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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 43044**
	)	
v.	)	**ADA COUNTY NO. CR 2014-3210**
	)	
JEROME NATHANIEL HARRIS,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

REPLY 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

_____

HONORABLE JASON D. SCOTT
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Jerome Harris was charged with, tried for, and ultimately convicted of a single count of attempted first degree arson and a "persistent violator" sentence enhancement. On appeal, Mr. Harris contends the State failed to offer sufficient evidence to support the jury's persistent violator finding and, therefore, the enhancement must be vacated. Specifically, he argues that although the State offered substantial evidence from which a rational trier of fact could find that Mr. Harris had previously been convicted of one prior felony and two other offenses, it offered no evidence that either of those other two offenses were felonies.

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case were previously detailed in Mr. Harris' Appellant's Brief and, therefore, are not repeated herein.

ISSUE

Did the State offer sufficient evidence that Mr. Harris was previously convicted of two felonies, so as to support its finding that he is a "persistent violator of law" within the meaning of I.C. § 19-2514?

ARGUMENT

Because The State Failed To Offer Substantial Evidence That Mr. Harris Was Previously Convicted Of Two Felonies, There Is Insufficient Evidence To Sustain The Jury's Finding That Mr. Harris Is A "Persistent Violator Of Law" Under I.C. § 19-2514

In his Appellant's Brief, Mr. Harris argued that, in order for Idaho's persistent violator sentencing enhancement to apply, the State must first prove beyond a reasonable doubt that the defendant has previously been convicted of two or more felonies. (*See* App. Br., pp.6-7.) He then conceded that the State offered sufficient evidence to prove he had been convicted of one felony in Ada County, and two other *offenses* in Kootenai County, and he argued that the State failed to offer any evidence that the Kootenai County offenses were felonies. (*See* App. Br., pp.7-9.) Accordingly, he concluded the State failed to offer sufficient evidence to sustain the jury's verdict with regard to the persistent violator enhancement. (*See* App. Br., p.9.)

In response, the State asks this Court to affirm the verdict with regard to the persistent violator enhancement. (*See* Resp. Br., pp.4-13.) It seems to offer three arguments in support of this request: (1) the State does not have to prove the defendant's prior convictions were felonies if they were Idaho convictions, as opposed to out-of-state convictions (*see* Resp. Br., pp.6-9); (2) the State does not have to offer evidence that the defendant's prior convictions were felonies because this Court can determine, as a matter of law, that they are (*see* Resp. Br., pp.6, 11-12); and (3) the State did, in fact, offer sufficient evidence that Mr. Harris' prior convictions are felonies because the jury could have guessed as much based on the nature of the offenses (*see* Resp. Br., p.12). These arguments, however, are unconvincing.

The State's first argument is that the authorities relied upon by Mr. Harris—a line of cases clearly holding that, for purposes of the persistent violator enhancement, the

State has the burden of proving the prior convictions were for felony offenses, and that the State may satisfy this burden by offering judgments of conviction that say the convictions were for felony offenses or by presenting to the jury admissible copies of the statutes indicating the crimes of conviction were felonies—are all distinguishable from the present case because those cases arose in the context of prior convictions from other states. (*See* Resp. Br., pp.6-9 (citing *State v. McClain*, 154 Idaho 742 (Ct. App. 2012), and *State v. Williams*, 103 Idaho 635 (Ct. App. 1982).) The State's suggestion is clear: if the prior conviction arose in another jurisdiction, the State must offer sufficient evidence for the jury to find beyond a reasonable doubt that it was a felony; however, if the conviction arose in Idaho, the jury need not find the prior offense was a felony. (*See* Resp. Br., pp.6-9.)

The State's argument is unsupportable under the persistent violator statute and the cases interpreting that statute. The statute provides, "Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law . . . ." I.C. § 19-2514. Thus, it treats all prior felony convictions the same, regardless of the jurisdiction from which they arose. Because the plain language of the statute is clear and unambiguous in this regard, this Court may not read into it disparate standards depending on the jurisdiction in which the prior conviction arose. *See Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893 (2011). Furthermore, although *McClain*, *Williams*, and a third case, *State v. Pacheco*, 134 Idaho 367 (Ct. App. 2000), all involved prior *out-of-state* convictions (Oregon, Washington,

and California convictions, respectively),[1] that does not mean a different standard applies to prior Idaho convictions. In fact, under an analogous statute dealing with felonies generally, the Idaho Supreme Court recently held the State to its statutory burden of proving even in-state offenses are felonies. In *State v. Yermola*, 159 Idaho 785, 367 P.3d 180 (2016), the Supreme Court analyzed Idaho's willful concealment of evidence statute, which characterizes the crime of willful concealment as a misdemeanor if the evidence concealed concerns a civil matter or a misdemeanor criminal offense, and as a felony, if the evidence concerns "a felony offense." I.C. § 18-2603. The Supreme Court held that in a prosecution for felony concealment of evidence, the State must prove to the jury, beyond a reasonable doubt, that the subject offense is a felony. *Yermola*, 367 P.3d at 182-83. It reached this holding despite the fact that the subject offense in that case was an alleged Idaho offense (grand theft). So just as the *Yermola* Court applied the plain language of section 18-2603 to in-state felonies, so too should this Court apply the plain language of the persistent violator statute to in-state felonies.

The State's next argument is that the State does not have to offer evidence that the defendant's prior convictions were felonies because this Court can determine, as a matter of law, that they are. (*See* Resp. Br., pp.6, 11-12.) However, a virtually identical argument was rejected in *Yermola* and, in the process, the *Yermola* Court, drew a parallel to the persistent violator context:

[1] *See also State v. Smith*, 116 Idaho 553, 560 (Ct. app. 1989) (discussing the State's obligation to prove the prior convictions were felonies, and holding that the State met that burden, but not revealing whether the prior felony convictions were from Idaho or a different jurisdiction).

> In the instant case, the State argues that whether the subject offense is a felony is not an issue for the jury to decide . . . . The State argues in its brief on appeal that "it is not the province of the jury to classify a specific offense. . . . It is the Idaho Legislature's role to decide which criminal offenses are felonies, and which are not." This argument is nonsensical. The jury would not be classifying the subject offense. Its role would simply be to determine whether the evidence had proved that the legislature classified it as a felony. When a jury decides whether the elements of a crime or civil cause of action have been proved, it is not determining what those elements should be. It is only deciding whether those elements have been proved.
>
> Having the jury determine whether the crime being investigated was a felony is not conceptually different from the jury deciding whether a prior criminal offense of a defendant charged with being a felon in possession of a firearm is a felony. It is likewise not conceptually different from the jury deciding whether a defendant is a persistent violator, which juries have been required to do in Idaho since at least 1918. . . .

Yermola, 367 P.3d at 182-83. Further, the State's argument fails to account for cases such as *McClain*, *Williams*, *Smith*, and *Pacheco*, where it was squarely held that the question of whether a prior offense was a felony is a fact that must be found by the jury, not a question of law to be decided by the court. If the question of whether a prior Idaho conviction was for a felony can be decided as a matter of law, so too could the determination of whether a prior out-of-state conviction was a felony be decided as a matter of law. But the Idaho Court of Appeals has never taken that approach; instead, the Court of Appeals, like the Supreme Court in *Yermola*, has consistently held that the question of whether an offense is a felony is one that is to be decided by the jury.

Finally, the State argues that because the Kootenai County convictions at issue were for trafficking in methamphetamine and delivery of methamphetamine, and that they resulted in prison sentences, the jurors should have known that they were felonies. (*See* Resp. Br., p.12.) The State claims that because this would have been a "reasonable inference," there was sufficient evidence to support the persistent violator

enhancement. (Resp. Br., p.12.) However, that would not have been a reasonable inference; rather, it would have been rank speculation. As the *Yermola* Court explained, it is the Legislature's job to determine which offenses are felonies. *Yermola*, 159 Idaho at 183. Although one would hope the Legislature's determinations in this regard would be logical, consistent, and intuitive, there is no requirement that they be so. Thus, while one could *speculate* that the offenses of delivery of methamphetamine and trafficking in methamphetamine are felonies, that need not necessarily be the case. So if the jury based its verdict on the belief that the crimes of delivery and trafficking in methamphetamine must be felonies, that verdict was based upon nothing more than the jurors' guesses, not the evidence in the case.

CONCLUSION

For the reasons set forth above and in his Appellant's Brief, Mr. Harris respectfully requests that this Court vacate the jury's special verdict finding him to be a persistent violator, as well as his sentence, and that it remand his case to the district court for re-sentencing on the un-enhanced crime of attempted first degree arson.

DATED this 17th day of June, 2016.

_____/s/_____
ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of June, 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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DISTRICT JUDGE
E-MAILED BRIEF

DAVID LORELLO
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

ERL/eas