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State v. Anderes Appellant's Reply Brief Dckt. 41744

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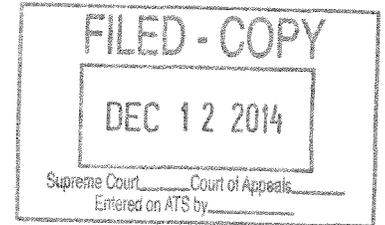
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
LEIGH BROOKS ANDERES,)
)
Defendant-Appellant.)

NO. 41744

ADA COUNTY NO. CR 2013-6054

REPLY BRIEF



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

Leigh Anderes appeals from the district court's Judgment and Commitment. Ms. Anderes was found guilty of battery upon a probation officer after a jury trial. She asserts that the prosecution committed misconduct when it repeatedly called her a liar and vouched for the credibility of the State's witnesses during closing arguments. The prosecutorial misconduct was not objected to; however, Ms. Anderes asserts that the misconduct amounted to fundamental error, that it was not harmless, and that her felony conviction must be overturned.

Furthermore, Ms. Anderes asserts that the district court abused its discretion in ordering restitution for the entirety of the alleged victim's shoulder surgery because the surgery not only repaired damage from the alleged battery, but also treated joint/bone issues not related to the battery. She also asserts that the district court abused its discretion in ordering her to pay for the replacement of a pair of sunglasses because insufficient evidence was supplied to prove that Ms. Anderes' criminal actions resulted in the need for the replacement of the sunglasses.

This Reply Brief is necessary to address the State's assertions that the prosecutorial misconduct raised on appeal was not an expression of the prosecutor's personal opinions, that the error was harmless, and that Officer Kightlinger did not receive treatment for his pre-existing arthritis or bone spurring during his surgery to repair the injury sustained during the alleged battery. Argument will not be provided on any other issues because the State's additional arguments are unremarkable.

Statement of the Facts and Course of Proceedings

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

ISSUES

1. Did the state violate Ms. Anderes' right to a fair trial by committing prosecutorial misconduct?
2. Did the district court abuse its discretion when it ordered restitution for a portion of Mr. Kightlinger's surgery which repaired damage that was not proven to have been caused by Ms. Anderes and in ordering restitution for a pair of sunglasses that the State failed to prove were damaged or destroyed as a result of Ms. Anderes' criminal actions?

ARGUMENT

I.

The State Violated Ms. Anderes' Right To A Fair Trial By Committing Prosecutorial Misconduct

A. The Statements By The Prosecutor Where Misconduct And Not A Fair Comment On The Evidence

The State asserted that:

The prosecutor did not express her personal opinion, but “invited the jury to make an inference from the evidence presented at trial” that demonstrated Anderes was lying. It is apparent from the context of the prosecutor’s statements regarding Anderes’ credibility that this is precisely what she was doing; such argument is entirely proper.

(Respondent's Brief, p.10.) It also asserted that, “[t]he prosecutor in this case did not frame her comments in terms of personal belief or opinion; she detailed the evidence supporting the witnesses’ testimony and the state’s view of the evidence.”

(Respondent's Brief, p.13.) However, Ms. Anderes asserts this is a misrepresentation of the prosecutor’s comments which were not merely comments on the evidence presented. After making appropriate comments on the evidence, the prosecutor went a step further injecting her personal opinions about the credibility of witnesses into the closing arguments. The sections of the transcript illustrating Ms. Anderes’ arguments on this point were originally cited in the Appellant’s Brief and will not be highlighted again here in the interest of brevity, but are incorporated by reference. (See Appellant’s Brief, pp.13-14.)

Ms. Anderes asserts that the comments by the prosecution were attempts to characterize Ms. Anderes as an individual that could not be believed under any circumstances - and to bolster the credibility of the State’s witnesses. The comments

did not present mere conflicting evidence and ask the jury to draw its own conclusions, but told the jury the conclusions that they must reach because they were the conclusions of the prosecutor.

B. The Prosecutorial Misconduct Requires Vacation Of The Conviction

The State has asserted that Ms. Anderes “has not and cannot show the error affected her substantial rights” and that “there was overwhelming evidence of Anderes’ guilt, including Anderes’ own admissions regarding her conduct.” (Respondent’s Brief, p.15.) Ms. Anderes’ version of events was that she initially was complying with orders to place her items on the ground and not her hands behind her back, but then changed her mind, scooped up her belongings and ran towards the door. (Tr., p.570, L.14 – p.574, L.9.) At this time, Officer Kightlinger was parallel with her backing up toward the door, saying “Whoa, Whoa, Whoa.” (Tr., p.574, Ls.5-18.) She stated that she did not run into Officer Kightlinger, but that he was running along side her, and that when she almost got out the door, the officer grabbed her and tackled her to the ground. (Tr., p.576, L.5 – p.577, L.16.) The two got back to their feet and then he dropped her to the ground again. (Tr., p.580, Ls.14-25.) Her version of events does not provide sufficient evidence for the jury to find her guilty of battery upon a probation officer.

The State has also asserted that, “[a]s noted by the prosecutor, ‘if you believe Eli Martinez, Tara Richardson and Chris Phillips, you can convict [Anderes] even if you didn’t believe Robert Kightlinger.’” (Respondent’s Brief, p.16 (citation omitted).) However, these witnesses also provided conflicting testimony and whether there is sufficient evidence to convict for a battery during the struggle after initial contact also depends on the jury’s credibility determinations. While Ms. Richardson and

Mr. Martinez offered testimony to support Officer Kightlinger's claims about the continued struggle, Mr. Phillips offered testimony that may call into question whether Ms. Anderes battered Officer Kightlinger after the initial contact: Tara Richardson heard a thump outside of her office and came out to find Officer Kightlinger on top of Ms. Anderes, saw the two were struggling, went to get help, and returned to see the struggle continue. (See generally Tr., p.496, L.13 – p.511, L.7.) Elias Martinez testified that when he came upon Officer Kightlinger and Ms. Anderes they were on the floor and Ms. Anderes was struggling, kicking, and flopping, so he restrained her legs. (Tr., p.650, L.4 – p.651, L.10.) Yet, Christopher Phillips testified that he responded to a call for help, found Officer Kightlinger on the ground on top of Ms. Anderes who was "laying on the ground" and struggling a little bit, "not much." (Tr., p.631, L.14 – p.632, L.10.)

Other than the testimony about what occurred from Officer Kightlinger and Ms. Anderes, there was no additional evidence regarding the initial contact. The two versions of testimony force the jury to make a critical credibility determination. Furthermore, it was unclear from the conflicting testimony if Ms. Anderes was kicking Officer Kightlinger while on the floor, after the initial contact, because the state's own witnesses disagreed about the struggle. As such, under either theory for the battery, the jury had to make critical credibility determinations and the prosecutorial misconduct could have swayed the jury in making these determinations. In reviewing the trial as a whole, the prosecutor's improper comments, constituting misconduct, may have contributed to the jury verdict.

Additionally, the State has encouraged this Court to find that any misconduct is harmless because the jury was instructed regarding credibility determinations and that the parties' arguments are not evidence. (Respondent's Brief, pp.16-17.) This argument undercuts the law on prosecutorial misconduct. If general jury instructions were enough to cure any potential prosecutorial misconduct error, there would simply be no real appellate review for prosecutorial misconduct. Prosecutors must not be allowed to push past the boundaries of acceptable prosecutorial behavior and then fall back on standardized jury instructions to cure any error and absolve them the misconduct. As the Idaho Supreme Court stated:

We long ago held, "It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury." *State v. Irwin*, 9 Idaho 35, 44, 71 P. 608, 611 (1903). They should not "exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused." *Id.*

State v. Christiansen, 144 Idaho 463, 469 (2007). Idaho Courts have held on numerous occasions that prosecutorial misconduct could not be found harmless and, presumably, in those cases the jury also received standard jury instructions. (See *State v. Bebee*, 145 Idaho 570 (Ct. App. 2007) (finding that the prosecutor's comments which misstated the evidence and amounted to an appeal to the jury to consider factors other than evidence of guilt amounted to prosecutorial misconduct and warranted a new trial); *State v. Phillips*, 144 Idaho 82 (Ct. App. 2007) (finding that the prosecutor's comments that the jury should be "irritated" and "upset" with the defense constituted prosecutorial misconduct and warranted a new trial).)

Ms. Anderes maintains that despite jury instructions that informed the jury that there were the judges of credibility and that the parties' arguments were not evidence,

that the prosecutorial misconduct in this case denied Ms. Anderes her right to a fair trial and amounts to fundamental error.

II.

The District Court Abused Its Discretion When It Ordered Restitution For A Portion Of Mr. Kightlinger's Surgery Which Repaired Damage That Was Not Proven To Have Been Caused By Ms. Anderes And In Ordering Restitution For A Pair Of Sunglasses That The State Failed To Prove Were Damaged Or Destroyed As A Result Of Ms. Anderes' Criminal Actions

The State asserted that "Dr. Tandje [sic] discovered arthritis in Officer Kightlinger's shoulder while he repaired the labral tear and examined the rotator cuff does not qualify as treatment for arthritis. Anderes' claim otherwise is unsupported by fact and her contention that she is not responsible for the shoulder surgery caused by her criminal conduct is contrary to law." (Respondent's Brief, p.23.) The State is incorrect because in addition to receiving treatment for his injury, Officer Kightlinger also received treatment for his arthritis.

Ms. Anderes asserts that a portion of Mr. Kightlinger's shoulder surgery was completed to address arthritis issues including calcification and bone spurring. The district court abused its discretion in ordering restitution for the entire surgery and not merely the portions necessary to address the physical injuries that were the result of the alleged battery.

From the beginning of treatment for Officer Kightlinger's shoulder injury, doctors noted that there was prior damage and new damage. Although Officer Kightlinger denied any previous injuries, the x-rays showed that the joint had a prominent bone on the acromial and clavicular aspects where there was *chronic calcifications from previous injuries*. (PSI, p.78 (emphasis added.)) An MRI revealed that there was tearing of the

superior glenoid labrum, tendinopathy of the distal supraspinatus, and mild acromioclavical joint degenerative change. (PSI, p.84.) Dr. Tadge listed his impressions as right shoulder impingement, labral tear and *acromioclavicular arthritis*. (R., p.86 (emphasis added).) Dr. Tadge noted that Mr. Kightlinger's shoulder pain was likely caused by impingement, a labral tear, and *acromioclavicular joint arthritis*. (PSI, pp.76-77 (emphasis added).)

During the surgery, Dr. Tadge found extensive labral tearing and repaired the tearing, reattaching the labrum to the glenoid. (PSI, p.87.) After making this repair he turned his attention to the subacromial space where Officer Kightlinger had "quite a bit of bursal inflammation" which required the doctor to use a "Bovie and a shaver to clear the soft tissue out of this area." (PSI, p.87.) He then turned his attention to the AC joint where Officer Kightlinger had "significant bone spurring and narrowing of the AC joint and through an anterior portal, I brought a bur in and removed the distal portion of the clavicle, so there was a very nice space in-between the clavicle and the acromion." (PSI, p.87.)

It was noted that both the preoperative and postoperative diagnoses included "[r]ight AC joint arthritis." (PSI, p.86.) Ms. Anderes asserts that after Dr. Tadge turned his attention from the labral tear he began treating for arthritis related conditions in an effort to relieve pain that was also caused by these conditions. Because the State failed to prove that Ms. Anderes' criminal actions were the cause of Officer Kightlinger's arthritis, bone spurring, or the calcification of his AC joint it was an abuse of discretion for the district court to order her to pay for this portion of the surgery.

CONCLUSION

Ms. Anderes respectfully requests that her felony conviction be vacated and her case remanded for a new trial. Additionally, she requests that her restitution order be vacated and that her case be remanded for a new restitution hearing for the limited purpose of determining what portion of the cost of the shoulder surgery she is responsible.

DATED this 12th day of December, 2014.



ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of December, 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:

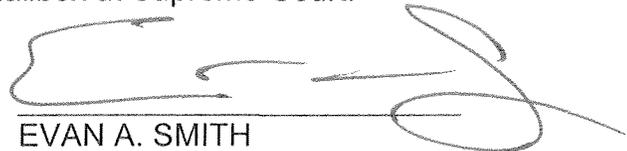
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