canyon Co. Case No.
vs.	)	CR-2010-25783
	)	
RICARDO OZUNA, JR. aka RICHARD,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Ricardo Ozuna Jr. appeals from his conviction and sentence for lewd conduct with a minor following a jury trial. Specifically, Ozuna challenges the district court's denial of Ozuna's attempts to elicit testimony that his 15-year old victim had Chlamydia at the time he engaged in sexual contact with her and he asserts the district court abused its sentencing discretion.

Statement of Facts and Course of Proceedings

Ozuna met then 15-year old E.B. and her friend A.B. through Live Links. (JT Tr., p.286, L.11 – p.287, L.25.) Ozuna picked the two minor girls up and took them to the house he shared with his father where he provided E.B. with alcohol. (JT Tr., p.289, L.13 – p.296, L.6.) E.B. became intoxicated to the point she "couldn't even walk straight." (JT Tr., p.296, L.19.) E.B. blacked out for a while and when she regained consciousness, Ozuna was lying on top of her and she felt him withdraw his penis from her vagina. (JT Tr., p.301, L.22 – p.303, L.9.) When Ozuna gave E.B. a ride to a convenience store down the street from her house later that morning, he thanked E.B. for having sex with him twice the previous night. (JT Tr., p.306, L.19 – p.308, L.2.)

A grand jury indicted Ozuna for lewd conduct with a minor under 16 for having genital to genital contact with E.B. (R., pp.36-37.) The state later filed an amended superceding indictment adding a sentencing enhancement pursuant to Idaho Code Section 19-2520G (2) for Ozuna's prior conviction for lewd conduct. (R., pp.67-68.) Ozuna pled not guilty and the matter proceeded to jury trial.

After the jury was selected for his trial, Ozuna made an oral motion seeking to introduce evidence that E.B. had chlamydia at the time of the sexual contact with Ozuna by asking E.B. "whether or not she had a sexually transmittable disease at the time she allege[d] that she had sexual relations with Mr. Ozuna" and by eliciting hearsay testimony from Ozuna that he did not have any desire to have sex with E.B. because A.B. had informed Ozuna that E.B. had chlamydia. (JT Tr., p.229, L.8 – p.230, L.5.) Ozuna also wished to testify that at the time of trial, he [did] not suffer from a sexually transmitted disease. He [did] not suffer from chlamydia, and never came down with any signs." (JT Tr., p.230, Ls.7-12.)

The trial court denied Ozuna's motion, finding the evidence was inadmissible under Idaho Rule of Evidence 412. (JT Tr., p.243, Ls.17-21.) The court further found the proffered evidence was not "constitutionally required to be admitted" and that "the probative value of the evidence outweigh[ed] the danger of unfair prejudice." (JT Tr., p.245, Ls.3-6.)

The matter continued to trial with the jury returning a verdict of guilty to lewd conduct with a minor. (JT Tr., p.695, Ls.11-25; R., p.173.) Following the verdict and the presentation of evidence on the part II of the amended superceding indictment, the jury also found that Ozuna had been previously convicted of lewd conduct with a minor in support of the sentencing enhancement. (JT Tr., p.722, Ls.14-22; R., p.174.)

The court sentenced Ozuna to a unified life sentence with the first 20 years fixed. (6/21/12 Tr., p.48, Ls.11-18; R., pp.225-226.) Ozuna timely appeals. (R., pp.227-231.)

ISSUES

Ozuna states the issues on appeal as:

> 1. Did the district court err in concluding that the proffered evidence fell under Idaho Rule of Evidence 412, and violate Mr. Ozuna's constitutional rights to present a defense and a fair trial, when it prevented him from testifying that he did not have sexual intercourse with the alleged victim because he had been told that she had chlamydia?
>
> 2. Did the district court err in concluding that the proffered evidence fell under Idaho Rule of Evidence 412, and violate Mr. Ozuna's constitutional rights to present a defense and a fair trial, when it prevented him from eliciting testimony that the alleged victim had chlamydia at the time of the alleged assault and that he had shown no signs of chlamydia since the alleged assault?
>
> 3. Did the district court abuse its discretion when it imposed a life sentence, with twenty years fixed, following Mr. Ozuna's conviction for lewd conduct with a sentencing enhancement?

(Appellant's brief, p. 9.)

The state rephrases the issues as:

1. Has Ozuna failed to show the district court erred in denying his motion to elicit testimony of the victim's past sexual behavior?

2. Has Ozuna failed to show that the district court abused its sentencing discretion?

ARGUMENT

I.
Ozuna Has Failed To Show That The District Court Erred When It Denied Ozuna's Motion To Introduce Evidence Of His Victim's Previous Sexual Behavior

A. Introduction

Ozuna asserts that the district court erred when it prevented him from testifying that he "did not have sexual intercourse with E.B. because he had been told that she had chlamydia," and from presenting evidence that his victim did have chlamydia "at the time of the alleged assault, and that he did not contract chlamydia following the alleged assault." (Appellant's brief, pp.4, 16.) Ozuna's claim fails, however, because the district court correctly determined the proffered evidence was impermissible evidence of a victim's previous sexual behavior and was not constitutionally required.

B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of that discretion. State v. Perry, 139 Idaho 520, 521, 81 P.3d 1230, 1231 (2003). Questions of relevancy, however, are reviewed de novo. State v. Zichko, 129 Idaho 259, 923 P.2d 966 (1996); State v. Raudebaugh, 124 Idaho 758, 764, 864 P.2d 596 (1993).

C. Ozuna Has Failed To Show An Abuse Of Discretion Because The Proposed Evidence Was Not Admissible

Admission of evidence of a victim's past sexual behavior is controlled by Idaho Rule of Evidence 412. That rule provides that "evidence of a victim's past sexual behavior" is not admissible unless the defendant (1) complies with the procedures of the rule and (2) admission of the evidence is "constitutionally required." I.R.E. 412 (b). The procedural prerequisite to admissibility was recently set forth by the Idaho Supreme Court:

> The admissibility of I.R.E. 412 evidence is determined solely from the basis of the I.R.E. 412 hearing. See I.R.E. 412 (c)(2)-(3). Under I.R.E. 412, evidence of a victim's past sexual behavior is generally inadmissible. I.R.E. 412 (a)-(b). A defendant seeking to introduce evidence regarding a sex-crime victim's past sexual behavior is required to submit a written offer of proof from which the trial court determines if that evidence falls within the limited exceptions for admissibility. I.R.E. 412 (c)(2). In other words, the trial court determines whether it will even consider the admissibility of the evidence based upon the written offer of proof. If the trial court determines that an I.R.E. 412 hearing is warranted, the evidence's admissibility is determined from the basis of that hearing alone. I.R.E. 412 (c)(3).

State v. Perry, 150 Idaho 209, 216, 245 P.3d 961, 968 (2010). Because the court found that Ozuna did not receive "the evidence confirming that [the victim] had chlamydia" until the weekend before the trial was to begin, it found Ozuna's motion was not untimely nor that Ozuna "failed to comply with that aspect of the rule." (JT Tr., p.242, L.22 – p.243, L.3.) Finding Ozuna's motion was not procedurally barred, the trial court analyzed it pursuant to I.R.E. 412 despite Ozuna's claim that the rule did not apply to this particular set of circumstances.

The Idaho Court of Appeals has articulated the constitutional standard of I.R.E. 412 (b) as a two-prong test of, first, "whether the evidence proffered is

relevant" and second, if so, "whether other legitimate interests outweigh the defendant's interest in presenting the evidence." State v. Meister, 148 Idaho 236, 241, 220 P.3d 1055, 1060 (Ct. App. 2009) (quoting State v. Self, 139 Idaho 718, 722, 85 P.3d 1117, 1121 (Ct. App. 2003)). Thus, to show error, Ozuna must demonstrate that he presented to the district court an offer of proof that established both that the proposed evidence was relevant and that its relevance was not outweighed by other legitimate interests.

The morning of trial, the district court addressed the issue of "whether or not defense should be able to address the issue of diagnosis or health diagnosis regarding the alleged victim of the case." (JT Tr., p.229, Ls.8-12.) Ozuna advised the court that the "first thing [he] want[ed] to do" was to ask E.B. "whether or not she had a sexually transmittable disease at the time she allege[d] that she had sexual relations with Mr. Ozuna." (JT Tr., p.229, Ls.18-21.) Ozuna indicated he then wanted to be able to testify at his trial not only does he "not [now] suffer from a sexually transmitted disease," he "was not interested in having sexual relations with [E.B.]" because a third party had told Ozuna that E.B. had chlamydia. (JT Tr., p.229, L.22 – p.230, L.5.) Ozuna's offer of proof for his position was:

> when Mr. Ozuna testifies, he would testify, I'll make an offer of proof, that [A.B.], the other woman present, had told him that [E.B.] had a sexually transmitted disease.
>
> . . .
>
> On the first case, Judge, the fact that she had a sexually transmitted disease, Mr. Ozuna would further testify that he has since been to a doctor, had, basically, a full physical, and he does not suffer from a sexually transmitted disease. He does not suffer from chlamydia, and never came down with any signs.

(JT Tr., p.229, L.23 – p.230, L.12.)

Contrary to Ozuna's assertion that the evidence was being offered to show his state of mind at the time he was around E.B., thus proving why he did not want to have sex with her (see JT Tr., p.246, L.16 – p.248, L.9), at best it was evidence of a prior sexual act used merely to paint the victim as a person of questionable moral character who had contracted a sexually transmitted disease—the very thing prohibited by Rule 412. The district court pointed out that contrary to Ozuna's assertion, asking his victim if she had a sexually transmitted disease "would certainly be an inquiry about the truth of the allegation." (JT Tr., p.255, Ls.7-12.) The court found that "giving the jury the impression that the alleged victim was promiscuous, having sex with people" was not outweighed by the probative value of such evidence. (JT Tr., p.248, Ls.10-15.) The district court properly held that Ozuna had failed to demonstrate that he was entitled to admission of the evidence under the constitutional right exception to the rule. (JT Tr., p.245, Ls.2-6.)

Ozuna asserted below and asserts on appeal that the evidence he was seeking to introduce at trial did not fall under I.R.E. 412 because he was not introducing it for the truth of the matter asserted. (Appellant's brief, pp.5-10.) His own position at the hearing on his oral motion belies this point. He advised the court that the first thing he wanted to be able to do was ask the victim if she in fact had chlamydia at the time Ozuna had sexual contact with her. (See, JT Tr., p.229, Ls.17-21.) Ozuna indicated he would then follow up with his own testimony that he had "basically, a full physical" and never "came down with any

signs" of chlamydia. (JT Tr., p.230, Ls.1-12.) Asking a victim of a sexual offense if she had a sexually transmitted disease contracted prior to her being sexually active with a defendant is by its very nature asking about prior sexual behavior of the victim. The district court agreed, finding "the suggested evidence is evidence of a victim's past behavior, suggesting that she had past sexual activities." (JT Tr., p.243, Ls.17-21.)

Ozuna argues that his attempt to testify at trial as to A.B.'s statement to him that E.B. had chlamydia was not covered by I.R.E. 412 because it was not offered for the truth of the matter asserted but to show why he was not interested in having sexual contact with E.B. (Appellant's brief, pp.5-10.) However, the only evidence of this conversation is the uncorroborated word of Ozuna himself. If the Court were to determine such hearsay evidence was not covered by I.R.E. 412, the trial court correctly determined that the probative value of such evidence did not outweigh the danger of unfair prejudice. (See JT Tr., p.244, L.22 – p.245, L.248, L.15.)

Because the Idaho appellate courts have not directly addressed this issue, Ozuna cites to Reece v. State, 383 S.E.2d 572, 574 (Ga. Ct. App. 1989), for his position that evidence of a victim's contracting a sexually transmitted disease is not evidence of the kind of prior sexual behavior sought to be excluded by I.R.E. 412. (See Appellant's brief, pp.7-10.) Reece is a case that involved the state attempting to show that a victim contracted a sexually transmitted disease from the defendant and the defendant objecting to the trial court's refusal to allow him to counter that with evidence that he did not in fact have a disease to sexually

transmit and was therefore not the one responsible for committing the sexual offense he had been accused of. 383 S.E.2d at 574.

Reece is distinguishable from the present case wherein Ozuna is attempting to introduce evidence that his victim had a sexually transmitted disease which she contracted prior to his meeting her in order to show that since he did not contract a sexually transmitted disease from his victim, he did not have sexual contact with her. However, Ozuna's offer of proof that he had subsequently been tested by a doctor does not establish that he was not infected after the sexual contact occurred nor does it rule out the possibility that Ozuna had sexual contact with E.B. Ozuna has failed to establish the district court erred by analyzing the evidence proffered under I.R.E. 412 and concluding it was inadmissible.

Finally, even if it was error for the district court to exclude evidence that his victim had tested positive for chlamydia prior to his contact with her and Ozuna's own self-reported negative chlamydia status at the time of trial, any error was harmless. In State v. Pena-Rojas, 822 A.2d 921 (R.I. 2003), the Rhode Island Supreme Court found the failure of the trial court to exclude evidence that the defendant was "free of any sexually transmitted diseases" where there was evidence that the victim had sexual contact with another man on the same evening he was alleged to have had sexual contact with her was harmless error based on the other evidence presented at trial:

> Most importantly, other evidence implicated defendant as the person who had sexual relations with the victim on the date in question, including the victim's testimony, her identification of the location of the motel where the assault too place, her identification

> of defendant from a police-assembled photographic array, and the physical evidence of motel records identifying defendant as the person who rented the motel room. Thus, if it was error for the trial justice to exclude evidence that defendant was free of any sexually transmitted diseases, it was harmless error.

822 A.2d at 924.

In this case, any error in the exclusion of evidence was harmless in light of the overwhelming evidence implicating Ozuna as E.B.'s offender. "'Where error concerns evidence omitted at trial, the test [for harmless error] is whether there is a reasonable possibility that the lack of excluded evidence might have contributed to the conviction.'" State v. Harris, 132 Idaho 843, 847, 979 P.2d 1201, 1205 (1999) (quoting State v. Pressnall, 119 Idaho 207, 209, 804 P.2d 936, 938 (Ct. App. 1991)).

Here, E.B. identified Ozuna from a photo-lineup conducted at the beginning of the investigation. (JT Tr., p.312, L.23 – p.315, L.1.) Ozuna ultimately admitted to having been with E.B. on the evening in question and although he initially denied having any sexual contact with E.B., Ozuna testified at trial that he woke up to E.B. "straddling" him while he was wearing only his "boxers and a tank top." (JT Tr., p.608, Ls.1-14.) Most importantly, however, as evidence presented implicating Ozuna as the person who had sexual contact with the 15-year old E.B. were the results of a DNA analysis taken from a swab taken from E.B. after Ozuna had sexual contact with her. The results of that analysis were that it was "137 quadrillion times more likely" that the swab taken from E.B. was "a result of the combination of [E.B.'s] DNA and Mr. Ozuna's DNA than if it had been a combination of [E.B.'s] DNA and an unrelated person

randomly selected from the general population." (JT Tr., p.547, Ls.16-24.) If it was error to exclude the evidence proffered by Ozuna the morning of trial, any error was harmless.

II.
Ozuna Has Failed To Establish An Abuse Of The Sentencing Court's Discretion

A. Introduction

Ozuna argues the district court abused its discretion by failing to give sufficient consideration to the mitigating factors presented to it at Ozuna's sentencing hearing. (Appellant's brief, pp.24-26.) Ozuna has failed to meet his burden and has thereby failed to establish that the district court abused its discretion in imposing a unified life sentence with the first 20 years fixed upon a jury finding of guilty to lewd conduct with a sentencing enhancement for having a previous conviction for lewd conduct.

B. Standard Of Review

When a defendant alleges an excessive sentence on appeal, the appellate court independently reviews "all of the facts and circumstances of the case" and considers the nature of the offense and the character of the offender. State v. Cope, 142 Idaho 492, 500, 129 P.3d 1241, 1249 (2006). To prevail, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive considering the objectives of criminal punishment. Cope, 142 Idaho at 500, 129 P.3d at 1249. Those objectives are "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the

possibility of rehabilitation; and (4) punishment or retribution for wrongdoing." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). The fixed portion of the sentence is considered the probable duration of confinement. State v. Sanchez, 115 Idaho 776, 777, 769 P.2d 1148, 1149 (Ct. App. 1989). A sentence that does not exceed the statutory maximum will not be disturbed on appeal absent a clear abuse of discretion. State v. Reinke, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). Where reasonable minds might differ as to the length of sentence, the appellate court will not substitute its view for that of the sentencing court. State v. Brown, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992).

C. Ozuna Has Failed To Establish That The District Court Abused Its Discretion

Ozuna asserts on appeal "that, given any view of the facts, his life sentence, with twenty years fixed, is excessive." (Appellant's brief, p.24.) Specifically, Ozuna contends that his family support and substance abuse were "mitigating factors known to the district court at the time of sentencing, [and] the district court abused its discretion when it imposed a unified life sentence, with twenty years fixed." (Appellant's brief, p.26.)

The court considered mitigating factors before sentencing Ozuna, including his family support: "In mitigation Mr. Ozuna in the relationship with his family and circumstances outside of his predatory sexual behavior appears to care about his family, children, has done some positive things in his lifetime." (6/21/12 Tr., p.46, Ls.17-21.) Ozuna's "history of substance and alcohol abuse"

was also before the court at sentencing. (PSI, p.11.) The court considered Ozuna's "substance abuse issues" but weighed them against the opportunities had been given and failed "each time" he was on probation or parole. (6/21/12 Tr., p.45, L.11 – p.46, L.2.)

The aggravation considered by the court far outweighed the mitigation presented at sentencing. The court found "the nature of the offense" itself aggravating, especially where Ozuna was "already subject to registration requirements as a sexual predator." (6/21/12 Tr., p.43, Ls.16-22.) The court noted Ozuna continued to deny culpability for his actions and instead attempted to place the blame on his victim at sentencing: "Mr. Ozuna, I'm a little – I'm a lot disappointed that you continually attempt to besmirch the victim in this case by making reference to things that may insult her character." (6/21/12 Tr., p.43, L.23 – p.44, L.1.)

The court found Ozuna was a "predator" based on the similarities in Ozuna's behavior leading to his two lewd conduct convictions, his commission of the latest while on his third opportunity on parole, and the use of alcohol in the abuse of his victims. (6/21/12 Tr., p.44, Ls.14-23.) Those concerns, coupled with Ozuna's dishonesty in the investigation and his repeated failed opportunities at rehabilitation led the court to the conclusion that Ozuna "pose[d] a threat to . . . potential victims of sexual abuse." (6/21/12 Tr., p.46, Ls.5-6.)

Ozuna has failed to show that the sentence of twenty years fixed followed by an indeterminate life is excessive considering the seriousness of his repeat offense and the impact upon his victim and potential victims when viewed with

Ozuna's many previous failed attempts at rehabilitation and his continued failure to take any responsibility or exhibit any remorse for his actions.

CONCLUSION

The state respectfully requests this Court to uphold Ozuna's judgment of conviction and sentence.

Dated this 16th day of May 2013.

NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of May 2013 served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm