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11/15/2019 12:54 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46552-2018**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR-FE-2016-1966**
	)	
JAIME DEAN CHARBONEAU,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE MICHAEL REARDON
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jaime Dean Charboneau appeals from his convictions for burglary and aggravated assault with a deadly weapon enhancement

Statement Of The Facts And Course Of The Proceedings

Helen Collinson met Jaime Charboneau in November 2015. (Tr., p 766, Ls. 9-17.) They dated from mid-December 2015 to January 30, 2016. (Tr., p. 771, Ls. 2-8.) On January 30, 2016, Collinson told Charboneau she did not wish to continue dating him because of jealous behaviors she was noticing. (Tr., p. 790, L. 23 – p. 793, L. 16.) On February 15, 2016, Collinson returned home and found Charboneau broken into her home and "crouched in [her] bathroom doorway." (Tr., p. 884, L. 10 – p. 905, L. 7.) Charboneau pointed a loaded crossbow at her from a couple of feet away and told her "[she] caused this, it's [her] fault" and the situation was "going to be bad." (Tr., p. 905, L. 2 – p. 907, L. 1.) Collinson started agreeing with everything he said "to keep the situation as calm as possible" as she tried to "think of what [she] needed to do to get out of there." (Tr., p. 907, L. 2 – p. 910, L. 10.) When Charboneau mentioned having a dry mouth, she got him a drink of water and then picked up her dog, stated she was going to get the dog a treat from the laundry room, and then fled the house to a neighbor who called 9-1-1. (Tr., p. 910, L. 11 – p. 912, L. 8.)

The state charged Charboneau with burglary and aggravated assault with a deadly weapon. (R., pp. 81-82.) The matter proceeded to trial. (See, generally, Tr., pp. 188-1881.)

Relevant to this appeal, during trial the state called Thomas Bergstrom, who was a friend of Charboneau's and dating and cohabiting with Charboneau's sister. (Tr., p. 489, L. 8 – p. 491, L. 25.) Bergstrom testified about communications he received from Charboneau in early February, 2016, claiming that Collinson had attacked him and kidnapped him. (Tr., p. 497, L. 5 – p. 512, L. 1.) During that testimony Bergstrom volunteered that Charboneau expressed "some concerns about being exposed to any criminal activity and the revocation of his bond, the possibility that it could be revoked if he was involved in criminal activity or something like that—" (Tr., p. 500, Ls. 15-21; p. 502, Ls. 2-23.) Charboneau objected, and the district court sustained the objection and instructed the jury to "disregard the last comment that the witness made and not consider or refer to it in your later deliberations." (Tr., p. 500, L. 22 – p. 501, L. 2.) The district court then excused the jury and held that there had not been "sufficient prejudice as to interrupt the trial" because there "was no reference to what any bond might have referred to" and the jury had been "admonished not to consider [the] statement" and therefore "any prejudice that was created has been remedied." (Tr., p. 501, Ls. 16-23.)

Later in the trial, based on Charboneau's offers of proof, the district court determined that proposed testimony of two potential defense witnesses regarding the victim's alleged behaviors during a previous marriage and Charboneau's alleged lack of jealous displays prior to the victim breaking up with him was inadmissible because it was irrelevant or improper character evidence. (Tr., p. 1551, Ls. 9-14; p. 1552, L. 3 – p. 1553, L. 21; p. 1554, Ls. 1-6; p. 1555, Ls. 8-14; p. 1557, Ls. 2 – p. 1560, L. 1.)

The jury convicted Charboneau on both counts and the enhancement. (R., pp. 649-50.) The district court sentenced Charboneau to ten years fixed for burglary and 15 years

fixed for aggravated assault as enhanced, both sentences to run consecutively to each other and to the life sentence imposed upon Charboneau for his conviction for murdering his wife several years before. (R., pp. 808-810; PSI, p. 4.) Charboneau filed a timely notice of appeal from the entry of judgment. (R., pp. 802-04, 814-21.)

ISSUES

Charboneau states the issues on appeal as:

I. Did the district court err by denying Mr. Charboneau's motion for a mistrial?

II. Did the district court err by excluding two of Mr. Charboneau's witnesses?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Charboneau failed to show that the district court abused its discretion when it concluded that sustaining an objection and instructing the jury to disregard Bergstrom's volunteered statement was sufficient to cure any prejudice?

2. Has Charboneau failed to show error in the district court's ruling that proffered testimony by two potential witnesses was inadmissible?

ARGUMENT

I.
Charboneau Has Failed To Show That The District Court Abused Its Discretion When It Concluded That Sustaining An Objection And Instructing The Jury To Disregard Bergstrom's Volunteered Statement Was Sufficient To Cure Any Prejudice

A. Introduction

The district court concluded that an admonition to disregard a volunteered statement by a witness that Charboneau stated concern about revocation of his bond was sufficient to cure any prejudice from the inadmissible statement. (Tr., p. 501, Ls. 16-23.) Charboneau contends the district court abused its discretion by not declaring a mistrial because "the jury was still left to wonder what type of crime for which Mr. Charboneau was out on bond" and therefore was "going to believe that Mr. Charboneau [was] predisposed to criminal activity." (Appellant's brief, pp. 6-8.) Charboneau's argument assumes, without basis, that the jury disregarded at least two of the district court's instructions: the instruction to disregard the statement and the instruction to avoid speculation. Because the jury must be presumed to have followed its instructions, and Charboneau has failed to present any reason the jury would have disregarded those instructions, Charboneau has failed to show error.

B. Standard Of Review

"A mistrial may be declared on motion of the defendant when there occurs during the trial, either inside or outside the courtroom, an error or legal defect in the proceedings, or conduct that is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a). In reviewing the denial of a mistrial motion the appellate court "focus[es]" on "the continuing impact" the triggering event had "on the trial." State v. Johnson, 163

Idaho 412, 421, 414 P.3d 234, 243 (2018) (internal quotation omitted). "The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error." Id.

C. Charboneau Has Not Rebutted The Presumption That The Jury Followed The Curative Jury Instruction

"Where, as here, improper testimony inadvertently arises and the trial court promptly instructs the jury to disregard the evidence, it must be presumed that the jury obeyed the trial court's direction entirely." State v. Hedger, 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989). "'Error in admission of evidence may be cured by proper instruction, and it must be presumed that the jury obeyed the trial court's direction.'" State v. Johnson, 163 Idaho 412, 422, 414 P.3d 234, 244 (2018) (quoting State v. Tolman, 121 Idaho 899, 905-06 n.6, 828 P.2d 1304, 1310-11 n.6 (1992)). This presumption applies "'unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be "devastating" to the defendant.'" Id. (quoting Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (internal citations omitted)).

The district court found that the inadmissible statement did not make "reference to what any bond might have referred to" and therefore the jury instruction "not to consider [the] statement" was sufficient to minimize the potential prejudice. (Tr., p. 501, Ls. 16-23.) The district court's ruling is supported by the record. Bergstrom stated that Charboneau said he wanted no involvement with criminal activity because he was concerned about "revocation of his bond," but provided no information regarding what the bond related to. (Tr., p. 500, Ls. 17-21.) The district court instructed the jury to "disregard

the last comment that the witness made and not consider or refer to it in your later deliberations." (Tr., p. 500, L. 24 – p. 501, L. 2.) Because the statement itself created only marginal potential prejudice, the statement was not "devastating" to the defense and there is no "overwhelming probability" that the jury was be unable to follow the court's curative or other instructions regarding the evidence.

Charboneau argues the evidence paints him as a "man of criminal character" who was "more likely to have committed the present crime" and who was less believable than the victim because the jury was "left to wonder" what type of criminal allegation led him to post bond. (Appellant's brief, p. 8.) The inadmissible statement did not reveal what sort of criminal allegation was involved. It did not assert the bond related to a felony or a misdemeanor. It did not assert that the bond related to a charge involving violence, nor did it indicate that the charge involved untruthfulness. Because the jury was not informed of the nature of the crime, the inadmissible statement did not show Charboneau had a character for violence or a character for dishonesty. The jury was not "left to wonder" about what criminal allegation the bond may have related to, because it was specifically instructed to disregard the statement (Tr., p., 500, L. 24 – p. 501, L. 2), and specifically instructed to base its verdict on the evidence (R., p. 666). Charboneau's supposition that the jurors may have disregarded these instructions, and then might have engaged in speculation about what sort of criminal allegation may have been related to the bond, and then could have, based on their speculations, concluded Charboneau was a person of violent or dishonest character, and then possibly relied on their conclusions as to his character in rendering their verdict, falls short of bearing Charboneau's burden of

demonstrating an "overwhelming probability" that the jury was unable to follow the court's instructions to disregard the statement and base their verdict on the evidence.[1]

II.
Charboneau Has Failed To Show Error In The District Court's Ruling That Proffered Testimony By Two Potential Witnesses Was Inadmissible

A. Introduction

Among the witnesses proffered by Charboneau at trial were Doug Evans and Dave Orem. (Tr., p.208, Ls. 6-24; p. 653, Ls. 12-16; p. 1022, L. 22 – p. 1023, L. 9.) Evans was the victim's ex-husband. (Tr., p. 141, Ls. 15-17.) The district court had already sustained an objection to questioning the victim about an incident six years prior where she had allegedly confronted Evans and his girlfriend in a restaurant while she was drunk. (Tr., p. 824, L. 17 – p. 826, L. 14.) The prosecution later objected to Evans testifying about the event in the restaurant six years earlier. (Tr., p. 1550, L. 10 – p. 1551, L. 1.) The district court then asked Charboneau for an offer of proof. (Tr., p. 1551, Ls. 2-3.) Charboneau represented that Evans would testify about "how [the victim] behaved" when she and Evans "lived together." (Tr., p. 1551, Ls. 9-14.) The prosecution objected that the proposed testimony was "improper character evidence" and the district court sustained the objection. (Tr., p. 1551, Ls. 15-24.) Charboneau also represented Evans could testify about a phone call from Michelle Ballard, a friend of the victim's, in which Ballard asked about Charboneau's activities, which Charboneau claimed would show that Ballard and the victim were "stalking" him, as a way of undermining Ballard's and the victim's testimony.

[1] Another reason Charboneau has failed to show an "overwhelming probability" that the jury ignored its instructions is the strength of the state's evidence, as set forth below, *infra* at pp. 18-19, and incorporated here by reference.

(Tr., p. 1552, L. 3 – p. 1553, L. 15.[2]) The district court ruled the proposed testimony was "too attenuated" to attack the credibility of the victim, was inadmissible evidence of a specific incident of conduct to attack the character of Ballard, "[a]nd it's excludable under [I.R.E.] 403." (Tr., p. 1553, Ls. 16-21; p. 1554, Ls. 1-6; p. 1555, Ls. 8-14.)

The prosecutor also moved to exclude the testimony of Dave Orem as irrelevant, representing that Orem told the state's investigator that Charboneau gave him a ride home one evening, but could not say what date. (Tr., p. 1556, Ls. 3-20.) Charboneau represented that Orem would testify he was present on January 30 when the victim broke up with him and could "rebut" evidence from state witnesses as to Charboneau's and the victim's "character." (Tr., p. 1557, Ls. 2-11.) The district court pointed out that the only testimony about that night was the victim's, testifying that "she made the determination that night to end [the] relationship based upon her perception that [Charboneau was] exhibiting jealousy." (Tr., p. 1557, Ls. 12-21.[3]) Charboneau elaborated that Orem would allegedly testify to seeing Charboneau and the victim "many times" and had "seen [their] relationship" and could testify that on January 30 it was "very rowdy, the rap music being extremely loud." (Tr., p. 1557, L. 22 – p. 1558, L. 15.) When asked how this testimony was relevant, Charboneau contended it would show "[t]here was no jealousy at all." (Tr.,

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[2] The prosecution's counter-offer of proof was quite different, asserting that Ballard was concerned about Charboneau distributing a flier about the victim that was inflammatory and threatening. (Tr., p. 1554, L. 9 – p. 1555, L. 7.) The district court ruled that neither version showed that the evidence was admissible. (Tr., p. 1555, Ls. 8-11.)

[3] The victim testified that after she talked with two men Charboneau became "withdrawn" and "kind of sullen" and when she asked him what was wrong he responded that she was "touching those guys too long" or "too much." (Tr., p. 791, Ls. 11-22.) The "same type of issue" had also "come up a couple of weeks prior," and this led her to the conclusion that the relationship was not working out. (Tr., p. 791, L. 23 – p. 792, L. 2.)

p. 1558, Ls. 16-25.) The district court found that the proposed evidence of giving Charboneau a ride home and seeing him and the victim at her business was irrelevant. (Tr., p. 1559, Ls. 1-15.) Charboneau also represented that Orem could "testify about his personal knowledge of her character in the bar that night." (Tr., p. 1559, Ls. 16-21.) The district court found that proffered testimony inadmissible under Rule 404 and 608. (Tr., p. 1559, L. 22 – p. 1560, L. 1.)

Charboneau argues that the proposed testimony of Orem was relevant "to impeach [the victim's] evidence that she ended the relationship due to Mr. Charboneau's jealousy and to refute the State's allegation that Mr. Charboneau assaulted Ms. Collinson out of jealousy." (Appellant's brief, pp. 10-11.) Charboneau argues that Evans "could testify as to his opinion of a pertinent character trait" of the victim. (Appellant's brief, pp. 12-13.) The primary flaw in Charboneau's arguments is that they are not based on the evidence actually proffered at trial by Charboneau. Application of relevant evidentiary standards to the offers of proof in fact made at trial show that the district court did not abuse its discretion.

B. Standard Of Review

"This Court reviews questions regarding the admissibility of evidence using a mixed standard of review." State v. Sanchez, 165 Idaho 563, ___, 448 P.3d 991, 995 (2019) (internal quotations omitted). "First, whether the evidence is relevant is a matter of law that is subject to free review." State v. Kralovec, 161 Idaho 569, 574, 388 P.3d 583, 588 (2017) (internal quotations omitted). On all other evidentiary matters "[t]he trial court's judgment concerning admission of evidence shall only be disturbed on appeal when there

has been a clear abuse of discretion." State v. Godwin, 164 Idaho 903, 918, 436 P.3d 1252, 1267 (2019) (internal quotations omitted).

Rulings under I.R.E. 404(b) are reviewed under a bifurcated standard: Whether the evidence is admissible for a purpose other than propensity is given free review while the determination of whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice is reviewed for an abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009).

When an appellate court reviews a lower court for an abuse of discretion, it determines whether the lower court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." In re Bd. of Tax Appeals, Appeal No. 16-A-1079, 165 Idaho 433, ___, 447 P.3d 881, 886 (2019) (internal quotations omitted).

C. Charboneau Has Shown No Error Because The District Court Properly Concluded That The Evidence He Proffered In His Offers Of Proof Was Inadmissible

The Idaho Rules of Evidence require that before a party may challenge the exclusion of evidence it must inform the court of the "substance" of evidence by offer of proof "unless the substance was apparent from the context." I.R.E. 103(a)(2) (2017).[4] "The purpose of this rule is to preserve a record for appeal and to enable the court to rule on the evidence's admissibility." Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 251, 245 P.3d 992, 1003 (2010). See also State v. Joslin, 145 Idaho 75, 82, 175 P.3d

[4] The rules of evidence were amended effective a few weeks after the trial. All citations are to the language of the rules prior to these amendments.

764, 771 (2007) ("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."). "Absent an offer of proof or anything in the record showing" that the evidence is relevant, an appellant "has not preserved" its challenge to the exclusion of the evidence. State v. Young, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001).

This rule "provides that a party can only assert error on the part of the trial court in excluding evidence where the party made an offer of proof at trial describing the substance of the evidence sought to be admitted." Morris By & Through Morris v. Thomson, 130 Idaho 138, 143, 937 P.2d 1212, 1217 (1997). This rule embodies "long-standing policy that in order to preserve an evidentiary ruling for appellate review, the party assigning error to the ruling must make a sufficient record from which an appellate court can adequately determine whether there was error, and also whether the rights of such party have been prejudiced." State v. Schoonover, 125 Idaho 953, 954, 877 P.2d 924, 925 (Ct. App. 1994)

Charboneau made offers of proof in relation to both Orem and Evans, and the district court concluded that Charboneau had not offered admissible evidence. Application of the pertinent evidentiary standards to the offers of proof Charboneau in fact made at trial shows no error. In claiming error, Charboneau claims evidence beyond the scope of his trial offers of proof, and therefore did not preserve any claim that the witnesses would have testified as claimed on appeal.

