11-17-2017

State v. Derrick Appellant's Brief Dckt. 44985

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44985**
Plaintiff-Respondent,	)	
	)	**TWIN FALLS COUNTY NO.**
v.	)	**CR42-16-5588**
	)	
ROBERT SNOW DERRICK,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE RANDY J. STOKER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

A jury found Robert Snow Derrick guilty of felony injury to a child. The mental state for this offense is "willfully," which is explicitly defined by statute. During closing argument, the prosecutor misstated the law on the willful mental state and therefore committed misconduct. Mr. Derrick asserts this prosecutorial misconduct clearly violated his unwaived constitutional right to a fair trial and was not harmless. In addition, Mr. Derrick contends the district court abused its discretion by admitting an audio recording of his conversation with a police officer because the State did not establish proper foundation.

Statement of Facts and Course of Proceedings

The State charged Mr. Derrick with felony injury to a child, in violation of I.C. § 18-1501(1), for punching his thirteen-year-old stepson, R.B., in the abdomen and/or spleen.[1] (R., pp.69–70.) Mr. Derrick pled not guilty and exercised his right to a jury trial. (R., p.75.)

At trial, R.B. testified that Mr. Derrick put him in a chokehold after R.B. had pulled a kitchen knife on Mr. Derrick. (Tr., p.197, L.2–p.200, L.16.) R.B. said that Mr. Derrick then punched him in the stomach and threw him outside on the back patio. (Tr., p.199, L.20–p.200, L.16, p.201, L.10–p.203, L.11.) Ms. Derrick, who was R.B.'s mother, two doctors that treated R.B., and three police officers also testified in the State's case-in-chief. (*See generally* Tr., p.117, L.20–p.186, L.9 (Ms. Derrick); p.232, L.2–p.256, L.15 (Dr. D'Angelo); p.272, L.3–p.304, L.25 (Officer Hayes); p.306, L.16–p.317, L.13 (Officer Cyr); p.317, L.20–p.345, L.11 (Dr. Lamb); p.348, L.15–p.372, L.10 (Officer Jansen).). Mr. Derrick testified in his defense. (*See generally*

Tr., p.380, L.18–p.448, L.17.) He admitted that he grabbed R.B. and tossed him outside, but he denied hitting him in the stomach. (Tr., p.400, L.9–p.405, L.14.)

On rebuttal, the State sought to admit an audio recording of Mr. Derrick's conversation with a police officer on the night of the alleged offense (State's Exhibit 9). (Tr., p.481, L.2–p.483, L.21; State's Ex. 9.) Officer Hayes and Officer Jansen had both arrived at the scene, and Officer Jansen interviewed Mr. Derrick while Officer Hayes interviewed Ms. Derrick. (Tr., p.273, L.15–p.276, L.6 (Officer Hayes); p.349, L.23–p.353, L.6 (Officer Jansen). Officer Jansen testified that they both had their audio recorders on. (Tr., p.353, Ls.7–21, p.481, L.6–p.482, L.5.) In seeking to admit this recording of Officer Jansen's conversation with Mr. Derrick, the State did not call Officer Jansen to lay a foundation. The State called Officer Hayes instead. (Tr., p.480, L.20–p.482, L.16.) Mr. Derrick objected for lack of foundation. (Tr., p.482, Ls.17–25.) The district court overruled his objection and admitted the recording. (Tr., p.483, Ls.9–10, 18–19.) The district court reasoned, "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.10–15.) The State then played the recording for the jury. (Tr., p.483, L.24.) The State used this recording to impeach Mr. Derrick regarding his demeanor during his interaction with the police and his recollection of the events in question. (Tr., p.414, Ls.4–14, p.429, L.21–p.431, L.14, p.444, L.2–p.447, L.25, p.484, L.1–p.485, L.16.) For example, Mr. Derrick testified that he was nervous and shaky, but, in the audio recording, he can be heard speaking casually and joking. (*Compare* Tr., p.444, L.12–p.445, L.8, *with* State's Ex. 9.)

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[1] Mr. Derrick was also charged with misdemeanor domestic battery in the presence of a child, R.B., for striking his wife, Ms. Derrick, during the same course of events. (R., p.70.) The jury found him not guilty of this charge. (Tr., p.559, Ls.7–9; R., pp.164, 180)

After the presentation of evidence, the district court and the parties discussed the final jury instructions. (*See generally* Tr., p.494, L.6–p.506, L.16.) The district court explained, and the prosecutor agreed, that the definition of willful for felony injury to a child was different from the standard definition of willful in the Idaho Code. (Tr., p.500, L.16–p.501, L.14.) *Compare* I.C. § 18-101(1) ("wilfully" definition), *with* I.C. § 18-1501(5) ("willfully" definition for this section). The instruction proposed by the district court read: "The 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 (emphasis added).) The prosecutor commented, "I don't know that I like the word likely as opposed to potentially." (Tr., p.501, Ls.18–20.) The district court did not address this comment and moved on to the next instruction. (Tr., p.501, Ls.20–22.) There was no further discussion of the willful definition for felony injury to a child during the final jury instruction conference. (*See generally* Tr., p.494, L.6–p.506, L.16.)

For felony injury to a child, the district court instructed the jury:

> In order for the defendant to be guilty of Felony Injury to a Child, the State must prove each of the following:
>
> 1. On or about May 16, 2016
>
> 2. in the State of Idaho
>
> 3. the defendant, Robert Snow Derrick,
>
> 4. had the care or custody of [R.B.]
>
> 5. who was a child under 18 years of age, and
>
> 6. the defendant willfully, by causing a traumatic injury to [R.B.]'s abdomen and/or spleen, caused [R.B.]'s person or health to be injured, and
>
> 7. the above occurred under circumstances or conditions likely to produce great bodily harm or death to [R.B.]

> If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.
>
> The 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 (Instruction No. 13.1) (emphasis added); Tr., p.511, Ls.16–20.)

In her closing argument, the prosecutor circled back to her concern with the willful instruction. She argued in closing to the jury:

> 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. So let's break this down. . . .

(Tr., p.524, Ls.8–14 (emphasis added).) After further argument, the prosecutor stated, "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.525, Ls.2–7.) Similarly, the prosecutor stated after additional argument, "Given all the 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.) The jury found Mr. Derrick guilty of felony injury to a child. (Tr., p.559, Ls.4–6; R., p.164.)

The district court sentenced Mr. Derrick to ten years, with two years fixed. (Tr., p.602, Ls.13–15; R., pp.198–202.) Mr. Derrick timely appealed from the district court's judgment of conviction. (R., pp.206–08.)

ISSUES

I. Did the prosecutor commit misconduct and thereby violate 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?

ARGUMENT

I.

The Prosecutor Committed Misconduct And Thereby Violated Mr. Derrick's Unwaived Constitutional Rights To Due Process And A Fair Trial When The Prosecutor Misstated The Law In Her Closing Argument

A. Introduction

Mr. Derrick contends his unwaived constitutional rights to due process and a fair trial were violated when the prosecutor misstated the law to the jury in her closing argument. He further contends this error is clear from the record and was not harmless.

B. Standard Of Review

This Court reviews unobjected-to prosecutorial misconduct pursuant to the fundamental error standard:

> Such review includes a three-prong inquiry wherein 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.

State v. Perry, 150 Idaho 209, 227, 228 (2010).

C. The Prosecutor Committed Misconduct When She Told The Jurors To "Pick The Word You Like" For The Charged Offense's Mental State

Mr. Derrick contends the prosecutor committed misconduct by misstating the law in her closing argument. He did not object to the misconduct, so he must show fundamental error on appeal. Mr. Derrick submits this standard has been met because the prosecutorial misconduct violated his unwaived Fourteenth Amendment rights to due process and a fair trial, is obvious from the record, and was not harmless.

"[E]very defendant has a Fourteenth Amendment right to due process and '[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Perry*, 150 Idaho at 224 (second and third alterations in original) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009)) "Prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process under the Fourteenth Amendment to the United States Constitution." *State v. Jimenez*, 159 Idaho 466, 472 (Ct. App. 2015) (citing *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Perry*, 150 Idaho at 227; *State v. Gamble*, 146 Idaho 331, 344 (Ct. App. 2008)). "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227.

> Closing argument is an opportunity for the attorneys on each side to clarify the issues that must be resolved by the jury; to review the evidence and discuss, from the parties' respective standpoints, the inferences that jurors should draw therefrom; and to discuss the law set forth in the jury instructions as it applies to the trial evidence.

State v. Erickson, 148 Idaho 679, 685 (Ct. App. 2010) (citing *State v. Beebe*, 145 Idaho 570, 576 (Ct. App. 2007)). "Both sides have traditionally been afforded considerable latitude in closing argument to the jury . . . ." *State v. Sheahan*, 139 Idaho 267, 280 (2003). "Considerable latitude, however, has its limits, both in matters expressly stated and those implied." *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). "Urgings, explicit or implied, for the jury to render a verdict based on factors other than the evidence admitted at trial and the law contained in the jury instructions have no place in closing arguments." *Erickson*, 148 Idaho at 685 (quoting *Beebe*, 145 Idaho at 576)).

"It is prosecutorial misconduct to misrepresent the State's burden to prove an accused's guilt beyond a reasonable doubt." *State v. Herrera*, 152 Idaho 24, 31 (Ct. App. 2011). It is also "prosecutorial misconduct for a prosecutor to misstate the law in closing arguments." *State v. Iverson*, 155 Idaho 766, 771 (Ct. App. 2014) (citing *State v. Coffin*, 146 Idaho 166, 170 (Ct. App. 2008); *Phillips*, 144 Idaho at 86).

Here, the prosecutor committed misconduct because she misstated the law on the willful mental state during her closing argument. The mental state of willfulness for felony injury to a child is explicitly defined in the statute: "As used in this section, 'willfully' 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) (emphasis added). Moreover, the standard criminal jury instruction for felony injury to a child uses this same definition: "The word 'willfully' 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." Idaho Criminal Jury Instruction 1244 (emphasis added). The jury instruction here mirrored these definitions, instructing the jury: "The 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."[2] (R., p.173 (emphasis added).) Thus, the definition of willfulness for felony injury to a child is beyond dispute. It requires the State to prove, beyond a reasonable doubt, a reasonable person would know the act is *likely* to result in injury, harm, or endangerment to the child.

[2] The jury instruction in this case omitted the statute's and standard instruction's reference to "failing to act" because the alleged crime here was not a failure to act, but rather the act of punching R.B.

Despite this undisputed definition, the prosecutor here chose to advance a different definition of willfulness to the jury. And she urged the jury to "pick the word you like" when evaluating Mr. Derrick's mental state for the charged offense. The prosecutor argued:

> 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. So let's break this down. . . .

(Tr., p.524, Ls.8–14 (emphasis added).) Although prosecutor acknowledged the district court used "likely," she told the jurors to "pick the word you like" and offered some examples of "could" or "potentially." Essentially, the prosecutor told the jury that they could select and apply their own reasonable person standard. Later on, the prosecutor applied her preferred definition of willfully to the facts of the case. She argued Mr. Derrick "had reason to know" R.B. "*likely or could be* injured or endangered." (Tr., p.525, Ls.2–7.) She also argued Mr. Derrick "had a reason to know . . . [R.B.]'s health or person *could likely* be injured or endangered." (Tr., p.526, Ls.16–19.) This was prosecutorial misconduct. The "only plausible reasoning" for the prosecutor's closing argument was that she was arguing the jury could convict Mr. Derrick for injuring R.B. even the jury found a reasonable person would only know that the act of punching R.B. could or potentially injure him, as opposed to a likely injury. *See Coffin*, 146 Idaho at 171. "This is in direct contravention" to the jury instruction "as well as the requirement" of the felony injury to a child statute. *See id.*

