2-5-2018

State v. Ibarra Respondent's Brief Dckt. 44945

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 44945, 44946 & 44947**
Plaintiff-Respondent,	)	
	)	**Canyon County Case Nos.**
v.	)	**CR-2016-11195, CR-2016-11241**
	)	**& CR-2016-12526**
JESSICA JEAN IBARRA AKA DELEON,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jessica Jean Ibarra appeals from her judgment of conviction and from the district court's order awarding restitution.

Statement Of The Facts And Course Of The Proceedings

Ibarra was a passenger in a vehicle that was pulled over for failure to stop at a stop sign. (Tr. vol. II, p. 146, L. 23 – p. 147, L. 25; p. 150, L. 21 – p. 151, L. 11.[1]) An officer observed a gun in the back of the vehicle, removed Ibarra and the driver from the vehicle, and searched Ibarra. (Tr. vol. II, p. 151, L. 15 – p. 155, L. 21.) Officers found marijuana in Ibarra's pocket and cocaine in a baggie in her sock. (Tr. vol. II, p. 155, L. 22 – p. 156, L. 2; p. 167, L. 18 – p. 170, L. 11.) The officers searched the car and found a methamphetamine pipe on the passenger seat (Tr. vol. II, p. 221, L. 18 – p. 222, L. 8), and a purse containing more paraphernalia (Tr. vol. II, p. 221, Ls. 18-22; p. 225, L. 1 – p. 226, L. 21).

The officers questioned Ibarra and she indicated the items found in the car, other than the gun, were "all hers, all for her personal use." (Tr. vol. II, p. 166, Ls. 2-25.) When asked "What about all the meth pipes?," Ibarra affirmed they were hers. (State's Ex. 12, 00:12 – 00:40; Tr. vol. II, p. 166, Ls. 9-13.) Ibarra initially denied any knowledge of the gun (Tr. vol. II, p. 166, Ls. 2-4), but, once she was told the driver, Mariano, would be charged with unlawful possession of the firearm, Ibarra admitted the

[1] This brief will use the convention set forth in the Appellant's brief, denoting the motion to suppress and sentencing hearing transcripts as "vol. I," the transcripts from the first day of trial as "vol. II," and the transcripts from the second day of trial at "vol. III."

gun was hers. (Tr. vol. II, p. 182, Ls. 6-15.) The state charged Ibarra with possession of cocaine, unlawful possession of a firearm, possession of marijuana, and possession of paraphernalia. (R., pp. 7-10, 38-39, 147-48.)

The district court heard pretrial motions on the morning of trial. (Tr. vol. II, pp. 6-23.) The state brought up the pipe found in the car, noting that residue inside it tested positive for methamphetamine, and that it "anticipat[ed] asking [the state lab expert] Ms. Corrina Owsley about that." (Tr. vol. II, p. 19, Ls. 6-20.) Ibarra objected based on I.R.E. 404(b) grounds:

> MR. SISSON: Your Honor, first of all, my client is charged with possession of cocaine, not possession of methamphetamine. The results of the test from, I think, scraping one of the pipes, was that there was some methamphetamine present, but I want to first of all emphasize that my client isn't charged with that crime.
>
> THE COURT: Maybe we could just say there was illegal drugs found in the pipe.
>
> MR. SISSION: Well, Your Honor, the second thing is [sic] that my understanding is that the State wants to use this for intent or knowledge or lack of mistake. Those are 404(b) issues. That requires the State to provide notice.
>
> THE COURT: You mean the meth part?
>
> MR. SISSION: Yes, the meth part.
>
> So for them to provide written notice prior to court, unless there's good cause shown that they want to use this information as 404(b).
>
> I haven't received that. I was verbally informed of that this morning, but I haven't received a 404(b) notice of their intent to use that, so that puts us at a disadvantage now, where we have to now defend against something else.

(Tr. vol. II, p. 19, L. 25 – p. 20, L. 22.) Ibarra therefore requested that "we just don't talk about it." (Tr. vol. II, p. 20, Ls. 24-25.)

The state responded that the methamphetamine was not 404(b) evidence, but evidence proving an element of the paraphernalia charge:

> MS. FARLEY: Your Honor, the State does have to show beyond a reasonable doubt that [Ibarra] did possess or did use paraphernalia with intent to use a controlled substance. Methamphetamine is a controlled substance.
>
> Then it goes directly to the point that she did have the intention to use that paraphernalia pipe for methamphetamine.

(Tr. vol. II, p. 21, Ls. 7-13.)

The district court ruled on Ibarra's motion and determined it would not allow the officer to say, "'We tested it, and it was meth in it'"; however, the court ruled that "[h]e can say, 'We tested it, and it contained an illegal controlled substance,' and leave it at that." (Tr. vol. II, p. 22, Ls. 20-24.)

The state called the arresting officer as a witness. (Tr. vol. II, pp. 142-216.) During direct examination, the prosecutor asked the officer whether, "[b]ased on your training and experience, you believed [the defendant and the driver] were both guilty of this?" (Tr. vol. II, p. 183, Ls. 21-22.) Ibarra objected, and the objection was sustained before the officer could answer the question. (Tr. vol. II, p. 183, Ls. 23-24.)

On redirect, the prosecutor asked the officer, "[i]f you believed someone was innocent, would you arrest them," and, "if you believed Jessica [Ibarra] did not know about the gun and did not have access to it, would you have arrested her?" (Tr. vol. II, p. 214, L. 11 – p. 215, L. 19.) Ibarra did not object to these questions or move for a mistrial based on them. (See Tr. vol. II, pp. 214-15.)

The jury found Ibarra guilty of possession of cocaine, unlawful possession of a firearm, possession of marijuana, and possession of paraphernalia, and, pursuant to an

information part 2, a prior-felony enhancement. (Tr. vol. III, p. 151, L. 13 – p. 157, L. 8.) Ibarra was sentenced to 14 years imprisonment with six-and-a-half years fixed for the cocaine charge, followed by a consecutive five-year sentence, with zero years fixed, for the firearm charge. (Tr. vol. I, p. 120, Ls. 10-25.) Ibarra was also sentenced to two concurrent 180-day sentences for the two misdemeanor charges. (Tr. vol. I, p. 121, Ls. 17-23.)

At sentencing, the state requested restitution for costs of prosecution, and later submitted a statement in support of those costs. (Tr. vol. I, p. 124, L. 8 – p. 125, L. 21; R., pp. 77-88.) Ibarra never objected to the restitution order, challenged it, or requested a hearing on it. (See Tr. vol. I, pp. 124-25; see generally, R.)

Ibarra timely appealed from the judgments of conviction. (R., pp. 75, 83-84, 89-93, 339-45.)

ISSUES

Ibarra states the issues on appeal as:

I. Whether the prosecutor committed misconduct by eliciting opinion testimony about Ms. Ibarra's guilt in regard to the firearm charge.

II. Whether the district court erred by admitting propensity evidence when the State failed to provide the written notice required under I.R.E. 404(b).

III. Whether the district court abused its discretion by ordering restitution which was solely based on the prosecutor's unsworn statement, not on sufficient evidence.

(Appellant's brief, p. 3.)

The state rephrases the issues as:

I. Has Ibarra failed to show the prosecutor's questions constituted fundamental error?

II. Because generic references to the pipe containing "an illegal controlled substance" prove an element of the paraphernalia charge, has Ibarra failed to show the district court erred by not requiring written notice to admit the evidence?

III. By failing to challenge the restitution order below has Ibarra waived her argument challenging it for the first time on appeal?

ARGUMENT

I.
Ibarra Has Failed To Show The Prosecutor's Questions On Redirect Constitute Fundamental Error

A. Introduction

During direct examination, the prosecutor asked the arresting officer whether, "[b]ased on your training and experience, you believed [the defendant and the driver] were both guilty of this?" (Tr. vol. II, p. 183, Ls. 21-24.) Prior to any answer being given, Ibarra objected to this question, and the district court sustained the objection. (Tr., vol. II, p. 183, Ls. 23-24.)

On cross examination, Ibarra's counsel asked the officer whether he had "any reason to believe [Ibarra] was lying about meth pipes or bongs or paraphernalia." (Tr., vol. II, p. 196, L. 25 – p. 197, L. 3.) Ibarra's counsel also inquired about the conversation between Ibarra and the officer, which was recorded and previously published to the jury:

> Q. [from defense counsel] Okay.
>
> So I don't get it. I mean, she is admitting to the gun. Why are you so adamant about "taking the beef for him" and, you know, "absolutely not"?
>
> I think another one was, "Good luck. I hope you wise up and decide not to take the heat for him."
>
> What do you care if she's doing that?
>
> A. [from Officer Duke] Like I said, I do not believe Mariano [the driver] was totally innocent.
>
> And the fact that he got away with all of the drugs that were located, and—that's my point.
>
> Q. Okay. So your point isn't that you are skeptical about whether she actually knew the gun was there or not. You are just saying she is taking all of the heat for him?

A. Yeah.

Q. Okay. Why didn't you say that? Why didn't you just say, "Look, Jessica. I know you knew the gun was there, but why aren't you saying? Why aren't you being honest and telling us that Mariano also knew the gun was there"?

Why didn't you just say that? I mean, that's pretty easy; right?

Yes or no?

A. Yeah, I could have. Yeah. Absolutely.

Q. I mean, your goal here, according to your testimony, is to get her to admit he knew the gun was there as well; right?

A. Yeah.

Q. So why are you taking the stand of, "I don't believe you"?

Well of course I guess that's not what you are saying. You are just trying to say, "Don't take the heat for him."

But you are not actually asking her, "Look, come clean with us, tell us the truth. Tell us that it's Mariano's gun."

A. I'm pretty sure the conversation may have started that way, and then it eventually led to the end conversation where her and I were basically screaming at each other.

Q. Uh-huh. Uh-huh.

(Tr., vol. II, p. 211, L. 2 – p. 212, L. 18.)

On redirect, the prosecutor asked the following questions:

Q. [from the prosecutor] So you didn't seek out on your own this vehicle driven by the defendant [sic] and pull it over?

A. [from Officer Duke] No.

Q. When you submit items to be fingerprinted, is there a record of that?

A. Yes.

Q. And are you aware of how a firearm is fingerprinted?

A. No.

Q. And as part of your job, is it to arrest innocent people?

A. No.

Q. *If you believed someone was innocent, would you arrest them?*

A. No.

Q. So counsel had a conversation with you about your interaction with Ms. Ibarra, and you indicated that you didn't think Mr. [Mariano] Castillo was completely innocent—

A. Correct.

Q. –so you were using interview tactics to try to gain some further information?

A. Yes.

Q. And counsel suggested some ways maybe you could have interviewed, asking nicely basically?

A. Yes.

Q. And would you agree with me in State's Exhibit No. 12, when you asked, "Okay. Whose gun is it? Is it Mariano's?"

Is that a nice way to ask whose gun it was?

A. I thought I was being nice.

Q. And you described when we first talked today that sometimes you try to talk on a level to gain respect.

Is that what you eventually attempted to do, is speak to Jessica how she was speaking to you?

A. More or less; yes.

Q. Mimicking the language she was speaking with you?

A. Correct.

Q. *And if you believed Jessica did not know about the gun and did not have access to it, would you have arrested her?*

A. No.

(Tr. vol. II, p. 214, L. 2 – p. 215, L. 19 (emphasis added).)

Ibarra argues that the two questions highlighted above, asked during redirect examination, constitute fundamental error. (Appellant's brief, p. 5.)[2] However, Ibarra fails to show the first question was improper, insofar as she fails to show it was referring to Ibarra, and not the driver of the car. Regarding the second question, defense counsel repeatedly cast doubt on the officer's beliefs that Ibarra actually possessed the gun; insofar as counsel opened the door to this line of inquiry, it was proper for the state to clarify what the officer believed.

Even if error, the questions on redirect did not rise to the level of fundamental error because Ibarra fails to show a clearly violated constitutional right, plain on the record, that was not harmless.

B. Standard Of Review

Idaho's courts review claims of prosecutorial misconduct "not preserved on appeal through an objection at trial" for fundamental error. State v. Parker, 157 Idaho 132, 141, 334 P.3d 806, 815 (2014).

[2] The question asked on direct—"[b]ased on your training and experience, you believed [the defendant and the driver] were both guilty of this?", was objected to, and the objection was properly sustained. (Tr. vol. II, p. 183, Ls. 21-24.)

C. Ibarra Fails To Show A Violation Of A Constitutional Right, Clear On The Record, That Was Not Harmless; Thus, She Fails To Show That The Prosecutor's Statements Rose To The Level Of Fundamental Error

For the first time on appeal, Ibarra claims the prosecutor committed misconduct that deprived her of a fair trial by improperly eliciting the officer's opinion about her guilt during redirect examination. (Appellant's brief, pp. 4-10.) Because she did not preserve this claim with an objection below she is required to show fundamental error on appeal. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). To establish fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's 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.

Id. at 228, 245 P.3d at 980.

Ibarra has failed to show the prosecutor's questions on redirect constituted error, much less fundamental error entitling her to review of this unpreserved claim.

1. Ibarra Fails To Show The Questions Asked On Redirect Were Error, As She Fails To Show The First Question Pertained To Ibarra, And She Fails To Show The Second Question Was Not A Proper Response To Defense Counsel's Questions On Cross-Examination

Pursuant to Idaho Rules of Evidence 702 and 704, expert opinion testimony "that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the juror's common sense and normal experience is inadmissible." State v. Ellington, 151 Idaho 53, 66, 253 P.3d 727, 740 (2011); I.R.E. 702, 704. Questions such as these are objectionable not because they address the ultimate issue, but because they concern conclusions and "inference[s] that could be drawn by the jurors utilizing their

own common sense and normal experience." See id. (quoting State v. Parks, 71 Or. App. 630, 693 P.2d 657, 659–60 (1985) (noting a question to an expert "was the defendant negligent?" would be objectionable, "not because it's the ultimate issue to be determined by the jury, but because the witness is not better able to reach a conclusion on that issue")); see also State v. Turner, 136 Idaho 629, 633, 38 P.3d 1285, 1289 (Ct. App. 2001). Applying this standard, the Ellington Court examined an accident-reconstruction expert's testimony on whether the defendant acted intentionally. 151 Idaho at 65-67, 253 P.3d at 739-41. The Ellington Court concluded that expert testimony "that there was 'not an accident' was clearly inadmissible opinion testimony on Mr. Ellington's state of mind that was not helpful to the jury." Id. at 67, 253 P.3d at 741. Similarly, "a lay or expert witness cannot give an opinion of another witness's credibility or encroach on the fact-finding functions of the jury." Parker, 157 Idaho at 148-49, 334 P.3d at 822-23.

As a threshold matter, Ibarra has failed to show that the prosecutor's first question was an error, because Ibarra fails to show the inquiry about arresting "someone" was a reference to *her*, and not Mariano Castillo, the driver of the car. The complete exchange was as follows:

> Q. If you believed someone was innocent, would you arrest them?
>
> A. No.
>
> Q. So counsel had a conversation with you about your interaction with Ms. Ibarra, *and you indicated that you didn't think Mr. Castillo was completely innocent—*
>
> A. Correct.
>
> Q. *–so you were using interview tactics to try to gain some further information*?

A. Yes.

(Tr. vol. II, p. 214, Ls. 14-23.) Placed in context, the "someone" in the prosecutor's hypothetical was not Ibarra, but was Mariano, and the question sought to clarify the officer's intent to elicit information about Mariano—an issue the defense had mentioned in cross-examination. (See Tr. vol. II, p. 212, Ls. 2-5.)

Moreover, Ibarra has failed to show that questions about *another* individual's guilt or innocence would be prohibited by the rules of evidence. Admittedly, per Parker, a lay witness may not opine about another witness's credibility or "encroach on the fact-finding functions of the jury." Parker, 157 Idaho at 148-49, 334 P.3d at 822-23. It was therefore nonreversible error, in that case, "to comment on Parker's truthfulness or guilt." Id.

But Parker does not indicate this prohibition also applies to comments on *other* persons' guilt. See id. And Mariano was not on trial here, Ibarra was. Mariano's guilt or innocence was not a province reserved for the jury, nor was this statement an opinion about Mariano's truthfulness. The officer simply explained his interview tactics, which were driven by a belief about Mariano's guilt, and which the prosecutor brought up in response to a point addressed on cross-examination. Ibarra fails to show this was an error.

As for the prosecutor's second question, regarding the officer's beliefs about Ibarra's knowledge of the gun, defense counsel directly opened the door to this line of questioning. Here, defense counsel's strategy was to create doubt about the officer's beliefs, based on the officer's statements that Ibarra was trying to "take the heat for" Mariano (see State's Ex. 20):

Q. So *I don't get it. I mean, she is admitting to the gun. Why are you so adamant about "taking the beef for him" and, you know, "absolutely not"?*

I think another one was, "Good luck. I hope you wise up and decide not to take the heat for him."

