4-30-2013

State v. Osterhoudt Appellant's Reply Brief Dckt. 39287

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39287
	)	
v.	)	TWIN FALLS CO. NO. CR 2007 2567
	)	
FRANKLIN WARD OSTERHOUDT,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY 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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE

Nature of the Case

Mr. Osterhoudt appeals from his Judgment of Conviction Upon a Guilty Verdict to Four Felony Counts, and Order of Commitment. He asserts that the district court erred by allowing the alleged victim, H.O., to that Mr. Osterhoudt provided her with methamphetamine, and further erred by allowing H.O. to testify that Mr. Osterhoudt committed the act of oral to genital contact upon her when she was age five. Additionally, Mr. Osterhoudt asserts that the district court erred by allowing the State to present the recordings of conversations between he and his niece and between he and his mother, as substantive evidence. Mr. Osterhoudt asserts that even if the State attempted to demonstrate that each of these three preserved errors is individually harmless beyond a reasonable doubt, the accumulation of these errors deprived him of a fair trial.

This Reply Brief is necessary to address the State's misguided attempt to change one of Mr. Osterhoudt's preserved claims - that the district court erred in admitting hearsay statements as substantive evidence - into a claim of unpreserved error, and to address the State's forfeiture of any argument that the preserved errors in the present case were harmless beyond a reasonable doubt.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Osterhoudt's Appellant's Brief. They need not be repeated in this Reply Brief in detail, but are incorporated herein by reference thereto.

ISSUES

1. Did the district court err by allowing the State to present evidence, pursuant to IRE 404(b), that Mr. Osterhoudt provided methamphetamine to H.O., as such evidence was not relevant to any charged count?

2. Did the district court err by allowing the State to present evidence, in rebuttal and pursuant to IRE 404(b), that Mr. Osterhoudt molested H.O. when she was five years old, as such evidence did not rebut any arguments or claims made by the defense?

3. Did the district court err by allowing recordings of phone conversations between Mr. Osterhoudt and his niece, and Mr. Osterhoudt and his mother, as substantive evidence for the truth of the matter asserted?

4. Even if individually harmless, did the accumulation of preserved errors in this case deprive Mr. Osterhoudt of a fair trial, requiring this Court to vacate his convictions?

ARGUMENT

I.

The District Court Erred By Allowing The State To Present Evidence, Pursuant To IRE 404(B), That Mr. Osterhoudt Provided Methamphetamine To H.O., As Such Evidence Was Not Relevant To Any Charged Count

Over defense objection, the district court allowed the State to present evidence that Mr. Osterhoudt was "grooming" H.O. by providing her methamphetamine, beginning when she was 14 years old. The court ruled that such evidence was admissible only as it related to Count I, which alleged an act of lewd conduct committed on or between November 1, 2006, and November 30, 2006. As H.O. herself testified, she had stopped using methamphetamine by October of 2006. Therefore, because Mr. Osterhoudt's alleged providing meth to H.O. is not tied to any charged crime, such evidence was not relevant. As such, the district court erred in finding that the evidence was relevant and abused its discretion by admitting this evidence. Mr. Osterhoudt further asserts that the State will not be able to prove the error is harmless beyond a reasonable doubt. His arguments on this issue are found in the Appellant's Brief and are not repeated herein. (*See* Appellant's Brief, pp.19-27.)

The State's argument in response to this claim is simply that the district court did not err in its ruling, and is generally unremarkable. (*See* Respondent's Brief, pp.9-12.) However, the State failed to make any assertion that, should this Court agree with Mr. Osterhoudt and find that the district court did err in admitting the evidence, the error was harmless beyond a reasonable doubt. (*See generally*, Respondent's Brief.) As such, should this Court find that the district court erred in allowing the State to present evidence that Mr. Osterhoudt provided H.O. with methamphetamine, this Court must

vacate his conviction and remand his case to the district court. *See State v. Perry*, 150 Idaho 209, 227 (2010) (holding that where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 24 (1967)); *see also State v. Almaraz*, 2013 Opinion No. 41 (Idaho, April 1, 2013) (*petition for rehearing pending*).

II.

The District Court Erred By Allowing The State To Present Evidence, In Rebuttal And Pursuant To IRE 404(b), That Ms. Osterhoudt Molested H.O. When She Was Five Years Old, As Such Evidence Did Not Rebut Any Arguments Or Claims Made By The Defense

Over the objection of defense counsel, the district court allowed H.O. to testify that she first claimed that Mr. Osterhoudt had sexually abused her when she was five years old, purportedly in rebuttal to the claim that she accused Mr. Osterhoudt so that she could be with her boyfriend, Mr. Pederson. However, this evidence did not actually rebut any evidence presented by the defense, and was pure propensity evidence. As such, the district court erred in finding that the evidence was relevant and abused its discretion by admitting this evidence. Mr. Osterhoudt further asserts that the State will be unable to prove that the error is harmless beyond a reasonable doubt. His arguments on this issue are found in the Appellant's Brief and are not repeated herein. (*See* Appellant's Brief, pp.27-33.)

The State's argument in response to this claim is simply that the district court did not err in its ruling, and is generally unremarkable. (*See* Respondent's Brief, pp.12-14.)

However, the State failed to make any assertion that, should this Court agree with Mr. Osterhoudt and find that the district court did err in admitting the evidence, the error was harmless beyond a reasonable doubt. (*See generally*, Respondent's Brief.) As such, should this Court find that the district court erred in allowing the State to present evidence that Mr. Osterhoudt molested H.O. when she was five years old, this Court must vacate his conviction and remand his case to the district court. *See State v. Perry*, 150 Idaho 209, 227 (2010) (holding that where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 24 (1967)); *see also State v. Almaraz*, 2013 Opinion No. 41 (Idaho, April 1, 2013) (*petition for rehearing pending*).

III.

The District Court Erred By Admitting Recordings Of Phone Conversations Between Mr. Osterhoudt And His Niece, And Mr. Osterhoudt And His Mother, As Substantive Evidence For The Truth Of The Matter Asserted

Over defense objection, the district court allowed the State to present audio recordings of phone conversations that Mr. Osterhoudt had with his niece and his mother, as substantive evidence. Assuming the evidence was admissible as either impeachment evidence or evidence of bias on the part of either S.M. or Sharon Williams, the proffered evidence was still hearsay and should not have been admitted for the truth of the matter asserted. By allowing the jury to consider these recordings as substantive evidence, rather than merely impeaching, the district court abused its

discretion. Furthermore, Mr. Osterhoudt asserts that the State will be unable to prove the error in admitting the evidence was harmless beyond a reasonable doubt.

In response, the State declines to address the actual issue raised by Mr. Osterhoudt and instead asserts that Mr. Osterhoudt is at fault because he failed to ask the court to instruct the jury that they could not consider the evidence for the truth of the matter asserted, thereby purportedly shifting the burden to Mr. Osterhoudt to demonstrate the error requires reversal under a *Perry* fundamental error analysis.[1] (*See* Respondent's Brief pp.15-17.) Notably, the State does not actually argue or attempt to support with citations to the record that the district court ruled that the jury *could not* consider the evidence for truth of the matter asserted, apparently conceding that the district court admitted the recordings as substantive evidence. (*See* Respondent's Brief pp.15-17.) Had the State made such an assertion, the State would be impliedly conceding that the prosecutor committed misconduct during closing arguments by referring to the recordings as substantive evidence. (*See* Tr.Opening/Closing Arguments, p.98, L.19 – p.99, L.14. (State arguing "Those tapes clearly indicate collusion."); *see also State v. Hairston*, 133 Idaho 496, 507 (1999) (finding misconduct where prosecutor argued an audio recording admitted solely for

[1] 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. *State v. Perry*, 150 Idaho 209, 229 (2010).

impeachment purposes was substantive evidence of the defendant's guilt).[2]) Regardless, the record demonstrates that the recordings were admitted as substantive evidence, over the objection of defense counsel, and the State's argument that the error in this case is unpreserved is without merit.

When discussing the State's motion to present the audio recordings as rebuttal evidence, the following exchange occurred:

> [Defense counsel, Mr. Essma:] There's a huge objection, Your Honor.
> THE COURT: How is it improper rebuttal?
> MR. ESSMA: How is it improper what?
> THE COURT: Rebuttal.
> MR. ESSMA: Because I'm not -- number one, they're **hearsay**.
> THE COURT: Well, they're probably being offered to show they're directly not true, rather than they are; right?
> MR. ESSMA: I don't know what the state wants them in for, but they're **hearsay**, number one, and I don't know what the exception to the **hearsay** rule is going to be.

(Tr.2/16/11, p.1459, Ls.6-17 (emphasis added).) The Court overruled the hearsay objection finding that the evidence was admissible for non-hearsay impeachment purposes. (Tr. p.1469, Ls.5-9.) However, the district court later made it clear that it viewed the recordings, not merely as impeaching or for some not-for-the-truth-of-the-matter-asserted-purpose, but as substantive evidence. The Court stated,

> You're being allowed to make a record. I just -- Here's the thing. I'll just be blunt: I've listened to them. I know what's on them. **It's not a mere prior inconsistent statement. It is direct evidence that because of the late disclosure the state was not allowed to use in their case in chief**. And I noted at the time of that ruling that the danger of the late disclosure is that there's a problem with witnesses getting up and saying whatever they want.
>
> **In some cases this is an inconsistent statement with a particular thing they said on the phone, but it goes beyond that**. And

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[2] Counsel for Mr. Osterhoudt incorrectly cited to *State v. Raudebaugh*, 124 Idaho 758, 769 (1993), in support of this proposition in the Appellant's Brief. (*See* Appellant's Brief, p.38, f.n.15.)

it's obvious from the context of them it goes beyond that. So you have a right to object and to make a record, **but the state is offering it for more than that, that's clear, and I've listened to them.**

I mean, how are they not just merely inconsistent statements? It's witnesses discussing -- obviously there's some inferences that can be drawn and perhaps argued one way or another -- **but the clear gist of them goes much beyond mere prior inconsistent statement.**

(Tr. 2/16/11, p.1489, L.11 – p.1490, L.6 (emphasis added).)

The court further held that the audio recordings were admissible as "some of the statements in these are prior inconsistent statements, or could be viewed that way," but that,

> What these tape-recorded conversations show is a pattern of witnesses planning testimony, conferring about it. Concoct may be a strong word, but that is an inference that can properly be drawn from the recordings. Getting their stories together, at best.
>
> Now there may be an alternate explanation for that, so the court in making this ruling does not need to find that fact exactly if the evidence has the tendency to show that, which is an obvious and reasonable inference from the context of these calls.
>
> So as to the relevance objection, some of the calls are brief, and perhaps if that were the only fragment would not appear to have much relevant information, but in light of the other phone calls they have obvious and extensive relevance.
>
> As to the question of impeachment, what we're dealing with here is not merely impeachment of a prior inconsistent statement. We're talking about bias, and I guess to put it uncharitably and maybe the most extreme inference again, fabrication or concocting of testimony. The witnesses testified to that. Their motive, their bias is all relevant. It is the most important issue in the trial. It is the most important function of the justice system, as the defense has argued when it came to the 404(b) evidence, to get at the truth.
>
> **So bias is not collateral and bias is not something that is limited necessarily by the impeachment rule of prior inconsistent statements**. And here by bias we have an effort where an inference can be drawn strongly from these recordings that there was an effort to coordinate testimony which was denied directly on the stand.

(Tr.2/17/11, p.1493, L.4 – p.1495, L.13. (emphasis added).)

It is abundantly clear that the district court admitted these audio recordings for the truth of the matter asserted. The record reflects that Mr. Osterhoudt objected on hearsay grounds and the district court overruled his objection; therefore, his issue is preserved for appeal. Should this Court find that the district court erred in allowing the jury to consider these recordings as substantive evidence, the State bears the burden of demonstrating this error is harmless beyond a reasonable doubt.

Once again, the State failed to make any assertion that, should this Court agree with Mr. Osterhoudt and find that the district court did err in admitting the evidence, the error was harmless beyond a reasonable doubt. (*See generally*, Respondent's Brief.) As such, should this Court find that the district court erred in admitting the recorded conversations between Mr. Osterhoudt and his niece, and Mr. Osterhoudt and his mother, this Court must vacate his conviction and remand his case to the district court. *See State v. Perry*, 150 Idaho 209, 227 (2010) (holding that where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 24 (1967)); *see also State v. Almaraz*, 2013 Opinion No. 41 (Idaho, April 1, 2013) (*petition for rehearing pending*).

IV.

Even If Individually Harmless, The Accumulation Of Preserved Errors In This Case Deprived Mr. Osterhoudt A Fair Trial, Requiring This Court To Vacate His Convictions

Finally, Mr. Osterhoudt asserts that under the doctrine of cumulative error, that even if this Court finds the errors above to be individually cumulative, this Court should

nevertheless vacate his conviction. (Appellant's Brief, p.39.) In response, the State simply asserts that the district court did not error in the above rulings and that, therefore, the cumulative error doctrine does not apply. (Respondent's Brief, p.17.) Although Mr. Osterhoudt does not withdraw his cumulative error argument, due to the fact that the State has failed to claim that any error in any of the district court's rulings are harmless beyond a reasonable doubt, if this Court finds that the district court incorrectly ruled on *any* of the preserved claims of error, this Court must vacate his conviction. *See State v. Perry*, 150 Idaho 209, 227 (2010) (holding that where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 24 (1967)); *see also State v. Almaraz*, 2013 Opinion No. 41 (Idaho, April 1, 2013) (*petition for rehearing pending*).

CONCLUSION

Mr. Osterhoudt respectfully requests that this Court vacate all of his convictions and remand his case to the district court.

DATED this 30th day of April, 2013.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of April, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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