5-2-2014

State v. Hendren Appellant's Brief Dckt. 41345

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	SUPREME COURT NO. 41345
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	
	)	
THOMAS D. HENDREN,	)	
	)	
Defendant-Appellant.	)	

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Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for Idaho.

Honorable Michael J. Griffin, District Judge, Presiding

Danny J. Radakovich
Residing at Lewiston, Idaho, for Appellant

Lawrence Wasden, Idaho Attorney General
Residing at Boise, Idaho, for Respondent

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STATEMENT OF THE CASE

1. NATURE OF THE CASE.

This is an appeal by the defendant, Thomas D. Hendren to the Idaho Supreme Court/Court of Appeals from the May 8, 2013, Verdict of Guilty, the June 10, 2013, Order Denying (Post-Trial) Motions, and the July 30, 2013, Order Withholding Judgement and Order of Probation, the Honorable Michael J. Griffin presiding.

2. COURSE OF PRIOR PROCEEDINGS.

Before proceeding further with the Statement of the Case, a word on nomenclature is always in order. When we make reference to the transcript, we will utilize the customary symbol of "Tr.", followed by page and lien numbers. When we make reference to the Clerk's Record, we will use the customary symbol "R.", followed by the page number.

This matter commenced on September 28, 2012, with the filing of a Criminal Complaint charging the defendant, Thomas Hendren, with a single court of Aggravated Battery. (R., pp. 8-9) A preliminary hearing was held on November 19, 2012, at which the defendant was bound over on the charge of Aggravated Battery and held to answer. (R., pp. 13-15) An Information was duly filed on November 20, 2012. (R., pp. 16-17) The defendant was arraigned in the District Court on December 6, 2012, and entered a plea of not guilty. (R., p. 22) the case came on for trial on May 6, 7, and 8, 2013. (R., pp. 53 - 66) the jury found the defendant guilty of the charge of Aggravated Battery after deliberating about five (5) hours. (R., pp. 52, 65-66) The defendant's previous attorney filed post-trial motions consisting of a Motion for Acquittal or, in the alternative, a New Trial. (R., pp. 77-78) Those motions were, after argument, denied by the court on June 10, 2013. (R., pp. 85-86) The defendant's first attorney withdrew and the undersigned then appeared for the defendant

and handled the sentencing on July 29, 2013 (R., pp. 91-92) The defendant received a withheld judgement and probation via an order of the court dated July 30, 2013. (R., pp. 95-99) The defendant timely filed his Notice of Appeal on August 21, 2013. (R., pp. 102 - 105).

3. STATEMENT OF THE FACTS.

To say that the testimony given at the trial of this matter was conflicting and contradictory would be an understatement. If one takes the testimony as a whole, it almost appears as if there were three (3) or four (4) fights, not one. Even the witnesses who testified for one (1) side or the other were unable to tell a story which was completely consistent with the stories told by the other witnesses called by that same side. We will summarize the evidence as an aid to making our arguments set forth below.

The first witness at the trial was Mike Badgley, who was a police officer for Idaho County at the time of this incident. (Tr., p. 102, l. 25 - p. 103, l. 2; p. 103, l. 22 – p. 104, l. 1) Mr. Badgley, who is no longer an officer, responded to 417 Ping Street and encountered Thomas Hendren, who appeared agitated. (Tr., p. 105, ll. 9-23) Thomas Hendren reported to Badgley that he had been struck in the face and he also had a mark on his neck. (Tr., p. 107, ll. 2-22) Mr. Badgley indicated that Mr. Hendren told him that McNair had flipped him off, that he yelled at McNair to come back, that McNair hit him in the face, and that McNair brandished a weapon at him. (Tr., p. 108, ll. 9-17) The officer, either that day or the next, recovered the infamous baseball bat from Mr. Hendren. (Tr., p. 115, ll. 14-21)

Badgley then went and spoke with McNair and the deputy detailed what he saw of McNair's injuries and his condition. (Tr., p. 111, l. 15 – p. 113, l. 10)

Overall, it is clear that Badgley never actually observed any portion of the fight.

The next witness was Officer Tom Remington with the Idaho County Sheriff. (Tr., p. 139, ll. 21-23) Office Remington interacted with McNair and took some photographs. (Tr., p. 142, l. 4 – p. 144, l. 14) Officer Remington also interviewed some of the other witnesses and took some statements. (Tr., p. 144, l. 22 – p. 145, l. 12) He did not observe the fight.

The next witness was Mark Anderson, an EMT. (Tr., p. 160, ll. 9-16) His testimony consisted of his observations of McNair's condition while transporting him.

The next witness was Tema Jessup, who was the E.R. physician involved with treating McNair at the hospital. (Tr., p. 186, l. 11 – p. 187, l. 10) Her testimony consisted primarily of a description of the treatment she furnished to McNair.

The next witness was Douglas J. Schroeder, a resident of Kooskia, Idaho, who lives near both Mr. Hendren and McNair. (Tr., p. 209, l. 25 – 210, l. 20; p. 212, ll. 23 - 25) He did not see the fight, but heard loud voices raised in argument and, when he stepped out to investigate, he saw someone lying in the road and Mr. Hendren standing over that person. (Tr., p. 213, l. 1 – p. 214, l. 14) He saw Mr. Hendren looking down at the person lying in the street and holding a bat. (Tr., p. 214, ll. 19-23) Mr. Schroeder went to the scene and picked McNair up from the ground. (Tr., p. 215, ll. 19-20) He said that Mr. Hendren looked angry and told McNair that, if he ever pulled a gun, he would kill him. (Tr., p. 216, ll. 16-23) Mr. Schroeder went on to describe McNair's condition.

The next witness was Douglas W. Schroeder, the father of the preceding witness. (Tr., p. 247, ll. 18-21) Mr. Douglas W. Schroeder heard voices and, when he came out into the street, he saw Mr. Hendren and McNair. (Tr., p. 249, ll. 12-20) When the elder Schroeder reached the scene, he observed McNair's pickup straddling the centerline of the road and he observed his son helping McNair get up. (Tr., p. 251, ll. 8-23) Mr. Hendren was off the corner of the front of his big rig

holding a bat in his left hand. (Tr., p. 252, ll. 2-4) Mr. Schroeder also heard Mr. Hendren saying something to McNair to the effect that if you pull a gun on me again I'll kill you. (Tr., p. 254, ll. 8-10)

The next witness was Ben Sedgwick, who lived on the same street down near Schroeders. (Tr., p. 273, ll. 1-7) Sedgwick claimed to have been standing by his kitchen window and observed an altercation. (Tr., p. 275, ll.16-21) He claims to have seen Mr. Hendren hit McNair three (3) times with the bat. (Tr., p. 276, ll. 18-25) According to Sedgwick, the bat was in Mr. Hendren's left hand. (Tr., p. 277, ll. 20-23) He observed McNair grab Mr. Hendren and push him back toward his truck. (Tr., p. 278, l. 24 – p. 279, l. 4) He observed Mr. Hendren's brother, Fred, jump on McNair, hit him in the head, and bring him to the ground. (Tr., p. 287, l. 4 – p. 290, l. 2)

The next witness was McNair who told quite the story. He stated that he drove by Mr. Hendren, who flipped him off, called him names, and told him that he would kill him if he didn't get out of the neighborhood. (Tr., p. 328, ll. 16-22) Inexplicably, McNair turned around and drove back to find out what he had done to Mr. Hendren to make him so angry. (Tr., p. 329, ll. 4-8, ll. 17-19) He claims to have asked Mr. Hendren what he had done to make him so angry. (Tr., p. 329, l. 25 – p. 330, l. 1) That makes McNair sound like the calm, reasonable statesman in the situation, except for the fact that the testimony of the younger Schroeder made it clear that Mr. Hendren and McNair were in an argument and both were yelling loudly enough to be heard from Schroeders' house. (See above) McNair then claims that Mr. Hendren opened the door of his vehicle and pulled him out. (Tr., p. 330, l. 22 – p. 331, l. 8) McNair then went into a lengthy description of the beating with the baseball bat. (Tr., p. 331, l. 20 – p. 334, l. 11) At some point, apparently despite the veritable fusillade of bat blows, McNair somehow reached into the interior of his pickup, took his

gun out, and then put it back. (Tr., p. 334, l. 16 – p. 336, l. 6) Then, according to McNair, after he put the gun back, Mr. Hendren began beating him again with the bat. (Tr., p. 336, l. 24 – p. 337, l. 3; p. 339, ll. 5-16)

The next witness was Thomas Hendren who testified that he was in his truck speaking on his cell phone when McNair drove on by and flipped him off. (Tr., p. 400, l. 20 – p. 401, l. 13) Mr. Hendren jumped out of his truck and yelled at McNair to come back. (Tr., p. 401, ll. 15 - 22) Mr. Hendren walked out into the street and told McNair to get out of his vehicle. (Tr., p. 402, ll. 2 - 6) We have already discussed below the issue of the drug testimony, so won't set that forth here. Then Mr. Hendren indicated that McNair hit him in the face and he hit McNair back. (Tr., p. 411, ll. 22 – p. 412, l. 3) Mr. Hendren then indicated that McNair began getting out of his vehicle and pulled a gun. (Tr. P. 412, ll. 8-14; p. 413, ll. 19-24) That caused Mr. Hendren to get his bat. (Tr., p. 412, ll. 18-19) He denied ever hitting McNair with the bat. Mr. Hendren went through a description of various events, including his brother, Fred, hitting McNair.

