5-22-2018

State v. Dunn Appellant's Reply Brief Dckt. 45115

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45115**
Plaintiff-Respondent,	)	
	)	**BONNEVILLE COUNTY**
v.	)	**CR 2012-18467**
	)	
JEFFREY LEWIS DUNN,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE JOEL E. TINGEY
District Judge

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

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender
I.S.B. #7259
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

Jeffery Lewis Dunn appeals from the district court's Judgment of Conviction. The jury convicted Mr. Dunn of three counts of lewd conduct. Mr. Dunn's convictions were previously vacated and his case remanded for a new trial. He asserts that his second trial was also contaminated by errors and that his convictions must again be vacated.

Specifically, Mr. Dunn asserts that the district court erred and abused its discretion when it allowed the State to present a portion of his testimony from the prior trial. The testimony was not presented in its entirety due to the district court ruling that I.R.E. 404(b) evidence presented in the last trial was inadmissible in the second trial. One of the three portions of testimony presented to the jury was taken out of context and the meaning of the testimony was greatly altered. Mr. Dunn asserts that this portion of prior testimony should not have been presented as it was, when taken out of context, unfairly prejudicial. Although the testimony was relevant, it was minimally probative and the probative value was substantially outweighed by the danger of unfair prejudice.

During the trial, Mr. Dunn made two motions for mistrial; the first after S.E. alluded to Mr. Dunn being a registered sex offender when she was staying with him and the second after Brianne Bierma informed the jury that Mr. Dunn had been in prison. Mr. Dunn asserts that the district court erred in denying his motions for mistrial.

Additionally, Mr. Dunn asserts that the State committed prosecutorial misconduct which deprived him of a fair trial. The prosecution violated its duty to see that Mr. Dunn had a fair trial by appealing to the emotions, passions, and prejudices of the jury. Mr. Dunn contends that the

misconduct committed in his case constituted fundamental error and that the error is not harmless.

Finally, Mr. Dunn asserts that the errors are not harmless or, alternatively, that the errors amount to cumulative error, depriving him of his right to a fair trial.

This Reply Brief is necessary to address the State's erroneous assertion that Mr. Dunn's testimony conveyed the same meaning at the second trial as it did in the first, the State's reliance on an improper harmless error standard, and that Mr. Dunn invited Ms. Bierma's prejudicial statement by questioning her on an unrelated matter.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Dunn's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES[1]

I. Did the district court abuse its discretion when it allowed the State to read a portion of Mr. Dunn's prior testimony that was taken out of context and, as a result, was overly prejudicial?

II. Did the district court err in denying Mr. Dunn's motions for a mistrial?

III. Did the State violate Mr. Dunn's right to a fair trial by committing prosecutorial misconduct?

IV. Even if the above errors are individually harmless, was Mr. Dunn's Fourteenth Amendment right to due process of law violated because the accumulation of errors deprived him of his right to a fair trial?

[1] Mr. Dunn will not be providing a response to the issues regarding prosecutorial misconduct or cumulative error because the State's arguments on these issues are unremarkable and, as such, do not warrant additional briefing.

ARGUMENT

I.

The District Court Abused Its Discretion When It Allowed The State To Read A Portion Of Mr. Dunn's Prior Testimony That Was Taken Out Of Context And, As A Result, Was Overly Prejudicial

In the Respondent's Brief, the State asserted numerous times that Mr. Dunn's testimony at the second trial was presented in a way that conveyed the same meaning as it did in the first trial: "Dunn desired M.T." (Respondent's Brief, pp.12, 14, 15.) The State's assertion is specious.

In the first trial, Mr. Dunn answered a long line of questioning about his prior sexual offender treatment. (Tr. Trial 1, p.470, L.3 – p.476, L.2.) During this line of questioning, he admitted that he had been taught to avoid contact with female minors within the age range of his prior victim. (Tr. Trial 1, p.471, Ls.3-8.) The questioning continued:

> Q. Why are those directives in place? When you're on probation receiving treatment, why are those given to you as thing you are to do?
>
> A. I don't know that I can answer that. That's just the way – that's the rules they have. So.
>
> Q. Is there some level of understanding to remove you from a desire to do that? That would have come out in your treatment. Correct?
>
> A. I think that's accurate.
>
> Q. And so there's conditions put in place [for] the sole purpose of removing you from the temptation of what you desire. Correct? Not suggesting you desired these three victims. That's not what I am driving at. You have a desire that you've acted on in 1995.
>
> A. Right, okay.
>
> Q. Correct?
>
> A. Yes.

Q. In order to remove you from the ability to act on that desire that's been identified, you are told to stay away?

A. Yes, sir.

(Tr. Trial 1, p.473, L.24 – p.474, L.19.) It is clear that the prosecutor was discussing a past deviant desire toward girls of a certain age and precautions that were to be taken to ensure that any past desire was not provoked and/or acted upon again. In fact, he went so far as to specifically note that he was not suggesting that Mr. Dunn desired the alleged victims. (Tr. Trial 1, p.474, Ls.8-11.) The State's current and contrary assertion, that this line of questioning was for the explicit purpose of showing that Mr. Dunn desired M.T., is disingenuous.

Instead, this line of questing was designed to show that Mr. Dunn had disregarded his treatment and the safety precautions built-in for the purpose of attempting to avoid contact that *could* trigger a desire that had been present in the past. The testimony in no way implied that because Mr. Dunn had desired a young female in the past he automatically desired all young females or M.T. specifically.[2] Further, contrary to the State's assertions, the line of questioning did not attempt to show that Mr. Dunn's past desires toward girls of a specific age range were actually triggered prior to M.T. spending the night at his home. Notably, Mr. Dunn never admitted to desiring M.T. during this testimony.

However, the limited excerpt read to the jury during the second trial conveyed the opposite:

Q. And as I asked you before, you had initially rebuffed, I assume [A.D.] was probably bugging the heck out of you to let [M.T.] spend the night?

A. Yes, sir.

[2] A past desire cannot, in and of itself, be decidedly indicative of future or current desire. For example, it is absurd to believe that because a woman had once previously desired a man in his 20's, she must now desire all men in their 20's.

Q. She was pulling all over you to have a friend spend the night. I have no doubt that's how it plays out. Right?

A. Yes, sir.

Q. And you rebuffed that?

A. In the beginning, yes.

Q. And in part, rebuffed that based upon you knowing you must –

A. Yes.

Q. -- separate yourself from the object of desire.

A. Yes, sir.

Q. But you didn't stick with that one either. Right?

A. No, sir.

(Tr., p.393, L.6-24.) The testimony, as presented in the second trial, incorrectly conveys that Mr. Dunn had previously testified that he desired M.T. As such, contrary to the State's assertions otherwise, this excerpt of testimony was taken out of context, obscured the meaning of the actual testimony and, as a result, mislead the jury. This erroneously admitted testimony was undoubtedly devastating to Mr. Dunn's case.

The State next asserts that, "[e]ven if the district court abused its discretion in admitting the excerpt of Dunn's testimony regarding M.T. spending the night, the error was harmless." (Respondent's Brief, p.17.) The State has asserted the error was harmless for two reasons. First, the State erroneously asserts that "similar" evidence was admitted through another witness. (Respondent's Brief, pp.17-18.) Second, using an incorrect standard, the State asserts that the error was harmless because the State presented "overwhelming evidence of guilt." (Respondent's Brief, pp.18-21.) These arguments are erroneous.

While Detective McKenna testified about Mr. Dunn initially denying requests for M.T. to spend the night and his concern that it "would" or "potentially" put him in a bad spot, he did not testify that Mr. Dunn had told him that M.T. was an object of his desire. (Tr., p.380, L.17 – p.387, L.14.) This testimony only reiterates that Mr. Dunn had been trained to avoid situations that *may* trigger a desire in the future. It does not prove a current desire. Similarly, Mr. Dunn's statement that he would be "pissed" if his daughter slept in a bed with a friend's father does not imply that he desired M.T. (Tr., p.382, Ls.9-22.) Detective McKenna's testimony was not "similar" on the critical issue – whether Mr. Dunn expressed a desire of M.T. As such, the admission of excerpt of testimony from the first trial cannot be harmless for the first reason articulated by the State.

The State also asserted that the error was harmless because the State presented "overwhelming evidence of guilt." (Respondent's Brief, pp.18-21.) The suggestion is that this Court should consider whether the jury would have found Mr. Dunn guilty had they not heard the misleading excerpt of Mr. Dunn's testimony from the first trial. While the State initially quotes the harmless error standard accurately, the legal premise quoted is simply wrong.

This Court has recognized:

> Under the *Chapman* harmless error analysis, where a constitutional violation occurs at trial, and is followed by a contemporaneous objection, a reversal is necessitated, *unless* the State proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

(*State v. Almaraz*, 154 Idaho 584, 598 (2013) (citing *State v. Perry*, 150 Idaho 209, 221 (2010) (in turn quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).) Indeed, the United States Supreme Court has held:

> 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. That must be so, because to hypothesize a guilty verdict that was never in fact

> rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993) (citing *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Clark*, 478 U.S at 593 (BLACKMUN, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509–510 (1987) (STEVENS, J., dissenting).) Notably, in reversing the defendant's conviction, the *Almaraz* Court noted, "the State never specifically argues that [improperly admitted testimony] did not 'contribute to the verdict obtained' as clearly required under *Perry*." *Almaraz*, 154 Idaho at 598. Thus, it is not enough for the State to assert that there was "overwhelming evidence." The State must first assert, and then prove beyond a reasonable doubt, that the testimony did not contribute to the guilty verdict actually attained.

II.

The District Court Erred In Denying Mr. Dunn's Motions For A Mistrial[3]

The State asserted that Mr. Dunn "elicited Bierma's comment" and, as such, any error is not reversible. (Respondent's Brief, pp.25-26.) While it is clear that Ms. Bierma made the inappropriate comment during Mr. Dunn's questioning, the question asked did not have anything to do with Mr. Dunn potentially being in custody. Instead, it was a statement that was entirely unsolicited by defense counsel.

During cross-examination, Ms. Bierma was asked, "[a]nd Jeff's attitude toward her getting birth control was that he was not happy with her being – acting out sexually, correct?" (Tr., p.330, Ls.23-25.) Ms. Bierma responded, "[h]e had nothing to do with any of that. He was

[3] On appeal, Mr. Dunn has asserted two separate grounds for declaring a mistrial. (Appellant's Brief, pp.15-20.) In this Reply Brief, he only addresses the second ground, Ms. Bierma's statement regarding Mr. Dunn being in prison. The State's arguments on the first ground is unremarkable and, as such, does not warrant additional briefing.

in prison already." (Tr., p.331, Ls.1-2.) Certainly, the question did not require an answer that would mention Mr. Dunn being in custody. Unlike the witness in *Atkinson*, Ms. Bierma did not supply "an accurate, fair and responsive answer to defense counsel's question." *State v. Atkinson*, 124 Idaho 816, 821 (Ct. App. 1993). In fact, the district court struck the testimony because it was "not responsive." (Tr., p.331, Ls.5-7.) As such, the statement regarding prison was not solicited by defense counsel and cannot constitute invited error.

Next, the State appears to argue that Mr. Dunn raised, as a specific error on appeal, that the district court incorrectly instructed the jury following the motion for mistrial. (Respondent's Brief, pp.28-29.) Mr. Dunn made no such argument. Instead, he argued that the motion for mistrial was erroneously denied and, in arguing that the error in denying the motion for mistrial amounted to reversible error, argued that later attempts to mitigate the harm may have increased the continuing impact the evidence had on the trial. (Appellant's Brief, pp.19-20.)

The State also asserts that Mr. Dunn requested that the district court provide that instruction. (Respondent's Brief, p.29.) This is a mischaracterization of the events surrounding the motion for mistrial. Trial counsel's request for a mistrial was clear. Counsel noted that, "I think it places the Defense in kind of a bad position that any potential of curing this, any further mention of it, is kind of like scratching at an old wound or scab. It's just going to make it worse." (Tr., p.333, Ls.17-20.) Counsel noted that "we would stand on our motion for mistrial." (Tr., p.333, L.21.) Counsel's later efforts to mitigate the prejudice by asking that the court take judicial notice that Mr. Dunn was not in prison was not a blanket acquiesces to the jury instruction and was only suggested in the event the motion was denied. To the extent counsel agreed to an alternative remedy, if the motion was to be denied, it was just to "ask the Court to take judicial notice that [Mr. Dunn] was not in prison." (Tr., p.333, Ls.22-25.) It was the

prosecutor that requested the judicial notice be limited "to the time frame." (Tr., p.335, L.2 – p.336, L.5.) It was this limitation that invited the jury to speculate about whether Mr. Dunn was in prison at another time. Following the discussion, once it was a forgone conclusion that the motion was denied and a limiting instruction would be given, counsel then requested that the instruction be giving immediately, not later. (Tr., p.338, Ls.1-6.)

Mr. Dunn maintains that this Court can consider the instruction provided in determining "the continuing impact on the trial of the incident that triggered the mistrial motion." *State v. Field*, 144 Idaho 559, 571 (2007). He asserts that there is a great danger that the jury considered information that Mr. Dunn had been incarcerated to his detriment, that it had a continuing impact on the trial, may have contributed to the verdict, and, ultimately, deprived Mr. Dunn of his right to a fair trial.

CONCLUSION

Mr. Dunn respectfully requests that his convictions be vacated and his case remanded for a new trial.

DATED this 22nd day of May, 2018.

_____/s/_____
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of May, 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:

JEFFREY LEWIS DUNN
INMATE #48236
ISCC
PO BOX 70010
BOISE ID 83707

JOEL E TINGEY
DISTRICT COURT JUDGE
E-MAILED BRIEF

NEAL S RANDALL
ATTORNEY AT LAW
E-MAILED BRIEF

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

_____/s/_____
EVAN A. SMITH
Administrative Assistant

EAA/eas