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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45036**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR-FE-2016-8223**
	)	
JAMES MICHAEL BEYER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature Of The Case

James Michael Beyer appeals from his judgment of conviction for attempted strangulation.

Statement Of The Facts And Course Of The Proceedings

The state charged Beyer with one count of felony attempted strangulation. (R., pp. 44-45.) At trial Beyer's former girlfriend, Mandy McConnell, and her two children, M.M. and A.O., testified that, in the course of an argument, Beyer grabbed McConnell by the throat, threw her to the floor, pinned her there, and strangled her to near unconsciousness. (Tr., p. 152, L. 4 – p. 158, L. 10; p. 187, L. 13 – p. 193, L. 2; p. 318, L. 21 – p. 329, L. 4.) McConnell suffered marks and bruising on her neck, arm, and head. (Tr., p. 195, L. 7 – p. 199, L. 13; p. 329, L. 22 – p. 336, L. 25; State's Exhibits 8-20, 24-25.)

At the conclusion of trial the jury returned a guilty verdict. (R., p. 138.) Beyer timey appealed from the entry of judgment. (R., pp. 144-51.)

<u>ISSUES</u>

Beyer states the issues on appeal as:

I. Considering that Mr. Beyer gave only a conflicting account of his altercation of [sic] Ms. McConnell, and did not imply that the kids had recently fabricated their account of the physical altercation, did the district court abuse its discretion by allowing Officer Cooper to testify about what the kids told him on the day of the incident?

II. Did the prosecutor commit misconduct amounting to fundamental error by telling the jury that Mr. Beyer had lied to them and by misstating Mr. Beyer's testimony?

(Appellant's brief, p. 8.)

The state rephrases the issues as:

1. Has Beyer failed to show the district court abused its discretion by allowing the admission of evidence of a prior consistent statement?

2. Has Beyer failed to show fundamental error in the prosecutor's closing argument?

ARGUMENT

I.
Beyer Has Failed To Show The District Court Abused Its Discretion By Allowing The Admission Of Evidence Of A Prior Consistent Statement

A. Introduction

In rebuttal, the prosecution asked the responding officer about what witness M.M. had told him when he responded to the call about the crime. (Tr., p. 445, Ls. 6-7.) The defense asserted a hearsay objection. (Tr., p. 445, Ls. 8, 23-25.) The prosecution asserted the evidence was not hearsay because it was offered to rebut an express or implied claim of recent fabrication. (Tr., p. 445, Ls. 10-21.) The district court overruled the objection. (Tr., p. 446, Ls. 1-12.)

Beyer claims there was no express or implied claim of recent fabrication, and therefore this ruling was error. (Appellant's brief, pp. 9-10.) Beyer's claim does not withstand scrutiny. The record shows he did present testimony at trial raising an implied inference of recent fabrication or improper influence.

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). Review of a trial court's hearsay rulings "is limited to determining whether" the district court's decision was "within the outer boundaries of its discretion," "consistent with" applicable legal standards, and "reached through an exercise of reason." In re Estate of Conway, 152 Idaho 933, 941, 277 P.3d 380, 388 (2012).

C. Beyer Has Shown No Abuse Of Discretion

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." I.R.E. 801(c). Hearsay is generally not admissible. I.R.E. 802. A prior statement by a witness is not hearsay if "consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive; or, to rehabilitate the declarant's credibility as a witness when attacked on another ground." I.R.E. 801(d)(1)(B).

Where admission of evidence under this rule is premised upon evidence the witness had a motive to lie, this exception to what is hearsay "only permits introduction of out-of-court statements that were made prior to the time when the declarant would have a motive to lie." State v. Joy, 155 Idaho 1, 14, 304 P.3d 276, 289 (2013). Where admission of the evidence is premised upon a claim that testimony was different than prior statements by the witness, the evidence is properly "offered to rebut an express charge of recent fabrication." State v. Howard, 135 Idaho 727, 732, 24 P.3d 44, 49 (2001). Admission of a child's prior statement may be proper to rebut a claim of improper influence by a parent. See State v. McAway, 127 Idaho 54, 58–59, 896 P.2d 962, 966–67 (1995).

Application of these standards to the record shows M.M.'s statement to the officer near the time of the crime was properly admitted.

Witness M.M. testified that she was in the upstairs master bedroom during part of the argument. (Tr., p. 145, L. 8 – p. 152, L. 2; State's Exhibits 2-7.) She left the room to get her brother's phone, and thereafter sat on the stairs for a while. (Tr., p. 154, L. 24 – p. 156, L. 8.) She then returned upstairs and saw Beyer throw her mother, McConnell, to the ground in the hallway and start to strangle her. (Tr., p. 156, L. 9 – p. 158, L. 19.) In cross-

examination M.M. testified that she was not in the bedroom when the attack occurred, but was in the hallway above the stairs peeking around the corner. (Tr., p. 172, L. 15 – p. 174, L. 12.)

Beyer testified that M.M. was not in the room, but later came into the room when McConnell called her into the room to vindicate her in the argument. (Tr., p. 399, L. 8 – p. 404, L. 22.) McConnell then told her son to call the police, before there had been any violence. (Tr., p. 404, L. 2 – p. 409, L. 25.) Beyer testified that M.M. left the room later, but not to get a phone, and was out of "eye shot" and not in the hall. (Tr., p. 406, L. 11 – p. 407, L. 15.) Beyer testified that McConnell "body check[ed]" him, and to protect himself and his clothing he put his hands on her shoulder and collarbone, pushed her out of the room, and fell with her to the floor accidentally. (Tr., p. 407, L. 17 – p. 414, L. 3.) He testified he did not see M.M. in the hallway until after he had gotten up off McConnell. (Tr., p. 414, Ls. 4-6; p. 416, L. 15 – p. 417, L. 7.)

M.M. and McConnell testified consistently about the physical confrontation and crime. (Compare Tr., p. 152, L. 4 – p. 158, L. 10 with Tr., p. 318, L. 21 – p. 329, L. 4.) This testimony varied greatly with the version of events provided by Beyer. (Tr., p. 399, L. 8 – p. 417, L. 7.) Part of the defense cross-examination of M.M. inquired about with whom she had discussed the facts of the case, specifically with the officer and with the prosecutor. (Tr., p. 178, L. 25 – p. 180, L. 13.) Moreover, the evidence established that M.M. was 12 years old, McConnell was her mother, and she was not related to Beyer. (Tr., p. 140, L. 23 – p. 141, L. 21.)

The record shows an implied charge of recent fabrication or improper influence or motive. On this record, including Beyer's testimony that M.M. was not in the hall to see

what she testified to seeing, defense counsel certainly could have argued that in the months between the event and the trial McConnell had exerted improper influence on her adolescent daughter such that the consistency of their testimony was not the product of truth but the product of preparation. Narrowing the window of possible coordination of stories, either deliberate or inadvertent, to the less than half-an-hour between the event and the arrival of police certainly rebuts that implication of fabrication or improper influence.

Beyer argues he "did not impliedly or expressly claim during his testimony that the kids had recently fabricated their testimony or acted under improper influence or motive." (Appellant's brief, p. 10.) The record, however, shows that (1) Beyer directly claimed that McConnell used her children at the time to support her in the argument and to call the police prior to any crime taking place (Tr., p. 400, L. 6 – p. 409, L. 25); (2) Beyer testified to a version of events significantly different from the version told by McConnell and her two children (compare Tr., p. 399, L. 8 – p. 417, L. 7 with Tr., p. 152, L. 4 – p. 158, L. 10; p. 186, L. 18 – p. 194, L. 21; p. 318, L. 21 – p. 329, L. 4); (3) Beyer testified that M.M. did not enter the hall until after he had pushed McConnell to the floor and gotten up off her (Tr., p. 406, L. 11 – p. 407, L. 15; p. 414, Ls. 4-6; p. 416, L. 15 – p. 417, L. 7); (4) the children had a maternal relationship with McConnell, and no significant relationship with Beyer (Tr., p. 140, L. 23 – p. 142, L. 16; p. 183, L. 12 – p. 184, L. 7); and (5) the trial occurred several months after the event in question (e.g., Tr., p. 116, Ls. 14-23). The prior consistent statements by McConnell's children rebutted the inference that McConnell had improperly influenced her children's testimony over the months leading to the trial to conform to her version of events. The record rebuts Beyer's claim there was no implied claim of fabrication or influence.

Beyer also argues that the children's motive to lie pre-dates the statements to Officer Cooper. (Appellant's brief, p. 10.) This argument assumes that the motive is the children's relationship with their mother, which certainly pre-dates the interview. As established above, however, the inference is whether there was fabrication of testimony at the instigation of McConnell or other improper influence. (See also Tr., p. 445, Ls. 10-12; p. 446, Ls. 2-10.) Although there was a short window of opportunity (measured in minutes) between the event and the arrival of the police, there was a much longer one (measured in months) between the interview and the trial. The evidence of the prior consistent statements rebuts the implied charge of improper influence during those months.

Beyer's unsupported claims that there was no implied charge of improper influence or recent fabrication does not withstand analysis. Such a charge is implied in the evidence and circumstances of this case. The district court was within its discretion when it concluded Beyer's testimony "could be construed as an attempt to raise a claim of recent fabrication." (Tr., p. 446, Ls. 2-10.) Beyer has therefore failed to show error.

D. The Alleged Error Is Harmless

Even if the evidence of M.M.'s prior statement was hearsay, its admission was harmless. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected …." I.R.E. 103(a). "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." I.C.R. 52. "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).

The evidence in question was that M.M. told the responding officer that she had seen Beyer grab her mother and push her to the floor with "one hand on her neck and then the other hand on her shoulder." (Tr., p. 446, Ls. 13-24.) This evidence did not add substantively to the evidence already presented. (Tr., p. 156, L. 15 – p. 158, L. 10.) That M.M. told the same version both to the police and at trial might have bolstered her credibility but, if Beyer is correct and he never challenged her credibility, then it added nothing to the trial. Admission of evidence that M.M.'s statement to the police was consistent with her trial testimony was harmless even if it was hearsay.

II.
Beyer Has Failed To Show Fundamental Error In The Prosecutor's Closing Argument

A. Introduction

In rebuttal closing, the prosecutor argued that most witnesses "can't conform their testimony to what others have said" in court, but Beyer was not only in a position to do so, "he tried to do it with you." (Tr., p. 521, L. 25 – p. 522, L. 7.) As evidence that Beyer had conformed his testimony to better match the other testimony at trial, the prosecutor pointed to discrepancies and inconsistencies in Beyer's statement to police and his trial testimony, specifically that he told police that McConnell had "jumped on his back" but he testified at trial that she had "body-checked" him. (Tr., p. 522, L. 8 – p. 524, L. 15.) The prosecutor concluded that the "new story makes it easier" to believe the children were mistaken rather than lying about seeing him strangle their mother. (Tr., p. 524, Ls. 16-21.) The prosecutor concluded this part of the argument by stating that Beyer's "new story" makes it "easier to rationalize" the children's testimony as a "misunderstanding" and that was why it was "important" for the jury to "understand and see the difference between what he said then

and now" was not merely a change in words, but a change in story that showed he was "lying, first to the officers and then two days ago to you." (Tr., p. 529, Ls. 3-22.) The prosecutor then went on to discuss which testimony fit the circumstantial evidence. (Tr., p. 529, L. 23 – p. 532, L. 3.)

For the first time on appeal Beyer contends these arguments were an improper appeal to emotion and a misstatement of the evidence. (Appellant's brief, pp. 11-14.) Review of Beyer's claim, however, shows neither improper argument nor, more importantly, 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. Beyer Has Failed To Show Error, Much Less 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.

Beyer first argues the prosecutor committed misconduct when she argued Beyer "tried to" conform his testimony to better respond to the children's testimony "with you" and that he lied "to you." (Appellant's brief, p. 12 (citing Tr., p. 522, Ls. 6-7; p. 529, Ls. 21-22).) This argument finds no support in the law.

It is proper to explain how the evidence adduced at trial affects the credibility of various witnesses, including the defendant. State v. Ehrlick, 158 Idaho 900, 928, 354 P.3d 462, 490 (2015) (not misconduct to "comment" on defendant's credibility and "explain" how evidence showed he was "dishonest"); State v. Moses, 156 Idaho 855, 871–72, 332 P.3d 767, 783–84 (2014) (argument that jury could put transcript of defense witness testimony "in the trash" was proper); State v. Norton, 151 Idaho 176, 188, 254 P.3d 77, 89 (Ct. App. 2011) (prosecutor's arguments that the defendant had lied did "not constitute misconduct" where supported by evidence). "[P]rosecutors may argue reasonable inferences based on the evidence, including that one of the two sides is lying." State v. Lankford, 162 Idaho 477, ___, 399 P.3d 804, 824 (2017) (internal quotations omitted). The prosecutor's argument that Beyer had lied in his testimony, based on the evidence adduced

at trial, was proper. Beyer has failed to show constitutional error, that the error was clear on the record (including that lack of objection was because trial counsel did not see any point or advantage in objecting and therefore risking emphasizing the argument to the jury) or that he was prejudiced.

Beyer next argues the prosecutor misstated his testimony regarding his statement to the police. (Appellant's brief, pp. 12-13.) The passage cited by Beyer is:

> But [Beyer] forgot which lie he told Officer Cooper. And he told you that. He hadn't reviewed the audio. He didn't remember saying that she had jumped on his back. He was sure that he had said that she had body-checked him. He was sure that he had said she knocked him off balance and that he had escorted her out.

(Tr., p. 523, Ls. 7-12 (cited Appellant's brief, p. 13).) This argument, in context, was proper.

Beyer testified that he was getting his clothes out of the closet when McConnell said "'let me help you do this faster,'" "body-checked" him out of the way causing him to almost lose his balance, and started ripping his clothes off the hanger; so he turned and pushed her toward the hallway when they accidentally tripped and he fell on top of her. (Tr., p. 406, L. 6 – p. 412, L. 19.) He also testified he told Officer Cooper "what had happened." (Tr., p. 419, Ls. 4-9.) Officer Cooper, however, testified that Beyer had given him a very different version of events; specifically, that Beyer stated at least three times that McConnell "jumped on his back" and had not stated that she had "body-checked him," among other inconsistencies. (Tr., p. 448, L. 21 – p. 451, L. 8.) The prosecutor's argument that Beyer, in conforming his testimony to the testimony presented at trial (Tr., p. 521, L. 25 – p. 529, L. 22), forgot that he had presented a very different version of events to the police was proper and based on the evidence.

Beyer contends that the prosecutor's argument was improper because he acknowledged some of the discrepancies between his trial testimony and his statement when confronted with them in cross-examination. (Appellant's brief, p. 13.) This argument depends on the prosecutor's argument being about what Beyer admitted in cross-examination. In context, however, it is clear that the prosecutor was not arguing what he admitted in cross-examination but was arguing about his direct testimony; specifically what Beyer either forgot or thought he remembered about his statement when he crafted the version he presented as his defense. (Tr., p. 521, L. 25 – p. 529, L. 22.) The prosecutor properly argued that Beyer had failed to account for his prior statement when he crafted his direct testimony to give him the best chance of acquittal in light of the state's evidence, and discrepancies between his statement and his testimony showed he was lying in both.

Even if Beyer could show that the argument was objectionable, he failed to show that it was fundamental error. First, Beyer has failed to show that allegedly misrepresenting evidence regarding impeachment (as opposed to evidence of guilt) rises to the level of a constitutional violation under any circumstances, much less the facts of this case. Second, as pointed out above, the proper interpretation of the prosecutor's argument is that it was a proper assertion that Beyer's testimony was based on an inadequate memory of what he had claimed in his statement, so the claimed error is not clear. Moreover, Beyer has failed to show that counsel did not tactically elect not to object because an objection would merely call additional attention to the fact that in cross-examination Beyer admitted glaring inconsistencies between his statement and his testimony. Finally, there is no prejudice because Beyer clearly gave conflicting versions of events and there is no basis for believing that the jury ignored its oath and decided this case on a basis other than the evidence.

Beyer has cited no law showing that an argument, based on the evidence, that the defendant lied when testifying or when providing a statement to police is improper. To the contrary, such an argument is proper. Lankford, 162 Idaho at ___, 399 P.3d at 824 ("prosecutors may argue reasonable inferences based on the evidence, including that one of the two sides is lying" (internal quotations omitted)). His argument therefore fails on all three prongs of the fundamental error test. Beyer's argument that the prosecutor misrepresented the evidence also fails on all three prongs because it was proper to argue that, in conforming his testimony to the testimony presented at trial, Beyer failed to account for his earlier, contrary statement. Even if the argument could have been interpreted as an argument that Beyer had denied making certain factual assertions in his statement to police, Beyer has failed to show constitutional error, failed to show clear error, and failed to show prejudice.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction.

DATED this 22nd day of February, 2018.

/s/ Kenneth K. Jorgensen______________
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of February, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

MAYA P. WALDRON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd