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State v. Lopez-Orozco Respondent's Brief Dckt. 40859

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent-Cross Appellant, vs. JORGE ALBERTO LOPEZ-OROZCO, Defendant-Appellant-Cross Respondent.	)	No. 40859 Elmore Co. Case No. CR-2002-112

BRIEF OF RESPONDENT

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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Nature Of The Case

Jorge A. Lopez-Orozco appeals from the judgment of conviction entered upon the jury verdicts finding him guilty of three counts of first-degree murder. Lopez-Orozco claims the district court committed evidentiary error.

Statement Of Facts And Course Of Proceedings

In 2002, Lopez-Orozco murdered Rebecca Ramirez Alamaraz and her two young sons, four-year-old R.R. and two-year-old M.H. (See Exhibits 177-179.) Lopez-Orozco drove the bodies to a desert area in Mountain Home and set the car they were in on fire, burning their bodies, leaving only bone fragments from which to identify them.[1] (Tr., Vol. III, p.1562, Ls.6-21; Exhibits 177-179.) On August 16, 2002, the state filed a Complaint charging Lopez-Orozco with three counts of first-degree murder for the deaths of Rebecca and her two sons. (R., Vol. I, pp.9-11; Exhibits 177-179.) After the murders, Lopez-Orozco fled to Mexico; he was finally extradited back to Idaho in 2011 and the court held a three-day preliminary hearing after which it found probable cause to support the three first-degree murder charges against Lopez-Orozco. (R., Vol. I, pp.61-83, 88-90, 91-95; see Tr., Vol. III, p.2146, L.25 – p.2147, L.6 (noting Lopez-Orozco "remained at large from July 31st of 2002 until October of 2009").) Lopez-Orozco pled not guilty and the case proceeded to trial at which a jury convicted him of all three counts. (R., Vol. I, p.96; R., Vol. IV, pp.642-644.) The court imposed three

[1] Both Rebecca and M.H. had gunshot wounds to their heads, but R.R.'s cause of death was undetermined. (Tr., Vol. III, p.1847, L.2 – p.1848, L.20.)

concurrent fixed life sentences. (R., Vol. IV, pp.653-654.) Lopez-Orozco filed a timely notice of appeal.[2] (R., Vol. IV, pp.656-658.)

[2] The state also filed a notice of cross-appeal (R., Vol. IV, pp.664-666); however, contemporaneous with this response, the state filed a motion to dismiss its cross-appeal.

ISSUES

Lopez-Orozco states the issues on appeal as:

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?

(Appellant's Brief, p.4.)

The state rephrases the issue on appeal as:

Has Lopez-Orozco failed to show the district court erred in admitting Jose's preliminary hearing testimony along with his prior statement, which was also admitted at the preliminary hearing?

ARGUMENT

Lopez-Orozco Has Failed To Show The District Court Erred In Allowing The Admission, At Trial, Of His Brother Jose's Preliminary Hearing Testimony And The Content Of A Written Statement Jose Signed In 2009, Which Statement Was Also Admitted At The Preliminary Hearing

A. Introduction

On June 15, 2011, Lopez-Orozco's brother, Jose, provided some limited testimony at Lopez-Orozco's preliminary hearing regarding statements Lopez-Orozco made in 2002. (6/15/2011 P.H. Tr., pp.249-260, 380-397.) At Lopez-Orozco's trial more in 2012,[3] Jose testified that he could not recall any of Lopez-Orozco's statements, any statements he made to law enforcement regarding what he heard Lopez-Orozco say, or his preliminary hearing testimony. (Tr., Vol. III, p.2017, L.23 – p.2018, L.9.) As a result, the prosecutor asked the court to declare Jose unavailable as a witness and allow Jose's preliminary hearing testimony to be read to the jury along with the contents of a written statement he signed for law enforcement in 2009 in which he detailed Lopez-Orozco's statements from 2002. (Tr., Vol. III, p.2018, L.20 – p.2020, L.3.) The court found Jose unavailable and granted the state's request to have Jose's preliminary hearing testimony along with the contents of his 2009 statement read to the jury. (Tr., Vol. III, p.2023, L.22 – p.2025, L.20.)

