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Idaho Supreme Court
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# IN THE SUPREME COURT OF THE STATE OF IDAHO

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| **STATE OF IDAHO,** | ) | |
| | ) | **No. 46756-2019** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **Twin Falls County Case No.** |
| **v.** | ) | **CR42-2018-117** |
| | ) | |
| **KODY DEAN FELTMAN,** | ) | |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

## BRIEF OF RESPONDENT

## APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

**HONORABLE BENJAMIN J. CLUFF**
**District Judge**

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## STATEMENT OF THE CASE

### Nature Of The Case

Kody Dean Feltman appeals from his convictions for felony propelling bodily fluids and misdemeanor second offense DUI.

### Statement Of The Facts And Course Of The Proceedings

The state charged Feltman with felony propelling bodily fluids and misdemeanor second offense DUI. (R., pp. 55-58, 76-79.) Prior to trial Feltman filed a motion requesting that the "element of the crime that the defendant's status be either that of a sentenced prisoner or a pretrial detainee" be included in the jury instructions regarding the propelling bodily fluids count. (R., pp. 80-85, 87-90; 8/27/18 Tr., p. 5, Ls. 6-9.) Feltman argued that a "pretrial detainee" is "different from an arrestee" and the jury should be required to determine whether he was a pretrial detainee or an arrestee, and that the statute only applies to the former. (8/27/18 Tr., p. 3, L. 15 – p. 4, L. 3; p. 5, L. 20 – p. 7, L. 9.) Specifically, Feltman argued that he was not a pretrial detainee, and therefore within the scope of the propelling bodily fluids statute, until there had been a "probable cause determination." (8/27/18 Tr., p. 7, L. 10 – p. 8, L. 12; 8/28/18 Tr., p. 6, L. 2 – p. 8, L. 25.) The district court initially determined that the proposed instruction was "not appropriate." (8/27/18 Tr., p. 10, L. 22 – p. 13, L. 10.) The district court ultimately ruled, based on the language of the statute, that "it is not incumbent upon the State to prove [Feltman] was a sentenced prisoner or a pretrial detainee," but that the state must prove only that "he was a person who was being transported or supervised by a correctional officer." (8/28/18 Tr., p. 13, Ls. 3-25.) The district court gave at trial an elements instruction that did not include any requirement that the jury determine whether Feltman was a pretrial detainee. (R., p. 124.)

At trial the prosecution, based on the defense's opening statements, objected to presentation of evidence of Feltman's mental illness. (8/29/18 Tr., p.118, Ls. 13-22.) The defense represented that it did not intend to present any experts, but intended, *if Feltman testified*, to ask him whether he had been hospitalized and diagnosed with bipolar disorder, expecting that Feltman would deny having been so diagnosed, in order to show that Feltman's behavior was not the result of being drunk. (8/29/18 Tr., p. 118, L. 23 – p. 121, L. 13.) The prosecutor initially acknowledged that Feltman could testify that his behavior was the result of mental illness and not intoxication,[1] but objected to Feltman testifying about "his own diagnosis." (8/29/18 Tr., p. 121, L. 16 – p. 122, L. 3.) The prosecutor also objected to the relevance of mental illness to the propelling bodily fluids charge, which would suggest an improper insanity defense. (8/29/18 Tr., p. 122, Ls. 4-13.) The district court ruled that "unless the Defense has an expert witness," evidence of mental illness "including the Defendant offering testimony as to what his diagnosis is" was inadmissible. (8/29/18 Tr., p. 123, L. 6 – p. 124, L. 9.)

The evidence at trial showed that Feltman was arrested for DUI and transported to the jail. (8/29/18 Tr., p. 129, L. 20 – p. 130, L. 24.) At the jail, Feltman spit on a jailer who was trying to remove Feltman from the police car. (8/29/18 Tr., p. 136, L. 15 – p. 141, L. 2; p. 147, Ls. 14-16; p. 183, L. 8 – p. 186, L. 3; State's Exhibit 1 (video file Howe 2318-2502).)

The jury convicted on both counts. (R., p. 133.) The district court entered judgments on the convictions and Feltman filed a timely appeal. (R., pp. 197-210.)

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[1] The prosecutor withdrew this argument later and maintained evidence of mental illness was inadmissible for even this purpose. (8/29/18 Tr., p. 125, Ls. 8-13.)

