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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45601
)	
v.)	ADA COUNTY NO. CR-FE-2016-4994
)	
MICHAEL THERON HAYES,)	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 SAMUEL A. HOAGLAND
District Judge

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STATEMENT OF THE CASE

Nature of the Case

On appeal from his conviction for one count of felony battery on a correctional officer, Michael Theron Hayes raised three issues: (1) the district court erred when it declined to issue subpoenas directing Mr. Hayes' medical providers to testify on his behalf; (2) the district court erred when it allowed the State, during cross-examination of Mr. Hayes, to inquire into specific instances of his past conduct that were not relevant to his character for untruthfulness; and (3) the district court abused its discretion when it denied Mr. Hayes' motion for a new trial, on the basis the district court erred as a matter of law when it prohibited Mr. Hayes from asking questions related to prison guidelines that were relevant to whether the State's witnesses had a motive to lie.

In its Respondent's Brief, the State argues: (1) Mr. Hayes' claim of error in the denial of his pro se request for subpoenas is moot because he was represented by counsel at trial; (2) Mr. Hayes did not show any error in the district court's rulings on the scope of cross-examination; and (3) Mr. Hayes did not show the district court erred when it excluded evidence of the Idaho Department of Correction's policies. (*See Resp. Br.*, pp.3-17.)

This Reply Brief is necessary to address the State's unavailing arguments.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Hayes' 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 err when it declined to issue subpoenas directing April Dawson, M.D., and Kevin Kaae to testify on Mr. Hayes' behalf?
- II. Did the district court err when it allowed the State, on cross-examination of Mr. Hayes, to inquire into specific instances of his prior conduct towards correctional officers and other inmates?
- III. Did the district court abuse its discretion when it denied Mr. Hayes' motion for a new trial, on the basis the district court erred as a matter of law when it prohibited Mr. Hayes from asking the correctional officers questions related to the prison guidelines?

ARGUMENT

I.

The District Court Erred When It Declined To Issue Subpoenas Directing April Dawson, M.D., And Kevin Kaae To Testify On Mr. Hayes' Behalf

A. Introduction

Mr. Hayes asserts the district court erred when it declined to issue subpoenas directing April Dawson, M.D., and Kevin Kaae to testify on Mr. Hayes' behalf. Dr. Dawson's and Mr. Kaae's proposed testimony about Mr. Hayes' medical condition and medical records was relevant to Mr. Hayes' defense.

B. This Issue Is Not Moot

The State argues this issue "was rendered moot by the appointment of counsel who then made his own determinations of what witnesses to subpoena." (*See Resp. Br.*, p.3.) However, this issue is not moot.

"An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief." *State v. Barclay*, 149 Idaho 6, 8 (2010) (internal quotation marks omitted). The State's mootness argument relies on the claim that "[t]he record in this case does not show that the court's ruling in any way affected counsel's choice of witnesses." (*See Resp. Br.*, p.4.) But on the page before that claim, the State recognizes that the district court "found that the proposed evidence of Dr. Dawson and Mr. Kaae was not relevant." (*See Resp. Br.*, p.3.) Indeed, the district court determined: "The court does not find that any evidence that might be offered by Dr. April Dawson or Kevin Kaae is relevant to the question of whether or not the defendant committed this crime. Therefore, they would not be allowed under any circumstance." (*Tr.*, p.199, Ls.10-15.)

The State's argument therefore presupposes that the district court would have revisited its determination that the proposed testimony was not relevant, after the appointment of counsel, so counsel could choose whether or not to call the medical providers as witnesses. Put otherwise, the State's argument implicitly concedes that Dr. Dawson's and Mr. Kaae's proposed testimony was relevant to Mr. Hayes' defense.

In any event, the issue is not moot. The issue here is not whether Mr. Hayes, in his pro se capacity, could subpoena Dr. Dawson or Mr. Kaae (*see* Resp. Br., p.4); rather, the issue is whether the district court erred when it declined to issue subpoenas directing them to testify on Mr. Hayes' behalf (*see* App. Br., pp.12-19). In spite of the State's rannygazoo¹ of a mootness argument, this issue is a real and substantial controversy that is capable of being concluded by judicial relief. *See Barclay*, 149 Idaho at 8. The issue of whether the district court erred, when it declined to issue subpoenas directing April Dawson, M.D., and Kevin Kaae to testify on Mr. Hayes' behalf, is not moot.

C. Dr. Dawson's And Mr. Kaae's Proposed Testimony Was Relevant To Mr. Hayes' Defense

Dr. Dawson's and Mr. Kaae's proposed testimony about Mr. Hayes' medical condition and medical records was relevant to Mr. Hayes' defense. Because their proposed testimony supported Mr. Hayes' defense that the officers committed a battery on him, the evidence was relevant under Rule 401. *See* I.R.E. 401 (2016).

¹ “[A] deceptive story or scheme, pranks, tricks or other irritating or foolish carryings-on,’ the last sense being utterly Wodehousian.” John E. McIntyre, *In a word: rannygazoo*, Baltimore Sun, (Apr. 8, 2013, 8:02 AM), <https://www.baltimoresun.com/news/language-blog/bal-in-a-word-rannygazoo-20130408-story.html>.

The State argues evidence that Mr. Hayes “may have been injured is irrelevant to whether he battered the correctional officers. Because it was uncontested that correctional officers used force on [Mr.] Hayes in order to subdue him, any resulting injuries did not prove or disprove whether he battered them.” (Resp. Br., p.5.) However, why the officers used force, and the extent of the force used, were both contested issues. In the motion for a medical expert, Mr. Hayes asserted he expected an expert to testify the officers assaulted and battered him, while he was shackled, handcuffed, and restrained. (*See R.*, p.330.) He also expected an expert to testify that medical testing and the process of elimination showed his injuries were caused by the officers, who severely beat and battered him. (*See R.*, p.333.) Mr. Hayes echoed those assertions at a hearing where he described what the officers had done. (*See Tr.*, p.63, L.15 – p.65, L.11.) Mr. Hayes also asserted the officers “became very violent towards me” when they were reading the infraction report to him. (*See Tr.*, p.79, Ls.11-15.) In contrast, the State argued Mr. Hayes had become aggressive, which led to the officers “going hands on with him.” (*See Tr.*, p.85, L.22 – p.86, L.1.) The State contended Mr. Hayes struck a couple of the officers, and the officers used force on him, including strikes and wrist locks. (*See Tr.*, p.86, Ls.1-7.)

Thus, evidence of blood in Mr. Hayes’ urine, and medical tests ruling out a disease or kidney stones as the cause of the blood in the urine (*see R.*, pp.332-33; *Tr.*, p.63, L.19 – p.64, L.4), supported Mr. Hayes’ defense that he did not commit a battery on the officers, and he had the injuries because the officers committed a battery on him, *see I.R.E.* 401. Additionally, a logical inference from the blood in Mr. Hayes’ urine being visible to the naked eye (*see Tr.*, p.102, Ls.19-24), was that his injuries were serious enough that a likely cause was the officers committing a battery on him as he described. *See I.R.E.* 401. The State’s argument that the proposed testimony was irrelevant fails.

D. The State Has Not Proven That The Error Was Harmless

The State has not proven that the district court's error in declining to issue the subpoenas for Dr. Dawson and Mr. Kaae was harmless. *See State v. Perry*, 150 Idaho 209, 227 (2010). The State argues Mr. Hayes "never offered evidence that any medical professional would testify that [Mr.] Hayes suffered any injury during the November 10, 2015 incident." (Resp. Br., p.6.) However, Mr. Hayes asserted in the motion for a medical expert that he expected an expert to testify that medical testing and the process of elimination showed his internal injuries were caused by the correctional officers, who severely beat and battered him on November 10, 2015. (*See R.*, p.333.) Mr. Hayes also asserted at a hearing that Dr. Dawson, "through a reliable scientific medical testing, they determined that these—that all this blood that was in the urine for over 37 days after this altercation was caused by internal bleeding from the injuries that were inflicted upon me by the three prison guards." (*See Tr.*, p.64, L.19 –p.65, L.8.)

Additionally, the State contends "the record, and in particular the district court's denial of the motion for a new trial, shows that the proffered testimony, if offered at trial, would also have been denied under I.R.E. 403 because it was too speculative." (Resp. Br., p.7.) But as discussed above, Mr. Hayes asserted Dr. Dawson would testify that the blood in his urine was caused by injuries inflicted by the correctional officers. (*See Tr.*, p.64, L.19 –p.65, L.8.) Further, the State fails to address (*see Resp. Br.*, pp.7-8), how testimony from Dr. Dawson and Mr. Kaae would have undermined the State's argument that the extent of Mr. Hayes' injuries, as documented by State's witness Mr. Rich, did not corroborate Mr. Hayes' testimony that the officers committed a battery on him (*see App. Br.*, pp.18-19).

Thus, the State has not demonstrated beyond a reasonable doubt that the district court's error in declining to issue subpoenas directing Dr. Dawson and Mr. Kaae to testify on

Mr. Hayes' behalf was harmless. *See State v. Sharp*, 101 Idaho 498, 507 (1980). Mr. Hayes' judgment of conviction should be vacated, and his case should be remanded for further proceedings.

II.

The District Court Erred When It Allowed The State, On Cross-Examination, To Inquire Into Specific Instances Of Mr. Hayes' Prior Conduct Towards Correctional Officers And Other Inmates

A. Introduction

Mr. Hayes asserts the district court erred when it allowed the State, on cross-examination of Mr. Hayes, to inquire into specific instances of his prior conduct towards correctional officers and other inmates. The prior conduct is not relevant to Mr. Hayes' character for untruthfulness, the purported reason offered by the State for allowing the inquiries. Even if the prior conduct were relevant to Mr. Hayes' character for untruthfulness, the district court abused its discretion under Rule 403 when it allowed the inquiry, because the prior conduct's danger of undue prejudice substantially outweighs any minimal probative value it might have.

B. The Prior Conduct Is Not Relevant To Mr. Hayes' Character For Untruthfulness

The prior conduct is not relevant to Mr. Hayes' character for untruthfulness pursuant to Rule 608(b), the purported reason offered by the State for the inquiry. (*See Tr.*, p.546, Ls.13-20.) The eight instances of Mr. Hayes' prior conduct inquired into by the State (*see Tr.*, p.553, L.12 – p.558, L.19), do not actually indicate anything about Mr. Hayes' character for untruthfulness, *see I.R.E.* 608(b) (2017).

The State contends the district court's determination "fit the specific language of Rule 608(b): the state was allowed 'cross-examination of the witness' regarding '[s]pecific

instances of conduct’ to demonstrate the ‘character of the witness for . . . untruthfulness.’ Impeachment of [Mr.] Hayes about his claim of being respectful to inmates and guards, and his reasons for such respect, was properly allowed by the district court.” (Resp. Br., p.11.) But the State has neglected to explain how the State’s impeachment by contradiction of Mr. Hayes’ trial testimony pertained to Mr. Hayes’ character for untruthfulness. None of the eight instances of his prior conduct (*see* Tr., p.553, L.12 – p.558, L.19), involved Mr. Hayes lying or otherwise engaging in dishonest behavior. The eight instances therefore had no probative value as to Mr. Hayes’ propensity to lie, and are not relevant to his character for untruthfulness. *See State v. Guinn*, 114 Idaho 30, 40 (Ct. App. 1988) (Burnett, J., specially concurring); *see also Pierson v. Brooks*, 115 Idaho 529, 533 (Ct. App. 1989) (“[C]ross-examination which attacks the witness’s testimony, but which contains no personal attack upon the witness’s veracity, does not trigger a right to present opinion testimony on the witness’s character for truthfulness.”).

The State also argues that, assuming Mr. Hayes is correct, “and I.R.E. 607 instead of 608 controlled, then the state should have been allowed to impeach [Mr.] Hayes with extrinsic evidence.” (Resp. Br., p.11.) To allay any confusion on the part of the State, Mr. Hayes does not actually argue on appeal that “the court erred by preventing the state from impeaching him with extrinsic evidence” (*See* Resp. Br., p.11.) Rather, Mr. Hayes asserts the district court erred when it allowed the State to inquire into the eight instances of his prior conduct, because the eight instances are not admissible under Rule 608(b), the reason offered by the State for allowing the inquiry.

Notably, the State did not argue before the district court that Rule 607 applied. (*See, e.g.*, Tr., p.546, Ls.13-20 (the State contending Rule 608(b) was applicable).) Thus, the State is essentially making a new argument, raised for the first time on appeal, that the inquiry was

permissible under Rule 607. (*See* Resp. Br., p.11.) The State “failed to advance this argument below, and it is not properly before this Court on appeal.” *See State v. Garcia-Rodriguez*, 162 Idaho 271, 275 (2017).

The prior conduct is not relevant to Mr. Hayes’ character for untruthfulness pursuant to Rule 608(b), the purported reason offered by the State for the inquiry. The State’s arguments to the contrary are unavailing.

C. The Prior Conduct’s Danger Of Unfair Prejudice Substantially Outweighs Its Minimal Probative Value

Even if the prior conduct were relevant to Mr. Hayes’ character for untruthfulness, its danger of unfair prejudice substantially outweighs any minimal probative value it might have. Thus, the district court abused its discretion, under Rule 403, by allowing the State to inquire into the specific instances of Mr. Hayes’ prior conduct. *See* I.R.E. 403 (2017). The district court did not act consistently with the applicable legal standards. *See State v. Hedger*, 115 Idaho 598, 600 (1989).

The State argues, “The district court properly weighed the probative value and the potential for unfair prejudice.” (Resp. Br., p.13.) The State’s argument on this point is unremarkable, and no further reply is necessary. Thus, Mr. Hayes would direct this Court’s attention to pages 25-27 of the Appellant’s Brief.

D. The State Has Not Proven That The Error Was Harmless

The State has not proven that the district court’s error in allowing the State to inquire into specific instances of Mr. Hayes’ prior conduct towards correctional officers and other inmates was harmless. *See Perry*, 150 Idaho at 227. The State’s questions about Mr. Hayes’ prior

conduct contributed to the conviction, even in the face of the district court's jury instruction purportedly limiting the jury's use of the inquiry into prior conduct. (*See App. Br.*, pp.27-28.)

The State argues that, because Mr. Hayes denied the prior conduct and the jury was instructed that the statements of lawyers were not evidence, "there was ultimately no *evidence* presented that [Mr.] Hayes acted disrespectfully to guards or inmates, [and] any error in allowing the asking of the questions was harmless." (*See Resp. Br.*, p.13.) However, the State's argument does not address the State's focus on the inquiries into Mr. Hayes' prior conduct during closing arguments. (*See Tr.*, p.589, Ls.11-16.) The State argued that Mr. Hayes' responses to the inquiries showed his "ability to exaggerate," and that his demeanor on the witness stand "kind of speaks for himself." (*See Tr.*, p.589, Ls.11-16.) The State's reliance on the inquiries in its closing arguments indicates there is a reasonable possibility the district court's error contributed to the conviction. *See Sharp*, 101 Idaho at 507. The State has not proven that the error was harmless. Mr. Hayes' judgment of conviction should be vacated, and his case should be remanded for further proceedings.

III.

The District Court Abused Its Discretion When It Denied Mr. Hayes' Motion For A New Trial, On The Basis The District Court Erred As A Matter Of Law When It Prohibited Mr. Hays From Asking The Correctional Officers Questions Related To The Prison Guidelines

A. Introduction

Mr. Hayes asserts the district court abused its discretion when it denied his motion for a new trial, on the basis the district court erred as a matter of law when it prohibited Mr. Hayes from asking the correctional officers questions related to the prison guidelines for disciplinary proceedings and infraction hearings. The questions related to the prison guidelines were actually

relevant to whether the officers had a motive to lie because their behavior during the incident was in violation of the guidelines. Furthermore, the questions were not inadmissible under Rule 403 for being a waste of time, confusing the issues, or misleading the jury.

B. The District Court Erred As A Matter Of Law When It Prohibited Mr. Hayes From Asking The Correctional Officers Questions Related To The Prison Guidelines

The district court erred as a matter of law when it prohibited Mr. Hayes from asking the correctional officers questions related to the prison guidelines for disciplinary proceedings and infraction hearings, because the questions were relevant to the officers' motive to lie, *see State v. Araiza*, 124 Idaho 82, 91 (1993), and the questions were not inadmissible under Rule 403, *see I.R.E. 403* (2017).

The State argues, as a preliminary matter, that Mr. Hayes “has failed to present a reviewable claim of error. He has failed to articulate what policy he believes the officers violated or how. . . . [Mr.] Hayes’ claims related to impeachment with policies are not reviewable because they are so vague as to be meaningless.” (Resp. Br., pp.15-16.) A review of the record refutes this argument. As discussed in the Appellant’s Brief (*see App. Br.*, pp.29-30), Mr. Hayes, in his supplemental memorandum in support of the motion for a new trial, asserted the relevant policies included a May 6, 1997 memorandum from the prison warden (attached to the motion) requiring the prison to allow inmates to express themselves in their concerns and grievances, even with the use of hostile, sexual, or threatening verbiage (*see R.*, pp.1123, 1128).

Also attached to the motion were policies on the use of force (*see R.*, pp.1129-30), and on disciplinary procedures (*see R.*, pp.1144-94). Mr. Hayes asserted, “Additional relevant policies that were disallowed to be used as impeachment evidence by the defendant and which would have demonstrated that the complaining witnesses acted in violation of established prison

policies in how the[y] engaged with the defendant on the date of the incident include Idaho Department of Correction 307, 308, 217.07.01.001, 218, 318, and 318.02.01.001.” (R., pp.1123-24.) For example, Policy Number 308 prohibited “the use of corporal punishment on any inmate.” (R., p.1130.)

Moreover, as discussed in the Appellant’s Brief (*see* App. Br., pp.30-31), Mr. Hayes’ counsel at the hearing on the motion for a new trial mentioned the policy that “says if we have inmates, who are yelling, upset, cursing at us, that they have the right to do that. And we have a strict policy on what the use of force is when we respond to that” (*see* Tr., p.657, Ls.18-22). Defense counsel asserted the correctional officers “did not follow those policies and they ultimately take this man to the ground. They claim that he kicks them. He claims that they are violating their policies in doing so.” (*See* Tr., p.657, Ls.22-25.)

Similarly, in the Appellant’s Brief itself, Mr. Hayes asserted the district court deprived him “of the opportunity for effective cross-examination by prohibiting him from questioning the correctional officers regarding the prison guidelines [on] disciplinary proceedings, infraction hearings, and the use of force.” (App. Br., p.34.) Based on the above, the State’s argument that this issue is too vague for appellate review is without merit.

1. The District Court Erred When It Determined The Questions Related To The Prison Guidelines Were Not Relevant, Because The Questions Were Relevant To The Correctional Officers’ Motive To Lie

The district court erred when it determined the questions related to the prison guidelines for disciplinary proceedings and infraction hearings were not relevant. The questions were relevant to the correctional officers’ motive to lie. *See Araiza*, 124 Idaho 82, 91 (1993) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)).

The State argues Mr. Hayes has not established error in the district court's ruling that the prison guidelines were irrelevant, because "[t]he mere existence of policies on prison procedure for disciplinary hearings in no discernable way creates an inference that the officers lied when they claimed [Mr.] Hayes battered them." (*See Resp. Br.*, pp.16-17.) The State argues that Mr. Hayes' "theory is apparently that the existence of guidelines created an incentive for the correctional officers to falsely claim that their behavior was within the scope of those guidelines." (*See Resp. Br.*, pp.16-17.) But Mr. Hayes' actual argument on appeal is that the guidelines were relevant to establish that the correctional officers possessed a motive to lie that their behavior was in compliance with the guidelines. (*See App. Br.*, p.34.)

What the State's argument seems to not understand is that, as the United States Supreme Court and Idaho Supreme Court have recognized, the motive of a witness to lie is always material and relevant to effective cross-examination. *See Araiza*, 124 Idaho at 91 (citing *Davis*, 415 U.S. at 316). Mr. Hayes had argued he was the victim of the correctional officers' battery against him, and sought to argue the officers acted in a manner that was contrary to the prison guidelines. (*See App. Br.*, p.34 (quoting *R.*, p.1124).) Thus, the guidelines themselves did not serve to "create an incentive to lie," as the State misstates Mr. Hayes' assertion here. (*See Resp. Br.*, pp.16-17.) Rather, Mr. Hayes wanted to inquire, through cross-examination of the officers, into the possibility the officers had a motive to lie as a result of their desire to cover up their violation of the prison guidelines during the incident. If the officers sought to cover up their violation of the prison guidelines, the prison guidelines were relevant to their motive to lie. *See Olden v. Kentucky*, 488 U.S. 227, 229-32 (1988) (per curiam) (discussing the relevance of evidence of an alleged rape victim's extramarital relationship as supporting a motive to lie,

where the defendant's theory of the case was that the alleged victim had lied about being raped to protect her extramarital relationship).

The questions related to the prison guidelines for disciplinary proceedings and infraction hearings were relevant to the correctional officers' motive to lie, and the district court erred when it determined the questions were not relevant. The State's argument seems to not understand that the motive of a witness to lie is always material and relevant to effective cross-examination.

2. The District Court Abused Its Discretion When It Determined The Questions On The Prison Guidelines Were Inadmissible Under Rule 403

The district court abused its discretion when it determined, under Rule 403, that the questions on the prison guidelines, even if relevant, were inadmissible for being a waste of time, confusing the issues, or misleading the jury. The probative value of the questions was not substantially outweighed by a danger of wasting time, confusing the issues, or misleading the jury. Thus, the district court did not act consistently with the applicable legal standards. *See* I.R.E. 403 (2017).

The State contends that the district court made its determination in an effort to avoid a "trial within a trial" dealing with collateral matters, and any relevance of the cross-examination of the correctional officers "was outweighed by the danger of wasting time, confusing the issues and misleading the jury." (*See* Resp. Br., pp.15, 17.) The State's argument on this point is unremarkable, and no further reply is necessary. Thus, Mr. Hayes would direct this Court's attention to pages 35-36 of the Appellant's Brief.

Despite the State's unavailing arguments, the district court erred as a matter of law when it prohibited Mr. Hayes from asking the correctional officers questions related to the prison guidelines for disciplinary proceedings, infraction hearings and the use of force. The questions

were relevant to the officers' motive to lie, and the questions were not inadmissible under Rule 403. Thus, the district court should have granted Mr. Hayes' motion for a new trial with respect to the questions related to the prison guidelines. The district court's order denying his motion for a new trial on that issue should be reversed, and the case should be remanded for further proceedings.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Hayes respectfully requests that this Court vacate his judgment of conviction and remand his case to the district court for further proceedings. Alternatively, he respectfully requests that this Court reverse the district court's order denying his motion for a new trial with respect to the prison guidelines issue, and remand his case to the district court for further proceedings.

DATED this 10th day of December, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 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
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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

BPM/eas