What do you care if she's doing that?

A. [from Officer Duke] Like I said, I do not believe Mariano was totally innocent.

And the fact that he got away with all of the drugs that were located, and—that's my point.

Q. Okay. *So your point isn't that you are skeptical about whether she actually knew the gun was there or not. You are just saying she is taking all of the heat for him?*

A. Yeah.

Q. *Okay. Why didn't you say that?* Why didn't you just say, "Look, Jessica. I know you knew the gun was there, but why aren't you saying? Why aren't you being honest and telling us that Mariano also knew the gun was there"?

Why didn't you just say that? I mean, that's pretty easy; right?

Yes or no?

A. Yeah, I could have. Yeah. Absolutely.

Q. I mean, your goal here, according to your testimony, is to get her to admit he knew the gun was there as well; right?

A. Yeah.

Q. *So why are you taking the stand of, "I don't believe you"?*

Well of course I guess that's not what you are saying. You are just trying to say, "Don't take the heat for him."

But you are not actually asking her, "Look, come clean with us, tell us the truth. Tell us that it's Mariano's gun."

(Tr., vol. II, p. 211, L. 2 – p. 212, L. 13.)

Defense counsel's *sotto voce* theme here is unmistakable: why did the officer accuse Ibarra of "taking the beef" for Mariano if the officer believed her admissions about possessing the gun? And if the officer *did* believe her admissions, why did he not "just say that"? By asking these questions, repeatedly, defense counsel clearly intended to show that the officer did not believe Ibarra's admissions.

And if there was any doubt this was the intended implication, defense counsel himself affirmed this is what he meant, by *explicitly* making this argument in closing:

> And then [Officer Duke] says, "Good luck." This is towards the end of the interview. I hope you wise up and decide not to take the heat for him. Once again, that's kind of a farewell, parting shot, so to speak. She goes, "I ain't taking the heat for no one." And then her voice kind of trails off. I'm not sure what she says. You can listen to it. And then he goes, "Really?" Once again. Our skeptic here.
>
> Okay. *Why is Officer Duke reacting to Jessica that way?* You would think he would be pretty happy. I've got someone who's confessed to a crime. My job is easy now, right? She's confessed. Easy. *And this subject was broached, I think, by—I think somewhere along in this trial. And let me ask you this. Did you get a good explanation of these comments? So he—at the time, I guess he supposedly believed that she possessed the gun and he possessed the gun at the same time. Is that—was that what's going on here or what is the answer to that question?* Okay? Or was this some kind of elaborate interrogation technique? You know, I kind of harass, or I act like I don't believe, or I say something one way and it's going to somehow get everybody else to confess to it another way? I'm not really sure.
>
> That's the point. Are you sure? Are you sure why he said that? *Or maybe the real answer is he said what he said because he really didn't believe Jessica possessed the gun. He had his doubts. He knew what was going on that evening. He knew that the girlfriend was taking the fall for the boyfriend.*

(Tr. vol. III, p. 129, L. 7 – p. 130, L. 15 (emphasis added).) Defense counsel could not have stated it more plainly; per defense counsel, the officer "really didn't believe Jessica

possessed the gun," and counsel's questions on cross-examination were no doubt intended to support this theory by calling the officer's beliefs and motivations into question.

Defense counsel's questions on cross-examination opened the door for the prosecutor to counter this line of attack and clarify what the officer *actually* believed. See e.g., State v. Lankford, 162 Idaho 477, 399 P.3d 804, 825 (2017) (quoting United States v. Dorsey, 677 F.3d 944, 954 (9th Cir. 2012) ("Having opened the door to the subject of the veracity of the State's witnesses, the defense 'should not be surprised to see the prosecutor enter.'")). While questions regarding an officer's beliefs about the defendant's guilt would usually be improper, in this case, under these facts, they were not. Because defense counsel raised the issue of the officer's beliefs about Ibarra's culpability, the prosecutor properly clarified what the officer believed. Placed in the context of this case, the prosecutor's questions were not error.

2. Even If Error, Ibarra Fails To Show That Questions To The Officer On Redirect Would Be A Violation Of An Unwaived Constitutional Right

Even if the questions posed on redirect were error, Ibarra fails to show fundamental error. First, to meet Perry's first prong, Ibarra must show a violation of a constitutional right. Perry, 150 Idaho at 228, 245 P.3d at 980. And in Parker, the Idaho Supreme Court has made clear that eliciting inadmissible testimony of an "opinion of Parker's truthfulness or guilt" is simply an evidentiary error—and not a *constitutional* violation—and therefore "does not satisfy the threshold analysis under the fundamental error standard." State v. Parker, 157 Idaho 132, 148-49, 334 P.3d 806, 822-23 (2014).

The Parker court reviewed the state's direct examination of a detective who testified about "the physical and verbal cues that he observes during interviews" of suspects. Id. at 148, 334 P.3d at 822. The detective "testified that it was a cue to him that Parker did not deny the allegations of inappropriate contact" with the victim," "[b]ecause in [the detective's] training and experience, someone that—most people, when they are accused of something they didn't do, will deny it." Id. When asked about why he deployed certain themes in interviews, the detective testified, "I take it that [defendant] is lying about the incident that the victim has alleged," and thus the officer's goal was "to minimize it so that later [the defendant] will come out with the truth." Id.

The Parker Court found no fundamental error, because Parker did not demonstrate an unwaived *constitutional* right was plainly violated:

> "[I]n Idaho a trial error that does not violate one or more of the defendant's constitutionally protected rights is not subject to reversal under the fundamental error doctrine." [*Perry*, 150 Idaho] at 226, 245 P.3d at 978. In other words, the fundamental error doctrine is not triggered by a violation of a rule or statute. *Id. A defendant's constitutional right to a fair trial is not categorically violated by an evidentiary error. This Court has repeatedly recognized that a lay or expert witness cannot give an opinion of another witness's credibility or encroach on the fact-finding functions of the jury, but that rule is based on the Idaho Rules of Evidence, not a constitutional provision.*

Id. at 148-49, 334 P.3d at 822-23 (emphasis added). "Thus," the court concluded, "even assuming that the prosecutor engaged in misconduct by eliciting inadmissible opinion testimony, Parker has failed to show a clear violation of a constitutional right," and "failed to satisfy the threshold analysis under the fundamental error standard." Id. at 149, 334 P.3d at 823.

That same standard applies here. Ibarra's claim, at root, is based on the rules of evidence and alleges an evidentiary error. She claims the officer's opinion testimony did "not speak to a matter that is beyond the common sense, experience, and education of the average juror, and so, such opinions do not 'assist' the jury in fulfilling its duties." (Appellant's brief, p. 5.) This is simply a paraphrase of I.R.E. 702. Moreover, the cases Ibarra cites in support of her claim—Hester and Ellington—were specifically examining the propriety of eliciting opinions per I.R.E. 702 and 704. See State v. Hester, 114 Idaho 688, 692-96, 760 P.2d 27, 31-35 (1988); Ellington, 151 Idaho at 66-67, 253 P.3d at 740-41. Thus, while packaged on appeal as a due process violation, at root this is an evidentiary claim, based on the rules of evidence. And the Parker Court has already found that while "a lay or expert witness cannot give an opinion of another witness's credibility or encroach on the fact-finding functions of the jury, … that rule is based on the Idaho Rules of Evidence, not a constitutional provision." 157 Idaho at 148–49, 334 P.3d at 822–23.

Ibarra, like Parker, presents a claim of evidentiary error. Per Perry's first prong, she therefore cannot show a clear violation of a constitutional right, and cannot meet the threshold of showing fundamental error.

3. Even If The Questions To The Officer Would Be A Violation Of An Unwaived Constitutional Right, Ibarra Fails To Show Such An Error Is Clear And Obvious From The Record

Alternatively, even assuming Ibarra can show a violation of an unwaived constitutional right, she fails to meet Perry's second prong, because she fails to show a violation that is clear and obvious from the record. See Perry, 150 Idaho at 228, 245 P.3d

at 980. An appellant alleging fundamental error has the burden under Perry's second prong to show that the error was "clear or obvious, 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." Perry, 150 Idaho at 226, 245 P.3d at 978.

Here, Ibarra fails to meet that burden. Her attorney's choice to object to the first question—but not the second and third questions—may have been tactical. By objecting to some, but not all of the questions at issue, an attorney demonstrates at the very least that he or she "likely was not ignorant of the law or unaware of the evidence the prosecutor attempted to introduce." Parker, 157 Idaho at 145, 334 P.3d at 819. That was precisely the case in Parker, where trial counsel raised hearsay objections and received rulings on some elicited statements, but later opted not to object or move for a mistrial for similar statements. Id. at 142-46, 334 P.3d at 815-20. The Parker Court inferred from the earlier objections that counsel "likely was not ignorant of the law"; as a result, Parker could not show the later failures to object were not purposeful, tactical choices. Id. at 145-46, 334 P.3d 819-20. Likewise, because Ibarra objected to one of the statements, but not the other two, she cannot show the failures to object were not tactical.

Ibarra concludes that 1) "the transcript is eminently clear as to what questions the prosecutor asked of Officer Duke"; 2) those questions were also "clearly" improper; and 3) "[t]herefore, the error is clear from the record." (Appellant's brief, p. 9.) However, this syllogism fails to address whether the failures to object were tactical choices. Because the failures to object may well have been tactical, and because it is not clear from the record whether they were, Ibarra fails to meet Perry's second prong and fails to show fundamental error.

4. Even If Ibarra Has Shown A Clear And Obvious Violation Of An Unwaived Constitutional Right, Any Error Was Harmless

Per Perry's final prong, even assuming clear and obvious error that violated a constitutional right, the defendant has the burden of showing "a reasonable possibility that the error affected the outcome of the trial." State v. Abdullah, 158 Idaho 386, 444, 348 P.3d 1, 59 (2015) (quoting Perry, 150 Idaho at 226, 245 P.3d at 978).

Ibarra has failed to show fundamental error, because, even assuming a clear and obvious violation of a constitutional right, the error would have been harmless. This was a strong case, and there was ample evidence—including the defendant's own taped, unobjected-to admissions that the items in the car were hers—supporting the jury verdict. (Tr. vol. II, p. 166, L. 2 – p. 167, L. 13; p. 182, L. 6 – p. 183, L. 6; State's Ex. 12, State's Ex. 19.)

Moreover, there was no reasonable possibility that hearing the arresting officer's opinion about Ibarra's culpability had any effect on this trial. The authorities Ibarra cites, while reversals, examine different legal questions and weaker evidentiary cases. See United States v. Vera, 770 F.3d 1232, 1243 (9th Cir. 2014) (finding plain error where the jury was not instructed on an officer's dual role as lay- and expert-witness; where the state failed to establish a foundation under federal evidentiary rules; where the state admitted plainly erroneous drug quantity testimony; and where the jury verdict depended on that quantity testimony); United States v. Freeman, 730 F.3d 590, 596-600 (6th Cir. 2013) (where the government conceded that the FBI agent "lacked the first-hand knowledge required to lay a sufficient foundation for his testimony under [federal] Rule 701(a)," and where the court concluded the agent's testimony could not have been

admitted as expert testimony, despite the agent's references "to his expertise and credentials, giving him an aura of authority on the stand"); United States v. Hampton, 718 F.3d 978, 984 (D.C. Cir. 2013) (where "the government's evidence consisted largely of wiretap interceptions" and recordings interpreted by the officer in question, and where the only other major source of evidence was a witness whom the "jury had reasons to doubt," and "discount her testimony"); United States v. Grinage, 390 F.3d 746, 751-52 (2nd Cir. 2004) (where the other evidence against the defendant was "thin" and "weak," such that the jury was initially hung, and only arrived at a verdict after receiving an Allen[3] charge); State v. Johnson, 119 Idaho 852, 859, 810 P.2d 1138, 1145 (Ct. App. 1991) (where the court erred in admitting a vouching opinion and "[t]he credibility of the state's witnesses was a primary issue in the case").

Here, the state presented ample evidence to prove its case. Ibarra fails to show a reasonable possibility that hearing the officer's opinion about her culpability had any effect on the verdict, and therefore, she fails to show the error was not harmless.

II.
Because References To The Pipe Containing "An Illegal Controlled Substance" Prove An Element Of The Paraphernalia Charge, Ibarra Fails To Show Written Notice Was Required To Introduce This Evidence; Alternatively, If Notice Was Required, Any Error Was Harmless

A. Introduction

Ibarra claims her convictions should be vacated because the state's lab expert testified that the pipe contained "an illegal controlled substance." (Appellant's brief, pp. 10-12.) Ibarra claims that "[t]hat generic reference … presents evidence of other

[3] Allen v. United States, 164 U.S. 492 (1896).

uncharged conduct, namely, possession of a controlled substance." (Appellant's brief, p. 12.) Therefore, she argues, per I.R.E. 404(b), "that generic reference is … inadmissible because the prosecutor did not provide the required written notice of her intent to present testimony about that other, uncharged act." (Appellant's brief, p. 12.)

This argument fails, because evidence showing the pipe contained an illegal controlled substance is evidence of the paraphernalia violation; not evidence of "other" uncharged conduct prohibited by I.R.E. 404(b). Alternatively, even if the evidence falls under I.R.E. 404(b), the failure to provide written notice was harmless.

B. Standard Of Review

Courts employ a two-tiered analysis to determine the admissibility of evidence of other crimes or misconduct. State v. Williams, 134 Idaho 590, 592, 6 P.3d 840, 842 (Ct. App. 2000). "First, the trial court must determine whether the evidence is relevant and, if so, the court must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." Id. (citing State v. Cochran, 129 Idaho 944, 948, 935 P.2d 207, 211 (Ct. App. 1997); State v. Roach, 109 Idaho 973, 974, 712 P.2d 674, 675 (Ct. App. 1985)). On appeal, this Court "exercise[s] free review of the trial court's determination of relevancy," but reviews for abuse of discretion "when considering the trial court's balancing of the probative value of the evidence against the danger of unfair prejudice." Williams, 134 Idaho at 592, 6 P.3d at 842.

C. Generic References To "An Illegal Controlled Substance" Do Not Refer To A Prior Bad Act To Be Analyzed Under I.R.E. 404(b), But Rather, Are Proof Of An Element Of The Paraphernalia Charge

Pursuant to I.R.E. 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." I.R.E. 404(b).

The Idaho Code provides "[i]t is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." I.C. § 37-2734A.

Here, in ruling on Ibarra's pretrial I.R.E. 404(b) objection to the state lab expert testifying about the meth pipe, the district court disallowed any specific reference to methamphetamine, but allowed the expert to testify the pipe contained "an illegal controlled substance." (Tr. vol. II, p. 22, L. 20 – p. 23, L. 5.) When asked by the prosecutor whether a test of the pipe showed "positive for an illegal controlled substance," the expert accordingly testified that "[i]t did." (Tr. vol. III, p. 60, Ls. 16-24.)

It is accordingly a threshold question on appeal whether the generic reference to "an illegal controlled substance" was evidence of "other crimes, wrongs, or acts," such

that I.R.E. 404(b), and its written notice requirements, applied. See State v. Sheldon, 145 Idaho 225, 228, 178 P.3d 28, 31 (2008) (asking first, as a threshold matter, whether "the nearly $7,000 found in [defendant's] vehicle" even qualified as "other acts" evidence, such that a 404(b) analysis was required).

It is unclear from the record whether the district court determined that a generic reference to "an illegal controlled substance" would be evidence of "other crimes, wrongs, or acts." (See Tr. vol. II, p. 22, L. 20 – p. 23, L. 5.) However, the state argued that the revelation of the test result would be proof of an element of the paraphernalia charge:

> Your Honor, *the State does have to show beyond a reasonable doubt that she did possess or did use paraphernalia with intent to use a controlled substance. Methamphetamine is a controlled substance.*

(Tr. vol. II, p. 21, Ls. 7-10 (emphasis added).)

This was correct. In the context of this case, evidence that the pipe contained a controlled substance is not "uncharged conduct"—it is an element of the *charged crime* of possession of paraphernalia, which prohibits possession "with intent to use, *drug paraphernalia to … store*, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body *a controlled substance*." I.C. § 37-2734A (emphasis added); see also State v. Newman, 108 Idaho 5, 14, 696 P.2d 856, 865 (1985) (interpreting I.C. § 37-2734B and holding "[t]he crucial decision under the Act, though, and what makes an item 'drug paraphernalia' for purposes of the Act, *is whether the defendant intended that it be used with illegal drugs.* We think it rare, indeed, that a defendant will ever be able to rebut the assertion that the item in question is, in fact, capable of being used as drug paraphernalia. But the defendant need not do so. *Rather, with respect to I.C. § 37–*

2701(bb), what the State must prove beyond a reasonable doubt is that the defendant used an item with an illegal drug….) (emphasis added, footnote omitted).

Ibarra argues that "the generic reference is still inadmissible because the prosecutor did not provide the required written notice of her intent to present testimony about that *other, uncharged act*." (Appellant's brief, p. 12 (emphasis added).) But without a reference to a specific controlled substance, or some prior incident of use, there was no "other, uncharged" act to speak of: the expert simply testified that the pipe tested positive for an illegal controlled substance, which was an element of the charged act of possessing paraphernalia. See I.C. § 37-2734A. A cryptic reference to "an illegal controlled substance" would not, on its own, be evidence of an uncharged crime, insofar as the state could not charge an individual with possessing a schedule-less, unnamed controlled substance. See I.C. § 37-2701, *et seq*.

And while use of an unnamed "illegal controlled substance" could conceivably qualify as a prior bad act, it would not function that way here, where Ibarra was charged with *present* possession of paraphernalia used to contain a controlled substance. By definition, testimony that the paraphernalia tested positive for an "illegal controlled substance" was purely evidence of that paraphernalia possession—which was neither uncharged, nor a prior bad act, and therefore outside the scope of I.R.E. 404(b).

Because this was not evidence of "an uncharged act" it is not subject to 404(b) as a threshold matter, and the state was not required to serve written notice prior to its use.

D. Even If The Evidence Should Be Analyzed Under 404(b), Any Error In Admitting The Evidence Without Notice Was Harmless

Alternatively, even if the reference to the test result was I.R.E. 404(b) evidence, Ibarra does not claim the district court erred when it applied a 404(b) balancing test. (See Appellant's brief, p. 12.) Instead, Ibarra claims the district court erred by allowing the generic testimony "in absence of the proper notice." (Appellant's brief, p. 12.) Based solely on this notice claim, Ibarra argues her convictions should be vacated. (Appellant's brief, p. 12.)

But failure to give 404(b) notice does not automatically require that the convictions be vacated. Rather, this Court applies a harmless error standard to determine the consequence of failing to provide 404(b) notice. See, e.g., Sheldon, 145 Idaho at 230-31, 178 P.3d at 33-34 (finding "the admission of evidence was not harmless error" because defendant's prior statements "regarding his past dealings in methamphetamine" were "highly prejudicial" and of "low" probative value, and because the fact that "Sheldon dealt smaller amounts of methamphetamine in the past does not lead to the conclusion he knew there was a pound of the substance under his car seat."). To find harmless error a reviewing court must "declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of contributed to the conviction." Id. (quoting Baldwin v. State, 145 Idaho 148, 156, 177 P.3d 362, 371 (2008)).

Here, any failure to provide 404(b) notice, and ensuing admission of the test result evidence, was harmless. The jury had already heard that law enforcement found a pipe "that's commonly used for methamphetamine" sticking out of the passenger seat where

Ibarra had been sitting, to which Ibarra had no objection. (Tr. vol. II, p. 221, L. 18 – p. 222, L. 8.) The jury heard testimony that Ibarra admitted items found in the car were "all hers, all for her personal use" to which Ibarra had no objection. (See Tr. vol. II, p. 166, Ls. 5-8.) The jury heard Ibarra herself on video, specifically admit to possessing the "meth pipes":

> Officer Duke: What about the uh, marijuana bong that was under your seat?
>
> Ibarra: That's mine.
>
> Officer Duke: That's yours, too? Okay. *What about all the meth pipes?*
>
> Ibarra: *Mine.*

(State's Ex. 12, 00:03 – 00:40 (emphasis added).) This videotaped confession was admitted into evidence without objection. (See Tr. vol. II, p. 167, Ls. 10-14.)

Given the plethora of admitted evidence that Ibarra possessed a meth pipe, further revelations that the meth pipe contained "an unnamed controlled substance," would not have affected the jury verdict.[4] Unlike the highly prejudicial, minimally probative statements in Sheldon, which did not bear on the charged elements of the crime, a test result confirming Ibarra's own admissions, regarding an element of a charged crime, would have been highly probative and not unfairly prejudicial. Even assuming the test result was 404(b) evidence, the failure to give notice and admission of the evidence was harmless.

[4] Ibarra's own taped admissions were arguably more damaging than the generic test result, given she verified the pipe was used for meth. (State's Ex. 12, 00:03 – 00:40.) The test result, on the other hand, simply confirmed the pipe contained an unnamed controlled substance—which for all the jury knew, could have been meth, or could have been codeine. See I.C. §§ 37-2707(d)(3), 37-2713(c)(1).

III.
Ibarra Failed To Challenge The Restitution Order Below, And Therefore Has Waived Challenging It For The First Time On Appeal

A. Introduction

For the first time on appeal, Ibarra claims the restitution order is void because it does not comport with State v. Nelson, 161 Idaho 692, 390 P.3d 418 (2017), and State v. Cunningham, 161 Idaho 698, 390 P.3d 424 (2017). Specifically, Ibarra now contends that the restitution order was not supported by sufficient evidence. (Appellant's brief, pp. 14-16.)

However, Ibarra never objected to the restitution order below, much less presented a claim that it was unsupported by sufficient evidence. She has therefore invited any error and has waived any challenge to the restitution order on appeal. Alternatively, should this Court grant relief on this claim, the proper remedy would be a remand to recalculate the restitution amount.

B. Standard Of Review

An award of "restitution under section 37-2732(k) is discretionary." Nelson, 161 Idaho at 695, 390 P.3d at 421. In determining whether the district court abused its discretion, this Court examines "whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with relevant legal standards; and (3) reached its decision by an exercise of reason." Id.

C. Ibarra Never Objected To The Restitution Order Below And Therefore Has Waived Her Challenge To It On Appeal

"Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." State v. Garcia-Rodriguez, 162 Idaho 271, ___, 396 P.3d 700, 704 (2017) (citing Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands, 99 Idaho 793, 799–800, 589 P.2d 540, 546–47 (1979); Marchbanks v. Roll, 142 Idaho 117, 119, 124 P.3d 993, 995 (2005); Frasier v. Carter, 92 Idaho 79, 82, 437 P.2d 32, 35 (1968)) ("We have held generally that this court will not review issues not presented in the trial court, and that parties will be held to the theory on which the cause was tried."). Similarly, where a party "complain[s] of errors one has consented to or acquiesced in," this Court "will not reverse." State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985) (citing State v. Owsley, 105 Idaho 836, 673 P.2d 436 (1983)). "In other words, invited errors are not reversible." Id.

A review of the sentencing hearing shows that Ibarra was apprised of her right to object to the state's proposed restitution order:

> THE COURT: Okay. Now, Ms. Farley, you apparently have a proposed order for restitution and judgment for the court's signature, but I don't think there's the—did you file the affidavit?
>
> MS. FARLEY: I believe I did. I do have hard copies, if you would like to see those. I don't know what the process is for filing them out here, but I do have them. And I—
>
> THE COURT: Well, there's an—there's an affidavit—did you have an affidavit that you filed?
>
> MS. FARLEY: I believe it was filed. There's my affidavit that I have signed and the affidavit for restitution from the Idaho State Police lab as well, Your Honor.

THE COURT: Okay. And do you know when they were filed?

MS. FARLEY: This fax for the order is on January 27 of 2017. I—it should have been attached with those documents.

THE COURT: January 27.

MS. FARLEY: And it looks like we faxed that in.

THE COURT: Okay. Is it in the ROA?

THE CLERK: I'll look. No.

MS. FARLEY: And I can have those resubmitted after today, too, as well.

THE COURT: Yeah, I'm just not seeing them.

And—and again, you know, and I apologize to everybody who's been waiting. This case was set on my calendar by somebody else, and it was set for a half hour. And this—it's unfortunate but, of course, it's important, and it needed to take the time that was required.

And so I'm going to—I'll just have to look and see if it was filed. Otherwise—

MS. FARLEY: I will refile it.

THE COURT: —then you will need to file it. So that—

Because I want to make a record that also, Ms. Ibarra, you have a right to object to any request for restitution, either if it's beyond the scope of what's allowed or—by law or the amounts don't look right. So I want to make sure that the process has been filed—I mean, followed so that the issue can be addressed.

(See Tr. vol. I, p. 124, L. 8 – p. 125, L. 21.) However, a review of the record shows Ibarra never objected to or challenged the restitution that was ultimately ordered. (See generally R.)

The newfound error Ibarra complains of was therefore invited by her, insofar as she never challenged the state's evidence supporting the restitution order. Accordingly,

any failure of the district court to *sua sponte* convene a restitution hearing, or refuse to consider an unobjected-to statement supporting the restitution order, was a consented-to error. Likewise, newly posed legal theories, such as Ibarra's claim that "the drug charges were consolidated with the firearm charge, and the applicable statute does not authorize the district court to award restitution for the time spent on the firearm charge" (Appellant's brief, p. 14), have likewise been waived. Garcia-Rodriguez, 162 Idaho at ___, 396 P.3d at 704. Because Ibarra invited any errors, and waited until this appeal to raise these issues, she has failed to preserve her claim on appeal. See, e.g., State v. Mosqueda, 150 Idaho 830, 833, 252 P.3d 563, 566 (Ct. App. 2010) (where defendant's claim that the district court erred by using county calculations for hourly rates of pay, including "allotted fringe benefits," contrary to the statutory definition of "regular salaries of employees" was not preserved, because defendant "did not challenge the propriety of the state's calculation of the officers' hourly pay rates at any of the hearings in this case. This Court will not consider issues not raised in the court below … including contentions that restitution was awarded in error because it was not statutorily authorized") (internal citations omitted); but see, e.g., State v. Faught, 127 Idaho 873, 877, 908 P.2d 566, 570 (1995) (holding "a criminal defendant need not move for a directed verdict or judgment notwithstanding the verdict in order to preserve for appeal the issue of whether there was sufficient evidence before the jury to support a verdict to convict").

Alternatively, even if this claim has been preserved, the proper remedy would not be vacating the restitution order, as Ibarra requests. (See Appellant's brief, pp. 15-16.) Rather, this Court should remand the claim to calculate restitution in light of Nelson and Cunningham (which, at the time of sentencing, had only existed for one day).

Ibarra claims that this case should not be remanded because the district court "expressly told the State it needed to present evidence to support its restitution request and the State still failed to meet its burden in that regard." (Appellant's brief, p. 15.) She analogizes to Nelson, where "the State had been afforded two opportunities to provide sufficient evidence and failed to carry its burden," and concludes that here too, "a second bite at the proverbial apple would be improper." (Appellant's brief, p. 15 (citing Nelson, 161 Idaho at 697, 390 P.3d at 423).)

But the proverbial apple was never on the menu below, much less bitten. Ibarra waited until this appeal to challenge the restitution. The state had no opportunity to address her arguments because she never made them below. This is unlike Nelson, where the requested restitution was adjusted by the district court and ordered; appealed; remanded; litigated at a restitution hearing, expressly objected to, and re-ordered; and appealed again. 161 Idaho at 694, 390 P.3d at 420. By contrast, Ibarra made zero efforts to challenge the order below, and should not receive the benefit of barring the state from submitting additional evidence to address her belated evidentiary concerns. In the event she prevails on this unpreserved claim, the proper remedy would be a remand. See also Cunningham, 161 Idaho at 702, 390 P.3d at 428.

CONCLUSION

The state respectfully requests this Court affirm Ibarra's judgments of conviction and affirm the restitution order.

DATED this 5th day of February, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of February, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd