2-23-2018

State v. Derrick Respondent's Brief Dckt. 44985

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44985**
Plaintiff-Respondent,	)	
	)	**Twin Falls County Case No.**
v.	)	**CR42-2016-5588**
	)	
ROBERT SNOW DERRICK,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature Of The Case

Robert Snow Derrick appeals from the judgment entered upon the jury's verdict finding him guilty of felony injury to a child. On appeal, Derrick argues the prosecutor committed misconduct amounting to fundamental error during her closing argument. He also argues the trial court erred in one of its evidentiary rulings.

Statement Of The Facts And Course Of The Proceedings

Derrick punched his 13-year-old stepson in the stomach, lacerating his stepson's spleen. (Tr., p.125, Ls.7-16, p.133, L.8 – p.146, L.3, p.152, L.21 – p.153, L.10, p.154, Ls.15-19, p.188, L.23 – p.189, L.4, p.190, L.15 – p.191, L.9, p.193, L.7 – p.203, L.22, p.230, L.16 – p.231, L.10, p.240, L.6 – p.249, L.9, p.324, L.8 – p.340, L.2.) The state charged Derrick with felony injury to a child and with misdemeanor domestic battery in the presence of a child (alleging Derrick also hit his wife in his stepson's presence). (R., pp.69-71.) Following a trial, a jury found Derrick guilty of felony injury to a child but not guilty of the domestic battery charge. (R., p.164.) Derrick filed a motion for a new trial (R., pp.193-96), which the district court denied (R., p.197; Tr., p.582, L.9 – p.585, L.12). Derrick timely appealed from the entry of judgment. (R., pp.198-203, 206-09.)

ISSUES

Derrick states the issues on appeal as:

I. Did the prosecutor commit misconduct and thereby violated Mr. Derrick's unwaived constitutional rights to due process and a fair trial when she misstated the law in her closing argument?

II. Did the district court abuse its discretion when it admitted an audio recording without proper foundation from the State?

(Appellant's brief, p.5.)

The state rephrases the issues as:

1. Has Derrick failed to carry his burden of demonstrating fundamental error in relation to his unpreserved claim of prosecutorial misconduct?

2. Has Derrick failed to show the district court abused its discretion in admitting an audio recording of Derrick's interaction with law enforcement over Derrick's foundation objection?

ARGUMENT

I.
Derrick Has Failed To Carry His Burden Of Demonstrating Fundamental Error In Relation To His Unpreserved Claim Of Prosecutorial Misconduct

A. Introduction

For the first time on appeal, Derrick argues the prosecutor misstated the law during her closing argument and, in so doing, violated his "unwaived constitutional rights to due process and a fair trial." (Appellant's brief, pp.6-11.) Derrick's argument fails; a review of the challenged statement in light of the record and the applicable law shows no misconduct, much less misconduct rising to the level of fundamental error.

B. Standard Of Review

"[T]he standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). Where, as here, a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

C. Derrick Has Failed To Show Any Misconduct, Much Less Misconduct Rising To The Level Of Fundamental Error

An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error

is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated"; (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision"; and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Id. at 226, 245 P.3d at 978.

Derrick was charged with felony injury to a child, in violation of I.C. § 18-1501(1). (R., pp.69-71.) Consistent with the language of both the statute and the pattern jury instruction, the district court instructed the jury that, to find Derrick guilty, the state must have proved, *inter alia*, that Derrick "willfully, by causing a traumatic injury to [his stepson, R.B.'s] abdomen and/or spleen, caused [R.B.'s] person or health to be injured" and that he did so under circumstances or conditions likely to produce great bodily harm or death to [R.B.]." (R., p.173.) The court further instructed the jury that "[t]he word 'willfully' as used in this instruction means acting where a reasonable person would know the act is likely to result in injury or harm or is likely to endanger the person, health, safety or well-being of the child." (R., p.173 (compare with I.C. § 18-1501(5) and I.C.J.I. 1244).)

In arguing to the jury that it should find Derrick guilty of felony injury to a child, the prosecutor, during closing argument, referred to the foregoing instruction and

summarized the evidence that, from the state's perspective, proved each element of the crime. (See Tr., p.521, L.16 – p.528, L.10.) Specifically, regarding the mental state element of felony injury to a child, the prosecutor stated:

> Let's go to willfully. Very bottom of that page. Look at the definition of willfully. *A reasonable person would know the act is likely, could, potentially, pick the word you like, but the court has used likely to result in injury or harm or is likely to endanger the person, health, safety, or well being of the child.*

(Tr., p.524, Ls.8-14 (emphasis added).)

