3-13-2012

State v. Parton Appellant's Reply Brief Dckt. 37940

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 37940
	)	
v.	)	
	)	
DARIN WILLIAM PARTON,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

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

On appeal, Mr. Parton asserted that the following errors were present in his case: (1) the district court erred when it overruled his objections to the opinion testimony of Detective Matthew Brechwald regarding jail telephone calls; (2) the district court abused its discretion when it admitted, as an excited utterance, a statement made by the victim after she had fallen asleep; (3) even if the two errors complained of above are individually harmless, the cumulative error doctrine requires reversal; (4) the evidence was insufficient to support the jury's finding that he was a persistent violator; and (5) the prosecutor violated Mr. Parton's Fifth Amendment rights when she improperly solicited testimony as to his pre-arrest silence, his post-arrest invocation of his right to counsel, and commented on his silence in her closing argument.

In its Respondent's Brief, the State asserts that none of the complained of errors occurred, and, in the alternative, that if any errors did occur they were harmless. (*See generally* Respondent's Brief.) The State's arguments in response to two issues are relevant to this Reply Brief. First, the State argues that the district court did not err in admitting Detective Brechwald's testimony because he was an expert witness despite the State affirmatively stating that he was not being offered as an expert witness, that other claims concerning his testimony were not preserved by objection, and that, even if it was error to admit his testimony, any such error was harmless beyond a reasonable doubt. (Respondent's Brief, pp.8-15.) Second, the State argues that the evidence was sufficient to support the jury's persistent violator finding. (Respondent's Brief, pp.20-23.)

This Reply Brief is necessary in order to respond to the State's arguments concerning the admission of Detective Brechwald's testimony over Mr. Parton's objection and the persistent violator enhancement. While Mr. Parton maintains that the other asserted errors occurred and should be remedied, he will rely upon the arguments set forth in his Appellant's Brief as to those errors and will not reiterate them herein.

Statement of the Facts and Course of Proceedings

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

ISSUES

1. Was Detective Brechwald's testimony properly admitted?

2. Must the State's argument concerning the sufficiency of the evidence supporting the persistent violator finding be rejected under *State v. Zichko* because it failed to cite to authority in support of its argument?

ARGUMENT

I.

Detective Brechwald's Testimony Was Not Properly Admitted

In opposing Mr. Parton's claims that the district court erred when it overruled his objection to the testimony of Detective Brechwald the State advances two primary arguments: (1) that two of the bases upon which Mr. Parton claims error were not preserved by objection; and (2) that this Court can affirm, on an alternate ground that was expressly disavowed by the State at trial, as to the basis it acknowledges was preserved by objection.[1] For the reasons set forth below, Mr. Parton asserts that the State's arguments are without merit. (Respondent's Brief, pp.8-15.)

With respect to the claim that it acknowledges was preserved by objection below, the State argues,

> Parton acknowledges he objected to Detective Brechwald's testimony on the ground that it "call[ed] for opinion testimony of an expert when it would not assist the trier of fact," but he does not address whether the testimony was admissible under I.R.E. 702, presumably in light of the prosecutor's position below that she was not offering it as expert testimony. (Appellant's Brief, pp.12-14.) While the prosecutor affirmatively asserted she was "not offering [Detective Brechwald] as an expert under 702" (Trial Tr., Vol. I, p.315, Ls.16-17), the state's questioning was based on Detective Brechwald's specific expertise and it is readily apparent that the court viewed Detective Brechwald as an expert even if it is not entirely clear that the court admitted the testimony on this basis (see Trial Tr., Vol.I, p.314, Ls.2-3, 13-14). Regardless, this Court can affirm on any basis supported by the record. Total Success Investments, LLC v. Ada County Highway Dist., 148 Idaho 688, 696, 227 P.3d 942, 950 (Ct. App. 2010) ("an appellate court may affirm the district court's decision if an alternative legal basis supports it") (citations omitted). Application of the correct legal standard to the facts supports the conclusion that Detective

[1] The State also argues that, even if Detective Brechwald's testimony was erroneously admitted, any such error was harmless. With respect to that argument, Mr. Parton relies upon the argument set forth in his Appellant's Brief (Appellant's Brief, pp.14-15), and will not reiterate it herein.

> Brechwald could provide expert testimony explaining the interplay between the dynamics of domestic violence and the statements Parton made to Theresa following his arrest.

(Respondent's Brief, pp.13-14 (brackets in original).)

The State's argument is untenable and unpersuasive for a number of reasons. First, the State affirmatively abandoned the argument that Detective Brechwald was an expert witness at trial, a fact that the State, on appeal, candidly acknowledges, and, as such, the State should be judicially estopped from making a contrary argument on appeal. The Idaho Supreme Court has recognized the doctrine of judicial estoppel for nearly sixty years. *Heinze v. Bauer*, 145 Idaho 232, 235 (2008) (noting that it first recognized the doctrine in *Loomis v. Church*, 76 Idaho 87 (1954)). "Judicial estoppel 'precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.'" *Id.* (quoting *McKay v. Owens*, 130 Idaho 148, 152 (1997)). It is "intended to prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action." *Id.* (citing *McKay*, 130 Idaho at 153).

Before the district court, the State was confronted with an argument by defense counsel that the jury did not need to hear expert testimony from Detective Brechwald regarding his impressions of the phone calls between Mr. Parton and the alleged victim. (Trial Tr. Vol. I, p.315, Ls.5-15.) Rather than seeking a ruling from the district court as to whether the witness was qualified as an expert and, if so, whether the witness could offer such testimony, the State expressly disavowed any argument that Detective Brechwald was an expert, preventing the district court from ruling on whether he was an expert and to what extent he could testify as such. (Trial Tr. Vol. I, p.315, Ls.16-23.) As

a result, the State prevailed before the district court on a theory that Detective Brechwald was not testifying as an expert. (Trial Tr. Vol. I, p.315, L.24 – p.316, L.24.)

It appears that the State's deliberate decision to disclaim any reliance on Detective Brechwald as an expert was based on a pre-trial conference at which the State, defense counsel, and the district court engaged in the following discussion regarding the potential use of Detective Brechwald as an expert witness:

> [The State]: Your Honor, there's one brief issue. I don't know. I just wanted to make court and counsel aware that regarding the state's expert witness we disclosed according to Rule 16(k), both Detective Breckweld [sic] and provided the CD, as well as Ladessa Foster. She works for the WCA.
>
> The one issue I see perhaps in using Detective Breckwald [sic] is that he did listen to one jail call associated with this case. He wasn't involved in any other way regarding the investigation. However, he did listen to a jail call. I don't know if Your Honor or defense counsel thought that that would prohibit him from being the state's expert.
>
> THE COURT: What is he going to be an expert on?
>
> [The State]: Domestic violence dynamics.
>
> THE COURT: Is he going to testify as to the phone call, or what?
>
> [The State]: Well, *if I used him as the state's domestic violence expert, I would not have him testify to the phone call at all.* The jury wouldn't know that he had ever listened to anything regarding this case, but I did want to have an honest disclosure regarding that to see if Your Honor believed that that would prohibit him as being the state's chosen expert.
>
> THE COURT: I don't think it prohibits, but Mr. Smith could certainly cross-examine him on that if you think that it somehow affected his opinion.
> [Defense Counsel]: Right.
>
> Thank you.
>
> [The State]: Okay. I guess I just wanted to make everyone aware. Thank you, Judge.

THE COURT: And then you have another expert on domestic violence?

[The State]: Well, no. The state would only use one or the other. It would be my preference due to scheduling at this time to use Detective Breckwald [sic], because Ms. Foster – so it would be my strong preference to use Detective Breckwald [sic] because of scheduling, but I didn't know if that issue, the fact that he had listened to one jail call, would prohibit him from serving in that capacity, *especially given the pretrial argument we had on this issue regarding the state's use of [a] domestic violence expert.*

THE COURT: Right. He's not going to give an opinion that domestic violence actually occurred; he's just telling the jury about the dynamics of domestic violence.

(Pretrial Conference Tr., p.2, L.9 – p.4, L.11 (emphases added).)

The State's reference to the pretrial argument concerning the use of a domestic violence expert witness was to the following colloquy between the district court and the State concerning defense counsel's objection to the use of a domestic violence expert:

[The State]: And, again, I think it's – you know, Mr. Smith's argument that he hasn't – either expert, Ms. Foster or Detective Brechweld [sic] has spoken to this particular victim and counseled her for anything, I think that goes to the reason why an expert is appropriate in this case; otherwise it would be unfairly and improperly having somebody come in and comment on the specific victim of this case['s] credibility, and that's not what this is about.

I mean, in State v. Dutt,[2] an Idaho case from the Court of Appeals in 2003, an expert in that case – it was a child abuse case – but it was allowed in order to "provide the jurors with specialized knowledge that could assist them in evaluating the victim's credibility" without specifically commenting on the victim of this particular crime.

THE COURT: Yes. And in that case, it dealt with the expert's opinion regarding general behavior and emotional characteristics of the victim and offender in child sexual abuse cases, so it wasn't specific to the actual victim and offender in that case.

...

[2] *See State v. Dutt*, 139 Idaho 99 (Ct. App. 2003).

> And it appears that the victim would go to general issues, as to behavior, emotional considerations, the things that the state's wanting to use the expert for, so the court would allow that, but, of course, again, I'd still be listening to the case and determining whether or not it continued to be relevant, depending on the case, how the facts come out ....
>
> ...
>
> So I think the authority is outlined in State v. Dutt, that allow the state to do this, and it does appear that it would help the jurors to understand the dynamics of domestic violence.
>
> ...
>
> Okay, and the, of course, *when the expert testifies, I mean they're talking about victims then generally, not the specific victim in this case.*

(Trial Tr. Vol. I, p.12, L.18 – p.15, L.18 (emphasis added).)

The State's citation to *Dutt*, which was the basis for the district court's order allowing expert testimony about the dynamics of domestic violence in general, is important to understand why the State did not attempt to have Detective Brechwald qualified as an expert before he testified about the telephone calls. In *Dutt*, the Court of Appeals held that it was appropriate for an expert on child sexual abuse to testify concerning "the general progression of child sexual abuse through various phases, as well as the behavior and characteristics of the victim and offender during the progression," finding it to be appropriate precisely because the expert "did not link the general progression of child sexual abuse to the particular circumstances of the offenses with which Dutt was charged, and she offered no opinion specifically addressing the experiences or credibility" of the specific victim in the underlying case. *Dutt*, 139 Idaho at 104.

Unlike the facts in *Dutt*, in this case, Detective Brechwald specifically applied his knowledge and training to the telephone calls that he listened to before testifying over defense counsel's objection. (Trial Tr. Vol. I, p.317, Ls.5-20.) Based on the representations of the State below and the ruling of the district court, such testimony would not have been allowed had the State sought to qualify Detective Brechwald as an expert witness. Now, after prevailing precisely because it disavowed an argument that Detective Brechwald was an expert, the State seeks to prevail on appeal by adopting the very argument that it disavowed to obtain a favorable ruling below. This tactic provides a textbook case for applying judicial estoppel.

Next, even if the State was not judicially estopped from making a contradictory argument on appeal regarding Detective Brechwald's status as an expert witness, *Dutt* and the argument set forth by the State, which was adopted by the district court, during the pretrial discussion of expert witnesses make it clear that Detective Brechwald could not have testified as an expert about domestic violence dynamics while applying any such expertise to the facts of this case. As such, the State's claim that "it is readily apparent that the court viewed Detective Brechwald as an expert even if it is not entirely clear that the court admitted the testimony on this basis" (Respondent's Brief, p.13), is not just unsupported by the record, it is wholly contradicted by it.

The State's remaining argument is that Mr. Parton only objected on the grounds that Detective Brechwald's testimony constituted improper expert testimony, and did not preserve claims that the testimony was irrelevant and constituted an improper opinion by a lay witness. (Respondent's Brief, pp.8-12.) With respect to the lay witness claim, Mr. Parton asserts that, from the context of the argument following his objection, it is

obvious that he objected on grounds that the testimony was improper lay witness testimony and irrelevant.

After the State expressly disavowed any argument that Detective Brechwald was being offered as an expert witness, defense counsel said, "I'm not withdrawing the objection. You can rule as you choose, but I maintain the objection. But I think it is up to the jury to determine what these calls mean to them." (Trial Tr. Vol. I, p.315, L.16 – p.316, L.15.) Defense counsel's statement makes no sense if it was solely intended to continue objecting with respect to a position that the State had already expressly disavowed. It only makes sense in the context of the argument if the objection was to the testimony of Detective Brechwald in general, *including its relevance* and, in light of the State's abandonment of any attempt to qualify him as an expert, his position as a lay witness.

As the State's arguments concerning Detective Brechwald's testimony are without merit, for the reasons set forth in his Appellant's Brief and in this Reply Brief, Mr. Parton respectfully requests that this Court vacate the judgment of conviction and remand this matter to the district court for a new trial.

II.

The State's Argument As To The Sufficiency Of The Evidence Supporting The Persistent Violator Finding Is Not Supported With Citation To Authority And Must Be Rejected Under *State v. Zichko*

In opposing Mr. Parton's argument that the evidence presented was insufficient to support the jury's finding that he was a persistent violator, the State argues,

> Evidence that a felony judgment was previously entered against an individual with the exact same name and exact same birthday as Parton was sufficient for the jury to conclude, beyond a reasonable doubt, that

> Parton was the same person formerly convicted pursuant to the judgment admitted as Exhibit 32.

(Respondent's Brief, p.23.) The State cites no authority in support of its proposition that similarity in name and date of birth in a prior judgment of conviction is sufficient to establish beyond a reasonable doubt that the person named in that judgment is the same as the person alleged to be a persistent violator. (Respondent's Brief, pp.22-23.) As such, the State's argument must be rejected under *State v. Zichko*, 129 Idaho 259, 263 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking").

It is worth noting that the State does not discuss, let alone attempt to rebut, Mr. Parton's citation, in his Appellant's Brief, to *State v. Lawyer*, 150 Idaho 170 (Ct. App. 2010), and his accompanying argument that something more than the same name and date of birth is needed in order to provide sufficient evidence to support a finding, beyond a reasonable doubt, that the person named in a prior judgment of conviction is the same person charged in a later prosecution.[3] (Respondent's Brief, pp.20-23; Appellant's Brief, pp.21-22 (the *Lawyer* argument).)

In light of the State's failure to provide authority in support of its argument concerning the sufficiency of the evidence as to the persistent violator enhancement, this Court should find the argument to be waived on appeal. As such, for the reasons set forth in his Appellant's Brief, this Court should vacate the persistent violator finding,

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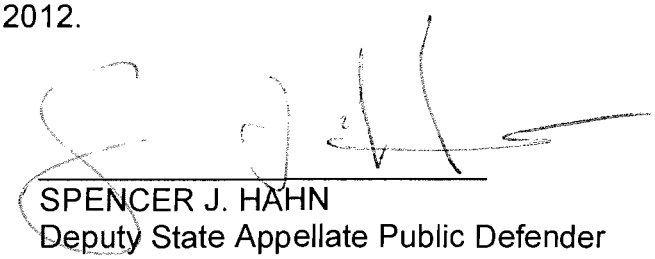
[3] The State quotes a portion of Mr. Parton's argument, namely, "A judgment of conviction bearing the same name as the defendant, with nothing more, is insufficient to establish the identity of the person formerly convicted beyond a reasonable doubt," and then proceeds to respond only to that incomplete version of Mr. Parton's argument. (Respondent's Brief, pp.22-23 (citations and internal quotation marks omitted).)

enter a judgment of acquittal on it, and remand this matter to the district court for resentencing without such an enhancement.

CONCLUSION

For the reasons set forth herein, and in his Appellant's Brief, Mr. Parton respectfully requests that this Court vacate his judgment of conviction, and remand this matter to the district court for a new trial. Additionally, if this Court remands Mr. Parton's case for a new trial *and* finds that the evidence supporting the persistent violator enhancement is insufficient, he respectfully requests that this Court enter a judgment of acquittal on the enhancement. In the alternative, if this Court only finds error in the sufficiency of the evidence supporting the persistent violator finding, Mr. Parton respectfully requests that this Court enter a judgment of acquittal on the enhancement, and remand this matter to the district court for resentencing on the underlying charges.

DATED this 13th day of March, 2012.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of March, 2012, 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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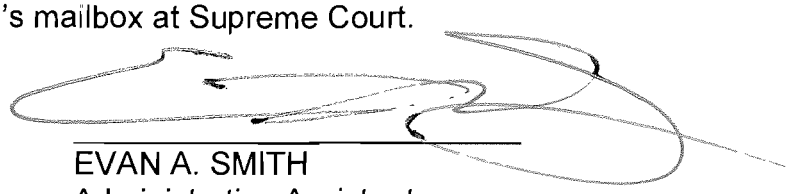

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