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State v. Rodriguez Appellant's Brief Dckt. 43577

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43577
Plaintiff-Respondent,)	
)	CANYON COUNTY
)	NO. CR 2014-21888
v.)	
)	
ENRIQUE LOMELI)	
RODRIGUEZ ,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

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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STATEMENT OF THE CASE

Nature of the Case

Enrique Lomeli Rodriguez was convicted, following a jury trial, of felony witness intimidation, felony solicitation to commit witness intimidation, and misdemeanor violation of a no contact order. On appeal, Mr. Rodriguez asserts that the district court erred when it excluded the audio recording of the telephone calls between Mr. Rodriguez and the alleged victim, Alma Rosa Amador-Torres, and instead permitted the State to call two employees of the prosecutor's office to read aloud to the jury from the transcription of the translated version of the telephone calls.

Statement of the Facts and Course of Proceedings

On the afternoon of September 21, 2014, Enrique Rodriguez and his domestic partner, Alma Rosa Amador-Torres, got into an altercation. (Trial Tr., p.163, Ls.7-12; p.165, L.24 – p.166, L.25.) The incident took place at the home of family friends, Porfirio "Pilo" and Maria Griselda Vallejo "Gris." (Trial Tr., p.160, L.6 - p.161, L.16; p.169, Ls.9-14.) Gris heard Mr. Rodriguez and Ms. Amador-Torres arguing, and then a slapping sound, but did not see the contact. (Trial Tr., p.166, L.23 – p.167, L.19.) She had observed Ms. Amador-Torres holding an item with two hands, so she concluded that Mr. Rodriguez slapped Ms. Amador-Torres. (Trial Tr., p.167, Ls.11-19.) Ms. Amador-Torres' 10-year-old son contacted law enforcement, and Mr. Rodriguez was taken to jail. (Trial Tr., p.175, Ls.3-20.) Mr. Rodriguez was charged with misdemeanor domestic violence in the presence of a child. (R., pp.9-10, 15, 25-26.) At his arraignment, the magistrate court told Mr. Rodriguez that he could not have contact

with Ms. Amador-Torres and four minors.¹ (State's Trial Exhibits 2A, 3A.) Thereafter, the magistrate court entered a no contact order against Mr. Rodriguez that prohibited contact with Ms. Amador-Torres and four minor children. (R., p.15; State's Trial Exhibit 2A.)

Over the course of the next few days, while in jail, a flustered Mr. Rodriguez attempted to contact Ms. Amador-Torres, and, during some of those conversations, he asked her to try to get the case dismissed. (Trial Tr., p.240, L.14 - p.252, L.14; State's Trial Exhibits 5, 6.) Between September 22 and September 30, 2014, Mr. Rodriguez spoke with Ms. Amador-Torres five times. (Trial Tr., p.177, Ls.6-10; p.227, L.19 - p.228, L.1; p.240, Ls,14-18; p.253, Ls.9-13; p.269, Ls.7-10; State's Trial Exhibits 5, 6.) He asked her to tell Gris and Pilo "not to go to court." (Trial Tr., p.257, L.21 - p.258, L.10; 265, L.12 – p.268, L.6.) Based on these facts, Mr. Rodriguez was charged by information with felony witness intimidation, felony solicitation to commit witness intimidation, misdemeanor violation of a no contact order, misdemeanor domestic battery in the presence of children, and misdemeanor domestic assault in the presence of children. (R., pp.51-54.)

Prior to trial, Mr. Rodriguez moved to dismiss Counts IV and V, asserting the State had violated his due process and speedy trial rights. (6/17/15 Tr., p.5, L.16 – p.19, L.6; R., pp.103-106.) After finding that Mr. Rodriguez's speedy trial right had been violated, the district court dismissed Count IV, which charged Mr. Rodriguez with

¹ While the magistrate court did say he was "ordering him to have no contact with [Ms. Amador-Torres and three minors]," the court did not orally advise Mr. Rodriguez that it was entering an order to that effect, or that it could be a new crime if he did contact them, or even what "contact" meant. (State's Trial Exhibit 2A.)

domestic battery in the presence of a child. (6/17/15 Tr., p.5, Ls.20-24; p.17, L.14 – p.18, L.1; R., pp.132-133.) The State dismissed Count V, which charged Mr. Rodriguez with one count of domestic assault, just prior to the start of the trial. (Trial Tr., p.141, Ls.19-25; R., p.179.)

At trial, the State presented testimony from Ms. Amador-Torres. (Trial Tr., p.170, L.16 – p.189, L.12.) The State also called a police officer who responded to the scene after the altercation had ended. (Trial Tr., p.170, L.20 – p.176, L.19; p.190, L.4 – p.192, L.14.) The State also presented the testimony of “Gris”, who was present during the initial altercation. (Trial Tr., p.160, L.6 – p.167, L.19.)

Over defense objections, the audio recording of the telephone conversations between Mr. Rodriguez and Ms. Amador-Torres was not played for the jury. (Trial Tr., p.235, L.21 – p.237, L.14.) Instead, four of the telephone conversations between the two had been transcribed, then translated from Spanish into English. (State’s Exhibits 5, 6; Trial Tr., p.240, Ls.7-13; 6/17/15 Tr., p.38, Ls.9-20.) The transcript of the English translation was then read by two employees of the prosecutor’s office, the male employee read for the voice that purportedly belonged to Mr. Rodriguez and the female employee read for the voice that purportedly belonged to Alma Rosa Amador-Torres. (Trial Tr., p.240, L.7 – p.274, L.7.) The written English translation was never submitted to the jury, nor did the jury hear the audio recording of the telephone calls.² (Trial Tr., p.234, L.23 – p.235, L.9; p.302, L.8 – p.303, L.4.) At the close of trial, the district

² The defense also objected to the introduction of State’s Exhibit 4, the audio recording, because it was unredacted. (Trial Tr., p.237, Ls.5-14.) While a redacted version was available (6/17/15 Tr., p.28, Ls.20-23), the district court had just ruled that the audio recording of the telephone calls would not be played for the jury, apparently because it was in Spanish. (6/17/15 Tr., p.236, Ls.7-12.)

court instructed the jury that it was the jury's duty to determine what, if any, relevance the transcribed phone calls had and whether the transcription was accurate. (R., p.305.)

The jury convicted Mr. Rodriguez of felony witness intimidation, felony solicitation to commit witness intimidation, and misdemeanor violation of a no contact order. (Trial Tr., p.344, L.17 – p.345, L.12; R., pp.175-176.) The district court ordered a PSI and a mental health evaluation and set the matter for a sentencing hearing. (Trial Tr., p.347, Ls.1-11; R., p.177.)

At sentencing, the district court withheld judgment on both counts and placed Mr. Rodriguez on probation for two years, concurrently.³ (8/25/15 Tr., p.19, L.21 – p.20, L.10; R., pp.180-185, 191-194.)

Mr. Rodriguez timely appealed from his judgment of conviction. (R., pp.197-199.)

³ As for the misdemeanor violation of a no contact order charge, the district court withheld judgment and Mr. Rodriguez was sentenced to six months of unsupervised probation. (8/25/15 Tr., p.20, Ls.13-18; R., p.184.)

ISSUE

Did the district court err in excluding the audio recording of the telephone calls?

ARGUMENT

The District Court Erred In Excluding The Audio Recordings Of The Telephone Calls From The Jail

A. Introduction

Over Mr. Rodriguez's objections, the district court excluded the audio recording of the telephone calls between Mr. Rodriguez and Alma Rosa Amador-Torres and instead permitted the State to call two employees from the prosecutor's office to read aloud to the jury the transcribed, translated version of the telephone calls. Defense counsel objected to the introduction on the basis that the best evidence of the telephone conversations were the audio recordings of the calls. Nevertheless, the district court overruled counsel's objection and the jury never heard any part of the audio recordings.

B. Relevant Law

Idaho Rule of Evidence 1002 provides, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." I.R.E. 1002. Under I.R.E. 1002, the original is required to prove the content unless otherwise provided by rule or statute. *Idaho Dept. of Health and Welfare v. Doe*, 150 Idaho 103, 115 (Ct. App. 2010). Under I.R.E. 1001(3), the "original" of a recording is the recording itself. I.R.E. 1001(3).

A reviewing court examines challenges to a trial court's evidentiary rulings, including challenges to a trial court's decision to admit or exclude documentary and/or testimonial evidence, using an abuse of discretion standard. *Doe*, 150 Idaho at 114. Evidentiary "[e]rror is disregarded unless the ruling is a manifest abuse of the district court's discretion and affects a substantial right of the party." *Id.* at 115.

“Under the Idaho Rules of Evidence, there is a preference in favor of original instruments as opposed to copies or other secondary sources of information.” *Christensen v. Ransom*, 123 Idaho 99 (Ct. App. 1992) (citing I.R.E. 1002) (holding the edited version of the original tape recording which had been lost was not admissible as an accurate reproduction as it was edited by only one party and did not accurately reproduce the original tape recording). Duplicates are admissible as originals, unless there is a question regarding the authenticity of the original or a question of fairness in admitting the duplicate in lieu of the original. I.R.E. 1003. The Rules define a duplicate as “a counterpart produced by . . . mechanical or electronic re-recording . . . which accurately reproduces the original.” I.R.E. 1001(4). The comments on I.R.E. 1003 provide:

To qualify as a duplicate, the counterpart must be the product of a method which insures accuracy and genuineness as defined in Rule 1001(4).

Only when a substantial question is raised as to the authenticity of either the original or the duplicate, or in other circumstances when it would be unfair to admit the duplicate in place of the original, should the original be insisted upon. The rule purposely fails to attempt to define circumstances where it would be unfair to admit a duplicate, leaving this issue to the broad discretion of the court for decision on a case-by-case basis.

Christensen, 123 Idaho at 106-07 (internal citations omitted). The admissibility of a duplicate is discretionary. *Id.* at 107. In *Christensen*, the Court of Appeals held the district court abused its discretion in admitting the re-recording as it was not an accurate reproduction of the original recording and was thus inadmissible, and further, it was not admissible because there was a genuine question regarding the authenticity of the original where the original tape “turned on and off” when the party’s jacket blew in the wind. *Id.* 123 Idaho at 107.

C. The District Court Erred In Excluding The Audio Recording Of The Telephone Calls

As defense counsel argued, and as the district court initially found, the primary evidence of Mr. Rodriguez's alleged crimes was the audio recordings of the telephone conversations between him and his wife. These audio recordings were otherwise available; however, over the objections of defense counsel, the State instead used a transcribed, translated version of the telephone calls, which were read to the jury by two prosecutors. Such was error as how Mr. Rodriguez said the words is almost as important as what he said. The tone and inflection with which the remarks were uttered was a necessary part of the jury's understanding as Mr. Rodriguez could have uttered the remarks while being flippant, or when joking with Ms. Amador-Torres.

Prior to trial, defense counsel objected to the audio recording of the telephone conversation between Mr. Rodriguez and Ms. Amador-Torres for lack of foundation. (6/17/15 Tr., p.22, L.20 – p.25, L.17.) While the district court initially ruled that it would require the recording to be played to the jury with the interpretation (6/17/15 Tr., p.25, L.18 – p.26, L.1), the court later ruled that, if defense counsel disagreed with the transcription, he could provide his own interpretation of what was said (6/17/15 Tr., p.26, Ls.1-11).⁴ The district court found that sufficient foundation would be laid for admission of the translated conversation after the trained and certified court reporter who translated the recordings, testified. (6/17/15 Tr., p.26, Ls.3-8.)

The certified court reporter who translated and transcribed the audio recordings then testified, the day before trial, to lay a foundation for the written documents.

(6/17/15 Tr., p.32, L.18 – p.65, L.18.) The district court ruled that the foundation for the transcription had been laid and the transcript could be read to the jury. (6/17/15 Tr., p.65, Ls.2-6.) When defense counsel objected and requested the trial be reset for a date when the interpreter was available to testify at trial, the district court ruled, “No. I’m going to rule that these transcripts, provided the actual telephone calls come in, will be allowed to be read to the jury tomorrow.” (6/17/15 Tr., p.62, L.24 – p.63, L.2.) The district court found that a foundation was laid for the transcription and it would permit it to be read for the jury, provided the foundation for the phone calls themselves was established. (6/17/15 Tr., p.65, Ls.2-6.) Ultimately, the district court characterized the transcribed, translation as “just an interpretation of the other evidence,” but noted that “[t]he actual evidence are the phone calls which are in Spanish.” (6/17/15 Tr., p.62, Ls.11-14.) The district court ruled, “I’m going to rule that these transcripts, provided the actual telephone calls come in, will be allowed to be read to the jury tomorrow.” (6/17/15 Tr., p.62, L.24 – p.63, L.2.) Defense counsel maintained its objection to the transcripts—the interpretation of the telephone conversation. (6/17/15 Tr., p.66, Ls.4-13.)

The district court seemingly took a different position at trial when it denied defense counsel’s motion to admit redacted audio recordings of the telephone calls.⁵ Defense counsel objected to the admission of the written English transcription of the

⁴ The district court noted, “I view this issue as the evidence is actually what the defendant said on the – in and during the phone calls. I would require that that recording be played to the jury with the interpretation.” (6/17/15 Tr., p.25, Ls.18-22.)

⁵ The previous day, the prosecutor advised the district court that it had redacted the audio recordings of inappropriate character evidence. (6/17/15 Tr., p.28, Ls.20-23.)

conversation, and the reading of the transcription to the jury by two re-enactors.⁶ (Trial Tr., p.235, L.15 – p.237, L.14.) Defense counsel argued that the audio recording was the evidence of what had been said, not the transcribed and translated version:

Judge, the evidence in the case is the phone records themselves and what was on them. The transcripts are simply – what’s going to be read is simply an interpretation of those. Therefore, I believe it’s necessary that the jury has a redacted copy of the phone records to be able to review in order for -- if we’re going to admit the audio recording, it has to be something the jury has in evidence redacted copies of that recording because the evidence is the recording, not the interpreter’s interpretation.

(Trial Tr., p.235, L.21 – p.236, L.6.) The district court found the fact that the audio recordings were in Spanish to be problematic:

Well, that’s assuming that there’s Spanish speakers on the jury. I don’t know that one way or the other. And in addition, if there is and they wanted to do their own interpretation, it would be improper for them to do that.

(Trial Tr., p.236, Ls.7-12.) Counsel objected to the unredacted audio and further objected to the reading of the translated transcript, “[T]he transcript also we object to that being read to the jury because they’re not being able to listen to the audio recording.”⁷ (Trial Tr., p.237, Ls.5-12.) The district court overruled the defense’s objection, and two prosecutors read the redacted, transcribed, translated version of the audio recording of the telephone calls. (Trial Tr., p.237, L.13; p.240, L.7 – p.274, L.7.) The district court later instructed the jury that they were not to consider the responses of Ms. Amador-Torres for the truth of the matter asserted. (Trial Tr., p.285, Ls.1-7; R., p.165; 6/17/15 Tr., p.29, Ls.12-18.)

⁶ The prosecutors did not read all of the transcribed noises. (Trial Tr., p.238, L.15 – p.239, L.11.)

The district court erred in denying the defense’s motion to have the redacted audio recording played for the jury and admitted into evidence. The telephone conversations were the evidence of the alleged crime, but the jury was not allowed to listen to them. Further, the transcribed, translated and then read-aloud version was not “produced by the same impression as the original” and was therefore not a “duplicate” within I.R.E. 1001(4), and in this circumstance it was unfair to admit a duplicate. Idaho Rule of Evidence 1002 clearly requires the original recording to prove the content of a recording. The jurors did not hear the original recording or any portion of it. As such, the jury was unable to hear how Mr. Rodriguez was saying the words—whether he was using a joking or off-hand manner or whether he was serious.

A speaker’s inflection and tone are very important, especially where the speaker has been charged with a specific intent crime. Where the burden was on the State to show that Mr. Rodriguez intended to influence the testimony of witnesses, his tone of voice was particularly important. Notably, the prosecutor, during voir dire asked Juror No. 42 if they thought witness intimidation could be done “[w]ith a gentle voice?” to which the prospective juror responded, “Yes.” (Trial Tr., p.97, Ls.5-6.) However, the jury was never allowed to listen to the audio recording to observe the volume or tone of Mr. Rodriguez’s voice.

In this case, the tone and inflection were particularly important as defense counsel told the jury that Mr. Rodriguez was afraid, he was panicking about the

⁷ To be clear, defense counsel objected to the admission of State’s Exhibit 4, the unredacted audio recording of the telephone calls, but sought to have the redacted version of the audio recording played for the jury.

charges.⁸ (Trial Tr., p.158, Ls.13-23.) Ms. Amador-Torres testified that she was also very stressed at the time the telephone conversations took place. (Trial Tr., p.186, Ls.16-22.) However, the jury was unable to hear the tone of their voices on the audio recording.

The district court erred in denying the defense's motion to have the redacted audio recording played for the jury and admitted into evidence where audio recordings of the telephone conversations constituted the central, crucial evidence of the alleged crime.

CONCLUSION

Mr. Rodriguez respectfully requests that this Court vacate his convictions and remand for a new trial.

DATED this 5th day of August, 2016.

/s/
SALLY J. COOLEY
Deputy State Appellate Public Defender

⁸ Defense counsel told the jury during his opening statement, "Those phone calls were recorded. They're going to show that from the period of September 21st or 22nd until September 30th there was obviously panic and stress with related to the individual that was in custody." (Trial Tr., p.158, Ls.16-21.)

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of August, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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8417 W FAIRVIEW AV # 9
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DISTRICT COURT JUDGE
E-MAILED BRIEF

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