## ISSUES

Feltman states the issues on appeal as:

I. Did the district court err by rejecting Mr. Feltman's proposed jury instructions on the pretrial detainee element of propelling bodily fluids?

II. Did the district court commit fundamental error by failing to instruct on the pretrial detainee element of propelling bodily fluids?

III. Did the State present sufficient evidence to prove the pretrial detainee element of propelling bodily fluids?

IV. Did the district court abuse its discretion by prohibiting Mr. Feltman from testifying about his mental illness at the time of the alleged offenses?

(Appellant's brief, p. 7.)

The state rephrases the issues as:

1. Has Feltman failed to show error in the jury instructions or that the evidence is insufficient because there is no "pretrial detainee element" in the propelling bodily fluids statute?

2. Has Feltman failed to show that the district court abused its discretion by ruling that the evidence of mental illness proffered by Feltman was inadmissible?

## ARGUMENT

### I.
### There Is No "Pretrial Detainee Element" In The Propelling Bodily Fluids Statute

### A. Introduction

The district court ruled that "it is not incumbent upon the State to prove that [Feltman] was a sentenced prisoner or a pretrial detainee." (8/28/18 Tr., p. 13, Ls. 20-22.) Rather, the state's burden was only to prove that Feltman "was a person who was being transported or supervised by a correctional officer." (8/28/18 Tr., p. 13, Ls. 22-24.)

Feltman argues that the district court erred because the propelling bodily fluids statute contains an "essential element that the defendant be 'a sentenced prisoner or pretrial detainee.'" (Appellant's brief, p. 8.) Thus, he contends, the jury was improperly instructed and the state's evidence fails on this "essential element." (Appellant's brief, pp. 8-22.) However, a complete quote of the phrase at issue is "*irrespective of whether the person is* a sentenced prisoner or a pretrial detainee." I.C. § 18-915B (emphasis added).) Because Felton is guilty "irrespective of whether" he is a pretrial detainee, his status as pretrial detainee is not an "essential element" of the crime.

### B. Standard Of Review

"The interpretation of a statute is a question of law and is reviewed *de novo.*" D.A.F. v. Lieteau, ___ Idaho ___, ___ P.3d ___, No. 46026, 2019 WL 4924954, at *2 (Oct. 7, 2019). "This Court exercises free review over the propriety of jury instructions." State v. Bodenbach, ___ Idaho ___, 448 P.3d 1005, 1012 (2019). "When a criminal defendant challenges the sufficiency of the evidence supporting a judgment of conviction entered upon a jury verdict, the relevant inquiry is not whether this Court would find the defendant

guilty beyond a reasonable doubt but whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Schiermeier, 165 Idaho 447, 447 P.3d 895, 899 (2019) (internal quotations and brackets omitted, emphasis original).

C. The State Did Not Need To Prove Feltman Was A "Pretrial Detainee" Because He Was Guilty "Irrespective" Of Whether He Was A Pretrial Detainee

"Statutory interpretation begins with the statute's plain language." State v. Brand, 162 Idaho 189, 191, 395 P.3d 809, 811 (2017). "Statutory interpretation begins with the literal language of the statute and provisions should not be read in isolation, but must be interpreted in the context of the entire document." Edwards v. Idaho Transportation Dep't, ___ Idaho ___, 448 P.3d 1020, 1024 (2019) (internal quotations omitted). "Where the legislature has not provided a definition in the statute, terms in the statute are given their common, everyday meanings." State v. Yzaguirre, 144 Idaho 471, 477, 163 P.3d 1183, 1189 (2007). "When the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and we do not need to go beyond the statute's plain language to consider other rules of statutory construction." State v. Osborn, ___ Idaho ___, 449 P.3d 419, 421 (2019).

Unlike most criminal statutes, which apply to all persons who commit the prohibited act, the propelling bodily fluid statute applies only to a limited class of defendants: those who are "housed" in a jail or correctional facility or are "being transported or supervised by a correctional or detention officer." I.C. § 18-915B. The state was thus required to prove only that Feltman was a "person" who was "being transported or supervised by a correctional officer or detention officer," which it did. (8/29/18 Tr., p.

136, L. 15 – p. 141, L. 2; p. 147, Ls. 14-16; p. 183, L. 8 – p. 186, L. 3; State's Exhibit 1 (video file Howe 2318-2502).) Moreover, the jury was properly instructed that it had to find that Feltman "was being transported or supervised by a correctional officer or detention officer." (R., p. 124.)

The statute then specifically provides that such a person (one "housed" in a jail or "transported" or "supervised" by a jailer) is within the ambit of the statute "irrespective of whether the person is a sentenced prisoner or a pretrial detainee." I.C. § 18-915B. Giving the language of the statute its plain meaning,[2] Feltman was within the ambit of the statute without respect to or regardless of whether he was a sentenced prisoner or a pretrial detainee. As correctly stated by the district court, this language "broaden[s] the statute" rather than "narrow[s]" it by making sure that its application is not limited to a particular class of inmate. (8/28/18 Tr., p. 13, Ls. 9-25.) Rather than an "essential element," the language of the statute specifically excludes consideration of Feltman's status as sentenced prisoner or pretrial detainee.

Felton argues that the district court erred under the plain language of the statute. (Appellant's brief, pp. 10-11.) Specifically, he first argues that the statutory language "irrespective of whether" is, by a couple of convolutions, synonymous with "whether or not"; that such phrases generally modify "the sentence's main verb"; and therefore the phrase in question means that "[n]either category [sentenced prisoner or pretrial detainee]

[2] The Merriam-Webster definition of "irrespective" is "functioning without or having no regard for persons, conditions, circumstances, or consequences." https://www.merriam-webster.com/dictionary/irrespective. The Dictionary.com definition is: "without regard to something else, especially something specified; ignoring or discounting (usually followed by *of*)." https://www.dictionary.com/browse/irrespective. The Cambridge Dictionary definition is: "without considering; not needing to allow for." https://dictionary.cambridge.org/us/dictionary/english/irrespective.

changes the person's liability." (Appellant's brief, pp. 10-11.) Setting aside whether substituting the language used by the legislature for allegedly synonymous language is a proper analysis of the plain language of the statute, it is hard to argue with the conclusion that the legislature intended that "neither category"—sentenced prisoner or pretrial detainee—"changes the person's liability." (Appellant's brief, pp. 10-11.) Indeed, that Feltman's status as sentenced prisoner or pretrial detainee did not change his liability is the state's argument and the district court's analysis.

Felton's argument seems to be lacking a logical step, namely how a conclusion that "[n]either category changes the person's liability" leads to the conclusion that one of the categories is an "essential element" of the crime. If the legislature meant that the person must be either a sentenced prisoner or a pretrial detainee, and excluded other classes of persons in custody of prison officers or jailers, it would have simply said so. The language "irrespective of whether" is language that excludes consideration of whether the person is a sentenced prisoner or pretrial detainee, not language that demands such consideration.

Felton next argues that "the entire 'irrespective' phrase modifies the initial reference to '[a]ny person who is housed … or who is being transported or supervised.'" (Appellant's brief, p. 11 (quoting I.C. § 18-915B).) Again, the state generally agrees. The determination of whether Felton was a person housed in a jail or being transported or supervised as a jailer is to be made "irrespective of whether the person is a sentenced prisoner or a pretrial detainee." I.C. § 18-915B. Felton simply disingenuously omits the "irrespective of whether" language from the analysis portion of his argument and asserts that the "person" within the ambit of the statute must be "a sentenced prisoner or pretrial detainee." (Appellant's brief, p. 11.) This simply ignores the statutory language.

The statute limits the scope of "[a]ny person" by stating that it must be a person "who is housed" or "who is being transported or supervised." I.C. § 18-915B. It does not then limit the scope to a person "who is" "a sentenced prisoner or a pretrial detainee." I.C. § 18-915B. Rather, a person "who is" housed or supervised is in the ambit of the statute "irrespective of whether the person is a sentenced prisoner or a pretrial detainee." I.C. § 18-915B. Stated simply, a person's status as a sentenced prisoner or pretrial detainee is excluded from consideration, and thus "[n]either category changes the person's liability." (Appellant's brief, p. 11.)

Feltman argues the phrase "irrespective of whether" means that the jury must consider whether Felton is "a sentenced prisoner or a pretrial detainee." The express and plain language is the opposite: Feltman falls within the class of person in the ambit of the statute by virtue of being "transported or supervised by a correctional officer or detention officer, *irrespective of whether* [he] is a sentenced prisoner or a pretrial detainee." I.C. § 18-915B. The district court did not err in its jury instructions, and the evidence supports the verdict, because whether Felton was a pretrial detainee is expressly excluded from consideration of whether Felton was within the ambit of the statute.

## II.
## Feltman Has Failed To Show That The District Court Abused Its Discretion By Ruling That The Evidence Of Mental Illness Proffered By Feltman Was Inadmissible

### A. Introduction

During opening statement, defense counsel asserted that Feltman "had a mental breakdown" during which he "thought that he was Jesus Christ" and "believed he was being possessed or attacked by devils at the time of this incident," and that the jury would hear Feltman's statements substantiating this when they watched the video of the incident.

(8/29/18 Tr., p. 104, L. 20 – p. 105, L. 3; p. 106, Ls. 6-15.) The prosecution later objected to the defense presenting evidence that Feltman suffered from a mental illness as indicated by the opening statement. (8/29/18 Tr., p.118, Ls. 13-22.) The defense argued that such evidence would provide "an alternate explanation" for why Feltman was combative and "saying crazy things," to rebut the implication that it was because he was drunk. (8/29/18 Tr., p. 119, Ls. 5-9; p. 120, Ls. 8-15.) Defense counsel pointed out that the evidence of Feltman's mental illness was "going to come out anyway" through his bizarre statements and behavior in the video of the encounter. (8/29/18 Tr., p. 119, Ls. 10-11.) "And if Mr. Feltman testifies, you're going to get a whole lot of it. Not deliberately, but it is going to have to—" (8/29/18 Tr., p. 119, Ls. 11-13 (ending of sentence original).) Defense counsel then acknowledged that the defense was not proposing presenting experts who would "testify that the Defendant is mentally ill" and directly stated that although Feltman has a diagnosis of bipolar disorder, if he testified he "would probably deny it." (8/29/18 Tr., p. 119, Ls. 14-23.) Defense counsel then stated that, "*if Mr. Feltman testifies*, I was thinking about asking him about [how] he went to State Hospital for a few months where he was diagnosed with this disorder." (8/29/18 Tr., p. 120, Ls. 22-25 (emphasis added).) The district court ruled that "unless the Defense has an expert witness" to testify about mental illness, evidence of mental illness "including the Defendant offering testimony as to what his diagnosis is" was inadmissible. (8/29/18 Tr., p. 123, L. 6 – p. 124, L. 9.)

On appeal Feltman argues that the district court abused its discretion and his own testimony regarding his diagnosis was admissible. (Appellant's brief, pp. 23-28.) This argument fails because it is inadequately preserved and, if the merits are considered, the district court properly held that the evidence was inadmissible.

B. Standard Of Review

"'The question of whether evidence is relevant is reviewed de novo, while the decision to admit relevant evidence is reviewed for an abuse of discretion.'" State v. Sanchez, 165 Idaho 563, ___, 448 P.3d 991, 1000 (2019) (quoting State v. Hall, 163 Idaho 744, 781, 419 P.3d 1042, 1079 (2018)). See also State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993) (citations omitted).

C. Feltman's Offer Of Proof Does Not Show Admissible Evidence

"A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and …, if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." I.R.E. 103(a). See State v. Stone, 154 Idaho 949, 959, 303 P.3d 636, 646 (Ct. App. 2013) ("The Idaho Rules of Evidence require that when appealing an exclusion of evidence, the 'substance of the evidence was made known to the court by offer or was apparent from the context....'" (quoting I.R.E. 103(a)(2).) "The purpose of an offer of proof is to make a record either for appeal or to enable the court to rule on the admissibility of proffered evidence." State v. Joslin, 145 Idaho 75, 82, 175 P.3d 764, 771 (2007). An insufficient offer of proof fails to preserve the issue for appeal. Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 251, 245 P.3d 992, 1003 (2010).

Defense counsel represented that the defense did not intend to call experts on Feltman's mental state. Rather, counsel stated that "if Mr. Feltman testifies" counsel would "ask[] him about [how] he went to State Hospital for a few months" and his diagnosis with bipolar disorder, which Feltman would "probably deny." (8/29/18 Tr., p. 119, Ls. 5-13; p. 119, Ls. 21-23; p. 120, Ls. 8-15; p. 120, L. 22 – p. 121, L. 13.) This offer of proof does

not show what evidence would have been presented, and therefore is inadequate to show it was error to exclude the unknown evidence.

First, the presentation of any evidence was contingent upon Felton choosing to take the stand. (8/29/18 Tr., p. 120, Ls. 22-25.) Felton chose not to take the stand, and did not claim that choice was in any way motivated by the district court's ruling. (8/29/18 Tr., p. 193, L. 4 – p. 195, L. 22; p. 199, Ls. 8-12.) Had the offer of proof been that Feltman intended to testify, then he could have met his burden of presenting a record that the evidence in question would have been presented. However, on this record he cannot meet his burden of showing that the evidence contained in his offer was in fact not presented because of the court's *in limine* ruling. Because the entire offer of proof was contingent on Feltman choosing to testify, and Feltman chose not to testify, Feltman's offer of proof was insufficient to create a record adequate for appellate review.

Second, the offer of proof does not actually state what Feltman would ultimately have testified to even if he had taken the stand. Counsel represented what questions he wished to ask, but acknowledged that Felton might simply deny being mentally ill. (8/29/18 Tr., p. 119, Ls. 21-23; p. 120, Ls. 22-25.) The questions of counsel are not evidence. See, e.g., ICJI 202. The district court specifically stated it was "unclear on where the Defense is going with the issue of mental illness." (8/29/18 Tr., p. 123, Ls. 15-17.) "Given the vague and very limited offer of proof presented by defense counsel, we cannot say that the proffered testimony was clearly admissible." State v. Konechny, 134 Idaho 410, 420, 3 P.3d 535, 545 (Ct. App. 2000). Feltman's trial counsel represented what questions he wished to ask, but specifically stated he did not know what testimony those

questions would elicit. As such, Feltman's offer of proof did not establish what evidence was at issue, and therefore failed to preserve this issue.

Even if it were proper to assume that Feltman would have taken the stand but for the trial court's ruling, and assumed that if asked he would have claimed to be bipolar, Feltman has failed to show error. The district court concluded that I.C. § 18-207 prohibited the admission of "evidence of mental illness." (8/29/18 Tr., p. 124, Ls. 7-9.) That would include "the Defendant offering testimony as to what his diagnosis is." (8/29/18 Tr., p. 123, Ls. 19-21.) The court reasoned that the statute contemplated that when mental illness evidence is presented in a criminal proceeding, it would be presented through experts, with certain procedural steps that must be followed as a condition of admission of the expert's testimony. (8/29/18 Tr., p. 123, L. 6 – p. 124, L. 9.) The law supports the district court's ruling.

The statute cited by the district court provides that "[m]ental condition shall not be a defense to any charge of criminal conduct." I.C. § 18-207(1). However, nothing in the statute barring mental condition as a defense "is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence." I.C. § 18-207(3). The presentation of such expert testimony is subject to specific procedural prerequisites to admissibility, such as notice, submission of a written synopsis of expected testimony, a waiver of privileges, and submission to an examination. I.C. § 18-207(4). The statute by its plain language establishes that mental condition evidence is presented by expert testimony after compliance with certain procedures. The district court correctly held that the proposed mental condition evidence, whatever it might be, did not comply with the statute and was inadmissible.

On appeal Feltman, for the first time, argues that "Idaho Code § 18-207 simply did not apply, unless Mr. Feltman intended to call an expert to testify about his mental health." (Appellant's brief, p. 26.) First, this issue was not preserved. "[B]oth the issue and the party's position on the issue must be raised before the trial court for it to be properly preserved for appeal." State v. Gonzalez, 165 Idaho 95, 439 P.3d 1267, 1271 (2019). At no point before the trial court did Feltman take the position that I.C. § 18-207 was not the applicable legal standard, nor did he suggest a different legal standard. (8/29/18 Tr., p. 119, Ls. 5-23; p. 120, L. 8 – p. 121, L. 13; p. 124, Ls. 10-23.) On appeal he faults the district court for not "examin[ing] whether Mr. Feltman's testimony was permissible lay witness testimony on a medical condition" (Appellant's brief, p. 27), but the reason the district court did not examine that issue is that Feltman never requested it to do so. Feltman cannot claim the district court erred by applying the standard argued by the parties and not applying a legal standard that he did not raise.

Even if preserved, Feltman's argument fails. I.C. § 18-207 states that "[m]ental condition is not a defense" I.C. § 18-207(1), but this does not "prevent the admission of expert evidence" I.C. § 18-207(3), so long as certain procedural prerequisites are met, I.C. § 18-207(4). Because mental state evidence from experts is exempted from the exclusionary reach of the statute, it is admissible. No such exemption applies for mental state evidence from lay witnesses. The district court properly concluded the statute *allows* expert testimony (under certain conditions) but does allow lay testimony of mental condition.

Furthermore, Feltman's proposed reading of the statute completely subverts its meaning and intent. The statute allows defense expert opinion only after notice and an

allowance for the state to conduct its own evaluation and to secure its own expert testimony. That whole construct would be subverted if the defense could merely have an evaluation done, have the evaluator tell the defendant the results of the evaluation, and then put the defendant on the stand to testify about those results while avoiding any meaningful opportunity by the state to get a second opinion. The district court did not err by applying I.C. § 18-207 to the issue of admissibility and concluding Feltman's proffered mental condition evidence was inadmissible.

Even if this Court were to apply the legal standards Feltman advocates for, for the first time on appeal, Feltman has shown no error. A lay witness may offer opinion testimony that is "not based on scientific, technical, or other specialized knowledge." I.R.E. 701. Under this rule, "a lay person is not qualified to give an opinion about a medical diagnosis." Bloching v. Albertson's, Inc., 129 Idaho 844, 846, 934 P.2d 17, 19 (1997). An opinion that Feltman suffers from bi-polar disorder is one that requires scientific, technical, or other specialized knowledge. The district court did not abuse its discretion by excluding mental health evidence including Feltman's diagnosis.

Feltman argues "a lay witness can testify on 'the cause of a medical condition' or 'alleged injuries' if they 'are of a common nature and arise from a readily identifiable cause.'" (Appellant's brief, p. 26 (quoting Dodge-Farrar v. Am. Cleaning Serv. Co., Inc., 137 Idaho 838, 842, 54 P.3d 954, 958 (Ct. App. 2002).) While this rule would certainly allow someone who "fell down some steps, landing on a knee, and immediately thereafter felt pain in the knee, saw an open wound on the knee, and within minutes or hours observed that the knee was swelling" to testify "that the pain, wound and swelling were caused by the fall," Dodge-Farrar, 137 Idaho at 842, 54 P.3d at 958, it does not support the conclusion

that the district court abused its discretion. Making a diagnosis that Feltman was bi-polar, and explication of how that affected his behavior on the night in question, is not based on common knowledge. Opinion testimony on these topics requires specialized, expert knowledge.

Finally, any error was necessarily harmless. An "abuse of discretion may be deemed harmless if a substantial right is not affected. In the case of an incorrect ruling regarding evidence, this Court will grant relief on appeal only if the error affects a substantial right of one of the parties." State v. Shackelford, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010); accord I.R.E. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party …."); I.C.R. 52 ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). "To establish harmless error, the State must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Parker, 157 Idaho 132, 140, 334 P.3d 806, 814 (2014) (quoting State v. Perry, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010)). "'In other words, the error is harmless if the Court finds that the result would be the same without the error.'" State v. Montgomery, 163 Idaho 40, 46, 408 P.3d 38, 44 (2017) (quoting State v. Almaraz, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013)).

Felton sought admission of the evidence in question, regarding his mental condition, only to rebut any inference that his behavior in the encounter with officers and the jailers was the product of intoxication. (8/29/18 Tr., p. 119, Ls. 5-13 (evidence offered as "an alternate explanation for why he's acting that way"); p. 120, Ls. 8-15 ("if they're showing he's acting crazy because he's drunk, I think I can show he's acting crazy because

he's crazy").) Defense counsel specifically stated that the state could have avoided any defense need for the evidence "simply by proving it, per se, but they wanted to get in all the evidence of intoxication based on how he was acting." (8/29/18 Tr., p. 120, Ls. 9-12.) The record thus establishes that the evidence was admissible, if at all, for consideration only of one of the theories related to the DUI charge, and was neither offered nor admissible as relevant to the propelling bodily fluids charge or the *per se* theory of the DUI charge. (See R., p. 77 (charging DUI under alternative under the influence and *per se* theories).) The *per se* theory of DUI was supported with evidence of a blood draw of .256 blood alcohol content. (8/29/18 Tr., p. 143, Ls. 14 – p. 146, L. 18; State's Exhibit 2.) Because the evidence in question was unrelated to the bodily fluids charge and unrelated to the *per se* theory of DUI (which was supported by overwhelming evidence), any error was harmless beyond any reasonable doubt.

## CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 8th day of November, 2019.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of November, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd