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State v. Inthapanya Appellant's Reply Brief Dckt. 45510

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45510**
	)	
v.	)	**ADA COUNTY NO. CR-FE-2016-6687**
	)	
KHAMLA INTHAPANYA,	)	**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 NANCY A. BASKIN
District Judge

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

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
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

Khamla Inthapanya contends the district court abused its discretion by allowing one of the officers to give improper opinion testimony without conducting half of the analysis required by controlling precedent. The State's arguments in response are not persuasive. The relevant case law reveals this issue was sufficiently preserved for appeal, the district court's decision to admit the opinion testimony was inconsistent with the applicable legal standards, and the State failed, under the proper standard, to prove the error harmless beyond a reasonable doubt. As such, this Court should vacate the verdict and judgment of conviction and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

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

ISSUE

Whether the district court abused its discretion when it overruled Mr. Inthapanya's objection to the officer's improper opinion testimony without conducting the analysis required by controlling precedent.

ARGUMENT

The District Court Abused Its Discretion When It Overruled Mr. Inthapanya's Objection To The Officer's Improper Opinion Testimony Without Conducting The Analysis Required By Controlling Precedent

A. Court Of Appeals' Precedent Makes It Clear That Mr. Inthapanya's Relevance Objection Was Sufficient To Preserve His Argument Under I.R.E. 702 For Appeal

Below, trial counsel objected to the improper expert opinion testimony on the grounds of relevance. (Tr., p.592, Ls.10-13.) Accordingly, in his opening brief, Mr. Inthapanya expressly argued that, "if the opinion is not beyond the common sense, experience, or education of the average juror, *that opinion is not relevant* to the trial. (*See* Tr., p.592, Ls.10-11.)" (App. Br., p.6 (emphasis added).) Nevertheless, the State maintains that he "makes no attempt, however, to show how such an objection preserve his appellate argument." (Resp. Br., p.5.) Since the State's response blatantly ignores the actual argument Mr. Inthapanya made, this Court should reject the State's frivolous response in that regard.

This Court should also reject the State's preservation argument because it is frivolous on its merits. As the Court of Appeals has recently explained, I.R.E. 702 defines when an expert opinion is relevant, and therefore, admissible: "once the witness is qualified as an expert, the trial court must determine whether the expert's opinion testimony will assist the trier of fact in understanding the evidence. I.R.E. 702 . . . . *This condition goes primarily to relevance*." *State v. Caliz-Bautista*, 162 Idaho 833, 835-36 (Ct. App. 2017) (emphasis added). "One aspect of relevancy," the Court of Appeals continued, "is whether the expert testimony is sufficiently tied to the facts of the case such that the testimony will aid the jury in resolving a factual dispute." *Id.* Therefore, Mr. Inthapanya's objection on the grounds of relevance was sufficient

to preserve his argument – that the officer's testimony was not relevant under I.R.E. 702 because it did not address an issue beyond the average juror's ken – for appeal.

The district court actually appears to have understood that this was the case, as it engaged in conducted half of the analysis required under I.R.E. 702 in response to Mr. Inthapanya's relevance objection. (*See* Tr., p.592, L.23 - p.593, L.3.) In fact, the fact that the district court actually decided the issue under the auspices of I.R.E. 702 means the district court's decision itself was sufficient to preserve Mr. Inthapanya's argument for appeal even if his objection itself was not. *State v. DuValt*, 131 Idaho 550, 553 (1998) (explaining that an exception to the preservation rule "has been applied by this Court when the issue was argued to *or decided by* the trial court. . . . Since this issue was directly addressed by the trial court below, we will decide this issue on appeal.") (emphasis added).

For either reason, this Court should reject the State's frivolous preservation argument.

B. The District Court's Decision To Admit The Officer's Opinion Was Inconsistent With The Applicable Legal Standard

As with its preservation argument, the State's responses on the merits of the issue on appeal are contrary to the applicable precedent in several respects. First, its contention that the district court does not need to articulate its analysis under the applicable test when ruling on whether evidence is admissible under the Rules of Evidence (Resp. Br., p.6) has been rejected by Court of Appeals. *E.g.*, *State v. Gomez*, 151 Idaho 146, 151 (Ct. App. 2011). In *Gomez*, there was a question of whether the district court needed to articulate its analysis under I.R.E. 404(b) in regard to whether there was sufficient evidence to show that the prior conduct the State sought to present at trial actually occurred. *Id*. The Court of Appeals held that, "if that question is squarely at issue," then the district court is "required to make a specific articulation" of its

analysis in that regard. *Id*. (explaining the decision in *Cooke v. State*, 149 Idaho 233, 239 (Ct. App. 2010)); *accord State v. Parmer*, 147 Idaho 210, 215 (Ct. App. 2009) (citing *State v. Grist*, 147 Idaho 49, 53 (2009)); *see also State v. Orellana-Castro*, 158 Idaho 757, 762 (2015) (holding that the district court's failure to conduct the analysis required by *Grist* was an abuse of the district court's discretion).

The State tries to distinguish the reasoning in those cases on the basis that they dealt with a pretrial motions, while the objection in this case occurred during trial. (Resp. Br., p.6.) However, the State does not cite any opinions regarding in-trial decisions to support its argument; rather, it only cites to opinions which were reviewing decisions to impose a sentence or deny a motion for leniency. (*See* Resp. Br., p.6.) Of the two, the line addressing pretrial decisions regarding the admission of evidence is more like the issue in this case, since the question at the heart of both is whether evidence is properly admitted under the Rules of Evidence. As such, the line of cases Mr. Inthapanya has cited should control the analysis in this case, meaning the district court's failure to articulate its rationale when the question was squarely presented to it was an abuse of its discretion.

In fact, one of the cases the State cites in support of its argument – *State v. Newman* – actually supports Mr. Inthapanya's argument. In *Newman*, the Idaho Supreme Court explained that it is preferable for the district court to actually articulate the rationales for its decision because, without that articulation, the appellate court may not have a sufficient record to review the sentencing decision. *State v. Newman*, 124 Idaho 415, 418-19 (1993). That was, in fact, the case in *Newman*, and so the Supreme Court vacated the sentence based on the district court's failure to articulate its reasoning and remanded the case so the district court could actually conduct the proper analysis. *Id*.; *compare State v. Ojeda*, 119 Idaho 862, 867 (Ct. App. 1991)

(finding the record sufficient to review the sentencing decision despite the fact that the district court did not articulate its reasoning, and so affirming the decision to deny the motion for leniency at issue in that case).

That lack of an adequate records is, in fact, the reason why the district court is required to articulate its rationales in the admission-of-evidence context. When deciding whether certain evidence is admissible under the Rules of Evidence, the district court will be required to make determinations of fact or weigh credibly of conflicting assertions. *See Parmer*, 147 Idaho at 215. As a result, the record's mere recitation of the arguments and final decision will not adequately reveal the district court's unspoken rationales for appellate review. *E.g., Orellana-Castro*, 158 Idaho at 762 (explaining that there was no record of what facts the district court considered to constitute the common scheme or plan that would justify the admission of the evidence in that case). As a result, the district court needs to articulate its rationale when the question of admissibly of certain evidence is directly before it so that the appellate court can adequately evaluate those rationales under the proper standard. *Gomez*, 151 Idaho at 151; *compare Newman*, 124 Idaho at 418-19.

As such, the rule from the *Orellana-Castro* and *Gomez* line of cases should guide the analysis in this case. Since the question of relevancy under I.R.E. 702 was directly before the district court, its failure to articulate its analysis on the question squarely before it constituted an abuse of its discretion. On that basis alone, this Court should vacate the district court's decision in this case. *See Orellana-Castro*, 158 Idaho at 762.

Second, the State misunderstands Mr. Inthapanya's argument that, had the district court actually conducted the second half of the requisite test, it would not have allowed the officer's opinion testimony in. Mr. Inthapanya argued that the problem in this case was with allowing the

officer to testify that it was his opinion that Mr. Khenyarath got all the heroin in question specifically from Mr. Inthapanya (*i.e.*, testifying that Mr. Inthapanya was guilty of the offense charged) because that was a question which the average juror was capable of answering on his or her own. (App. Br., pp.6-8.) However, the State tries to twist that argument into an evaluation of whether the average juror would know about the "niceties of heroin trafficking." (Resp. Br., pp.6-7.) That response noticeably ignores the fact that Mr. Inthapanya actually explained in his Appellant's Brief that the officer *likely could* testify about those aspects of heroin trafficking – that individual drug dealers might package drugs in a particular manner, that heroin has a particular price range in a particular area, etc. – provided that the district court actually found that information to be beyond the jury's ken. (App. Br., pp.7-8 (though Mr. Inthapanya noted that, because the district court did not actually conduct that part of the analysis, there was actually no decision to that effect in this record).)

Ultimately, though, the State's strawman in that regard is irrelevant to the actual issue on appeal – regardless of whether the officer could testify about the "niceties" of heroin trafficking, he still cannot testify that, because such facts are present in this case, it is his opinion that this defendant was the source of the drugs purchased in this case. The average juror is absolutely capable of deciding what weight to attach to the various pieces of evidence presented in the testimony, including the officer's testimony about the niceties of heroin trafficking, in determining whether the State proved guilt beyond a reasonable doubt. (R., pp.169-70 (the district court instructing the jurors to do precisely that with respect to all the evidence in the case and specifically repeating that instruction in regard to expert testimony).)

As such, the average juror absolutely could, without need of the officer's expert opinion, decide whether Mr. Inthapanya was the source of all the heroin bought in this case by

considering both the officer's explanation about the "niceties of heroin trafficking" and the contrary evidence that Mr. Khenyarath's normal source was low, such that Mr. Khenyarath, as was his custom, was considering turning to a different source of lower-quality heroin to make the December 29, 2015, deal, and that Mr. Khenyarath subsequently apologized to the undercover officer for actually selling him a lower quality of product during the December 29 deal. (*See* App. Br., pp.1-2 (detailing the evidence about Mr. Khenyarath looking to an alternative source for the December 29 deal.) As such, the district court erred by allowing the officer to testify that it was his opinion that all the drugs came from a single source (Mr. Inthapanya) rather than multiple sources because the weighing of the evidence in that respect was within the average jurors' ken.

C. Applying The Proper Standard, The State Failed To Prove Beyond A Reasonable Doubt That This Error Did Not Contribute To The Verdict Actually Rendered

Like its other arguments, the State misrepresents the issue actually on appeal in regard to its assertion that this error was harmless. The State contends that, because trafficking in its base form only requires delivery of two grams, the verdict would have been the same absent error. (Resp. Br., pp.8-9.) However, the trafficking statute includes various enhancements based on the amount of heroin trafficked. I.C. § 37-2732B. The grand jury below specifically indicted Mr. Inthapanya, at the prosecutor's request, under subsection (a)(6)(C), which enhances the potential sentence to a fifteen-year mandatory minimum term if twenty-eight grams are possessed. (R., pp.11-13) When a charge involves such enhancements, the facts underlying that enhancement must be found beyond a reasonable doubt by a jury. *State v. McLeskey*, 138 Idaho 691, 698 (2003) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Therefore, if the error affected the jury's decision regarding the enhancement, the error is not harmless. *Chapman v.*

California, 386 U.S. 18, 24 (1967) (holding the question under the harmless error doctrine is whether the verdict actually rendered by this jury was surely unattirbutible to the error); *State v. Perry*, 150 Idaho 206, 221 (2010) (acknowledging various articulations of the harmlessness standard and specifically adopting the *Chapman* articulation).

The State used the December 29 sales to help prove that it had met the twenty-eight-gram threshold for the enhancment. (*See* Tr., p.800, L.1 - p.801, L.4.) As such, there is a reasonable possibility that, despite the evidence suggesting Mr. Khenyarath had gone to a different source for the heroin he sold the undercover officer on December 29, the jurors deferred to the officer's opinion in specifically finding that enhancing fact in the special verdict form. (*See* R., pp.206-07 (the verdict form).) Thus, there is a reasonable possibility that this error contributed to the verdict this jury actually rendered, and as such, was not harmless.

In fact, the State's argument – that this Court should find that a hypothetical jury would have convicted Mr. Inthapanya of a lesser form of trafficking – does not acurately reflect the proper standard for assessing harmlessness. *See Chapman*, 386 U.S. at 24. To say that an error did not contribute to the verdict does not mean the appellate court has to say the jury needed to be unaware of the erroneous evidence; rather, it must be able to say the error was not important within the whole fabric of the case. *Yates v. Evitts*, 500 U.S. 391, 403 (1991), *overruled in part on other grounds*. That is not a subjective inquiry into how the appellate court thinks the jurors would ultimately decide the case. *See id.* Rather, it is an objective evaluation of whether there is a reasonable possibility a reasonable juror could have considered that evidence (or lack of evidence) to be an important factor in the decision this jury made. *See id.*; *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993). More important, though, is the fact this standard does not operate

as a zero-sum game –while other evidence might also be important, that does not, *ipso facto*, mean the erroneous evidence was not. *See id.*

The Idaho Supreme Court actually demonstrated how that analysis is supposed to work in *State v. Thomas.* When the Court of Appeals ruled on that case, it concluded that the erroneous suppression of certain defense evidence was harmless because, in the Court of Appeals' opinion, the improperly-omitted testimony was less significant and less believable than other evidence in the record, and so, it held the verdict would have bene the same absent the error. *State v. Thomas*, Not Reported in P.3d, 2014 WL 1266316, **4-8 (Ct. App. 2014). However, the Idaho Supreme Court granted review and reached precisely the opposite conclusion on the harmless error question. *State v. Thomas*, 157 Idaho 916, ___, 342 P.3d 628, 631-32 (2015). It explained that a reasonable juror could have believed the improperly-omitted testimony, which meant the error was not harmless. *Id.* It could not say that the erroneous omission of that evidence was not significant within the fabric of that case, regardless of how significant the other evidence considered by the Court of Appeals might have been. *See id.*

The Supreme Court recently reiterated this point in *State v. Austin*, 163 Idaho 378, ___, 413 P.3d 778, 782 (2018). In that case, it rejected the State's argument – that the erroneous exclusion of defense evidence regarding the *per se* theory of DUI was harmless because "Austin still would have been convicted under the impairment theory of DUI" – because there was no indication on which theory the jury in that case had actually reached its verdict. *Id.* As in *Thomas*, the State in *Austin* had not proved the erroneously-admitted evidence was objectively not significant within the fabric of the case actually presented to the jury, which meant that error was not harmless beyond a reasonable doubt. *See id.*

The State's argument in this case makes the same mistake the Court of Appeals did in *Thomas* – it is based on this Court determining that the erroneously-admitted opinion testimony was not significant based on the belief that other evidence presented was significant. (*See* Resp. Br., pp.8-9.) In other words, the State has asked this Court to weigh the evidence itself and resolve this case based on how it thinks a hypothetical jury would ultimately decide this case. That, the United States Supreme Court has expressly held, is improper under *Chapman.*[1] *Sullivan*, 508 U.S. 275, 279-80 (1993). In fact, as the *Sullivan* Court explained, adopting such a perspective would amount to an independent violation of the constitutional right a jury trial: "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action" which means "to hypothesize a guilty verdict that was never in fact rendered—no matter

[1] In making its harmless error argument, the State pointed to an articulation of the harmless error standard in *State v. Montgomery*, 163 Idaho 40, 44 (2017) – that the question is simply whether the error would have been the same absent the error. (Resp. Br., p.8.) However, the State's argument takes the *Montgomery* articulation out of context because that articulation is rooted in *Chapman*. Specifically, *Montgomery* quoted part of the explanation of the harmless error standard from *State v. Almaraz*, 154 Idaho 584, 598 (2013). *Montgomery*, 163 Idaho at 44. The full recitation in *Almaraz* to which the *Montgomery* Court was referring states:

> '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.'' *Perry*, 150 Idaho at 221 . . . (quoting *Chapman*, 386 U.S. at 24 . . .). Put another way, did the State prove beyond a reasonable doubt that the verdict would have been the same if [the witness's] testimony had not been erroneously admitted into evidence.

Almaraz, 154 Idaho at 598. As such, *Almaraz* and *Montgomery* must be understood within the context of *Chapman* – that, if the error was objectively significant within the overall fabric, the appellate court cannot say, beyond a reasonable doubt, that the verdict would have been the same without that evidence. *See id.*; *Montgomery*, 163 Idaho at 44. Therefore, despite referencing *Montgomery*, the State's actual argument still fails to conform with the proper standard for harmlessness.

how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.*

Rather, under the proper standard, the officer's improper opinion testimony was objectively significant within the fabric of the case regardless of whether other evidence was also significant. As such, the State has failed to carry its actual burden to show this error was harmless beyond a reasonable doubt, which means this Court should vacate that erroneous decision.

CONCLUSION

Mr. Inthapanya respectfully requests this Court vacate the verdict and judgment of conviction in this case and remand it for further proceedings.

DATED this 9th day of October, 2018.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas