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# State v. Paoli Appellant's Brief Dckt. 44038

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**IN THE SUPREME COURT**
**OF THE STATE OF IDAHO**

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| STATE OF IDAHO, | ) | |
| | ) | Case No. 44038 |
| Respondent, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| TREVOR VON PAOLI, | ) | |
| | ) | |
| Appellant. | ) | |
| | ) | |

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# BRIEF OF APPELLANT

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Appeal from the Magistrate Division of the Fifth Judicial District
In and For the County of Cassia

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Magistrate Blaine P. Cannon, Presiding

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**Attorney for Appellant:**

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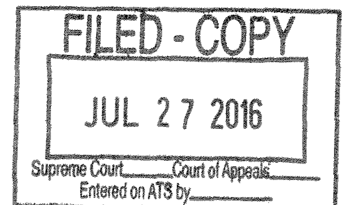


## Table of Contents

Page

I. STATEMENT OF THE CASE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

II. ISSUES ON APPEAL . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

III. FACTS OF THE CASE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

IV. LEGAL ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

V. CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

## TABLE OF AUTHORITIES


STATUTES PAGE

I.C. § 19-2132 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

RULES

Idaho Rule of Evidence 803(3) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

CASE LAW

*Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988) . . . . . . . . . . . . . . . . . . . . . . . . 6

*State v. Burton*, 115 Idaho 1154, 772 P.2d 1248 (Ct. App.1989) . . . . . . . . . . . . . . . . . 4

*State v. Evans*, 119 Idaho 383, 807 P.2d 62 (Ct. App.1991) . . . . . . . . . . . . . . . . . . . . 3

*State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992) . . . . . . . . . . . . . . . . . . . . . . . . 2

*State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999) . . . . . . . . . . . . . . . . . . . . . . 6

*State v. Hansen*, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999) . . . . . . . . . . . . . . . . 3,5

*State v. Keaveny*, 136 Idaho 31, 28 P.3d 372 (2001) . . . . . . . . . . . . . . . . . . . . . . . . . 2

*State v. Kodesh*, 122 Idaho 756, 838 P.2d 885 (Ct. App.1992) . . . . . . . . . . . . . . . . . . 3

*Lankford v. Nicholson Mfg. Co.*, 126 Idaho 187, 879 P.2d 1120 (1994) . . . . . . . . . . . . 2

*State v. Osborne*, 130 Idaho 365, 941 P.2d 337 (Ct. App.1997) . . . . . . . . . . . . . . . . . 6

*State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1986) . . . . . . . . . . . . . . . . . . . . . . . . . . 4

*State v. Stover,* 126 Idaho 258, 881 P.2d 553 (Ct. App.1994) . . . . . . . . . . . . . . . . . . 4

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) . . . . 6

*State v. Valverde*, 128 Idaho 237, 239, 912 P.2d 124, 126 (Ct. App.1996) . . . . . . . . . 4

## I. STATEMENT OF THE CASE

This is an appeal from a jury verdict finding the defendant guilty of Domestic Battery and Destruction of a Telecommunications Device. The appellant alleges the trial court erred in some of its rulings and that his trial counsel provided ineffective assistance of counsel.

## II. ISSUES ON APPEAL

1. Did the trial court err in failing to give a jury instruction on self defense?
2. Did the Trial Court err in admitting the Audio/Video recorded by Officer Rose?
3. Did the Trial Court err in admitting the audio of the 911 call?
3. Did the Appellant's trial counsel provide ineffective assistance of counsel?

## III. FACTS OF THE CASE

The state's witness, Dena Clemons testified that on March 1, 2015, she and the appellant got into an argument. The two had previously lived together but at the time the appellant had moved out.

The appellant had come to the witness' house to get some of his belongings. Ms Clemons was in her car and the appellant was on his motorcycle. They met in the alley behind Ms. Clemons' house and a fight ensued. Ms. Clemons testified that she was unclear who started the fight. Ms. Clemons further that despite not remembering who started the fight, she did push the appellant and he pushed back. The fighting continued and the two ended up in the gravel. Ms. Clemons tried to call 911 and the appellant tried to get the phone but her arm was longer.

The appellant was charged with Domestic Battery and Destruction of a Telecommunications device. The case was then tried in front of a jury.

At trial, the state also called the 911 dispatcher and the officer who met with Ms. Clemons after the event. Both conversations were recorded. Such conversations differed from the testimony of Ms. Clemons at the trial. Recordings of those conversations were also admitted at trial.

At the jury instruction conference, trial counsel requested the Court to give a jury instruction on self-defense. The trial court declined to give such an instruction. The jury then returned a verdict of guilty on both counts.

## IV. LEGAL ARGUMENT

**1. The trial court erred in failing to give the requested self-defense instruction.**

At the jury instruction conference, trial counsel asked that the court give a jury instruction on self-defense. (Transcript p. 122, ll. 5-8). This request was based on the testimony of Ms. Clemons which differed from previous statements. The Court declined to give the instruction.

In refusing the instruction the Trial Court based its decision on several factors. First, Self-defense was not argued in opening statement (Transcript p. 122, ll. 16-23). Secondly, the court stated that merely because Ms. Clemons was the first one to touch did not mean it was a self-defense case and thirdly, the trial court did not see it as a self defense case. ( Transcript p. 123, ll. 11-17). The Court also Court based its opinion on that the defendant had not previously claimed self-defense. (Transcript p. 125, ll. 25 - p. 126 ll. 6). And finally, the Court stated it found nothing to support the claim of self-defense. (Transcript p. 161, ll. 23-24).

In reaching its opinion, the court stated that it would require not just some evidence to support the self-defense argument, but a reasonable view of the evidence was necessary to support the claim. (Transcript p. 125, line 1). This decision was erroneous.

The question of whether the trial court properly instructed the jury presents a question of law over which this Court exercises free review. *State v. Keaveny*, 136 Idaho 31, 28 P.3d 372 (2001); *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992). On appeal, when a party challenges a decision of the trial court denying a proposed jury instruction, we review the jury instructions to determine whether the instructions, taken as a whole, fairly and accurately reflect the issues and the applicable law. *Lankford v. Nicholson Mfg. Co.*, 126 Idaho 187, 879 P.2d 1120 (1994).

The jury must be properly instructed or the case should be remanded for a new trial. In instructing jurors, "the court must state to them all matters of law necessary for their information." I.C. § 19-2132. A defendant is entitled to have the jury instructed on every defense or theory of defense having any support in the evidence, *State v.*

*Kodesh*, 122 Idaho 756, 758, 838 P.2d 885, 887 (Ct. App.1992); *State v. Evans*, 119 Idaho 383, 807 P.2d 62 (Ct. App.1991).

This case is similar to *State v. Hansen*, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999) where the Appellate Court reversed a trial court that refused to give a self-defense instruction. The Court of Appeals found that testimony of the complaining witness that she touched the defendant first was sufficient to require the instruction on self-defense. The credibility of the testimony and the resolution of any inferences of that testimony was up to the jury as the trier of fact and not for the court to determine. The Court held that the trial court erred in not instructing the jury as to self-defendant and the case was then remanded for a new trial.

In this case, Ms. Clemons testified that she pushed first. In fact she testified that the appellant was just trying to get away. This testimony meets the criteria of "some evidence" and justified the self-defense jury instruction.

Instead, the trial court became the trier of fact. Weighing the evidence and opining as to the value of that evidence prevented the jury making the ultimate decision. The court erred in failing to give the requested instruction and the jury verdict should be vacated and the matter remanded for a new trial.

**2. The trial court erred in admitting the 911 tape and the body cam video as an excited utterance.**

The State sought to introduce the body cam video of Officer Rose showing his interview of Ms. Clemons after he arrived to the seen. The State offered this evidence for the proof of the truth of the matter asserted and the Court allowed its admission an "excited utterance." (Transcript, P. 116, ll. 13-15).

The excited utterance exception to the hearsay rule authorizes the admission of hearsay if the testimony recounts "[a] statement relating to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition." I.R.E. 803(2). To fall within the excited utterance exception, an out-of-court statement must meet two requirements. First, there must be a startling event that renders inoperative the normal reflective thought process of the observer, and second, the declarant's statement must be a spontaneous reaction to that event rather than the

result of reflective thought. *State v. Parker*, 112 Idaho 1, 4, 730 P.2d 921, 924 (1986); *State v. Burton*, 115 Idaho 1154, 1156, 772 P.2d 1248, 1250 (Ct. App.1989).

Whether a statement falls within the excited utterance exception is a discretionary determination to be made by the trial court, Id.; *State v. Valverde*, 128 Idaho 237, 239, 912 P.2d 124, 126 (Ct. App.1996), giving consideration to the totality of the circumstances. *State v. Stover,* 126 Idaho 258, 263, 881 P.2d 553, 558 (Ct. App.1994).

The importance of the passage of time as a factor is illustrated in *Burton*. In that case, the Court of Appeals a defendant's statement made five minutes after an altercation in which the defendant had fired a gun, hitting two people. The defense sought to introduce an exculpatory statement made by the defendant to his son as they were driving away from the site of the shooting. The Court held that the trial court had properly refused admission of the statement as an excited utterance because the remark "was removed by time and distance from the events." To be noted that the rationale underlying the excited utterance exception is the "special reliability which is regarded as furnished by the excitement suspending the declarant's powers of reflection and fabrication." Id. at 1156, 772 P.2d at 1250 (quoting E. CLEARY, MCCORMICK ON EVIDENCE § 297 [986 P.2d 349] 133 Idaho 326 at 855 (3d ed.1984).

The Court of Appeals concluded that because of the lapse of time between the startling event and the statement, as well as the self-serving content of the statement, the circumstances did not point to "special reliability" that would render the remark admissible under the excited utterance exception.

Similar considerations need to be made in this case as there is a several minute lapse, probably about 5 minutes, between the startling event and the conversation with the officer. The appellant had left. She called 911, officers were dispatched and it took time for them to arrive. This is a significant period of time which removes Ms. Clemons from the event. This gives an *adult* time to reflect and fabricate a story. Or allow anger to influence what is said. What is said is not longer an excited utterance.

This is a similar set of facts to the *Hansen* case where the Court of Appeals ruled

that statements made by the victim did not qualify as excited utterances. The passage of time prevented the Court from the application of a broad view of the excited utterance exception to the victim's statements. 133 Idaho at 327, 986 P2d 350.

Ms. Clemons testified that by the time the officer arrived she was angry and mad. No longer under the influence of the event she was not clear as to what happened. Her statements to both 911 and to the officer should not have been admitted as an excited utterances.

**3. The Trial Court erred in admitting the audio recording of the 911 call.**

The State also sought to introduce a copy of the audio of the 911 call, made shortly after the event. The Court allowed its admittance as an excited utterance (Transcript, P. 115, line 25 thru P. 116, ll. 1-3) and as a present sense impression (Trancript, P. 115, ll 13-16). However, the 911 call includes much more information than covered by this exception.

As with the audio/video recorded by Officer Rose, the 911 call was made after the event occurred. For the reasons stated above, the Trial Court erred in admitting the audio of the 911 as an excited utterance.

Further, the trial court erred in admitting the audio as a present sense impression. Idaho Rule of Evidence 803(3) states "Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

Here, the 911 audio contained more than the declarant's state of mind. It was introduced, not only as impeachment evidence, but for the truth of the matter asserted, as it contradicted the complaining victim's testimony. Such testimony involved the facts surrounding the incident and the identity of the alleged assailant are contained in these calls, far more than just a present sense impression. This was erroneous and the jury verdict must be vacated.

**4. Trial counsel's performance was ineffective.**

A criminal defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. Id. at 761, 760 P.2d at 1177.

A claim of ineffective assistance of counsel is an issue rarely appropriate on direct appeal from a judgment of conviction; rather it is usually reserved for post-conviction relief proceedings, where a more complete evidentiary record can be developed. *State v. Osborne*, 130 Idaho 365, 372, 941 P.2d 337, 344 (Ct. App.1997). However, in the case of a misdemeanor, it makes sense as there is no time for the filing of a petition for post conviction relief.

In this case, trial counsel's representation was deficient for the following reasons: (1) Failing to obtain color copies of the photographs used as exhibits prior to trial and (2) counsel's conduct in closing arguments.

While inexperience alone is not sufficient to show ineffective assistance, *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), the inexperience shown by trial counsel did impact the appellant's trial.

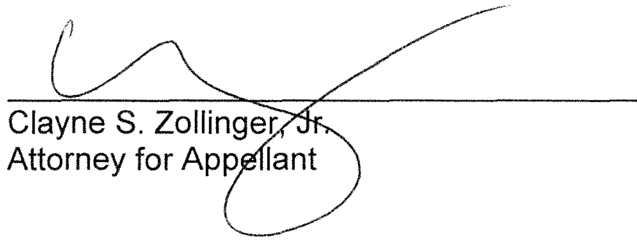
From the start of the trial to the finish, it appears that trial counsel was not prepared for the trial. Not obtaining color photographs of potential trial exhibits and not inquiring as to whether better copies of the 911 call existed would most likely have affected the preparation for the trial.

And finally, counsel showed his inexperience during closing argument. Counsel ended his brief closing argument with "We say these things in the name of Jesus -- sorry. Different talk -- time. " Showing his confusion that he was in a trial, not in church. An embarrassing and distressful statement. Such conduct could have no other effect than to influence a jury negatively for the appellant.

## CONCLUSION

For the reasons stated above, the appellant asks the Court to vacate the jury verdict and remand the matter for a new trial.

RESPECTFULLY SUBMITTED this 25 day of July, 2016.



Clayne S. Zollinger, Jr.
Attorney for Appellant

## CERTIFICATE OF SERVICE

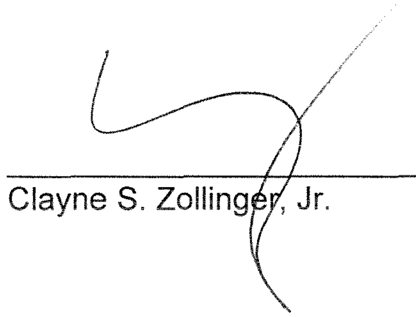
I hereby certify that on this 26 day of July, 2016, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted below:

David Shirley
Burley City Attorney
P.O. Box 910
Burley, ID 83318

_X_ By depositing copies of the same in the United States mail, postage prepaid, at the post office in Rupert, Idaho.

____ By hand delivering copies of the same to the office of the attorneys(s) at his office in the address stated above.

____ By telecopying copies of the same to said attorney(s) at the telecopied number(s) ________, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office in Rupert, Idaho.



Clayne S. Zollinger, Jr.