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

STATE OF IDAHO,	)	
	)	**No. 45785**
Plaintiff-Respondent,	)	
	)	**Twin Falls County Case No.**
v.	)	**CR42-2016-8492**
	)	
ZANE BOYD MURRI,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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 the judgment of conviction entered after a jury found Murri guilty of first-degree arson. Murri argues that the district court abused its discretion when it denied Murri's request to exclude the state's expert witness as a sanction for the late disclosure of the expert's second report. Murri also argues that the district court abused its discretion when it overruled his I.R.E. 403 objection that the evidence presented by the expert was more prejudicial than probative.

Statement Of The Facts And Course Of The Proceedings

In the summer of 2016, Zane Boyd Murri lived in Stepping Stones, a halfway house located in Twin Falls. (Tr., p.162, Ls.16-25, p.165, Ls.10-16.) He worked construction for one of the managers of Stepping Stones. (Tr., p.202, Ls.14-15, p.205, Ls.8-14, p.206, Ls.21-23.) In July 2016, Murri fell behind on his rent, and his employer refused to pay him until he caught up. (Tr., p.203, Ls.1-8, p.205, Ls.3-7.) While at work one day, Murri told two of his co-workers that, if the Stepping Stones manager refused to pay him, "'I'll burn [Stepping Stones] to the ground.'" (Tr., p.203, L.23 – p.204, L.10.) Within a few weeks, a fire that started in Murri's bedroom caused more than $16,000 of damage to Stepping Stones. (Tr., p.166, L.19 – p.167, L.16, p.168, Ls.8-9, p.202, L.23 – p.203, L.11, p.206, L.12 – p.207, L.4, p.308, Ls.1-23.)

On the night of the fire, Murri went into the bedroom in Stepping Stones where his good friend Mark Olson slept. (Tr., p.236, L.19 – p.237, L.3.) Thomas Chaput, Olson's roommate, could smell something burning. (Id.) Chaput asked Murri and Olson what was on fire. (Id.) Murri and Olson both responded that nothing was on fire and then left the

house. (Tr., p.237, Ls.7-24.) About ten minutes later, police came running into Chaput's bedroom saying everyone needed to get out of the house because it was on fire. (Tr., p.237, L.25 – p.238, L.3.)

Firefighters from the Twin Falls Fire Department, including Captain Slagel, responded to the fire and extinguished it. (Tr., p.179, Ls.20-22, p.186, L.23 – p.187, L.13.) The fire started in and destroyed Murri's bedroom in the basement. (Tr., p.180, Ls.16-19, p.191, L.7 – p.192, L.16.) In a conversation with Captain Slagel, Murri "admitted that he had started the fire" but claimed it was an accident. (Tr., p.197, L.24 – p.198, L.12.) Murri said "that he had been smoking in his room, and he put his cigarette down in a container on the bed, and then had left the room." (Tr., p.193, L.23 – p.194, L.4.)

After the police and firefighters left, Murri and Olson "both went straight to the basement" for "[a] good ten or 15 minutes." (Tr., p.239, L.22 – p.240, L.2.) The next morning, Chaput heard Murri say "the evidence was gone, and he wasn't going to get caught doing it on purpose" and "that no one's going to prove shit on it." (Tr., p.241, Ls.2-13, p.243, Ls.14-17.) Daniel Dawson, another housemate, heard Murri boasting throughout the house "that they'll never catch me because they don't have enough evidence to get me." (Tr., p.227, Ls.15-19; see Tr., p.222, Ls.17-19, p.224, Ls.10-11.) Darrell Friel, yet another housemate, heard Murri say "they wouldn't prove that he burned it on purpose." (Tr., p.213, Ls.16-19; see Tr., p.208, L.14 – p.209, L.18.) In all, six different individuals associated with Stepping Stones contacted the police department within days of the fire to report "that [Murri] was bragging about starting the fire." (Tr., p.305, Ls.4-25.)

Based on the numerous reports from Murri's housemates, Detective Rivers in the Twin Falls Police Department opened an investigation into the fire. (Tr., p.303, Ls.1-4,

p.304, L.19 – p.305, L.12.) Detective Rivers recruited Fire Marshal Tim Lauda to help with the investigation. (Tr., p.306, Ls.16-21.) Marshal Lauda worked as a fire investigator for the Twin Falls Fire Department. (Tr., p.253, Ls.3-19.)

Detective Rivers and Marshal Lauda spoke with Murri about the fire in a series of interviews. (Tr., p.259, Ls.9-15, p.306, L.22 – p.307, L.16.) Murri said that the day the fire started "was the worst day of his life." (Tr., p.260, Ls.8-14, p.308, Ls.21-23.) He explained that he had been stressed because his employer withheld his paycheck, he owed rent, he was concerned he was going to be evicted, his food stamps had been cut off, and agencies that he contacted denied him assistance. (Tr., p.308, Ls.1-17.)

Detective Rivers and Marshal Lauda asked Murri how the fire started. (Tr., p.309, Ls.4-5.) Murri claimed "that the fire originated from a cigarette that he'd left in a chewing tobacco can on his bed." (Tr., p.309, Ls.6-9.) He said he left the room to talk briefly with Olson and returned to find the mattress on fire. (Tr., p.309, Ls.14-20.) Murri said "he left the room for approximately three to five minutes." (Tr., p.265, Ls.14-25.) "He was extremely adamant that [his] mattress was a newer mattress, it was still in the plastic from the factory, and there was absolutely no sheets, no pillows, anything on the mattress." (Tr., p.259, L.21 – p.260, L.2.)

Marshal Lauda put Murri's explanation of what happened to the test in a controlled burn he conducted on August 9, 2016. (Tr., p.257, L.22 – p.258, L.10.) He created cigarettes using the same tobacco Murri said he used the day of the fire. (Tr., p.262, L.20 – p.263, L.4.) He purchased a new plastic-covered mattress from Everton Mattress Factory. (Prelim. Hr'g Tr., p.63, L.18 – p.64, L.6.) Marshal Lauda laid five lit cigarettes flat on the mattress and let them burn out. (Tr., p.263, Ls.8-21.) No fire started. (Id.) He

placed a chew can on the mattress, put lit cigarettes in the chew can, leaned lit cigarettes against the chew can, and let the cigarettes burn out. (Id.) No fire started. (Tr., p.264, Ls.16-18.) He laid lit cigarettes on the mattress underneath computer paper and on the mattress on top of computer paper and let the cigarettes burn out. (Tr., p.264, L.19 – p.265, L.6.) No fire started. (Id.) Finally, Detective Rivers lit the computer paper on fire using a lighter and "continued to feed" the burning paper to the mattress for approximately twelve minutes to try and burn the mattress. (Tr., p.267, Ls.5-24.) "[T]he mattress scorched very deep, but it never caught on fire." (Id.) Marshal Lauda filmed the controlled burn and memorialized the test in a written report. (See R., pp.158-95; DSCN5915.MOV; DSCN5917.MOV; DSCN5918.MOV.)

On August 24, 2016, Murri filed a request for discovery. (R., pp.35-38.) He requested the identity and contact information of any expert used by the state. (R., p.37.) He also requested "any records created by any such expert witness pertaining to this matter." (Id.)

On August 30, 2016, the prosecutor filed a response to Murri's discovery request. (R., pp.46-52.) The response identified Marshal Lauda as a potential witness for the state. (R., p.49.) The prosecutor also contemporaneously provided Marshal Lauda's written report for the controlled burn and, presumably, the video of the controlled burn.[1] (R., p.47; see R., pp.158-95.)

Marshal Lauda testified at a preliminary hearing on November 10, 2016. (R., pp.59, 61.) He testified that Murri's explanation of how the fire started sounded implausible from

[1] Although the exact date on which the prosecutor provided the video of the first controlled burn is not clear from the record, Murri has not raised any issue regarding the disclosure of information related to the first controlled burn.

the beginning. (Prelim. Hr'g Tr., p.62, Ls.19-22.) He explained the controlled burn he conducted to test Murri's explanation. (Prelim. Hr'g Tr., p.62, L.23 – p.69, L.14.) And he testified that, in his opinion, a fire could not have started the way Murri suggested. (Prelim. Hr'g Tr., p.69, Ls.15-21.) On cross examination, Marshal Lauda admitted that he did not know if the mattress he used in his test "was the exact mattress" that Murri had in Stepping Stones. (Prelim. Hr'g Tr., p.71, Ls.7-9.)

In December 2016, Marshal Lauda conducted a second controlled burn. (Tr., p.269, Ls.2-6.) For the second controlled burn, he verified with the owner of Stepping Stones the type of mattress Murri had in his bedroom at the time of the fire. (Tr., p.269, Ls.10-20.) He then "purchased a mattress that was the same brand, same type, same everything as the one that [the owner] said that they had purchased." (Id.) Similar to the first controlled burn, Marshal Lauda used cigarettes like the cigarettes Murri described, a chew can, and various types of paper to test whether he could start the mattress on fire. (Tr., p.271, L.25 – p.272, L.18.) And, similar to the first controlled burn, the cigarettes never lit the mattress on fire. (Tr., p.272, Ls.19-21.)

"[A]fter the second controlled burn, [the prosecutor] spoke directly to [Murri's counsel], [and] told him about the second test." (Tr., p.22, Ls.16-25.) The prosecutor also provided Murri's counsel with video of the second controlled burn. (Id.)

Unbeknownst to the prosecutor, Marshal Lauda wrote a report memorializing the second controlled burn and sent it to the police department. (Tr., p.23, L.20 – p.24, L.9.) The four-page report contained details about the weather during the second controlled burn, a summary of Marshal Lauda's conversation with the owner of Stepping Stones, a narrative describing the second controlled burn, a summary of events describing his interactions with

Murri, and Marshal Lauda's professional opinion. (R., pp.215-18.) Marshal Lauda opined in the report that "[b]ased on two test burns, years of experience and training [sic] I have determined it to be impossible for this fire to have started the way Mr. Murri said." (R., p.218.)

On February 2, 2017, the prosecutor disclosed Marshal Lauda as a potential expert witness for trial. (R., pp.90-92.) The disclosure stated that Marshal "Lauda's testimony is expected to include, the following: . . . Tests 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., p.91.) Murri did not object to the expert disclosure.

On September 5, 2017, Murri filed a motion in limine to exclude Marshal Lauda's testimony and opinions. (R., pp.115-16.) The accompanying memorandum argued that Marshal Lauda's testimony would not assist the trier of fact to understand the evidence because Marshal Lauda "failed to properly reconstruct the crime scene, and failed to personally investigate the crime scene itself." (R., p.118.)

On September 19, 2017, in preparing for trial, the prosecutor discovered Marshal Lauda's report on the second controlled burn. (Tr., p.23, L.20 – p.24, L.9.) He "sent it over to the defense immediately." (Tr., p.24, Ls.7-9; see R., pp.198-99.)

On September 20, 2017, Murri amended his motion in limine. (R., pp.200-01.) Murri argued that the second report "was not timely disclosed." (R., p.203.) He asked the district court to bar the admission of "the additional report, as well as testimony founded on conclusions drawn from the State's expert witness contained within the [second report]." (Id.)

On September 22, 2017, the district court held a hearing on Murri's motion in limine. (R., p.222.) After hearing arguments from the parties and testimony from Marshal Lauda, the district court denied Murri's motion in limine. (Id.) Although the district court was "not happy about how all of the discovery in this case has transpired," it could "[]not find that there's sufficient prejudice to justify either continuing this trial or excluding Marshal Lauda as a witness." (Tr., p.63, Ls.18-23.) The district court also weighed the probative value of Marshal Lauda's testimony against the potential prejudice and "concluded that [Rule] 403 does not preclude this evidence." (Tr., p.65, Ls.6-13; p.292, L.23 – p.295, L.19.)

After a two-day jury trial, on October 3-4, 2017, the jury convicted Murri of first-degree arson. (R., pp.288-91, p.293.) The district court sentenced Murri to a unified sentence of twenty years, with ten years fixed and ten years indeterminate. (R., p.324.) Murri timely appealed. (R., pp.330-32.)

ISSUES

Murri states the issues on appeal as:

> 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?

(Appellant's brief, p.10.)

The state rephrases the issues as:

I. Has Murri failed to show that the district court abused its discretion when it denied Murri's request to exclude Marshal Lauda as a discovery sanction?

II. Has Murri failed to show that the district court abused its discretion when it overruled Murri's objection that Marshal Lauda's testimony was more prejudicial than probative?

III. If the district court abused its discretion by allowing Marshal Lauda to testify, was the error harmless?

ARGUMENT

I.
Murri Has Failed To Show The District Court Abused Its Discretion By Refusing To Exclude Marshal Lauda As A Sanction For The Prosecutor's Late Disclosure

A. Introduction

The state does not dispute that the prosecutor disclosed Marshal Lauda's second report late. But, in determining not to impose a sanction, the district court correctly found the late disclosure did not prejudice Murri. Murri's claim of prejudice on appeal is that, if the prosecutor had timely disclosed the second report, Murri could have conducted further investigation by having an expert assess the second report. (See Appellant's brief, pp.12-15.) That is insufficient as a matter of law: "Prejudice is not demonstrated by a mere claim that additional investigation or testing could have been conducted." State v. Hawkins, 131 Idaho 396, 405, 958 P.2d 22, 31 (Ct. App. 1998).

B. Standard Of Review

"Whether to impose a sanction for a party's failure to comply with a discovery request, and the choice of an appropriate sanction, are within the discretion of the trial court." State v. Allen, 145 Idaho 183, 185, 177 P.3d 397, 399 (Ct. App. 2008). "Where 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, 977 P.2d 203, 206 (1999). Where, as here, the district court refused to impose a sanction, this Court "examin[es] the record to see if there [is] substantial and competent evidence to support a finding of no unfair prejudice." Id.

