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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45480
)	
v.)	ADA COUNTY NO. CR01-17-4319
)	
LANCE CAMERON)	
CLEMENTS,)	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 STEVEN J. HIPPLER
District Judge**

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**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

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STATEMENT OF THE CASE

Nature of the Case

Lance Clements appeals from his judgment of conviction for two counts of lewd conduct with a minor under the age of sixteen. Mr. Clements was found guilty following a jury trial and the district court imposed unified sentences of thirty years, with ten years fixed, and ordered that the sentences run concurrent. Mr. Clements appeals, and he asserts that the district court abused its discretion by admitting the CARES interview pursuant to I.R.E. 803(4) because the statements were made to a person who does not provide medical treatment and abused its discretion by holding that Mr. Clements had waived any additional hearsay objections at trial by not making those objections during the motion in limine.

Statement of the Facts and Course of Proceedings

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

ISSUES

- I. Did the district court abuse its discretion by concluding that the CARES interview was admissible pursuant to I.R.E. 803(4)?

- II. Did the district court abuse its discretion by holding that Mr. Clements' hearsay objections were waived by failing to make the objections during the motion in limine and that every statement in the interview was admissible?

I.

The District Court Abused Its Discretion When It Admitted The CARES Interview Pursuant to I.R.E. 803(4)

A. Introduction

Mr. Clements submits that, because T.C.'s statements were made to a person who could not provide medical treatment, they were not admissible pursuant to I.R.E. 803(4). This Reply Brief addresses the State's assertion that it is not this Court's duty to search the record in order to find error and that any error is harmless.

B. The District Court Abused Its Discretion When It Admitted The CARES Interview Pursuant to I.R.E. 803(4)

Mr. Clements has argued on appeal that the district court abused its discretion by admitting the interview as a whole, without determining which statements would meet the hearsay exception and which ones would not. (Appellant's Brief, p.10.) The State notes that Mr. Clements did not respond to the State's motion by identifying particular inadmissible statements, but rather responded by asserting that the interview as a whole was inadmissible. (Respondent's Brief, p.14.) The State then asserts that this Court should not parse out the individuals statements to determine whether the district court erred in its application of I.R.E. 803(4).

Mr. Clements agrees with the State that is generally not this Court's duty to search the record for error or to parse out the individual statements. And he acknowledges that in district court, Mr. Clements objected to the entire interview, not particular statements. However, he has not asked this Court to become a factfinder or search the record for error. The error in this case is clear: when faced with a hearsay objection, the district court did not individually review the statements to determine whether they were subject to the exception. This is an abuse of

discretion. *See State v. Robins*, 2018 WL 6254427 at *14 (“Robins argues on appeal that the district court erred by not individually reviewing the statements within the greater narrative to determine whether each one was against Douglas’s interest. His argument is correct.” In *Robins*, the defendant argued that the letter at issue was inadmissible hearsay. *Id.* at *2. The district court agreed that it was hearsay but found it admissible as a statement against interest. *Id.* This Court found error in the court’s admission of the entire letter without evaluating all of the statements in it. *Id.* at *14. And nothing in *Robins* suggests that the parties requested the court parse out the statements – the defendant objected to the entire letter.

Similarly, in *State v. Ruiz*, 150 Idaho 469 (2010), the defendant asserted that the district court abused its discretion by failing to conduct the proper analysis under I.R.E. 403. *Id.* at 471. This Court found that the district court did not conduct the necessary analysis and, because the State did not assert that the error was harmless, vacated the judgment of conviction. *Id.* It did not then conduct the proper analysis itself; it remanded the case for the district court to properly exercise its discretion.

Mr. Clements is asking the same thing here. Mr. Clements is not asking this Court to search the record for an abuse of discretion and parse out all of the statements. This was the role of the district court and its failure to do so in the first instance constitutes an abuse of discretion. Once this Court finds an abuse of discretion, it reverses the decision of the district court unless the decision is harmless. *See id.*

The error is not harmless. The harmless error test articulated in *Chapman v. California*, 386 U.S. 18 (1967), applies in cases of objected-to error. *See State v. Perry*, 150 Idaho 209 (2010). Under the *Chapman* harmless error analysis, where a constitutional violation occurs at trial, and is followed by a contemporaneous objection, a reversal is necessitated, unless the

State proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.* Mr. Clements notes approximately the first seventeen minutes of the interview do not concern the allegations of abuse at all.¹ The interviewer at T.C. discusses what T.C. likes to do for fun, which she does at school, and what happened on Christmas day, including having cocoa, watching movies, and opening presents. This serves no purpose other than to make T.C. appear sympathetic. While the State is correct that T.C.'s mother and Dr. Cox testified to T.C.'s allegations, the video of the interview clearly places T.C. in a sympathetic light and begins with statements that have nothing at all to do with the allegations. This evidence therefore plays on the jury's sympathies and was not harmless.

II.

The District Court Abused Its Discretion When It Held That Mr. Clements' Objections Were Waived By Failing To Make The Objections During The Motion In Limine And That Every Statement In the Interview Was Admissible

A. Introduction

Mr. Clements asserts that the district court abused its discretion when it held that Mr. Clements' hearsay objections at trial were waived, and when it held that that every statement in the interview was admissible. This Reply Brief addresses the State's assertions that the issue that the issue was waived pursuant to I.C.R. 12(e) and I.C.R. 12(f) and that the error was harmless.

¹ In the recording in the record in this case, nothing occurs for the first sixteen minutes, and then T.C. enters the room. No discussion of the allegations occurs until the 33rd minute of the interview. These statements discussing events prior to, and unrelated to, the allegations are clearly not made for the purpose of medical diagnosis or treatment.

B. The District Court Abused Its Discretion When It Held That Mr. Clements' Objections Were Waived By Failing To Make The Objections During The Motion In Limine And That Every Statement In the Interview Was Admissible

The State acknowledges that “ordinarily, hearsay objections may be made at trial. The State also acknowledges that there is no rule that requires parties to bring motions in limine to determine the admissible to evidence they seek to present (or preclude admission of) at trial.” (Respondent’s Brief, p.18.) The State, however, asserts that, pursuant to I.C.R. 12(e) and I.C.R. 12(f), the district court did not abuse its discretion by finding Mr. Clements’ hearsay objections waived.

I.C.R. 12(e) provides, “a motion made before trial must be determined before trial unless the court orders that it be deferred for determination at trial of the general issue. Where factual findings are involved in determining a motion, the court must state its essential findings on the record.” This rule does not apply in this situation, because Mr. Clements’s hearsay objection was raised on the morning of trial, which, as the State acknowledges, no rule prohibits. Further, the motion made prior to trial in this case was the State’s motion, not Mr. Clements’s motion. (R., p.51.) And counsel for Mr. Clements emphasized that this new motion was made in light of the court’s ruling on the admissibility of the entire recording. (Tr., p.101, Ls.21-23.) Further, I.C.R. 12(f) does not apply, because this rule applies to defendants who fail to raise an objection that “must be made prior to trial.” And, as the State acknowledges, this hearsay objection is not an objection that must be made prior to trial. Finally, the State cites to *Hansen v. Roberts*, 154 Idaho 469 (2013) to support its waiver argument, and in so doing notes that the decision rests on the civil rules. The State is correct that the decision rests on I.R.C.P. 32. Of course, the civil rules are not applicable in this case; the criminal rules are. And the criminal rules, specifically, I.C.R. 12(e) and I.C.R. 12(f), did not preclude Mr. Clements’ motion in this case.

The State also asserts that the error is harmless for the same reasons as it asserted in the previous issue. Mr. Clements also incorporates his harmless error argument from section I(B) and asserts that the error in this not harmless.

CONCLUSION

Mr. Clements requests that his judgment of conviction be vacated and that his case be remanded for further proceedings.

DATED this 4th day of January, 2019.

/s/ Justin M. Curtis
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 2019, I caused a true and correct copy of the foregoing APPELLANT’S REPLY BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
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JMC/eas