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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. MICHAEL EUGENE KOCH, Defendant/Appellant.	)	S.Ct. Docket No. 40294-2012 Ada Co. No. 2011-17513

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 CHERI C. COPSEY
District Judge

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A. *The Court Erred by Failing to Require the State to Comply with I.C.R. 16(b)(7)*

Mr. Koch argued that the district court erred by failing to order the state to comply with I.C.R. 16(b)(7) and then by allowing Mydell Yeager to testify. The state responds that Mr. Koch has not shown the court abused its discretion in denying his discovery request. In particular, it contends the disclosure was adequate "to satisfy the I.C.R. 16(b)(7) requirement that the state disclose the witness's opinions" and that it was not required to produce any "facts or data for these opinions." State's Brief, pg. 8-9 (internal quotation marks omitted).

First, the standard of review of a decision that no discovery violation occurred is not abuse of discretion. The case cited by the respondent, *State v. Wilson*, 142 Idaho 431, 128 P.3d 968 (Ct. App. 2006) (albeit with the "see" signal), does not stand for or even suggest that proposition. The *Wilson* Court remanded the case to the district court for the failure to conduct an *in camera* hearing as required by I.R.E. 509. The question of the standard of review of decisions under I.C.R. 16 was not presented in that case. In fact, the appellate courts conduct a review of the record to determine if the finding of the trial court regarding a claimed discovery violation is supported by substantial and competent evidence. *State v. Stradley*, 127 Idaho 203, 207-08, 899 P.2d 416, 420-421 (1995). If a violation is found and a sanction imposed, the sanction is reviewed under abuse of discretion standard. *State v. Winson*, 129 Idaho 298, 302, 923 P.2d 1005, 1009 (Ct. App. 1996).

Second, the district court's finding of compliance with I.C.R. 16(b)(7) is not supported by the record. To the contrary, the record is clear that the state's summary of Ms. Yeager's testimony did not fulfill the requirements of the rule. In particular, the summary did not inform

Mr. Koch as to what Ms. Yeager's opinions about "the dynamics of delayed disclosure as it relates to child sexual abuse" might be. And, the summary did not inform Mr. Koch of what Ms. Yeager's opinions "regarding behavior of children who have been sexually abused" were. It turned out that, at least according to Ms. Yeager, there are four phases, *i.e.,* engagement, sexual interaction, secrecy and disclosure, "that kids go through in that whole process of sexual abuse[.]" T pg. 697, ln. 23-25. However, the expert witness disclosure did not give Mr. Koch notice that Ms. Yeager would testify to any of that. In addition, it did not inform him as to the facts and data Ms. Yeager relied upon in coming to her opinion that these four phases actually exist.

The summary did give notice that Ms. Yeager would "testify that it is rare that a child immediately discloses their sexual abuse especially when they know the perpetrator," but it did not disclose that Ms. Yeager was going to testify that sometimes children disclose because of an overwhelming sense of shame or humiliation. Nor did the summary disclose how Mr. Yeager came to hold those opinions, *i.e.*, the facts and data underlying her opinion.

The state argues that it could not provide any facts or data because "Yeager's general expert testimony about child sex abuse was not based on any particular or specifically identifiable data source, but on her years of experiences as an expert in the field." State's Brief, pg. 10. But if there were no facts or data supporting Ms. Yeager's opinions, *i.e.*, that they were based upon clinical experience and anecdotes, Mr. Koch was entitled to know that. However, that does not appear to be the case because, according to Ms. Yeager, "there [has been] lots published and lots of documents about that." T Vol. II, pg. 27, ln. 16-21. Presumably, there are facts and data within those presumably peer review publications and other documents. If not,

Mr. Koch was still entitled to be made aware of that, since Ms. Yeager testified she relied upon those publications and documents in forming her opinions. T Vol. II, pg. 27, ln. 16-21. The problem is none of those publications or documents were disclosed to Mr. Koch notwithstanding his specific discovery request, his pretrial motion to compel compliance with the discovery rule and his contemporaneous objection to her testimony. Mr. Koch still does not know what these publications and documents are.

This Court should vacate the conviction because the state should not have been permitted to present Ms. Yeager's testimony which was highly damaging to the defense theory.

B. ***The Multiple Erroneous Rulings During the Trial Deprived Mr. Koch of a Fair Trial***

1. Error during the state's opening statement

During opening statement, the state said to the jury that "[t]he defendant started talking to C[.] about things he should have never shared with a 13-year-old girl." This was objected to as argumentative and that objection was overruled. T Vol. I, pg. 198, ln. 16-23.

The state argues the comment was proper because it "stated a broadly held societal view regarding the appropriateness of sexually explicit conversations with children in the context of her summary of the evidence supporting the state's theory of the case[.]" State's Brief, pg. 13. But the state's argument proves too much. Its belief that sexually explicit conversations are wrong and possibly immoral may or may not be "broadly held,"[1] but its value judgment about such conversations is clearly not evidence which the state expects to produce in support of its

[1] As acknowledged by the state, there was evidence at trial that Mr. and Ms. Koch held "open and liberal sexual attitudes" and would speak openly about sexual matters to their daughter T.K. State's Brief, pg. 3. Whether there is a broadly held societal view against frankly discussing sexual matters with one's own teenaged daughter is highly doubtful.

charge. (Indeed, the state presented no evidence about the moral rightness or wrongness of such conversations, nor would such evidence be relevant.) While the state is permitted to describe the evidence of those conversations, assuming a good-faith belief it will be able to present that evidence, what it may not do in opening statements is attach moral judgments to the evidence it intends to present. *See State v. Griffith*, 97 Idaho 52, 56, 539 P.2d 604, 608 (1975). ("Counsel should not at that time attempt to impeach or otherwise argue the merits of evidence that the opposing side has or will present.") The court erred in overruling Mr. Koch's objection.

2. Evidentiary error during the testimony of Lisa Conn

Mr. Koch argues that the trial court erred in admitting testimony regarding the contents of two text messages sent to Lisa Conn allegedly from Mr. Koch because there was insufficient foundation to show Mr. Koch sent the texts.

The state responds that "it was sufficient for foundational purposes that C.C. and C.C.'s mother [Lisa Conn] testified they recognized Koch's phone number and email address and that the content of those communications led both of them to believe that they were communicating with Koch." State's Brief, pg. 17. However, Ms. Conn did not specifically testify that she recognized the telephone number of the sender during the first incident. She only said in a general sense that she had received telephone calls in the past from Mr. Koch and that she had received texts from that same number. T Vol. I, pg. 259, ln. 12 - pg. 260, ln. 12. As to the second text, Ms. Conn testified that she didn't recognize the number. She said that "the text message came from a number that I didn't recognize. . . . And I said, I'm sorry. I don't recognize this number. Who is this?" T Vol. I, pg. 264, ln. 3-4. And, if the "content of those communications" are to be believed, Michael Koch did not send the first text message since the

second one related that someone had hacked into his computer and was sending messages under his name.

Notwithstanding the state's attempt to turn lemons into lemonade, *State v. Harris*, 358 S.W.3d 172 (Mo. Ct. App. 2011), supports Mr. Koch's position. While Lisa Conn said she had received text messages in the past from Mr. Koch's phone number, she did not testify that she recognized his number when testifying about the first text message. And, she specifically testified that she didn't recognize the number that the second text came from. Under the reasoning in *Harris*, the text messages here are inadmissible.

The court abused its discretion because it treated the legal question of whether sufficient foundation has been presented as merely an issue to be raised during cross-examination. But the question of the weight of the evidence is different from the question of its admissibility. As our Supreme Court has stated, a proper foundation for proffered evidence is "a condition precedent to its admission." *State v. Joy*, 151 Idaho 1, 15, 304 P.3d 276, 290 (2013).

State v. Thompson, 777 N.W.2d 717 (N.D. 2010), a case cited by the state, is easily distinguishable. There the defendant: 1) admitted sending the victim text messages earlier that day; 2) the victim recognized the defendant's phone number and a unique signature on her text messages; and 3) the defendant conceded the text message in question was sent by her phone but said that the victim "may have used her phone to send the message to himself." 777 N.W.2d at 623. Here, by contrast: 1) Mr. Koch did not admit sending the messages; 2) Ms. Conn did not testify she recognized the telephone number from the first text and testified she did not recognize the number from the second; 3) there was no testimony about a unique signature on either email; and 4) there was no admission by Mr. Koch that his phone was used to send the emails. Plainly,

Thompson is not analogous to this case.

Finally, the state fails to address *Rodriguez v. State*, 273 P.3d 845, 849-850 (Nev. 2012), cited by Mr. Koch in his Opening Brief. In *Rodriguez* the Nevada Court found only two of 12 text messages admissible and then only because there was bus surveillance video demonstrating that a co-defendant, with Rodriguez seated next to him and watching, held and operated the cell phone during the time the messages were sent. No similar foundation was offered here.

The court abused its discretion in admitting testimony about these two text messages.

3. Evidentiary errors during the testimony of C.C.

(i) Irrelevant evidence

Mr. Koch contends that the court erred in admitting evidence from C.C. that Mr. Koch "did not enjoy the way that [Ms. Koch] would give him a blow job, oral sex." T Vol. I, pg. 304, ln. 2-17. The state apparently concedes Mr. Koch's argument that whether or not Mr. Koch enjoyed his wife's oral sex techniques is irrelevant, but instead pursues an alternative theory for its admission, *i.e.*, evidence of "grooming behavior." State's Brief, pg. 21. This is not the case for several reasons.

First, had that been the limited purpose for which the court was admitting the evidence, it would have given a limiting instruction in response to Mr. Koch's relevancy objection instead of simply overruling it without explanation. In fact, the evidence was offered and admitted for precisely the purpose Mr. Koch argues it was. Second, there is nothing in the record to suggest such a statement to C.C. would be evidence of grooming. Thus, it would be still be inadmissible for lack of relevance. Ms. Yeager, the only witness arguably qualified to give such testimony, testified after C.C.'s testimony was over. Further, Ms. Yeager did not address the concept of

grooming in her testimony. See T Vol. I, pg. 694, ln. 11.

Finally, the state cites to *State v. Truman*, 150 Idaho 714, 249 P.3d 1169 (Ct. App. 2010). There, the Court found that evidence of sexual comments toward the complaining witness, showing her pornography, the use of rewards and punishments, and other sexual acts were relevant as showing "steps allegedly effectuating a plan to accomplish the charged offenses." 150 Idaho 729, 249 P.3d at 1176. That same pattern of steps is simply not present here and *Truman* is not apposite. (To the extent the state argues that the evidence was admissible as evidence of a plan under I.R.E. 404(b), Mr. Koch notes that he was not given proper notice of the state's intent to use this type of 404(b) prior to trial, CR 74-75, and it would be inadmissible on that basis alone. *State v. Sheldon*, 145 Idaho 225, 230, 178 P.3d 28, 33 (2008).)

(ii) Irrelevant evidence within a non-responsive answer

Mr. Koch objected to the testimony that C.C. "wouldn't go to Renaissance High School, the high school [she] had gotten into, . . . because [she] didn't want to see . . . Michael or Tori or Salina." T pg. 333, ln. 12 - pg. 334, ln. 6. He argued in his Opening Brief that this evidence was both irrelevant and non-responsive to the state's question.

The question of whether evidence is relevant is reviewed *de novo. Perception Const. Management v. Bell,* 151 Idaho 250, 252, 254 P.3d 1246, 1248 (2011). Here, whether or not C.C. decided she couldn't go to her "special" high school because she might run into a member of the Koch family does not tend to prove any fact of consequence to the determination of the action. The state does not respond to this issue in its brief and has apparently conceded the point.

Mr. Koch rests on his Opening Brief as to why the trial court abused its discretion in not permitting Mr. Koch to object to the same evidence as non-responsive.

(iii) Foundation for an email and text messages to C.C.

Mr. Koch argues that C.C. should not have been allowed to testify that she received an email from Mr. Koch asking about her dad based upon the foundation that she recognized his email address as "Dolphins Fan something, something." T pg. 337, ln. 12-17. He also argued that State's Exhibit 17, a series of photographs showing a text message exchange between C.C. and someone using Mr. Koch's telephone, was not admissible. C.C. was permitted to testify that the sender was Mr. Koch based upon her partial recollection of his cell phone number. T pg. 363, ln. 5-7. The foundation for this testimony and the exhibit was inadequate for the reasons argued in section B(2) above and will not be repeated here in the interests of brevity.

(iv) Non-responsive answer by C.C. during cross-examination

Mr. Koch objected to C.C.'s testimony about Mr. Koch being "very adamant about douching and things after you have sex" as not responsive to the prosecutor's question, "So you were laying on the bathroom floor and crying?" Mr. Koch rests on his Opening Brief as to why the trial court abused its discretion in not permitting Mr. Koch to object to the same evidence as non-responsive. The objection should have been sustained.

4. Evidentiary errors during the testimony of Salina Koch

Mr. Koch argues that Salina Koch should not have been permitted to answer the prosecutor's question about whether she recalled, "explaining to Detective McGilvery that if Michael had been happy in your relationship, that he wouldn't have done anything?" T pg. 666, ln. 4-8. Ms. Koch answered, "I do remember that comment, yes, ma'am." T pg. 666, ln. 9.

The state first argues that Mr. Koch did not preserve the issue for appeal. State's Brief,

pg. 22. While it is true that Mr. Koch made an unadorned objection to the question, it is obvious from the context that the basis is relevance. The question and objection are set forth below:

> Q. All right. But do you recall further explaining to Detective – when Detective McGilvery said why would you say you were responsible for it, that you provided him with an explanation? Do you remember providing him with an explanation?
>
> A. Providing the detective with an explanation of –
>
> Q. Why you were responsible for what happened between the defendant and [C.C].
>
> MR. SMETHERS: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> MR. SMETHERS: Judge, I need a side bar.

T Vol. II, pg. 665, ln. 10-22. An objection stating specific grounds is only required "if the specific grounds [is] not apparent from the context." I.R.E. 103(a)(1). Here, it is obvious from the context the objection is relevancy. Thus, the state's argument is without merit.

Next the state argues the court did not abuse its discretion[2] in admitting the evidence because it was relevant as it "pointed to a potential motive for, or reasoning behind, Koch's criminal conduct – that he was unhappy in his marriage." State's Brief, pg. 22. But that is incorrect. The evidence had nothing to do with Mr. Koch's motive to commit the charged offenses. It was Ms. Koch expressing her belief that if her husband sought comfort from C.C. it must have been due to unhappiness in their marriage. That belief says nothing about Mr. Koch's state of happiness with his marriage. In addition, the unstated premise of the argument, *i.e.*, that

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[2] As previously noted, questions of relevancy are reviewed *de novo. Perception Const. Management v. Bell, supra.*

unhappiness in marriage creates a motive to have sexual contact with underage females is bizarre. Ms. Koch's statement of her belief had nothing to do with a fact of consequence in this case and the court erred by overruling Mr. Koch's objection.

5. Evidentiary errors during the testimony of Christopher McGilvery

Mr. Koch argued that the state should not have been able to ask the detective "whether or not [Ms. Koch] recalled talking to C[.] about her concerns that something was going on between C[.] and Michael?" As previously noted, the defense objection to this question was overruled and he answered, "Yes." The detective was then asked, "What did she say about that?" He answered, "[S]he to a degree, danced around that question. She told me at times that she had thought about that." Defense objected again and was overruled. T Vol. II, pg. 43, ln. 19 - pg. 44, ln. 8. Mr. Koch also objected to the question which led to the detective saying that Ms. Koch "said that . . . she had suspicions that something was going on, but she wasn't for sure what." T Vol. II, pg. 45, ln. 3-11. Mr. Koch argued this evidence was inadmissible because it was not an inconsistent out-of-court statement because it was not inconsistent with her testimony. See T pg. 629, ln. 17 - pg. 681, ln. 11 (testimony of Salina Koch).

The state responds that "Detective's McGilvery testimony about Sabrina's vague expressed suspicions about Koch was admissible because it was inconsistent with her prior testimony." State's Brief, pg. 31. However, this Court should disregard that argument as the state does not cite the portion of the record it relies upon for that assertion. Further, Mr. Koch's review of the record did not reveal the basis of the state's assertion.

C. *The Erroneous Admission of the Recorded Telephone Call was Reversible Error*

Mr. Koch argued that there was insufficient foundation to permit the admission of Exhibit 19, the recorded telephone call, as C.C. never testified that the recording was the conversation between her and Mr. Koch and Detective McGilvery was unable to identify the male voice as Mr. Koch. Thus, the foundation was insufficient under I.R.E. 901(a).[3] The state contends that C.C.'s testimony that she participated in a recorded call to Mr. Koch and Detective McGilvery's testimony that he assisted in setting up and recording a phone call was sufficient foundation to establish that Exhibit 19 was the phone call referred to by C.C. State's Brief, pg. 34. That is not the case because no one testified that it was Mr. Koch speaking on Exhibit 19.

Moreover, establishing the foundation for the telephone call requires more than just two state witnesses talking about the same telephone call. The proponent of the evidence must establish that the recording accurately represented what occurred during the conversation. C.C. did not testify that it was an accurate recording and the detective could not because he was not listening in during the recording. T Vol. II, pg. 32, ln. 8-23. The state did not provide any "evidence sufficient to support a finding that the matter in question is what its proponent claims," *i.e.*, a complete and accurate recording of a conversation between C.C. and Mr. Koch. Thus, it was not admissible under I.R.E. 901(a).

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[3] Subsection (b)(6) of the rule provides an illustration of the application of the rule to these circumstances. It states that telephone conversations may be authenticated "by evidence that a call was made to the number assigned at the time by the telephone company to a particular person if . . . circumstances, including self-identification, show the person answering to be the once called."

D. *The Cumulative Effect of the Above Errors Deprived Mr. Koch of a Fair Trial*

The state contends that the cumulative error doctrine does not apply because no error has been shown. State's Brief, pg. 35. That assertion has been shown incorrect above.

III. CONCLUSION

The error in admitting Mydell's Yeager's testimony was not harmless. It so undermined the theory of defense that reversal is required for this error alone. The same is true regarding the admission of Exhibit 19. (As previously noted, the state placed great emphasis on the confrontation call during closing argument. *See, e.g.*, T Vol. III, pg. 82, ln. 22 - pg. 83, ln. 5. (". . . even after that phone call where C[.] is confronting him . . . he's not hanging up, he's not telling her C[.], you are crazy; C[.], I didn't do this, what are you talking about?"); T Vol. III, pg. 84, ln. 24-25. ("The confront call is very important."); T Vol. III, pg. 86, ln. 16 - pg. 87, ln. 2; T Vol. III, pg. 85, ln. 23 - pg. 86, ln. 5; T Vol. III, pg. 86, ln. 16 - pg. 87, ln. 2.) Alternatively, the prejudicial effect of all the errors above requires the Court to conclude that the state cannot meet its burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the errors. *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010); *citing Chapman v. California*, 386 U.S. 18 (1967). Therefore, reversal of the convictions and a remand for a new trial is still required.

Respectfully submitted this 4th day of December, 2013.

Dennis Benjamin
Attorney for Michael Koch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of December, 2013, I caused two true and correct copies of the foregoing to be mailed to:

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