4-27-2018

State v. Beyer Appellant's Reply Brief Dckt. 45036

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45036**
	)	
v.	)	**ADA COUNTY NO. CR-FE-2016-8223**
	)	
JAMES MICHAEL BEYER,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE GEORGE D. CAREY
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

MAYA P. WALDRON
Deputy State Appellate Public Defender
I.S.B. #9582
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Mr. Beyer challenges his conviction for attempted strangulation on two grounds—that the court incorrectly allowed Officer Cooper to testify to what Ms. McConnell's children told him on the day of the incident, and the prosecutor committed misconduct at closing by telling the jury that Mr. Beyer had lied to them and by misstating Mr. Beyer's testimony. The State's response, which relies on incorrect legal standards and a dubious interpretation of the facts, is unavailing. This Court should vacate Mr. Beyer's judgment of conviction and remand for a new trial.

ISSUES

I. Considering that Mr. Beyer gave only a conflicting account of his altercation of 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?

ARGUMENT

I.

The District Court Abused Its Discretion By Admitting Officer Cooper's Testimony Regarding What The Kids Told Him On The Day Of The Incident

In his appellant's brief, Mr. Beyer argued that because he did not impliedly or expressly claim during his testimony that the kids had recently fabricated their testimony or acted under an improper influence or motive, and any supposed allegation of fabrication or improper influence or motive preceded the kids' statements to Officer Cooper, the court should not have allowed Officer Cooper to testify to what the kids told him. In response, the State attempts to justify the court's decision by drawing an inference from thin air and then asks this Court to interpret the exception at issue so broadly that it would nearly swallow the rule. As for harmlessness, the State cites an incorrect legal standard, misinterprets the facts, and overlooks Officer Cooper's testimony about AO's statement entirely. Because the district court abused its discretion when it admitted Officer Cooper's testimony regarding what the kids told him on the day of the incident, and the State has not proven the error harmless, the Court should vacate Mr. Beyer's judgment of conviction.

A. The State's Arguments In Support Of The District Court's Ruling Are Without Merit

The State first asserts that the district court did not err because, "[o]n 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 . . . ." (Resp. Br., pp.5–6 (emphasis added).) It goes without saying that an inference that defense counsel could have, but did not, draw does not trigger the hearsay rule at issue. *See* I.R.E. 801(d)(1)(B).

The State next suggests that a prior consistent statement is admissible based on the circumstances of the case alone, namely when the defendant testifies to a different set of facts than the witness, the witness is either the victim or has a relationship with the victim, and more time elapses between the crime and the testimony than passed between the crime and the initial statement. (Resp. Br., pp.5–6.) The State is incorrect. Those circumstances cannot in and of themselves imply recent fabrication or improper influence or motive—with the exception of Mr. Beyer's decision to exercise his Fifth Amendment right to testify in his own defense, they are the inevitable result of the alleged crime, and not an after-the-fact decision by Mr. Beyer regarding trial strategy. What's more, this same set of circumstances inevitably occurs in a rather large number of cases, which means the State's argument would render this nonhearsay "exception" the rule.

Finally, the State posits that Mr. Beyer's argument assumes that the children had a motive to lie based on their relationship to their mother, and agrees that this motive pre-dates their statements to Officer Cooper. (Resp. Br., p.7.) The State then suggests that because this case actually deals an implication that the kids fabricated their stories at Ms. McConnell's direction, and only a short amount of time passed between the altercation and the kid's statements to Officer Cooper, but a longer amount of time passed between then and the trial, Mr. Beyer implied improper influence during the latter period of time. (*Id.*) Not so. Regardless of whether the supposed implication were one of recent fabrication or improper influence or motive, the motive, influence, or fabrication could have taken place in the time between the altercation and the arrival of the police. More importantly, the State's argument further underscores that Mr. Beyer did not imply anything about a recent fabrication or improper influence or motive regarding that part of the kids' testimony, much less did he "imply" that Ms. McConnell directed

her children to recount a specific version of events specifically between when the officers got to the scene and the trial.

B. The State Has Not Shown That The Error Is Harmless Beyond A Reasonable Doubt

As an initial matter, the State argues harmlessness using an incorrect legal standard. The State cited to *State v. Vondenkamp*, 141 Idaho 878, 887 (Ct. App. 2005), for the proposition that "[a]n 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." (Resp. Br., p.7 (emphasis added).) But this Court in *State v. Perry*, 150 Idaho 209, 221 (2008), adopted the U.S. Supreme Court's harmless error analysis from *Chapman v. California*, 386 U.S. 18, 24 (1967). That standard provides that, when a defendant objects to an error and shows that a violation occurred, the State bears the burden of proving, "'beyond a reasonable doubt that the error complained of *did not* contribute to the verdict obtained.'" *Perry*, 150 Idaho at 221 (quoting *Chapman*, 386 U.S. at 24 (emphasis added)). The question "is whether the jury *actually* rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of" the inadmissible evidence. *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis). "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in this trial was *surely unattributable* to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis added). The standard cited by the State has not been good law for a decade.

Next, the State argues the error is harmless by explaining that Officer Cooper's testimony "might have bolstered [MM's] credibility, but if Beyer is correct and he never challenged her credibility, then it added nothing to the trial." (Resp. Br., p.8.) The State appears

to have confused an implication of fabrication with a challenge to credibility. Although Mr. Beyer did not imply that the kids fabricated their testimony, he certainly challenged their credibility by testifying to a different version of the altercation. And because the trial came down to who the jury believed—Ms. McConnell and her children or Mr. Beyer—this error cannot be harmless.

Finally, the State never addressed Officer Cooper's testimony about AO's statements, (Resp. Br., pp.3–8), even though Mr. Beyer challenged the admission of Officer Coopers' testimony with respect to both MM and AO,[1] (App. Br., pp.9–10). Because "[t]he State fails to meet its burden of proving harmless error if it does not address the subject in its briefing," *State v. Hill*, 161 Idaho 444, 450, 387 P.3d 112, 118 (2016); *State v. Almaraz*, 154 Idaho 584, 598–99 (2013), the State has failed to meet its burden as to Officer Cooper's testimony about AO's statements. This Court should vacate Mr. Beyer's judgment of conviction.

II.

The Prosecutor Committed Misconduct Amounting To Fundamental Error By Telling The Jury That Mr. Beyer Lied To Them And By Misstating Mr. Beyer's Testimony

Mr. Beyer argued in his appellant's brief that the prosecutor committed misconduct at closing in two ways—by telling the jury that Mr. Beyer had lied to them and by misstating

[1] Defense counsel did not object to Officer Cooper's testimony about AO's statement, but the objection to Officer Cooper's testimony regarding MM's statement adequately preserved that issue. In response to that objection, the prosecutor argued that "this goes to rebut any claim or [sic] fabrication given the testimony of the defendant that *they* may be fabricating their story now," and that Mr. Beyer "was explaining that *the kids* didn't see, essentially, what they had saw because he laid down on their mom." (Tr., p.445, Ls.10–18.) Further, immediately after asking Officer Cooper about what MM said, the prosecutor asked him about what AO said. (Tr., p.446, L.13–p.447, L.11). Therefore, it is clear the parties and court understood the objection to apply to Officer Cooper's testimony regarding both prior statements.

Mr. Beyer's testimony. In response, the State argues that prosecutor's statements did not amount to misconduct at all, nor did they rise to the level of fundamental error. The State is mistaken.

As for the prosecutor's claim that Mr. Beyer had lied to them, the State claims "it is proper to explain how evidence adduced at trial affects the credibility of various witnesses." (Resp. Br., p.10.) True, but the prosecutor here went beyond merely discussing credibility. Instead, she made it personal—he had lied *to them*: "And he tried to do it *with you*. You know he tried to do it *with you*." (Tr., p.522, Ls.6–7 (emphasis added).) "[H]e was lying, first to the officers and then two days ago *to you*." (Tr., p.529, Ls.21–22 (emphasis added).) "This was inflammatory language seemingly calculated to arouse negative emotions," and thus amounted to misconduct. *State v. Phillips*, 144 Idaho 82, 87 (Ct. App. 2007).

As for misstating Mr. Beyer's testimony, the State claims that the prosecutor's argument was proper "in context" because "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." (Resp. Br., p.12.) The record belies State's argument, but it fails regardless.

Again, the prosecutor said that Mr. 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 *he had said* she knocked him off balance and that he had escorted her out.

(Tr., p.523, Ls.8–11 (emphasis added).) But Mr. Beyer did not discuss the substance of his earlier statements about the altercation to Officer Cooper until cross-examination. (*See generally* p.406, L.11–p.421, L.6 (direct-examination), p.419, Ls.4–9 (Mr. Beyer confirming during direct that he told Officer Cooper "what had happened," but not discussing any specifics of their conversation), p.431, L.14–p.436, L.16 (Mr. Beyer testifying to what he told Officer Cooper

during cross-examination), p.438, L.16–p.439, L.9 (Mr. Beyer testifying to what he told Officer Cooper during redirect-examination).) Thus, the prosecutor misstated Mr. Beyer's testimony, regardless of whether she intended to reference direct- or cross-examination. If the prosecutor intended to refer to Mr. Beyer's cross-examination—which she clearly did—then she misstated the substance of his testimony by claiming he did not remember telling Officer Cooper that Ms. McConnell had jumped on his back and he was sure he had used the term "body-check" with Officer Cooper. (*See* App. Br., pp.12–13.) On the other hand, if the prosecutor intended to reference only Mr. Beyer's direct testimony, then she misstated that he testified about his statements to Officer Cooper during his direct testimony at all, and further misled the jury by simply ignoring Mr. Beyer's testimony on cross-examination. (*See* p.406, L.11–p.421, L.6, p.417, Ls.4–9.) Either way, the prosecutor committed misconduct.

Finally, the State asserts that Mr. Beyer did not show that defense counsel elected not to object to the misconduct because it "would merely call additional attention to the fact that in cross-examination Beyer admitted glaring inconsistencies between his statement and his testimony." (Resp. Br., p.12; *see also* Resp. Br., p.12 (saying "there is no prejudice because Beyer clearly gave conflicting versions of events"), p.13 (describing Mr. Breyer's earlier statement as "contrary" to his trial testimony).) The State's characterization of the "inconsistencies" is a stretch. On direct examination, Mr. Beyer said Ms. McConnell "body-checked" him, explaining that "the best way I can describe it is a body check. I can *feel her on my back* and pushing me at the same time while I'm bent over. . . ." (Tr., p.406, L.11–p.409, L.14, p.408, Ls.10–12 (emphasis added).) When asked on cross-examination, Mr. Beyer acknowledged that he told Officer Cooper that Ms. McConnell had *jumped on his back* and did not use the term "body-check." (Tr., p.431, L.14–p.433, L.24 (emphasis added).) Although

Mr. Beyer did not use identical wording, his descriptions of Ms. McConnell's actions to Officer Cooper and at trial paint the same picture. Therefore, defense counsel's failure to object to the "glaring inconsistencies" between Mr. Beyer's actual testimony and the prosecutor's misrepresentations of that testimony could only be oversight.

The prosecutor committed misconduct which deprived Mr. Beyer of his due process right to a fair trial, the misconduct is clear from the record, and there is a reasonable possibility that the misconduct affected the verdict. This Court should vacate Mr. Beyer's judgment of conviction.

CONCLUSION

Mr. Beyer respectfully asks that this Court vacate his judgment of conviction and remand for a new trial.

DATED this 27th day of April, 2018.

_____/s/_____
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of April, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JAMES MICHAEL BEYER
INMATE #122945
ISCC
PO BOX 70010
BOISE ID 83707

GEORGE D CAREY
DISTRICT COURT JUDGE
E-MAILED BRIEF

JONATHAN LOSCHI
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

MPW/eas