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State v. Marks Appellant's Reply Brief Dckt. 39684

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39684
)	
v.)	KOOTENAI COUNTY NO. CR 2009-
)	13817
FRANK DONALD MARKS,)	
)	REPLY BRIEF
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

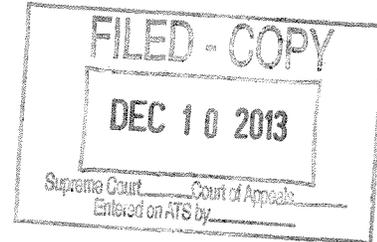
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	2
ISSUES PRESENTED ON APPEAL.....	3
ARGUMENT.....	4
I. The Issues Raised By The State In Support Of The District Court’s Order Preventing Mr. Marks From Presenting His Medical Expert’s Testimony Go To The Weight Rather Than The Admissibility Of The Proffered Testimony	4
II. The Error In Depriving Mr. Marks Of His Right To Present A Defense Through His Medical Expert Impacts The Verdicts On All Three Counts	6
CONCLUSION	7
CERTIFICATE OF MAILING	8

TABLE OF AUTHORITIES

Cases

<i>Fredricksen v. Fullmer</i> , 74 Idaho 164 (1953)	5
<i>Smith v. Big Lost River Irr. Dist.</i> , 83 Idaho 374 (1961)	5
<i>State v. Hopkins</i> , 113 Idaho 679 (Ct. App. 1987)	4
<i>State v. Simmons</i> , 120 Idaho 672 (Ct. App. 1991)	5
<i>State v. Stutliff</i> , 97 Idaho 523 (1976)	5
<i>State v. Thomas</i> , 94 Idaho 430 (1971)	5

Rules

I.R.E 703	5
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STATEMENT OF THE CASE

Nature of the Case

On appeal, Mr. Marks has raised several issues: (1) that the district court erred and violated his constitutional rights when it prevented his medical expert from testifying at trial; (2) that the district court erred when it permitted the presentation of 404(b) evidence; and (3) that the district court abused its discretion when it imposed an excessive sentence and denied his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion in light of the new information presented.

In response, the State disputed all of Mr. Marks' claims, including arguing that Mr. Marks has failed to establish that the district court erred when it prevented him from calling his medical expert to testify concerning a medical examination of one of the alleged victims. As to that issue, the State argues that the expert witness' testimony was properly excluded because his proffered testimony "lacked any foundation for his opinions." The State further argued that, assuming the exclusion was erroneous, any such error was harmless, and that if the error was not harmless, it "would only impact the jury's verdict with respect to K.M."

This Reply Brief is necessary to address the State's arguments concerning the improper exclusion of his medical expert. With respect to the State's arguments on the remaining issues, Mr. Marks believes that they have been adequately covered in the opening brief, and will not respond to them in this Reply Brief.

Statement of the Facts and Course of Proceedings

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

ISSUES

1. Do the issues raised by the State in support of the district court's order preventing Mr. Marks from presenting his medical expert's testimony go to the weight rather than the admissibility of the proffered testimony?
2. Does the error in depriving Mr. Marks of his right to present a defense via his medical expert only impact the jury's verdict as to count two?

ARGUMENT

I.

The Issues Raised By The State In Support Of The District Court's Order Preventing Mr. Marks From Presenting His Medical Expert's Testimony Go To The Weight Rather Than The Admissibility Of The Proffered Testimony

In asserting that the district court was correct in preventing Mr. Marks from calling a medical expert to provide his medical opinion concerning a sexual abuse examination conducted on K.M., the State argues,

The fundamental flaw in Dr. Guertin's proposed testimony was that he lacked any foundation for his opinions about what Dr. Martin did and saw during her examination of K.M.; or, as characterized by the district court, Dr. Guertin's testimony was entirely speculative. (Tr., p.646, Ls.20-23.) While Dr. Guertin may have the ability to be qualified as an expert on issues involving child sexual abuse including the ability to offer opinions about standard medical examinations that are conducted in such cases and physical findings that may be indicative of child abuse, he had no basis for offering an opinion on whether Dr. Martin actually examined K.M.'s hymen. Just because he expected her to, does not mean she did and whether she acted in compliance with "national standards" was irrelevant.

...

Although Dr. Guertin believes Dr. Martin's examination of K.M.'s external genitalia "would have included an examination of the hymen" (R., p.347) he has no actual knowledge that it did.

(Respondent's Brief, pp.12-13.)

The problem with the State's argument is that it completely ignores an argument, supported by authority, advanced by Mr. Marks in his Appellant's Brief. That argument reads as follows:

While the fact that Dr. Guertin had never physically examined the alleged victims may have been relevant to the weight a jury might give his testimony, it certainly didn't, as a matter of law, preclude its admissibility. See *State v. Hopkins*, 113 Idaho 679, 681 (Ct. App. 1987) (finding it improper for trial court to exclude proffered expert on breath testing

machines because of his lack of experience with the particular type of machine used, explaining “[t]he lack of direct experience is not fatal to [his] qualifications but it may affect the weight given his testimony”). The plain language of Idaho Rule of Evidence 703, in relevant part, provides, “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to* the expert at or before the hearing.” I.R.E. 703 (emphasis added).

(Appellant’s Brief, pp.13-14 (brackets in original).)

The oft-used response to an objection to testimony on some issue, probably resorted to more frequently by prosecutors than defense counsel, should be overruled because it goes to “weight not admissibility” is common and well-accepted in Idaho. See *State v. Stutliff*, 97 Idaho 523, 524 (1976) (“The lapse of time prior to the extraction of [blood] samples goes to the weight to be afforded the test results and not to their admissibility.”) (citations omitted); *State v. Thomas*, 94 Idaho 430, 433-34 (1971) (defendant’s objection to expert’s opinion testimony that a shoe found on his person and one found at the scene of the crime “had common wear characteristics and . . . could have been a pair” was properly denied because such an objection “went to the weight of the evidence, not to the admissibility of the exhibits”); *Smith v. Big Lost River Irr. Dist.*, 83 Idaho 374, 386 (1961) (“The owner’s failure or inability to explain the basis for his appraisal may affect the weight of his testimony, but it does not disqualify him as a witness.”); *Fredricksen v. Fullmer*, 74 Idaho 164, 171 (1953) (“The fact that the exemplar (Exhibit ‘C’) contained only the word ‘Elizabeth’ for comparison purposes might be considered in the weight of the testimony, but not its admissibility.”); *State v. Simmons*, 120 Idaho 672, 678 (Ct. App. 1991) (“Lack of positive identification goes to weight, not admissibility.”) (citations omitted).

In light of the large volume of authority supporting Mr. Marks' contention that the issues raised by the State concerning the reliability or accuracy of Dr. Guertin's proffered testimony go to the weight, rather than the admissibility, of the evidence, Mr. Marks asserts that the district court erred when it deprived him of his right to present testimony relevant to his defense, in violation of, *inter alia*, his Sixth Amendment right to present a defense.

II.

The Error In Depriving Mr. Marks Of His Right To Present A Defense Through His Medical Expert Impacts The Verdicts On All Three Counts

On the issue of the exclusion of Mr. Marks' medical expert's testimony, the State argues alternatively that, assuming the exclusion was erroneous, "Even if the Court cannot find the error harmless, the state submits this would only impact the jury's verdict with respect to K.M. for the reasons noted in footnote 5, *supra*." (Respondent's Brief, p.17 n.9.) The State's assertion merits a brief response.

The State charged Mr. Marks with conduct alleged to have been committed against three named victims in the same or similar manner over the same time period. The State presented evidence that all three alleged victims were first molested at the same time, in the same room, and in the same manner. (Tr., p.800, Ls.7-13; p.1029, L.18 – p.1032, L.6.) Additionally, in closing argument, the State noted how important it was that the testimony of the three alleged victims was so consistent (Tr., p.1272, L.24 – p.1273, L.12), and that the three alleged victims could not "have put together the set of facts between them out of thin air." (Tr., p.1272, Ls.18-23.) Given the interrelated nature of the three counts, and the State's reliance on the consistency of the three

alleged victims' stories in closing argument, testimony that would have called into question the allegations made by one would tend to call into question the allegations made by all. The exclusion of such testimony, then, cannot be said to have been harmless beyond a reasonable doubt as to any, let alone all, of the counts.

CONCLUSION

For the reasons herein, and in his Appellant's Brief, Mr. Marks respectfully requests that this Court vacate the judgment of conviction, and remand this matter for a new trial. In the alternative, he respectfully requests that this Court reduce his underlying sentence to concurrent, unified sentences of fifteen years, with five years fixed, or otherwise reduce them as it deems appropriate.

DATED this 10th day of December, 2013.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of December, 2013, 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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INMATE #100539
IMSI
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BENJAMIN R SIMPSON
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