10-10-2014

State v. Everhart Appellant's Reply Brief Dckt. 41180

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 41180
	)	
v.	)	ADA COUNTY NO. CR 2011-16076
	)	
JORDAN D. EVERHART,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Jordan D. Everhart appeals from his Judgment of Conviction and Commitment for first degree murder. Mr. Everhart asserts that the district court erred in admitting audio exhibits and the corresponding transcripts of certain phone calls made by him while in custody. He asserts that the phone calls, or portions thereof, were not relevant. Alternatively, Mr. Everhart asserts that this evidence's prejudicial effect outweighed its probative value. Additionally, Mr. Everhart asserts that the district court abused its discretion in imposing an excessive sentence and in denying his Idaho Criminal Rule 35 motion for a reduction of sentence.

This Reply Brief is necessary to address the State's assertions that the challenged exhibits were relevant and that the issue of whether this evidence's prejudicial effect outweighed its probative value is not preserved for appeal.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Everhart's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES[1]

1. Did the district court err in admitting State's Exhibits 53, 53-A, 55, and 55-A, audio and the corresponding transcripts of two jail phone calls placed by Mr. Everhart, as the exhibits, or portions thereof, were not relevant and were overly prejudicial?

2. Did the district court abuse its discretion when it imposed upon Mr. Everhart a sentence that is excessive given any view of the facts?

3. Did the district court abuse its discretion when it denied Mr. Everhart's Rule 35 Motion?

[1] Mr. Everhart will not be providing a response to issues two and three in this Reply Brief because the State's arguments on these issues are unremarkable.

ARGUMENT

I.

The District Court Erred In Admitting State's Exhibits 53, 53-A, 55, And 55-A, Audio And The Corresponding Transcripts Of Two Jail Phone Calls Placed By Mr. Everhart, As The Exhibits, Or Portions Thereof, Were Not Relevant And Were Overly Prejudicial

A. The Exhibits Were Not Relevant

The State has asserted that "[i]t is difficult to imagine evidence more relevant in a criminal case than the defendant's statements about the crime with which he is charged." (Respondent's Brief, p.9 (citation omitted).) Certainly, if these portions of the phone calls involved statements by Mr. Everhart about the circumstances of the night that A.C. was injured, the State's argument about relevance would be stronger. However, the challenged portions involve only the following statements by Mr. Everhart: "Yeah," "I know," "Yeah," an inaudible statement, "Yeah," and "Yeah." (State's Exhibit 53, State's Exhibit 53-A, p.3, Ls.5-12; State's Exhibit 55, State's Exhibit 55-A, p.2, L.10 – p.3, L.2.)

The State continues noting that "Everhart's statements that he had told a 'story' and knew he should 'stick to' the 'script' were relevant to both the credibility of his statements about events and his mental state surrounding those statements." (Respondent's Brief, p.11.) Contrary to the State's assertion, Mr. Everhart, in the challenged portions of the phone calls, did not make any statement that he had told a "story." And, it is unclear if his statement "I know" shows that he knew he should stick to a script or if it was an acknowledgment that he knew his family was "standing by [him] 100 percent." (State's Exhibit 53, State's Exhibit 53-A, p.3, Ls.8-12.) In both phone calls, Mr. Everhart merely acknowledges the statements by his family and does not

explicitly endorse or adopt the content of the statements. As such, these excerpts do not provide any insight to his state of mind or his credibility and, at best, provide insight into his family's state of mind; a subject which is wholly irrelevant.

Additionally, the State has asserted that Mr. Everhart's statement in the Appellant's Brief that the State had conceded that the contents of State's Exhibit 55 were not actually relevant was "an overstatement of the prosecutor's 'concession.'" (Respondent's Brief, p.11.) Mr. Everhart asserts that there was no "overstatement" of the concession. Instead, as he does again here, in the Appellant's Brief he directly quoted the prosecutor's statement:

> MS. LONGHURST: Judge, I agree that the call on the 12th is kind of dependant in its relevance to the call to his mother, "I told him too much." *If that call doesn't come in, I don't see that the 12th is relevant.*

(Tr. Vol. I., p.517, L.24 – p.518, L.2 (emphasis added); Appellant's Brief, p.10.)

On appeal, the State is now taking an inconsistent position by arguing that the phone call from October 12, 2011, or State's Exhibit 55, is now relevant by stretching the facts to somehow assert that the State did not actually concede the relevancy of the call in question by trying to put the concession "in . . . context." (Respondent's Brief, p.12.) However, Mr. Everhart asserts the concession regarding relevance is clear from the record.

While Mr. Everhart agrees that the district court was not bound by the concession, he asserts that when both the defendant and the prosecution agree that a piece of evidence is not relevant, such agreement should carry substantial weight in determining the relevancy of the evidence both at the district court and appellate levels.

It is important to note that in making its harmless error argument, the State noted that, "[t]hat Everhart participated in phone conversations, as depicted in Exhibits 53, 53-A, 55 and 55-A, indicating that he had a story or a script to stick to with an underlying theme that he 'didn't do it,' *did not make the evidence of his guilt more compelling that it already was.*" (Respondent's Brief, p.16 (emphasis added).) This argument clearly calls into question the relevance of this evidence. "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. I.R.E. 401. If the evidence, did not "make the evidence of his guilt more compelling that it already was," than its relevancy is clearly called into question.

Based on his arguments presented above and included in the Appellant's Brief, Mr. Everhart asserts that it was error for the district court to admit the excerpts from State's Exhibit's 53 and 55 as this evidence was not relevant.

B. The Probative Value Is Outweighed By The Prejudicial Effect

In addressing the harmless error argument, the State not only made a statement that called the relevancy of the evidence into question, it also noted that, "the fact that Everhart had a 'story' was readily apparent from other evidence." (Respondent's Brief, p.16.) These Respondent's Brief statements show that, at minimum, the evidence had very little probative value. For reasons articulated in the Appellant's Brief, there was a great danger of prejudice related to the admission of this evidence. As such, with the State's recent articulations that the evidence did not "make the evidence of his guilt more compelling that it already was," and that "the fact that Everhart had a 'story' was

readily apparent from other evidence" strongly suggest that the probative value was outweighed by the prejudicial effect. (Respondent's Brief, p.16.)

Additionally, in the Respondent's Brief, the State asserted that Mr. Everhart's I.R.E. 403 argument is not preserved. The State noted that, "[b]ecause Everhart did not challenge the evidence below under I.R.E. 403 and because the district court employed no I.R.E. 403 analysis to the exhibits, the court should decline to consider Everhart's I.R.E. 403 argument." (Respondent's Brief, p.14.) However, the State's argument is misplaced. While Mr. Everhart admittedly did not challenge the prejudicial nature of State's Exhibits 53, 53-A, 55, or 55-A, it was directly put at issue by the State in its motion practice (Sealed R., pp.30-31) and the balancing required under I.R.E. 403 was specifically discussed by the district court during the October 22, 2012, hearing (*See generally* Tr. Vol. I., p.487, L.15 – p.531, L.16).

To properly preserve an issue for appeal, one must either raise it in the court below *or* receive an adverse ruling on the issue. *McPheters v. Maile,* 138 Idaho 391, 397 (2003) (emphasis added). Mr. Everhart asserts that although the district court did not specifically mention I.R.E. 403 or prejudice in ruling on the admissibility of the challenged portions of the phone calls, the required balancing test was implicit in the admissibility ruling as evidenced by the district court's repeated mentioning of the balancing test when ruling that some portions of the phone calls were inadmissible. He asserts that the district court therefore issued an adverse ruling on the issue and, as such, the issue is properly presented on appeal.

Furthermore, the State has failed to address the merits of the issue as to whether or not the probative value was outweighed by the prejudicial effect. It is well settled that

a party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263 (1996). Therefore, Mr. Everhart asserts that, both based on the State's lack of argument in opposition and his arguments contained in the Appellant's Brief, the district court abused its discretion by admitting the challenged portions of the exhibits as the danger of unfair prejudice outweighs any potential probative value.

C. The State Will Be Unable To Prove That Admittance Of The Evidence Was Harmless Error

Despite physical evidence regarding A.C.'s death from a traumatic brain injury, this case boiled down to a credibility determination. Mr. Everhart admitted causing the fatal injury, but testified that it was an accident. (Tr. Vol. II., p.617, Ls.3-23.) A medical expert, Dr. Eric Christensen, testified that the injury was consistent with a child being tossing in the air, slipping from the hands of the person who tossed her, and hitting her head on the dryer. (Tr. Vol. II., p.695, L.14 – p.696, L.6.) This evidence left the jury to decide if the injury was an accident, as Mr. Everhart claimed, or murder, as the State asserted.

An interpretation of the statements made by Mr. Everhart's family is that they are repeatedly telling him to say nothing and "stick to the script" because they are concerned about his potential involvement or, worse, believe he is guilty and that keeping quiet will deprive the State of the evidence it may otherwise obtain to prove this fact. This is an interpretation that the State encouraged the jury to find by highlighting the "stick to the script" comments in closing arguments. (Tr. Vol. II., p.721, L.15 – p.733, L.17, p.818, Ls.7-23.) In making the credibility determination and ultimately the guilt or innocence determination, the jury not only considered Mr. Everhart's testimony and

demeanor, but likely considered evidence regarding whether or not his family believed and supported him.

As such, Mr. Everhart asserts that the State has failed to meet its burden to prove that the error is harmless beyond a reasonable doubt, especially in light of the fact that the harm from the admission of the exhibits was not limited to just the jury hearing and reading along with the exhibits, but that the harm was amplified by the State's mention of these exhibits in closing arguments

CONCLUSION

Mr. Everhart respectfully requests that his judgment of conviction be vacated and his case remanded for further proceedings. Alternatively, Mr. Everhart requests that this court reduce his sentence as it deems appropriate.

DATED this 10th day of October, 2014.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of October, 2014, 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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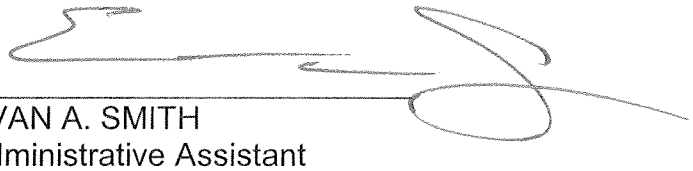

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