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State v. Lopez-Orozco Appellant's Reply Brief Dckt. 40859

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JORGE ALBERTO LOPEZ-OROZCO , Defendant-Appellant.	)	NO. 40859 ELMORE COUNTY NO. CR 2002-112 REPLY BRIEF

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 ELMORE

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STATEMENT OF THE CASE

Nature of the Case

Jorge Alberto Lopez-Orozco appeals from his judgment of conviction for three counts of first degree murder. Mr. Lopez-Orozco was found guilty at trial and the district court imposed three concurrent determinate life sentences. On appeal, Mr. Lopez-Orozco contends that the district court erred in finding that his brother was an unavailable witness and therefore allowing his testimony from the preliminary hearing transcript to be read into evidence. Mr. Lopez-Orozco further contends that the district court erred in permitting hearsay evidence in the form of an unsworn written statement allegedly adopted by his brother to be read into evidence. This Reply Brief addresses the State's assertions that the claims are not preserved and that any error is harmless.

Statement of the Facts and Course of Proceedings

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

ISSUES

1. Did the district court err in ruling that Jose Lopez-Orozco was an unavailable witness and then admitting his preliminary hearing testimony?

2. Did the district court err in allowing Jose's unsworn declaration to be read to the jury?

ARGUMENT

I.

The District Court Erred In Ruling That Jose Lopez-Orozco Was "Unavailable" As A Witness At Trial And Then Admitting His Preliminary Hearing Testimony

A. Introduction

At trial, the State called Jose Lopez-Orozco to testify to a conversation he overheard between the defendant and his brother and sister; however, Jose testified that he did not recall any such statements. When asked, Jose testified that maybe the reason he did not remember the statements made was due to the length of time that had passed and because this was an "emotionally charged issue." (Trial Tr., p.2018, Ls.10-18.) The State successfully sought to have Jose declared "unavailable" such that his preliminary hearing testimony could be read to the jury.

B. The District Court Erred In Ruling That Jose Lopez-Orozco Was "Unavailable" As A Witness At Trial And Then Admitting His Preliminary Hearing Testimony

The State asserts that Mr. Lopez-Orozco's arguments concerning Jose's unavailability are unpreserved. (Respondent's Brief, pp.10-11.) The State is incorrect.

First, the district court held a hearing on Jose's unavailability, which would have been entirely unnecessary if Mr. Lopez-Orozco was not objecting to the introduction of his preliminary hearing testimony. (Trial Tr., p.2016, L.18 – p.2018, L.19.) Following the offer of proof, the district court specifically addressed the question of unavailability and found Jose unavailable. (Trial Tr., p.2023, L.22 – p.2024, L.7.) Even assuming that Mr. Lopez-Orozco did not specifically object, the error is still preserved because it was

specifically addressed. The Idaho Supreme Court's Opinion in *State v. Duvalt*, 131 Idaho 550 (1998) is instructive:

> Preliminarily, we note that the State argues that this issue may not be raised on appeal because it was not raised to the trial court. This Court has held that ordinarily issues cannot be raised for the first time on appeal. *Sandpoint Convalescent Servs. Inc. v. Idaho Dep't of Health & Welfare,* 114 Idaho 281, 284 (1988). **An exception to this rule, however, has been applied by this Court when the issue was argued to or decided by the trial court.** *Northcutt v. Sun Valley Co.,* 117 Idaho 351, 356–57 (1990). In the case at bar, the trial court stated that "[d]efendant contends that he was illegally arrested when he was handcuffed and patted down.... The handcuffing during this investigatory stop was a reasonable means to execute the investigatory stop." Since this issue was directly addressed by the trial court below, we will decide this issue on appeal.

*Id.*at 553. Because unavailability was argued to and decided by the district court, the claim is preserved on appeal.

Second, the claim is preserved. When the State then asked Jose to be declared unavailable, counsel for Mr. Lopez-Orozco asked the court to make a distinction between a refusal to testify and an inability to recall. (Trial Tr., p.2021, Ls.1-3.) The district court recognized this as an objection to the finding of unavailability, stating,

> [i]n this case, I am inclined to agree with the State, and I think Mr. Ratliff really was simply asking that the Court do distinguish this case from [. . .] *Barcella*[1], where in fact the Court of Appeals in that case had indicated that before the Court could find a witness unavailable or refusing to testify, the Court in that case did have to bring the defendant back into court and order the defendant to testify under the threat of possible contempt of court proceedings.
>
> In this situation, though, where the claim is a lapse of memory rather than a refusal to testify, I agree with the State.

(Trial Tr., p.2021, Ls.24 – p.2022, L.14.) Later, counsel for Mr. Lopez-Orozco specifically asserted that he did not want the preliminary hearing testimony admitted. Counsel asserted, "we have a lapse of memory and corroboration, so I think that is the

issue." (Trial Tr., p.2032, Ls.4-8.) Counsel then requested that the preliminary hearing testimony be marked as an exhibit for the appellate record, because "I don't want it admitted." (Trial Tr., p.2043, Ls.23-24.)

On appeal, Mr. Lopez-Orozco is also asserting that "lapse of memory" is the issue, and that the district court erred by finding the lack of memory asserted by Jose to be adequate to show unavailability. Because this issue was specifically addressed by the district court, and the introduction of the preliminary hearing testimony was objected to, Mr. Lopez-Orozco's claim of error is preserved.

C. The District Court's Error In Admitting Jose's Preliminary Hearing Testimony Was Not Harmless

The State asserts that any error in the admission of Jose's preliminary hearing testimony was harmless. (Respondent's Brief, pp.17-22.) The State is incorrect.

In *State v. Perry,* the Idaho Supreme Court clarified for all future appeals the standard to be employed in appellate review. *State v. Perry,* 150 Idaho 209, 219-228 (2010). The *Perry* Court chose to use the test provided for in *Chapman v. California,* 386 U.S. 18 (1967). *Perry,* 150 Idaho at 221 ("In Idaho, the harmless error test established in *Chapman* is now applied to all objected-to error.").

The Idaho Supreme Court recently reiterated the test, explaining,

> Under the *Chapman* harmless error analysis, where a constitutional violation occurs at trial, and is followed by a contemporaneous objection, a reversal is necessitated, *unless* the State proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

[1] *State v. Barcella*, 135 Idaho 191 (Ct. App. 2000).

State v. Almaraz, 154 Idaho 584, 598 (2013) (citing *Perry,* 150 Idaho at 221 (quoting *Chapman,* 386 U.S. at 24.) The Idaho Supreme Court has made clear *Chapman* is the proper test to be used when evaluating objected-to errors.

The purpose of a harmless error rule is to block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the results of the trial." *State v. Garcia*, 100 Idaho 108, 111 (1979) (internal quotations omitted). In determining whether an evidentiary error affected the defendant's substantial rights, the appellate court considers a number of factors,

> including the importance of the witness' testimony to the prosecutor's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case.

State v. Parker, 157 Idaho 132, ___, 334 P.3d 806, 814 (2014) (quoting *State v. Shackelford*, 150 Idaho 355, 366 (2010)). If a substantial right is not affected, the reviewing court may deem an abuse of discretion harmless. *Parker*, 334 P.3d at 814.

Mr. Lopez-Orozco contends that the errors were not harmless beyond a reasonable doubt. Because there was a timely objection, Mr. Lopez-Orozco only has the duty to prove that an error occurred, "at which point the State has the burden of demonstrating that the error is harmless beyond a reasonable doubt." *Perry*, 150 Idaho at 222. The State cannot show that "the error[s] complained of did not contribute to the verdict obtained." *Perry,* 150 Idaho at 221 (quoting *Chapman,* 386 U.S. at 24).

In this case, Jose's preliminary hearing testimony was vitally important to the prosecution's case. The prosecutor relied on Jose's anticipated testimony even when giving her opening remarks:

> One last thing. He did admit to committing this crime to his family. . . Jose recalls in his indications to law enforcement that he [Jorge] indicated he killed his girlfriend and the children and that he then burned them in his car.

(Trial Tr., p.1056, Ls.21-22, p.1057, Ls.8-11.)

The prosecutor repeatedly emphasized the importance of Jose's testimony to the State's case in her closing statements:

> Jose Aurelio Lopez-Orozco knew some details. He knew that the defendant had seen a patrol car. He knew that the defendant has successfully eluded this man following him.
>
> But Jose Aurelio also knew that Becky and the boys were there. Jose wrote in his statement, which was read to you, the defendant admitted he killed Becky and the kids. He was sad and desperate. He killed Rebecca because she threatened to tell that patrol car, tell that policeman that he was holding her against her will. Oh, and if that wasn't good enough, she threatened to throw one of the kids out of the moving car. So he became upset with her and shot her. He then took her body in the car and burned them. And Jose stated, "Jorge didn't tell me anything specific about how he killed the kids." But those are all of the details that Jose Aurelio Lopez-Orozco knew in August of 2002.

(Trial Tr., p.2796, Ls.3-22.) The prosecutor further highlighted the importance of Jose's preliminary hearing testimony and unsworn statement: "Now, according to Jose Aurelio, the defendant again knew Becky and the boys had been killed." (Trial Tr., p.279, Ls.11-13.) Finally, she summarized Jose's knowledge for the jury, "Jose Lopez-Orozco. The defendant said he shot Rebecca. He said he took her body and burned it in the car. He did not give details about the children. That is what Jose Aurelio knew in 2002." (Trial Tr., p.2807, Ls.6-10.)

Ultimately the prosecutor referenced Jose's testimony or written statement four separate times during her closing remarks; this is not the kind of treatment the State

would give to information that is cumulative or insignificant in light of all of the other testimony and evidence adduced at trial.

Jose was the sole witness whose preliminary hearing testimony and unsworn statement linked Mr. Lopez-Orozco to the death of Becky and the children. Jose's preliminary hearing testimony and his unsworn statement was not cumulative evidence where Jose was the only witness through whom the State introduced evidence that Mr. Lopez-Orozco confessed to killing Becky and the kids.

The only evidence truly contradicting Mr. Lopez-Orozco's version of events came in the form of Jose's preliminary hearing testimony and in his unsworn statement, which told a far different story, and ultimately purported to be Mr. Lopez-Orozco's confession to the killings—where no evidence that Mr. Lopez-Orozco confessed to causing the deaths was admitted at trial prior to the admission of Jose's preliminary hearing testimony and unsworn statement, and no evidence that Mr. Lopez-Orozco confessed to causing the deaths was admitted into evidence following Jose's preliminary hearing testimony and unsworn statement. Although the State relies on the testimony of Balvina and Maria Garcia to demonstrate the "harmlessness" of the admittance of Jose's preliminary hearing testimony and unsworn statement, Balvina testified that while Mr. Lopez-Orozco did come to her house, he said that someone had followed him because "he wanted the girl," that shots were fired at him, and that a police car followed him but did not stop him. (Trial Tr., p.2112, L.7 – p.2113, L.1.) This testimony only corroborates Mr. Lopez-Orozco's story as told to the detectives in the van. (Exhibit 187.) Maria Garcia testified as to her understanding of why Mr. Lopez-Orozco was going to California—he had a shooting with somebody and that he had left somebody

that was injured or that he had shot someone and left him for dead. (Trial Tr., p.2171, L.7 – p.2172, L.5.) Neither of these two witnesses' testimony corroborates Jose's testimony that Mr. Lopez-Orozco confessed to killing Becky and the kids. Further, even the testimony of Liliana Pedroza and Peggy Larios regarding the transfer of gas early in the morning in the desert—while an unusual favor to ask—does not serve to confirm the evidence adduced from Jose's preliminary hearing testimony and unsworn statement. (Trial Tr., pp.1162-1222, 1235-1263.)

The preliminary hearing testimony and unsworn statement was not cumulative evidence where Jose was the sole witness through whom the State introduced evidence that Mr. Lopez-Orozco confessed to killing Becky and the kids. Jose was the sole witness whose testimony and unsworn statement affirmatively linked Mr. Lopez-Orozco to the death of Becky and the kids.

Although the State claims that the testimony at trial corroborated Jose's statement, this is only partially true. While other testimony adduced at trial may have corroborated insignificant details contained in Jose's preliminary hearing testimony and unsworn statement, the critical, new information revealed through Jose's preliminary hearing testimony and unsworn statement—that Mr. Lopez-Orozco had confessed to his family that he killed Becky and her kids—was only admitted through Jose. The State refers to Balvina's and Maria Garcia's testimony as corroborating Jose's preliminary hearing testimony and sworn statement; however, these two witnesses' testimony added nothing material to Mr. Lopez-Orozco's statement to the officers in the van and certainly did not corroborate that Mr. Lopez-Orozco told either of them that he killed Becky and the kids.

Jose was never cross-examined at trial as he was found to be unavailable. (Trial Tr., p.2016, L.17 – p.2025, L.15, p.2027, L.1 – 2074, L.18.) The only cross-examination of Jose occurred the prior year at the preliminary hearing—and was limited to establishing the populace of the room and what type of background noises were in the room during Mr. Lopez-Orozco's purported confession to his family members. (Trial Tr., p.2066, L.9 – p.2068, L.24.) Further, the prosecutor's case was missing several key elements, including a murder weapon (Trial Tr., p.2838, L.14) and a firm motive (*see, e.g.*, Trial Tr., p.2804, L.16 – p.2806, L.17) (discussing three possible motives for the murders) and (Trial Tr., p.2839, Ls.7-9) (admitting that there were "a variety of motives out there").

The error was not harmless because the State failed to produce physical evidence or corroborating testimony at trial. The State's case lacked physical evidence such as DNA, fingerprints, ballistics, etc. which would have tied Mr. Lopez-Orozco to the deaths. Ultimately, the State did not introduce any evidence or testimony which truly contradicted Mr. Lopez-Orozco's version of events, save for Jose's preliminary hearing testimony and unsworn statement. Mr. Lopez-Orozco's version of events, as told to the detectives in the van on the trip from Salt Lake City (Exhibit 187), matched the physical evidence at the scene—when he last saw Becky and the kids, they were alive and in his car, but being shot at. Thus State built its case around Mr. Lopez-Orozco's statements to his family, as overheard by his brother, Jose. As the prosecutor put it, "they [Jose and Balvina] are the only two people who actually heard the admission from the defendant's own mouth." (Trial Tr., p.1984, L.25 – p.1985, L.2.) The State pointed out that "they are the only two witnesses that the State can obtain that information from."

(Trial Tr., p.1985, Ls.4-5.) The district court agreed with the prosecutor and found "that realistically in terms of any statement attributed to the defendant in this case as to his part in the alleged murder in this matter that these two witnesses are the only two that can provide that evidence." (Trial Tr., p.1993, Ls.15-20.) The jury did not obtain this information through any other means—only Jose's preliminary hearing testimony and unsworn statement told the jury of Mr. Lopez-Orozco's purported confession to killing Becky and the kids.

Mr. Lopez-Orozco told a plausible story of what had happened to him and Becky after they left Becky's dad's house. (Exhibit 187.) The story was corroborated by testimony and evidence admitted at trial. The only resounding testimony and evidence supporting the State's theory of the case—that Mr. Lopez-Orozco killed Becky and her kids—was the Jose's preliminary hearing testimony and his unsworn statement.

The failure to admit the evidence was not harmless beyond a reasonable doubt. *See P*erry, 150 Idaho at 227, *see also, Chapman,* 386 U.S. at 24.

II.

The District Court Erred In Permitting Jose's Unsworn Statement To Be Read To The Jury

A. Introduction

The district court erred when it allowed the unsworn statement attributed to Jose to be read to the jury. The unsworn statement was not prepared by Jose, substantial time had lapsed between the event and the preparation of the unsworn statement, Jose never adopted the unsworn statement, and it did not accurately reflect Jose's knowledge in 2002. Thus, the requisite safeguards to insure the probable accuracy of

the statement were not present and the district court erred in allowing the statement to be read to the jury.

B. The District Court Erred In Permitting Jose's Unsworn Statement To Be Read To The Jury

The State asserts that Mr. Lopez-Orozco's arguments concerning the unsworn statement are not preserved. (Respondent's Brief, pp.14-15.) The State is incorrect.

The State asserts that counsel for Mr. Lopez-Orozco objected only to the statement being admitted as an exhibit. (Respondent's Brief, p.14 (citing Trial Tr., p.1979, L.3 – p.1980, L.8.) Mr. Lopez-Orozco disagrees with the State's characterization of counsel's objection, as counsel stated that the State could not "bring in or [. . .] submit on the record in the record the actual statements . . . ." (Trial Tr., p.1979, Ls.3-9.) Thus, counsel objected to the evidence altogether. Further, later in that hearing, counsel for Mr. Lopez-Orozco objected to introduction of the out-of court declaration in any form, stating, "Judge, I think under [I.R.E.] 803(8) that the declarations are not admissible as exhibits and they should not come in, either as an exhibit and/or as verbal testimony." (Trial Tr., p.1987, Ls.19-22.)

Finally, after the arguments from the parties, the district court specifically addressed the requirements of I.R.E. 803(5). (Trial Tr., p.1995, L.5 – p.1996, L.25.) As previously mentioned, when an issue is presented to or decided by the trial court, the issue is preserved. *Duvalt*, 131 Idaho at 550 (1998) (citing *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 356–57 (1990). The issue was presented to the trial court, which ruled on the merits of I.R.E. 803(5). This is the challenge that Mr. Lopez-Orozco is making on appeal, and the argument is clearly preserved.

C. The District Court's Error In Permitting Jose's Unsworn Statement To Be Read To The Jury Was Not Harmless

The State asserts that any error in the admission of Jose's unsworn statement was harmless. (Respondent's Brief, pp.17-22.) The State is incorrect. The analysis of the harmfulness in admitting Jose's preliminary hearing testimony and the analysis of the harmfulness in admitting Jose's unsworn statement are inextricably linked where the substance of the preliminary hearing testimony essentially explains the circumstances surrounding the creation of the unsworn statement and the content of the unsworn statement. (Trial Tr., p.2046, L.13 – p.2074, L.16.) Throughout the trial the testimony and statement are discussed and referenced together, thus Mr. Lopez-Orozco will hereby adopt and incorporate by reference his analysis from Section (I)(C) as to the harmfulness of the admittance of Jose's unsworn statement.

CONCLUSION

Mr. Lopez-Orozco requests that his convictions be vacated and the case remanded for further proceedings.

DATED this 16th day of January, 2015.

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JUSTIN M. CURTIS
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of January, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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