The next witness was the Hendren boys' mother, who testimony was not terribly consequential. She heard yelling, saw McNair strike her son, Tom, and she called her other son, Fred, to go help Tom. (Tr., p. 465, l. 18 – p. 472, l. 16)

The next witness was Fred Hendren, whose testimony basically confirmed that he had struck McNair and taken him to the ground. (Tr., p. 489, l. 19 – p. 494, l. 16)

The final witness was Matt Finnell, who basically testified to watching Fred Hendren go across the street and strike McNair. (Tr., p. 519, l. 24 – p. 520, l. 10) He also saw the bat leaning up against the front of the semi truck. (P. 520, ll. 18 - 23)

ISSUE PRESENTED ON APPEAL

ISSUE NO. 1: THE DISTRICT COURT ERRED IN REFUSING TO ALLOW SPECIFIC EVIDENCE AS TO WHY MR. HENDREN FELT THREATENED BY MR. McNAIR.

ISSUE NO. 2: THE COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL.

ISSUE NO. 3: THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE, IN LIGHT OF THE PROBABLE CAUSE STANDARD.

ARGUMENT

ISSUE NO. 1: THE DISTRICT COURT ERRED IN REFUSING TO ALLOW SPECIFIC EVIDENCE AS TO WHY MR. HENDREN FELT THREATENED BY MR. McNAIR.

When Mr. Hendren began to testify, he was asked a question relative to why he got his bat out of the pickup when McNair approached. The defendant's reply is set forth on page 405 of the transcript, at lines17-20, to-wit:

> Q. Why did you get the bat out and then lay it down?
>
> A. Because of the drugs, because of the meth and the prescription drugs these guys are on."

This drew an immediate objection from the prosecutor, Mr. MacGregor. Mr. MacGregor explained his objection on page 406 of the transcript, from lines 8-15, as follows:

> "Judge, this is basically prior bad act evidence of a witness. There's been no motion made by the defense to bring any prior bad acts into this case. Highly prejudicial. I mean, I don't know if Mr. Chapman talked to him about – warned him about saying that. Obviously this is prior bad act evidence and that should not be used regarding a witness."

And then Mr. MacGregor went on at lines 23 and 24 of the same page:

> "Your Honor, I had no notice that was going to be brought up."

Mr. Chapman's response is set forth on page 407 from lines 5-17, to-wit:

> Well, Your Honor, I guess I disagree. Nothing is not offered for any reason other than why he would have a bat, and I think that's one of the essential elements to this. And that would just be what his belief was. I don't think he has any evidence of that. That was just his belief of it. In all honesty I didn't know that's what his response was going to be, but I don't think its an inappropriate response given the circumstances of this case and why someone would come back, walking back with a bat. And I think the reason I ask the question is because I think the jury should know why he did that as opposed to carrying the bat up loaded for bear."

The court, without truly allowing the testimony to be developed in the absence of the jury to any

great extent so that Mr. Hendren's thinking could be further explicated, simply sustained the objection, noting commencing at line 18 on page 407 and ending at line 6 on page 408:

> "The motion to strike will be granted. The Court will give a cautionary instruction that the jurors cannot consider it. There is a difference to Mr. Hendren testifying that he got the bat because he was afraid of physical violence from the victim versus the fact that he thinks the victim used drugs or was a homosexual or some other thing that unrelated to the charge in this case. Drugs and use of drugs is unrelated to the battery charge and, therefore, is – can only be used to impugn the character of the victim in this case or the purported victim and, therefore, is irrelevant and does prejudice – it is prejudicial. The court will under Rule 4404 [sic] subparagraph B [sic] exclude the evidence."

To be fair, the court did allow Mr. Hendren to make the rather vanilla statement in front of the jury that he got out his bat because he was fearful for his safety. (Tr., p. 410, ll. 4-7) That wasn't especially helpful because there was no reason able to be given why he was fearful. Thus, it was just an unsupported assertion of fearfulness.

There are several points to be made relative to this interchange.

First, either Mr. MacGregor did not correctly interpret Rule 404(b), I.R.E., or else the undersigned is not doing so now because it appears to the undersigned that the advance notice language in Rule 404(b), I.R.E. is only applicable to a situation where the ***prosecution*** seeks to use Rule 404(b) evidence. As is stated in the latter portion of Rule 404(b), I.R.E.:

> ". . . provided that the ***prosecution*** in a criminal case shall first file and serve notice reasonably in advance of trial, or during the trial is the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." (Emphasis ours)

So, neither Mr. Hendren nor Mr. Chapman did anything wrong in failing to file a 404(b) notice as Mr. MacGregor asserted.

Second, the plain and obvious fact is that the testimony of Mr. Hendren relative to drug use

by McNair was not offered as character evidence but, rather, as evidence of as to why Mr. Hendren believed that he was in danger. The court clearly understood that the defendant was making a defense to the aggravated battery charge based on the principle of self-defense. That the court understood that can be discerned from the fact that the court gave self-defense instructions starting at line 5 on page 532 of the transcript. On that page of the transcript, the court's laying out of the self-defense instruction is detailed. Significantly, the court noted that one of the elements of self-defense is that the defendant must have believed he was in imminent danger of bodily harm. (Tr., p. 532, ll. 9-11) The court went on to note that a second element of the defense was that the defendant must have believed that the action he took was necessary to save himself from the danger presented. (Tr., p. 532, ll. 11-13) Thirdly, the circumstances must have been such that a reasonable person under similar circumstances would have believed the defendant was in danger of bodily injury and that the action taken was necessary. (Tr., p. 532, ll. 14-17) It should be quite clear from even the very abortive testimony given by Mr. Hendren before Mr. MacGregor interrupted him that Mr. Hendren believed McNair was on "the meth and the prescription drugs these guys are on." Mr. Hendren clearly believed Mr. McNair, in that drugged state presented a danger. Unfortunately, we have no way of knowing at this point how that testimony could have been fleshed out because Mr. MacGregor cut it off and the judge then did not allow it to proceed. We all see in the newspaper virtually daily how drug-addled people kill or injure others. It is part of the information we take in about our society. In light of that, it isn't unreasonable for Mr. Hendren to take steps to protect himself. If one looks back at the elements of self-defense we have set forth above, the way it works is that the defendant is allowed to set forth his proposition as to why he felt himself at risk of bodily harm and then it is the ***jury*** – not the judge – which gets to decide whether or not the fears which Mr.

Hendren had for his safety were fears that a reasonable person might have. By cutting off the testimony when he did, the judge, in effect, precluded or crippled that aspect of Mr. Hendren's self-defense claim. It left a situation where the prosecution was free to argue that a man with a bat, for no real reason, beat up on an unarmed man. That is error and, in and of itself, should lead to a new trial.

Third, the drug testimony could be viewed as character evidence and that is because Mr. MacGregor, throughout the trial, spent considerable time ***building up*** the character of McNair and then making argument about it to the jury. (Tr., p. 326, ll. 7-20; p. 327, ll. 4-20; p. 335, ll. 18-23) Mr. MacGregor bid pretty fair to make McNair look like some sort of plaster saint. The law appears relatively clear that, when one party chooses to use character evidence, then that opens it up for the opposing party to do the opposite. **State v. Enno**, 119 Idaho 392, 807 P.2d 610 (1991) As the judge noted in his comments at sentencing (Tr., p. 646, l. 17 - p. 648, l. 1), this was a bit of an odd case, stating with the fact that McNair inexplicably chose to turn around and come back for this confrontation and continuing onward with the fact that the injuries to McNair weren't consistent with the sort of severe beating with a baseball bat that was described by McNair. The whole thing was fairly inexplicable, in some respects. We must add on top of that the fact that the testimony as to what happened varied wildly from witness to witness. All of that being the case, the trial turned into what amounted to a credibility contest. With a credibility contest, it seems clear that issues of character can take on a magnified importance.

The overall point to be made is that there was deliberate interference with Mr. Hendren's ability to tell his story in a sensible and credible fashion. He was allowed to make a watered-down statement about why he was in fear for his safety. That whole process very much interfered with his

self-defense claim. In addition, Mr. MacGregor skillfully created a clear path to be able to build up McNair's credibility and character and then use that in his closing argument to get the jury to accept McNair's story of what occurred, rather than Thomas Hendren's. This sort of real manipulation of the evidentiary record and stifling of a facially valid legal defense really demands a new trial.

ISSUE NO. 2: THE COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL.

As noted above, subsequent to the trial, Mr. Chapman filed a motion for, among other things, a new trial. That motion was denied. Mr. Chapman based his motion for a new trial on the issue of adverse evidentiary rulings by the court and in particular the rulings not allowing Mr. Hendren to go into McNair's drug involvement.

A motion to a new trial is partially governed by Rule 34, I.C.R., which states:

> "The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice. If the trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgement if entered, take additional testimony and direct the entry of a new judgement. A motion for a new trial based upon newly discovered evidence may be made only before or within two (2) years after final judgement. A motion for a new trial based on any other ground may be made at any time within fourteen (14) days after verdict, finding of guilt or imposition of sentence or within such further time as the court may fix during the fourteen (14) day period."

Motions for new trial are also subject to Idaho Code §19-2406 which stated, in relevant part, as follows:

> "When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:
>
> * * *
>
> 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial."

In this case, the error of law which we contend was made is the same error discussed in our argument of Issue 1 on appeal, i.e. that the court made a mistake in its handling of the question of Mr. Hendren's intention of testifying the McNair's drug involvement. We won't repeat that argument. Given the error by the court in handling this testimonial issue of McNair's drug involvement, the new trial should have been granted.

ISSUE NO. 3: THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE, IN LIGHT OF THE PROBABLE CAUSE STANDARD.

Mr. Chapman, as noted above, also made a motion for a judgement of acquittal under Rule 29, I.C.R., twice – once at the close of the State's case and once following the entry of the verdict. This motion was twice denied by the trial court. This motion is admittedly a difficult one for any defendant to make, especially after a verdict has been rendered by the jury. Nonetheless, Mr. Hendren continues to push for a judgement of acquittal on appeal.

Motions for a judgement of acquittal are governed primarily by Rule 29, I.C.R., which provides, in salient part, as follows:

> (a) Motion before submission to jury. The court on motion of the defendant or on its own motion shall order the entry of judgement of acquittal of one or more offenses charged in the indictment, information or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgement of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence. . . .
>
> * * *
>
> (c) Motion after discharge of jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgement of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. . . . "

In ruling upon motions for judgements the general standard can be found in the case of **State**

v. Sibley, 138 Idaho 259, 61 P.3d 616 (Ct. App., 2003) which states on page 262 thereof:

> "A motion for judgement of acquittal under Rule 29 may be brought by the defendant if the evidence is insufficient to sustain a conviction of the challenged offense. Appellate review of the sufficiency of the evidence is limited in scope. A judgement of conviction, entered upon a jury verdict, will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. . . . This Court will not substitute its view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. . . . Moreover, the Court will consider the evidence in the light most favorable to the prosecution."

In the case now before the Court, Mr. Hendren's argument relative to a judgement of acquittal is really based on the fact that the State's witnesses could not tell a consistent or straight story. McNair told an involved story about being hit many, many times with the bat. The only other prosecution witness who claims to have actually observed the hitting with the bat was Mr. Sedgwick. His observation of the hitting he observed was from quite a ways down the street and he detailed far less blows with the bat than what Mr. McNair claimed. Moreover, Mr. Sedgwick's testimony involved the hitting with the bat not starting until after McNair had closed the door of his pickup and that ties in with McNair's admission that he had gone into the cab area of his pickup and pulled out a gun, which he put back without discharging it. The witnesses called by Mr. Hendren who actually observed the action did not see any beating with the bat. The point we make is that the reasonable doubt standard, as it is now applied, speaks of reasonable doubt not being mere possible or imaginary doubt but, rather, a doubt based on reason and common sense, a doubt which would make an ordinary person hesitant to act in the most important affairs of his or her own life. Our argument is that, with those standards and the severely conflicting nature of the testimony ***of the State's witnesses***, it is difficult to see how the reasonable doubt standard could be met here. The jury, at

least for a period of time, had some problem with the evidence meeting that standard because it took this jury five (5) hours to come to a verdict.

A judgement of acquittal should have been entered.

CONCLUSION

Mr Hendren is not asking for much. He wanted an opportunity for a full, fair trial. He does not feel he received one and he wants one now or else the entry of a judgement of acquittal.

DATED this 30th April, 2014.

Danny J. Radakovich
Attorney for Appellant

I hereby certify that two (2) true and correct copies of the foregoing instrument were mailed, first-class class, postage prepaid to:

Lawrence Wasden
P.O. Box 83720
Boise, ID 83720-0010

on this 30th day of April, 2014.

Danny J. Radakovich