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State v. Ward Appellant's Brief Dckt. 40467

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Respondent, vs. JASON WARD, Appellant.	)))))))))	NO. 40467

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE Randy Stoker, District Judge

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ATTORNEYS FOR RESPONDENT

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This matter arises out of a criminal case in which the Appellant, Jason Ward, was convicted of Rape after a Jury Trial.

II. ISSUE ON APPEAL

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2. Did the prosecution commit prosecutorial misconduct and in it's questioning of the defense witness?

3. Did the Trial Court error in the admission of evidence over an objection as to chain of custody?

4. Does the Cumulative Error Doctrine Apply?

III. STATEMENT OF FACTS

The Appellant was originally charged with Rape by a complaint on the 27th day of May, 2011. The charge was based on the following facts.

1. The 911 call

At the jury trial, the recording of the original 911 was admitted. A summary of the call is as follows.

Initially the complaining witness called 911 to report being raped. Although she knew the appellant, the complaining witness denied knowing who allegedly raped her to the 911 operator. She further gave false information as to the description of the perpetrator as to his height. She further misled the 911 operator by stating that the perpetrator was driving a white 4-door Oldsmobile, and could not remember which direction it headed after leaving her in the country.

She further stated that the alleged perpetrator threatened her if she were to report the incident to the police. The police arrived and she was eventually taken to a hospital where evidently her story changed.

2. The Change of Plea.

The Appellant hired private counsel and the case proceeded to Jury Trial. (Transcript, Pages 23-24). A significant amount of discovery was exchanged and the Jury Trial was set for December 20, 2011.

On the day of Jury Trial, the trial counsel informed the Appellant that this was not a case that he could win and that because Mr. Ward was on probation for Felony Driving Under the Influence, that even if the jury acquitted him, the Court could revoke his probation and sentence him to prison. (See Affidavit of Jason Ward, Clerk's Record, Pages 185-188; Transcript, Pages. 11, Line 23 and Page 13, Line 24).

Based on the advice of counsel, the Appellant, Jason Ward, then pled guilty to the charge. He was sworn and testified as to the basis of the charge, admitting to the Rape. (Transcript, Pages 8-17).

3. The Plea Withdrawal.

After pleading guilty, the Appellant changed counsel and moved to withdraw his guilty plea. The Appellant testified, at the hearing to withdraw his guilty plea, that his plea was based upon the advice of counsel. However, this advice of counsel was erroneous as the felony Driving Under the Influence charge arose after the charge of Rape and therefore, his probation on felony DUI could not be a knowing voluntary waiver of his rights.

The Trial Court agreed that the Appellant's trial counsel misstated the law (Transcript Page 74, Lines 8-11). He found that the Appellant relied upon this misstatement (Transcript Page 74, Lines 12-14). The Trial Court further found that, because of his reliance on the misstatement of law of counsel, his plea was not knowing and voluntary (Transcript Page 75, Lines 1-3). Therefore, the plea was not properly taken and he allowed the Appellant to withdraw his plea (Transcript Page 76, Lines 4-7). Implicit in this finding is that the Appellant received ineffective assistance of counsel in the plea negotiations and therefore, the Court was required to allow Mr. Ward to withdraw his plea.

4. The Jury Trial.

The case then went on to Jury Trial with new counsel. Trial was held on July 2, 2012.

At trial, the complaining witness testified very distinctly from her 911 phone call. The complaining witness testified that she had met the Appellant before, that on the day of the alleged rape, the Appellant, Colby Redgrave, a prior boyfriend and others went water-skiing. (Transcript Pages 104-16). Later, she, Colby and Mr. Ward ended up at the home of Mr. Ward to drink. (Transcript, Pages 107-108). At the Appellant's home, all parties drank to, most likely, the point of intoxication. (Transcript, Pages 109 -110).

Later, she desired to go home and Mr. Ward drove her home, although she stated she did not go voluntarily. (Transcript, Page 120, Lines 6-7). She got in Mr. Ward's 4-door pickup truck. (Transcript, Page 120, Lines 19-20).

She then testified that on the way home, Mr. Ward stopped and raped her on the side of the road. (Transcript, Pages 135-137). She then got back into the truck and smoked 2 cigarettes. (Transcript, Pages 138-141). They then had sex again. (Transcript, Pages 141 - 142). They then got back into the truck and he drove until he told her to get out. (Transcript, Page 149, Lines 7-11).

Mr. Ward testified that they indeed went water-skiing that day and ended up at his house to party. (Transcript, Pages 459-461). He testified that he was going to

drive the complaining witness to her mother's house in Hansen. (Transcript, Pages 463-465). After they started driving, complaining witness asked him to pull over so they could have sex. (Transcript, Pages 465-466). Eventually, they had sex twice. The complaining witness then asked to be dropped off so her sister could come and pick her up. (Transcript, Pages 477-488). On cross-examination, the State was allowed to use the testimony from the Change of Plea Hearing for impeachment purposes pursuant to I.R.E. 410(b)(3). The state then required Mr. Ward to read the transcript of the Change of Plea Hearing. (Transcript, Pages 488-490). The court allowed the State to require Mr. Ward to read his testimony as to the elements of the charge that he had previously admitted.

The Jury found the Appellant guilty of Rape and the Appellant was sentenced to a term of twenty (20) years in prison, consisting of the first seven (7) years fixed and thirteen (13) years indeterminate.

IV. LEGAL ARGUMENT

1. Did the use of the Appellant's testimony from a previously withdrawn guilty plea violate the fundamental constitutional rights of a Appellant?

Admittedly, this issue was not raised below at the trial court. Trial counsel allowed the use of the Change of Plea testimony, without objection. This is most likely because I.R.E. 410(b)(3) specifically allows for this use. The rule states:

Rule 410. Inadmissibility of pleas, plea discussions, and related statements (a) Inadmissibility. Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;
(2) a plea of nolo contendere;
(3) any statement made in the course of any proceedings under Rule 11 of the Idaho Rules of Criminal Procedure or comparable Federal or state procedure regarding either of the foregoing pleas; or
(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
(b) Exceptions. Notwithstanding the foregoing, such a statement is admissible:
(1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or
(2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel; or
(3) under subsection (a) (3) above, in the same criminal action or proceeding for impeachment purposes.

However, its use in this case infringes on the appellant's fundamental rights against self-incrimination and to effective assistance of counsel. The rule therefore has an unconstitutional effect in this case.

The Court generally will not consider issues that were not raised at trial unless the defendant demonstrates fundamental error, i.e., "that one of his unwaived constitutional rights was plainly violated." *State v. Perry*, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010)

> When an Appellant raises an issue on Appeal, not raised at Trial, the Courts in Idaho will engage in the following analysis:
>
> . . .
>
> (2) If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed by

> an appellate court under Idaho's fundamental error doctrine. Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.

Id. 227-28, 245 P.3d at 979-80.

The appellant requests that the Court review this case because it implicates such important constitutional rights as a defendant's Fifth Amendment Right against self incrimination and Sixth Amendment Right to affective assistance of counsel.

Unfortunately, there are nor reported cases regarding I.R.E. 410(b)(3), in the State of Idaho. Further, subsection (b)(3) seems to be unique to Idaho, leaving us without the benefits of other courts to help shed light in this situation.

The purpose of the rule appears to be straight forward. In general, parties to plea negotiations need to know their efforts are protected, allowing the freedom to discuss and pursue alternatives. The plea bargaining process is an essential component of the criminal justice system and needs to be encouraged. *Santobello v. N.Y.*, 404 U.S. 257, 92 S.Ct. 495 (1971). This should extend to all logical actions taken in accordance with a plea bargain.

A criminal defendant also has several other important constitutional rights that come into play in this situation. Important among them is the Fifth Amendment right

against self-incrimination. This requires that any statement used against a criminal defendant must be deemed voluntary. *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964). This prevents defendants from being convicted on coerced statements.

Also important is a defendant's right to effective assistance of counsel. This is an important right. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Article 1, § 13 of the Idaho Constitution also assures a criminal defendant of "reasonably competent assistance of counsel." *Gibson v. State*, 110 Idaho 631, 635, 718 P.2d 283, 287 (1986).

It is with all of these concepts in mind, that the Appellant asserts that, prior to allowing the use of such testimony, the Court should have determined whether those statements were made voluntarily and were reliable. Since this is a question of constitutional rights, the Court can exercise free review. *State v. Draper*, 151 Idaho 576, 261 P.3d 853 (2011).

The Courts in Colorado have encountered this problem numerous times. They have consistently held that statements that are not voluntary cannot be used against a defendant, even for impeachment purposes. *See*, *State v. Cole*, 584 P.2d 71 (Colo. 1978); *People v. McCormick*, 881 P.2d 423 (Colo. App. 1994).

For example, in *People v. Butler* 929 P.2d 36 (Colo. App. 1996), a Defendant has plead guilty and, subsequent to pleading guilty, had made certain statements to the police. Later said Defendant was allowed to withdraw his plea and the State attempted to use those statements made to the police after the change of plea. The Court found that while his plea had been withdrawn, the statements made subsequent to his plea to the police were knowing and voluntary and therefore, they could be used against the Defendant.

While the Colorado Court found the admission of the statements to be proper, important is the analysis. They reviewed the statements made to police subsequent to the change of plea and found that they were knowing and voluntary.

In this case, the Court made an express finding that Mr. Ward's plea was not a knowing and voluntary plea and therefore it was required to be withdrawn. It has long been held that a defendant's plea must be knowing and voluntary as to not violate the defendant's rights. *State v. Salisbury*, 143 ID 467, 147 P.3d 108 (Ct. App. 2006).

Therefore, if a plea is not knowing an voluntary, any statements made in connection to the plea agreement are also not knowing and voluntary. Allowing the use of the defendant's testimony, even for impeachment purposes, allows the State to continue the ineffective assistance of counsel experienced by Mr. Ward and violates his right to self-incrimination.

It appears clear that the first two prongs of the *Perry* test are satisfied. First, there is a clear violation of the appellant's rights. And Secondly, it is clear from the record that his rights were violated without his knowledge.

The more difficult question is whether the use of the testimony for impeachment purposes prejudiced the Appellant. Instructive on this point is the Trial Court's comments at the sentencing hearing. The Trial Court stated that it was left with the belief that neither side told the whole story. (Transcript Page 521). In such a case, any evidence can be significant in determining how much weight the jurors placed on such testimony. It is difficult not to assume the testimony of the appellant influenced the jury's finding of guilt.

Therefore, the violation of the Defendant's Constitutional Rights requires that the verdict be vacated and the case be remanded for a new trial.

2. Did the prosecution commit prosecutorial misconduct and in it's questioning of a defense witness?

At trial, the Defendant called Caleb Redgrave as a witness. Caleb was the former boyfriend of the alleged victim and a friend of the Appellant. In cross-examination the following occurred :

Q: When you invited the two girls, Sonia and her cousin over, were you trying to get some girls for Mr. Ward?

(Transcript, Page 447, Lines 9-11).

Trial counsel objected and a conference at the bench occurred. (Transcript p. 447, Lines 16-18).

The prosecutor furthered the misconduct:

Q: Momentarily. And it's your –

MR. SMETHERS: Judge we would request the prosecutor not make gratutitous comments and noises in front of the jury.

THE COURT: I didn't observe anything.

MR. SMETHERS: She, just for the record, Judge, she laughed and said "momentarily" like she was mocking the witness.

THE COURT: So noted.

(Transcript, Page 448, Lines 7-15).

After a recess, trial counsel moved for a mistrial based upon the prosecutor's actions. (Transcript, Pages 452 - 455).

When an objection to alleged prosecutorial misconduct is raised at trial, the Court uses a two-part test to determine whether the misconduct requires reversal. See, e.g., *State v. Reynolds*, 120 Idaho 445, 448, 816 P.2d 1002, 1005 (Ct.App.1991). First, the Court reviews whether the prosecutor's challenged action was improper. *State v. Romero-Garcia*, 139 Idaho 199, 202, 75 P.3d 1209, 1212 (Ct.App.2003). If it was not, then there was no prosecutorial misconduct. Id. If the conduct was improper, we then consider whether the misconduct " prejudiced the

defendant's right to a fair trial or whether it was harmless." Id. The defendant carries the burden of proving prejudice. *State v. Wright*, 97 Idaho 229, 232, 542 P.2d 63, 66 (1975). When a defendant is unable to demonstrate prejudice, the misconduct will be regarded as harmless error. *State v. Garcia*, 100 Idaho 108, 111, 594 P.2d 146, 149 (1979).

Insinuating that Mr. Redgrave was acting as a pimp to get some girls is totally indefensible. There was no evidence to support such a charge. Further, mocking and making noises at a witness diminishes the credibility of a witness. The State's actions were an attempt to improperly discredit the witness and violated the appellant's rights to a fair trial.

3. Did the Trial Court error in the admission of evidence over an objection as to chain of custody?

Over the objection of the defendant, the trial court admitted DNA evidence of the defendant and the complaining witness. Trial counsel objected that the chain of custody of these items were not established as the officer taking these samples, did not testify. Trial counsel was allowed to make its motion and the trial court denied the motion and admitted the evidence. (Transcript, Pages 420-424).

The problem is that the investigating office, Detective Becky White had left the Twin Falls Sheriff's office under circumstances dealing with dishonesty. (See Clerk's Record, Pages 252-254). Without her testimony, a proper chain was not established.

A trial court's determination that evidence is supported by a proper foundation is reviewed for an abuse of discretion. *State v. Kodesh*, 122 Idaho 756, 757, 838 P.2d 885, 886 (Ct.App.1992).

Without Detective White's testimony, the chain was not established as required by I.R.E. 901 and the evidence should not have been admitted.

4. Does the Cumulative Error Doctrine Apply?

If the Court finds that none of the errors are sufficient to justify reversal, the appellant believes that the cumulative effect of the errors requires reversal. Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. *State v. Adamcik*, 272 P.3d 417, 152 Idaho 445 (Idaho 2012).

V. CONCLUSION

For the reasons stated above, the appellant asks that the jury verdict be vacated and his case remanded for a new trial.

RESPECTFULLY SUBMITTED this 4th day of September, 2013

Clayne S. Zollinger, Jr.
Attorney for Defendant-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2013, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Kenneth K. Jorgensen
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__X__ By depositing copies of the same in the United States mail, postage prepaid, at the post office in Rupert, Idaho.

_____ By hand delivering copies of the same to the office of the attorneys(s) at his office in the address stated above.

_____ By telecopying copies of the same to said attorney(s) at the telecopied number(s) _____, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office in Rupert, Idaho.

Clayne S. Zollinger, Jr.