10-28-2014

# State v. Burgess Appellant's Brief Dckt. 41902

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>SHAYNE RAY BURGESS,<br><br>Defendant-Appellant. | NO. 41902<br><br>ADA COUNTY NO. CR 2013-2864<br><br>APPELLANT'S BRIEF |

# BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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## STATEMENT OF THE CASE

### Nature of the Case

Shayne Ray Burgess appeals from his Judgment of Conviction and Commitment for aggravated assault on certain personnel, with a weapons enhancement, and misdemeanor resisting, delaying or obstructing an officer. Mr. Burgess asserts that the district court erred at trial by allowing the State to introduce on cross-examination his inculpatory statements to Trooper Robinson. The statements were obtained in violation of the United States Supreme Court's holding in *Miranda v. Arizona*, and the State did not meet its burden of showing that the statements were voluntary and that they were being admitted for a permissible purpose. He further asserts that the district court erred when it admitted his statement to hospital staff that he used methamphetamine on the day of the incident because its unfairly prejudicial effect substantially outweighed its probative value.

### Statement of the Facts and Course of Proceedings

Mr. Burgess's wife was driving their car and he was in the passenger seat when Trooper Tulleners attempted to stop them for not having a license plate. (Tr. 11/20/13, p.169, Ls.10-20.) Rather than pull over, Mr. Burgess's wife attempted to flee from the police before finally stopping on the median side of the freeway. (Tr. 11/20/13, p.170, L.8 – p.173, L.25.) Mr. Burgess got out of the car with a knife in his hand. (Tr. 11/20/14, p.180, Ls.1-8.) Back-up officers arrived at the scene and hit Mr. Burgess with multiple bean-bag shotgun rounds and three Taser cycles. (Tr. 11/21/13, p.106, Ls.7-16.) Officer Bateman testified that when he approached Mr. Burgess, Mr. Burgess lunged at him with the knife. (Tr. 11/21/13, p.143, Ls.15-21.) Mr. Burgess testified that he did not lunge at Officer Bateman, but fell forward when he was hit with a bean-bag.

(Tr. 11/22/13, p.237, Ls.9-19.) He further testified that he wanted to commit suicide and he was hoping the officers would kill him. (Tr. 11/22/13, p.236, Ls.5-19.)

Mr. Burgess was charged with aggravated assault on certain personnel, with a weapons enhancement, and misdemeanor resisting, delaying or obstructing an officer. (R., p.46.) A jury trial began on November 20, 2013. (R., p.71.) Four police officers testified for the State. (Tr.11/21/13, p.4, Ls.3-12.) Mr. Burgess was the only witness for the defense. (Tr. 11/22/14, p.234, Ls.21-24.) After the close of the State's case, defense counsel made a motion to exclude a statement made by Mr. Burgess to hospital staff that he had used methamphetamine on the day of the offense on the grounds that the evidence's prejudicial effect substantially outweighed its probative value. (Tr. 11/22/13, p.224, Ls.10-16, p.225, Ls.14-17.) The district court overruled the objection and admitted the statement. (Tr. 11/22/13, p.226, Ls.8-14.)

Additionally, prior to Mr. Burgess's testimony, the State sought to admit statements that Mr. Burgess made to Trooper Robinson[1] in the patrol car on the way to the hospital after he was arrested. (Tr. 11/22/13, p.227, Ls.10-20.) Although the State did not identify which statements it wanted to use, the prior statements by Mr. Burgess that it ultimately introduced were:

1. "You guys aren't going to try and charge me with assault on an officer because I was trying to die, not hurt anybody?"
2. "That's still going to come out with assault with a weapon or some shit like that?"

The prosecutor admitted that he did not use the statements in his case-in-chief "because there is no *Miranda*," but asserted, "I think it is permissible for me to cross-

[1] Trooper Robinson was not a witness at trial.

examine Mr. Burgess on any statements he made to Trooper Robinson." (Tr. 11/22/13, p.227, Ls.13, 17-19.) Defense counsel objected because the statements were obtained in violation of *Miranda v. Arizona*[2], and they were coerced. (Tr. 11/22/14, p.227, L.22 – p.228, L.3.) The district court overruled the objection and did not make any findings as to the voluntariness of the statements. (Tr. 11/22/14, p.228, Ls.4-5.)

The jury found Mr. Burgess guilty on all charges. (R., pp.120-123.) Mr. Burgess timely appealed. (R., p.144.)

[2] 384 U.S. 436 (1966).

## ISSUES

1. Did the district court err in when it allowed the State to introduce on cross-examination Mr. Burgess's inculpatory statements that were obtained in violation of *Miranda v. Arizona*?

2. Did the district court err when it admitted Mr. Burgess's statement that he used methamphetamine on the day of the offense?

## ARGUMENT

## I.

## The District Court Erred When It Allowed The State To Introduce On Cross-Examination Mr. Burgess's Inculpatory Statements That Were Obtained In Violation Of *Miranda v. Arizona*

### A. Introduction

Mr. Burgess asserts that it was error for the district court to allow the State, on cross-examination, to introduce his inculpatory statements to Trooper Robinson. The statements were obtained in violation of *Miranda v. Arizona*, and the State did not meet its burden of showing that the statements were voluntary and that they were being offered for a permissible purpose.

### B. Standard Of Review

Appellate courts review constitutional challenges *de novo*. *State v. Olson,* 138 Idaho 438, 440 (2003).

### C. The District Court Erred When It Admitted Mr. Burgess's Inculpatory Statements To Trooper Robinson During The State's Cross-Examination Of Mr. Burgess; The Statements Were Obtained In Violation Of *Miranda,* And The Prosecution Did Not Meet Its Burden Of Showing That The Statements Were Voluntary And Were Being Offered For A Permissible Purpose

The State conceded that Mr. Burgess's inculpatory statements to Trooper Robinson were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 444-46 (1966), and therefore could not be used in the State's case-in-chief. (Tr. 11/22/13, p.227, Ls.12-14.) However, after the prosecutor rested his case, he requested that he be permitted to "cross-examine Mr. Burgess on any statements he made to Trooper Robinson" on the basis that "there has been no claim that those [statements] are

involuntary." (Tr. 11/22/13, p.227, Ls.10-20.) Defense counsel objected to the admission of the statements, asserting that they were obtained in violation of *Miranda* and, based on the facts, "it's inherently at some level of coercion." (Tr. 11/22/13, p.227, L.22 – p.228, L.3.) The district court overruled the objection and, since it did not clarify or limit its ruling, ostensibly admitted the statements for all purposes. (Tr. 11/22/14, p.228, Ls.4-5.)

Failure to provide Miranda warnings renders a defendant's statements inadmissible, except for the limited purpose of impeachment. *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (holding that statements inadmissible against a defendant in the prosecutor's case in chief due to a *Miranda* violation may, if its trustworthiness satisfies legal standards, be used for impeachment purposes). However, in order to use a statement obtained in violation of *Miranda* to impeach a defendant, the State must prove at least by a preponderance of the evidence that the confession was voluntary. *Lego v. Twomey,* 404 U.S. 477, 481 (1972); *accord State v. Dillon*, 93 Idaho 698, 709-10 (1970); *State v. Valdez-Molina*, 127 Idaho 102, 106 (1995). Here, the State did not even attempt to meet its burden of showing that the statements were voluntary.

Additionally, "when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Lego, supra*, 404 U.S. at 481. Here, the district court made no findings as to voluntariness. To determine whether a confession is voluntary, a court must look to the "totality of the circumstances" to determine "whether the defendant's will was overborne." *State v. Radford*, 134 Idaho 187, 191 (2000). The court *must* consider certain factors in determining whether the confession was voluntary:

1) Whether *Miranda* warnings were given;

2) The youth of the accused;

3) The accused's level of education or low intelligence;

4) The length of the detention;

5) The repeated and prolonged nature of the questioning; and

6) Deprivation of food or sleep.

*State v. Troy*, 124 Idaho 211, 214 (1993). Here, the district court did not conduct any analysis on the issue of voluntariness, let alone consider the factors required by the United States Supreme Court. Had the district court conducted this analysis, it could have considered that, at the time he was questioned by Trooper Robinson on the way to the hospital, Mr. Burgess was suicidal, he was high on methamphetamine, he had been shot multiple times with "bean bag" shotgun rounds, he had been hit with a Taser three times, and he had bleeding abrasions and bruises all over his body, including a gash on his head. (Tr. 11/22/14, p.236, Ls.7-15; Tr. 11/21/13, p.106, Ls.7-16; State's Trial Exhibit 2; Defense Trial Exhibits 100, 101.) While the burden clearly remains with the State to prove voluntariness, there is ample evidence to support defense counsel's objection.

Further, even if the district court had determined that the State had somehow proven that the statements were voluntary, the State did not ultimately use the statements to impeach Mr. Burgess's testimony. Impeachment evidence may not be introduced on cross-examination unless the defendant opens the door by reasonably suggesting the line of questioning. *United States v. Martinez*, 967 F.2d 1343, 1347 (9th Cir. 1992). Additionally, "when the defendant presents his or her case on direct without raising issues that are open to impeachment, and the government cross-examines to

elicit impeachable statements, the government must be prepared to use legitimate evidence. It is error to permit the government to proceed to impeach its own induced statements with inadmissible evidence." *United States v. Whitson*, 587 F.2d 948, 952-953 (9th Cir. 1978) (referring to defendant's statements suppressed because of a *Miranda* violation).

Here, the State did not even attempt to characterize the use of the statements as impeachment. Rather, the prosecutor simply introduced the evidence for the first time during its cross-examination of Mr. Burgess:

Q: Did you give any thought as to what the officer had to go through?

A: No, I didn't.

Q: Well, you talked about Officer – Trooper Robinson. He's the one that took you to the hospital?

A: Yes, sir.

Q: All right. **As I listened to the tape, one of the first things that you're worried about is a charge just like this, right?**

A: Uh-huh.

Q: Is that a yes?

A: Oh, no. I do not believe I said that, actually.

Q: Well, let me ask you, you asked him, "What jail am I going to," do you remember that?

A: Yes, I do, sir.

Q: And he says, "I'm not taking you to jail. I'm taking you to the hospital," right?

A: Yes, sir.

Q: **And then you say, "You guys aren't going to try and charge me with assault on an officer because I was trying to die, not hurt anybody?"**

A: I do not recall saying that. I do recall saying the part I was just trying to die, not hurt anybody, though.

Q: **Do you recall still – telling him, "That it's still going to come out with assault with a weapon or some shit like that?"**

(Tr. 11/22/13, p.245, L.5 –p.246, L.12 (emphasis added).) The answer that prompted the prosecutor to ask Mr. Burgess about his un-Mirandized statements to Trooper Robinson was, "No, I didn't," in response to the question, "Did you give any thought as to what the officer had to go through?" It was a complete non sequitur to "impeach" this answer with statements about what charges Mr. Burgess thought he might be facing.

The State did not prove by a preponderance of the evidence that the statements were voluntary, and the district court erred by admitting the statements for any purpose without making a finding that the statements were voluntary. Further, even if such a finding had been made, the statements were ultimately used for an impermissible purpose.

II.

## The District Court Erred When It Admitted Mr. Burgess's Statement That He Used Methamphetamine On The Day Of The Incident Because Its Probative Value Was Substantially Outweighed By Its Unfairly Prejudicial Effect

### A. Introduction

Mr. Burgess asserts that the district court erred when it admitted his statement to hospital staff that he had used methamphetamine earlier in the day because its probative value is outweighed by its prejudicial effect.

B. Standard Of Review

When reviewing the determination that the probative value of the evidence is not substantially outweighed by unfair prejudice, the abuse of discretion standard is applied. *State v. Atkinson*, 124 Idaho 816, 818 (Ct. App. 1993).

C. The District Court Erred When It Admitted Mr. Burgess's Statement That He Used Methamphetamine On The Day Of The Incident Because Its Probative Value Was Substantially Outweighed By Its Unfairly Prejudicial Effect

Idaho Rule of Evidence 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Mr. Burgess asserts that his statement that he used methamphetamine the day of the incident is highly prejudicial and as such, any limited probative value is substantially outweighed by the danger of unfair prejudice.

The district court admitted the statement on the grounds that, "I think that's fair game, particularly if he testifies – and particularly if he does testify as to state of mind or his perceptions or his intentions." (Tr. 11/22/13, p.226, Ls.8-11.) However, the fact that Mr. Burgess consumed methamphetamine on the day of the incident is not relevant to the crime with which he was charged, and therefore has little probative value. Aggravated assault is a general intent crime. *See State v. Dudley*, 137 Idaho 888, 890-92 (Ct. App. 2002). As such, Mr. Burgess's state of mind or whether or not he intended to harm Officer Bateman is not relevant. The prosecutor acknowledged this in his closing argument when he told the jury, "The state is not required to prove anything about what was going through his [Mr. Burgess's] head." (Tr. 11/22/13, p.299, Ls.8-10.)

However, evidence of methamphetamine use is highly prejudicial. Methamphetamine possesses a significant social stigma and, in the minds of the jurors,

this one fact transformed Mr. Burgess from a mentally distraught, suicidal person to a drug user. Clearly, the jury would place significant emphasis on this fact.

Because the evidence has little, if any, probative value and it prejudicial effect is so great, Mr. Burgess asserts that the district court abused its discretion by admitting it.

## CONCLUSION

Mr. Burgess respectfully requests that this Court vacate his convictions and remand his case to the district court for a new trial.

DATED this 28th day of October, 2014.

KIMBERLY E. SMITH
Deputy State Appellate Public Defender

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of October, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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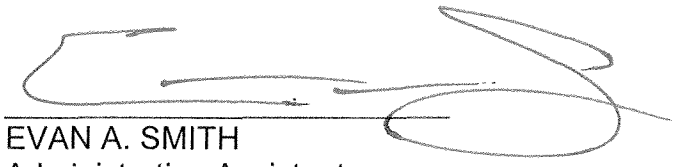

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