Derrick did not object to the prosecutor's argument below, but he contends on appeal that the prosecutor committed misconduct rising to the level of fundamental error by "urg[ing] the jury to 'pick the word you like' when evaluating Mr. Derrick's mental state for the charged offense." (Appellant's brief, p.9.) According to Derrick, "[b]y informing the jury that they [sic] only had to find a reasonable person could, potentially, or might know the act would cause injury, the prosecutor" misstated the law and "misrepresented and diminished her burden of proof on Mr. Derrick's mental state." (Appellant's brief, pp.9-10.) Derrick's argument is without merit; he has failed to show that the complained of statement was improper, much less that it rose to the level of fundamental error.

A prosecutor has considerable latitude in closing argument. State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009); State v. Porter, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997); State v. Priest, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995). He or she is entitled to argue all reasonable inferences from the evidence in the record. Severson, 147 Idaho at 720, 215 P.3d at 440; Porter, 130 Idaho at 786, 948 P.2d at 141 (citing State v. Garcia, 100 Idaho 108, 110, 594 P.2d 146, 148 (1979)). A prosecutor may

not "attempt[] to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial," however, as doing so "impacts a defendant's Fourteenth Amendment right to a fair trial." Perry, 150 Idaho at 227, 245 P.3d at 979; see also State v. Coffin, 146 Idaho 166, 170, 191 P.3d 244, 248 (Ct. App. 2008) (citing State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007)) ("It is prosecutorial misconduct for a prosecutor to misstate the law in closing arguments.").

Contrary to Derrick's claims on appeal, the prosecutor's statement in this case – that "willfully" means "[a] reasonable person would know the act is likely, could, potentially, pick the word you like, but the court has used likely to result in injury or harm or is likely to endanger the person, health, safety, or well being of the child" – ultimately did not misstate the law. The state readily acknowledges that "willfully," in the context of a felony injury to child charge, means "acting or failing to act where a reasonable person would know the act or failure to act is likely to result in injury or harm or is likely to endanger the person, health, safety or well-being of the child." I.C. § 18-1501(5); accord I.C.J.I. 1244. Although the prosecutor appears to have initially used the words "could" and "potentially" as synonymous with the word "likely" and told the jurors to "pick the word you like," she ultimately told the jury that the term "willfully," as used in the court's instructions, meant a reasonable person would know the act "is likely to result in injury or harm or is likely to endanger the person, health, safety, or well being of the child." (Tr., p.524, Ls.8-14.) This was a correct statement of the law.

Even assuming the challenged statement was improper, Derrick has not met his burden of demonstrating it rose to the level of fundamental error. As noted above, the first prong of the fundamental error test requires Derrick to demonstrate a constitutional

violation. Perry, 150 Idaho at 226, 245 P.3d at 978. Derrick argues that the prosecutor's statement violated his constitutional rights to due process and a fair trial because the words "could" and "potentially" "refer to something that might happen, as opposed to something that is likely to happen"; therefore, Derrick contends, the prosecutor's use of those words, combined with her suggestion to the jury to "pick the word you like," "misrepresented and diminished her burden of proof" on the mental state element of the crime. (Appellant's brief, pp.9-10.) Derrick's argument is unavailing for at least two reasons.

First, the argument ignores the fact that the jury was specifically instructed that it must "apply the law set forth in [the court's] instructions," that it must "follow [the court's] instructions regardless of [the jury's] own opinion of what the law is or should be, or what either side may state the law to be," that it was to "follow all the rules" as explained by the court, and that "[i]f anyone states a rule of law different from any" provided by the court, it was the court's instruction that the jury "must follow." (R., pp.149, 168.) Derrick does not dispute that the actual elements instruction was a correct statement of the law; his only argument is effectively that the jury ignored that instruction and could have concluded he was guilty based on a lower standard than required by the court's instruction. The law, however, presumes the contrary. See, e.g., State v. Joy, 155 Idaho 1, 7, 304 P.3d 276, 282 (2013) ("Idaho appellate courts … presume that a jury follows the instructions it is given." (citation omitted)).

Second, despite the prosecutor's initial use of the words "could" and "potentially," a review of the prosecutor's substantive argument on the willfulness element shows the prosecutor did not urge the jury to convict on a lesser standard of proof than required by

the law as set forth in the court's instruction. Instead, the prosecutor argued that the evidence supported a finding that Derrick acted "willfully" because a reasonable person in his position would have known that punching R.B. in the stomach was "likely" to injure R.B. and/or to endanger his health and well-being. She stated:

> … What is the act? The act has been testified to as a punch to the stomach and/or a throw to the deck. A reasonable person, what does that mean? This instruction is not asking you to decide whether this defendant is reasonable. But it is asking you to decide what a reasonable person would know, given the facts of this case. What a reasonable person. The common man. The every man in our society. To do that, you need to look at what you know about Robert Derrick.
>
> Robert Derrick is an adult. He's 46 years old. He stands six foot tall, 175 pounds. He knows [R.B.] is 13, he knows [R.B.'s] height, he knows [R.B.'s] weight. Given these facts, Robert Derrick had reason to know that, as an adult with his height, with his weight, if he punched [R.B.], a child who was shorter and weighs less than him, that if he punches [R.B.] in the stomach, [R.B.'s] health or person likely or could be injured or endangered.

(Tr., p.524, L.15 – p.525, L.7), and

> Given all these facts, Robert Derrick had a reason to know that as an adult in a rage like he was at that time, if he punched [R.B.] in the stomach, [R.B.'s] health or person could likely be injured or endangered.

(Tr., p.526, Ls.16-19).

Even assuming Derrick could overcome the first prong of the Perry test for fundamental error, his claim of prosecutorial misconduct nevertheless fails on the second prong of the test, which requires Derrick to demonstrate that the error he asserts is "clear or obvious" on the record, without the need for any additional information, including whether the failure to object was a tactical decision. Perry, 150 Idaho at 226, 245 P.3d at 978. Derrick argues that, because the willfulness element of felony injury to a child "elevates the conduct from 'innocent mistakes in judgment' to a criminal offense," "there

is no tactical or strategic reason for defense counsel to fail to object to the prosecutor's misstatement of the law on [that] essential element of the crime." (Appellant's brief, pp.10-11 (citing State v. Young, 138 Idaho 370, 372-73, 64 P.3d 296, 298-99 (2002).) Derrick's argument is belied by a review of the trial record, which shows at least one conceivable reason why Derrick's counsel would not have objected to the prosecutor's argument, even assuming it misstated the law. Derrick's defense at trial was not that he did not *willfully* injure R.B., it was that he did not injure R.B. *at all*. (See generally Tr., p.116, L.8 – p.117, L.11, p.532, L.14 – p.547, L.2.) Derrick testified that he never punched R.B. in the stomach (Tr., p.405, Ls.8-14), and his counsel suggested, both through his examination of witnesses and during his closing argument, that R.B. sustained the injury to his spleen during an altercation with one of his step-siblings, when Derrick was not even present (Tr., p.157, L.23 – p.178, L.20, p.209, L.22 – p.225, L.16, p.291, L.7 – p.302, L.19, p.340, L.15 – p.343, L.9, p.365, L.22 – p.371, L.5, p.449, L.16 – p.457, L.12, p.461, L.20 – p.470, L.18, p.477, Ls.4-20, p.532, L.14 – p.547, L.2). Because Derrick denied the conduct forming the basis of the felony injury to child charge occurred at all, trial counsel would have gained nothing by objecting to the prosecutor's argument regarding the willfulness element and, in fact, could have reasonably concluded that doing so would only invite the jury to reach that element of the charge.

Finally, Derrick has failed to show he was actually prejudiced by the prosecutor's statement. Even assuming that the statement could be construed in a vacuum as having misstated the law, there is no reasonable probability it in any way "affected the outcome of the trial." Perry, 150 Idaho at 226, 245 P.3d at 978. In an attempt to carry his burden on this issue, Derrick merely rehashes his assertion that, "[i]f the jurors accepted the

prosecutor's invitation to pick the word he or she liked for the reasonable person standard, the State did not have to prove the elements of the offense beyond a reasonable doubt." (Appellant's brief, p.11.) Derrick's argument fails because, as explained in greater detail above, the district court specifically instructed the jury that it was to apply the law as set forth in the court's instructions, not as represented by counsel. (R., pp.149, 168.) Derrick has not even mentioned the court's instructions, much less made any effort to overcome the presumption that the jury followed them. Nor has Derrick acknowledged that his defense at trial was that he never injured R.B. at all, not that he did so but that his conduct was not "willful."

Admittedly, because the jury clearly rejected Derrick's version of events and found he was the person who caused R.B.'s injury, it was necessarily required to determine whether Derrick's conduct was willful. Derrick, however, never disputed that, if the jurors believed the state's witnesses' testimony that he punched R.B. in the abdomen, such conduct was anything other than willful. Nor could he because the state's evidence on this element was overwhelming. The evidence showed Derrick—who was six feet tall, weighed 175 pounds, and was "much stronger" than his 13-year-old stepson, R.B. (Tr., p.162, Ls.13-19, p.283, Ls.10-15)—"grabbed [R.B.] in a choke hold," dragged him across the room, punched him in the abdomen and threw him to the ground (Tr., p.139, L.1 – p.144, L.2, p.198, L.17 – p.202, L.16). The punch was so forceful that it caused R.B. to cry, made it difficult for him get up off the ground and, ultimately, lacerated his spleen. (Tr., p.202, L.18 – p.203, L.2, p.240, L.6 – p.249, L.9.) In light of this evidence, a rational jury who believed that Derrick punched R.B. in the manner testified to by the state's witnesses could only conclude that a reasonable person in

Derrick's position would have known that his conduct was "likely to result in injury or harm or [was] likely to endanger the person, health, safety or well-being of" R.B. and, as such, the conduct was willful.

In light of the foregoing evidence that overwhelmingly established Derrick's guilt on the "willfully" element of felony injury to a child, and assuming, as this Court must, that the jury followed the court's instructions, State v. Grantham, 146 Idaho 490, 498, 198 P.3d 128, 136 (Ct. App. 2008), there is no reasonable possibility the prosecutor's statement affected the outcome of the trial. Derrick has failed to carry his burden of demonstrating fundamental error with respect to his unpreserved claim of prosecutorial misconduct. This Court should therefore decline to review the claim for the first time on appeal.

II.
Derrick Has Failed To Show The District Court Abused Its Discretion In Concluding The State Laid Adequate Foundation For The Admission Of An Audio Recording Of A Portion Of Derrick's Interaction With Law Enforcement

A. Introduction And Relevant Facts

During the state's case-in-chief, R.B. and R.B.'s mother both testified that Derrick put R.B. in a headlock; then, using his free arm, Derrick punched R.B. in the stomach, opened a sliding glass door, and threw R.B. out the door and onto the deck of their home. (Tr., p.139, L.21 – p.144, L.5, p.160, L.14 – p.164, L.4, p.193, L.7 – p.203, L.12.) Officers Hayes and Jansen testified that they responded to Derrick's residence on the night of the charged crimes, and both officers testified regarding the substance of their conversations with Derrick and R.B.'s mother, as well as to their observations of Derrick's demeanor during their interactions with him. (Tr., p.272, L.3 – p.276, L.1,

p.280, L.6 – p.281, L.6, p.287, L.15 – p.289, L.1, p.348, L.15 – p.360, L.6, p.363, Ls.2-20.) During Officer Jansen's testimony, the state admitted several audio recordings, including a recording of Officer Jansen's and Officer Hayes' conversations with Derrick. (Tr., p.352, L.15 – p.363, L.23, p.367, Ls.15-20; State's Exhibits 5-8.) Officer Hayes testified his conversation with Derrick lasted approximately 35 minutes, but the audio recording that was being admitted (State's Exhibit 5) was not that long because it had been "condensed to omit" "dead space" and irrelevant information. (Tr., p.352, L.15 – p.355, L.13.) On the audio, Derrick denied having hit R.B. or R.B.'s mother but admitted to having "grabbed" R.B. "around the shoulders" because, according to Derrick, R.B. had come at him with a knife.[1] (State's Exhibit 5 at 3:10-3:40.)

Derrick testified in his own defense and denied having hit R.B. in the stomach. (Tr., p.405, Ls.8-14.) He admitted that he "grab[bed]" R.B. "[a]round his shoulders" but again claimed he did so because R.B. "came at [him] with a knife." (Tr., p.400, L.8 – p.401, L.7.) According to Derrick, he put one arm around R.B.'s shoulders and the other around R.B.'s knee, then walked R.B. through the door and "let go" of him on the deck. (Tr., p.400, Ls.19-24, p.403, L.4 – p.404, L.19.) When asked whether he had to slide the door open, Derrick responded, "No," and claimed the door was already open because it was "[h]ot out." (Tr., p.403, Ls.8-13.) Derrick implied that R.B. and R.B.'s mother were being untruthful when they testified that Derrick had one arm free to punch R.B. and open the door, explaining, "If I would have switched arms or taken one hand to the door, [R.B.]

[1] Derrick admitted that, by the time he grabbed R.B., R.B. had already dropped the knife and no longer posed any threat to him. (State's Exhibit 5 at 3:10-3:40; see also Tr., p.439, L.22 – p.440, L.7.)

would have gotten away for sure because I got a wiggly kid in my arm, one arm isn't going to control him." (Tr., p.403, Ls.20-23.) He also testified that he was nervous and shaky when talking to the police. (Tr., p.444, L.12 – p.445, L.10.)

During rebuttal, the state called Officer Hayes to give further testimony regarding his observations of Derrick's demeanor on the night of charged incident. Officer Hayes testified, contrary to Derrick's testimony, that it "was fairly cold" that night and, in fact, during his interaction with officers Derrick "asked if he could get a jacket." (Tr., p.478, L.20 – p.479, L.19.) He also testified that although Derrick seemed "a little bit" nervous and "anxious to get out of there," he did not appear to be "scared" and "seemed to make light of the situation." (Tr., p.479, L.20 – p.480, L.19.) Officer Hayes testified that both he and Officer Jansen recorded their interactions with Derrick. (Tr., p.481, Ls.3-8.) The prosecutor then handed Officer Hayes an "audio disk," marked as State's Exhibit 9, after which the following exchange occurred:

Q [By Prosecutor:] … Do you recognize that?

A Yes.

Q How is it that you recognize it?

A I recently reviewed this audio disk and signed the back of the disk or the envelope that it's in.

Q Are you in that audio?

A No.

Q Who's in that audio?

A Mr. Derrick and Officer Jansen.

Q And when you came out to talk to Mr. Derrick, did you – you were recording as well?

A Yes.

Q Did you compare your audio with Officer Jansen's?

A Not side by side, no.

Q You both were recording at the same time?

A Yes, we should have been.

Q What is on – what is on this audio?

A This is a conversation between Mr. Derrick and Officer Jansen while I was inside speaking with [R.B.'s mother].

Q Did you – did you recognize Mr. Derrick's voice on there?

A Yes.

Q Did you recognize Officer Jansen's voice on there?

A Yes.

Q And is that, I mean, from what you observed, is that an accurate copy of part of that conversation?

A Yes.

(Tr., p.481, L.9 – p.482, L.14 (bolding in original).)

Immediately following the above exchange, the prosecutor moved to admit the audio recording into evidence. (Tr., p.482, Ls.15-16.) Defense counsel objected, arguing the state had failed to lay adequate foundation for the exhibit's admission. (Tr., p.482, L.17.) Specifically, counsel argued:

> This is not – this is Officer Jansen's conversation, partial conversation. The State has said that they have recordings that overlap to some extent. I'm not sure he said these two overlap to some extent. I just don't think that the foundation for Officer Jansen's conversation can be laid second-handedly by Officer Hayes.

(Tr., p.482, Ls.19-25.)[2] Before ruling on the objection, the district court sought clarification whether the portion of the conversation that was contained in State's Exhibit 9 was included in any of the previously admitted audio recordings. (Tr., p.483, Ls.1-5.) The prosecutor responded, "No, it's not," and explained, "This is part of the extra stuff that was taken out, like the joking and talking about the weather and things like that." (Tr., p.483, Ls.4-8.) With that clarification, the court overruled Derrick's foundation objection and admitted the exhibit, reasoning:

> The witness has testified that as to what this audio is. It purports to be statements of the defendant, which are certainly admissible. There's no indication of lack of accuracy of the recordings, so I think there's sufficient foundation.

(Tr., p.483, Ls.9-15). The state then published the audio recording, on which Derrick could be heard telling Officer Jansen that he was "kind of chilly," asking if he could "grab [his] jacket," and intermittently laughing and making jokes throughout the recorded conversation. (See generally State's Exhibit 9.)

On appeal, Derrick "asserts the district court abused its discretion by admitting the audio recording of a portion of his conversation with Officer Jansen (State's Exhibit 9)," contending "the State did not provide a proper foundation to authenticate the recording as an accurate and complete representation of that portion of the conversation."

[2] Although it is not entirely clear from the trial transcript why the prosecutor did not call Officer Jansen to lay foundation for the admission of State's Exhibit 9, it appears likely the prosecutor did not do so because Officer Jansen was ill and was almost unable to appear and testify in the state's case-in-chief. (Compare Tr., p.345, L.20 – p.348, L.2 (court recessing trial at 10:20 a.m. on December 21, 2016, after prosecutor represented that Officer Jansen was ill and unable to appear as a witness) with p.348, Ls.5-19 (trial resumes at 11:02 a.m. on December 21, 2016, and Officer Jansen takes the stand and testifies in state's case-in-chief) and p.478, L.10 – p.488, L.22 (prosecutor calls Officer Hayes as sole rebuttal witness on afternoon of December 21, 2016).)

(Appellant's brief, p.12.) Derrick's argument fails. Application of the law to the facts of this case supports the district court's determination that the state presented adequate foundation for the admission of the audio recording. Even if the court erred in its evidentiary ruling, the error was harmless and did not violate Derrick's substantial rights.

B. Standard Of Review

The trial court has broad discretion in determining the admissibility of evidence. State v. Harris, 141 Idaho 721, 724, 117 P.3d 135, 138 (Ct. App. 2005). A trial court's determination of whether evidence is supported by proper foundation is reviewed on appeal for an abuse of discretion standard. E.g., State v. Sheahan, 139 Idaho 267, 276, 77 P.3d 956, 965 (2003); State v. Bradley, 158 Idaho 66, 69, 343 P.3d 508, 511 (Ct. App. 2015); State v. Salazar, 153 Idaho 24, 26, 278 P.3d 426, 428 (Ct. App. 2012).

C. The State Laid Adequate Foundation For The Admission Of The Audio Recording

The foundational requirements for the admission of evidence are governed by Idaho Rule of Evidence 901, which provides:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

I.R.E. 901(a). Rule 901(b) sets forth "an illustrative, but not exhaustive" list of examples of ways in which the foundational requirements of I.R.E. 901(a) may be satisfied. State v. Koch, 157 Idaho 89, 96, 334 P.3d 280, 287 (2014); Bradley, 158 Idaho at 69, 343 P.3d at 511. Relevant to this case, foundation may be established through the "[t]estimony of a witness with knowledge that a matter is what it is claimed to be," I.R.E. 901(b)(1); by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics,

taken in conjunction with circumstances," I.R.E. 901(b)(4); and by "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker," I.R.E. 901(b)(5).

A review of the record in this case in light of the requirements of I.R.E. 901 supports the district court's discretionary determination that the state laid adequate foundation for the admission of State's Exhibit 9. Officer Hayes testified that he had "recently reviewed" the audio recording and recognized it as "a conversation between Mr. Derrick and Officer Jansen." (Tr., p.481, L.9 – p.482, L.5.) Although the officer testified he was not present during the portion of the conversation captured on State's Exhibit 9 (Tr., p.482, Ls.2-5), he personally participated in other conversations with Derrick and Officer Jansen on the night in question, he was aware that Officer Jansen was recording his interactions with Derrick, and he recognized Derrick's and Officer Jansen's voices on the audio recording (Tr., p.481, L.6 – p.482, L.11). Moreover, Officer Jansen had previously testified to having recorded his 35-minute conversation with Derrick, and his testimony established the foundation for the admission of State's Exhibit 5, which he represented was an audio recording of the conversation that had been "condensed to omit" "dead space" and casual conversation "about cars and stuff like that." (Tr., p.352, L.15 – p.355, L.14.) Finally, when asked by the district court whether the audio recording captured on State's Exhibit 9 was included in any of the previously admitted audio exhibits, the prosecutor clarified that it was not and explained, "This is part of the extra stuff that was taken out, like the joking and talking about the weather and things like that." (Tr., p.483, Ls.1-8.)

In light of the foregoing evidence, the district court acted well within its discretion in concluding the state met its burden under I.R.E. 901(a) of presenting "evidence sufficient to support a finding that [State's Exhibit 9] [was] what its proponent claim[ed]": an audio recording of part of Derrick's conversation with Officer Jansen on the night of the charged crimes. Officer Hayes' testimony that he was present on the night in question, was aware that Officer Jansen was recording his conversation with Derrick, and had reviewed the audio recording and recognized both Derrick's and Officer Jansen's voices on it was sufficient, by itself, to satisfy the foundational showings contemplated by I.R.E. 901(b)(1) ("[t]estimony of a witness with knowledge that a matter is what it is claimed to be") and 901(b)(5) (voice identification). That testimony, combined with Officer Jansen's prior testimony regarding having recorded his 35-minute conversation with Derrick—only a "condensed" portion of which had been previously admitted—also provided sufficient circumstantial evidence to establish that State's Exhibit 9 was, as the state claimed, an audio recording of a portion of the conversation that had been redacted from State's Exhibit 5. See I.R.E. 901(b)(4) (authentication requirements of I.R.E. 901(a) may be established by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances"); cf., Koch, 157 Idaho at 96-98, 334 P.3d at 287-289 (foundation for admission of text messages may be established by circumstantial evidence). Because the state presented sufficient evidence to satisfy the foundational requirements for admission of State's Exhibit 9, Derrick cannot show the district court abused its discretion in overruling his foundation objection and admitting the exhibit.

Citing State v. Bradley, *supra*, Derrick argues the state's foundational showing was not sufficient because, having not been present during the portion of the conversation captured on State's Exhibit 9, and having not set up Officer Jansen's recording device, "Officer Hayes did not have the knowledge to testify that the audio recording is what it is claimed to be—a complete and accurate recording of that portion of the conversation between Mr. Derrick and Officer Jansen." (Appellant's brief, pp.13-18.) The state acknowledges the factual distinctions between Bradley and this case—specifically, that the officer through whose testimony the state laid foundation for the admission of audio recordings of two telephone conversations in Bradley "testified that he set up the recording device, was present during both phone calls" and "heard a majority of what was said during the telephone conversation," and had "reviewed the audio recordings and they accurately reflected what he heard while the device was recording." Bradley, 158 Idaho at 69, 343 P.3d at 511. Contrary to Derrick's assertions, however, these factual distinctions do not compel a finding that the state failed to lay sufficient foundation for the admission of the audio recording at issue in this case; while the Court in Bradley held the evidence in that case was *sufficient* to establish foundation for admission of the audio recordings, the Court did not hold the presentation of such evidence is the *only* means by which the state can meet its burden of establishing the authentication requirement of I.R.E. 901(a). In fact, both I.R.E. 901 and the case law interpreting it (and its federal counterpart) suggest the opposite.

As noted above, I.R.E. 901(b)(4) specifically contemplates that the foundational requirements of I.R.E. 901(a) may be satisfied by reference to the proffered exhibit's "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics,

taken in conjunction with circumstances." Consistent with the language of this provision, the Idaho Supreme Court has held, albeit in the context of addressing the foundational requirements for the admission of emails and text messages, that the proponent of evidence may demonstrate its authenticity through circumstantial evidence. Koch, 157 Idaho at 97, 334 P.3d at 288; see also id. at 96, 334 P.3d at 287 (citing State v. Thompson, 777 N.W.2d 617, 624 (N.D. 2010) ("[C]ourts have held that circumstantial evidence establishing that the evidence was what the proponent claimed it to be was sufficient."). Courts interpreting Federal Rule of Evidence 901—the federal counterpart of I.R.E. 901—likewise hold that the authenticity of evidence, including audio recordings, may be established circumstantially. See, e.g., United States v. Collins, 715 F.3d 1032, 1035-37 (7th Cir. 2013) (finding "government provided ample circumstantial evidence" to establish "accuracy and trustworthiness" of proffered audio recordings); Lexington Ins. Co. v. Western Pennsylvania Hospital, 423 F.3d 318, 328-29 (3rd Cir. 2005) (noting "the burden of proof for authentication is slight" and may be satisfied through the presentation of circumstantial evidence" (internal quotations, brackets and citations omitted)); United States v. Hawkins, 905 F.2d 1489, 1493 (11th Cir. 1990) ("There need be only some competent evidence in the record to support authentication, which can consist of merely circumstantial evidence." (internal quotations and citation omitted)).

Because the state could meet it burden of establishing foundation for the admission of State's Exhibit 9 by either direct or circumstantial evidence, the fact that Officer Hayes was not personally present during the portion of the conversation contained on that exhibit was not fatal to its admission. As noted above, Officer Hayes was present during other portions of the conversation between Officer Jansen and Derrick, was aware

that Officer Jansen was recording the conversation, and recognized both Officer Jansen's and Derrick's voices on the audio recording. This testimony, combined with Officer Jansen's prior testimony regarding his conversation with Derrick and his recording thereof, was sufficient evidence that, "taken in conjunction with [the] circumstances," I.R.E. 901(b)(4), supported the district court's finding that State's Exhibit 9 was, as the state claimed, an audio recording of a portion of Officer Jansen's conversation with Derrick on the night of the charged crimes.

To the extent Derrick is arguing on appeal that the state failed to lay adequate foundation for the admission of State's Exhibit 9 because Officer Hayes had no personal knowledge whether the recording had been modified, such argument *is* directly controlled, and foreclosed, by Bradley, *supra*. Like the argument Derrick appears to be making in this case, Bradley argued that, because the officer through whose testimony the state sought to admit the audio recordings at issue in that case "did not hear every word of the recorded conversations, he could not know if the recordings had been modified or not." Bradley, 158 Idaho at 69, 343 P.3d at 511. While the Idaho Court of Appeals "agree[d] that a proper foundation for an audio recording ought to include evidence that it has not been modified," the Court declined to hold that such showing could be made "only through direct testimony denying tampering." Id. The Court accepted the officer's testimony that the recordings "were an accurate representation of the conversations he recorded" as an "[i]mplicit" representation that the recordings "were not modified." Id. at 70, 343 P.3d at 512. The Court also noted that Bradley "pointed to nothing in the recordings, or any other evidence at trial, that would indicate the recordings had been modified." Id. Because Bradley "merely speculate[d] that the recordings could have

been modified by some unknown party," he "failed to raise a colorable assertion of any defect in the audio recordings," sufficient to show error in their admission. Id.

Like Bradley, Derrick has pointed to nothing in State's Exhibit 9 or to any other evidence in the trial record that would indicate the audio recording of Officer Jansen's partial conversation with Derrick had been modified. (See Appellant's brief, pp.13-19.) Nor did he ever claim a lack of accuracy below. (See Tr., p.482, Ls.19-25 (objecting to admission of State's Exhibit 9 based on argument that "foundation for Officer Jansen's conversation" could not "be laid second-handedly by Officer Hayes"), p.483, Ls.9-15 (trial court overruling foundation objection because, *inter alia*, there was "no indication of lack of accuracy of the recordings").) Instead, like Bradley, Derrick merely speculates that the recording could have been modified, and he does so even though he was a party to the recorded conversation. While it was the state's burden below to present evidence that the recording accurately portrayed the conversation between Officer Jansen and Derrick, it met that burden through the presentation of the circumstantial evidence, discussed above, that demonstrated the exhibit was what the state purported it to be. Because Derrick never challenged the accuracy of the exhibit, either before or after its admission, Derrick, like Bradley, has failed to raise a colorable claim of any defect in the recording and has, thus, failed to show the district court abused its discretion in admitting State's Exhibit 9 over his foundation objection.

D. Even If The Trial Court Abused Its Discretion In Admitting The Audio Recording Over Derrick's Foundation Objection, The Error Was Harmless

Even when the trial court has abused its discretion, such "abuse of discretion may be deemed harmless if a substantial right is not affected. In the case of an incorrect ruling

regarding evidence, this Court will grant relief on appeal only if the error affects a substantial right of one of the parties." State v. Shackelford, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010); accord I.R.E. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected …."); I.C.R. 52 ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). "An error is harmless if a reviewing court can find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence." State v. Vondenkamp, 141 Idaho 878, 887, 119 P.3d 653, 662 (Ct. App. 2005).

Even if the district court abused its discretion in admitting State's Exhibit 9, the error did not affect Derrick's substantial rights. The state offered the exhibit in rebuttal, to counter Derrick's testimony that it was hot outside on the night of the charged crimes and that he was nervous when talking with the police. (Tr., p.478, L.20 – p.485, L.21.) On the recording, Derrick told Officer Jansen that he was "kind of chilly" and he asked and was granted permission to get his jacket out of his vehicle. (State's Exhibit 9 at 0:10-0:50.) He also intermittently laughed and made jokes during the recorded conversation. (See generally State's Exhibit 9.) This evidence did tend to rebut Derrick's testimony that it was hot outside, but it was not necessarily inconsistent with Derrick's claim that he was nervous and, in any event, it was entirely cumulative of evidence that had already been admitted.

During the state's case-in-chief Officer Jansen testified that Derrick "seemed very nervous" and that "[h]e was cracking jokes and just had a very nervous feel to him." (Tr., p.363, Ls.2-14.) Officer Hayes likewise testified during the state's rebuttal case (but

before State's Exhibit 9 was admitted) that Derrick seemed "[a] little bit nervous" and "anxious to get out of there," but that he also "seemed to make light of the situation." (Tr., p.479, L.20 – p.480, L.19.) He also testified that it "was fairly cold" outside on the night in question and that, based on his review of an audio—which had not yet been offered or admitted—he knew Derrick had asked for a jacket. (Tr., p.478, L.20 – p.479, L.19.)

Considering the trial record as a whole, it is clear that Derrick's recorded statements contained on State's Exhibit 9 were, at worst, merely cumulative of evidence the jury had already received. As such, the admission of those statements, even if error, was harmless. See State v. Gerardo, 147 Idaho 22, 27, 205 P.3d 671, 676 (Ct. App. 2009) (error in admission of evidence was harmless where "erroneously admitted evidence was merely cumulative" of other evidence presented at trial). Moreover, because State's Exhibit 9 did not actually rebut Derrick's testimony that he was nervous, and because both officers testified that Derrick did seem nervous during their encounters with him, there is no reasonable possibility that the audio recording offered in rebuttal affected the outcome of the trial. If there was error it was harmless.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Derrick guilty of felony injury to a child.

DATED this 23rd day of February, 2018.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of February, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

LAF/dd