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State v. Murri Appellant's Brief Dckt. 45785

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45785**
Plaintiff-Respondent,	)	
	)	**TWIN FALLS COUNTY**
v.	)	**NO. CR42-16-8492**
	)	
ZANE BOYD MURRI,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Zane Boyd Murri appeals from his judgment of conviction, entered after a jury found him guilty of felony arson in the first degree. Mr. Murri asserts the district court abused its discretion when it declined to sanction the State for late disclosure of a fire marshal's report on testing Mr. Murri's account of how the fire at issue started, and allowed the fire marshal to testify. Mr. Murri also asserts the district court abused its discretion when it declined to exclude the fire marshal's evidence under Idaho Rule of Evidence 403 (Rule 403), because its probative value was substantially outweighed by the dangers of unfair prejudice and confusion of the issues.

Statement of the Facts and Course of Proceedings

In July of 2016, a fire started in Mr. Murri's basement bedroom, in the Twin Falls halfway house where he had been living. (*See* Tr., p.164, L.21 – p.167, L.3; p.179, L.20 – p.194, L.4.) The responding fire captain described the damage as "pretty significant." (*See* Tr., p.187, Ls.8-9.) After the fire was extinguished, Mr. Murri told the fire captain that he had been smoking in his room, had put his cigarette down in a container on the bed, and then had left the room. (*See* Tr., p.193, L.23 – p.194, L.4.) Based on Mr. Murri's statements, the fire captain originally believed the fire was accidental. (*See* Tr., p.191, Ls.15-24.)

Several days later, some of the other occupants of the halfway house contacted the police and claimed that Mr. Murri was bragging about starting the fire. (*See* Tr., p.305, Ls.4-12.) A detective contacted Twin Falls Fire Marshal Tim Lauda and asked him if, in his opinion, the fire could start by a cigarette landing on a mattress. (*See* Tr., p.46, Ls.14-22.) Marshal Lauda stated it was his opinion that could not happen. (*See* Tr., p.46, Ls.22-23.) The detective and the fire marshal subsequently interviewed Mr. Murri and asked him how he thought the fire started. (*See*

Tr., p.47, Ls.14-19.) Mr. Murri was insistent that the mattress did not have any sheets or pillows on it, and that the mattress was still in plastic. (*See* Tr., p.50, Ls.24-25, p.51, Ls.8-12.) According to Marshal Lauda, Mr. Murri told them he left the lit cigarette in a chewing tobacco can on the mattress and left the room for three to five minutes. (*See* Tr., p.49, Ls.1-2, p.49, L.25 – p.50, L.3.)

Later, in early August of 2016, Marshal Lauda tested the effects of leaving lit cigarettes and papers on a mattress, in four controlled burns. (*See* Tr., p.47, L.19 – p.52, L.12.) The fire marshal left the mattress in the plastic from the factory, but conducted the test outside. (*See* Tr., p.47, L.19 – p.48, L.2.) He testified it was actually more likely to have the mattress catch on fire if it was outside. (*See* Tr., p.51, L.18 – p.52, L.5.) The mattress did not catch on fire during the test. (*See* Tr., p.54, Ls.1-2.) Marshal Lauda prepared a first report documenting his first test, concluding: "Through my experience and years of training I do not believe this fire could have started the way Mr. Murri said. I also conducted a test burn using like materials in an area that would not have hindered ignition or flame spread." (R., pp.158-62.)

The detective confronted Mr. Murri with his and Marshal Lauda's opinion that it was impossible for the fire to start in the manner Mr. Murri described. (*See* Tr., p.312, Ls.13-17.) The detective testified Mr. Murri initially stuck with his account of how the fire started, but later offered the alternative that, hypothetically, it was possible he lit some papers on fire in a period of extreme frustration and dropped them on the bed. (*See* Tr., p.312, L.18 – p.313, L.7.)

The State charged Mr. Murri with one count of arson in the first degree, felony, I.C. § 18-802, and a persistent violator sentencing enhancement pursuant to I.C. § 19-2514. (R., pp.71-74.) Mr. Murri entered a not guilty plea. (R., p.80.) After Mr. Murri requested a continuance,

the district court set the jury trial date for October 3, 2017, with a pretrial conference in late September of 2017. (*See* R., pp.102, 105.)

Meanwhile, Marshal Lauda conduced additional testing on a mattress on December 13, 2016. (*See* Tr., p.52, L.13 – p.55, L.9.) For this second test, the fire marshal purchased a mattress of the same type as used in the halfway house, kept it in plastic, and placed lit cigarettes on it. (*See* Tr., p.52, L.15 – p.53, L.18.) He conducted the second test in the bay of the fire department. (*See* Tr., p.54, Ls.20-24.) The mattress did not catch on fire after the second test. (*See* Tr., p.54, Ls.3-4.) Marshal Lauda prepared a second report based on the second test, concluding, "Based on two test burns, years of experience and training I have determined it to be impossible for this fire to have started the way Mr. Murri said." (R., pp.215-18.)

Mr. Murri had filed a Request for Discovery and Inspection. (R., pp.35-38.) His requests for discovery included: "Copies of any material or information within your possession or control or which hereafter comes into your possession or control which shall be used as evidence in the trial or any hearing of this matter." (R., p.36.) He also requested: "If you have used any expert witness for any reason what so ever in this matter; please produce the name, telephone number, address and curriculum vita[e] of any such expert witness." (R., p.37.) He requested "any records created by such expert witness pertaining to this matter," and "the summary of the expert witnesses' knowledge of this matter and that upon the witness is expected to testify." (R., p.37.)

In February of 2017, the State disclosed Marshal Lauda as a potential expert witness and filed a "Summary" of his expected testimony, stating it would include "[h]is education and training as a Fire Marshal," and "[t]ests conducted to replicate the ability to start a mattress on fire based on defendant's explanation and his opinion of whether a fire could have started in that manner." (R., pp.90-91.) The State also disclosed Marshal Lauda's first report. (*See* Tr., p.19,

Ls.15-20.) However, the State did not disclose Marshal Lauda's second report until September 19, 2017, about two weeks before trial. (*See* R., p.203.)

In early August of 2017, the district court appointed new trial counsel for Mr. Murri. (*See* R., pp.113-14.) In early September of 2017, Mr. Murri filed a Motion in Limine to exclude "[a]ny and all statements, reports, documents and prior testimony offered by or referencing conclusions drawn by the Fire Marshal[] Tim Lauda." (R., pp.115-16.) In the supporting memorandum, Mr. Murri asserted Marshal Lauda's expert opinions on the cause of the fire were not admissible under Idaho Rule of Evidence 702, because they would not assist the jury. (*See* R., pp.153-57.) Further, Mr. Murri asserted the fire marshal's conclusions were not relevant under Idaho Rule of Evidence 401, because his testing was not performed under circumstances equal to those at the scene of the fire. (*See* R., p.156.) He also asserted that, even if Marshal Lauda's statements and report were relevant, they were inadmissible under Idaho Rule of Evidence 403 because their potential prejudicial effect substantially outweighed their probative value. (*See* R., p.156.)

On September 20, 2017, the day after the State disclosed Marshal Lauda's second report, Mr. Murri filed an Amended Motion in Limine, requesting the district court also exclude "[t]he expert report written by Tim Lauda on December 13, 2016, along with any and all statements, reports, documents and prior testimony offered by or referencing conclusions drawn from this report." (*See* R., pp.200-01.) In the supporting memorandum, Mr. Murri asserted he had made a request for discovery, and the State had filed a supplemental discovery response that included Marshal Lauda's second report. (*See* R., pp.202-03.) He noted, "the Defendant had no notice that this report existed until it was disclosed on the 19th of September, 2017." (R., p.203.)

Mr. Lauda asserted, pursuant to Idaho Criminal Rule 16(j), "that there is a continuing duty to disclose information throughout the pendency of this case . . . ." (*See* R., pp.203-04.) He asserted, "Despite the duty to immediately notify counsel of additional discovery, the information which was gathered on the 13th of December, 2016, was turned over by the State in discovery on the 19th of September, 2017, or two weeks prior to trial." (R., p.204.) Mr. Lauda concluded, "because it was not presented to counsel at a time when they could adequately respond it must be stricken from the case." (R., p.204.)

On the day of the hearing on Mr. Murri's motion in limine, the State filed a response. (*See* R., pp.224-30.) During the hearing, the district court characterized the motion as raising three issues: "The first issue is whether the State has violated Rule 16 in failing to disclose under the rule that requires disclosure of facts and opinions, period. . . . The second issue is whether the disclosure of . . . September the 17th is timely under the rule." (Tr., p.13, Ls.9-17.) "And then the third issue is, if none of that makes a difference . . . is he an expert to offer testimony that would be relevant and credible to help the jury in this case?" (Tr., p.13, Ls.18-21.)

