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# State v. Sams Appellant's Reply Brief Dckt. 43357

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 43357
	)	
v.	)	ADA COUNTY NO. CR 2015-513
	)	
SCOTT JEFFERY SAMS,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

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**REPLY BRIEF OF APPELLANT**

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

---

**HONORABLE LYNN G. NORTON**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Mr. Sams was charged with felony aggravated assault and use of a deadly weapon in the commission of a crime. Following his jury trial, a jury found Mr. Sams guilty of the lesser-included offense of misdemeanor disturbing the peace. Mr. Sams appealed, asserting the district court abused its discretion when it admitted evidence of a standoff between Mr. Sams and police that occurred after the alleged incident at issue. The standoff evidence was Idaho Rule of Evidence 404(b) (“Rule 404(b)”) evidence of other acts, and was inadmissible because the State failed to serve notice. The district court’s ultimate determination that the standoff evidence was not Rule 404(b) evidence was arbitrary and outside the boundaries of its discretion.

In its Respondent’s Brief, the State argues this Court should decline to consider Mr. Sams’ issue on appeal because he did not present argument and authority on the standoff evidence being admissible as *res gestae* or to show consciousness of guilt. (Resp. Br., pp.8-11.) The State further argues admission of the standoff evidence was proper as both *res gestae* and to show consciousness of guilt, even if the district court did not admit the evidence on those grounds. (Resp. Br., pp.11-14.)

This Reply Brief is necessary to show the State’s arguments are meritless, because they ignore the notice provisions of Rule 404(b). Mr. Sams asserts on appeal the standoff evidence was inadmissible because the State failed to comply with the notice provisions of Rule 404(b). Even if the standoff evidence were relevant for a non-propensity purpose such as *res gestae* or consciousness of guilt, the standoff evidence was still inadmissible under Rule 404(b) because the State failed to serve notice.

### Statement of Facts and Course of Proceedings

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

## ISSUE

Did the district court abuse its discretion when it admitted evidence of the standoff between Mr. Sams and the police on the basis it was not Idaho Criminal Rule 404(b) evidence, despite the court's earlier ruling the evidence was Rule 404(b) evidence?

## ARGUMENT

### The District Court Abused Its Discretion When It Admitted Evidence Of The Standoff On The Basis It Was Not Idaho Rule Of Evidence 404(b) Evidence, Because The Court Earlier Ruled The Standoff Evidence Was Rule 404(b) Evidence

#### A. Introduction

Mr. Sams asserts the district court abused its discretion when it admitted evidence of the standoff on the basis it was not Idaho Rule of Evidence 404(b) evidence, because the court earlier ruled the standoff was Rule 404(b) evidence.

The standoff evidence was evidence of other acts subject to the strictures of Rule 404(b). Because the State failed to serve notice, the standoff evidence was inadmissible. The State's arguments that the standoff evidence was admissible are meritless because they ignore the notice provisions of Rule 404(b).

The district court's ultimate determination admitting the standoff evidence on the basis it was not Rule 404(b) evidence, was arbitrary and outside the boundaries of the court's discretion. Further, the State has not proven the district court's error was harmless beyond a reasonable doubt. Thus, Mr. Sams' judgment of conviction should be vacated and the case should be remanded to the district court.

B. The Standoff Evidence Was Evidence Of Other Acts Subject To The Strictures Of Rule 404(b)

Mr. Sams asserts that the standoff evidence was evidence of other acts subject to the strictures of Rule 404(b). See I.R.E. 404(b). In the Respondent's Brief, the State appears to concede the standoff evidence was Rule 404(b) evidence of other acts, because the State argues the standoff evidence was admissible as *res gestae* or to show consciousness of guilt. (See Resp. Br., pp.8-14.)

As discussed in the Appellant's Brief (App. Br., p.11), to be admissible under Rule 404(b), evidence of other acts "must be relevant to a material and disputed issue concerning the crime charged, other than propensity." *State v. Grist*, 147 Idaho 49, 52 (2009). Evidence of other acts may be admissible under Rule 404(b) if it is *res gestae*, a term referring to "other acts that occur during the commission of or in close temporal proximity to the charged offense which must be described to complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings." See *State v. Blackstead*, 126 Idaho 14, 17-19 (Ct. App. 1994) (internal quotation marks omitted). And as Mr. Sams previously discussed (App. Br., pp.10-11), Idaho's appellate courts have recognized consciousness of guilt as a non-propensity purpose for the admission of other acts evidence under Rule 404(b). *State v. Ehrlick*, 158 Idaho 900, 917 (2015); *State v. Pokorney*, 149 Idaho 459, 463 (Ct. App. 2010).

Thus, by arguing the district court admitted the standoff evidence as *res gestae* or to show consciousness of guilt (see Resp. Br., pp.8-11), and by arguing the standoff evidence was properly admitted on those grounds even if the district court did not so admit it (see Resp. Br., pp.11-14), the State appears to concede the standoff evidence was evidence of other acts subject to the strictures of Rule 404(b).

C. The Standoff Evidence Was Inadmissible Because The State Failed To Serve Notice

The standoff evidence was inadmissible because the State failed to serve notice as required by Rule 404(b). (See Tr., p.118, Ls.20-22.) Further, the district court excused the State's failure to serve notice not because of good cause shown under Rule 404(b), but because the district court determined the standoff evidence was not Rule 404(b) evidence. (See Tr., p.119, Ls.2-15.) Because the State failed to comply with the notice provisions of Rule 404(b), the standoff evidence was inadmissible. See *State v. Sheldon*, 145 Idaho 225, 230 (2008).

In the Respondent's Brief, the State has not offered any argument or authority showing that the State complied with the notice provisions of Rule 404(b) or that the State's failure to comply with the notice provisions should be excused on good cause shown. (See Resp. Br., pp.7-17.) Thus, any argument from the State concerning the State's failure to comply with the notice provisions of Rule 404(b) should not be considered by this Court. See *State v. Zichko*, 129 Idaho 259, 263 (1996).

Rather than address Mr. Sams' assertion on appeal that the State did not comply with the notice provisions of Rule 404(b), the State argues this Court should disregard Mr. Sams' issue on appeal because he "has not presented argument and authority to show that the district court's reliance on either the *res gestae* principle or the 'consciousness of guilt' ground is erroneous." (Resp. Br., p.11.) The State's argument is meritless because it ignores the notice provisions of Rule 404(b).

Mr. Sams asserted before the district court that he was entitled to notice of the standoff evidence under Rule 404(b). (See Tr., p.114, Ls.24-25.) The district court acknowledged there was no Rule 404(b) notice by the State. (See Tr., p.118, Ls.20-

22.) To dispel any confusion the State may have, Mr. Sams has not asserted on appeal the standoff evidence was inadmissible because it was not relevant for a purpose other than propensity. Rather, Mr. Sams' assertion on appeal is the standoff evidence was inadmissible because the State failed to serve notice as required by Rule 404(b). (App. Br., pp.12-13.)

Even if the standoff evidence were relevant for a non-propensity purpose such as *res gestae* or consciousness of guilt, the standoff evidence was still inadmissible under Rule 404(b) because the State failed to serve notice. As in *Sheldon*, “[b]ecause the State failed to comply with the notice provisions of I.R.E. 404(b),” the standoff evidence as other acts evidence was “inadmissible” against Mr. Sams. See *Sheldon*, 145 Idaho at 230. The State’s argument this Court should disregard Mr. Sams’ issue on appeal is therefore meritless.

The State’s argument this Court should affirm the district court’s decision because the standoff evidence was properly admissible on grounds of *res gestae* and consciousness of guilt, even if the district court did not admit the standoff evidence on the basis of *res gestae* (see Resp. Br., pp.11-12), is likewise meritless. The evidence was inadmissible not because it was not relevant for a purpose other than propensity, but because the State failed to comply with the notice provisions of Rule 404(b). See *Sheldon*, 145 Idaho at 230. Adopting the State’s argument would contradict *Sheldon* and eviscerate the notice provisions of Rule 404(b).

The State failed to comply with the notice provisions of Rule 404(b), and the standoff evidence was therefore inadmissible. See *Sheldon*, 145 Idaho at 230.

D. The District Court's Ultimate Determination That The Standoff Evidence Was Not Rule 404(b) Evidence Was Arbitrary And Outside The Boundaries Of The District Court's Discretion

By determining the standoff evidence was admissible because it was not Rule 404(b) evidence, the district court contradicted its earlier ruling that the evidence was Rule 404(b) evidence. Mr. Sams asserts the district court's ultimate determination that the standoff evidence was not Rule 404(b) evidence was arbitrary, and therefore outside the boundaries of the district court's discretion. Because the district court's ultimate determination that the standoff evidence was not Rule 404(b) evidence was outside the boundaries of the district court's discretion, the district court abused its discretion when it admitted the standoff evidence. See *State v. Hedger*, 115 Idaho 598, 600 (1989).

In attempting to counter the above assertion, the State seems to abandon its earlier apparent concession that the standoff evidence was admissible under Rule 404(b). The State contends "the court's initial ruling stated a 'not Rule 404(b) evidence' basis (i.e., *res gestae*) for admitting such testimony. The notice issue merely served to eliminate the 404(b) ground for admitting 'standoff' testimony, but left the non 404(b) grounds (i.e., *res gestae* and 'consciousness of guilt') intact." (Resp. Br., p.14 (citation omitted).) Put otherwise, the State now contends the standoff evidence was *not* admitted under Rule 404(b). (See Resp. Br., p.14.)

Much like the district court, the State has seemingly flip-flopped on whether the standoff evidence was other acts evidence subject to the strictures of Rule 404(b). Contrary to the argument by the State that the standoff evidence was not admitted under Rule 404(b), the decisions of the Idaho Supreme Court and Idaho Court of

Appeals instruct that other acts evidence admissible as *res gestae* or to show consciousness of guilt are subject to Rule 404(b). See, e.g., *Ehrlick*, 158 Idaho at 917; *Blackstead*, 126 Idaho at 17-19. Thus, even if the evidence were relevant for the non-propensity purposes of *res gestae* or consciousness of guilt, because the standoff evidence was evidence of other acts, the State was required to provide notice as required by Rule 404(b). See *Sheldon*, 145 Idaho at 230. As shown above, the State failed to serve notice, and the standoff evidence was inadmissible.

E. The State Has Not Proven That The District Court's Error Was Harmless Beyond A Reasonable Doubt

Mr. Sams asserts his judgment of conviction should be vacated and the case should be remanded, because the State has not proven that the district court's error in admitting the standoff evidence was harmless beyond a reasonable doubt.

Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). See *State v. Perry*, 150 Idaho 209, 227 (2010). "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp*, 101 Idaho 498, 507 (1980) (citing *Chapman*, 386 U.S. at 24).

The State has not proven that the district court's abuse of discretion was harmless beyond a reasonable doubt. The State's argument to the contrary is not

remarkable (see Resp. Br., pp.14-17), and no further reply is necessary. Accordingly, Mr. Sams refers the Court to pages 16-17 of the Appellant's Brief.

### CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Sams respectfully requests this Court vacate his judgment of conviction and remand his case to the district court.

DATED this 6<sup>th</sup> day of July, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6<sup>th</sup> day of July, 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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3206 ACRE LANE  
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DISTRICT COURT JUDGE  
E-MAILED BRIEF

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\_\_\_\_\_/s/  
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