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State v. Bosse Appellant's Reply Brief Dckt. 44774

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 44774
)	
v.)	ADA COUNTY NO. CR-FE-2016-3183
)	
MICHAEL ERIC HAGER,)	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**

HONORABLE STEVEN J. HIPPLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Michael Hager contends the district court failed to conduct the required analysis on evidence which it recognized fell under I.R.E. 404(b). The State does not contest that point. Rather, it raises the new argument that the testimony was not subject to I.R.E. 404(b) in the first place because it was facts relating to the overarching criminal episode. In making that argument, the State does not address the recent decision in *State v. Kralovec*, 161 Idaho 569, 573-74 (2017), in which the Supreme Court expressly refused to endorse the admission of evidence just to provide context when that evidence is not otherwise admissible under the Rules of Evidence.

Mr. Hager also asserts that the testimony in question was not admissible under I.R.E. 404(b). The State responds it was relevant to his motive. However, since the past verbal argument does not make it more likely that Mr. Hager engaged in the physical acts alleged in this case, the testimony about the prior argument is not admissible as evidence of motive under I.R.E. 404(b). Additionally, the State does not address the risk of undue prejudice that exists in the admission of that propensity evidence, which, in this case, substantially outweighs whatever minimal probative value that testimony might have had.

Finally, the State's argument that the erroneous admission of that testimony was harmless is directly contrary to the United States Supreme Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), as the State argues this Court should do precisely what the United States Supreme Court said it cannot do, lest it violate Mr. Hager's constitutional right to a trial by jury.

For all those reasons, this Court should reject the State's arguments, vacate Mr. Hager's judgment of conviction, and remand this case for a new trial.

Statement of the Facts and Course of Proceedings

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

ISSUE

Whether the district court failed to use the proper standard when it overruled Mr. Hager's objection to the admission of improper propensity evidence.

ARGUMENT

The District Court Failed To Use The Proper Standard When It Overruled Mr. Hager's Objection To The Admission Of Improper Propensity Evidence

A. Despite Recognizing The Testimony At Issue Was Subject To I.R.E. 404(b), The District Court Did Not Conduct Either Part Of The Requisite Analysis Under That Rule

The district court specifically recognized the testimony to which Mr. Hager had objected was subject to I.R.E. 404(b). (Tr., p.281, Ls.8-9 (“I think it’s 404(b) kind of stuff”). The prosecutor below did not contest that conclusion. (*See generally* Tr., p.280, L.17 - p.281, L.11 (the entirety of the argument and decision on defense counsel’s objection under I.R.E. 404(b)).) Nevertheless, on appeal, the State argues that the objected-to testimony about the prior argument was not subject to I.R.E. 404(b). (Resp. Br., pp.12-13.)

It is not proper for the State to argue for affirming the district court’s decision on a theory it did not argue below. *State v. Cohagan*, 162 Idaho 717, ___, 404 P.3d 659, 663 (2017), *reh’g denied*. ““It is manifestly unfair for a party to go into court and slumber, as it were, on his defense, take no exception to the ruling, present no point for the attention of the court, and seek to present his defense that was never mooted before, to the judgment of the appellate court.”” *Id.* (quoting *Smith v. Sterling*, 1 Idaho 128, 131 (1867)); *accord State v. Garcia-Rodriguez*, 162 Idaho 271, ___, 396 P.3d 700, 704-05 (2017) (adding that “[t]his requirement applies equally to all parties on appeal”), *reh’g denied*. Therefore, the State’s argument that this testimony was not subject to review under I.R.E. 404(b) is not properly raised in this appeal, since that argument was not presented below.

At any rate, the district court was correct that this testimony was subject to review under I.R.E. 404(b). The testimony was about an argument which had occurred sometime before the incident in question. (*See* Tr., p.279, L.19 - p.282, L.20.) The facts about that argument had no

tendency to make J.A.'s account of what happened in the cab of the truck more or less likely to be accurate. For example, the fact that Mr. Hager had gotten into a *verbal* argument with J.A. on that previous occasion did not make it more or less probable that he *physically* assaulted her on this occasion, particularly when the prior argument did not have a physical component. Nor did the fact that Mr. Hager would bring up that prior argument in subsequent *verbal* altercations make it more or less probable that he *physically* assaulted her on this occasion. Similarly, the facts about what was discussed during that prior argument did not make J.A.'s version of events in the cab of the truck more or less likely. Rather, all those facts were only relevant to try to show that Mr. Hager has an irrationally-jealous character and that he acted in accordance with that purported character. Therefore, that testimony was subject to I.R.E. 404(b). *See, e.g., State v. Whitaker*, 152 Idaho 945, 949 (Ct. App. 2012) (explaining that evidence about other acts which bear upon the defendant's character is subject to I.R.E. 404(b)).

Furthermore, the State's assertion – that this evidence is not subject to I.R.E. 404(b) because it was describing events surrounding the alleged crime (Resp. Br., p.13) – is contrary to the Idaho Supreme Court's decision in *Kralovec*, 161 Idaho at 573-74, which the State does not acknowledge at all. (*See generally* Resp. Br.) As indicated above, the fact that the prior argument occurred, and the details of that prior argument, are not relevant to any of the elements of either of the two charged offenses (domestic battery and attempted strangulation). (*See* R., pp.60-61.) Therefore, the State's reliance on *State v. Sams*, 160 Idaho 917, 919-20 (Ct. App. 2016), *rev. denied*, is misplaced.

Rather, under the State's argument, those facts were merely offered to place the events in the cab in context of nearby or nearly contemporaneous happenings (the argument earlier in the evening which included references to the past argument). That mere proximity of events,

however, is not a valid basis to admit evidence if that evidence is not otherwise admissible under the Rules of Evidence. *Kralovec*, 161 Idaho at 573-74. Therefore, this testimony must still be assessed under I.R.E. 404(b) before it can be properly admitted.

Despite properly recognizing that I.R.E. 404(b) applied, the district court failed to conduct either aspect of the analysis required under that rule. *See, e.g., State v. Sheldon*, 145 Idaho 225, 230 (2007) (holding, while evaluating the notice provision of the rule, that compliance with I.R.E. 404(b) is mandatory and a condition precedent to admission of evidence under that rule). The State does not contest Mr. Hager's analysis in that regard. (*See generally* Resp. Br.)

The district court's failure to conduct that required analysis is, itself, reversible error. *See, e.g., State v. Grist*, 147 Idaho 49, 52 (2009). In *Grist*, the Idaho Supreme Court found error in the fact that the district court had not articulated the basis on which it had found the propensity evidence to be relevant. *Id.*; compare *State v. Marks*, 156 Idaho 559, 565 (2014) (noting that a trial court's actual identification of the permissible basis for admission of evidence is sufficient to meet this obligation on the relevance prong of the test), *rev. denied*. Without a determination under the first prong of that test to review, the Supreme Court vacated the judgment of conviction and remanded the case. *Grist*, 147 Idaho at 52.

By not identifying a non-propensity purpose to which this evidence might have been relevant, and by not conducting the balancing test, the district court in this case made the same error the district court in *Grist* did. Therefore, the same result is appropriate here. Because the district court failed to use the proper standard, to conduct the proper analysis, this Court should vacate the judgment of conviction and remand the case for a new trial.

B. The Testimony At Issue Was Not Admissible Under I.R.E. 404(b) As Evidence Of Motive

Should this Court depart from *Grist* and assess the admissibility of the propensity evidence in this case, that evidence was not relevant to a non-propensity purpose. Specifically, the State contends that evidence was relevant to motive. (Resp. Br., p.15; *compare* Tr., p.280, L.17 - p.281, L.11 (the prosecutor below not identifying any basis upon which that evidence might be relevant under I.R.E. 404(b).) “Motive” is “something (as a need or desire) that causes a person to act.” MERRIAM-WEBSTER’S DICTIONARY AND THESAURUS, 528 (2007); *accord State v. Peppcorn*, 152 Idaho 678, 689 (2012) (“Motive is generally defined as that which leads or tempts the mind to indulge in a particular act.”). However, evidence of motive is only admissible under I.R.E. 404(b) when it “tend[s] to make it more probable that the person in question did the act.” *State v. Russo*, 157 Idaho 299, 308 (2014); *see also Grist*, 147 Idaho at 54 (reiterating the need for limits on the admission of propensity evidence, particularly in sex abuse cases). As noted in Section A, *supra*, the acts in question here were physical assaults, and the facts about a prior verbal argument, which did not have a physical component, do not make it more or less likely that Mr. Hager engaged in the alleged physical acts. Thus, the evidence about the prior argument was not relevant to motive, as that concept is understood under I.R.E. 404(b).

And even if that evidence were minimally-relevant to the question of motive, that probative value was substantially outweighed by the risk of undue prejudice. In arguing to the contrary, the State does not address the risk of prejudice actually created by admitting propensity evidence. (*See generally* Resp. Br., pp.15-16.) The actual risk of undue prejudice caused by presenting propensity evidence is that it “takes the jury away from their primary consideration of the guilt or innocence of the particular crime on trial,” leading them to convict a defendant based on his character instead. *Grist*, 147 Idaho at 49. Thus, the risk in this case is that the jury would

convict Mr. Hager, that the jurors would overlook reasonable doubts about his guilt of the alleged conduct in the cab of the truck, based on the propensity evidence's portrayal of his character.

The State's argument under this second prong of I.R.E. 404(b) only reasserts the district court's conclusion that this evidence was not prejudicial because it was "relationship stuff" which did not involve an act of violence. (*See* Resp. Br., pp.15-16.) However, neither of those facts bear on whether the jury might convict Mr. Hager based on his portrayed character, rather than actual guilt of the charged conduct. Therefore, the State's argument on the second part of the analysis under I.R.E. 404(b) is actually irrelevant to that analysis.

Furthermore, the risk of undue prejudice is substantial in this case because the jury had to make a credibility determination between J.A.'s account and Mr. Hager's account about what happened in the cab of the truck. Therefore, there is a risk that the jury rejected Mr. Hager's account based on the propensity evidence's portrayal of his character. *Compare State v. Joy*, 155 Idaho 1, 11-12 (2013) (vacating a conviction in light of the risk that propensity evidence had prejudiced a credibility determination central to the verdict). Thus, the minimal relevance of that evidence to motive is substantially outweighed by the risk of that undue prejudice in this case. As such, even if this Court considers the merits of admitting the evidence under I.R.E. 404(b), it should still vacate Mr. Hager's conviction.

C. The State's Argument Under The Harmless Error Doctrine Asks This Court To Do Precisely What The United States Supreme Court Has Held It Cannot Do – Presume A Verdict Not Actually Rendered In Violation Of His Constitutional Right To A Jury Trial

The State contends that this Court should hold the improper admission of this propensity evidence harmless because "[e]ven if the jury had not heard about the source of the argument, the jury verdict would have been the same." (Resp. Br., p.17.) The United States Supreme

Court has squarely rejected that precise sort of analysis because engaging in that sort of analysis violates the Sixth Amendment's promise of a trial by jury. *Sullivan*, 508 U.S. at 279 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Idaho uses the same test to assess whether an objected-to error is harmless. *See State v. Perry*, 150 Idaho 209, 227 (2010).

Specifically, *Sullivan* explained that a court using the harmless error test must look at “the basis on which the jury *actually rested* its verdict.” *Sullivan*, 508 U.S. at 279 (emphasis from original) (internal quotation omitted). “The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered” *Id.* Yet that is precisely what the State now asks this Court to consider – whether the verdict would have been the same in a trial where the error had not occurred, where “the jury had not heard [the improper evidence], the jury verdict would have been the same.” (Resp. Br., p.17.) Therefore, the State's argument is directly contrary to the standard for harmless error clearly established by the United States Supreme Court.

That State's proposed analysis is particularly problematic because, “to hypothesize a guilty verdict that was never in fact rendered,” as the State does here, “no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.” *Sullivan*, 508 U.S. at 279. “The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action.” *Id.* at 280. Therefore, this Court should reject the State's harmless error argument, which promotes violating the Sixth Amendment to the United States Constitution.

As that erroneous assertion was the State's only argument under the harmless error doctrine (*see generally* Resp. Br., pp.16-17), it has failed to offer argument in regard to, much less meet, its actual burden under that doctrine. *See Sullivan*, 508 U.S. at 279 (requiring the State

to prove beyond a reasonable doubt that “the guilty verdict actually rendered in *this* trial was surely unattributable to the error.”) (emphasis from original); *accord Perry*, 150 Idaho at 227. Because the State failed to make any argument in regard to its actual burden of proof, this Court should vacate Mr. Hager’s conviction based on the erroneous admission of that propensity evidence. *See, e.g., Garcia-Rodriguez*, 396 P.3d at 705 (refusing to consider the State’s contention which was not supported by cogent argument when the State bore the burden on appeal).

And even if the State had tried to meet its burden, it could not have done so. A few hours into deliberations, the jury sent out two questions which revealed that they were struggling to reach a unanimous verdict on the attempted strangulation charge. (Tr., 424, Ls.3-24; PSI, pp.172-73.) Because the only testimony in regard to that charge came from Mr. Hager and J.A., there is a reasonable possibility that the improper propensity evidence affected the jurors’ determination of which of the two accounts was accurate. Thus, the State cannot show, beyond a reasonable doubt, that the error did not contribute to the verdict actually rendered in this case. *Compare Joy*, 155 Idaho at 11-12 (holding the improper admission of propensity evidence was not harmless in a case where the verdict was based on a similar credibility determination). That conclusion is particularly true in light of the jury’s questions, which indicated at least three jurors were harboring doubts about the sufficiency of the State’s evidence in that regard. *Compare State v. Thomas*, 157 Idaho 916, ___, 342 P.3d 628, 631-32 (2015) (holding an error was not harmless in light of a similar jury question). As such, the erroneous admission of the propensity evidence in this case was not harmless.

CONCLUSION

Mr. Hager respectfully requests this Court vacate his judgment of conviction and remand this case for a new trial.

DATED this 21st day of December, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of December, 2017, 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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