Lopez-Orozco claims the court erred in finding Jose unavailable, arguing the "prosecutor's inquiry" in this regard was "insufficient." (Appellant's Brief, pp.6-9.) This Court should decline to consider Lopez-Orozco's claim regarding

[3] Jose appeared at Lopez-Orozco's trial on October 29, 2012. (Tr., Vol. III, p.2016, Ls.12-15.)

unavailability because it is not preserved. Even if preserved, Lopez-Orozco's argument regarding Jose's unavailability fails. Lopez-Orozco's other arguments relating to the admission of Lopez-Orozco's preliminary hearing testimony and his 2009 written statement likewise fail. Application of the relevant law to the record shows the district court correctly concluded that both the prior testimony and the statement were admissible. Even if this Court concludes otherwise, any error is harmless.

B. Standard Of Review

"The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of discretion." State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010) (citations omitted). When the appellate court reviews an evidentiary ruling for abuse of discretion, it considers (1) whether the trial court perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with any applicable legal standards; and (3) whether the trial court exercised reason in reaching its decision. State v. Hoak, 147 Idaho 919, 921, 216 P.3d 1291, 1293 (Ct. App. 2009) (citation omitted).

C. Lopez-Orozco Has Failed To Show Error In The Admission Of Jose's Preliminary Hearing Testimony Or His 2009 Written Statement

Prior to the state calling Jose as a witness, the court conducted a hearing on the admissibility of Jose's preliminary hearing testimony and the statement he signed for law enforcement in 2009. (Tr., Vol. III, pp.1973-2008.) The prosecutor noted that she anticipated Jose was going to testify that he did not "remember

anything," in which case she asked that the court find him unavailable and allow the state to admit his preliminary hearing testimony.[4] (Tr., Vol. III, p.1977, Ls.3-10.) In response defense counsel argued:

> It seems to me looking at this matter in the brief time we have had that the State has to show, according to Ricks[5], that the people to testify, Jose and Balvina, are the only persons whose testimony provides statements of substantial evidence on every material element of the offence charged.
>
> Now, they may be able to provide substantial evidence on -- while they can provide substantial evidence perhaps on flight, but that is not part of the offence charged.
>
> As far as premeditation-premeditation murder they are not the only people that can testify to this. We have had testimony from Noemi who said, "The last person I saw my mother with was the defendant." We have the other testimony from the investigating officers as to its being the defendant's car. We have other testimony and we are expected to have testimony from Dr. Groben as to the three bodies found in the automobile, as to the cause of death by Marla Spence, two of them being gunshot, one of them being undetermined.
>
> So these are not the only people who can provide evidence, substantial evidence on every material element of the offence charged. So they haven't met that threshold level just based on testimony you have had so far.

(Tr., Vol. III, p.1978, L.1 – p.1979, L.2.)

Counsel also argued that the "major issue" was "whether or not the scope and the adequacy and opportunity of [his] work at the preliminary hearing comports with [Idaho Code] 9-366 [sic]" and the "Idaho Rules of Evidence and

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[4] The prosecutor's comments related to the anticipated testimony of both Jose and Lopez-Orozco's sister, Balvina. (See R., Vol. III, p.1977, L.3 – p.1978, L.7.)

[5] Defense counsel is presumably referring to State v. Ricks, 122 Idaho 856, 840 P.2d 00 (Ct. App. 1992), which discussed the requirements for admission of a preliminary hearing transcript under I.C. § 9-336.

the case law." (Tr., Vol. III, p.1980, Ls.9-13.) More specifically, counsel asserted that the "issue" was "whether or not there [was] a new and significant material line of cross-examination that was not explored in the prior examination." (Tr., Vol. III, p.1980, Ls.18-22.) Counsel asserted "the significant material that was not touched upon at the preliminary hearing is this:"

> The jury is not going to hear, if you admit this testimony, the fact that he did not have counsel; that they did not have Miranda warnings; that they never explained to them what a declaration was and the federal law behind it; they never got their Fifth Amendment rights against self-incrimination. None of that due process of rights ever existed. Or I shouldn't say never existed, but they were never informed of those rights.
>
> . . . [W]hen it comes to the point when Jose and Balvina testify, the jury ought to hear what it is that Balvina and Jose did not know. And so they couldn't have adopted the statements from 2006 and 2011 because they didn't have those – they didn't have knowledge of what they were doing. They didn't have knowledge of how it implicated them. It wasn't free and clear and constitutionally sound. So that is the significant material line of questioning that never got into the prelim.

(Tr., Vol. III, p.1982, L.4 – p.1983, L.3.)

The declarations to which counsel was referring were written statements by Jose and Balvina; Jose signed his statement in 2009 and Balvina signed hers in 2006. (Exhibits 184, 185.[6]) Jose's statement was admitted at the preliminary hearing as a recorded recollection. (6/15/2011 P.H. Tr., p.388, Ls.6-10, p.390, L.15 – p.391, L.25; Exhibits 19, 19A.) With respect to the admission of those statements as exhibits at trial, Lopez-Orozco asserted:

> Now, if we talk about the issue of whether or not they are allowed to bring in or to submit on the record in the record the

[6] Exhibits 184 and 185 are included in the record but were not admitted at trial. (R., Vol. IV, Certificate of Exhibits, p.6.)

> actual statements, those statements that were signed by Jose and Balvina, I believe in 2006, and the ones that were allegedly adopted, quote unquote, by those witnesses in 2011, that is not permitted.
>
> And I think part of that issue is number one, 803(8) talks about the not allowed to bring in investigative reports or stuff done by law enforcement for preparation of a charge if it's done in the course of scope of the investigation unless the defendant brings them in. So you are prohibited by 803(8) from doing that.
>
> And then the case law, if you take a look at -- under 804(b) there is a case in there, adaptations, on page 925 and 926, Beco Construction Company versus City of Idaho falls, where it says that "an affidavit of a witness prepared in summary judgment cannot be admitted at trial." So it's hearsay.
>
> So what the courts have allowed, you can read the affidavit or recommendation if you find that it's an exception, or you can play the preliminary hearing transcript but you are not allowed to introduce it into evidence. Now that is my reading of that.
>
> Now, that is the way I read the rules and the case law, Judge. So they are not allowed to use or bring that material in for purposes of exhibits or anything else like that.

(Tr., Vol. III, p.1979, L.3 – p.1980, L.8.)

The district court ruled that if Jose and Balvina were "found to be unavailable," the preliminary hearing testimony could be admitted. (Tr., Vol. III, p.1991, Ls.11-16.) The court also found Lopez-Orozco had an adequate opportunity to examine the witnesses at the preliminary hearing (Tr., Vol. III, p.1991, L.17 - p.1993, L.5), and that the "evidence in question is of a material fact and that the State could not procure other evidence on that issue through reasonable efforts" (Tr., Vol. III, p.1994, Ls.2-7). With respect to the written statements, the court found the requirements of I.R.E. 803(5) were satisfied for purposes of admissibility. (Tr., Vol. III, p.1995, L.5 – p.1997, L.9.)

After Jose took the stand, the following colloquy occurred:

Q. Sir, do you recall any statements that the defendant made in your presence about his leaving Idaho in 2002?

A. No.

Q. Sir, do you recall any statements that you gave to law enforcement about what you overheard the defendant say?

A. No.

Q. Sir, do you recall the testimony that you provided on June 15th, 2011 on these very issues?

A. No.

Q. And sir, is your lack of recall due to the length in time since 2002, when these events occurred?

A. Maybe.

Q. It's been a long time for you?

A. Yes.

Q. And this has been a very emotionally charged issue for you?

A. Too emotional.

(Tr., Vol. III, p.2017, L.23 – p.2018, L.18 (bold omitted).)

After the foregoing preliminary questions, the prosecutor asked the court to find Jose "unavailable under Idaho Rule of Evidence 804(a)(3)." (Tr., Vol. III, p.2018, Ls.20-23.) The court asked defense counsel if he "would like to ask Mr. Orozco [any questions] concerning . . . his unavailability," and counsel declined. (Tr., Vol. III, p.2020, Ls.12-19.) When asked for "any additional argument . . . concerning the State's request," defense counsel requested the court "to make the distinction between what is happening here and what happened in State

versus Barcella[7], a refusal to testify versus an inability to recall." (Tr., Vol. III, p.2020, L.20 – p.2021, L.2.) The court did as counsel requested and noted that, unlike Barcella, which involved a refusal to testify, there was a "lapse of memory rather than a refusal to testify." (Tr., Vol. III, p.2022, Ls.12-14.)

On appeal, Lopez-Orozco first argues that the district court erred "when it found Jose was unavailable under Idaho Rule of Evidence 804(a)(3)." (Appellant's Brief, p.6.) Lopez-Orozco's argument regarding unavailability relies on two related premises: (1) Jose "merely lacked memory of having made the out-of-court statements" but did not "lack[ ] memory of the subject matter" (Appellant's Brief, p.7), and (2) the "prosecutor's inquiry was insufficient to establish that Jose had no memory of the subject matter" (Appellant's Brief, p.8). This argument should not be considered because it is not preserved.

"The threshold inquiry in any appeal is whether an issue presented for review was preserved by a timely and specific objection at trial." State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989). If not preserved, the appellate court generally will not consider the issue absent a showing of fundamental error. State v. Parker, 157 Idaho 132, ___, 334 P.3d 806, 815 (2014); Stevens, 115 Idaho at 459, 767 P.2d at 834.

Lopez-Orozco did not object to the prosecutor's questions as inadequate for purposes of establishing Jose's unavailability. His only objection, to the extent it could be considered an objection, was that there needed to be a determination whether Jose was refusing to testify or could not remember. This

[7] State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000).

is a different inquiry than the one Lopez-Orozco is asking this Court to make on appeal. Lopez-Orozco's appellate argument is essentially predicated on a claim of inadequate foundation, not a claim that Jose was not unavailable because he was refusing to testify. "[A]n objection on one ground will not be deemed sufficient to preserve for appeal all objections that could have been raised." Stevens, 115 Idaho at 459, 767 P.2d at 834. Because Lopez-Orozco's appellate argument regarding unavailability involves a different assertion than the one he raised below, this Court should decline to consider it.

Even if considered, Lopez-Orozco has failed to show the district court erred in declaring Jose unavailable under I.R.E. 804(a). Rule of Evidence 804 defines unavailability as including situations in which the declarant "testifies to a lack of memory of the subject matter of declarant's statement." I.R.E. 804(a)(3). "The proponent of the hearsay evidence bears the burden of proving the declarant's unavailability." State v. Fair, 156 Idaho 431, ___, 327 P.3d 989, 992 (Ct. App. 2014) (citations omitted). In determining that a witness is unavailable due to lack of memory, the relevant inquiry is not whether the witness recalls making a statement, but whether the witness does not remember the "'subject matter' of the out-of-court statements." Fair, 156 Idaho at ___, 327 P.3d at 993 (quoting Milburn v. State, 135 Idaho 701, 708, 23 P.3d 775, 782 (Ct. App. 2000)). Before being deemed unavailable on this basis, the plain language of I.R.E. 804(a)(3) requires the witness to testify to such lack of memory. Milburn, 135 Idaho at 708, 23 P.3d at 782.

The subject matter of Jose's statement at issue in this case is what Lopez-Orozco told him in 2002 about why he left Idaho. When asked if he remembered any of those statements, Jose answered, "No." (Tr., Vol. III, p.2017, L.23 – p.2018, L.1.) Jose also testified that he did not recall any of the statements he made to law enforcement regarding what Lopez-Orozco told him and did not recall his prior testimony on the subject. (Tr., Vol. III, p.2018, Ls.2-9.)

Lopez-Orozco claims "Jose's statements in this case indicated that he merely lacked memory of having made the out-of-court statements, not that he lacked memory of the subject matter." (Appellant's Brief, p.7.) The record contradicts this claim. Jose's testimony that he did not remember any of the statements Lopez-Orozco made to him "in 2002 about why left Idaho" has nothing to do with Jose's "memory" of his own out-of-court statements – the question and answer instead go squarely to whether he remembered Lopez-Orozco's statements.

Lopez-Orozco next argues "Jose's responses do not show that he lacked a memory of the subject matter" and claims that, "because of the way the prosecutor phrased the questions, Jose's answers could indicate that only [sic] does Jose not recall any statements, but also that he never heard any statements made by the defendant about his leaving Idaho." (Appellant's Brief, p.8.) That Lopez-Orozco speculates that Jose may have been answering a different question than the one asked falls far short of demonstrating error in the district court's finding that Jose was unavailable. Lopez-Orozco's re-interpretation of Jose's negative response to the question, "do you recall any

statements that the defendant made in your presence about his leaving Idaho in 2002" as meaning Lopez-Orozco did not make any statements at all is also inconsistent with what is readily apparent from the entirety of the prosecutor's initial examination of Jose, which established Jose was unable to recall the relevant subject matter or his own prior statements and testimony regarding the subject matter. Lopez-Orozco has failed to show error in the district court's determination that Jose was unavailable as a witness at trial.

If a declarant is unavailable as a witness, prior testimony by the declarant is not subject to exclusion by the hearsay rule if the testimony was "given as a witness at another hearing of the same or a different proceeding" and the "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." I.R.E. 804(b)(1). Idaho Code Section 9-336 sets forth the requirements for using preliminary hearing testimony of a witness declared unavailable at trial. Under that statute, before admitting preliminary hearing testimony, the trial court "must find that the testimony offered is:"

> 1. Offered as evidence of a material fact and that the testimony is more probative on the point for which it is offered than any other evidence with the proponent can procure through reasonable efforts; and
>
> 2. That the witness is, after diligent and good faith attempts to locate, unavailable for the hearing; and
>
> 3. That at the preliminary hearing, the party against whom the admission of the testimony is sought had an adequate opportunity to prepare and cross-examine the proffered testimony.

I.C. § 9-336; see State v. Richardson, 156 Idaho 524, ___, 328 P.3d 504, 510 (2014) (noting I.C. § 9-336 "permits the admission of preliminary hearing testimony of an unavailable witness at trial subject to three findings by the district court"); State v. Cross, 132 Idaho 667, 669, 978 P.2d 227, 229 (1999) ("To determine the admissibility of preliminary hearing testimony under I.C. § 9-336, a trial court must make factual findings as the three requirements.").

The only requirement Lopez-Orozco claims was not satisfied under I.C. 9-336 is that he was unavailable. (Appellant's Brief, pp.9-11.) For the reasons already stated, Lopez-Orozco's claim in this regard fails. Accordingly, he has failed to show error in the admission of his preliminary hearing testimony.

Lopez-Orozco next asserts that the court erred when it allowed his 2009 statement to be read to the jury. (Appellant's Brief, p.11.) More specifically, Lopez-Orozco argues "the requisite safeguards to insure the probable accuracy of the statement were not present" because "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." (Appellant's Brief, p.11.) The Court should also decline to consider this argument on appeal because it is not preserved.

Lopez-Orozco's only objection at trial with respect to Jose's 2009 written statement was that the statement itself could not be admitted as an exhibit, but could only be read into evidence. (Tr., Vol. III, p.1979, L.3 – p.1980, L.8.) Lopez-Orozco did not claim at trial, as he does now, that the statement did not

satisfy the requirements of a recorded recollection.[8] This Court should, therefore, decline to consider Lopez-Orozco's argument that it did not.

Even if considered, Lopez-Orozco has failed to show the district court erred in admitting Jose's 2009 statement as a recorded recollection. Idaho Rule of Evidence 803(5) provides that a recorded recollection is not excluded by the hearsay rule. A recorded recollection is defined as:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to reflect that knowledge correctly.

I.R.E. 803(5).

Applying the foregoing standards, the district court stated:

> The Court would find that based upon the information contained in the preliminary hearing transcript, at least it appears that the statements were made or adopted by the witness when the matter was fresh in their memory, there is no time limit as to when that occurs. But it does appear to me from the information and evidence provided that the element has been established and does, in fact, appear to correctly reflect the knowledge at that time. Therefore, the Court does find that that would come in pursuant to 803(5).
>
> In addition, the Court also notes and acknowledges the magistrate's findings, which the Court finds to be appropriate, as well. The issues related to coercion or alleged coercion or threats or anything such as that goes more to weight than to admissibility. As long as the State is able to provide the necessary foundation from 803(5) those recollections should be made available to the jury for their consideration.

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[8] Although Lopez-Orozco did object on this basis at the preliminary hearing (6/15/2011 P.H. Tr., p.388, Ls.14-18, p.389, Ls.4-15, p.390, Ls.10-14), he did not do so at trial although the preliminary hearing objection and the court's ruling thereon was included in the portion of the preliminary hearing transcript that was read to the jury (Tr., Vol. III, p.2059, L.22 – p.2061, L.2, p.2061, L.24 – p.2062, L.24).

(Tr., Vol. III, p.1996, L.14 – p.1997, L.9.)

The record supports the district court's findings. After denying any memory of several statements Jose previously claimed Lopez-Orozco made to him, the prosecutor asked Jose to review his 2009 statement to see if it refreshed his recollection. (Tr., Vol. III, p.2056, L.11 – p.2057, L.20.) After Jose reviewed the statement and again denied any memory of certain statements he told law enforcement he heard Lopez-Orozco make, the prosecutor asked Jose whether, at the time Jose signed the statement, it truthfully said what he remembered. (Tr., Vol. III, p.2057, L.22 – p.2058, L.20.) Jose answered: "Yes. I couldn't really remember much." (Tr., Vol. III, p.2058, L.21.) Jose and the prosecutor then engaged in the following exchange:

> Q. Okay. Does the Statement set forth what you remember in 2009?
>
> A. That is part of the Statement that I gave in 2002 that is in the front of it.
>
> Q. Right. You provided a statement in 2002, correct?
>
> A. Yes.
>
> Q. And what you were told was put in this document in 2009, correct?
>
> A. Seems that way.
>
> Q. So when you signed this in 2009, was it true?
>
> A. That's what I said before.
>
> Q. Okay. And today you don't remember everything you remembered in 2002?
>
> A. No.

Q. And today you don't remember everything you remembered in 2009?

A. No.

(Tr., Vol. III, p.2058, L.22 – p.2059, L.15 (bold omitted).)

Based on Jose's testimony regarding the contents of the 2009 statement, the requirements for admission of a recorded recollection under I.R.E. 803(5) were satisfied. Lopez-Orozco argues otherwise, asserting the statement was not admissible because it was "not prepared by Jose, it was never adopted by Jose, and it did not accurately reflect his knowledge in 2002." (Appellant's Brief, p.14.) Jose's testimony is directly contrary to this argument. That Jose also provided testimony in which he contradicted himself with respect to the statement (Appellant's Brief, p.15 n.3) does not, for purposes of I.R.E. 803(5), negate his ultimate acknowledgment that the statement was correct. Lopez-Orozco has failed to show any error in the admission of the contents of his 2009 statement.

D. Even If This Court Finds Error In Relation To The Admission Of Jose's Preliminary Hearing Testimony And The Contents Of Jose's Prior Written Statement, Any Error Is Harmless

Even if the Court finds the district court erred in admitting Jose's preliminary hearing testimony and the content of his 2009 written statement, any error is harmless.

"In the case of an incorrect ruling regarding evidence, this Court will grant relief on appeal only if the error affects a substantial right of one of the parties." State v. Parker, 157 Idaho 132, ___, 334 P.3d 806, 813-814 (2014) (quotations and citations 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 prosecution'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." Id. (quoting State v. Shackelford, 150 Idaho 355, 366, 247 P.3d 582, 593 (2010)). "To establish harmless error, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Parker, 157 Idaho at ___, 334 P.3d at 814.

Jose's preliminary hearing testimony, which was read to the jury, was that in July and August of 2002, Jose was living with his sister Balvina in San Jose. (Tr., Vol. III, p.2048, Ls.3-16.) Jose testified that, at one point, Lopez-Orozco came to Balvina's apartment. (Tr., Vol. III, p.2048, Ls.20-22, p.2050, Ls.4-7.) While at Balvina's apartment, Jose overheard Lopez-Orozco tell Balvina that "someone had been wanting to kill him" and that he had picked Rebecca up from her father's house in Nyssa, Oregon and "was with [Rebecca] in the car." (Tr., Vol. III, p.2056, L.6 – p.2057, L.4.) The written statement Jose signed in 2009 included the following information:

> [I]n late July or early August of 2002, Simon Lopez Orozco . . . , who is also my brother, brought Jorge [Lopez-Orozco] to the apartment that I shared with my sister Balvina in San Jose, California. That night Jorge [Lopez-Orozco], Simon, and Balvina were sitting at the kitchen table, and I was in the living room.
>
> Jorge seemed sad and desperate when he told Balvina and Simon how he had killed Rebecca, also known as Becky, and the children. Jorge [Lopez-Orozco] said that he had also burned his vehicle, a white Grand Am, with Rebecca and the children inside.

> Jorge [Lopez-Orozco] didn't say how he burned the vehicle. Jorge [Lopez-Orozco] didn't say where this happened.
>
> I also heard Jorge [Lopez-Orozco] say the following: Becky was in Oregon visiting her father, and she called Jorge [Lopez-Orozco] and asked him to pick her up. Jorge [Lopez-Orozco] drove to Oregon in a white Grand Am vehicle. When he arrived to pick her up, Becky didn't want to go with him.
>
> Jorge [Lopez-Orozco] was on his way back to Idaho when Becky called him again and asked him to go back to pick her up. Jorge [Lopez-Orozco] returned to Oregon to pick up Becky. When he arrived, he noticed some suspicious individuals in the area.
>
> Becky and her two children left with Jorge [Lopez-Orozco] to Idaho. The suspicious individual started following them in a truck and fired bullets at them. Jorge [Lopez-Orozco] wasn't hit, and he was able to get rid of the individuals.
>
> At some point in time a police car was behind them but didn't stop them. Becky was telling Jorge [Lopez-Orozco] that she would tell the police that he was keeping her against her will. Becky threatened to throw one of the children out of the window if Jorge [Lopez-Orozco] didn't stop the car. Jorge [Lopez-Orozco] didn't stop the car.
>
> Jorge [Lopez-Orozco] reacted to Becky's threats and shot her. Then Jorge [Lopez-Orozco] took her body to a field and burned it inside the vehicle. Jorge [Lopez-Orozco] didn't mention in detail what happened with the children.
>
> I was able to hear Jorge [Lopez-Orozco] say all of this because the kitchen where the conversation took place was beside the living room where I was.

(Tr., Vol. III, p.5, L.5 – p.2073, L. (24 (quotation marks and number identifying paragraphs from statement omitted).)

In addition to the admissions Lopez-Orozco made to Jose, he also made statements to another brother, Simon. Simon's former partner, Maria Garcia, testified that Simon left home in the early morning hours one day in late July 2002 after receiving a phone call from another brother, Leobardo, who asked him

to go with him to pick up Lopez-Orozco. (Tr., Vol. III, p.2128, L.18 – p.2129, L.14.) After leaving, Simon called Maria and told her to meet him at a gas station and bring him their truck and any cash she had available. (Tr., Vol. III, p.2130, L.15 – p.2132, L.24.) When Maria met Simon at the gas station, he was with Lopez-Orozco and Leobardo. (Tr., Vol. III, p.2166, Ls.8-16.) Maria gave the truck and the money to Simon and Simon, who was acting nervous, told her they had to be in California because Lopez-Orozco had a fight with someone, that there was a shooting, and that someone was injured or possibly dead. (Tr., Vol. III, p.2170, L.4 – p.2171, L.16.)

The testimony at trial also corroborated many of the other details from Jose's statement and there was substantial evidence supporting Lopez-Orozco's convictions. After Jose's preliminary hearing testimony was read into evidence, the state called Balvina as a witness. Balvina said she thought she remembered Lopez-Orozco coming to her apartment in August 2002 and acknowledged that Jose was also there. (Tr., Vol. III, p.2080, Ls.9-13, p.2081, Ls.1-2.) Although Balvina denied Lopez-Orozco made any statements about why he left Idaho (Tr., Vol. III, p.2076, Ls.8-11), she also testified that Lopez-Orozco told her "someone had followed him because he wanted the girl," there were shots fired at him but he got away, and that a police car had followed him but did not stop him. (Tr., Vol. III, p.2112, L.7 – p.2113, L.1.) Balvina said she did not see or talk to Lopez-Orozco again after he left her apartment. (Tr., Vol. III,p.2114, Ls.7-12.) She did, however, see Lopez-Orozco's wife and their children after Lopez-Orozco left

when they came to stay with her for "maybe" two weeks before they left to Mexico. (Tr., Vol. III, p.2115, L.6 – p.2116, L.1.)

Lopez-Orozco's flight to California and then Mexico right after he murdered Rebecca, R.R., and M.H., was corroborated not only by Balvina, but also by evidence demonstrating that Lopez-Orozco quickly fled his residence in Mountain Home, all of which demonstrates Lopez-Orozco's consciousness of guilt. (Tr., Vol. II, p.1660, L.14 – p.1666, L.2.)

Perhaps most damning was the evidence establishing that Lopez-Orozco was the last person seen with Rebecca and her two children while they were still alive and the evidence that three individuals met Lopez-Orozco on a dark road in the early morning hours of July 30 or 31, 2002, after Lopez-Orozco called "Beto" and asked him to bring him some gasoline. (Tr., Vol. II, pp.1115-1116 (Rebecca's daughter, Noemi, testifying she last saw her mother and two little brothers with Lopez-Orozco when he picked them up in Nyssa); pp.1166-1186 (Liliana Pedroza's testimony about taking Lopez-Orozco gas along with "Beto" and Peggy Larios), pp.1237-1247 (Peggy Larios' testimony corroborating Pedroza's story about taking gas to an individual in the early morning hours), p.1669, Ls.16-25 (Rebecca's father said he last saw Rebecca alive on July 30 between 6:00 p.m. and 7:00 p.m. when she left with Orozco); Tr., Vol. III, pp.1791-1800 (gas station attendant corroborates story about individuals coming to get gas and trying to put gas in milk jugs).) Liliana Pedroza testified that when they took the gas to Lopez-Orozco's location, she saw someone in the passenger seat with a cowboy hat covering the person's face and "blankets or

clothes or something in the back seat." (Tr., Vol. II, pp.1189-1190.) When Beto gave Lopez-Orozco the gasoline, he poured it into empty milk jugs, not into his car. (Tr., Vol. II, p.1186, Ls.9-20.) In addition, the evidence established that the charred remains of Rebecca and her two children were found in Lopez-Orozco's car – the same car he was last seen driving when he was with them. (Tr., Vol. II, p.1115, Ls.6-15, p.1705, Ls.10-12, p.1726, L.20 – p.1729, L.25; Exhibit 172A.)

Finally, Lopez-Orozco's own statements made to law enforcement after he was extradited are evidence of his guilt and his non-credible efforts to account for the evidence against him. (See generally Exhibit 187.)

Given the overwhelming evidence presented at trial, this Court can conclude, beyond a reasonable doubt, that even without Jose's preliminary hearing testimony and the contents of his 2009 statement, the jury would have found Lopez-Orozco guilty of all three counts of first-degree murder. The evidentiary error Lopez-Orozco claims on appeal is therefore harmless and does not warrant any relief.

CONCLUSION

The state respectfully requests that this Court affirm Lopez-Orozco's judgment of conviction for three counts of first-degree murder.

DATED this 4th day of November, 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of November 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
JUSTIN . CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDERS

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General