2-24-2016

State v. Cruz-Romero Appellant's Reply Brief Dckt. 42994

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 42994**
	)	
v.	)	**JEROME COUNTY NO. CR 2014-2004**
	)	
CARLOS ADRIAN CRUZ-ROMERO,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

REPLY BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

_____

HONORABLE JOHN K BUTLER
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Carlos Adrian Cruz-Romero appeals from his judgment of conviction for felony driving under the influence. In his appellant's brief, he argued that the district court erred by granting the State's motion in limine to exclude evidence that the Intoxilyzer used to test his breath-alcohol content was not working properly. In response, the State asks this Court to affirm a ruling that intruded on the province of the jury and deprived Mr. Cruz-Romero of his constitutional right to defend against the State's charges. This reply addresses a handful of shortcomings in the State's arguments.

ISSUES

I. Did the district court err by granting the State's motion in limine to exclude evidence of the Intoxilyzer malfunctioning?

II. Did the district court violate Mr. Cruz-Romero's constitutional right to present a complete defense by excluding evidence of the Intoxilyzer malfunctioning?

ARGUMENT

I.

The District Court Abused Its Discretion By Granting The State's Motion In Limine To Exclude Evidence Of The Intoxilyzer Malfunctioning

Mr. Cruz-Romero argued in his appellant's brief that the district court abused its discretion when it granted the State's motion in limine to exclude the operations log from his trial, absent expert testimony on the subject.[1] The district court first found that the Intoxilyzer was working properly on the day in question, an issue that should have been left to the jury. From that conclusion, the court erroneously found that evidence showing that the Intoxilyzer was out of tolerance before April 8 and after May 9 was not relevant and would be excluded from trial. Finally, the court held that Mr. Cruz-Romero may be able to introduce that evidence to challenge Ms. Cutler's, but not Deputy Sedlmayr's, testimony.

In response, the State first contends that the court's "'factual finding' was neither erroneous nor binding on a non-existent jury." (Resp. Br., p.8.) The State has missed the point. Mr. Cruz-Romero's contention (which can hardly be disputed) is that the court's finding prevented him from introducing the operations log to call into question the

[1] Mr. Cruz-Romero does not dispute that the court held he could call his own expert and, if he called that expert, he could then introduce evidence of the malfunctioning as represented in the logs. But that fact does nothing to salvage the court's decision. Mr. Cruz-Romero could properly call into question the reliability of the Intoxilyzer by using the operations log to cross examine whichever of the State's witnesses introduced his breath test results, regardless of whether he called an expert. *See State v. Ward*, 135 Idaho 400, 404 (Ct. App. 2001) ("[O]nce the trial court has made the threshold determination of admissibility [of the test result], a defendant is free to attack the reliability and accuracy of the admitted evidence through the presentation of evidence at trial. *This evidence could include concessions elicited on cross-examination of the officer who administered the test* or testimony from a defense expert.") (internal citation omitted and emphasis added).

reliability of the Intoxilyzer, unless he called an expert. (App. Br., pp.8–13.) By finding "that between the certification of the machine on April 8th and the recertification on May 9th that it does appear, at least from the logs, that the machine was working properly at that time" (Tr., p.35, Ls.13–17), the court decided that evidence of the Intoxilyzer malfunctioning was not relevant, and in turn excluded the operations log from trial. But the reliability of the Intoxilyzer was an issue for the jury to decide at trial, not an issue for the court to decide during a motion in limine.

In re Hubbard, 152 Idaho 879 (Ct. App. 2012)—the principle case on which Mr. Cruz-Romero relied and which the State wholly failed to mention in its response brief—gets at the crux of this issue. At an administrative license suspension hearing, Hubbard sought to introduce evidence of fluctuating performance verification tests done before and after her breath test. *Id.* at 882–83. The district court excluded that evidence, concluding that the acceptable performance verification result on the day of Hubbard's breath test established, as a matter of law, that the machine was working correctly. *Id.* at 883. The Court of Appeals rejected that logic: "'If there is evidence that any particular machine has malfunctioned or was designed or operated so as to produce unreliable results, such evidence would be relevant to both the admissibility and weight of the test results.'" *Id.* (quoting *State v. Hartwig*, 112 Idaho 370, 375 (Ct. App. 1987) (superseded by statute on other grounds as stated in *State v. Howell*, 122 Idaho 209, 212–13 (Ct. App. 1992)). But because the burden in that case was on *Hubbard*, and there was no testimony about the possible causes or significance of the apparent malfunctioning, the Court of Appeals held that Hubbard did not meet her burden of showing that the testing equipment had malfunctioned. *Id.* at 883–84.

Here, however, the burden is on the State to prove that the Intoxilyzer worked properly. *State v. Ward*, 135 Idaho 400, 404 (Ct. App. 2001) ("[t]he burden of persuading the jury that the test results are accurate remains with the prosecution," and thus "'the reliability and performance of any given machine is subject to challenge.'") (quoting *Hartwig*, 112 Idaho at 375). Just as the Court of Appeals in *Hubbard* rejected the notion that an acceptable performance verification reading on the day of Hubbard's breath test established that the machine worked properly as a matter of law, the district court here erred by concluding that the Intoxilyzer was working properly and thus excluding that evidence from trial.

Relatedly, the State's claim that Mr. Cruz-Romero "did not identify any evidence that he could present to demonstrate that his specific test results were unreliable or that the Intoxilyzer malfunctioned at the time of testing" relies on the same misunderstanding as above. (Resp. Br., p.11.) As an initial matter, the State again overlooks the burden of proof. At the motion in limine hearing, it was the State's burden of showing that the evidence was not relevant and thus should be excluded from trial. *See State v. Haynes*, 159 Idaho 36, 355 P.3d 1266, 1273 (2015). Further, Mr. Cruz-Romero sought to introduce evidence of malfunctioning that was greater than that approved of in *Hubbard*: the operations log showed that the Intoxilyzer used to test Mr. Cruz-Romero's breath on April 27 tested out of tolerance on April 5, May 15, and May 16 (Tr., p.19, Ls.11–19, p.21, Ls.8–25; Def. Ex. A, pp.1, 4); the Intoxilyzer did not calibrate properly on August 5, apparently because of a problem with a solution jar that was used as early as March 2014 (Tr., p.8, L.25 – p.12, L.7; Def. Ex. A, p.7); Deputy Sedlmayr could not say whether the malfunctions in April and May were related to that jar (Tr., p.23, Ls.4–10);

and Deputy Sedlmayr could only infer that the Intoxilyzer was working properly on the day in question (Tr., p.14, L.25 – p.13, L.3, p.24, L.16 – p.25, L.13). *See Hubbard*, 152 Idaho at 882–83. The State's assertion that Mr. Cruz-Romero did not identify any evidence of the Intoxilyzer malfunctioning is baseless.

The State correctly notes that Deputy Sedlmayr testified that the Intoxilyzer would not allow testing to proceed if it was out of tolerance (Resp. Br., p.11), but overlooks that he also said he did not know whether the Intoxilyzer could malfunction but not give an out of tolerance reading:

> Q: What—can there be issues with the instrument where it doesn't show up that it's out of tolerance but there are still issues with the instrument?
> A: Not that I'm aware of. There's a lot of different checks and balances for—and information along those lines. I would have to refer you to Rachel Cutler from the ISP Forensic Lab.
> Q: *So you don't have the knowledge to answer that?*
> A: *No.*

(Tr., p.22, L.18 – p.23, L.3.) Therefore, even if it were proper for the court to make a factual finding about whether the Intoxilyzer worked properly in order to determine whether the evidence was relevant, the State did not meet its burden of proving as much.

Finally, the State takes issue with Mr. Cruz-Romero's interpretation of the district court's ruling regarding his ability to cross-examine Deputy Sedlmayr. (Resp. Br., p.9.) The relevant exchange is as follows:

> Ms. Scott [the State]: Your Honor, the State had gotten the expert essentially as *rebuttal evidence to show that it was working properly at the date and time in question.* It was a preliminary procedure that we took in order to have somebody here so that they could testify that, in fact, on that day, *the instrument was working properly*.
> However, *there's been no expert shown or disclosed to state that it wasn't*, and that's the issue here is that there's been no presentation given

> or anybody disclosed that would show that that instrument was not working properly on the date and time.
>
> The Court: Ms. DePew, is it correct that the defense does not have an expert in this case?
>
> Ms. DePew [defense counsel]: We do not, Your Honor, but what the State's asking us to do is be precluded from cross examining their expert as to their conclusions. If the expert's allowed to testify based on whatever information they have that this machine was working properly, the defense has a right to question what they base that decision on.
>
> The Court: I agree. If the State calls Ms. Cutler, then you certainly have a right to examine her as to those issues, but what is the relevance of this evidence if they do not call Ms. Cutler in their case in chief?
>
> Ms. DePew: Your Honor, I still believe it's relevant through Officer Sedlmayr. He's considered an expert on the breath testing machine. He's going to testify that it was working properly. I, again, have a right to cross examine that opinion.
>
> The Court: All right. The Court is going to—as far as the evidence of the malfunctioning of the Intox 5000, the evidence before the Court, at this time, demonstrates that between the certification of the machine on April 8th and the recertification on May 9th that it does appear, at least from the logs, that the machine was working properly at that time. There is no indication about a tolerance.
>
> *Presumptively*, the State's evidence will demonstrate the certification for the Intoxilyzer, the reliability of the test results. Absent expert testimony on the subject, the Court would find that any evidence of indications that the Intox 5000 was out of tolerance either before April 8th of 2014 or after May 9th, 2014, is not of probative value. And certainly *if the State does intend to call Ms. Cutler, then that certainly may change the analysis*, but at this time, the Court does find that the test results before April 8th and after May 9th are not relevant and would not be admissible at trial. . . .

(Tr., p.34, L.3 – p.36, L.6 (emphasis added).)

The State is correct that the court did not explicitly say that Mr. Cruz-Romero *could not* cross examine Deputy Sedlmayr using the operations logs. (Resp. Br., p.9.) What the court did say is that "[a]bsent expert testimony on the subject, [the operations log] is not of probative value," and "certainly if the State does intend to call Ms. Cutler," then maybe the operations logs could come in. (Tr., p.35, L.21 – p.36, L.3.) The court gave no indication that the evidence would be admitted under any other circumstance.

More importantly, the common thread throughout the above dialogue is that both the State and the court believed that Mr. Cruz-Romero had the burden at trial of proving the Intoxilyzer malfunctioned. The State said it listed Ms. Cutler to present "*rebuttal evidence* to show that it was working properly at the date and time in question," and, according to the court, "*[p]resumptively*, the State's evidence will demonstrate the certification for the Intoxilyzer, the reliability of the test results." (Tr., p.34, L.4–6, p.35, Ls.19–21 (emphasis added).) To the contrary, the State still had the burden to prove the Intoxilyzer results were reliable. *See Ward*, 135 Idaho at 404 ("The burden of persuading the jury that the test results are accurate remains with the prosecution."). Whoever intended to testify as much at trial—whether Ms. Cutler, Deputy Sedlmayr, or Sergeant West—was subject to cross examination about the reliability of those test results, and the operation log was a proper way to call those results into question. *See Ward*, 135 Idaho at 404 (the defense can challenge breath results by presenting evidence such as "concessions elicited on cross-examination of the officer who administered the test"). The district court's ruling to the contrary was an abuse of discretion.

II.

The District Court Violated Mr. Cruz-Romero's Constitutional Right To Present A Complete Defense By Excluding Evidence Of The Intoxilyzer Malfunctioning

In his appellant's brief, Mr. Cruz-Romero argued that the district court's ruling on the motion in limine deprived him of his constitutional right to present a complete defense, which includes the right to introduce evidence and cross examine witnesses

regarding the Intoxilyzer's performance in order to challenge the validity of his breath test results. (App. Br., pp.8–14.)

In response, the State contends that Mr. Cruz-Romero did not preserve this issue for appeal because an objection must state "the specific ground of objection, if the specific ground was not apparent from the context," I.R.E. 103(a)(1), and he "never objected to the state's motion on constitutional grounds" (Resp. Br., p.12). The State correctly notes that defense counsel did not specifically state that the court's ruling implicated Mr. Cruz-Romero's constitutional rights, but the State's claim that he needed to do so to preserve the issue is baseless.

As an initial matter, the State has overlooked that I.R.E. 103(a)(1) applies only to objections made to rulings *admitting* evidence, not excluding it. Regardless, the grounds for Mr. Cruz-Romero's objection were clear. He told the district court that he had a right to introduce the operations log because "[i]t is up to the jury to decide whether or not this instrument and the reading that it gave us is something that they believe establishes the BAC beyond a doubt" (Tr., p.31, Ls.10–14), and that the court's ruling "precluded [him] from cross examining their expert as to their conclusions" (Tr., p.34, Ls.19–21). Therefore, the purpose behind requiring a specific objection—"to alert the trial court and the other party to the grounds of the objection so that it may be addressed or cured"—was met. *See State v. Rocha*, 157 Idaho 246, 251 (Ct. App. 2014) (citing *State v. Vondenkamp*, 141 Idaho 878, 885 (Ct. App. 2005)). Mr. Cruz-Romero need not also cite the *source* of those grounds. *See State v. Almaraz*, 154 Idaho 584, 602 (2013) ("Although the rule was not specifically invoked, the defense's arguments surrounding Lieutenant Steele's testimony show that the defense

was concerned that her conclusion was a lay opinion that was not helpful to a clear understanding for the jury and was based on specialized knowledge as a police officer in violation of I.R.E. 701."). The State's claim that Mr. Cruz-Romero failed to preserve this issue because he did not specifically cite the U.S. or Idaho Constitutions is without merit.

CONCLUSION

Mr. Cruz-Romero respectfully asks this Court to vacate his judgment of conviction and guilty plea, reverse the order granting the State's motion in limine, and remand this case to the district court for further proceedings.

DATED this 24th day of February, 2016.

_____/s/_____
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of February, 2016, 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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