8-13-2009

State v. Keyes Respondent's Brief Dckt. 36695

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. DANIEL RAY KEYES, II, Defendant-Appellant.	)	NO. 36695

BRIEF OF RESPONDENT

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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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATEMENT OF THE CASE

Nature Of The Case

Daniel Ray Keyes II appeals from the judgment of conviction entered after a jury found him guilty of first degree arson. Specifically, he claims the district court committed reversible error when it denied his motion for a mistrial.

Statement Of Facts And Course Of Proceedings

In the early-morning hours of August 11, 2008, a fire occurred at a duplex in which Keyes and his girlfriend lived. (Trial Tr., p.59, Ls.9-16, p.92, Ls.11-25.) Keyes was seen by his neighbor attempting to extinguish the fire with a garden hose; shortly thereafter, Keyes drove away from the scene in his car. (Trial Tr., p.59, Ls.3-19, p.419, Ls.1-9.) When Keyes returned to the scene during the aftermath of the fire and the ensuing investigation by the fire department, he told the investigators that, earlier in the evening, he had burned several of his girlfriend's personal items in the fireplace, and that the fireplace burned through to the garage. (Trial Tr., p.359, L.3 – p.360, L.16, p.400, L.16 – p.411, L.13.)

Keyes was charged with first-degree arson. (R., pp.54-55.)

The lead investigator on the fire scene was Fire Inspector Halverson, who was assisted by Deputy Fire Chief Lauper. (Trial Tr., p.330, L.24 – p.334, L.4.) Both testified at Keyes's trial regarding their investigation and the conclusions they had drawn about the cause of the fire.

Inspector Halverson testified that, as a result of their investigation and in light of his training and experience, he had concluded there were at least two points of origin of the fire, one in the garage and one in front of the fireplace.

(Trial Tr., p.283, Ls.13-24.) Inspector Halverson further testified that he had reached a conclusion regarding the cause of the fire:

A: The cause of the fire is intentional.

Q: And intentional by what?

A: Intentional by someone lit the fire and caused a fire to happen.

Q: And not that the fireplace didn't malfunction?

A: I'm sorry?

Q: And that the fireplace did not malfunction?

A: Correct.

(Trial Tr., p.290, Ls.7-23.) Keyes did not object to this testimony.

Deputy Fire Chief Lauper also testified as to the investigators' belief that there was more than one point of origin of the fire, and that one of these was located about four or five feet in front of the fireplace hearth, where there was a large burn hole in the living room floor. (Trial Tr., p.339, L.3 – p.340, L.23.) The investigators concluded that the fire at this point of origin was not merely caused by burning items falling out of the fireplace, because there was no burn pattern connecting the hole in the floor back to the fireplace hearth; it simply was an un-connected hole in the floor. (Trial Tr., p.340, Ls.12-23.) After Deputy Fire Chief Lauper testified further, the prosecutor again brought the questioning around to discuss the origins of the fire:

Q: Now, based upon your experience and training, do you have an opinion as to the origin of these – of this fire?

A: I do.

Q: And what is that?

A: It's an incendiary fire. The fire was deliberately set by the defendant.

[DEFENSE COUNSEL]: Objection. Motion for a mistrial.

(Trial Tr., p.350, Ls.17-25.) The district court's response was immediate:

> 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. It is not his function.

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

After the court denied the motion and directed the state to restate the question, Deputy Fire Chief Lauper testified regarding his opinion that the point of origin of the fire was in the living room, and that the garage was another potential point of origin. (Trial Tr., p.352, Ls.3-21.) He then testified about his contact with Keyes after he returned to the scene during the investigation before the state asked its last series of questions of Deputy Fire Chief Lauper:

Q: Can you indicate to this jury, based upon your experience and training, Chief, was the cause of this fire an accident, based upon your years of experience?

A: This fire was not an accident.

Q: What was the cause of the fire?

A: It was incendiary.

Q: And what does "incendiary" mean?

