10-9-2019

State v. Berry Appellant's Reply Brief Dckt. 46349

Electronically Filed
10/9/2019 9:44 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 46349-2018**
	)	
v.	)	**LEMHI COUNTY NO. CR-2018-194**
	)	
JESSY CAL BERRY,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

HONORABLE STEVAN H. THOMPSON
District Judge

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

JENNY C. SWINFORD
Deputy State Appellate Public Defender
I.S.B. #9263
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

Nature of the Case

A jury found Jessy C. Berry guilty of grand theft and unlawful possession of a firearm for taking his grandmother's handgun or possessing her gun knowing it was stolen. At trial, the district court allowed the State to present evidence surrounding Mr. Berry's violence against his grandmother before taking her gun. On appeal, Mr. Berry argued the district court abused its discretion by allowing this evidence because the danger of unfair prejudice substantially outweighed its minimal probative value. He also argued the State could not prove this error was harmless.

In response, the State argued Mr. Berry's assignment of error was not preserved for appeal because the district court's ruling on this evidence's admissibility was conditional. The State also argued the district court did not abuse its discretion by allowing this evidence and any error was harmless.

Mr. Berry replies to the State's argument on preservation and some of the State's arguments on the merits of this evidentiary issue.

Statement of Facts and Course of Proceedings

Mr. Berry's Appellant's Brief articulated the facts and proceedings. (App. Br., pp.1–5.) They are not repeated here, but are incorporated by reference.

ISSUE

Did the district court abuse its discretion by allowing the State to present unfairly prejudicial evidence of Mr. Berry's harm to Ms. Berry?

ARGUMENT

The District Court Abused Its Discretion By Allowing The State To Present Unfairly Prejudicial Evidence Of Mr. Berry's Harm To Ms. Berry

On appeal, Mr. Berry argued the district court erred by admitting prejudicial evidence of his violence towards his grandmother, Ms. Berry, the victim of the alleged gun theft. (App. Br., pp.7–11.) To this end, he asserted the district court did not conduct the balancing test required by Idaho Rule of Evidence 403 ("Rule 403") and, on balance, the evidence's probative value was substantially outweighed by the danger of unfair prejudice. (App. Br., pp.9–11.) He also argued this error was not harmless. (App. Br., p.12.)

The State responded with four main arguments. First, the State argued Mr. Berry's issue was not preserved because the district court deferred ruling on this evidence's admissibility. (Resp. Br., pp.9, 10–13.) Second, assuming preservation, the State contended the district court applied the correct balancing test under Rule 403. (Resp. Br., pp.13–15.) Third, the State asserted the district court exercised reason because the evidence's probative value was not outweighed by its prejudicial effect. (Resp. Br., pp.15–17.) Finally, the State argued any error was harmless. (Resp. Br., pp.18–19.)

To start, Mr. Berry takes issue with the State's claim that this issue is not preserved for appeal. This issue is preserved for this Court's review. The district court's ruling contains no indication its decision was qualified or conditional. The district court clearly ruled certain evidence was admissible and other evidence was not. Mr. Berry did not need to renew his objection to this evidence at trial.

The transcript shows the district court made a definitive pre-trial ruling on this evidence. Right before trial, the district court raised a concern with the admissibility of "some background information," such as Ms. Berry's testimony "regarding the events that occurred at her home"

and "the battery and second-degree kidnapping." (Tr., p.21, L.19–p.23, L.2.) Specifically, the district court reasoned the "events of that day" were admissible and relevant to Mr. Berry's motive, intent, and opportunity to take Ms. Berry's gun for the grand theft charge, but the district court believed these events "may not be admissible" for the unlawful possession charge. (Tr., p.22, L.5–p.23, L.25.) The district court invited counsels' comments on this evidentiary issue. (Tr., p.22, Ls.19–20.)

In response, the State argued "some of the information" was relevant to

> to the State's case for the reasons the court's identified, specifically as regards to why she was -- after she returned to her house, she immediately went to the location where the firearm that's in question was located, discovered it gone. So I think there will be some testimony from her. And I think it's relevant as to why she immediately went to that location, her concerns, et cetera.

(Tr., p.23, Ls.7–15.) The State agreed to "fashion its questions in a way that -- with some leeway, with regards to leading questions, et cetera, to avoid specifics of the battery and the false imprisonment." (Tr., p.23, Ls.16–19.) The State also contended this same information was relevant to the unlawful possession charge with the same caveat of limiting the specifics of the prior trial. (Tr., p.23, L.21–p.24, L.19.)

After the State's argument, although Mr. Berry "appreciate[d]" the State's willingness to limit its questioning, Mr. Berry told the district court he "would object to its admissible wholesale." (Tr., p.24, Ls.23–24.) He argued:

> Under Rule 403, even though evidence may be relevant, if there's a danger that, you know, its probative value is substantially outweighed by (indiscernible) prejudice, then, you know, even all the evidence can be excluded under this court's discretion. I think that, you know, specifics and details about that encounter wouldn't necessarily add that much value to the story of the case. And there would be a substantial risk of prejudicing the jury and engaging in, you know, propensity reasoning because he's a bad guy who engaged in that behavior, that obviously, you know, he did what he's being charged of in this case. So for that reason, Your Honor, we lodge that objection and direct the court to Rule 403 as the basis for that.

(Tr., p.24, L.25–p.25, L.14.) In short, Mr. Berry did not dispute relevancy, but asserted any evidence of the background events between Mr. Berry and Ms. Berry was too prejudicial for admission.

After these arguments, the district court clearly and definitely ruled on the evidence's admissibility (as well as the issue of bifurcating the grand theft and unlawful possession charges). The district court's ruling states in full:

> THE COURT: Very well. Well, the court's intent would be to proceed as I've described. And as far as a pretrial ruling on the 404(b) -- 403 issue, the court is going to allow the State some leeway in presenting that kind of background information of where this gun was allegedly taken from, who it belonged to, how Mr. Berry had access to that home on the particular day in question it was alleged to have been taken, and the events that transpired between he and Ms. Berry, although I don't think the detail of the prior trial needs to be presented, necessarily, with the photographs showing the battery injuries and all of those types of things, simply the interaction that's alleged to have occurred between the two of them. Certainly will be no reference to him being convicted of a misdemeanor battery or false imprisonment. That would be inadmissible.
>
> But the events of that day, as the State indicated, are relevant to why Ms. Berry went to look for her gun. Her testimony that she alleges that it was there before, I assume -- before and after [verbatim] those events, I think, are relevant and admissible to the theory that Mr. Berry actually took the gun. The alternative theory is that he simply possessed it at a later time, knowing or should have known that it was stolen.
>
> So the court's going to proceed with the jury on Count I without any reference to Count II. So the jury will not be told in opening statements or this court's instructions about the existence of Count II. Once a verdict is rendered, then obviously we'll regroup. But it's the intention of the court to then reinstruct the jury that -- and advise them of Count II and the elements of Count II, proceed with whatever opening statements counsel may wish to make, and then present whatever evidence the State wishes to present and any evidence the defendant wishes to present as to that charge, and then resubmit it to the jury for deliberation as to Count II. I think that's the -- that's going to be the ruling of the court, how we'll proceed.

(Tr., p.25, L.15–p.27, L.7 (alteration in original).) The district court's ruling is unambiguous. The district court determined the State could present evidence on: (a) background information of where this gun was allegedly taken from; (b) who it belonged to; (c) how Mr. Berry had access

to that home on the day the gun was allegedly taken; and (d) the events that transpired between Mr. Berry and Ms. Berry. (Tr., p.25, Ls.19–24.) The district court agreed with the State's position that "the events of that day" were relevant to why Mr. Berry took the gun and why Ms. Berry went to look for it. (Tr., p.26, Ls.8–14.) But, the district court determined the "details of the prior trial," such as photographs of Ms. Berry's injuries and "all of those types of things," were inadmissible, as were references to Mr. Berry's convictions for battery and false imprisonment. (Tr., p.25, L.24–p.26, L.3, p.26, Ls.4–7.) "[S]imply the interaction that's alleged to have occurred between the two of them" was admissible. (Tr., p.26, Ls.3–4.) In summary, the district court's ruling divided the evidence into two categories: (1) photographs and similar details from the prior trial and (2) general evidence on Mr. Berry and Ms. Berry's interaction. The second category was admissible, the first was not.

As shown by the transcript of this discussion, the district court's ruling was unqualified, and therefore Mr. Berry's Rule 403 objection preserved the issue for this Court's review. The State has seized on two words by the district court—leeway and necessarily—to argue otherwise. Neither of these words represents the usual words or phrases used by the district court to reserve ruling on an objection or a motion. When reserving ruling, the district court will say as much, state its ruling is conditional, or expressly defer ruling until later. Moreover, the district court will often inform the moving party to renew his objection. There are very few contexts, if any, where "leeway" and "necessarily" mean the reservation of a ruling. And, that meaning certainly does not apply here. Looking at "leeway," the district court likely used this word to reference the State's request for some "leeway" in questioning Ms. Berry. The State wanted "some leeway" to be allowed to "fashion" leading questions (which are generally impermissible (I.R.E. 611(c)) to avoid having Ms. Berry inadvertently provide inadmissible testimony on "specifics of the battery

and the false imprisonment." (Tr., p.23, Ls.16–20.) The district court's statement on leeway was an approval of the State's request. Second, the district court's use of "necessarily" recognized that "the events that transpired" were relevant and admissible, but it was not necessary to present "the detail of the prior trial" trial to inform the jury about this "interaction." (Tr., p.25, L.23–p.26, L.4.) Nothing about the district court's ruling was conditional.

Moreover, the three cases relied upon by the State do not support its position of a conditional ruling. First, in *State v. Hester*, the Court held the defendant did not preserve an evidentiary issue because the defendant never obtained a ruling from the trial court. 114 Idaho 688, 699 (1988). The defendant had filed a motion in limine, the trial court did not rule on it, and the defendant did not object to that evidence at trial. *Id.* The Court held the defendant's evidentiary issue was not preserved because the trial court never ruled on the motion. *Id.* at 699–700. Second, in *Gunter v. Murphy's Lounge, LLC*, the Court held the defendants did not preserve an evidentiary issue for appeal because the district court "denied the motion, but required that the issue be readdressed at trial outside the presence of the jury before counsel solicited questions on these lines." 141 Idaho 16, 25 (2005). "Since the Defendants did not object at the time the evidence was being presented to the jury, the Defendants have waived the issue on appeal." *Id.* Third, in *State v. Pickens*, the Court of Appeals held the defendant did not preserve his challenge to the admissibility of the witnesses' testimony because he did not object during the prosecutor's examination of the witnesses. 148 Idaho 554, 557 (Ct. App. 2010). There, the defendant objected and moved for a mistrial during the prosecutor's opening statement that referred to an inadmissible prior bad act. *Id.* at 555–56. The district court did not make "an express ruling on the admissibility of the evidence," but denied the motion for a mistrial. *Id.* at 556. The Court of Appeals held the district court's ruling on the mistrial motion did not "unambiguously state"

whether "it issued a decision adverse" to the defendant "on the question of the admissibility of the challenged evidence." *Id.* at 557–58. Rather, the Court of Appeals determined the district court's ruling "seem[ed] to imply that the court found the prosecutor's statement impermissible but concluded that in context it was not sufficiently harmful to require a mistrial." *Id.* at 557. Unlike *Hester*, *Gunter*, and *Pickens*, the district court here raised an issue sua sponte on the admissibility of certain evidence, heard the parties' arguments, and then ruled on the evidence's admissibility. There was not a motion that was never ruled upon, there was not a requirement by the district court to readdress the issue before questioning, and there was not an ambiguous statement by the district court on admissibility in a different context. None of these cases cited by the State apply to the district court's clear ruling in this case.

Lastly, on the preservation issue, Mr. Berry challenges the State's position that Mr. Berry had to object to the police officers' testimony on Ms. Berry's "injuries" to preserve this part of his alleged evidentiary error. (Resp. Br., p.17.) The State asserts the officers' testimony falls into the first category of photographs and similar details from the prior trial, so Mr. Berry's failure to object constitutes a waiver of the issue on appeal. (Resp. Br., p.17.) Contrary to the State's arguments, the officers' testimony was not part of the excluded category. The officers' testimony complied with the district court's ruling. The State did not elicit testimony from the officers on the details of the trial or the evidence admitted at the trial (such as the photographs). Rather, the officers testified about the reason for their arrival onto the scene, Ms. Berry's physical state, their presence at the hospital, and their safety concerns with her returning home. (*See* Tr., p.117, Ls.1–2, L.13, p.118, Ls.1–6, Ls.14–16, Ls.17–19, p.122, L.14, p.123, Ls.13–14.) This testimony contains no trial inferences. Their testimony pertained to the "interaction" between Mr. Berry and Ms. Berry, how Mr. Berry had access to Ms. Berry's home on that day, and why she went

looking for her gun after "the events"—all evidence deemed admissible by the district court. Further, any implication from the officers' testimony that Mr. Berry injured Ms. Berry was the sole reason for Mr. Berry's objection. The implication does not place the evidence in the inadmissible category, but demonstrates precisely why Mr. Berry objected "wholesale" to his evidence: the jury would "engag[e] in . . . propensity reasoning because he's a bad guy who engaged in that behavior." (Tr., p.25, Ls.9–10.) Therefore, Mr. Berry's objection to this evidence included the police officers' testimony, and the State followed the district court's evidentiary ruling by eliciting this testimony from the officers. For all of these reasons, Mr. Berry maintains the State is incorrect in arguing this issue was not preserved for this Court's review.

Next, Mr. Berry disputes the State's contention the district court properly balanced the evidence's probative value and its danger of unfair prejudice. In his Appellant's Brief, Mr. Berry argued the district court did not conduct a proper Rule 403 analysis because, although the district court cited "403," the district court did not discuss its weighing of the evidence's danger of unfair prejudice against its probative value. (App. Br., pp.9–11.) Mr. Berry cited to *State v. Parker*, 157 Idaho 132 (2014), *State v. Ruiz*, 150 Idaho 469 (2010), and *State v. Meister*, 148 Idaho 236 (2009), in support of the Court's requirement for the district court to address Rule 403's balancing test on the record. (App. Br., p.9.) In response, the State argued the district court expressly cited Rule 403, "and, at least implicitly, conducted the required balancing." (Resp. Br., pp.13–14.) The State further argued "no court has interpreted *Ruiz* or *Parker* as a requirement that district courts detail their Rule 403 balancing on the record." (Resp. Br., p.14.) However, since the State's response, the Court has once again reaffirmed the district court must detail its Rule 403 balancing on the record. In *State v. Samuel*, No. 44182, 2019 WL 4282915 (Idaho Sept. 11, 2019), the Court held "the district court abused its discretion in excluding the

evidence based on its failure to identify support for its Rule 403 analysis." 2019 WL 4282915, at *22. In *Samuel*, the district court determined certain evidence was cumulative and "thus overly prejudicial based on other evidence in the record . . . ." 2019 WL 4282915, at *22. "As a result," the district court excluded the evidence as "more prejudicial than probative." 2019 WL 4282915, at *22. On appeal, the Court confirmed its past holdings "that a district court's exclusion of evidence without identifying the support for a Rule 403 analysis constituted an abuse of discretion." 2019 WL 4282915, at *22 (citing *Parker*, 157 Idaho at 139; *Ruiz*, 150 Idaho at 471). The Court reiterated, "Simply stating that the probative value is outweighed by unfair prejudice is insufficient." 2019 WL 4282915, at *22. Like *Samuel*, the district court here failed to discuss its Rule 403 analysis, other than citing the rule itself. The district court did not state the probative value was outweighed by the danger of unfair prejudice. (*See* Tr., p.25, L.15–p.27, L.7.) As in *Parker*, *Ruiz*, and now *Samuel*, Mr. Berry maintains the district court did not apply the correct legal standards and thus abused its discretion by admitting evidence without balancing its probative value against its danger of unfair prejudice.

Finally, on the merits of this evidentiary error, Mr. Berry responds only to the State's argument on opening the door to Ms. Berry's testimony about "the incident." (Resp. Br., p.18.) Mr. Berry respectfully disagrees. Upon review of the transcript, it is clear Mr. Berry did not open to the door to the events of that day, but to his prior conviction from years before this incident that rendered him unable to possess a firearm. Mr. Berry cross-examined Ms. Berry about her ever loaning him her gun, and the State argued Mr. Berry opened the door to his prior conviction. (Tr., p.186, L.9–p.187, L.13, p.190, L.11–p.191, L.9.) The State explained Mr. Berry's "line of questioning" created "an inference that the State should be able to cure with some questions related to the circumstances that caused her to not allow him to borrow the gun," namely,

Mr. Berry's prior conviction. (Tr., p.191, Ls.1–4.) The district court agreed with the State and ruled:

> The Court is concerned. I think the State's entitled to have a clear presentation of their case here as well. And I think they're sort of left dangling, not being able to really explain why Ms. Berry would not have given him permission to take this gun on this particular day, November 22nd [2017].
>
> I think the question of some concern that I feel is out there is that the defendant -- defense counsel specifically asked: Have you ever revoked permission for Mr. Berry to use your guns? Obviously, she answered the question no. But I think [the prosecutor] is entitled to clarify that answer on his redirect.
>
> And I think under Rule 404, ... I think the evidence of prior conviction [sic] is relevant to his intent in this case, that he was taking the gun without permission, not with her permission, because there's knowledge . . . under 404(b), that he couldn't possess a firearm legally, so she couldn't give him permission to give the gun.
>
> So as indicated in chambers, I was inclined to allow the State -- that the door had been opened for them to clarify why she no longer would give him permission to take this firearm. The State's agreed to sanitize it, in the sense of not having her explain that the reason is because he's a prior -- has a felony conviction, but simply that to her knowledge he cannot possess a firearm.
>
> . . . .
>
> So I'm of the opinion the door's been opened, and the State should be entitled to clarify her testimony when the nature of the cross-examination appeared to be attempting to establish the defendant may have had permission and that she had given him permission to take her guns. And . . . I think the State is entitled to clarify through her potential testimony that that's not the case and why.

(Tr., p.192, L.4–p.193, L.18.) Consistent with the district court's ruling, on redirect, the prosecutor asked:

> Q. . . . . [Defense counsel] also asked you if you had ever revoked your permission that [Mr. Berry] could borrow your gun. Do you remember that question?
>
> A. Yes, I do.
>
> Q. And you said no. Was that accurate?
>
> A. No.
>
> Q. Okay.

A. I misunderstood.

Q. Did something happen between you and [Mr. Berry] to cause you to stop allowing him to borrow your firearm?

A. Yes.

Q. Okay. When was the last time you would have given him permission to borrow your firearm?

A. Approximately 6, maybe 6 1/2 years ago.

(Tr., p.195, L.23–p.196, L.13.) Later, in part two of the trial, the State proved Mr. Berry had a prior felony conviction from 2013. (Tr., p.235, L.17–p.236, L.5; *see* State's Exs. 25, 26.)

The transcript of this discussion indicates Mr. Berry opened the door for the State to use his 2013 felony conviction to refute any inference Ms. Berry had given Mr. Berry permission to use her guns. Neither the parties nor the district court understood the door-opening to mean the State could now present evidence on "the incident" between Mr. Berry and Ms. Berry to disprove permission. (Resp. Br., p.18.) Indeed, the State seems to recognize this—arguing only that if the State "should not have presented evidence of the incident" earlier, the State "could and would" have presented that evidence after Mr. Berry opened the door. (Resp. Br., p.18.) As discussed above, the State is incorrect because Mr. Berry did not open the door to "the incident," but rather his prior felony conviction.

Moreover, the State's argument is misplaced because harmless error does not consider what the State should, could, or would have done in a hypothetical trial. (Resp. Br., p.18.) "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). The proper harmless error inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely

have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* at 279. Mr. Berry submits the State cannot hypothesize about the evidence that might have been admitted in a different trial to prove harmless error.

Finally, Mr. Berry respectfully refers this Court to his Appellant's Brief on the prejudicial effect of the evidence of Mr. Berry's harm to Ms. Berry and whether the State has shown this error was harmless. (App. Br., pp.11–12.) For the reasons stated here and in his Appellant's Brief, Mr. Berry asserts the district court abused its discretion by admitting unfairly prejudicial evidence, and the State has not met its burden to prove this error, beyond a reasonable doubt, did not contribute to the jury's guilty verdict.

CONCLUSION

Mr. Berry respectfully requests this Court vacate his judgment of conviction and remand his case for a new trial.

DATED this 9th day of October, 2019.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY 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

JCS/eas