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State v. Castro Appellant's Reply Brief Dckt. 46700

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

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 46700-2019**
	)	
v.	)	**CANYON COUNTY NO. CR14-18-14083**
	)	
MANUEL JOSE CASTRO,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE GEORGE A. SOUTHWORTH
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

Nature of the Case

Manuel Castro contends the district court misunderstood both the potential probative value and the risk of undue prejudice from certain propensity evidence in this case. As a result, its decision to admit that evidence, which the district court already describes as a "close call," was an abuse of its discretion. The State's responses on the merits are overly-simplistic and contrary to the applicable legal standards. Moreover, its harmless error argument is based on an improper standard, one which the United States Supreme Court has repeatedly rejected. In fact, if the State's standard were used, the Supreme Court has said it would create an independent violation of the Fifth Amendment. For all those reasons, this Court should reject the State's arguments. As such, it should reverse the decision to admit the propensity evidence and remand this case for a new trial.

Statement of the Facts and Course of Proceedings

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

ISSUE

Whether the district court abused its discretion by determining the risk of undue prejudice from admitting evidence of Mr. Castro's gang affiliations did not substantially outweigh the minimal probative value it had toward his motive.

ARGUMENT

The District Court Abused Its Discretion By Determining The Risk Of Undue Prejudice From Admitting Evidence Of Mr. Castro's Gang Affiliations Did Not Substantially Outweigh The Minimal Probative Value It Had Toward His Motive

A. Just Because Propensity Evidence Might Fit Into The State's Theory Of The Case, That Does Not Make The Propensity Evidence Relevant As A Matter Of Law

The district court rejected Mr. Castro's argument that the riot statute requires the State to prove a community of purpose between the participants in a riot. (*See generally* Tr., p.262, L.10 - p.266, L.22.) However, since that decision means mere participation creates liability under the riot statute, that decision also reveals that the motives of the various participants are not particularly material to the charged offense. As such, the district court's decision to admit the propensity evidence of Mr. Castro's gang affiliation because it was highly probative to his motive and intent (Tr., p.21, Ls.11-13) was an abuse of discretion, since it demonstrates the district court's misunderstanding of relevance in this regard. (App. Br., pp.6-7.) The State's response – that since the State's theory was that the fight was gang-related, that evidence of gang affiliation was relevant under I.R.E. 404(b) (Resp. Br., pp.6-8) – is overly simplistic and not consistent with the applicable precedent.

The fact that evidence might be consistent with a party's theory is not a sufficient basis on which to deem it relevant *as a matter of law.* To be relevant as a matter of law, the other act "must be relevant to a *material* and disputed issue concerning the crime charged, other than propensity." *State v. Grist*, 147 Idaho 49, 52 (2009) (emphasis added). As a result, the Court of Appeals held that, even though the evidence in question might have been relevant the concept of intent under the State's theory of the case, it was not relevant as a matter of law under I.R.E. 404(b) because intent was not a material and disputed issue relating to the charge at issue.

State v. Folk, 157 Idaho 869, 879 (Ct. App. 2014). Rather, the Court of Appeals explained, the act itself proved any associated intent. *Id.* As such, the propensity evidence was not particularly probative to intent, and so, should not have been admitted on that basis. *Id.* Here, as in *Folk*, the district court concluded that the act of participation itself was sufficient to show liability under the riot statute. As such, the questions of motive and intent, to the extent they were material at all, were demonstrated by the act itself. *Compare Folk*, 157 Idaho at 879. Therefore, as in *Folk*, the propensity evidence was not particularly probative to show motive and intent. Since the district court did not appreciate the actual probative value of that evidence, its weighing of the probative value against the risk of undue prejudice was, like the weighing in *Folk*, an abuse of discretion.

The district court's decision that participation is sufficient also demonstrates why why the State's reliance on *State v. Almaraz* is unpersuasive. (*See* Resp. Br., p.7 (quoting *State v. Almaraz*, 154 Idaho 584, 591 (2011)). In *Almaraz*, the defendant was charged with first-degree murder. *Almaraz*, 154 Idaho at 588. Murder is a specific-intent crime. *See* I.C. §§ 18-4001, -4002 (defining murder as killing "with malice aforethought," and malice is "a deliberate intention to unlawfully take away life"). Therefore, motive was a separate, material and disputed issue concerning the crime charged in *Almaraz*, and thus, propensity evidence could be probative in that context. However, since riot is, according to the district court's decision, a general intent statute akin to battery, *Almaraz* is distinguishable from this case.

Thus, under a proper understanding of the relevance prong, the district court misunderstood the potential probative value of Mr. Castro's gang affiliation, and that demonstrates its already-close decision to admit that evidence was an abuse of its discretion.

B. The State's Argument Reads The Precedent Regarding The Prejudice Prong Analysis Overly-Narrowly

The district court also misunderstood how much risk of undue prejudice the propensity evidence carried in this case. As Mr. Castro pointed out, this is the type of evidence that carries a risk of prejudice that a limiting instruction would not sufficiently restrict. (App. Br., pp.7-8 (comparing this case to *State v. Johnson*, 148 Idaho 664 (2010)).) The State ignores the part of his argument, claiming that Mr. Castro has not addressed the presumption that jurors follow the Court's instructions. (Resp. Br., p.9.) The State is mistaken, because that is precisely the point Mr. Castro was addressing by comparing to *Johnson*.

In *Johnson*, the Idaho Supreme Court expressly recognized there are certain situations where, despite being given a limiting instruction, the risk of undue prejudice is so high that the courts the jurors will still consider the evidence for propensity purposes (*i.e.*, they will be unable to follow the limiting instruction). *Johnson*, 148 Idaho at 670. The State contends that *Johnson* is not applicable because, in *Johnson* the propensity evidence was for the same specific conduct that had been charged in the case at bar. (Resp. Br., p.10.) *Johnson* is not so limited. *See, e.g., State v. Pokorney*, 149 Idaho 459 (Ct. App. 2010).

In *Pokorney*, the Court of Appeals considered whether evidence of the defendant writing a letter to his son, the alleged victim, would be admissible under I.R.E. 404(b) in a case alleging lewd conduct. *Pokorney* 149 Idaho at 463-64. Even though the propsensity evidence (attempting to influence a witness) was not for the same sort of specific conduct as the charged conduct, the Court of Appeals still applied the *Johnson* rationales to its evaluation of the question of prejudice. *Id.* at 466. Therefore, the State's attempt to distinguish *Johnson* is wholly unpersuasive.

More importantly, the *Pokorney* Court held that the district court abused its discretion in weighing the risk of prejudice because it did not act appreciate the nature of the prejudice recognized in *Johnson*:

> Particularly in light of *Grist* and *Johnson* . . . we must conclude that the district court erroneously balanced the probative value against the prejudicial effect of the evidence. Even with a limiting instruction, there was a high risk that the jury would convict Pokorney based upon propensity and sexual deviancy. We are constrained to conclude that the unfair prejudice substantially outweighed the probative value of the evidence.

Id. at 466; *see also State v. Sheldon*, 145 Idaho 225, 229 n.3 (2007) (reaching a similar conclusion in the context of a methamphetamine charge).

The district court here, like the district court in *Pokorney*, abused its discretion because it did not appreciate the extent of the risk of undue prejudice this sort evidence carries, as discussed in *Johnson*. In fact, propensity evidence that speaks to the allegations in a sentencing enhancement usually need to be presented in a bifurcated trial *because of* the risk of undue prejudice associate with that sort of evidence. *See, e.g., State v. Wiggins*, 96 Idaho 766, 768 (1975) (requiring bifurcation of trials in regard to a sentencing enhancement based on prior convictions because to offer evidence relevant to that enhancement in the case-in-chief "is to run a great risk of creating prejudice in the minds of the jury that no instruction of the court can wholly erase.") (internal quotation omitted). This is not to say that evidence relevant to an enhancement can never come in during the State's case-in-chief. *See, e.g., State v. Thumm*, 153 Idaho 533, 540 (Ct. App. 2012) (holding that, where gang membership was only being used to show a witness's bias, rather than that the defendant committed the charged crime, the risk of undue prejudice did not require excluding the evidence). However, admission of the evidence in that circumstance would be because the risk of undue prejudice did not substantially outweigh

the relevance of the evidence in that circumstance, not because the risk of undue prejudice itself was lower than in other contexts.

The problem in Mr. Castro's case is that the district court did not appreciate the nature and extent of the undue prejudice that accompanies this sort of propensity evidence, and so, its resulting weighing of the probative value against the risk of undue prejudice was an abuse of its discretion. *Compare Pokorney*, 149 Idaho at 466. Therefore, as in *Pokorney*, the decision to admit that evidence should be reversed, especially since, even with its flawed understanding of the risk of prejudice, this was a close call for the district court.

C. The Standard The State Uses For Its Harmless Error Argument Is Inconsistent With Idaho Supreme Court And United States Supreme Court Precedent And Would, If Used, Create An Independent Violation Of The Fifth Amendment

In *State v. Perry*, the Idaho Supreme Court made it clear that, "in Idaho, the harmless error test established in *Chapman* is now applied to all objected-to error." *State v. Perry*, 150 Idaho 209 (2010) (referencing *Chapman v. California*, 386 U.S. 18 (1967)). Under *Chapman*, an error requires reversal "*unless* the State proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (quoting *Chapman*, 386 U.S. at 24) (emphasis from *Perry*). in order to determine whether an error "contribute[d] to the verdict obtained," the appellate court must look to "the basis on which 'the jury *actually rested* its verdict.'" *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991)) (emphasis from *Sullivan*).

In this case, the prosecutor repeatedly and specifically urged the jurors to consider Mr. Castro's gang affiliations to prove his guilt. (Tr., p.286, Ls.22 - p.287, L.5; p.297, Ls.21-23; p.298, Ls.11-18).) As a result, and for the reasons discussed in Section B, *supra*, the State has failed to carry its burden to prove there was no reasonable possibility that this error contributed

to the verdict obtained, that it was not part of the basis on which this jury actually rested its verdict.

The State attempts to avoid this conclusion by arguing for a different standard for evaluating harmless error – that this Court should ignore the possibility that the jurors considered the erroneously-introduced evidence and usurp the jury's role to weigh the other evidence itself. (Resp. Br., pp.11-12.) The United States Supreme Court has made it clear that this is improper.

In fact, in *Sullivan*, the Supreme Court explained that using the State's standard would result in an independent violation of the defendant's constitutional rights: "to hypothesize a guilty verdict that was never in fact rendered—*no matter how inescapable the findings to support that verdict might be*—would violate the jury-trial guarantee."[1] *Sullivan*, 508 U.S. at 279 (emphasis added). The reason such a decision would violate the Constitution is because, were a judge to make the determination that the defendant would have been found guilty based on allegedly-overwhelming evidence, it would be "the wrong entity judg[ing] the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986) (explaining trial judges cannot order a guilty verdict "regardless of how overwhelmingly the evidence may point in that direction" because of the "Sixth Amendment's clear command to afford jury trials in serious criminal cases").

However, it is necessary to note that the Court of Appeals has held that *Sullivan*'s analysis should only be applied to claims of structural error, not *Chapman* harmless error. *State v. Joslin*, ___ P.3d ___, 2019 WL 4941722 (Ct. App. 2019) (refusing to "read the *Sullivan*

[1] In other words, just as the courts will not "speculate on the course of action the investigation could have taken in the absence of [the error]—even if that alternate course likely would have yielded the evidence" because that would allow the inevitable discovery doctrine to swallow the exclusionary rule, *State v. Maxim*, ___ P.3d ___, 2019 WL 6519992, *7 (2019); *id.* at *8 (the dissenting justices agreeing with this analysis), they should not speculate on the course a trial could have taken in the absence of the error—even if that alternate course likely would have yielded a conviction – because that would allow the harmless error doctrine to swallow the rules excluding improper evidence.

language into the *Chapman* standard"), *rev. pending*. Rather, the Court of Appeals concluded that the decision in *State v. Montgomery*, 163 Idaho 40, 46 (2017), allows for the use of an overwhelming evidence standard. *Joslin*, 2019 WL 4941722, *3. *Joslin*, which is not yet final and a petition for review is pending, misreads *Sullivan*'s analysis and misconstrues *Montgomery*'s evaluation.[2]

Sullivan was evaluating a constitutionally-deficient reasonable-doubt instruction specifically to determine whether such errors always required reversal, or whether the resulting verdict could still be affirmed as harmless error. *Sullivan*, 508 U.S. at 276. In order to determine whether the harmless error test from *Chapman* could be applicable in that situation, the Supreme Court first had to explain what the *Chapman* test would require it to do:

> In *Chapman v. California*, we rejected the view that all federal constitutional errors in the course of a criminal trial require reversal. . . . Although most constitutional errors have been held amenable to harmless-error analysis, some will always invalidate the conviction. The question in the present case is to which category the present error belongs.
>
> *Chapman* itself suggests the answer. Consistent with the jury-trial guarantee, the question it [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis upon which the jury actually rested its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

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[2] To the extent *Montgomery* actually endorses the "overwhelming evidence" standard argued by the State, it should be overruled for because it is inconsistent with the controlling precedent discussed *infra*. *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990) (reiterating that the Courts should overrule a prior decision when, *inter alia*, it is manifestly wrong or overruling it is necessary to vindicate obvious principles of law).

> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident.

Id. at 279-80 (internal citations, quotations, and emphasis omitted). Once it properly understood what the *Chapman* test required, the *Sullivan* Court went on to explain why that analysis could not be conducted with respect to the jury-instruction error at issue. *Id.* at 280. As such, *Sullivan*'s discussion of what *Chapman* requires is binding. *See, e.g., Perry*, 150 Idaho at 227-28 (summarizing that Idaho uses the *Chapman* test and that *Sullivan* has only identified an exception to the *Chapman* test that is specific to errors in the jury instructions). As a result, *Joslin*'s refusal to accept *Sullivan*'s articulation of the *Chapman* standard actually requires, *Joslin*, 2019 WL 4941722, *3, is manifestly wrong.

This is particularly true because *Joslin*'s alternative standard – looking just at whether the other evidence would support a guilty verdict because it was overwhelming – is contrary to the plain, ordinary principles of law in this regard. In fact, the first case in which the United States Supreme Court considered the concept of harmless error, it expressly rejected the Second Circuit's use of an overwhelming evidence analysis: "It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, . . . [*b*]*ut whether so or not is neither our problem nor that of the Court of Appeals for this case.* That conviction would, or might probably, have resulted in properly conducted trial is not the criterion . . . ." *Kotteakos v. United States*, 328 U.S. 750, 775-76 (1946).

There has been some confusion in the articulation of that rule since *Kotteakos*, but the Supreme Court has always returned to the same basis, rejecting harmless error evaluations based solely on what the other evidence might show. For example, in *Fahy v. Connecticut*, the

Supreme Court reaffirmed: "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of [*i.e.*, whether there was overwhelming evidence of guilt]. The question here is whether there was a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85 (1963). More notably, in *Chapman* itself, the Supreme Court found the error was not harmless *despite the fact* that it found the Government's evidence to be "reasonably strong." *Chapman*, 386 U.S. at 24-26.

Finally, when it adopted the *Chapman* test, the Idaho Supreme Court also tried to resolve any disparity caused by the varying articulations of the standard. *See Perry*, 150 Idaho at 221-22. It explained that all the different evaluations, including those that talked in terms of overwhelming evidence, shared the same central analysis – of whether the erroneously-introduced evidence contributed to the jury's decision (as opposed to whether the other evidence by itself would still likely have netted a conviction).[3] *Id.* (citing, *inter alia*, *State v. Stoddard*, 105 Idaho 169 (Ct. App. 1983), in which the Court of Appeals found an error to be harmless because "we find nothing in the record to suggest that the remarks about the flashlight materially affected the outcome. Stoddard has not contested the sufficiency of the evidence to support the jury's verdict.")). This is the point both *Joslin* and the State in this case fail to appreciate by arguing that the error was not harmless because the other evidence alone would be enough to support a conviction. Therefore, both should be rejected as inconsistent with the applicable controlling precedent.

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[3] Even *Montgomery* shares this central analysis. *See Montgomery*, 163 Idaho at 44 (essentially explaining that the error – improperly allowing rebuttal witnesses to rebut the defendant's testimony by offering more specific details about the allegations – was harmless because, in the context of the rest of the evidence, the points discussed by the rebuttal testimony were not really in dispute or relevant to the overarching charge, and so, no reasonable possibility the rebuttal testimony affected the jury's deliberations on the charges filed).

Rather, as discussed *supra*, there is a reasonable possibility the jurors in this case considered the erroneously-admitted evidence of Mr. Castro's gang affiliation in their determination of his guilt. After all, the prosecutor repeatedly and specifically urged them to do so. (Tr., p.286, Ls.22 - p.287, L.5; p.297, Ls.21-23; p.298, Ls.11-18).) Since the State has failed to carry its burden under the proper standard, this Court should reverse the erroneous decision to admit that evidence.

CONCLUSION

Mr. Castro respectfully requests this Court vacate his judgment of conviction, reverse the order admitting the evidence of his gang affiliation in the first part of the bifurcated trial, and remand this case for a new trial.

DATED this 16th day of January, 2020.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2020, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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BRD/eas