11-20-2013

State v. Folk Appellant's Reply Brief Dckt. 39622

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintif-Respondent, vs. JONATHAN FOLK, Defendant-Appellant.	)	S.Ct. No. 39622 D.Ct. No. CR-2008-332 (Bonneville County)

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 DARREN B. SIMPSON
District Judge

Deborah Whipple
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Idaho Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

STATE CASES

II. ARGUMENT IN REPLY

A. Mr. Folk Challenged the Relevance of the Nightmare Hearsay Below

Mr. Folk argued in the district court and in his Opening Brief that testimony from Ms. Reed that T.R. told her that he had just had a nightmare about "what that bad guy did to me last night" and identifying Mr. Folk as the bad guy should be excluded because it was not relevant. R Vol. I, pp. 67-72, 100-102; Tr. 11/15/11, p. 108, ln. 19 - p. 109, ln. 12; Appellant's Opening Brief pp. 9-19. In response, the State argues that any challenge to the relevance of the hearsay statements made after the nightmare was not preserved for appellate review. Respondent's Brief at page 8. The record rebuts this argument.

Mr. Folk's motion to exclude the hearsay was based on relevance: "The defense moves the court to exclude the testimony of why the mother, Charity Reed, called the police, in order to prevent erroneous admission of *irrelevant testimony*." R Vol. I, p. 67 (emphasis added). Mr. Folk then set out verbatim IRE 401 defining relevant evidence and IRE 402 excluding irrelevant evidence. R Vol. I, p. 69. Mr. Folk then explained, "These statements of the mother [repeating T.R.'s hearsay about the content of his nightmare] are not going to be helpful to the jury in deciding what is the guilt or innocence of the defendant." R Vol. I, p. 70. Mr. Folk's motion concluded that the hearsay would be "irrelevant evidence under IRE 402, [it] should be excluded." R Vol. I, p. 71.

In the State's response in the district court to Mr. Folk's motion, it recognized that relevance was the issue - it argued, "The Defendant in his Motion indicated that some of these questions are not relevant. . . .The statements made by [T.R.] concerning what Mr. Folk did is relevant as that is why this case is going forward." R Vol. I, p. 95-96. The State continued, "The

Defendant also tries to argue admissibility of statements. . . . There is an argument for excited utterance and possible other exceptions to the hearsay rule. Mr. Folk does not understand that one may keep evidence out, but other rules let it in." R Vol. I, p. 96. (The State offered no citation for any case law that would allow irrelevant evidence to be admitted because, even though excludable under IRE 402, the evidence happened to be hearsay.) *Id.*

In reply, Mr. Folk argued that the State was seeking admission of irrelevant evidence. He wrote: "As stated in the Defense motion, if it's not relevant foundation, it's improper evidence." R Vol. I, p. 100.

Contrary to the State's argument on appeal, Mr. Folk did raise in the district court the issue of the relevance of T.R.'s hearsay made after the nightmare and the issue is preserved for appeal.

B. Admission of the Hearsay About the Content of the Nightmare was Improper

The hearsay challenged by Mr. Folk is T.R.'s statement explaining the content of the nightmare: "[H]e told me it was about what that bad guy did to him the night before." "What bad guy?" "Jon, Jonathan." Trial Tr. p. 198, ln. 1-5.

The State argues that this hearsay was an excited utterance because the identification of Mr. Folk as a bad guy who did something to T.R. the night before was a spontaneous reaction to the nightmare. Respondent's Brief p. 7. But, that analysis is incomplete - the hearsay although prompted by the nightmare and discussing the content of the nightmare was about the events of the night before - not about the events of a few minutes before the statement was made. When the statement is analyzed in that light, as opposed to the State's erroneous interpretation that the statement was simply about and would simply be understood by the jury to be about the

nightmare and not Mr. Folk's identity as the bad guy who did something the night before, the statement is inadmissible as an excited utterance. *State v. Field,* 144 Idaho 559, 165 P.3d 273 (2007). And, if the State's interpretation is correct and the statement was only about the nightmare and nothing more - not about Mr. Folk or an accusation against him, then the statement was clearly irrelevant - because the content of a nightmare does not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. IRE 401. A nightmare is just a nightmare. People dream all sorts of things for all sorts of reasons and dreams, let alone nightmares, do not reflect an accurate recounting of real events. As such, the content of dreams and nightmares are not relevant to ascertaining what happened in reality.

Under either analysis, the district court abused its discretion in admitting the hearsay; the hearsay did not fall within the excited utterance exception and it was not relevant.

C. The Error in Admission of the Hearsay was not Harmless Beyond a Reasonable Doubt

The State has argued that the error in the admission of the hearsay was harmless beyond a reasonable doubt. *State v. Perry,* 150 Idaho 209, 222, 245 P.3d 961, 974 (2010) ("[T]he State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt.")

Mr. Folk has set out in his Opening Brief a full analysis of the State's case and its weaknesses. Appellant's Opening Brief pp. 14-19. In light of those weaknesses, the State cannot carry its burden of demonstrating no harm beyond a reasonable doubt.

D. Evidence of Prior Convictions was Improperly Admitted

Mr. Folk set out in his Opening Brief how the district court erred in admitting evidence of

two prior convictions. The court had admitted the convictions to prove motive, opportunity, and intent.

In his Opening Brief at pages 26-27, Mr. Folk set out why the prior convictions were not admissible to prove intent. The State does not make any argument in response on the question of intent. Rather, ir argues only that the priors were admissible to show opportunity and motive. Respondent's Brief pp. 12-15. This Court, for the reasons set out in Mr. Folk's Opening Brief, should accept the State's implicit concession of error and hold that the priors were not admissible to prove intent.

In his Opening Brief, Mr. Folk also discussed that the prior offenses were probative of motive only insofar as the jury would draw the conclusion that because Mr. Folk had previously offended against boys, he was now motivated to commit a new offense against boys - an impermissible propensity use of the evidence. *State v. Grist,* 147 Idaho 49, 54, 205 P.3d 1185, 1190 (2008); *State v. Johnson,* 148 Idaho 664, 668, 227 P.3d 918, 922 (2010); *State v. Joy,* 155 Idaho 1, 8-9, 304 P.3d 276, 283-284 (2013). Appellant's Opening Brief p. 25.

The State has not addressed how the prior offenses prove motive save to say that "because Folk's prior convictions involving D.P and M.P. show Folk accomplishing molestation under the guise of innocent childcare or in brief periods of time, they are relevant to show opportunity and motive in this case." Respondent's Brief p. 15. But, this is no more than impermissible propensity evidence - to say that the fact that someone did the same sort of crime before proves a motive to do it again is the essence of propensity. Therefore, the evidence of the prior convictions was inadmissible. *Grist, supra*; *Johnson, supra*; *Joy, supra.*

The State relies upon *State v. Gomez,* 151 Idaho 146, 152, 254 P.3d 47, 53 (Ct. App.

2011), to argue that the prior convictions were also admissible to show opportunity. Respondent's Brief, pp. 12-15. In *Gomez,* the Court of Appeals held that evidence that Gomez had previously molested the victim, her sisters, and a friend of one of the sisters while in small living spaces accommodating up to 12 people, even while the girls were sleeping in beds with other siblings or their mother, was admissible to prove opportunity and credibility in a case wherein he was accused of touching the victim while she was asleep in a bed with her sixteen year old brother. 151 Idaho at 154, 254 P.3d at 55. The Court held that the relevance of the evidence "was not only to Gomez's ability to access the room, but also his ability, in a house full of people, to surreptitiously enter V.B.'s bedroom, while she was sleeping next to her brother, to touch her and offer her money to sleep with him." The Court noted, "This testimony was necessary to explain how and why Gomez was able to abuse V.B. without anyone seeing the abuse, as her testimony, if considered alone, raised substantial questions as to how such abuse was possible in a house with little privacy." 151 Idaho at 155, 254 P.3d at 56.

Gomez is clearly distinguishable from Mr. Folk's case because the circumstances of the offense in *Gomez* were very unique - commission of lewd conduct while the victim was in bed with another person without the other person being aware of the offense. The allegations in Mr. Folk's case - touching a child quickly in the absence of any prior relationship with the child - did not involve unique circumstances. A very small sample of such cases includes: *State v. Greensweig,* 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982) (luring passing girl into church); *State v. Taylor,* 122 Idaho 218, 832 P.2d 1153 (Ct. App. 1992) (entering homes of strangers and touching children therein); *State v. Bingham,* 116 Idaho 415, 776 P.2d 424 (1989) (lewd conduct with girl who happened to walk by defendant's apartment); *State v. Gratiot,* 104 Idaho 782, 663

P.2d 1084 (1983) (touching girl who was walking near railroad tracks). Furthermore, the prior convictions evidence presented in Mr. Folk's trial involved the 1992 case wherein Mr. Folk was convicted following repeated contacts with a boy at a motel while caring for the boy with the parents' permission where both he and the boy's family were staying over an extended period of time and the 1999 case wherein Mr. Folk was convicted following a single contact with a previously unknown child in a laundromat. As the circumstances of the two prior offense were quite different from one another, the State cannot argue that the two together prove opportunity in the unique way the prior offenses proved opportunity in *Gomez.*

In *Gomez,* the Court of Appeals also held that the evidence was relevant to prove the credibility of the complaining witness. However, insofar as *Gomez* holds that complaining witness credibility may be established by evidence of other bad acts of the defendant, it was wrongly decided and should be overruled.

IRE 404(b) does not specifically allow proof of other crimes, wrongs, or acts to prove credibility. Rather the rule allows admission of prior bad acts evidence for purposes "such as" motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Credibility is not such a purpose. Credibility of the complaining witness is at issue in every trial. If prior bad acts are admissible to prove credibility of the complaining witness, then prior bad acts are always admissible and IRE 404(b) would not exist. Using other bad acts of the defendant to prove the complaining witness's credibility is simply using the other bad acts for purposes of propensity - if the defendant did it before, then the complaining witness's testimony that he did it again is more credible.

Moreover, IRE 608 is a more specific rule that controls the admissibility of proof of the

character and conduct of a witness, including the witness's credibility. That rule only allows proof of specific instances of conduct of the witness, not someone else, for purposes of attacking or supporting the credibility of the witness and sets limitations on the proof used to establish those instances. IRE 608(b). *See Ausman v. State,* 124 Idaho 839, 841, 864 P.2d 1126, 1128 (1993) ("A specific statute, and by analogy a specific rule of civil or criminal procedure, controls over a more general statute when there is any conflict between the two or when the general statute is vague or ambiguous.")

Even if *Gomez* is not overruled, this Court should not accept the State's invitation to extend *Gomez* to hold that the prior offenses in this case were admissible to prove the credibility of T.R.

Lastly, the State has argued that the district court did not err in weighing the probative value of the two priors against the danger of unfair prejudice. Respondent's Brief pp. 15-16. The State argues: "Because the evidence was probative of opportunity, rather than for propensity alone, the danger of unfair prejudice is diminished." Respondent's Brief p. 15.

There are three flaws in this argument. First, as discussed above, the prior bad acts did not prove opportunity. They were merely propensity evidence and as such their probative value was nil and the danger of unfair prejudice was extremely high.

Second, as discussed above, even if this Court was to find, contrary to all the case law involving similar cases, that touching a previously unknown child quickly is such a unique situation that "opportunity" is at issue per *Gomez,* only the 1999 conviction was relevant. The facts of the 1992 conviction involved a period of grooming, getting the parents' permission to be alone with the child, and repeated contacts. Even if the 1999 conviction was admissible, the

1992 conviction was not and the probative value of the 1999 conviction alone was clearly outweighed by the danger of unfair prejudice in the admission of both priors.

Third, the State's argument does not address the error in the district court's analysis. As set out in Mr. Folk's Opening Brief p. 27, the district court concluded that the prejudice of the prior convictions was not great because Mr. Folk had admitted that he is a pedophile and that he wanted to change his behavior, but that he also still thinks about molesting children. R Vol. I p. 181. In other words, the district court found that the prior convictions were not overly prejudicial because the jury already had evidence before it that would allow it to conclude - once a pedophile, always a pedophile - guilty of this charge. But, of course, that is the opposite conclusion from that which is allowed by the Rules of Evidence. Under the Rules of Evidence, propensity evidence is inadmissible. IRE 404(b). And, the State has pointed to no case law which holds that once some propensity evidence is in, more is not prejudicial. In fact, more is extremely prejudicial. Not every pedophile sexually abuses children. But, that is a distinction that can be extremely difficult for people to understand. Even if Mr. Folk's jury panel was able to understand and apply that distinction, the jurors would very quickly determine that Mr. Folk was not a pedophile who did not sexually abuse children when they heard evidence, from a victim and from a victim's mother accompanied by photographs of the victims as they appeared at the time that they became victims, that Mr. Folk had been criminally convicted twice before for sex acts against children. The jury would convict on propensity. The danger of unfair prejudice was extreme - not diminished.

The district court erred both in finding the evidence of the prior convictions admissible under IRE 404(b) and in the balancing under IRE 403. Moreover, as set out in Mr. Folk's

Opening Brief, the State cannot demonstrate that the error was harmless beyond a reasonable doubt. *Chapman, supra*; *Perry, supra*; *Coleman, supra.* Therefore, the conviction should be reversed and a new trial granted.

E. Cumulative Error Requires Reversal

Mr. Folk has set out in his Opening Brief how a new trial is required because of each of the errors individually. In addition, he has set out how reversal is required under the doctrine of cumulative error. He relies upon his argument at page 28 of his Opening Brief on this point.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Mr. Folk asks that his conviction be reversed.

Respectfully submitted this 20th day of November, 2013.

Deborah Whipple
Attorney for Jonathan Folk

CERTIFICATE OF SERVICE

I CERTIFY that on November 20, 2013, I caused two true and correct copies of the foregoing document to be:

_X_ mailed

___ hand delivered

___ faxed

to: Daphne J. Huang
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple