4-2-2019

State v. Jones Appellant's Brief Dckt. 46086

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4/2/2019 2:15 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 46086-2018**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
v.	)	**NO. CR-2017-15579**
	)	
KODY E. JONES,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE SCOTT WAYMAN
District Judge

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

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Kody Jones contends the district court made two errors in his case. First, he asserts the district court erred by allowing the State to present statements he made after the alleged incident in order to prove his intent at the time of that incident. He asserts that evidence was only relevant except through a propensity analysis and was merely cumulative of statements he allegedly made at the time of the incident. He also asserts the district court did not weigh the risk of undue prejudice as required by the applicable legal standards, and that, under the proper standards, the actual risk of undue prejudice apparent from the record in this case substantially outweighed whatever minimal probative value those statements might have had.

Second, he contends the district court erred by overruling his objection to the alleged victim's testimony about what a third party said during the incident. That is particularly true in this case, since that hearsay testimony bore the same risk of undue prejudice as the propensity evidence the district court erroneously admitted. Because of these errors, either individually or cumulatively, this Court should vacate Mr. Jones' conviction and remand this case for a new trial.

Statement of the Facts and Course of Proceedings

Around midnight, Evander Cobbs was walking with some friends around the boat docks in Harrison, Idaho.[1] (Tr., p.174, Ls.13-25.) Mr. Cobbs, who is of African American heritage (Tr., p.175, Ls.7-9), testified that he and his friends passed two men on the docks, and once they were a fair distance apart, one of the men, who he identified as Mr. Jones, shouted back, "Are

[1] There had been an event at the docks that day, and several people were still around at that time. (Tr., p.188, Ls.13-17.)

you for nigger power or for white power?" (Tr., p.177, Ls.1-14; *see* Tr., p.177, Ls.9-10 (the district court overruling Mr. Jones' hearsay objection to this line of questioning).) Mr. Cobbs testified both groups began walking back toward each other, and he asked Mr. Jones, "Wait, what were you saying?" (Tr., p.179, Ls.15-16, p.181, Ls.23-24.) Mr. Cobbs testified that Mr. Jones appeared nervous, as though he were thinking "Oh, geez, this guy actually came back. This guy is bigger than me." (Tr., p.196, Ls.9-13.) To that point, Mr. Cobbs testified, Mr. Jones' answer to his question "what were you saying?" was that he had asked, "Are you for *black* power or white power?" (Tr., p.180, Ls.23-24 (emphasis added).) Mr. Cobbs responded by saying, "That's not what you said." (Tr., p.182, Ls.6-7.)

Mr. Cobbs testified that it did not seem like Mr. Jones "wanted to really be saying things like that and it seemed like his friend was kind of egging him on and pushing him on." (Tr., p.184, Ls.3-8.) For example, Mr. Cobbs testified that, after he told Mr. Jones, "That's not what you said," the friend (later identified as Billy Schwartz (*see* Tr., p.108, Ls.10-16) interjected, "You heard him, boy. He said are you for black power -- or for nigger power or for white power."[2] (Tr., p.182, Ls.15-17; *accord* Tr., p.181, Ls.2-4.) Mr. Cobbs testified that Mr. Jones then echoed Mr. Schwartz' interjection. (Tr., p.181, Ls.17-19.)

As Mr. Cobbs started confronting the two men about their continuing use of racial slurs, Mr. Schwartz hit Mr. Cobbs in the face. (Tr., p.182, Ls.17-19.) Mr. Cobbs testified they both went to the ground, where he tried to control Mr. Schwartz's arms with his legs. (Tr., p.200, Ls.3-12.) One of Mr. Cobbs' friends, Nick Ozust, testified he tried to break up the fight, but was

[2] Mr. Jones objected when the prosecutor asked Mr. Cobbs to testify to what Mr. Schwartz said. (Tr., p.182, Ls.8-13.) The district court overruled that hearsay objection without discussion or response from the State. (Tr., p.182, L.14.) However, in response to pretrial hearsay objections, the prosecutor had simply asserted, "I don't intend to elicit any admissible hearsay in this case." (Tr., p.72, Ls.19-20.)

hit in the back of the head. (Tr., p.134, Ls.22-24.) Mr. Cobbs testified he was also hit in the back of the head even though he felt he had secured Mr. Schwartz's arms. (Tr., p.205, Ls.12-13, p.207, Ls.17-21.) However, Mr. Cobbs and Mr. Ozust both testified that they did not see Mr. Jones ever hit Mr. Cobbs. (Tr., p.142, Ls.8-10, p.187, Ls.10-16) Other bystanders were ultimately able to break up the fight.[3] (*See* Tr., p.135, Ls.2-5, p.188, Ls.20-23.) Both Mr. Cobbs and Mr. Ozust testified the fight lasted no more than one minute after the first punch. (Tr., p.141, L.25 - p.142, L.3, p.197, Ls.5-9.)

As officers, who were already nearby, arrived on scene (*see* Tr., p.84, Ls.16-18), they contacted Mr. Jones as he was walking away from the docks. (Tr., p.87, L.13 - p.88, L.23.) The officer testified he "smelled alcohol" on Mr. Jones. (Tr., p.89, Ls.14-16.) He also testified he saw a drop of blood on Mr. Jones' shirt and some swelling on one of his fingers. (Tr., p.89, L.22 - p.90, L.25.) The officer testified he thought the swelling was consistent with the person hitting something. (Tr., p.91, Ls.6-9.)

Mr. Jones was ultimately charged by indictment with malicious harassment, either for causing a physical injury specifically to Mr. Cobbs due to his race or "by aiding or abetting the same." (R., pp.36-37.) The indictment made no mention of Mr. Ozust or Mr. Schwartz. (*See generally* R., pp.36-37.) Mr. Jones proceeded to trial alone. (*See* Tr., p.89, Ls.5-9 (the officer explaining they had not found Mr. Schwartz on the night of the incident); Tr. p.149, Ls.17-25 (the officer noting that, at the time of trial, they still had not located Mr. Schwartz).)

[3] While the officer did interview some of the bystanders, he did remember what they told him, and he did not collect witness statements from them. (*See* Tr., p.122, L.21 - p.124, 21.) The prosecutor admitted during his closing statement that the officer, who was still under the supervision of a field training officer at the time, did a terrible investigation. It's lacking. It's incomplete. It has multiple clerical issues . . . . It's bad. Nobody is saying otherwise." (Tr., p.247, Ls.8-14; *see* Tr., p.104, Ls.7-24 (the officer testifying to his status as "in training").)

In anticipation of trial, Mr. Jones moved to exclude a video which showed him in the back of the patrol car, during which time he repeatedly asserted that he had not been involved in the incident and that he had been misidentified by the alleged victim, to whom he referred with several racial slurs.[4] (*See* State's Exhibit 5.) Mr. Jones argued that the video was not relevant, and that the risk of undue prejudice substantially outweighed any probative value it might have. (R., pp.84-85.) The district court did not take up that motion until after the jury was selected. (*See* Tr., p.68, L.20 - p.69, L.21.)

During jury selection, several potential jurors expressed concerns about being able to remain impartial in the face of evidence of a person using these sort of racial slurs. (Tr., p.46, L.20 - p.52, Ls.15.) The district court denied Mr. Jones' motion to dismiss three of those potential jurors for cause after it secured their promise to try to remain impartial in the face of such evidence. (Tr., p.52, L.16 - p.55, L.22.) One of the potential jurors involved in that questioning – Juror 15 – was ultimately selected to sit on the jury. (Tr., p.69, L.25; *see* Tr., p.65, L.15 (defense counsel passing the panel for cause).)

The district court denied Mr. Jones' motion to exclude the video from the back of the patrol car, concluding it was relevant to show Mr. Jones' intent or because it was his description of the incident. (Tr., p.74, L.23 - p.75, L.2.) It also concluded those statements were not unduly prejudicial because they were "the defendant's own statements given shortly after the events took place." (Tr., p.75, Ls.10-16.) Mr. Jones renewed his objections to the video when the State proffered it as an exhibit at trial. (Tr., p.98, Ls.15-19.) The district court overruled that objection without further discussion. (Tr., p.98, Ls.20-21.)

[4] The prosecutor redacted other portions of the video to remove instances of hearsay or reference to other irrelevant topics. (*See* Tr., p.73, Ls.7-10, p.74, Ls.9-14.)

The jury ultimately convicted Mr. Jones as charged.[5] (R., p.157.) The district court subsequently imposed a unified sentence of five years, with two years fixed, and retained jurisdiction. (Tr., p.290, Ls.5-12.) Mr. Jones completed a rider program during that period of retained jurisdiction, and the district court suspended his sentence for a two-year period of probation as a result. (R., pp.194-98.) Mr. Jones filed a notice of appeal timely from the initial Judgment of Conviction. (R., pp.170, 176.)

[5] The jury was not asked to indicate whether it convicted Mr. Jones as the principal or for aiding and abetting. (*See* R., p.157; Tr., p.222, Ls.1-3.)

ISSUES

I. Whether the district court erred by admitting the video of Mr. Jones since, under the applicable legal standards, it was unduly prejudicial and the only probative value it might have had was merely cumulative.

II. Whether the district court erred by admitting Mr. Cobb's inadmissible hearsay testimony about what Mr. Schwartz, a third party, said during the incident.

III. Whether the accumulation of errors in this case requires reversal even if this Court determines them all to be individually harmless.

ARGUMENT

I.

The District Court Erred By Admitting The Video Of Mr. Jones Since, Under The Applicable Legal Standards, It Was Unduly Prejudicial And The Only Probative Value It Might Have Had Was Merely Cumulative

A. Standard Of Review

Mr. Jones objected to the admission of the video in this case under I.R.E. 402, 403, and 404(b). (Tr., p.98, Ls.17-19.) The appellate courts freely review the determination of whether evidence is relevant under I.R.E. 402. *State v. Hall*, 163 Idaho 744, 781 (2018), *reh'g denied*. They review the district court's weighing of the probative value and risk of undue prejudice under I.R.E. 403 for an abuse of discretion. *Id*. Likewise, under I.R.E. 404(b), the appellate courts freely review the district court's determination that the evidence is relevant to a non-propensity purpose, and they review its weighing of the probative value and the risk of undue prejudice for an abuse of discretion. *State v. Kralovec*, 161 Idaho 569, 574 (2017). If this sort of evidence is not admissible under the Rules of Evidence, it may not be admitted simply to put events "in the context of nearby and nearly contemporaneous happenings." *Id.* at 573.

The district court abuses its discretion when it fails to recognize the issue as one of discretion, when it acts beyond the outer bounds of its discretion, when it does not act consistently with the applicable legal standards, or when it does not reach its decision in an exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018).

B. Mr. Jones' After-The-Fact Statements Were Not Relevant To A Non-Propensity Purpose

The district court concluded Mr. Jones' statements while he was in the back of the police car were relevant to show his intent during the alleged incident or because it was his description of that alleged incident. (Tr., p.74, L.23 - p.75, L.2.) Neither conclusion is supported by the

record because the actual statements Mr. Jones made were that he had only been arrested because the alleged victim had misidentified him. (*E.g.*, State's Exhibit 5, ~35:30 ("I had nothing to do with this. I was on my way home, and all you guys want to do is pick on the little guy in the orange 'cause some little black man said I started something. Fuck him and the horse he road in on. Should tie him to a rope and hang him from a fuckin' tree.").) As such, these comments were clearly not describing the alleged indent on the docks, since Mr. Jones was denying being involved in any such incident. *See Lovitt v. Robideaux*, 139 Idaho 322, 325 (2003) (reiterating that a district court's factual findings are clearly erroneous, and not entitled to deference, when they are not supported by substantial and competent evidence). Likewise, those comments were not describing Mr. Jones' intent during the incident since he was saying he was not involved in such an incident. Therefore, the district court's conclusion that these comments were directly relevant was erroneous.[6]

Rather, those statements are only relevant to intent through the inference that Mr. Jones' language indicates that he holds particular views toward people of African American heritage, and that any actions he took that evening must have conformed to those views. Therefore, those statements are, in fact, only relevant through an improper propensity analysis. *Cf. State v. Grist*,

[6] The prosecutor did highlight one statement from that video that might be more directly relevant – that Mr. Jones said, "*We* should have buried him." (*E.g.*, Tr., p.231, Ls.14-15 (emphasis added).) However, it is not clear on the video whether Mr. Jones said "We" or "He" should have buried him. (*See* State's Exhibit 5, ~3:00.) In fact, the context of that statement suggests Mr. Jones used the word "he," since the context of that statement was a denial of his own involvement: "I had nothing to do with this. Mind my own God damn fucking business and I'm fuckin' arrested for it. Bullshit. [unintelligible] the little nigger had it coming for some fucking reason. He's done something and he didn't deserve it. *He* [whoever had actually attacked the alleged victim] should have fucking buried him." (State's Exhibit 5, ~3:00 (emphasis added).) However, even if the prosecutor was correct about what Mr. Jones said at that moment, as discussed in Section I(C), *infra*, any probative value that statement might have had was minimal because it was still only cumulative to the other evidence of what Mr. Jones allegedly said at the start confrontation.

147 Idaho 49, 53, 55 (2009) (warning, in regard to the common scheme or plan exception to I.R.E. 404(b), against admitting evidence that "is merely propensity evidence served up under a different name" and reiterating that "there must be limits on the use of bad acts evidence" in such cases) (internal quotations omitted). As such, they were not admissible under I.R.E. 402 or 404(b).

C. The Risk Of Undue Prejudice From The Video From The Car Substantially Outweighed Whatever Minimal And Merely Cumulative Probative Value That Evidence Might Have Had

Even if Mr. Jones' statements on the video were relevant, this Court should still reverse the district court's decision to admit them because its decision was not consistent with I.R.E. 403 and I.R.E. 404(b) in several respects. First, it did not use the proper analysis when considering the statements under these rules. Specifically, it concluded those statements were not unduly prejudicial simply because they were Mr. Jones' own comments made soon after the alleged incident. (Tr., p.75, Ls.10-16.) That is a *res gestae* analysis – that his statements should be admitted because they give context to the incident and were made nearly contemporaneous to the alleged incident. *See Kralovec*, 161 Idaho at 573.

The Idaho Supreme Court has made eminently clear that sort of analysis is not a proper basis upon which to admit evidence. *Id*. That is because, regardless of when those comments were made, or by whom they were made, presenting them to the jury still risked the jurors deciding the case on an improper basis – that Mr. Jones was willing to use those racial slurs – rather than on a determination of what he did during the incident at the docks. *See State v. Sanchez*, 161 Idaho 727, 733 (Ct. App. 2017) (explaining a risk of unfair prejudice exists when there is a possibility the evidence in question would cause the jury's decision to be made on an improper basis). Since the district court did not conduct the analysis actually required by the

applicable legal standards, and used an analysis the Supreme Court had expressly rejected instead, it abused its discretion. *State v. Orellana-Castro*, 158 Idaho 757, 762 (2015).

Second, under the applicable legal standards, the risk of undue prejudice significantly outweighed whatever probative value those statements might have had. For example, any probative value those statements might have had in regard to Mr. Jones' alleged intent at the time of the incident was merely cumulative, as the State also elicited evidence that Mr. Jones allegedly used similar racial slurs at the outset of the encounter. (*E.g.*, Tr., p.178, Ls.1-16.) Therefore, the probative value of Mr. Jones' statements in the police car, even if relevant, was particularly minimal in this case. *Compare State v. Brown*, 131 Idaho 61, 67-68 (Ct. App. 1998) (holding the district court properly excluded a letter written by the victim under I.R.E. 403 because, as here, any exculpatory value from the letter was marginal because it was based on a tenuous inference (*see* Section I(B), *supra*) and it was merely cumulative because the defense had been able to impeach the victim's testimony on the same basis through other evidence).

Moreover, the risk of undue prejudice was apparent from the fact that one of the jurors actually sitting on the case had expressed his doubts about his ability to remain impartial if presented with evidence of Mr. Jones using that type of language.[7] Specifically, Juror 15 explained: "I think that there should -- I don't know. It should be kind of a boundary to that because people shouldn't be able to, you known, make somebody feel like, you know, they're not welcome or wanted." (Tr., p.48, Ls.19-23.) As a result, he admitted that hearing that sort of language "will anger me for sure. That's not saying that you know -- because I'm not trying to be biased towards anybody as well. You know what I mean? . . . But I can see it kind of

[7] In fact, the district court was aware that at least one juror on the panel harbored those concerns when it ruled on the motion to exclude the video, since it did not rule on that motion until after the jury was selected. (*See* Tr., p.68, L.20 - p.69, L.21.)

effecting my judgment." (Tr., p.50, L.21 - p.51, L.2.) As a result, he answered defense counsel's questions – "is the language that's going to be used something that will create a bias against Mr. Jones?" and "will you be able to be fair and impartial to Mr. Jones?" – in the affirmative: "Yes. Very much so," and "Probably not." (Tr., p.51, Ls.11-17.) Additionally, when the district court followed up on that point, he said "I'll try my best" to fairly and impartially consider whatever evidence was ultimately presented, but he maintained "I'm having a hard time answering because I don't do good emotionally sometimes you know so usually I keep my mouth shut but . . . I can't tell you that it wouldn't effect my. [sic]" (Tr., p.54, L.13 - p.55, L.4.)

Juror 15 was not the only one who harbored such feelings. Three other potential jurors expressed similar feelings during *voir dire*. (Tr., p.46, L.17 - p.47, L.9, p.48, L.24 - p.50, L.16, p.51, L.18 - p.52, L.15.) That suggests that other jurors might have harbored similar prejudices and not verbalized them during the *voir dire* process. (*See* Tr., p.66, L.17 - p.68, L.19 (defense counsel striking other potential jurors rather than Juror 15).) Therefore, the record in this case actually shows there was a substantial risk that, when presented with the cumulative evidence of Mr. Jones using these racial slurs, the jurors (and Juror 15 in particular) would vote to convict him on an improper basis – his use of those racial slurs – rather than based on a determination of what he did with respect to the incident on the docks.

As such, there was a risk of undue prejudice in this particular case which substantially outweighed whatever minimal probative value that merely cumulative evidence might have had. Therefore, the district court erred by overruling Mr. Jones' objection to the video from the back of the police car.

II.

The District Court Erred By Admitting Mr. Cobb's Inadmissible Hearsay Testimony About What Mr. Schwartz, A Third Party, Said During The Incident

A. Standard Of Review

The district court's decision of whether to admit statements under the hearsay rules is reviewed for an abuse of discretion. *State v. Button*, 134 Idaho 864, 867 (Ct. App. 2000). Here, the district court abused its discretion because its decision was not consistent with the applicable legal standards set forth in the Rules of Evidence. *See Lunneborg*, 163 Idaho at 863-64.

B. Mr. Cobbs' Testimony About The Statements Mr. Schwartz Made Was Inadmissible Hearsay

Hearsay is any statement which a person does not make while testifying at the current trial and which is offered to prove the truth of the matter asserted. I.R.E. 801(c). In this case, Mr. Schwartz did not testify at the trial. (*See generally* Tr.) Instead, Mr. Cobbs testified about what Mr. Schwartz said during the encounter. (Tr., p.182, Ls.15-17.) Mr. Schwartz was not charged as a co-defendant in this trial, and so, he was not a party opponent. *See* I.R.E. 801(d)(2). That testimony was offered to prove the truth of the matter asserted – that Mr. Schwartz had actually made those racially-charged statements. (*See* Tr., p.182, Ls.15-17.) Thus, Mr. Cobbs' testimony about what Mr. Schwartz said was inadmissible hearsay. I.R.E. 801(c). Therefore, it was error for the district court to admit those statements. Moreover, because that inadmissible hearsay involved more racial slurs, that error is presents the same risk of undue prejudice the propensity evidence did. (*See* Section I(C), *supra*.)

III.

The Accumulation Of Errors In This Case Requires Reversal Even If This Court Determines Them All To Be Individually Harmless

Even if this Court determines that each of the errors discussed *supra* was harmless by itself, this Court should still vacate Mr. Jones' convictions under the cumulative-error doctrine. *See, e.g.*, *State v. Field*, 144 Idaho 559, 572-73 (2007). The accumulation of independently-harmless errors may still deprive the defendant of his right to a fair trial. *Id.* In order to find cumulative error, the appellate court must first find more than one instance of error. *State v. Sheahan*, 139 Idaho 267, 287 (2003). To prove the accumulated errors harmless, the State would have to show that the guilty verdict rendered in this case was surely unattributable to the cumulative effect of the errors. *See State v. Whitaker*, 152 Idaho 945, 953 (Ct. App. 2012); *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (articulating the proper test for harmless error); *State v. Thomas*, 157 Idaho 919 (2014) (reaffirming the application of the *Sullivan* articulation of the harmless error test in Idaho).

In this case, there are several instances of error, and there is a reasonable possibility that the combined effect of those errors contributed to Mr. Jones' conviction. As a result, even if all those errors are found to be independently harmless, this Court should still vacate the judgment of conviction and remand this case for a new trial because the accumulated errors deprived Mr. Jones of his right to a fair trial.

CONCLUSION

Mr. Jones respectfully requests this Court vacate his conviction and remand this case for further proceedings.

DATED this 2nd day of April, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2019, 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

BRD/eas