The State argued it had disclosed the second test and a video recording of the second test to Mr. Murri's prior counsel, and prior counsel apparently had not discussed it with current counsel. (*See* Tr., p.22, L.16 – p.23, L.19.) The State also contended it had not known about Marshal Lauda's second report until right before they disclosed it to Mr. Murri. (*See* Tr., p.23, L.20 – p.25, L.7.) The State argued it would be "beyond due diligence" to ask the prosecutor or their staff to check every other day to see if each case file had additional reports. (*See* Tr., p.25, L.8 – p.26, L.1.) Further, the State argued it did not intend to admit the second report itself. (*See* Tr., p.27, Ls.4-5.)

Addressing the prosecutor, the district court thought the State was ignoring Idaho Criminal Rule 16(b)(7) and (b)(8), on, respectively, providing in discovery written summaries of expert testimony and reports made by investigators. (*See* Tr., p.28, L.20 – p.30, L.13.) On Rule 16(b)(7), the district court stated, "this prosecutor's office has never understood this rule because every disclosure I have ever read on experts is totally, totally, inadequate . . . ." (*See* Tr., p.28, Ls.22-25.) As for Rule 16(b)(8), the district court thought "that includes things like these expert reports." (*See* Tr., p.29, Ls.16-22.)

The district court understood the State's argument that it was a huge burden on the prosecutor to track things down, and told the State, "having practiced as a judge in this county for now ten and a half years, it is more common than not that this problem occurs." (Tr., p.29, L.24 – p.30, L.5.) The district court stated, "I don't know how many cases I've had where police reports miraculously surface at the last minute a week before trial, a day before trial, the night before trial. So this isn't a new ball game in town." (Tr., p.30, Ls.5-9.) The district court, recognizing the prosecutor was new to the community, then stated, "I'm telling you, talk to your boss about that. You will find out it's happened. It's inexcusable, and it creates the problem we've got right now." (Tr., p.30, Ls.9-13.)

In response to the district court's questions, the State argued Marshal Lauda's testimony would not exceed the scope of the two reports, and his testimony was relevant to disprove Mr. Murri's account of the fire not being willful. (*See* Tr., p.30, L.14 – p.32, L.20.) According to the State, a layman might believe a mattress could be set on fire by a lit cigarette, and Marshal Lauda had specialized knowledge to disprove that. (*See* Tr., p.33, L.1 – p.34, L.5.)

Mr. Murri's counsel asserted the probative value of the reports was low because Marshal Lauda did not investigate the actual scene itself, and the evidence should be excluded

under Rule 403 balancing. (*See* Tr., p.36, Ls.10-23.) The second report contained information on how the second test was conducted, which counsel asserted had not been available to him before. (*See* Tr., p.36, L.24 – p.37, L.12.) He asserted that the prejudice was that "there are additional tests that were performed, that additional conclusions were gleaned from those tests that would lead to an expert opinion of whether or not the fire started the way that Mr. Murri said it did." (*See* Tr., p.41, Ls.10-15.) Mr. Murri's counsel had not had that information available to him, and had relied on the expert witness disclosure when he took over the case from prior counsel. (*See* Tr., p.41, L.16 – p.42, L.9.)

Marshal Lauda then provided testimony on behalf of the State regarding his testing. (*See generally* Tr., p.44, L.23 – p.59, L.25.) Marshal Lauda testified his investigations usually involved going to the scene and digging through evidence. (*See* Tr., p.45, L.22 – p.46, L.2.) But on cross-examination, he testified he had not gone to the scene of the fire at issue or seen any of the items recovered from the room. (*See* Tr., p.56, Ls.4-16.) The fire marshal also testified he believed the fire started on the bed, but could not reach a conclusion on the ignition source or who started the fire. (*See* Tr., p.57, Ls.7-23.) When asked if he could give an expert opinion on the cause of the fire, he testified: "I can pretty much eliminate that it was a cigarette. I can pretty much eliminate that it was electrical. There was nothing else in that room that I can think of that would have started that fire other than a person or persons." (Tr., p.57, L.24 – p.58, L.6.)

Mr. Murri asserted the probative value of Marshal Lauda's evidence was very limited, because he did not investigate the crime scene or anything recovered from the crime scene. (*See* Tr. p.60, Ls.8-19.) Counsel asserted the potential to confuse the issues and prejudice Mr. Murri was great and substantially outweighed the probative value. (*See* Tr., p.60, Ls.19-21.)

The district court determined that the State had disclosed Marshal Lauda as a witness, "and I still maintain that the disclosure was not adequate, but it was at least disclosed, and the general subject of his testimony was disclosed." (Tr., p.62, L.17 – p.63, L.5.) The district court thought "[t]he troubling point in this case, obviously, is the disclosure of this last report here a couple weeks ago." (Tr., p.63, Ls.6-8.) The district court did not see "that that materially changes much in this case. I think it's been clear from the outset . . . what Marshal Lauda's opinion is. His opinion is that the cigarettes didn't start the fire." (Tr., p.63, Ls.8-11.) The district court determined, "though I'm not happy about how all of the discovery in this case has transpired, I cannot find that there's sufficient prejudice to justify either continuing this trial or excluding Marshal Lauda as a witness in this case, so I'll let him testify." (Tr., p.63, Ls.18-23.)

The district court then determined Marshal Lauda was qualified to give an expert opinion on fire causation. (*See* Tr., p.63, L.24 – p.64, L.13.) The district court determined Marshal Lauda did not necessarily need to go to the scene to form an opinion. (*See* Tr., p.64, Ls.20-24.) As for the Rule 403 argument, the district court disagreed with the prejudice to Mr. Murri exceeding the probative value: "I've weighed the issues under that rule and concluded that 403 does not preclude this evidence. So I will let this witness testify, and we will proceed to trial as scheduled." (Tr., p.65, Ls.6-13.)

At Mr. Murri's jury trial, one of Mr. Murri's coworkers testified she heard Mr. Murri say a week before the fire, "I'll burn this place to the ground," because he was upset the partner of the halfway house's owner was withholding Mr. Murri's paycheck for his failure to pay rent. (*See* Tr., p.201, L.20 – p.205, L.14.) One of Mr. Murri's housemates testified Mr. Murri said he was going to burn the house down about a month before the incident. (*See* Tr., p.216, L.5 – p.217, L.14.) The housemate also testified that, two days after the fire, he noticed three-quarters

of the lighter fluid kept in the house for barbequing had been used. (*See* Tr., p.217, L.15 – p.220, L.7.) The housemate testified that, after the incident, Mr. Murri stated they would never prove that he burned it on purpose. (*See* Tr., p.212, L.17 – p.213, L.19.) Another occupant of the halfway house testified he overheard Mr. Murri say that they were going to have a hard time proving how the fire started because the evidence was gone. (*See* Tr., p.239, Ls.12-20.)

The detective testified that, during the interviews, Mr. Murri stated he was stressed because he was not receiving the full amount of his paycheck, he had rent to pay, he was concerned he would be evicted from the halfway house, his food stamps had been cut off, and he had been denied other assistance. (*See* Tr., p.308, Ls.1-16.) The detective and Marshal Lauda both testified that Mr. Murri described the day leading up to the fire as basically the worst day in his life. (*See* Tr., p.260, Ls.8-18, p.308, L.18 – p.309, L.3.)

Marshal Lauda testified on his testing of the mattresses. (*See generally* Tr., p.252, L.3 – p.290, L.8.) He testified that, in his professional opinion, the mattress could not have been set on fire by a lit cigarette. (*See* Tr., p.281, Ls.5-8.) Mr. Murri did not testify in his defense. (*See* Tr., p.321, L.24 – p.322, L.2.)

The jury found Mr. Murri guilty of arson in the first degree. (R., p.293; Tr., p.368, Ls.7-19.) The jury also found him guilty of being a persistent violator. (*See* R., pp.310-11; Tr., p.379, L.10 – p.380, L.11.) The district court, with a new presiding judge, imposed a unified sentence of twenty years, with ten years fixed. (*See* R., pp.323-27.) Mr. Murri filed a Notice of Appeal timely from the district court's Judgment of Conviction Upon a Jury Verdict of Guilty to One Felony Count and Order of Commitment. (R., pp.330-32.)

ISSUES

I. Did the district court abuse its discretion when it declined to sanction the State for late disclosure and allowed Marshal Lauda to testify?

II. Did the district court abuse its discretion when it declined to exclude Marshal Lauda's evidence under Rule 403, because its probative value was substantially outweighed by the dangers of unfair prejudice and confusion of the issues?

ARGUMENT

I.

The District Court Abused Its Discretion When It Declined To Sanction The State For Late Disclosure And Allowed Marshal Lauda To Testify

A. Introduction

Mr. Murri asserts the district court abused its discretion when it declined to sanction the State for late disclosure and allowed Marshal Lauda to testify. The district court highlighted the prosecutor's office's pattern of late disclosures in other cases. (*See* Tr., p.29, L.16 – p.30, L.13.) The district court described the late disclosures as "inexcusable." (*See* Tr., p.30, L.12.) In this case, through considering whether there was prejudice to Mr. Murri, the district court essentially found the State had committed a discovery violation through the late disclosure of Marshal Lauda's second report. (*See* Tr., p.63, Ls.6-23.) The district court determined, "though I'm not happy about how all of the discovery in this case has transpired, I cannot find that there's sufficient prejudice to justify either continuing this trial or excluding Marshal Lauda as a witness in this case, so I'll let him testify." (Tr., p.63, Ls.19-23.) The district court abused its discretion when it declined to sanction the State for this late disclosure and allowed Marshal Lauda to testify, because the district court did not act consistently with the applicable legal standards. The lateness of the disclosure unfairly prejudiced Mr. Murri.

B. Standard Of Review

The Idaho Supreme Court has held, "[w]hile we conduct a review of the record to determine if the finding of the trial court that there was a discovery violation is supported by substantial and competent evidence, we review the actual sanction imposed under the abuse of discretion." *State v. Stradley*, 127 Idaho 203, 207-08 (1995). "What sanction should be imposed

or whether a sanction would be imposed at all is discretionary with the trial court." *Id.* (internal quotation marks omitted). The trial court's exercise of discretion is beyond the purview of a reviewing court unless it has been clearly abused. *Id.*

When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry into whether the district court rightly perceived the issue as one of discretion, whether the district court acted within the outer boundaries of such discretion and consistently with any applicable legal standards, and whether the district court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

The Idaho Supreme Court has also held, "[w]here the question is one of late disclosure rather than failure to disclose, the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial." *State v. Byington*, 132 Idaho 589, 592 (1999) (internal quotation marks omitted). "To prove prejudice, a defendant must show there is a reasonable probability that, but for the late disclosure of evidence, the result of the proceedings would have been different." *Id.* (internal quotation marks omitted). In this context, the second step of the three-step *Hedger* inquiry requires the appellate court "to determine whether there is substantial and competent evidence to support the trial court's factual finding concerning unfair prejudice." *Id.* at 593.

C. The Lateness Of The Disclosure Unfairly Prejudiced Mr. Murri

The district court did not act consistently with the applicable legal standards, because the lateness of the disclosure unfairly prejudiced Mr. Murri. The rules of discovery provide that, on written request of the defendant, the State "must permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, made

in connection with the particular case, that are in the possession, custody or control of the prosecuting attorney or the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence." I.C.R. 16(b)(5). Further, on written request of the defendant, the State "must provide a written summary or report of any testimony that the state intends to introduce at trial or at a hearing pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence. The summary provided must describe the witness's opinions, the facts and data for those opinions, and the witness's qualifications." I.C.R. 16(b)(7).

Additionally, the rules of discovery provide that, "[i]f, after compliance with a request issued pursuant to this rule, and prior to or during trial, a party discovers additional evidence or the evidence of an additional witness or witnesses, or decides to use additional evidence, witness or witnesses, the evidence is automatically subject to discovery and inspection under the prior request." I.C.R. 16(j). Under this continuing duty to disclose, "[t]he party must immediately notify the other party or that party's attorney and the court of the existence of the additional evidence or the names of the additional witness or witnesses in order to allow the other party to make an appropriate request for additional discovery or inspection." *Id.*

The district court's comments that the late disclosure of the second report was "[t]he troubling point in this case" (*see* Tr., p.63, Ls.6-8), and the district court's consideration of whether there was sufficient prejudice to impose a sanction (*see* Tr., p.63, Ls.18-23), indicate the district court found the late disclosure here was a discovery violation. The district court correctly found the State violated its continuing duty of discovery through its late disclosure of the second report. *See* I.C.R. 16(j); *see also United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (holding, in the *Brady*[1] context, that "[i]f disclosure were excused in instances where the

[1] *See Brady v. Maryland*, 373 U.S. 83 (1963).

prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representations of the United States Government. This we decline to do").

However, the district court abused its discretion when it determined there was insufficient prejudice to justify continuing the trial or excluding Marshal Lauda as a witness (*see* Tr., p.63, Ls.20-23), because the district court did not act consistently with the applicable legal standards. At the hearing, Mr. Murri's counsel asserted, "The prejudice, Your Honor, he is saying that there are additional tests that were performed, that additional conclusions were gleaned from those tests that would lead to an expert opinion of whether or not the fire started the way that Mr. Murri said it did." (Tr., p.41, Ls.10-15.) Counsel questioned whether, now that he had the report, "can I take this report to an expert and see if those are validated opinions?" (*See* Tr., p.41, Ls.16-23.) Counsel also asserted he had relied on the expert witness disclosure: "Otherwise, I'm left with the first report and the cross-examination from the preliminary hearing transcript, which shows it wasn't even the same type of mattress that was used." (*See* Tr., p.42, Ls.4-9.)

In other words, the late disclosure of Marshal Lauda's second report meant Mr. Murri would be hard-pressed to find an expert to assess the report in the two weeks before trial, and he suddenly could not rely on the State's previous disclosures on the fire marshal's testing. Thus, there is a reasonable probability that, but for the late disclosure, the result of the proceedings would have been different. *See Byington*, 132 Idaho at 592. In closing arguments, the State emphasized Marshal Lauda's conclusions: "You heard the marshal testify. He doesn't have a bone to pick in this. The conclusions he made really impact how this case played out. One, that it's impossible for cigarettes to start that fire." (Tr., p.345, Ls.10-13.) The State contended

Marshal Lauda had dispelled the "myth" that leaving cigarettes on a mattress would start a fire. (*See* Tr., p.345, L.13 – p.346, L.1.) The State also invited the jury to consider Marshal Lauda's test results and played the video recordings from his tests. (*See* Tr., p.346, L.2 – p.347, L.15.) Further, in its rebuttal closing argument, the State told the jury that Mr. Murri's counsel "spoke about, you'll notice that he spent much time on the fireman's testimony. Why? I would argue, because they can't challenge the marshal." (*See* Tr., p.358, Ls.6-8.)

But the State's late disclosure left Mr. Murri unable to challenge Marshal Lauda's testimony through approaching an expert to assess the second report, or otherwise respond to the additional information from that report. Mr. Murri therefore submits that there is a reasonable probability that, but for the late disclosure, the result of the proceedings would have been different. *See Byington*, 132 Idaho at 592. The lateness of the disclosure so prejudiced Mr. Murri's preparation and presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial. *See id.* Substantial and competent evidence did not support the trial court's factual finding that there was no unfair prejudice, and the district court thereby did not act consistently with the applicable legal standards. *See id.* at 593.

Thus, the district court abused its discretion when it declined to sanction the State for this late disclosure and allowed Marshal Lauda to testify. *See Hedger*, 115 Idaho at 600. Mr. Murri's judgment of conviction should be vacated, and the case should be remanded to the district court for a new trial. *See State v. Lamphere*, 130 Idaho 630, 635-36 (1997).

II.

The District Court Abused Its Discretion When It Declined To Exclude Marshal Lauda's Evidence Under Rule 403, Because Its Probative Value Was Substantially Outweighed By The Dangers Of Unfair Prejudice And Confusion Of The Issues

A. Introduction

Mr. Murri asserts the district court abused its discretion when it declined to exclude Marshal Lauda's evidence under Idaho Rule of Evidence 403. The district court determined Rule 403 did not preclude admission of Marshal Lauda's evidence, ruling, "I've weighed the issues under that rule and concluded that 403 does not preclude this evidence." (*See* Tr., p.65, Ls.6-11.) However, the district court abused its discretion when it declined to exclude Marshal Lauda's evidence under Rule 403, because the district court did not act consistently with the applicable legal standards. Marshal Lauda's evidence should have been excluded because its probative value was substantially outweighed by the dangers of unfair prejudice and confusion of the issues. The State will be unable to show the district court's abuse of discretion in declining to exclude Marshal Lauda's evidence was harmless.