1. The Proffered Testimony Of Evans Was Inadmissible

Charboneau's offer of proof as to Evans was that he would "discuss his personal knowledge" of the victim, specifically, "how she behaved" when they were "man and wife." (Tr., p. 1551, Ls. 7-14.) The district court found this to be inadmissible character

evidence under I.R.E. 404(b) (2017). (Tr., p. 1551, Ls. 19-24.) "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." I.R.E. 404(b) (2017). "This rule generally prevents the admission of previous bad acts to establish a person's character for the purpose of showing that the person acted in conformity with that character." State v. McGuire, 135 Idaho 535, 538, 20 P.3d 719, 722 (Ct. App. 2001). Here Charboneau's offer or proof was that he wished to admit evidence of how the victim behaved when she was Evans' wife. The proffered testimony was evidence of the victim's prior actions offered to prove her character in order to show she acted in conformity with that character. The district court did not abuse its discretion by ruling this proffered evidence inadmissible.

On appeal Charboneau argues that Evans should have been allowed to "testify as to his opinion of a pertinent character trait of Ms. Collinson," namely, her "character traits for jealousy and hostility." (Appellant's brief, pp. 12-13.) This argument fails because it does not address the evidence Charboneau in fact offered at trial, and instead argues the admissibility of evidence he did not in fact offer at trial. Charboneau offered to call Evans to testify to how the victim "behaved" when he was married to her. (Tr., p. 1551, L. 7-14.) He at no point offered testimony regarding Evans' opinion about anything. (Tr., p. 1550, L. 10 – p. 1554, L. 6.) Because Charboneau's argument addresses evidence he never offered to present, it is not preserved.

Charboneau argues he did offer Evans' opinion testimony regarding the victim's character because "[i]t stands to reason that if Mr. Charboneau originally wanted to introduce specific acts of jealousy and hostility, the character traits he wanted to explore were the same." (Appellant's brief, p. 13.) This argument fails on logical and legal

grounds. An offer of proof relating to specific acts is not an offer of proof of opinion evidence. It does not "stand to reason" that an ex-husband who witnessed certain behaviors in an ex-wife years before necessarily holds an opinion as to her current character for jealousy. Charboneau had to either inform the trial court of the substance of the testimony or otherwise make that substance "apparent from the context." I.R.E. 103(a)(2) (2017). Neither applies to Charboneau's appellate argument that he should have been able to present opinion testimony from Evans. Charboneau did not inform the court that such was the proffered evidence and it is not "apparent from the context" that such was the proffered evidence. The district court cannot have erred by excluding evidence that was in fact never offered and its admissibility never ruled on.

2. The Proffered Testimony Of Orem Was Inadmissible

Charboneau asserted that Orem would testify about his and the victim's demeanor the night the victim broke up with Charboneau to rebut the victim's testimony that the reason she broke up with Charboneau was that he was jealous. (Tr., p. 1557, Ls. 2-11; p. 1557, L. 22 – p. 1558, L. 25.) Charboneau also asserted Orem could testify to the victim's "character in the bar that night." (Tr., p. 1559, Ls. 16-21.) The district court excluded the evidence as irrelevant and improper character evidence. (Tr., p. 1559, Ls. 1-15; p. 1559, L. 22 – p. 1560, L. 1.)

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401 (2017). Irrelevant evidence is inadmissible. I.R.E. 402 (2017). "Whether a fact is material is determined by its relationship to the legal theories presented by the parties." State v. Stevens, 146 Idaho 139, 143, 191 P.3d 217, 221

(2008) (citation omitted). The district court correctly concluded that evidence that Charboneau gave Orem a ride home, that the music on the night the victim broke up with him was loud, and that the bar was rowdy, was irrelevant. (Tr., p. 1559, Ls. 1-15.)

Nor did the district court abuse its discretion in concluding that the proffered character evidence did not rebut the victim's testimony regarding her motives for breaking up with Charboneau. "Rebuttal evidence is evidence that explains, repels, counteracts, or disproves evidence which has been introduced by or on behalf of the adverse party." In re Bd. of Tax Appeals, Appeal No. 16-A-1079, 165 Idaho 433, 447 P.3d 881, 891 (2019) (internal quotations omitted). Orem's testimony, as proffered, that he had "seen" Charboneau's and the victim's "relationship" and perceived "no jealousy at all" (Tr., p. 1557, L. 22 – p. 1558, L. 25) did not rebut the victim's testimony about her subjective motivations for breaking up with Charboneau. Even if it did in some way rebut that testimony, the district court did not abuse its discretion by excluding the testimony because the victim's *motives* for breaking up was insignificant when compared with the *fact* of the breakup. The breakup was Charboneau's motivation for his subsequent actions regardless of the underlying reason behind the breakup. Proving that the victim's subjective reasons for breaking up were invalid would not affect the weight of evidence that Charboneau's motive was retaliation for the breakup. Therefore evidence that Charboneau was not in fact jealous as perceived by the victim was not relevant to rebut or impeach the victim's testimony.

Finally, the district court did not err by excluding the proffered testimony of "personal knowledge of [the victim's] character in the bar that night." (Tr., p. 1559, L. 16 – p. 1560, L. 1.) "Evidence of other crimes, wrongs, or acts is not admissible to prove the

character of a person in order to show that the person acted in conformity therewith." I.R.E. 404(b) (2017). Evidence runs afoul of Rule 404(b) "if its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." State v. Folk, 157 Idaho 869, 876, 341 P.3d 586, 593 (Ct. App. 2014) (citations omitted). Charboneau did not articulate what aspect of the victim's "character" Orem would allegedly testify about other than her "demeanor" on the night she broke off the relationship with Charboneau. (See Tr., p. 1556, L. 25 – p. 1559, L. 21.) Nor did he articulate how that character trait was relevant. (Id.) Because Charboneau failed to establish any exception to I.R.E. 404(b) relevant to his proffered character evidence, the district court did not err or abuse its discretion in denying admission of the proffered evidence.

On appeal Charboneau claims error only[5] in the exclusion of Orem's proposed testimony that he "never saw Mr. Charboneau act jealous" and that "Charboneau was not acting jealous on the night" of the breakup. (Appellant's brief, p. 11.) He claims his lack of jealousy was relevant because "[t]he State's entire theory of this case is that Mr. Charboneau assaulted Ms. Collinson due to his jealousy and anger about ending the relationship." (Appellant's brief, p. 11.) This argument is based on false premises and misleading claims.

First, Charboneau cites to nothing in the record stating that the state claimed he acted from a jealous motivation. Nor is there anything in the record to support this claim. The state's theory was that Charboneau engaged in escalating efforts to harm the victim as

[5] He presents no argument claiming error in the exclusion of Orem's testimony regarding the character of the victim. (Appellant's brief, pp. 10-11.)

revenge for breaking up with him. (Tr., p. 1828, L. 21 – p. 1829, L. 17.) The word "jealousy" (and its derivatives) does not appear in the state's closing argument at all. (Tr., p. 1828, L. 21 – p. 1866, L. 17.) The only evidence identified by the district court regarding jealousy was the victim's testimony about her subjective reasons for ending her relationship with Charboneau. (Tr., p. 1557, Ls. 12-21.) Charboneau's argument is based on the false claim that the state's theory was based on his jealousy.

Second, even if the state's theory were that Charboneau's retaliation against the victim for breaking up with him was motivated by "jealousy," that theory would not have been rebutted by evidence that Charboneau did not experience jealousy *before* the breakup. Because the state's theory is that Charboneau's motivation, whatever it might be called, was the product of the victim ending the relationship. That Charboneau did not have the same motivation before the inciting incident of the breakup does nothing to disprove the state's theory. The only jealousy at all in issue prior to the breakup was the victim's conclusion that Charboneau was exhibiting jealousy inconsistent with what she wanted in the relationship, and the proposed evidence was not proper rebuttal of that evidence. The district court did not abuse its discretion in excluding the proposed testimony that Orem had not seen Charboneau behaving in a jealous manner prior to the breakup.

