1-30-2015

State v. Herrera Appellant's Reply Brief Dckt. 41494

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 41494
	)	
v.	)	BENEWAH COUNTY
	)	NO. CR 2011-2053
	)	
JOSEPH DUANE HERRERA,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

Nature of the Case

On appeal, Mr. Herrera argued that: (1) the evidence of malice was insufficient to support a conviction for second degree murder because it was undisputed that Mr. Herrera believed the firearm to be unloaded at the time it discharged; (2) the district court erred when, over his objection, it permitted the State to present irrelevant and prejudicial hearsay attributed to the victim; and (3) the district court erred when it denied his two motions for mistrial made after two of the State's final witnesses provided prejudicial testimony that had been excluded by the district court. In response, the State argued that it provided sufficient evidence of Mr. Herrera's conviction and the district court properly allowed hearsay evidence pursuant Idaho Rule of Evidence 803(3) ("IRE 803(3)"). In addition, the State conceded that "[a]lthough the improper evidence [that resulted in the mistrial motions] was unfairly prejudicial, and thus was properly excluded and stricken," there was no error by the district court in denying the Mr. Herrera's multiple motions for a mistrial.

On reply, Mr. Herrera will address the admission of present irrelevant and prejudicial hearsay attributed to the victim, pursuant to IRE 803(3). The remainder of the State's brief is unremarkable.

Statement of the Facts and Course of Proceedings

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

ISSUES

1. Was the evidence of malice sufficient to support Mr. Herrera's second degree murder conviction when it is undisputed that Mr. Herrera believed the gun was unloaded at the time it discharged?

2. Did the district court err when, over Mr. Herrera's objection, it permitted the State to present irrelevant and prejudicial hearsay attributed to the victim? [1]

3. Did the district court err when it denied Mr. Herrera's motions for mistrial after two of the State's final witnesses provided prejudicial testimony on matters that had been expressly excluded by the district court?

[1] This Reply Brief will be addressing Issue 2. Issues 1 and 3 were previously articulated in Mr. Herrera's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ARGUMENT

I.

The District Court Erred When, Over Mr. Herrera's Objection, It Permitted The State To Present Irrelevant And Prejudicial Hearsay Attributed To The Victim[2]

A. Introduction

The district court permitted the State to present, under the state of mind exception to the hearsay rule contained in Idaho Rule of Evidence 803(3), inadmissible, irrelevant, and prejudicial hearsay attributed to Ms. Comack, consisting almost entirely of prior bad acts and statements attributed to Mr. Herrera. Specifically, witnesses were permitted to testify that Mr. Herrera had threatened to commit suicide if Ms. Comack broke off their relationship, struck her head against a gear shifter before pointing a gun at her head and threatening to shoot her, and broke at least one cellular phone belonging to Ms. Comack. Additionally, an exhibit, consisting of an exchange of Facebook messages between Ms. Comack and her sister in which both express negative feelings concerning Mr. Herrera and in which statements attributed to Mr. Herrera regarding Ms. Comack's appearance were recounted, was admitted.

B. The District Court Erred When, Over Mr. Herrera's Objection, It Permitted The State To Present Irrelevant And Prejudicial Hearsay Attributed To The Victim

At trial, over Mr. Herrera's objection, the State offered the following:

(1) a series of Facebook messages between Kaitlyn Comack ("Kaitlyn") and Ms. Comack, where Kaitlyn called Mr. Herrera "a loser" and "mean" and Ms. Comack "thought i'd [sic] be alot [sic] more sad about it but i [sic] think i

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[2] Mr. Herrera urges this Court to review this issue even after finding the evidence insufficient to support a second degree murder conviction, as the district court will need guidance on this issue at any retrial.

[sic] might hate him to [sic] much to be sad." (Trial Tr. (Vol. I), p.328, Ls.19-22.)

(2) Eunice McEwen stated that a week to three weeks before Ms. Comack's death, Ms. Comack told her "that her and Joe got in a fight and he hit her head against the shifter and choked her and put a gun to her head and said that, if she didn't shut up, that he was going to shoot her." (Trial Tr. (Vol. I), p.331, L.21 – p.332, L.1.)

(3) Bobbie Jo Riddle stated that Ms. Comack had told her that Mr. Herrera had mistreated her during their relationship, and that Ms. Comack was having trouble breaking up with Mr. Herrera because, every time she tried to do so, he threatened to kill himself. (Trial Tr. (Vol. II), p.16, L.15 – p.19, L.16.)

(4) Ms. Comack told Susie Comack that Mr. Herrera had broken her phone because she was going to call Susie for a ride home; in the weeks before her death, Ms. Comack asked to use Susie's car to visit Mr. Herrera because he had threatened to kill himself, and the day before Ms. Comack's death, Susie told "her that this was no way to live, that she did not need to live like this," to which Ms. Comack purportedly responded, "Mom, you don't understand. He's psycho." (Trial Tr. (Vol. II), p.64, Ls.3-8, p.65, Ls.4-8, p.66, Ls.14-21.)

In response, presumably, the State argues that all of the above was properly admitted pursuant to IRE 803(3) as proof of Ms. Comack's *then existing state of mind* showing Ms. Comack's "statements about her intent to leave Herrera at the time of the of the homicide." (Respondent's Brief, p.18.)

Idaho Rule of Evidence 803, in relevant part, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> . . .
>
> (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

I.R.E. 803 (bold type in original).

"Limited circumstances exist in which statements made by a murder victim to a third party are admissible under I.R.E. 803(3)'s state of mind exception to the hearsay rule." *State v. Shackelford*, 150 Idaho 355, 364 (2010) (citation omitted). Such "statements may be admitted only after a determination that (1) the declaration is relevant, and (2) the need for and value of such testimony outweighs the possibility of prejudice to the defendant." *Id.* (citation omitted).

The Idaho Supreme Court has recognized that there are:

> four well-defined categories in which a declarant-victim's state of mind is relevant because of its relationship to the legal theories presented by the parties: (1) when the defendant claims self-defense as justification for the killing; (2) when the defendant seeks to build his defense around the fact that the deceased committed suicide evidence introduced which tends to demonstrate that the victim made statements inconsistent with a design to take his or her own life is relevant; (3) when the defendant claims the killing was accidental; and (4) when a specific "mens rea" is in issue.

Id. citing (*State v. Goodwin*, 97 Idaho 472, 477 n. 7, (1976)).

On appeal, the State has argued that, all of the above offered evidence was relevant under either (3) or (4), where the death was accident or a "specific 'mens rea' is in issue." Regardless of the exception under which the State seeks to validated the offered testimony, it is inadmissible as it deals with prior conduct, not the threat of future action by Mr. Herrera (assuming is veracity). The *Goodwin* Court, which sets forth the four categories through which the hearsay may be admissible under the state of mind exception, cites to *People v. Hamilton*, 362 P.2d 473 (Cal. 1961), *overruled on other grounds by People v. Wilson*, 462 P.2d 22 (Cal. 1970), for the proposition that the evidence is admissible because a "specific 'mens rea'" is at issue in the case. In

Hamilton, like *Lew*,[3] which was addressed in detail in Mr. Herrera's Appellant's Brief, limits the introduction of state of mind hearsay to those not referring to past acts of the defendant. *Id.* 362 at 482. The *Hamilton* Court observed that "In such cases, the authorities are agreed that it is impossible for the jury to separate the state of mind of the declarant from the truth of the facts contained in the declarations, and that for such reasons such declarations are inadmissible." *Id.* Moreover, "If declarations of belief or memory should be received to prove a past act, then there would not be much left of the Hearsay rule, and generally the courts hold that such declarations are inadmissible hearsay." *Id.*

As was addressed in Mr. Herrera's Appellant's Brief, with the possible exception of Mr. Comack's statement that she might hate Mr. Herrera too much to be sad,[4] all of the remaining declarations attributed to Ms. Comack included recitations of Ms. Comack's memory of prior acts and her belief about those acts. As such, those portions of her statements were clearly inadmissible under Idaho Rule of Evidence 803(3).

Further, the State's reliance on *State v. Radabaugh*, 93 Idaho 727 (1970) is unavailing. In *Radabaugh*, the relevant declaration included a statement that the deceased was "scared to death of him (defendant) not so bad when he's drinking beer, but when he's drinking whiskey he's crazier than a tick." *Id.* 93 Idaho at 476. The declaration in *Radabaugh* dealt not with past acts or feelings, but rather future fears of the defendant by the declarant. As such, the declaration was admissible under the state of mind exception.

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[3] *People v. Lew*, 441 P.2d 942 (Cal. 1968)).
[4] That statement was not relevant to a material issue in the case.

Accordingly, for the reasons stated herein, this Court should vacate the judgment of conviction and remand for a new trial.

CONCLUSION

For the reasons set forth herein and in Mr. Herrera's Appellant's Brief, Mr. Herrera respectfully requests that this Court vacate the judgment of conviction, and remand this matter for entry of a judgment of acquittal on the charge of murder in the second degree. He further requests that this Court declare the hearsay testimony admitted over his objection to be inadmissible at any retrial in this matter. In the alternative, he respectfully requests that this Court conclude that the district court's denial of his motions for mistrial resulted in reversible error, vacate his conviction, and remand this matter for a new trial.

DATED this 30th day of January, 2015.

ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th 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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