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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. DANIEL K. KEYES, II, Defendant-Appellant.	)	NO. 36695 APPELLANT'S BRIEF

COPY

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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FILED - COPY
MAY 2 1 2010
Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

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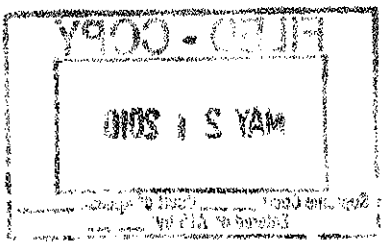

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STATEMENT OF THE CASE

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.

Statement of the Facts and Course of Proceedings

At approximately 3:00 a.m. on August 11, 2008, Helen Howell telephoned 911 to report that the duplex next to her home was on fire. (Trial Tr., p.55, Ls.18-21.) After she called 911, she went to the back yard of the duplex and saw her neighbor, Mr. Keyes, trying to extinguish the fire with a garden hose. (Trial Tr., p.59, Ls.3-19.) Desiree Eckard lived at the residence. (Trial Tr., p.90, Ls.7-9.) She had been in a relationship with Mr. Keyes and they had lived at the residence together. (Trial Tr., p.92, Ls.11-25.)

On the day before the fire, Ms. Eckard had been informed that Mr. Keyes was being released from the Kootenai County Jail; Mr. Keyes had been incarcerated for violating a no-contact order issued with regard to Ms. Eckard. (Trial Tr., p.97, Ls.3-5, p.73, Ls.10-15.) About a week before Mr. Keyes was released, Ms. Eckard had made the decision to end the relationship. (Trial Tr., p.110, Ls.22-25/)

Mr. Keyes went to the residence after being released and Ms. Eckard told him that she was going to end the relationship. (Trial Tr., p.117, Ls.22-25.) According to Ms. Eckard, Mr. Keyes told her that she needed to leave while it was still safe. (Trial Tr., p.118, Ls.2-5.) Ms. Eckard gathered some of her belongings and her pets and left the residence. (Trial Tr., p.119, Ls.2-20.) She stated that she took her pet birds because Mr. Keyes had previously threatened to "roast" them. (Trial Tr., p.119, Ls.16-20.)

Mr. Keyes testified as to his role in the fire. He explained that when he was released from jail, he went home expecting to live with Ms. Eckard because "we were engaged, and she was pregnant with our kid. I didn't see anything coming." (Trial Tr., p.395, Ls.3-25.) When she informed him of her plans, he became upset. (Trial Tr., p.396, Ls.1-7.) He stayed at the residence for approximately an hour and left to get some money, cigarettes, vodka and orange juice. (Trial Tr., p.399, Ls.4-8.) He made a couple of drinks and tried to relax for a while. (Trial Tr., p.399, Ls.14-16.) He stated that at around 7:00 pm, he decided to start a fire in the fireplace. (Trial Tr., p.400, Ls.16-23.) He became "extremely" intoxicated. (Trial Tr., p.402, Ls.10-11.)

He testified that "during the night I was throwing a whole bunch - you know – papers and junk mail and all kinds of stuff in there." (Trial Tr., p.402, Ls.15-18.) He acknowledged that he threw some of Ms. Eckard's clothing and a jewelry box into the fire. (Trial Tr., p.404, L.18 – p.406, L.20.) Mr. Keyes slept for a while, and when he work up, he

> looked over at the fireplace, and my fire had pretty much died down. At the bottom of my fireplace, it was all like the red embers, coals, whatever you want to call it, everything that burned. That was just kind of glowing, but there above there's like a grill along the top a bunch of slats. I don't

> know what it is, but that was glowing red. And I thought, 'that's weird. I've never seen that before.'

(Trial Tr., p.410, Ls.1-7.) He went into the garage to investigate this glow because the back of the chimney was in the garage. (Trial Tr., p.411, Ls.16-21.) As soon as he opened the garage door, "smoke and flames just came out." (Trial Tr., p.412, Ls.8-12.) He picked up a garden hose in an attempt to extinguish the fire. (Trial Tr., p.412, Ls.14-20.) He eventually went out to the front of the house and saw that his car was catching fire. (Trial Tr., p.418, Ls.9-15.) He got into the car and backed out of the driveway very quickly. (Trial Tr., p.419, Ls.1-4.) Drove down the street "as fast as I could because there was huge amounts of fire on my car." (Trial Tr., p.419, Ls.7-9.) The reason that he did not return to the residence was because he was panicked and drunk. (Trial Tr., p.422, Ls.21-22.)

Steven Field, who was in the duplex that evening, testified that he smelled a flammable solvent that evening, but wasn't going to interfere in the affairs of the folks next door." (Trial Tr., p.209, Ls.23-25.) Mr. Field had worked in a painting store and worked daily with paint thinners and solvents. (Trial Tr., p.207, Ls.1-8.) Mr. Keyes denied using any kind of solvent or paint thinner in the fire. (Tr., p.428, Ls.3-14.)

Brian Halvorson, a fire investigator, also testified. (Trial Tr., p.262, Ls.5-8.) He testified that there were two separate origins of the fire and that the fire was intentionally lit. (Trial Tr., p.290, Ls.6-18.) Glenn Lauper, the deputy chief with the Coeur d'Alene Fire Department, also testified. (Trial Tr., p.330, Ls.9-17.) He stated that he believed that the garage was a potential point of origin for the fire. (Trial Tr., p.339, Ls.11-14.) He believed the fire could also have originated in the living room. (Trial Tr., p.339, Ls.18-25.) When asked, based upon his training and experience, whether he had an

opinion as to the origin of the fire, Deputy Lauper stated, "it's an incendiary fire. The fire was deliberately set by the defendant." (Trial Tr., p.350, Ls.22-23.)

Counsel for Mr. Keyes objected and moved for a mistrial. (Trial Tr., p.350, Ls.24-25.) The district court responded,

> The objection is sustained. The jury will disregard the statements of the witness attributing fault to the defendant. That's the province of the jury. The witness knows and should know and counsel should know that that is not proper for him to be stating. And you will disregard it. That is your function. That is not his function.
>
> Request for mistrial is denied.

(Trial Tr., p.351, Ls.1-8.)

Mr. Keyes was charged by Information with one count of arson in the first degree, I.C. § 18-802. (R. p.54.) He was convicted following a jury trial. (R., p.211.) The district court imposed a unified sentence of twenty years, with five years fixed. (Trial Tr., p. 550, Ls.14-21.) Mr. Keyes appealed. (R., p.263.) He asserts that the district court erred by failing to grant a mistrial following Deputy Lauper's testimony.

ISSUE

Did Deputy Lauper's testimony that Mr. Keyes had deliberated 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

Expert witnesses may testify in the form of an opinion provided that: (1) they are properly qualified as an expert by their knowledge, skill, experience, or training; and (2) their specialized knowledge will assist the trial of fact to understand the evidence or to determine a fact in issue. I.R.E. 702. Idaho Rule of Evidence 704 also provides that opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." I.R.E. 704.

However, Idaho case law consistently recognizes that the provisions of I.R.E. 704, which permits opinion testimony that embraces an ultimate issue, must be read in conjunction with I.R.E. 702. *See, e.g., State v. Hester*, 114 Idaho 688, 696, 760 P.2d 27, 35 (1988). Specifically, where the expert opinion testimony only serves to

"impermissibly evaluate the circumstances and render the same conclusion the jury was asked to render by its verdict," then such testimony is improperly admitted. *Id.*; *see also State v. Raudebaugh*, 124 Idaho 758, 768, 864 P.2d 596, 606 (1993); *State v. Johnson*, 119 Idaho 852, 855, 810 P.2d 1138, 1141 (1991).

The Court in *Hester* adopted the following language and reasoning of the Kansas Supreme Court in *State v. Lash*, 699 P.2d 49 (Kan. 1985):

> [T]he opinion testimony of experts on the ultimate issue or issues is not admissible without limitations. Such testimony is admissible only insofar as the opinion will aid the jury in the interpretation of technical facts or when it will assist the jury in understanding the material in evidence. . . . Where the normal experience and qualifications of lay jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are inadmissible.

Hester, 114 Idaho at 696, 760 P.2d at 35 (internal citation omitted).

Where an expert testifies as to his or her opinion as to an ultimate issue in a case, and where such testimony is based on specialized experience and training such that a lay juror could not be expected to meaningfully interpret the evidence on his own, this testimony impermissibly invades on the province of the jury and should not be admitted. *Id.* Admission of expert testimony that invades the province of the jury constitutes a violation of the constitutional right to a jury trial.[1] *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

[1] Both the Sixth Amendment of the U.S. Constitution and Article I § 7 of the Idaho Constitution guarantee a criminal defendant the right to a trial by jury. *See, e.g., State v. Stover*, 140 Idaho 927, 104 P.3d 969 (2005).

> 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). In this case, the district court acknowledged that the testimony was improper, sustained the objection, and admonished the jury that it should not consider the testimony. (Trial Tr., p.351, Ls.1-7.) This was not sufficient, however, as the district court should have granted a mistrial because the testimony so infected the proceedings that it was impossible to "unring the bell" and Deputy Lauper was not "prevented from declaring" his damaging opinion.

Motions for a mistrial are governed by Idaho Criminal Rule 29.1. The Rule states, in relevant part, "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1.

The standard of review when a district court denies a motion for a mistrial is well established.

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Sandoval-Tena, 138 Idaho 908, 71 P.3d 1055 (2003) (quoting *State v. Shepherd,* 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct. App. 1993) (quoting *State v. Urquhart,* 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct. App. 1983))).

> [T]he impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California,* 386 U.S., at 23, 87 S.Ct., at 827. The right to an impartial adjudicator, be it judge or jury, is such a right. *Id.,* at 23, n. 8, 87 S.Ct., at 828, n. 8, citing, among other cases, *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge). As was stated in *Witherspoon,* a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.' " 391 U.S., at 521, 88 S.Ct., at 1776, quoting *Fay v. New York,* 332 U.S. 261, 294, 67 S.Ct. 1613, 1630, 91 L.Ed. 2043 (1947).

Gray v. Mississippi, 481 U.S. 648, 668 (1987). Mr. Keyes acknowledges that the district court sustained the objection and instructed the jury to disregard the statement and that this Court presumes that the jury followed the district court's instructions. *See State v. Kilby,* 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997); *State v. Hudson,* 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996). However, Mr. Keyes asserts that Deputy Lauper's testimony so infected the proceedings that the only sufficient remedy was a mistrial.

As the Idaho Supreme Court has noted, the type of opinion expressed by Deputy Lauper would impress and influence the jury because it is such an authoritative statement. *Walters*, 120 Idaho at 56-57, 813 P.2d at 867-68. And the court stated that the only way the jury would not have been impacted is if the expert was prevented from giving the opinion. *Id.* In this case, Deputy Lauper gave his opinion, and there can be little doubt that such an opinion would have impressed and influenced the jury. Further,

this case hinged on whether the jury believed Mr. Keyes that the fire occurred accidentally and that he only intended to light a fire in the fireplace, or if it believed the fire department witnesses who testified as to multiple sources of origin. Considering the evidence as a whole, Mr. Keyes respectfully submits that the district court erred by failing to grant a mistrial once Deputy Lauper improperly testified that Mr. Keyes had deliberately set the fire.

CONCLUSION

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

DATED this 21st day of May, 2010.

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of May, 2010, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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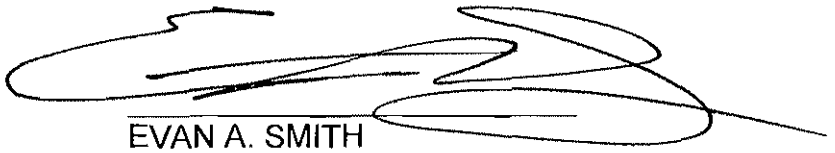

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