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State v. Keyes Appellant's Reply Brief Dckt. 36695

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 36695
)
 v.)
)
 DANIEL K. KEYES, II,) REPLY BRIEF
)
 Defendant-Appellant.)
 _____)

COPY

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature of the Case

Daniel K. Keyes, II, appeals from his judgment of conviction for first degree arson. Mr. Keyes was convicted following a jury trial and the district court imposed a unified sentence of twenty years, with five years fixed. Mr. Keyes now appeals, and he asserts that the district court erred by failing to grant a mistrial after an expert witness for the State invaded the province of the jury by stating his belief that the fire was deliberately set by Mr. Keyes. This Reply Brief addresses the State's contention that Mr. Keyes's argument is not preserved for appeal and that the testimony was proper.

Statement of the Facts and Course of Proceedings

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

ISSUE

Did Deputy Lauper's testimony that Mr. Keyes had deliberately started the fire impermissibly invade the province of the jury?

ARGUMENT

Deputy Lauper's Testimony Regarding Whether Mr. Keyes Deliberately Set the Fire Improperly Invaded The Province Of The Jury And The District Court Erred By Failing To Grant A Mistrial

A. Introduction

In this case, Deputy Lauper testified as to the ultimate issue for the jury's determination: whether Mr. Keyes deliberately set the fire. The prosecutor elicited this opinion as expert testimony. Because the issue of whether Mr. Keyes deliberately set the fire was the ultimate question for the jury to determine, Deputy Lauper's testimony was improper. While the district court sustained Mr. Keyes' objection, the district court erred by failing to grant the motion for a mistrial.

B. Deputy Lauper's Testimony Regarding Whether Mr. Keyes Deliberately Set the Fire Improperly Invaded The Province Of The Jury And The District Court Erred By Failing To Grant A Mistrial

The State has asserted that because several other witnesses testified, without objection, that the fire was deliberately set, the issue has not been preserved for appeal. The State is incorrect. Mr. Keyes preserved this issue on appeal both by objection to Deputy Lauper's testimony and moving for a mistrial on the basis of his testimony. Further, Deputy Lauper's testimony is different than the testimony cited by the State. The testimony cited by the state was that the fire was deliberately set; Deputy Lauper, however, testified that it was deliberately set by Mr. Keyes, which is different.

The State notes that in *State v. Hester*, 114 Idaho 688, 696, 760 P.2d 27, 35 (1988), the Idaho Supreme Court held that expert testimony that a child had been abused did not invade the province of the jury, but expert testimony that the child had

been abused *by the defendant* did exceed the proper bounds of expert testimony. This case is no different – not only did Deputy Lauper testify that the fire was deliberately set, he testified that it was deliberately set *by Mr. Keyes*. Therefore, Mr. Keyes's issue is preserved for appeal because he objected to improper testimony that was different than the testimony cited by the State.

Further, Deputy Lauper's testimony was improper. Admission of expert testimony that invades the province of the jury constitutes a violation of the constitutional right to a jury trial. *See State v. Walters*, 120 Idaho 46, 48, 813 P.2d 857, 859 (1991). In the context of an arson expert testifying as to the ultimate issue, the Idaho Supreme Court has stated:

There is little question that Dillard's opinion was prejudicial to Walters' defense. **When an arson expert declares that it was the defendant who set the fire in the house, there can be little doubt that the jury was impressed and influenced by the authoritative statement.** Had Dillard been **prevented from declaring** his damaging opinion, there is at the least a reasonable probability that the outcome of the proceeding would have been different. Most certainly, that probability is "sufficient to undermine confidence in the outcome."

Id., at 56-57, 813 P.2d at 867-68 (emphasis added). This case is no different. The jury would have been impressed and influence by Deputy Lauper's authoritative statement, and has therefore shown reversible error. Therefore, the district court erred when it denied Mr. Keyes's motion for a mistrial.

CONCLUSION

Mr. Keyes requests that his judgment of conviction be vacated and his case remanded for further proceedings.

DATED this 18th day of October, 2010.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of October, 2010, 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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