The district court did not abuse its discretion in excluding the proposed testimony or Orem and Evans. Charboneau's offer of proof was strictly based on proving character (his and the victim's) by evidence of specific acts of conduct. Such evidence is inadmissible character evidence. Charboneau's appellate efforts to re-cast his offer of proof is not well taken and must be rejected under applicable legal standards. He has therefore failed to show an abuse of discretion.

3. Any Error Was Harmless

Finally, any error was harmless. "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). "'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). Because the proffered evidence, if not completely irrelevant, had very little potential for rebutting the state's case, and because the circumstantial evidence overwhelmingly supported the victim's testimony, any possible error was harmless.

First, even if it had relevance the proffered testimony did nothing to actually rebut the state's case. Should Evans have been allowed to testify that the victim had behaved jealously regarding their marriage, such would do nothing to prove the victim was jealous after *she* broke up with *Charboneau*. It simply makes no sense that the victim stalked Charboneau because of the breakup when she unilaterally initiated the breakup. Likewise, if Orem had been allowed to testify that he did not observe any jealous behaviors by Charboneau prior to the breakup such would have done little, if anything, to rebut any aspect of the state's case. There is no reason to believe Orem would have been privy to Charboneau's complaints to the victim that she was touching other men with whom she interacted too much or too long. That Orem did not observe jealous behaviors by Charboneau does not impeach the victim's testimony that Charboneau complained about her interactions with other men, which led her to break up with him. In addition, Orem's observations regarding Charboneau's lack of jealousness prior to the breakup does nothing to show whether Charboneau resented the breakup and sought revenge for it.

Second, although only Charboneau and the victim were witnesses to what actually transpired in the victim's house on February 15, 2016, the victim's testimony that Charboneau broke into her house and threatened her with a crossbow (as set forth in the factual statement above) was overwhelmingly corroborated. The neighbor down the street who called 911 corroborated that the victim, whom she had never seen before, showed up at her house "very frightened," not wearing any shoes despite the cold, and asking for help. (Tr., p. 750, L. 5 – p. 757, L. 14; State's Exhibit 259.) When officers apprehended Charboneau they found crossbow bolts in a planter just outside his car. (Tr., p. 1083, L. 21 – p. 1093, L. 2; p. 1117, Ls. 5-16; p. 1172, L. 8 – p. 1173, L. 16.) Inside the car officers found a crossbow owner's manual, wax for the crossbow, tools to repair the crossbow, and other items purchased with the crossbow. (Tr., p. 1178, L. 6 – p. 1179, L. 7; p. 1197, L. 6 – p. 1199, L. 11; p. 1201, L. 1 – p. 1203, L. 7; State's Exhibits 97-100, 102, 118, 120-127.) Investigating officers found a crossbow, a lens cover for the aiming scope attached to the crossbow, and one crossbow bolt near the victim's home. (Tr., p. 1146, L. 7 – p. 1147, L. 6; p. 1155, L. 25 – p. 1157, L. 10; p. 1158, L. 6 – p. 1162, L. 1; p. 1208, L. 14 – p. 1209, L. 25; p. 1218, L. 24 – p. 1220, L. 9; State's Exhibits 137, 148, 150-155.) Charboneau had, two days before the assault, purchased the crossbow, crossbow bolts, and other items found in the car. (Tr., p. 1118, L. 14 – p. 1120, L. 4; p. 1283, L. 21 – p. 1284, L. 8; p. 1315, L. 3 – p. 1331, L. 1; p. 1466, L. 21 – p. 1470, L. 10; State's exhibits 220-222, 247-250.) The evidence that Charboneau planned and executed the burglary and aggravated assault was overwhelming.

Beyond a reasonable doubt the proposed evidence, which had very little if any probative value, would not have made any difference in a trial where the evidence of Charboneau's crimes was overwhelming.

CONCLUSION

The state respectfully requests this Court to affirm Charboneau's judgment of conviction.

DATED this 15th day of November, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th 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
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KKJ/dd