B. Standard Of Review

At the time of the district court's decision, the Idaho Rules of Evidence defined relevant evidence as "evidence having 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." I.R.E. 401 (2017). Evidence, although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." I.R.E. 403 (2017). "A trial court's determination under

Rule 403 will not be disturbed on appeal unless it is shown to be an abuse of discretion." *State v. Rawlings*, 159 Idaho 498, 506 (2015).

C. The Probative Value Of Marshal Lauda's Evidence Was Substantially Outweighed By The Dangers Of Unfair Prejudice And Confusion Of The Issues

Here, the district court did not act consistently with the applicable legal standards, because the probative value of Marshal Lauda's evidence was substantially outweighed by the dangers of unfair prejudice and confusion of the issues.

The probative value of Marshal Lauda's evidence was very limited. As Mr. Murri's counsel asserted before the district court, Marshal Lauda "cannot tell us the cause of the fire. He tested one theory or the theory that Mr. Murri gave him. But he did not do any investigation of the crime scene, he didn't do any investigation of anything that was recovered from the crime scene." (*See* Tr., p.60, Ls.13-18.) Indeed, at the hearing on the motion in limine, the fire marshal testified on direct examination that he had investigated "hundreds of fires" since becoming marshal, and the State asked him, "Investigated involves what?" (*See* Tr., p.45, L.22 – p.46, L.2.) Marshal Lauda replied: "Usually we go out on a scene where we're doing a scenic investigation. We're digging through evidence, then we're collecting data, analyzes data. Form a hypothesis, we test the hypothesis, and after we test the hypothesis, we find a conclusion." (Tr., p.46, L.3-7.) In contrast, Marshal Lauda testified on cross examination that, in this case, he did not go to the halfway house and observe the scene of the fire, nor did not see any of the items that came from the room. (*See* Tr., p.56, Ls.4-16.) Thus, the probative value of Marshal Lauda's evidence was "very limited." (*See* Tr., p.60, Ls.18-19.)

In contrast, as Mr. Murri's counsel asserted, the potential to confuse the issues and unfairly prejudice Mr. Murri was great and significantly outweighed the evidence's probative

value. (*See* Tr., p.60, Ls.19-21.) In the supporting memorandum for the motion in limine, Mr. Murri asserted, "[i]n essence, if the State were allowed the introduction of this information, it would allow an unreliable report and testimony to be presented to a jury in a convincing way that potentially determines the main issue in this matter." (R., p.156.) Thus, the probative value of Marshal Lauda's evidence was substantially outweighed by the dangers of unfair prejudice and confusion of the issues. *See* I.R.E. 403. The district court therefore did not act consistently with the applicable legal standards, and abused its discretion when it declined to exclude Marshal Lauda's evidence under Rule 403. *See Hedger*, 115 Idaho at 600.

D. The State Will Be Unable To Show The District Court's Abuse Of Discretion Was Harmless

Mr. Murri asserts the State will be unable to show the district court's abuse of discretion in declining to exclude Marshal Lauda's evidence was harmless. The Idaho Supreme Court has held, "In the case of an incorrect ruling regarding evidence, this Court will grant relief on appeal only if the error affects a substantial right of one of the parties." *State v. Parker*, 157 Idaho 132, 139-40 (2014). "Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded." I.C.R. 52. "If a substantial right is not affected, an abuse of discretion may be deemed harmless." *Parker*, 157 Idaho at 140.

Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). *See State v. Perry*, 150 Idaho 209, 227 (2010). "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt,

that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp*, 101 Idaho 498, 507 (1980) (citing *Chapman*, 386 U.S. at 24).

As discussed above, Marshal Lauda's evidence was a significant part of the State's case. The State stressed in closing argument that Marshal Lauda's tests had disproved Mr. Murri's account of how the fire started. (*See* Tr., p.345, L.10 – p.347, L.15.) Thus, the State cannot establish, beyond a reasonable doubt, that there was no reasonable possibility that Marshal Lauda's evidence contributed to the conviction. *See Sharp*, 101 Idaho at 507. The State will be unable to show the district court's abuse of discretion in declining to exclude Marshal Lauda's evidence was harmless. *See Perry*, 150 Idaho at 227. Mr. Murri's judgment of conviction should be vacated, and the case should be remanded to the district court for a new trial.

CONCLUSION

For the above reasons, Mr. Murri respectfully requests that this Court vacate his judgment of conviction and remand the case to the district court for a new trial.

DATED this 25th day of September, 2018.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 2018, I caused a true and correct copy of the foregoing APPELLANT'S 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

BPM/eas