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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38801
	)	
vs.	)	
	)	
WILLIAM M. TANKOVICH, JR.,	)	
	)	
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 KOOTENAI

HONORABLE JOHN P. LUSTER
District Judge

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Supreme Court Court of Appeals
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STATEMENT OF THE CASE

Nature Of The Case

William M. Tankovich, Jr., appeals from the judgment of conviction entered upon the jury verdicts finding him guilty malicious harassment and conspiracy to commit malicious harassment.

Statement Of Facts And Course Of Proceedings

One afternoon while Ken and Kim Requena were in their garage, they saw a truck drive by with five people inside. (Tr., p.1754, L.15 – p.1756, L.17; p.1817, L.8 – p.1818, L.2; p.2032, L.10 – p.2033, L.10.) Ken, who is Puerto Rican, noticed the men inside the truck were staring at them and that there was a swastika drawn in the dirt on the truck. (Tr., p.1752, L.17; p.1756, L.9 – p.1757, L.7.) On the other side of the truck, also written in dirt, was the phrase, "Born 2 Kill." (Tr., p.1818, Ls.3-15.)

The truck stopped at a nearby stop sign and then backed up to the front of the Requenas' driveway. (Tr., p.1757, Ls.9-18; p.1817, Ls.17-19.) The Requenas testified that Tankovich's brother, Frank, who was driving the truck, got out and quickly approached the end of the driveway and said, "Hey, come over here." (Tr., p.1757, L.24 – p.1758, L.3; p.1760, Ls.13-14.) Tankovich and his brother, Ira, also got out of the truck. (Tr., p.1760, L.17 – p.1761, L.11; p.1847, L.24 – p.1849, L.14.) Julie Oliver, one of the Requenas' neighbors, testified that the men were yelling and when she told them to leave, one of them told her to "shut up." (Tr., p.1819, Ls.1-12.)

Ken told his wife, Kim, to go inside and call 911 and bring him his gun. (Tr., p.1758, Ls.13-14.) When Ken got his gun, he cocked it so the Tankoviches could see it, hoping the gesture would make them leave. (Tr., p.1758, Ls.16-18.) Although the Tankoviches left, they threatened that they would be back. (Tr., p.1759, Ls.17-21; p.1850, Ls.9-18) The police arrived shortly thereafter and took statements from the Requenas and one of their neighbors. (Tr., p.1761, L.23 – p.1762, L.6; p.1821, Ls.5-10; p.1850, Ls.19-24.)

Twenty to thirty minutes later, the Tankoviches made good on their threat to return. (Tr., p.1728, Ls.2-6; p.1762, Ls.11-24.) This time, Tankovich and Frank travelled on foot with a pit bull in tow. (Tr., p.1727, Ls.10-17; p.1762, Ls.20-23.) They came to the end of Ken's driveway and told him he "fucked up." (Tr., p.1764, Ls.7-10.) Kim testified that Frank specifically threatened: "You fucked with the wrong people. I'm gonna fuck you up." (Tr., p.1852, Ls.12-19.) At about the same time, Ira approached on foot from another direction; however, he was intercepted by police who had arrived back on scene after receiving another 911 dispatch. (Tr., p.1853, L.2 – p.1855, L.13.) As the police approached, Ira threw a gun, which the police recovered. (Tr., p.1766, Ls.14-24; p.1855, Ls.5-9.) During a subsequent search of Ira, law enforcement discovered he was also in possession of a knife. (Tr., p.1979, L.21 – p.1980, L.3.)

The police detained Tankovich and Frank. (Tr., p.1768, Ls.5-9.) While the police were talking to Tankovich and Frank, both men repeatedly called Ken a "fuckin' beaner" and Tankovich threatened that they would "take care of business" and take care of the "beaner" themselves. (Tr., p.1769, Ls.4-17;

p.1856, Ls.4-16.) Tankovich also called the officers "pigs." (Tr., p.1911, Ls.24-25.) The Tankoviches eventually left. (Tr., p.1770, Ls.5-11.)

Although the police did not arrest Tankovich or Frank on the date of the incident, a grand jury later indicted Tankovich, Frank, and Ira, on one count of malicious harassment and one count of conspiracy to commit malicious harassment.[1] (R., Vol. 1, pp.1-3; Vol. 2, pp.241-43; Vol. 3, p.414-16; see Tr., p.404, L.12 – p.409, L.3.) The state filed a motion to join all three cases for trial, which the district court ultimately granted. (R., Vol. 1, pp.35, 55-66, 68-69, 73-75.)

Prior to trial, the state filed a motion in limine seeking admission of expert testimony from Tim Higgins regarding the culture and symbolism of white supremacists. (R., Vol. 3, pp.482-86.) In particular, the state sought to have Mr. Higgins testify about the relationship between white supremacy groups and some of the Tankoviches' tattoos, which included inverted stars with the words "Aryan Pride" (Tr., p.2078, L.13 – p.2079, L.9; Exhibit 6), the SS "bolts" symbols (Tr., p.2079, L.23 – p.2080, L.6; Exhibit 8), and a three-leaf clover, which is a "traditional Aryan Symbol" (Tr., p.2080, Ls.7-13; Exhibit 9). The court allowed limited testimony from Mr. Higgins on this issue. (Tr., p.2102, L.4 – p.2121, L.1.)

[1] The court later dismissed the malicious harassment charge against Ira finding a lack of evidence to support the charge, but found sufficient probable cause for the conspiracy charge against all three defendants. (Tr., p.157, L.21 – p.160, L.6.)

The jury convicted both Tankovich and Frank of malicious harassment and conspiracy to commit malicious harassment.[2] (R., Vol. 4, p.632; Tr., p.2236, L.15 – p.2237, L.12.) Tankovich filed a motion for a new trial, which the court denied. (R., Vol. 4, pp.634-36, 694-705.) The court subsequently imposed concurrent unified five-year sentences with two years fixed on both counts, but suspended the sentences and placed Tankovich on two years of supervised probation. (R., Vol. 4, pp.715-18.) Tankovich filed a timely notice of appeal. (R., Vol. 1, ROA, p.13; Notice of Appeal dated May 10, 2011 (file folder).)

[2] The verdicts finding Tankovich guilty occurred at the conclusion of the third jury trial set in this matter. The first trial ended in a mistrial after the court concluded inadmissible evidence was presented to the jury. (Trial Tr., pp.439-58.) The court also declared a mistrial in the second trial as to Tankovich and Frank after the jury could not reach a verdict as to either defendant; however, the jury in that trial found Ira guilty of conspiracy to disturb the peace. (Trial Tr., p.1466, L.3 – p.1468, L.17.)

ISSUE

Tankovich states the issue on appeal as:

> Did the district court err by permitting Mr. Higgins to testify because part of his testimony was not relevant and unfairly prejudiced Mr. Tankovich?

(Appellant's Brief, p.12)

The state rephrases the issue on appeal as:

Has Tankovich failed to establish error in the district court's ruling on the admissibility of Mr. Higgins' testimony?

ARGUMENT

Tankovich Has Failed To Show The District Court Abused Its Discretion In Allowing The Limited Testimony Of Tim Higgins

A. Introduction

Tankovich claims the district court erred "by permitting [Mr. Higgins] to testify regarding the meaning of Mr. Tankovich's tattoos because the testimony suggested that Mr. Tankovich was a member of a gang or had been to prison, which is both not relevant and unfairly prejudicial." (Appellant's Brief, p.13.) Tankovich is incorrect. To the extent Tankovich's claims are preserved, a review of the record reveals that Mr. Higgins never testified or "suggested" that Tankovich "was a member of a gang or had been to prison." Tankovich's claim of error on this basis, therefore, fails.

B. Standard Of Review

The trial court has broad discretion in the admission and exclusion of evidence and its decision to admit or exclude evidence will be reversed only when there has been a clear abuse of that discretion. State v. Howard, 135 Idaho 727, 721, 24 P.3d 44, 48 (2001); State v. Robinett, 141 Idaho 110, 112, 106 P.3d 436, 438 (2005).

C. Tankovich Has Failed To Establish Error In The Admission Of Mr. Higgins' Testimony

At trial, the court permitted the state to introduce evidence that (1) Tankovich's brother Ira has tattoos on his calves of inverted stars with the words "Aryan Pride" (Tr., p.2025, Ls.12-22; Exhibit 6); and (2) Tankovich has a tattoo of

the SS "bolts" symbols on his inner arm (Tr., p.2026, L.14 – p. 2027, L.6; p.2136, L.1 – p.2137, L.11; Exhibit 8), and a tattoo on his chest of a three-leaf clover, which is "common symbol worn by Aryan white supremacists" (Tr., p.2028, L.15 – p.2029, L.3; p.2137, L.12 – p.2139, L.13; Exhibit 9).[3] The court also granted the state's request to call Tim Higgins in order to explain the significance of the Tankoviches' tattoos.[4] In order to ensure the necessary foundation could be established for Mr. Higgins' testimony, the court conducted a hearing outside the presence of the jury. (Tr., pp.2062-2121.) During that hearing, Mr. Higgins testified that he "provide[s] administrative oversight for three programs statewide with the Department of Corrections both in probation and parole and in the prison system." (Tr., p.2064, Ls.8-12.) The three programs include "the investigations program," "the criminal intelligence program," and "the security threat group management program." (Tr., p.2064, Ls.13-16.) Mr. Higgins explained that "security threat groups" could mean criminal gang members, extremist groups, militia groups, white supremacist organizations, and "various other groups that would tend to be problematic inside a prison setting." (Tr., p.2067, Ls.4-8.) Mr.

[3] The state offered the tattoo evidence as probative of the Tankoviches' motive and intent in interacting with Ken Requena. (Tr., p.78-79, 84.) It appears the court held a hearing on this issue on August 10, 2010 (see R., Vol. 1, ROA at p.10, 8/11/2010 entry); however, the transcript of that hearing is not included in the record. The only transcript of proceedings on August 10, 2010, relates to Ira Tankovich's sentencing. (See Tr., Table of Contents and pp.1474-1509.) Based on what can be gleaned from the court's comments at later proceedings, the court concluded the evidence was admissible on the issue of intent. (See Tr., p.1519, Ls.17-25; p.2102, L.9 – p.2103, L.12.)

[4] Indeed, the court suggested the state needed to call an expert on this issue (Tr., p.79-80) and one of Tankovich's initial objections to the tattoo evidence before the state designated an expert was the lack of "foundation . . . as to what these tattoos mean" (Tr., p.66, Ls.5-8).

Higgins also explained how the Tankoviches' tattoos were representative of those worn by members of Aryan neo-Nazi groups or "gangs." (Tr., pp.2076-2093.)

Following the voir dire examination of Mr. Higgins, Tankovich advised the court:

> [M]y biggest concern is that letting this witness testify, all it's going to do is attempt to inflame the jury and say that these people are part of a gang. He has testified that that's only [sic] his expertise is in identifying if people are part of a gang or a security threat or whatever nonsense they're calling it these days, and he has given you no information that he is at all experienced in just testifying about relevant sorts of symbols. He has no doctorate, no degree in history. When discussing these symbols, he says that he hasn't studied the other uses of them.
>
> And more importantly, your Honor, it seems clear to me that what the State's hoping to do is have this witness testify and say these people are part of a gang. That's the only purpose of this testimony, even if he doesn't say it.

(Tr., p.2096, Ls.4-21.) Tankovich further argued that allowing Mr. Higgins to testify ran the "risk of letting the jury assume that they're in a gang when there's absolutely no evidence of that in this case." (Tr., p.2097, Ls.18-22.)

The state responded:

> Your Honor, with regards to the potential risk that counsel is referring to, I think that that's something that we have begun to address, certainly, in terms of the nature of the testimony that we'd be presenting to talk about things in terms of risk groups and rather than gangs and try to address some of the concerns the Court has.
>
> We wouldn't be seeking from this witness to testify about these particular defendants and their beliefs, rather, it's specialized testimony that this individual has based on years of experience and training relating to his knowledge of gangs and risk groups that is a part of his everyday work and has been a part of his everyday work for his entire career as a corrections officer.

(Tr., p.2100, Ls.9-24.)

The district court noted "the foundation that Mr. Higgins has laid here in the preliminary examination could be highly prejudicial in terms of exceeding the boundaries of what it is that would be relevant" since the Tankoviches were "not on trial for being members of a gang." (Tr., p.2105, Ls.4-13.) Nevertheless, the court noted the need for expert testimony on the symbolism of the tattoos, which would be a "legitimate purpose of Mr. Higgins's testimony." (Tr., p.2108, L.13 – p.2109, L.8.) Balancing the potential prejudice that could result from Mr. Higgins' foundational testimony against the need for his expertise, the court ruled that his testimony

> should not be presented in any way to infer or to imply that [the Tankoviches] had ever been in prison before or that any of these individuals were necessarily current members of any gangs or any gang affiliation or any of those things that Mr. Higgins is primarily entrusted to do in his everyday job.

(Tr., p.2109, Ls.18-25.) Accordingly, the court cautioned the state to avoid extensive inquiry into Mr. Higgins' background working for the Department of Correction in order to prevent any inference that the defendants "had been in prison or that they were members of specific gangs." (Tr., p.2113, Ls.3-14.) The court further clarified that Mr. Higgins could testify about his "general title" and "duties" and suggested that the prosecutor show Mr. Higgins the photographs of the tattoos, ask him about his familiarity and knowledge of them (Tr., p.2113, Ls.15-23), but that Mr. Higgins should not "characterize these tattoos as being

associated with gang members" (Tr., p.2120, Ls.12-15).[5] Consistent with the court's ruling, Mr. Higgins never used the word "gang" in his testimony, and, contrary to Tankovich's claim on appeal (Appellant's Brief, p.13), Mr. Higgins did not testify or even suggest that Tankovich was ever in prison or in a gang (see generally Tr., pp.2127-29, 2135-2140).

As required by the district court's ruling, Mr. Higgins' testimony regarding his experience was very limited. Mr. Higgins testified that he works at the Idaho Department of Correction as the "investigative and intelligence program director" and that, as part of his duties, he identifies and categorizes symbols and tattoos in relation to the Department of Correction's "population" (Tr., p.2128, Ls.1-10); both of these areas were proper under the court's order (Tr., p.2113, Ls.15-17). In discussing the symbolism behind the lightning bolts tattoo, Mr. Higgins testified, without objection, that he had "seen this specific symbol, as part of [his] duties," approximately "100 times in the last year." (Tr., p.2136, L.1 – p.2137, L.3.) As to that same tattoo, Mr. Higgins further testified, again without objection, that he had "seen symbols of this tattoo on people associated with Aryan neo-Nazi belief systems or white supremacy belief systems." (Tr., p.2137, Ls.9-11.)

On appeal, Tankovich cites the foregoing testimony and argues that "his association with a gang was not [relevant], nor was the frequency with which Mr. Higgins saw this tattoo in the prison system." (Appellant's Brief, pp.13-14.) Mr.

[5] To be clear, although the court ruled that Mr. Higgins should not "characterize these tattoos as being associated with gang members" (Tr., p.2120, Ls.13-15), Mr. Higgins was not prohibited from "mention[ing] gang activity because that [is] part of Mr. Higgins's work through the Department of Corrections" (Tr., p.2120, L.23 – p.2121, L.1).

Higgins did not, however, testify that Tankovich had an association with a gang; rather, his testimony was that the lightning bolt tattoo was associated with a particular belief system. Moreover, Tankovich never objected to this particular testimony as irrelevant, nor was his preliminary objection to Mr. Higgins' testimony based upon the relevance of Tankovich's "association with a gang," but was based on an alleged lack of experience with symbols and the risk of unfair prejudice.[6] (Tr., p.2096, Ls.4-21; p.2097, Ls.18-22.) Tankovich's objections on these bases is insufficient to "preserve a separate and different basis for excluding the evidence." State v. Vondenkamp, 141 Idaho 878, 885, 119 P.3d 653, 660 (Ct. App. 2005) (citing State v. Norton, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000)).

Tankovich also complains about Mr. Higgins' testimony that three-leaf clover tattoos are "common symbols worn by Aryan white supremacists inside." (Appellant's Brief, p.14 (quoting Tr., p.2139, Ls.12-13).) Tankovich argues that use of the word "inside" was not "relevant" because, he claims, it left the jury "with the impression that the tattoo was a prison tattoo, and the unmistakable inference the jury would draw was that Mr. Tankovich had been to prison." (Appellant's Brief, p.14.) Although Tankovich objected to and moved to "strike th[e] last part of the answer," which the court overruled, he did not state a basis for the objection. (Tr., p.2139, Ls.14-17.) Because Tankovich's objections to Mr. Higgins' testimony were based on Mr. Higgins' experience and the concern for

[6] Tankovich also did not object to this testimony on the basis that it was beyond the scope of the court's ruling. To the extent he is complaining on appeal that it was, any such claim is not preserved.

prejudice, and because he stated no other basis for his specific objection at the time Mr. Higgins testified, this Court should decline to consider Tankovich's argument that Mr. Higgins' use of the word "inside" was irrelevant.

Even if the Court entertains Tankovich's relevance argument, it is difficult to understand how the use of a single word in a witness's testimony can be subject to a relevance analysis. The gist of Mr. Higgins' challenged statement was that the three-leaf-clover is a symbol worn by Aryan white supremacists. This was relevant testimony. That Mr. Higgins' testimony incorporated reference to his experience with those on the "inside" does not make the testimony any less relevant even if he "could simply have testified to his understanding of the tattoo without" using the word "inside". (Appellant's Brief, p.14.)

In addition to his relevance argument, Tankovich asserts Mr. Higgins' testimony was "unfairly prejudicial." (Appellant's Brief, p.15.) This argument, like Tankovich's relevance argument, is premised on an incorrect characterization of Mr. Higgins' testimony as "suggesting" that Tankovich "was part of a white supremacist gang or had been in prison." (Appellant's Brief, p.15.) While "[e]vidence of a person's incarceration is prejudicial" (Appellant's Brief, p.15), Mr. Higgins never testified that Tankovich was, in fact, in prison nor did he imply as much. Just because Mr. Higgins' experience arises from his interaction with the prison population does not mean that his knowledge about tattoos only applies to people who are in prison and he certainly never testified that only prisoners have such tattoos or that such tattoos can only be obtained while in prison; indeed, such a proposition would be absurd given the safe assumption that there are no

tattoo parlors in prison. Tankovich's associated claim that Mr. Higgins implied he was in a "gang" fails because Mr. Higgins never used the word "gang," much less suggested that Tankovich was involved in one.

To the extent Tankovich preserved his relevance and prejudice arguments related to the specific portions of Mr. Higgins' testimony he challenges on appeal, he has failed to show error.

D. Even If This Court Finds Some Error Associated With Mr. Higgins' Testimony, Any Error Was Harmless

Even if this Court finds some error associated with Mr. Higgins' testimony about which Tankovich complains, any error does not require reversal.

Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52. "The [harmless error] inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence." State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)); see also State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

There is no dispute that Tankovich called Ken Requena a "beaner." (See Tr., p.2190, Ls.16-25 (counsel, in closing, arguing there was no "dispute" that the "Tankoviches made ignorant statements" about Ken Requena in calling him a "beaner"); Exhibit 10 (transcript of 911 call, which was admitted as Defendant's Exhibit D, wherein caller says "a beaner pulled a gun on him").) Tankovich

acknowledged as much (id.), but argued that his actions were the result of Ken pulling a gun on him when he allegedly just wanted to buy some wire from Ken, and were not the product of any racial animus (see generally Tr., pp.2187-97). There was, however, significant evidence contradicting this defense.

In addition to Requenas' testimony about the Tankoviches behavior preceding the first interaction and Ken Requena's denial that the only thing he recalled hearing was Frank saying, "Come over here" (Tr., p.1779, Ls.5-12), the Requenas' neighbor, Julie Oliver, testified that one of the Tankoviches told her to "shut up," corroborating the Requenas' claim that the Tankoviches were behaving aggressively. (Tr., p.1819, Ls.1-12.) There was also substantial evidence of the Tankoviches' racist intent, which included the swastika and the "Born 2 Kill" inscriptions on their truck, Ira's "Aryan Pride" tattoos (Exhibit 6), which were not addressed by Mr. Higgins' testimony[7], and the Tankoviches' repeated use of the word "beaner" in referring to Ken Requena.

Ultimately, this case was about whether the jury believed the Requenas and their neighbors or the Tankoviches with their swastika, their racially-charged tattoos, and their undisputed use of the word "beaner." The jury's verdicts reflect how they resolved the discrepancies between the two versions of events. This case was not about, and did not hinge, on some speculative inference that Tankovich "was a member of a gang and/or had been in prison."[8] (Appellant's

[7] The court did not allow Mr. Higgins to testify about Ira's tattoos, concluding those "tattoos on his calves speak for themselves." (Tr., p.2111, Ls.7-14.)

[8] It is also worth noting that, at the conclusion of Mr. Higgins' testimony, Tankovich requested a "limiting instruction informing the jury that they are to take

Brief, p.17.) Thus, to the extent the Court agrees with Tankovich's claims of relevance or prejudice in relation to Mr. Higgins' testimony, any error in that regard is harmless and does not require reversal of Tankovich's convictions.

CONCLUSION

The state respectfully requests that this Court affirm Tankovich's convictions for malicious harassment and conspiracy to commit malicious harassment.

DATED this 20th day of July, 2012

JESSICA M. LORELLO
Deputy Attorney General

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no inference that either of the Tankoviches are involved with any of those organizations [referred to by Mr. Higgins]." (Tr., p.2149, Ls.3-6.) The court stated it would defer ruling on that request until the instruction conference following the presentation of evidence. (Tr., p.2149, Ls.9-11.) After the presentation of evidence, the court excused the jury and indicated the parties were "going to meet . . . and continue to work on [the] instructions." (Tr., p.2166, Ls.18-22.) That "meeting" is not transcribed. The following day, the court noted the final instructions had been prepared and inquired as to whether there was "any objection to the giving of any instruction or to the refusal to give any particular instruction." (Tr., p.2168, L.21 – p.2169, L.1.) Tankovich responded: "my previous objections to the conspiracy instruction, I don't have any further, your Honor." (Tr., p.2169, Ls.2-4.) Thus, there is no indication in the record that Tankovich asked the court for a ruling on a limiting instruction in relation to Mr. Higgins' testimony, much less that the court denied such a request. If Tankovich abandoned his request in favor of raising the issue on appeal, that would seem to constitute the sort of sandbagging disfavored by courts. See State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) ("[R]equiring a contemporaneous objection prevents the litigant from sandbagging the court, *i.e.*, remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.") (citation and quotations omitted).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of July 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
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.

JESSICA M. LORELLO
Deputy Attorney General