A: Incendiary means that it was an intentional, it was a deliberate act to burn property of another person.

(Trial Tr., p.363, L.18 – p.364, L.3.) Keyes did not object to this testimony. The court then took a break for the lunch hour. (Trial Tr., p.364, Ls.6-10.)

After the lunch break, Keyes' counsel brought to the district court's attention the Idaho Supreme Court's opinion in State v. Walters, 120 Idaho 46, 813 P.2d 857 (1990), and a discussion was held off the record regarding the case and its applicability to Keyes's motion for mistrial. (Trial Tr., p.365, Ls.7-24.) Upon coming back on the record, the district court indicated it had reviewed the case, considered it sufficiently distinguishable from Keyes's case, and again denied Keyes's motion for a mistrial. (Trial Tr., p.365, L.23 – p.366, L.14.) The district court told Keyes that he was welcome to keep the issue open and brief it in further detail at the conclusion of the trial. (Trial Tr., p.366, Ls.14-17.)

On cross-examination, Keyes established that Deputy Fire Chief Lauper agreed with the conclusions contained in Inspector Halverson's report (Trial Tr., p.387, Ls.2-19), then had him read those conclusions with respect to the cause of the fire: "It is this investigator's opinion that the cause of the fire is incendiary in nature" (Trial Tr., p.390, Ls.1-3).

After the jury deliberated and returned a verdict of guilty (R., p.211), Keyes renewed his motion for mistrial on the basis of Deputy Fire Chief Lauper's statement "that this was an incendiary fire and that it had been caused or lit by my client" (Trial Tr., p.498, Ls.21-25). The district court later held a hearing on the renewed motion. (Trial Tr., p.502, Ls.13-16.) After hearing argument by the parties, the district court issued it's final order denying Keyes's motion for mistrial on the record in open court:

> I have given this a lot of thought, and I appreciate the brief the State has done and, of course the briefing that Mr. Neils did at the time of trial.

The first issue is the testimony by the fire chief, or assistant fire chief – I forget which he was – called as an expert at trial. His testimony was the effect that the – when asked the cause of the fire, statements were made that the fire was caused by the intentional acts of the defendant, which first of all, I want to emphasize what was implicit in the statement I made earlier, that, in reviewing this, there was certainly nothing improper about the question or the way the question was asked by Mr. Rierson. It was a proper question. It was simply the response from the deputy chief that was unacceptable. And at the time of trial, I instructed the jury in what I thought was very strong language that this testimony was not acceptable, that the chief – the witness, I should say, knew or at a minimum should have known better than to provide testimony that invades the province of the jury, that the jury was to completely disregard that testimony and they were the ones that were to make the factual findings here, not the witness. I thought the language I used was quite strong. And the jury is presumed to ... follow the instructions of the court. Nothing to indicate they didn't do that or wouldn't do that.

In hindsight I don't see how it could have been handled any different. Of course, Mr. Neil's point is that, no matter how you handled it, the response was improper and should have entitled him to a mistrial. I find that – let me make one other point. And that is that, it would not be surprising that – let me back up. This was not simply any run-of-the-mill expert witness. This was an expert witness who was an employee of the fire department, who was in effect part of the prosecution team in this case. There was a fire department employee sitting with Mr. Rierson during the trial. The jury knew that. And I don't think it would have come as much of a surprise to the jury that the fire department was blaming the defendant for the fire and considered it arson. Nevertheless, I did instruct them to disregard that, and I think the presumption that the jury would follow my instruction is correct.

This case is distinguishable in that respect from the State versus Walters case that Mr. Neils has relied upon.

...

Accordingly, the motion for mistrial is denied.

(Trial Tr., p.510, L.16 – p.512, L.14, p.515, Ls.21-22.)

Keyes timely appealed. (R., pp. 263-265.)

ISSUE

Keyes states the issue on appeal as:

> Did Deputy Lauper's testimony that Mr. Keyes had deliberated [sic] started the fire impermissibly invade the province of the jury?

(Appellant's brief, p.5.)

The state wishes to rephrase the issue on appeal as:

Has Keyes failed to show the district court erred by denying his motion for a mistrial based on a single statement that was remedied by a curative instruction?

ARGUMENT

The District Court Properly Exercised Its Discretion By Denying Keyes's Motion For Mistrial

A. Introduction

On direct examination, the state asked Deputy Fire Chief Lauper, who investigated the fire, his opinion as to the "origins of the fire." (Trial Tr., p.350, Ls.17-19.) Deputy Fire Chief Lauper responded: "It's an incendiary fire. The fire was deliberately set by the defendant." (Trial Tr., p.350, Ls.22-23.) Keyes claims the district court erred when it denied his motion for a mistrial based on this testimony. (Appellant's Brief, pp.6-10.) Keyes claims he was entitled to the mistrial because Deputy Fire Chief Lauper "testified as to the ultimate issue for the jury's determination: whether Mr. Keyes deliberately set the fire." (Appellant's Brief, p.6.) Keyes's claim lacks merit. The Deputy Fire Chief's statement had no prejudicial impact on the jury because the district court immediately gave the jury a curative instruction. As such, Keyes has failed to establish that the district court abused its discretion and committed reversible error when it denied his motion for a mistrial.

B. Standard Of Review

On appeal, the standard for review of a motion for mistrial is well-established:

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of the 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. [The appellate court's] 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. Shepherd, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct. App. 1993).

C. The District Court Properly Determined That Keyes Was Not Entitled To A Mistrial

1) The Expert Properly Testified That The Fire Was Deliberately Set

Keyes claims the district court should have granted a mistrial because "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." (Appellant's brief, p.10.) In other words, Keyes's objection on appeal is directed to that portion of the objected-to statement that asserted the fire was intentionally set, rather than that portion of the statement that asserted Keyes was the individual who set the fire. As such, Keyes has failed to establish any error in the introduction of this statement, let alone reversible error when the motion for mistrial was denied after the jury had been immediately instructed to disregard the statement.

As an initial matter, Keyes has waived this issue on appeal, as there were several other statements entered into evidence, without objection, expressing the fire inspectors' conclusion that the fire was intentionally set. "It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389,

398, 3 P.3d 67, 76 (Ct. App. 2000). Keyes did not object to Inspector Halverson's testimony, and did not ask for a continuing objection after objecting to Deputy Fire Chief Lauper's initial statement, and did not object to his subsequent statement that the fire was intentionally set. Keyes also elicited further testimony from Deputy Fire Chief Lauper that the fire was intentionally set. Therefore, this issue is not preserved for appeal. See also State v. Barnes, 147 Idaho 587, 597, 212 P.3d 1017, 1027 (Ct. App. 2009).

Even if Keyes's appellate argument is considered, the testimony was not improper. 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 trier 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.

Keyes's reliance on State v. Hester, 114 Idaho 688, 696, 760 P.2d 27, 35 (1988), for his claim that Deputy Fire Chief Lauper's testimony that the fire was intentionally set impermissibly invaded the province of the jury, is misplaced. The Hester Court determined that expert testimony that the child had been abused, an ultimate issue for the jury, was proper and did not invade the province of the jury. However, the court held that the expert exceeded the proper bounds of expert testimony when the expert testified that Hester was the abuser. Hester, 114 Idaho at 692-96, 760 P.2d at 31-35. The court stated that "having an

"having an expert render an opinion as to the identity of the abuser is more of an invasion of the jury's function rather than an 'assist' to the trier of fact." Id. at 695, 760 P.2d at 34. Testimony regarding the identity of the abuser embraced the ultimate issue in the case, whether or not Hester was the individual who abused the child, i.e., whether or not Hester was guilty. Id.

Deputy Fire Chief Lauper testified that, based on his investigation and the investigation of the other fire inspectors, he had concluded that the fire was intentionally set. Such a conclusion required scientific, technical and specialized knowledge that assisted the trier of fact to understand the evidence before it – to understand that the observations by the fire investigators indicated that the fire was intentionally, rather than accidentally, set. As in Hester, the expert testimony that the fire was intentionally set, though an ultimate issue for the jury, was proper and did not invade the province of the jury.

2) The District Court Properly Denied The Motion For Mistrial

If Keyes's appeal is construed as being directed to Deputy Fire Chief Lauper's statement regarding the identity of the person who set the fires, he has failed to establish reversible error on the part of the district court.

The question reviewing courts must ask is "whether the event or events which brought about the motion for mistrial constitute reversible error when viewed in the context of the entire record." State v. Canelo, 129 Idaho 386, 389, 924 P.2d 1230, 1233 (Ct. App. 1996). Error is not reversible if the appellate court "can conclude beyond a reasonable doubt that the verdict would have been

the same if the error had not occurred." State v. Pickens, 148 Idaho 554, ___, 224 P.3d 1143, 1146 (Ct. App. 2010).

Here, Keyes has not established reversible error. The basis for Keyes's motion for mistrial was Deputy Fire Chief Lauper's statement, in response to a question about the origins of the fire, that "[i]t's an incendiary fire. The fire was deliberately set by the defendant." (Trial Tr., p.350, Ls.22-23.) Keyes objected and immediately received a strongly worded instruction to the jury to disregard the statement:

> 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. It is not his function.

(Trial Tr., p.351, Ls.1-7.)

It is well established that "[w]here improper testimony is inadvertently introduced into a trial and the trial court promptly instructs the jury to disregard such evidence, it is ordinarily presumed that the jury obeyed the court's instruction entirely." State v. Hill, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004). Consequently, unless there is an "'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating'" it is "presume[d] that a jury will follow an instruction to disregard inadmissible evidence." Id. (citing).

The district court, in ruling on the motion for mistrial, recognized that the state did not intentionally elicit the statement (Trial Tr., p.511, Ls.1-6), that the jury was promptly instructed to disregard the statement (Trial Tr., p.511, Ls.6-18,

p.512, Ls.9-11) and that there was nothing to indicate, let alone an "overwhelming probability" that the jury was unable to follow the instruction (Trial Tr., p.511, Ls.6-18, p.512, Ls.9-11). The court, therefore, concluded that Keyes had not shown the statement, in light of the immediate curative instruction, merited a mistrial.

Keyes has not shown how these determinations were erroneous. The jury was promptly instructed to disregard the testimony of the witness. Keyes has not shown by an "overwhelming probability" that the jury was unable to follow the court's instruction to disregard the statement. Any error in the admission of the testimony was cured by the immediate instruction. Keyes himself has acknowledged that the case did not hinge on establishing his identity, but in establishing whether the fire was intentionally or accidentally set. (Appellant's brief, p.10.) Keyes has failed to establish reversible error in the denial of his motion for mistrial.

CONCLUSION

The state respectfully asks this Court to affirm the judgment of conviction entered upon the jury's verdict finding Keyes guilty of first degree arson.

DATED this 13th day of August, 2010.

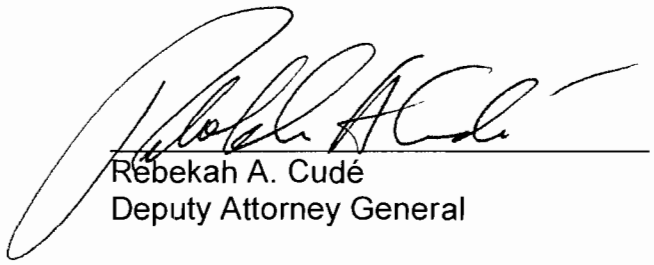
Rebekah A. Cudé
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2010, I served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defenders' basket located in the Idaho Supreme Court Clerk's office.



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