C. The District Court Properly Denied Murri's Requested Sanction Because The Late Disclosure Of Marshal Lauda's Second Report Did Not Prejudice Murri

The district court properly found that Murri failed to show prejudice from the prosecutor's late disclosure of Marshal Lauda's second report. "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." State v. Tapia, 127 Idaho 249, 255, 899 P.2d 959, 965 (1995). "[S]uch a showing can seldom be made on the trial record alone, but will require post-trial proceedings." State v. Siegel, 137 Idaho 538, 542, 50 P.3d 1033, 1037 (Ct. App. 2002). "Prejudice is not demonstrated by a mere claim that additional investigation or testing could have been conducted." State v. Hawkins, 131 Idaho 396, 405, 958 P.2d 22, 31 (Ct. App. 1998).

For example, in Hawkins, the court held that the defendant failed to show prejudice from the state's late disclosure of DNA test results. Id. The defendant argued that he suffered prejudice because the late disclosure resulted in his "inability to conduct independent tests." Id. at 405-06, 958 P.2d 31-32. The court found the defendant's "mere claim that additional investigation or testing could have been conducted . . . demonstrate[d] only a potential for prejudice, not realized prejudice" because the defendant "ha[d] not shown that independent tests would have been exculpatory." Id.

Similarly, in Siegel, the court held that the defendant failed to show prejudice from the late disclosure of a witness. Siegel, 137 Idaho at 541-42, 50 P.3d at 1036-37. The defendant argued that the late disclosure prejudiced him because he did not have sufficient time to "acquire evidence to discredit" the witness. Id. at 542, 50 P.3d at 1037. The court found the defendant's "bare claim that additional investigation could have been conducted" insufficient to prove prejudice "because nothing in the record indicate[d] that information

useful for [the] defense could have been acquired if he had been given additional time to investigate." Id.

Here, Murri's claim of prejudice fails for the exact same reason the claims of prejudice failed in Hawkins and Siegel. Like the defendants in Hawkins and Siegel, who both claimed prejudice on the basis that a timely disclosure would have allowed them to conduct additional investigation or testing, Murri claims prejudice on the basis that a timely disclosure would have allowed him to "approach[] an expert to assess the second report."[2] (Appellant's brief, p.15.) That is precisely the type of "bare claim that additional investigation could have been conducted" that Idaho's appellate courts have consistently held constitutes "a potential for prejudice, not realized prejudice." Hawkins, 131 Idaho at 406, 958 P.2d at 32; see Tapia, 127 Idaho at 255, 899 P.2d at 965 ("[T]he bare claim that additional investigation could have been conducted is not sufficient to demonstrate unfair prejudice . . . ."); Hawkins, 131 Idaho at 405, 958 P.2d at 31 ("Prejudice is not demonstrated by a mere claim that additional investigation or testing could have been conducted."); Siegel, 137 Idaho at 542, 50 P.3d at 1037 ("A bare claim that additional investigation could have been conducted is insufficient to show prejudice."); cf. State v. Albert, 138 Idaho 284, 289 n.4, 62 P.3d 208, 213 n.4 (Ct. App. 2002) ("Decisions are legion in which Idaho appellate courts have held that a criminal defendant who was denied a remedy for the

[2] Murri also claims prejudice because the late disclosure "left Mr. Murri unable to . . . otherwise respond to the additional information from that report." (Appellant's brief, p.15.) He fails to explain what additional information in the second report he is referencing or how he could possibly have "otherwise respond[ed]" to that information. (Id.) The bald assertion that Murri did not have time to respond to the untimely disclosure cannot possibly satisfy Murri's burden to show prejudice. See Tapia, 127 Idaho at 255, 899 P.2d at 965.

State's late disclosure of evidence will not find relief on appeal without a demonstration of genuine prejudice.").

Moreover, Murri's strategy to obtain relief ignores repeated warnings from the Idaho Court of Appeals that a showing of prejudice from an untimely disclosure "can seldom be made on the trial record alone, but will require post-trial proceedings." Siegel, 137 Idaho at 542, 50 P.3d at 1037. Murri could have "tak[en] appropriate post-trial steps to create the necessary record to support an appeal" by, for example, asking an expert to assess the second report and then "present[ing] to the trial court test results, affidavits, or other evidence that would demonstrate prejudice from the court's earlier denial of an adequate remedy for the State's untimely disclosure." Hawkins, 131 Idaho at 406, 958 P.2d at 32. Instead, Murri is "relying solely on the trial record and asking this Court to speculate as to whether [he] was prejudiced by the trial court's denial of . . . sanctions." Id. As the Idaho Court of Appels has repeatedly explained, that is insufficient to show prejudice. See id.; Siegel, 137 Idaho at 542, 50 P.3d at 1037.

Even setting aside Murri's insufficient evidence problem, the record belies Murri's claim that he would have approached an expert witness to assess the second report but for the late disclosure. The state disclosed the second report a full *two weeks* before trial. (R., pp.198-99, 272-75.) Nothing in the record suggests Murri's counsel took any steps to try and engage an expert in those two weeks.[3] Murri speculates that he would have been "hard-pressed to find an expert to assess the report in the two weeks," but he cites no evidence to

[3] Notably, Murri had Marshal Lauda's first report and videos of both controlled burns long before he received the second report (Tr., p.22, L.1 – p.23, L.3), yet Murri's counsel had chosen not to hire an expert (Tr., p.40, Ls.7-15).

support that claim.[4] (Appellant's brief, p.14.) Even if an expert assessment would have taken more than two weeks, Murri could have requested a continuance to complete the assessment. Instead, Murri's counsel made clear, three days after receiving the second report, that Murri did "not wish to continue this case at all." (Tr., p.11, Ls.20-22.)

In sum, Murri had to demonstrate actual prejudice from the late disclosure of Marshal Lauda's second report for this Court to disturb the district court's decision not to impose a sanction, and his bare claim that he could have had an expert assess the second report falls far short. See Tapia, 127 Idaho at 255, 899 P.2d at 965; Hawkins, 131 Idaho at 406, 958 P.2d at 32; Siegel, 137 Idaho at 542, 50 P.3d at 1037.

II.
Murri Has Failed To Show The District Court Abused Its Discretion When It Overruled Murri's Rule 403 Objection To The Evidence Presented By Marshal Lauda

A. Introduction

The district court properly overruled Murri's objection that the probative value of the evidence presented by Marshal Lauda was substantially outweighed by unfair prejudice. The evidence presented by Marshal Lauda was highly probative because it undercut Murri's theory that he started the fire accidentally and because it supported the

[4] At the hearing on Murri's motion in limine, held three days after the state disclosed the second report, Murri's trial counsel asked the district court: "Now that I [have the second report], can I take this report to an expert and see if those are validated opinions?" (Tr., p.41, Ls.19-23.) The district court responded: "[o]kay." (Tr., p.41, L.24.) Murri suggests his trial counsel was arguing he did not have time to have an expert validate the opinions in the second report. (Appellant's brief, p.14.) The transcript could just as easily be read as an acknowledgment by Murri's trial counsel that he had the option to seek out an expert opinion—even though he ultimately chose not to do so. (See Tr., p.41, Ls.19-24.) Regardless of how this Court interprets the colloquy, Murri has not provided any evidence in the district court or on appeal that an expert could not have reviewed the second report in the two weeks between its disclosure and the trial.

state's theory that Murri started the fire willfully by eliminating a number of innocent explanations of how the fire could have started. In addition, the evidence presented by Marshal Lauda was not unfairly prejudicial because it did not suggest that the jury should make its decision on an improper decision.

B. Standard Of Review

"'The district court's ruling that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice may be overturned only for an abuse of discretion.'" State v. Hall, 163 Idaho 744, ___, 419 P.3d 1042, 1079 (2018) (quoting State v. Labelle, 126 Idaho 564, 567, 887 P.2d 1071, 1074 (1995)). An appellate court reviewing a trial court's discretionary decision typically "conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." State v. Hernandez, 163 Idaho 9, 16-17, 407 P.3d 596, 603-04 (Ct. App. 2017). Here, however, Murri contends only that "the district court did not act consistently with the applicable legal standards." (Appellant's brief, p.17.)

C. The District Court Properly Overruled Murri's Rule 403 Objection Because Marshal Lauda's Testimony Was Highly Probative And Not Unfairly Prejudicial

The district court did not abuse its discretion when it allowed the state to present Marshal Lauda's evidence over Murri's I.R.E. 403 objection. At the time of Murri's objection, Rule 403 allowed for the exclusion of evidence where "its probative value is substantially outweighed by the danger of unfair prejudice." I.R. 403 (2017). The district

court properly admitted Marshal Lauda's evidence because it was (1) highly probative and (2) not unfairly prejudicial.[5]

First, Marshal Lauda's evidence was highly probative because it undermined Murri's theory that he accidentally started the fire and supported the state's theory that Murri willfully started the fire.[6] The probative value of evidence depends upon the extent to which it supports or undermines a party's theory of the case. See State v. Vierra, 125 Idaho 465, 471, 872 P.2d 728, 734 (Ct. App. 1994) (affirming district court's decision to overrule 403 objection because "[t]he evidence was highly probative of [the defendant's] conduct and directly undermined [the defendant's] 'bonus' theory of compensation"); State v. Peite, 122 Idaho 809, 817, 839 P.2d 1223, 1231 (Ct. App. 1992) (finding evidence probative because it "tends to corroborate the complaining witness's version of the events surrounding the alleged rape and to contradict the defendant's claim of consent"); State v. Fenley, 103 Idaho 199, 202, 646 P.2d 441, 444 (Ct. App. 1982) (finding evidence probative because it "logically tended to inculpate [the defendant] and to disprove his alibi").

Marshal Lauda's evidence was highly probative because it undermined Murri's theory of the case. Murri told investigators that "the fire originated from a cigarette that

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[5] Murri also claims the evidence should have been excluded because of "the potential to confuse the issues." (Appellant's brief, p.17.) The district court, who observed Marshal Lauda's testimony, rightly rejected that argument: "Confusion of the issues, I think Marshal Lauda's test is very clear what he did. I don't see how that could confuse this jury at all or mislead them." (Tr., p.295, Ls.16-19.) On appeal, Murri has failed even to allege how Marshal Lauda's testimony could have confused the jury or to explain how the district court was wrong. (See Appellant's brief, pp.17-18.) That omission alone requires rejection of his argument. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.").

[6] To prove arson, the state had to prove that Murri "willfully" started the fire. (R., p.301.) The jury instructions told the jury that "[a]n act is 'willful' or done 'willfully' when done on purpose." (R., p.303.)

he'd left in a chewing tobacco can on his bed" when he "left the room and returned a short time later." (Tr., p.309, Ls.6-15.) His counsel strongly implied to the jurors that they could not find Murri guilty of arson because he accidentally started the fire. (Tr., p.160, L.2 – p.161, L.4.) His counsel told the jurors that they had to determine "whether or not this fire was willfully and unlawfully started by Mr. Murri[,] [n]ot that it was just negligence or not that it was neglect, but that it was actually caused by him." (Tr., p.161, Ls.5-10.)

Marshal Lauda's evidence directly undermined Murri's theory that he accidentally started the fire. Marshal Lauda told the jury that, in his expert opinion, "it's virtually impossible" to use a cigarette to light "a bare mattress" on fire. (Tr., p.255, Ls.17-20.) He explained to the jury how he conducted the two controlled burns and how those controlled burns supported his opinion. (Tr., p.258, L.9 – p.278, L.24.) If believed, Marshal Lauda's testimony proved that Murri could not have accidentally started the fire with a cigarette. Because the evidence presented by Marshal Lauda directly contradicted Murri's explanation of how the fire started, it is highly probative of Murri's guilt. See Vierra, 125 Idaho at 471, 872 P.2d at 734; Peite, 122 Idaho at 817, 839 P.2d at 1231; Fenley, 103 Idaho at 202, 646 P.2d at 444.

Marshal Lauda's evidence was also highly probative because it supported the state's theory that Murri willfully started the fire. As Marshal Lauda explained to the jury, "a lot of times" fire investigation is just a "process of elimination."[7] (Tr., p.280, L.1 –

[7] The district court elaborated on this, outside of the presence of the jury, when it explained the relevance of Marshal Lauda's testimony: "This is kind of a strange case because it's what I call a 'negative proof' case, and I think that's well illustrated by Marshal Lauda's testimony, that, in fire investigations, often it's not finding out the cause of fires, it's finding out what didn't cause them. It's a process of elimination, so that's why I say it's like negative proof." (Tr., p.293, Ls.11-17.)

p.281, L.4.) Marshall Lauda told the jury how he eliminated a number of potential theories as to how the fire started: He used the controlled burns to determine Murri could not have started the fire accidentally with cigarettes. (Tr., p.255, Ls.17-20; p.257, L.6 – p.258, L.4.) He used pictures of the bedroom "to eliminate the air conditioner." (Tr., p.282, Ls.22-25.) He used pictures of the bedroom to eliminate the fan. (Tr., p.283, Ls.1-14.) And he used pictures of the bedroom to eliminate the light. (Id.) Thus, Marshal Lauda's testimony was probative because, if believed, it eliminated a number of innocent theories of how the fire started, which made the state's competing theory that Murri willfully started the fire more probable.

Murri argues that Marshal Lauda's evidence had limited probative value given that he could not tell the jury the exact cause of the fire. (Appellant's brief, p.17.) His argument suggests that the probative value of evidence is determined by how far the evidence goes in proving the ultimate issue. That is incorrect. See State v. McGuire, 135 Idaho 535, 541, 20 P.3d 719, 725 (Ct. App. 2001) (affirming district court's decision to overrule 403 objection because "the district court properly . . . considered the probative value of the evidence in relation to the theory of logical relevance under which it was offered"); cf. State v. Koch, 157 Idaho 89, 100, 334 P.3d 280, 291 (2014) (explaining that the relevance of evidence "is determined by its relationship to the legal theories presented by the parties"). The state did not use Marshal Lauda's evidence to prove the exact cause of the fire; Marshal Lauda freely admitted on direct examination that he "can't tell you the exact source of this fire." (Tr., p.280, Ls.21-24.) The purpose of Marshal Lauda's testimony was to eliminate innocent explanations of how the fire started, including Murri's

explanation that he started the fire accidentally, which was, at least at the start of the trial,[8] the crux of Murri's defense. (Tr., p.160, L.2 – p.161, L.4.)

Murri also erroneously argues that Marshal Lauda's evidence had limited probative value because Marshal Lauda did not physically go to the scene of the crime. (Appellant's brief, p.17.) As the district court observed, Marshal Lauda did not need to go to the scene of the crime to form his opinion because he relied on other evidence, such as photographs of the bedroom and his interview with Murri, to gather the information he needed. (Tr., p.64, Ls.20-24.) Murri has failed even to try to explain why Marshal Lauda would need to go to the bedroom instead of rely on the photographs, statements, and controlled-burn tests to form his opinions. (See Appellant's brief, p.17.)

Second, Marshal Lauda's evidence did not pose a risk of unfair prejudice. "Rule 403 does not require the exclusion of prejudicial evidence." State v. Rawlings, 159 Idaho 498, 506, 363 P.3d 339, 347 (2015). "The rule only applies to evidence that is *unfairly* prejudicial because it tends to suggest that the jury should base its decision on an improper basis." Id. (emphasis in original).

Nothing about Marshal Lauda's evidence was unfairly prejudicial. For example, Marshal Lauda did not tell the jury about "other misconduct" committed by Murri. State v. Herrera, 152 Idaho 24, 34, 266 P.3d 499, 509 (Ct. App. 2011). His evidence "did not touch on any collateral issue or irrelevant matter." Cook v. State, 157 Idaho 775, 780, 339 P.3d 1179, 1184 (Ct. App. 2014). And there was nothing "inherently inflammatory about

[8] During closing arguments, Murri's counsel seemed to suggest that Marshal Lauda's opinion exonerated Murri from having started the fire at all. (Tr., p.354, L.5 – p.355, L.14 (arguing that, if "cigarettes could not have set the fire," it "[w]asn't Zane Murri that started this fire").)

the evidence." State v. Palmer, 110 Idaho 142, 146, 715 P.2d 355, 359 (Ct. App. 1985). In short, Marshal Lauda's evidence could not have been unfairly prejudicial because it did not "suggest that the jury should base its decision on an improper basis." Rawlings, 159 Idaho at 506, 363 P.3d at 347; see State v. Fenley, 103 Idaho 199, 203, 646 P.2d 441, 445 (Ct. App. 1982) (finding no unfair prejudice where "[t]he only prejudice we discern is that which naturally flowed from the probative value of the evidence").

Murri seems to argue that Marshal Lauda's testimony was unfairly prejudicial because Marshal Lauda did not properly reconstruct the crime scene and did not personally investigate the crime scene.[9] (See Appellant's brief, p.18.) In other words, Murri just repeats his argument as to why he believes the evidence has limited probative value to try and show unfair prejudice. (See Appellant's brief, pp.17-18.)

As Murri's argument recycling suggests, and as the district court observed, these issues go to the weight or probative value of Marshal Lauda's evidence—not to unfair prejudice. (Tr., p.64, L.20 – p.65, L.5.) Murri had the opportunity to expose to the jury

[9] Murri's unfair prejudice argument is difficult to discern from his opening brief, which quotes only a conclusory statement from his motion in limine filed in the district court: "'[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.'" (Appellant's brief, p.18 (quoting R., p.156).) A review of the underlying motion in limine suggests that Murri believes the evidence is unreliable because Marshal Lauda "failed to properly reconstruct the crime scene, and failed to personally investigate the crime scene itself." (R., pp.155-56.)

during cross examination the alleged flaws in Marshal Lauda's methods.[10] (See, e.g., Tr., p.282, Ls.10-18.) And the jury was free to give Marshal Lauda's evidence the weight the jury believed it deserved. But evidence is not unfairly prejudicial merely because it is susceptible to cross examination that could reduce its probative value. See State v. Brown, 131 Idaho 61, 66, 951 P.2d 1288, 1293 (Ct. App. 1998) (rejecting argument that "the lack of a specific scientific test connecting [the defendant] to the semen and the imperfect chain of custody" caused unfair prejudice because such arguments "go to the weight of the evidence and may reduce its probative value" but do not "indicate that the clothing somehow created an *unfair* prejudice." (emphasis in original)).

Because Marshal Luauda presented highly probative evidence that was not unfairly prejudicial, the district court did not abuse its discretion when it overruled Murri's Rule 403 objection.

III.
Any Error In The Admission Of Marshal Lauda's Evidence Was Harmless

Even if the district erred by admitting Marshal Lauda's testimony, either by failing to sanction the state for a late disclosure or by overruling Murri's Rule 403 objection, this Court should still affirm the judgment of conviction because the error was harmless. In the context of an evidentiary error, this Court will grant relief only when the error is not harmless. State v. Ehrlick, 158 Idaho 900, 911, 354 P.3d 462, 473 (2014); see I.C.R. 52.

[10] Murri chose not to cross examine Marshal Lauda regarding his alleged failure to properly reconstruct the crime scene, (see Tr., p.281, L.14 – p.288, L.14), which is yet another reason to reject his unfair prejudice argument as to that issue. See State v. Fordyce, 151 Idaho 868, 870, 264 P.3d 975, 977 (Ct. App. 2011) ("An accused may not construct unfair prejudice merely by conceiving of an incorrect inference that possibly could be drawn from the State's evidence and then declining to dispel that incorrect inference through appropriate cross-examination.").

"To establish harmless error, the State must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Parker, 157 Idaho 132, 140, 334 P.3d 806, 814 (2014) (quoting State v. Perry, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010)). "'In other words, the error is harmless if the Court finds that the result would be the same without the error.'" State v. Montgomery, 163 Idaho 40, 46, 408 P.3d 38, 44 (2017) (quoting State v. Almaraz, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013)).

Here, any error in the admission of Marshal Lauda's testimony was harmless given the overwhelming evidence that Murri willfully started the fire.[11] See Montgomery, 163 Idaho at 46, 408 P.3d at 44 (holding error harmless "[b]ased on the overwhelming evidence presented against Montgomery at trial"). Around the time of the fire, Murri's employer, who was one of the managers of Stepping Stones, was refusing to pay Murri for his work until Murri paid rent. (Tr., p.202, Ls.14-15, p.205, Ls.1-14.) Murri told his co-workers that, unless he received his money, he was going to "burn [Stepping Stones] to the ground.'" (Tr., p.203, L.23 – p.204, L.10.) Within a few weeks, a fire started in and destroyed Murri's bedroom at Stepping Stones. (Tr., p.166, L.19 – p.167, L.16, p.168, Ls.8-9, p.202, L.23 – p.203, L.11, p.206, L.12 – p.207, L.4, p.308, Ls.1-23.) An eyewitness put Murri at Stepping Stones within minutes of when the fire started. (Tr., p.236, L.19 – p.238, L.3.)

[11] To prove arson, the state had to prove that Murri, between July 16 and July 17, 2016, in the state of Idaho, willfully by fire or explosion damaged a dwelling or structure. (R., p.301.) Murri did not dispute at trial that a fire occurred at Stepping Stones Halfway House in Twin Falls on July 16-17, 2016, that "destroyed pretty much [Murri's] entire room and everything in it." (Tr., p.159, L.16 – p.161, L.13; p.348, L.9 – p.355, L.14.) Accordingly, the dispute at trial was whether Murri started the fire and, if so, whether he started the fire willfully.

In the days following the fire, six different individuals heard Murri "bragging about starting the fire." (Tr., p.305, Ls.4-25.) One of Murri's housemates told the jury that he heard Murri say "the evidence was gone, and he wasn't going to get caught doing it on purpose" and "that no one's going to prove shit on it." (Tr., p.241, Ls.2-7, p.243, Ls.14-17.) A second housemate told the jury he heard Murri boasting "that they'll never catch me because they don't have enough evidence." (Tr., p.227, Ls.15-19.) A third housemate testified that Murri said "they wouldn't prove that he burned it on purpose." (Tr., p.213, Ls.16-19.) Given (1) Murri's motive to damage Stepping Stones, (2) Murri's threat to burn down Stepping Stones made shortly before the fire occurred, (3) the location of the fire in Murri's bedroom at Stepping Stones, (4) Murri's presence at the scene of the fire within minutes of when the fire occurred, and (5) the witnesses who testified they heard Murri bragging about starting the fire after the fire occurred, the evidence that Murri willfully started the fire was overwhelming. Any error in the admission of Marshal Lauda's testimony was thus harmless. See Montgomery, 163 Idaho at 46, 408 P.3d at 44.

CONCLUSION

The state respectfully requests this Court affirm the judgment of conviction entered by the district court after the jury found Murri guilty of first-degree arson.

DATED this 27th day of November, 2018.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of November, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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JN/dd