This distinction between "likely," "could," and "potentially" matters because these words have different meanings. "Likely" means "having a high probability of occurring or being true" and "very probable." Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/likely (last visited November 16, 2017). The probability of occurrence is

much lower with "could" or "potentially." "Can," the present tense of "could," is defined in relevant part as "used to indicate possibility." Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/can (last visited November 16, 2017). Similarly, "potentially" means "existing in possibility: capable of development into actuality" and "expressing possibility; specifically: of, relating to, or constituting a verb phrase expressing possibility, liberty, or power by the use of an auxiliary with the infinitive of the verb (as in 'it may rain')." Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/potentially (last visited November 16, 2017) (italics omitted). These definitions refer to something that might happen, as opposed to something that is likely to happen. By informing the jury that they only had to find reasonable person could, potentially, or might know the act would cause injury, the prosecutor mispresented and diminished her burden of proof on Mr. Derrick's mental statute. Accordingly, Mr. Derrick has met his burden show to a violation of his constitutional rights to due process and a fair trial because the prosecutor committed misconduct in misrepresenting the law on a critical element of the crime to the jury.

Further, this constitutional violation is clear and plain from the record. It is well established that misstatements of the law constitute misconduct. *Iverson*, 155 Idaho at 771; *Coffin*, 146 Idaho at 170; *Phillips*, 144 Idaho at 86. It is also well established that "willfulness is plainly an element of this crime." *State v. Gonzales*, 158 Idaho 112, 117 (Ct. App. 2015) (citing *State v. Jones*, 140 Idaho 755, 758 (2004); *State v. Young*, 138 Idaho 370, 372–73 (2002)). "Willfulness is a necessary element of felony injury to a child because it is named in the statute and without willful intent the information would describe a non-crime." *Jones*, 140 Idaho at 758 (citing *Young*, 138 Idaho at 372–73). It follows that there is no tactical or strategic reason for defense counsel to fail to object to the prosecutor's misstatement of the law on an essential

element of the crime, especially the very element that elevates the conduct from "innocent mistakes in judgment" to a criminal offense. *See Young*, 138 Idaho at 373. Defense counsel gains no benefit or advantage by allowing the prosecutor—who occupies an official position that necessarily leads jurors to give more credence to his or her statements—to misrepresent the law to the jury. *See Phillips*, 144 Idaho at 87 (quoting *State v. Irwin*, 9 Idaho 35, 43–44 (1903)) ("Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused."). In mispresenting the law, the prosecutor encouraged the jury to apply a lesser burden of proof to the mental state element. The prosecutor also encouraged the jury to "pick the word you like" on the reasonable person standard. Each juror could have applied his or her own reasonable person standard instead of following the district court's instruction. A reasonable jurist would have wanted the jury to be properly instructed and not misinformed by the prosecutor. Thus, Mr. Derrick has met his burden to show the violation of his unwaived constitutional rights to due process and a fair trial plainly exists.

Finally, this error was not harmless. An error is not harmless "if there is a reasonable possibility that the error affected the outcome of the trial." *Perry*, 150 Idaho at 226. If 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. The State effectively reduced or diminished its burden of proof at trial. It cannot be said that the possibility that the jury failed to find all the essential elements of the offense beyond a reasonable doubt was a harmless error. Mr. Derrick asserts the prosecutorial misconduct in this case "affected [his] substantial rights" and was not harmless. *Id.*

II.

The District Court Abused Its Discretion When It Admitted An Audio Recording Without A Proper Foundation From The State

A. Introduction

Mr. 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). Specifically, he argues the State did not provide a proper foundation to authenticate the recording as an accurate and complete representation of that portion of the conversation.

B. Standard Of Review

"The decision whether to admit evidence at trial is generally within the province of the trial court. A trial court's determination that evidence is supported by a proper foundation is reviewed for an abuse of discretion." *State v. Bradley*, 158 Idaho 66, 69 (Ct. App. 2015) (citation omitted). On review of a district court's discretionary decision, the Court examines: "(1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *State v. Parker*, 157 Idaho 132, 138 (2014) (quoting *State v. Shackelford*, 150 Idaho 355, 363 (2010)).

The Court reviews preserved errors under the harmless error standard: "A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." *Perry*, 150 Idaho at 222.

C. The State Did Not Provide A Proper Foundation For Admission Of The Audio Recording Because Officer Hayes Had No Knowledge Of The Accuracy Of Officer Jansen's Recording

Mr. Derrick contends the State failed to establish a proper foundation of Officer Jansen's recording as an accurate and complete representation of that portion of their conversation. Mr. Derrick objected for lack of foundation when the State sought to admit State's Exhibit 9 during its rebuttal. (Tr., p.482, Ls.17–25). On appeal, Mr. Derrick has the burden to show the district court erred, at which point the burden shifts to the State to prove beyond a reasonable doubt the error was harmless.

Idaho Rule of Evidence 901 states: "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). The rule also contains "an illustrative, but not exhaustive, list," *Bradley*, 158 Idaho at 69, of "examples of authentication or identification conforming with the requirements of this rule," I.R.E. 901(b). Relevant here, the rule lists "[t]estimony of a witness with knowledge that a matter is what it is claimed to be" as one way to establish foundation. I.R.E. 901(b)(1).

The Court of Appeals recently examined authentication and identification of audio recordings in *Bradley*. There, the district court admitted audio recordings of two telephone conversations between the defendant and a confidential informant. 158 Idaho at 68. A police sergeant recorded the calls and was present for both. *Id.* The sergeant admitted he could not hear everything the speaker (later identified as the defendant) said on the other end of the call, but he "testified that he reviewed the audio recordings of the two calls and they accurately represented the audio he recorded." *Id.* The Court of Appeals held that a proper foundation was laid, even though the sergeant could not hear "every single word" of the conversation. *Id.* at 69. The Court

of Appeals reasoned that the sergeant "set up the recording device," was present for both calls, "heard a majority of what was said during the telephone calls," "testified to the approximate length of the conversations," and testified that the recordings were an accurate reflection of what he heard. *Id.* Further, the Court of Appeals noted, "There was no indication that the device was not working properly or it somehow failed to pick up portions of the conversation." *Id.* The Court of Appeals agreed that "a proper foundation for an audio recording ought to include evidence that it has not been modified," but declined to require direct testimony denying modification. The Court of Appeals stated that evidence of accuracy and completeness can be implied. *Id.* at 69–70. In light of the sergeant's testimony, and other testimony identifying the defendant as the speaker, the Court of Appeals held the district court properly admitted the recordings. *Id.*

Here, Officer Hayes's testimony was insufficient to support a finding that Officer Jansen's audio recording was what the State claimed it to be. In support of the foundation for admission of State's Exhibit 9, Officer Hayes testified:

> Q. What's been marked as State's Exhibit 9. When you were out with Mr. Derrick, did you have an audio?
>
> A. Yes.
>
> Q. So were you able to record some of what was being said while Officer Jansen also had an audio?
>
> A. Yes.
>
> Q. And I just handed you what's been marked as State's Exhibit 9. 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 Tina Derrick.

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.

[Prosecutor]: Your Honor, we'd move to admit State's Exhibit 9.

(Tr., p.481, L.2–p.482, L.16.) This testimony was inadequate to prove foundation. Unlike the sergeant in *Bradley*, Officer Hayes was not present during Officer Jansen's conversation. Officer Hayes was inside the residence with Ms. Derrick, and Officer Jansen and Mr. Derrick were outside. (Tr., p.275, L.21–p.276, L.4, p.351, L.23–p.352, L.18) Officer Hayes did not hear this portion of their conversation at the time it was being recording. Nor did he set up Officer Jansen's recording device. While Officer Hayes may have had the knowledge to identify Mr. Derrick's and Officer Jansen's voices, 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.

Further, Officer Jansen's testimony during the State's case-in-chief did not bolster Officer Hayes's testimony on the recording's authenticity. In the State's case-in-chief, the State sought to admit a different recording by Officer Jansen and relied on Officer Jansen's testimony to lay the foundation. (Tr., p.353, L.5–p.354, L.25.) Officer Jansen testified:

Q. How long do you think you talked [to Mr. Derrick]?

A. Approximately 35 minutes.

Q. And when you go, I guess, out on a call, do you wear a recorder?

A. I do.

Q. Is a recorder the right name, or is audio a better term?

A. An audio recorder.

Q. Did you record your conversation with Mr. Derrick?

A. I did.

Q. And then once you get back, I guess to the station, what do you do with that recording?

A. That recording is submitted into evidence and attached to the report.

Q. And did you do that in this case?

A. I did.

Q. I'm going to hand you what's been marked State's Exhibit 5. And is that exhibit marked by you, dated by you in any way?

A. Yes.

Q. And where is that?

A. I initialed and dated it on the back.

Q. And did you listen to that exhibit?

A. I did.

Q. And what is that a recording of?

A. It has two separate recordings from my contact with Mr. Derrick as well as a phone conversation between Mr. Derrick and his sister, actually.

Q. Okay. So in this recording, did you listen to it recently?

A. I did.

Q. And is it an adequate or accurate, I guess, recording of what you and Mr. Derrick talked about?

A. It is.

(Tr., p.353, L.5–p.354, L.14.) After this testimony, the State moved for admission of State's Exhibit 5, and Mr. Derrick recognized "a proper foundation has been laid." (Tr., p.354, Ls.15–21.) The district court admitted State's Exhibit 5. (Tr., p.354, Ls.24–25.) Officer Jansen then testified:

Q. Is that audio 35 minutes long?

A. It is not.

Q. Is there -- why is it shorter, I guess I should ask?

A. It's been condensed to omit some of the --

Q. Was there, like dead space time?

A. Yeah.

Q. Things talking about cars and stuff like that?

A. Yes.

Q. Okay. But other than that, is it accurate as to the things relating to what happened on May 16th, 2016?

A. Yes.

(Tr., p.355, Ls.2–14.) Looking at Officer Jansen's testimony, it provided no evidence on his knowledge of the accuracy of State's Exhibit 9. His testimony went to the foundation for State's Exhibit 5 only, a different audio recording. In fact, when seeking to admit State's Exhibit 9, the State acknowledged the audio in State's Exhibit 9 was not included in any other recordings previously heard at trial. (Tr., p.483, L.s1–4.) The State explained that State's Exhibit 9 was "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.6–8.) Thus, Officer Jansen's prior testimony does not support a finding that State's Exhibit 9 was what the State claimed it to be. Officer Jansen's testimony on his knowledge of the accuracy of Exhibit 5 does not establish a proper foundation for Exhibit 9.

The district court therefore abused its discretion by admitting State's Exhibit 9. The district court did not act consistently with the legal standards because the evidence was insufficient to lay a foundation of State's Exhibit 9 pursuant to I.R.E. 901. Likewise, the district court did not exercise reason in its decision because Officer Hayes did not possess any knowledge that the audio recording was what it was claimed to be since Officer Hayes did not set up Officer Jansen's recording device, was not present for the conversation, and did not hear the conversation. Finally, the State cannot meet its burden to show that this error was harmless. Credibility determinations were central to this case—R.B., Ms. Derrick, and the doctors provided

testimony to support a finding that R.B. was punched by Mr. Derrick; Mr. Derrick denied punching R.B. The State's case depended on the jury believing its witnesses and disbelieving Mr. Derrick. To this end, the State's reasons for playing Exhibit 9 for the jury were to impeach Mr. Derrick and call into question his credibility. Therefore, the State cannot prove beyond a reasonable doubt the erroneous admission of evidence used to impeach Mr. Derrick did not contribute to the jury's verdict.

CONCLUSION

Based on prosecutorial misconduct or the evidentiary error, Mr. Derrick respectfully requests that this Court vacate the district court's judgment of conviction and remand this case for a new trial.

DATED this 16th day of November, 2017.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of November, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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JCS/eas