2-21-2012

State v. Hochrein Respondent's Brief Dckt. 38316

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38316, 38317
	)	
vs.	)	
	)	
EDWARD R. HOCHREIN, JR.,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

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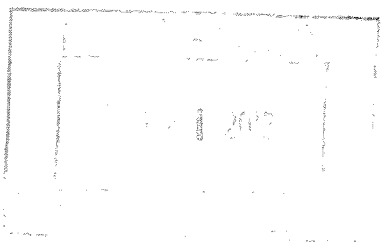

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STATEMENT OF THE CASE

Nature of the Case

Edward R. Hochrein, Jr., appeals in Docket No. 38317[1] from the judgment entered upon the jury verdicts finding him guilty of felony violation of a no contact order and being a persistent violator of the law. On appeal he challenges the sufficiency of the evidence supporting his conviction, claims fundamental error in the jury instructions, and argues that the district court erred in one of its evidentiary rulings.

Statement of Facts and Course of Proceedings

After Hochrein was charged with intimidating a witness, a magistrate issued a no contact order that prohibited Hochrein from having contact with the victim, Tanya Lewis. (#38316 R., pp.40-41, 43, 45; see also #38317 Prelim. Hearing Exhibit 4.) The order was signed by Hochrein and was to remain in effect until 11:59 p.m. on March 4, 2011. (Id.) After Hochrein was bound over, the state amended the information to also charge Hochrein with misdemeanor domestic battery (against Tanya Lewis) and cruelty to animals (against Tanya's dog). (#38316 R., pp.73-74.) Pursuant to a plea agreement, Hochrein pled guilty to the misdemeanors and the state dismissed the intimidating a witness charge. (#38316 R., pp.77-82.) The district court placed Hochrein on probation

[1] By order of the Idaho Supreme Court, Docket Nos. 38316 and 38317 have been consolidated for purposes of appeal. (#38317 R., p.205.) Hochrein, however, concedes that any appellate issues he might have been able to raise in Docket No. 38316 have been rendered moot and, as such, his appellate challenges are limited only to issues arising in Docket No. 38317. (Appellant's brief, p.1 n.1.)

for two years and, as a condition of probation, ordered the previously issued no contact order to continue in effect until August 20, 2011. (#38316 R., pp.86-87, 91-99; see also #38317 Prelim. Hearing Exhibit 5.)

On January 28, 2010, Tanya Lewis and Chris Yeats were at Tanya's residence watching television when the doorbell rang. (Trial Tr.,[2] p.145, L.20 – p.146, L.10, p.162, Ls.14-20.) Chris got up to answer the door and, upon looking through the peephole, saw a man whom he believed to be Hochrein standing outside the door. (Trial Tr., p.162, L.21 – p.164, L.13.) Chris told Tanya that Hochrein was outside the door, and Tanya immediately called 911. (Trial Tr., p.146, Ls.11-14, p.147, Ls.7-14, p.163, L.23 – p.164, L.4, p.165, Ls.3-8.) When the police arrived, the person who had rung the doorbell was already gone. (Trial Tr., p.165, Ls.9-18.) An officer subsequently showed Chris a photographic line-up that included Hochrein's picture, and Chris identified Hochrein as the man who had been standing outside Tanya's door. (Trial Tr., p.165, L.25 – p.168, L.6, p.192, Ls.19-24, p.196, L.11 – p.200, L.3; State's Trial Exhibit 1.)

The state charged Hochrein with felony violation of a no contact order, I.C. § 18-920, and a persistent violator enhancement, I.C. § 19-2514. (#38317 R., pp.33-34, 64-66, 101-03.) At trial, the parties stipulated to the following facts:

> On January 28, 2010, a No Contact Order issued by a Court was in effect in Case No. CR2009-0002146. The No Contact Order was issued because the Defendant, Edward R. Hochrein, Jr., had been charged with or convicted of an offense for which the Court found that a No Contact Order was appropriate. The No Contact Order prohibited the Defendant from contacting Tanya

[2] Because Hochrein only went to trial in Docket No. 38317, all citations herein to "Trial Tr." and to "State's Trial Exhibit" refer, respectively, to the trial transcript and state's trial exhibits in Docket No. 38317.

> Lewis. The No Contact Order also prohibited the Defendant from being at Ms. Lewis' residence.

(Trial Tr., p.223, L.22 – p.224, L.18; State's Trial Exhibit 3A; see also Trial Tr., p.133, L.23 – p.134, L.7 (concession by defense counsel during his opening statement that "there was a no contact order in place, that's true").) In addition, the state called Tanya Lewis and Chris Yeats, each of whom testified regarding the events of January 28, 2010. (See generally Trial Tr., pp.142-89.) The state also called Officer Chris Reese, who testified regarding the photographic line-up procedures and confirmed Chris Yeats' testimony that Chris identified Hochrein as the man who was standing outside Tanya's door. (See generally Trial Tr., pp.189-218.) Hochrein did not testify, but he did call three alibi witnesses. (See generally Trial Tr., pp.225-70.) During closing argument, Hohrein's trial counsel emphasized, as he had during his opening statement (see Trial Tr., p.133, L.23 – p.134, L.7), that there was "really only one issue" for the jury to decide "and that's was Ed Hochrein outside the door at Tanya Lewis' apartment on January 28th" (Trial Tr., p.304, Ls.2-5). Ultimately, the jury rejected Hochrein's alibi defense and found Hochrein guilty as charged. (#38317 R., pp.118-136.) The district court entered judgment on the jury's verdicts and imposed a unified sentence of 10 years, with three years fixed. (#38317 R., pp.180-82.) Hochrein timely appeals. (#38317 R., pp.186-89.)

ISSUES

Hochrein states the issues on appeal as:

> 1. Was there insufficient evidence to support the State's charge of felony violation of a no-contact order under I.C. § 18-920?
>
> 2. Were the district court's jury instructions defining the elements of the offense of violation of a no-contact order fatally deficient because these instructions omitted the essential element requiring the State to prove that Mr. Hochrein had prior notice of the no-contact order he was alleged to have violated?
>
> 3. Did the district court err when it granted the State's motion in limine to preclude Mr. Hochrein from impeaching Ms. Lewis with evidence of her prior conviction for felony possession of a financial transaction card?

(Appellant's brief, p.10.)

The state rephrases the issues on appeal as:

1. Has Hochrein failed to show that the state presented insufficient evidence to prove that Hochrein had notice of the no contact order when Hochrein himself admitted, pursuant to a factual stipulation that was admitted into evidence at trial, that the no contact order had been issued and "was in effect" on the date of the charged offense?

2. Has Hochrein failed to carry his burden of establishing that the omission of the notice element from the jury instructions constitutes fundamental error where the element was both uncontested and supported by the parties' factual stipulation?

3. Has Hochrein failed to establish that the district court abused its discretion by prohibiting him from impeaching Tanya Lewis with evidence of a withheld judgment when I.R.E. 609(c) specifically precludes the use of a withheld judgment as evidence of a conviction for purposes of impeachment?

ARGUMENT

I.
The State Presented Substantial Competent Evidence To Support The Jury Verdict Finding Hochrein Guilty Of A Felony No Contact Order Violation

A. Introduction

Hochrein stipulated that a no contact order prohibiting him from having contact with Tanya Lewis had been issued and "was in effect" on the date of the charged offense (Trial Tr., p.223, L.22 – p.224, L.18; State's Trial Exhibit 3A), and he argued to the jury that the "only" real issue before it was whether "Hochrein [was] outside the door at Tanya Lewis' apartment on January 28th" (Trial Tr., p.304, Ls.2-5). Having now been found guilty of the felony no contact order violation, Hochrein shifts focus and argues on appeal that the state failed to present any evidence to prove that Hochrein had prior notice of the no contact order he was ultimately convicted of violating. (Appellant's brief, pp.11-21.) Hochrein's appellate argument is, at best, without merit and, at worst, disingenuous.

The state acknowledges that prior notice of the no contact order is an essential element of the crime of violation of a no contact order. Contrary to Hochrein's assertions on appeal, however, the very facts to which Hochrein stipulated – *i.e.*, that a no contact order had been issued and "was in effect" –

constituted substantial competent evidence that satisfied the state's burden of proof with respect to the notice element.[3]

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997); Hart, 112 Idaho at 761, 735 P.2d at 1072.

[3] The state notes that the Idaho Supreme Court has approved a pattern jury instruction that eliminates the need for the state to present any evidence as to facts that the parties have stipulated are true. See ICJI 344. Because the jury in this case was not so instructed, and because the "Parties' Factual Stipulation" was actually admitted as an exhibit in the state's case-in-chief, the state focuses its appellate argument on whether there was substantial competent evidence to support a jury finding on the notice element.

C. The Facts To Which Hochrein Stipulated Constituted Substantial Competent Evidence That Satisfied The State's Burden Of Proof With Respect To The Notice Element Of The Crime

Hochrein was charged pursuant to I.C. § 18-920 with violating a no contact order. (#38317 R., pp.33-34, 64-66, 101-03.) Pursuant to I.C. § 18-920(2), a violation of a no contact order is committed when:

> (a) A person has been charged or convicted under any offense [for which a no contact order may be issued]; and
>
> (b) A no contact order has been issued, either by a court or by an Idaho criminal rule; and
>
> (c) The person charged or convicted has had contact with the stated person in violation of an order.

I.C. § 18-920(2). Although the statute does not itself expressly require a person charged with violating a no contact order to have had prior notice of the order,[4] Idaho Criminal Rule 46.2, which implements I.C. § 18-920, does. See State v. Cobler, 148 Idaho 769, 772, 229 P.3d 374, 377 (2010) (Rule 46.2 implements I.C. § 18-920 and sets forth requirements of a valid no contact order). Specifically, I.C.R. 46.2(a) states: "No contact orders issued pursuant to Idaho Code § 18-920 shall be in writing *and served on or signed by the defendant.*" (Emphasis added.)

[4] Subsection (4) of section 18-920 states: "A peace officer may arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated a no contact order issued under this section if the person restrained had notice of the order." While this subsection provides that violation of a no contact order is an arrestable offense when the person arrested has had notice of the order, it does not appear to require prior notice in every case where a person has been charged with a no contact order violation.

That prior notice of the order is an essential element of the crime of violation of a no contact order is also reflected in the Idaho Supreme Court's pattern criminal jury instruction that requires the state to prove beyond a reasonable doubt that, before the prohibited contact, "the defendant had notice of the order." ICJI 1282. It is also consistent with generally recognized requirements of procedural due process that one facing criminal sanctions for violating a court order is entitled, among other things, to "notice of the exact charges against him, [and] proof that he had knowledge of the terms of the court's order he was alleged to have violated." Ross v. Coleman Co., Inc., 114 Idaho 817, 838, 761 P.2d 1169, 1190 (1988); see also International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826-27 (1994) (quoting Hicks v. Feiock, 485 U.S. 624, 632 (1988)) ("'[C]riminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.'").

Because prior notice is an element of the crime of violation of a no contact order, the state was required to prove beyond a reasonable doubt that, before Hochrein went to Tanya Lewis' residence on January 28, 2010, he had notice of the order that prohibited him from having contact with her. See I.C. § 18-920; I.C.R. 46.2(a); ICJI 1282; see also Jackson v. Virginia, 443 U.S. 307, 313–14 (1979) (due process requires state to prove every element of a crime beyond a reasonable doubt); State v. Mubita, 145 Idaho 925, 942, 188 P.3d 867, 884 (2008) (same); State v. Felder, 150 Idaho 269, 274, 245 P.3d 1021, 1026 (Ct. App. 2010) (same). Despite having stipulated below that such no contact order

had been issued and "was in effect" on the date of the charged offense (Trial Tr., p.223, L.22 – p.224, L.18; State's Trial Exhibit 3A), Hochrein argues on appeal that "the State presented absolutely no evidence at trial that Mr. Hochrein had prior notice of the criminal no-contact order that he was alleged to have violated" (Appellant's brief, p.20). Specifically, he argues that the parties' factual stipulation, admitted as an exhibit in the State's case-in-chief, was not sufficient to satisfy the state's burden of proof as to the notice element of the crime because, he contends, there is nothing in the stipulation "that provides for, or would allow a reasonable inference that, Mr. Hochrein had received prior notice of the no-contact order that he was criminally charged with violating." (Appellant's brief, p.21.) Hochrein is incorrect.

The parties' factual stipulation, signed by both defense counsel and the deputy prosecutor, stated in relevant part:

> On January 28, 2010, a No Contact Order issued by a Court *was in effect* in Case No. CR2009-0002146. The No Contact Order was issued because the Defendant, Edward R. Hochrein, Jr., had been charged with or convicted of an offense for which the Court found that a No Contact Order was appropriate. The No Contact Order prohibited the Defendant from contacting Tanya Lewis. The No Contact Order also prohibited the Defendant from being at Ms. Lewis' residence.

(State's Trial Exhibit 3A (emphasis added).) While the word "notice" does not appear in the stipulation, it is evident from the language of the first sentence that the stipulation actually addressed the notice element of the crime. The parties stipulated both that the no contact order had been "issued" *and* that it "was in effect" on the date of the charged offense. Pursuant to I.C.R. 46.2, a no contact order issued pursuant to I.C. § 18-920 is only valid, *i.e.*, effective, if it has been

"served on or signed by the defendant." Thus, by stipulating that the no contact order he was charged with violating "was in effect," Hochrein necessarily stipulated that he had prior notice of the order.

This reading of the stipulation is consistent with trial counsel's concession during his opening statement that "there was a no contact order in place, that is true" (Trial Tr., p.134, Ls.6-7), as well as his representations during both his opening statement and closing argument that the only issue before the jury, "really," was whether Hochrein was at Tanya Lewis' residence on January 28, 2010 (Trial Tr., p.133, L.23 – p.134, L.5, p.304, Ls.2-5). While the state acknowledges that defense counsel's statements and argument were certainly not themselves evidence, and the jury was instructed accordingly (see #38317 R., p.144), those statements and arguments do shed light on counsel's intended meaning of the stipulated facts. Given those statements and arguments, and considering the wording of the stipulation itself, the only rational inference the jury could draw was that Hochrein had prior notice of the no contact order he was alleged to have violated.

Because the state presented substantial competent evidence in the form of the parties' factual stipulation to establish the notice element of the crime, Hochrein has failed any basis for reversal of his felony no contact order conviction.

II.

Hochrein Has Failed To Show Fundamental, Reversible Error In The Jury Instruction Setting Forth The Elements The State Was Required To Prove To Establish The No Contact Order Violation

A. Introduction

The district court instructed the jury that, to find Hochrein guilty of violation of a no contact order, it must find that the state proved each of the following elements beyond a reasonable doubt:

1. On or about the 28th day of January, 2010;
2. in Nez Perce County, in the State of Idaho;
3. the Defendant, EDWARD R. HOCHREIN JR.;
4. did violate the No Contact Order in Case No. CR2009-0002146;
5. by going within 200 feet of Tanya Lewis' residence.

(#38317 R., p.151; see also p.152 (quoting the statutory language of I.C. § 18-920(2).)

Hochrein did not object to this instruction below.[5] (See Trial Tr., p.272, Ls.8-23). Nevertheless, he argues on appeal that the instruction was "fatally deficient" because it omitted the requirement that the state prove Hochrein had

[5] Without even citing to the portion of the trial transcript in which Hochrein's defense counsel specifically represented that he had no objection to any of the court's instructions (see Trial Tr., p.272, Ls.8-23), Hochrein asserts "that there is some indication," based on the list of potential issues presented in the notice of appeal, that Hochrein's trial counsel actually objected to one or more of the court's instructions during an off-the-record jury instruction conference. (See Appellant's brief, p.23 n.7.) This assertion is nothing more than base speculation and is unsupported by the record which shows that, when given the opportunity following the off-the-record conference to voice any objection to the court's final instructions, Hochrein's counsel indicated that he had none. (Trial Tr., p.272, Ls.8-23.)

prior notice of the no contact order, thereby relieving the state of its burden of proving an essential element of the crime. (Appellant's brief, pp.22-26.) The state acknowledges that, had an objection been raised below, it would have been error for the district court not to have altered the instruction to include the notice element. Hochrein has failed to show that the failure of the district court to *sua sponte* correct the instruction to include the notice element rose to the level of fundamental, reversible error, however, because a review of the record shows that the notice element was both uncontested and supported by overwhelming evidence in the form of the parties' factual stipulation. Stated differently, Hochrein has failed to carry his burden of showing that the omission of the notice element from the jury instruction was anything but harmless under the facts of this case.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, ___, 261 P.3d 853, 864-65 (2011); State v. Pina, 149 Idaho 140, 147, 233 P.3d 71, 78 (2010); State v. Young, 138 Idaho 370, 372, 64 P.3d 296, 298 (2002). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." Draper, 151 Idaho at ___, 261 P.3d at 865 (quoting State v. Shackelford, 150 Idaho 355, ___, 247 P.3d 582, 600-01 (2010)).

C. Hochrein Has Failed To Carry His Burden Of Establishing Fundamental, Reversible Error With Respect To The Elements Instruction

"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). See also State v. Draper, 151 Idaho 576, ___, 261 P.3d 853, 865 (2011) (citing State v. Sheahan, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003)) ("An error generally is not reviewable if raised for the first time on appeal."). This same principle applies to alleged errors in jury instructions. See I.C.R. 30(b) ("No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection."); Draper, 151 Idaho at ___, 261 P.3d at 865. Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. Draper, 151 Idaho at ___, 261 P.3d at 365; State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Review under the fundamental error doctrine requires Hochrein to demonstrate that the error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980. The Idaho Supreme Court recently reiterated that a jury instruction that relieves the state of its duty to prove beyond a reasonable doubt all of the essential elements of the crime charged violates

the defendant's right to due process. Draper, 151 Idaho at ___, 261 P.3d at 865 (citing Middleton v. McNeil, 541 U.S. 433, 437 (2004); State v. Anderson, 144 Idaho 773, 749, 170 P.3d 886, 892 (2007)). Thus, where the alleged error is that a jury "instruction omitted a *contested* element of the crime," such allegation, if true, rises to the level of fundamental error. Id. (emphasis added). If, however, the omitted element is "uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error," the error in the omission of the element is harmless. Neder v. United States, 527 U.S. 1, 17 (1999), quoted in Draper, 151 Idaho at ___, 261 P.3d at 868-69; see also Perry, 150 Idaho at 224, 245 P.3d at 976 ("[W]here the evidence supporting a finding on the omitted element is overwhelming and uncontroverted, so that no rational jury could have found that the state failed to prove that element, the constitutional violation may be deemed harmless.").

In this case, there is no question that the challenged instruction omitted any requirement that the state prove Hochrein had prior notice of the no contact order. (See #38317 R., p.151.) Because, as set forth in Section I.C., *supra*, notice is an essential element of the crime, and in light of the Idaho Supreme Court's decision in Draper, the state acknowledges that Hochrein has carried his burden of establishing the first two prongs of the fundamental error analysis –

i.e., error of constitutional significance that plainly exists on the record.[6] Hochrein has failed to carry his burden of establishing the third prong of the fundamental error test, however, because he has failed to establish that the omission of the notice element was anything but harmless under the facts of this case.

Hochrein presented an alibi defense at trial. (See generally Trial Tr., p.139, Ls.14-19, p.225, L.10 – p.268, L.1; see also #38317 R., pp.80-81 (pretrial notice of alibi).) In support of that defense, he presented three witnesses, each of whom testified that Hochrein could not have been at Tanya Lewis' house on the date and time of the charged offense. (See generally Trial Tr., pp.225-68.) He also argued to the jury, in both his opening statement and his closing argument, that the only issue before it, "really," was whether Hochrein was at Tanya Lewis' residence on January 28, 2010. (Trial Tr., p.133, L.23 – p.134, L.7, p.304, Ls.2-5.) Hochrein never once contested that he was aware of the existence of the no contact order. To the contrary, Hochrein conceded in his opening statement that "there was a no contact order in place" (Trial Tr., p.134,

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[6] The state notes that, while the error in the instruction is clear and obvious from a review of the instruction itself, the *reason* for the error is not equally clear and obvious. To the contrary, because, as set forth in greater detail below, the notice element was uncontested at trial, it is unsurprising that trial counsel would choose not to object to the court's instruction that omitted that element. Even if counsel had deemed the instruction technically erroneous for failing to include the notice element, counsel may have deliberately chosen to forego objecting for any number of reasons, including counsel's determination that the omitted language did not relieve the state of its burden of proof because the parties had stipulated that the no contact order at issue "was in effect" (State's Trial Exhibit 3A) and the only issue before the jury, "really" was whether Hochrein was at Tanya Lewis' residence on the date of the charged offense (Trial Tr., p.133, L.23 – p.134, L.5, p.304, Ls.2-5).

Ls.6-7), and he stipulated in the evidentiary phase of the trial that the no contact order had been issued and "was in effect" on the date he was alleged to have had the prohibited contact (Trial Tr., p.223, L.22 – p.224, L.18; State's Trial Exhibit 3A). For the reasons set forth in Section I.C., *supra*, and incorporated herein by reference, by stipulating that the no contact order "was in effect," Hochrein necessarily stipulated that he had notice of the order (either by virtue of having signed it or having been served with it, or both, see I.C.R. 46.2(a)). Because the notice element was uncontested and supported by overwhelming evidence in the form of the parties' factual stipulation, this Court can conclude beyond a reasonable doubt that the jury verdict would have been the same even absent the error and was therefore harmless. Neder, 527 U.S. at 17; Draper, 151 Idaho at ___, 261 P.3d at 868-69; Perry, 150 Idaho at 224, 245 P.3d at 976. Hochrein has failed to carry his burden of establishing that the omission of the element from the instruction rises to the level of fundamental, reversible error.

III.
Hochrein Has Failed To Show That The District Court Abused Its Discretion In Prohibiting Him From Impeaching A State's Witness With Evidence That The Witness Had Received A Withheld Judgment For Criminal Possession Of A Financial Transaction Card

A. Introduction

Prior to trial, the state filed a motion in limine to prohibit Hochrein from attempting to impeach Tanya Lewis with evidence that, in 2008, she pled guilty to and received a withheld judgment for criminal possession of a financial transaction card. (#38317 R., pp.89-92.) In addition to arguing that any probative value of the evidence would be outweighed by its potential for

prejudice, the state also argued that the withheld judgment did not qualify as a prior conviction for purposes of impeachment pursuant to Idaho Rule of Evidence 609(c). (#38317 R., pp.90-91; #38317 Augmented Tr., p.10, L.22 – p.12, L.4.) Responding to the latter argument, Hochrein acknowledged that Ms. Lewis had received a withheld judgment but he argued that, "unless and until an appropriate motion is made and granted, the status of her record is that she is a convicted felon." (#38317 Augmented Tr., p.12, Ls.11-17.) The district court ultimately granted the state's motion, ruling: "It appears [Ms. Lewis] was granted a withheld judgment, and that still applies to her, and pursuant to the rule [I.R.E. 609(c)], that is not a prior conviction for purposes of bringing that before the jury." (#38317 Augmented Tr., p.15, L.24 – p.16, L.2.)

Hochrein challenges the district court's ruling, arguing as he did below that "Ms. Lewis' withheld judgment for felony possession of a financial transaction card constitutes a conviction for purposes of I.R.E. 609." (Appellant's brief, p.28 (underlining omitted, capitalization altered).) Hochrein's argument is without merit. The plain and unambiguous language of I.R.E 609(c) specifically provides that, for purposes of the evidentiary rule allowing impeachment with a felony conviction, "evidence of a withheld judgment ... shall not be admitted as a conviction." Because the rule unambiguously prohibits the use of a withheld judgment for purposes of impeachment, Hochrein has failed to show error in the district court's evidentiary ruling.

B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of discretion. State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010) (citations omitted). "The interpretation of a rule of evidence, like the interpretation of a statute, is reviewed *de novo*." State v. Button, 134 Idaho 864, 867, 11 P.3d 483, 486 (Ct. App. 2000) (citing State v. Moore, 131 Idaho 814, 821, 965 P.2d 174, 181 (1998)).

C. The District Court's Evidentiary Ruling Is Supported By The Plain Language Of I.R.E. 609(c) That Prohibits The Use Of A Withheld Judgment For Purposes Of Impeachment

The circumstances in which a witness may be impeached by evidence of a prior felony conviction are governed by Rule 609, I.R.E. The general rule for use of a prior conviction for impeachment purposes is set forth in I.R.E. 609(a), which provides in relevant part:

> For the purpose of attacking the credibility of a witness, evidence of the fact that the witness has been convicted of a felony and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the credibility of the witness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness.

There are several limitations to the general rule, including those contained in I.R.E. 609(c), which provides:

> *Evidence of a withheld judgment* or a vacated judgment *shall not be admitted as a conviction.* Nor shall a conviction that has been

> the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence be admissible under this rule.

(Emphasis added.) Although Hochrein argues otherwise, the district court correctly interpreted I.R.E. 609(c) as prohibiting Hochrein from using evidence of Ms. Lewis' withheld judgment to attack her credibility.

The interpretation of a rule of evidence is governed by the same rules of interpretation applicable to statutory provisions. Miller v. Haller, 129 Idaho 345, 350, 924 P.2d 607, 612 (1996). Those standards require the appellate court to "begin with an examination of the literal words of the rule and give the language its plain, obvious and rational meaning." Id. (citing Grand Canyon Dories v. Idaho State Tax Comm., 124 Idaho 1, 5, 855 P.2d 466 (1993)). Where the language of the rule is plain and unambiguous, the appellate court must give effect to the rule as written, without engaging in construction. State v. Locke, 149 Idaho 641, 642, 239 P.3d 34, 35 (Ct. App. 2010) (citing State v. Rhode, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); State v. Burnight, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); State v. Escobar, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000)).

The language of I.R.E. 609(c) could not be more plain. It states, in relevant part: "Evidence of a withheld judgment or a vacated judgment shall not be admitted as a conviction." I.R.E. 609(c). Because the rule unambiguously provides that a withheld judgment may not be admitted as a conviction for the purpose of impeaching a witness, this Court must give effect to the rule as written and uphold the district court's ruling that prohibited Hochrein from attempting to impeach Ms. Lewis with evidence of her withheld judgment.

In an attempt to create ambiguity where there is none, Hochrein argues that the term "withheld judgment" is susceptible to multiple interpretations. (Appellant's brief, p.28.) Relying on what he deems to be "relevant principles of statutory construction" and the Idaho Supreme Court's opinion in United States v. Sharp, 145 Idaho 403, 179 P.3d 1059 (2008), Hochrein contends that, as used in I.R.E. 609(c), the term "withheld judgment" does not mean the "initial withholding of judgment and placing of a defendant on probation under I.C. § 19-2601(3) and (5)," but instead means "the ultimate granting of relief pursuant to I.C. § 19-2604, permitting the defendant to set aside his or her guilty plea, terminating the case, and dismissing the judgment." (Appellant's brief, pp.28-31.) Contrary to Hochrein's assertions, however, neither relevant rules of statutory construction nor the case law he cites supports his tortured interpretation of the rule.

As previously stated, the first rule of statutory interpretation requires this Court to give the words of I.R.E. 609(c) their "plain, obvious and rational meaning." Miller, 129 Idaho at 350, 924 P.2d at 612. As it is ordinarily understood, the term "withheld judgment" means just that – the withholding of judgment and the placing of the defendant on probation "on such terms and for such time" as the court may prescribe. I.C. § 19-2601(3). Nowhere in the rule does it state, or even suggest, that the term "withheld judgment" means the ultimate granting of relief pursuant to I.C. § 19-2604(1). Nor does such an interpretation make sense. By definition, a dismissal granted pursuant to I.C. § 19-2604(1) can occur only *after* the withholding of judgment; it is not the withheld

judgment itself. See I.C. § 19-2604(1) (where sentence has been withheld court may, upon satisfactory showing by defendant that he or she has complied with probation, set aside the plea and finally dismiss the case). Because Hochrein's argument that the term "withheld judgment" is ambiguous rests entirely on his failure to give effect to the "plain, obvious and rational meaning" of that term, this Court must reject it.

Even if this Court accepts Hochrein's invitation to ignore the obvious meaning of the term "withheld judgment" and to engage in statutory construction, there is still no basis upon which to construe the term "withheld judgment" as meaning the ultimate dismissal of the case pursuant to I.C. § 19-2604(1). Relying on the maxim *nonscitur a sociis*, Hochrein argues that, as it is used in I.R.E. 609(c), the term "withheld judgment" must be interpreted in light of the terms that surround it. (Appellant's brief, p.30.) The state agrees that, if the term "withheld judgment" is ambiguous, it must be interpreted in light of its surrounding terms. See State v. Schulz, 151 Idaho 863, ___, 264 P.3d 970, 974 (2011) (citing State v. Hammersley, 134 Idaho 816, 821, 10 P.3d 1284, 1290 (2000)) ("In determining legislative intent, this Court applies the maxim *nonscitur a sociis*, which means 'a word is known by the company it keeps.'"). In so doing, however, "effect must be given to all the words of the [rule] if possible, so that none will be void, superfluous, or redundant." Ameritel Inns, Inc. v. Pocatello-Chubbuck Auditorium or Community Center Dist., 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008) (quoting In re Winton Lumber Co., 57 Idaho 131, 136, 63 P.2d 664, 666 (1936)); see also State v. Mercer, 143 Idaho 108, 109, 138 P.3d

308, 309 (2006); State v. Griffith, 127 Idaho 8, 10-11, 896 P.2d 334, 336-337 (1995).

Here, the rule provides that the following are not admissible as a conviction for purposes of impeachment under I.R.E. 609(a): "Evidence of a withheld judgment or a vacated judgment" and evidence of "a conviction that has been the subject of a pardon annulment or other equivalent procedure based on a finding of innocence." I.R.E. 609(c). If, as Hochrein contends, the intent of I.R.E. 609(c) is to disallow impeachment with only those convictions that have been "excused or set aside as a matter of law" (see Appellant's brief, p.30), the term "withheld judgment" would itself be superfluous and/or redundant because the term "vacated judgment" necessarily means one that has been excused or set aside as a matter of law. That the drafters of I.R.E. 609(c) included a "withheld judgment" as among the evidence that is not admissible as a conviction for impeachment purposes, when the rule already provides that evidence of a "vacated judgment" is not admissible as a conviction, shows that the drafters intended the term "withheld judgment" to mean something other than a dismissal after the withholding of judgment. The only rational interpretation, and the one that gives effect to every word of the rule, is that a "withheld judgment" means the withholding of judgment and granting of probation.

United States v. Sharp, 145 Idaho 403, 179 P.3d 1059 (2008), relied on by Hochrein, does not compel a contrary result. Sharp was charged with burglary in Idaho. Id. at 403, 179 P.3d at 1059. He pled guilty and was granted a withheld judgment and placed on probation. Id. Sharp successfully completed

his probation but never moved to have his guilty plea set aside or his case dismissed pursuant to I.C. § 19-2604(1). Sharp, 145 Idaho at 404, 179 P.3d at 1060. Several years after he completed his probation, Sharp was charged in federal court in Utah with unlawfully possessing a firearm, a charge that was predicated on the Idaho case in which Sharp had pled guilty to burglary and received a withheld judgment. Id.

The question in Sharp, on certification from the federal district court in Utah, was whether "an outstanding withheld judgment based on a guilty plea qualif[ies] as a conviction under Idaho law." Id. at 403, 179 P.3d at 1059. The Idaho Supreme Court answered that question in the affirmative. Id. In so doing, the Court noted at the outset that, "[a]s it is *ordinarily* used, the term 'conviction' means the establishing of guilt either by a plea of guilty or by a finding of guilt following a trial." Id. at 404, 179 P.3d at 1060 (emphasis added) (citation omitted). The Court then discussed numerous statutory provisions and cases that that stand for the proposition that, in Idaho, "a conviction must precede punishment, including withholding judgment and placing the defendant on probation." Id. at 404-05, 179 P.3d at 1060-61. The Court recognized its prior holding in State v. Cliett, 96 Idaho 646, 650, 534 P.2d 476, 480 (1975), "that a withheld judgment did not constitute a conviction for the purpose of impeaching a witness by showing a prior felony conviction." Sharp, 145 Idaho at 405, 179 P.3d at 1061. However, without citing the rules of evidence, which were adopted 10 years after Cliett was decided, the Sharp Court held that the opinion in Cliett "was in error to the extent that it held that a defendant granted a withheld

judgment did not have a conviction," and it overruled Cliett "insofar as it so holds." Sharp, 145 Idaho at 407, 179 P.3d at 1063.

Contrary to Hochrein's assertions on appeal, the holding in Sharp does not support his claim that, "*for purposes of impeachment under I.R.E. 609*, an outstanding withheld judgment can be used as impeachment unless and until the witness has actually been granted the relief of withdrawing his or her plea, or setting aside the underlying conviction, pursuant to I.C. § 19-2604." (Appellant's brief, p.30 (emphasis added).) Sharp did not even cite I.R.E. 609, much less discuss the admissibility of evidence of a withheld judgment to establish a conviction for purposes of that rule. While Sharp undoubtedly stands for the proposition that an outstanding withheld judgment is a conviction under Idaho law, that holding does not override the express language of I.R.E. 609(c) that, for purposes of the rule permitting impeachment of a witness with a prior conviction, "[e]vidence of a withheld judgment" is not admissible.

Whether examining only the plain language of I.R.E. 609(c), or applying accepted principles of statutory construction, the only reasonable interpretation of that rule is that evidence of an outstanding withheld judgment is not admissible as a conviction for purposes impeachment. Hochrein has thus failed to show error in the district court's ruling that prohibited him from attempting to impeach Ms. Lewis with evidence of her withheld judgment.

D. Even If The Court Erred In Prohibiting Hochrein From Impeaching Ms. Lewis With Evidence Of Her Withheld Judgment, Such Error Was Harmless

Even if this Court determines that the district court erred in concluding that I.R.E. 609(c) categorically prohibited Hochrein from attempting to impeach Ms. Lewis with evidence of her withheld judgment, any error in the exclusion of the proposed impeachment evidence was harmless. Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Error in the exclusion of evidence "is harmless when the Court can declare, beyond a reasonable doubt, that the result of the trial would have been the same absent the error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (2010) (citations omitted).

As argued by Hochrein's defense counsel in closing argument, the state's case against Hochrein rested almost entirely upon Chris Yeats' trial testimony and the reliability of his identification of Hochrein as the man who was standing outside Tanya Lewis' door on the date of the charged offense. (Trial Tr., p.310, L.19 – p.311, L.1.) Although, Ms. Lewis was the victim of the no contact order violation, she was not the one who saw Hochrein at the door, and she testified to that effect at trial. (Trial Tr., p.145, L.20 – p.147, L.11, p.153, Ls.15-25.) Commenting on the lack of import of Ms. Lewis' trial testimony, Hochrein's trial counsel argued:

> Now, Ms. Lewis, to her credit, isn't trying to embellish, she just stated she didn't see who was at the door. So it's interesting as her testimony would be on some sidelines. *The truth is, Ms. Lewis really doesn't help you make your decision.*

(Trial Tr., p.313, Ls.19-24.) Trial counsel's assessment was correct. Because Ms. Lewis never saw Hochrein at her house on the date of the charged offense, her testimony was not essential to the state's case. Given the limited relevance of Ms. Lewis' testimony, evidence that Ms. Lewis had previously pled guilty to and received a withheld judgment for criminal possession of a financial transaction card would not have changed the jury's verdicts in this case. Based on the evidence presented, this Court can easily declare a belief that the error alleged by Hochrein was harmless beyond a reasonable doubt." Johnson, 149 Idaho at 265, 233 P.3d at 196.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon jury verdicts finding Hochrein guilty of felony violation of a no contact order and being a persistent violator.

DATED this 21st day of February 2012.

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of February 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

LORI A. FLEMING
Deputy Attorney General

LAF/pm