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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47557-2019
Plaintiff-Respondent,)	
)	BONNEVILLE COUNTY NO.
v.)	CR-2017-11589
)	
JESSE STEPHEN BARBER,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

HONORABLE JOEL E. TINGEY
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jesse Barber appeals from his judgment of conviction for intimidation of a witness and violation of a no contact order. At trial, the district court excluded Mr. Barber's exhibit because he did not disclose it as a potential trial exhibit, even though he received the exhibit from the State's discovery and the State suffered no prejudice by the exhibit's admission. Mr. Barber now asserts the district court's exclusion of this exhibit was an abuse of discretion. Due to this discretionary error, he respectfully requests this Court vacate his judgment of conviction for the violation of a no contact order and remand that charge for a new trial.

Statement of Facts and Course of Proceedings

The State charged Mr. Barber with intimidation of a witness, in violation of I.C. § 18-2604, and violation of a no-contact order ("NCO"), in violation of I.C. § 18-920. (No. 46590 R.,¹ pp.121–22.) Both charges involved Mr. Barber's phone call to his then-girlfriend April Lloyd while he was in jail pending a preliminary hearing on another case where Ms. Lloyd was the alleged victim. (*See* No. 46590 R., pp.22–23 (police narrative).) Mr. Barber pled not guilty and went to trial. (No. 46590 R., pp.131–32; *see* No. 46590 R., pp.204–15 (trial minutes).) Before trial, Mr. Barber filed one witness and exhibit list that listed Appendix A (forms) in the Idaho Criminal Rules as the only exhibit. (No. 46590 R., p.75.)

The State's evidence showed that, on October 23, 2017, Sergeant White was assisting with Mr. Barber's initial appearance via video at the Bonneville County Jail. (Tr., p.119, L.14–25, p.121, L.5–p.123, L.22.) Sergeant White testified that she served Mr. Barber with a NCO for

¹ This Court augmented the record on appeal with the record from Mr. Barber's prior appeal in No. 46590-2018. Citations to the prior record will reference its docket number.

Ms. Lloyd shortly after the initial appearance. (Tr., p.124, Ls.5–18.) The district court admitted the NCO as State’s Exhibit 1. (State’s Ex. 1, pp.13–15.²) The NCO contained a “faxed” date of October 23, 2017, and a district court file-stamped date of October 24, 2017. (State’s Ex. 1, pp.13–15.) Sergeant White testified that she saw Mr. Barber sign and date the NCO, and she signed and dated it after him. (Tr., p.126, Ls.9–18, p.128, L.22–p.129, L.11.) She also explained that, after she served the NCO, she puts the original in the court box to be filed the next morning. (Tr., p.131, L.21–p.132, L.1, p.134, L.13–p.135, L.8.)

During Mr. Barber’s cross-examination of Sergeant White,³ he moved to admit Defendant’s Exhibit A, but, after an off-record sidebar with the prosecutor and the district court, he did not renew that motion. (Tr., p.131, Ls.1–11.) Then, after the State’s redirect, Mr. Barber tried to “rebut again” with Defendant’s Exhibit D. (Tr., p.135, Ls.1–14.) Mr. Barber stated that this exhibit “was disclosed through discovery.” (Tr., p.135, Ls.17–18.) The State responded, “Your Honor, we have the same problem we just discussed a moment ago.” (Tr., p.135, Ls.19–20.) Mr. Barber responded, “[The prosecutor] disclosed it to us in discovery. I can’t admit it as evidence?” (Tr., p.135, Ls.22–23.) The district court took the matter up outside the jury, and Mr. Barber explained that Defendant’s Exhibit D was an unsigned version of the NCO with a district court file-stamped date of October 23, 2017. (Tr., p.136, Ls.14–19.) Mr. Barber repeated that he received this exhibit from the State in discovery. (Tr., p.136, Ls.22–23.) The district court explained to Mr. Barber that there was a difference between “disclosing records in discovery and identifying a document as a potential exhibit.” (Tr., p.137, L.24–p.138, L.1.) The district court allowed Mr. Barber to ask Sergeant White additional questions and show her Defendant’s

² The exhibits are contained in an electronic file from No. 46590 titled “Exhibits Volume 1.pdf” and contain the preliminary hearing and trial exhibits.

³ Mr. Barber represented himself throughout most of the trial.

Exhibit D. (Tr., p.138, Ls.1–20.) The district court did not admit the exhibit. (Tr., p.138, Ls.8–10.)

On re-cross, Sergeant White testified that Defendant’s Exhibit D was dated October 23, 2017, and this was not the NCO that she sent back to the court. (Tr., p.139, Ls.16–17, p.140, Ls.16–17.) She also testified that five boxes for “file,” “sheriff’s office,” “prosecutor,” “defense attorney,” “protected person(s),” and “protected person(s) via prosecuting attorney” were checked. (Tr., p.139, L.22–p.140, L.1.) (These boxes were not checked in State’s Exhibit 1. (State’s Ex. 1, p.15.)) On further redirect, Sergeant White testified that the October 23 date indicated when the document was faxed to the jail from the district court, and it would be unsigned at that point. (Tr., p.141, Ls.4–16.)

The State also presented evidence that, on October 23, 2017, at 5:59 p.m., Mr. Barber called Ms. Lloyd on a recorded phone call from the jail. (Tr., p.156, Ls.14–p.158, L.7; *see* State’s Ex. 2.) During the call, Mr. Barber told Ms. Lloyd that, if she did not show up to testify at an upcoming hearing, he would be “let go.” (Tr., p.163, Ls.12–24, p.165, Ls.7–12, p.165, Ls.19–23.) Mr. Barber also referred to himself in the third person as having a NCO and “that he couldn’t talk to April.” (Tr., p.165, Ls.4–6.) Ms. Lloyd denied that Mr. Barber threatened, harassed, obstructed, or intimidated her, but she agreed that she was influenced by his call. (Tr., p.167, Ls.10–24, p.171, Ls.18–22, p.172, Ls.18–25.) She did not attend the hearing referenced in the call. (Tr., p.166, Ls.4–7.)

Mr. Barber testified in his defense. He stated that he knew about the NCO from the initial appearance with the judge, but Sergeant White never served him and he never signed it. (Tr., p.174, L.18–p.175, L.25, p.181, L.22–p.182, L.11.) He testified that he never saw the NCO until the State provided it in discovery. (Tr., p.180, Ls.3–23.) He also stated that he called

Ms. Lloyd on October 23 because he was “trying to, you know, make that phone call before I was served with” the NCO. (Tr., p.176, Ls.1–9.) He also denied trying to influence or persuade her not to attend the hearing. (Tr., p.176, L.25–p.177, L.2, p.178, Ls.2–22.) On cross-examination, Mr. Barber agreed that it looked like his signature on State’s Exhibit 1, but he believed that it was “a copy.” (Tr., p.183, Ls.16–21.)

After Mr. Barber’s testimony, he moved again to admit Defendant’s Exhibit D. (Tr., p.187, Ls.5–6.) The State objected “for the same basis we discussed in the sidebar.” (Tr., p.187, Ls.7–8.) The district court had the following exchange with Mr. Barber:

THE COURT: As I understand the record, Mr. Barber, that hasn’t been disclosed as a potential exhibit.

THE DEFENDANT: We used it already.

THE COURT: Well, you can ask questions about it. That was perfectly appropriate. But whether to use it as an exhibit or not that’s not been disclosed is problematic.

THE DEFENDANT: They disclosed it.

THE COURT: Well, it’s different between being a discovery document and a document identified as a potential exhibit.

(Tr., p.187, Ls.9–18.) The district court did not admit the exhibit. (*See* Tr., p.187, Ls.9–18.) The jury found Mr. Barber guilty of both offenses. (No. 46590 R., p.216.)

The district court sentenced Mr. Barber to five years, with two years fixed, for intimidation of a witness and 120 days with 120 days credit for time served for violation of a NCO. (No. 46590 R., pp.231–32.) Through post-conviction proceedings, Mr. Barber regained his appeal rights, and he filed a timely notice of appeal from the district court’s amended judgment of conviction. (R., pp.21, 23–24, 26–30.)

ISSUE

Did the district court abuse its discretion when it excluded Mr. Barber's exhibit on nondisclosure grounds even though the State showed no prejudice in its admission?

ARGUMENT

The District Court Abused Its Discretion When It Excluded Mr. Barber's Exhibit On Nondisclosure Grounds Even Though The State Showed No Prejudice In Its Admission

A. Introduction

Mr. Barber argues the district court abused its discretion by refusing to admit Defendant's Exhibit D because, even though he did not disclose it as a trial exhibit, the State established no prejudice by its admission. The State provided Defendant's Exhibit D to Mr. Barber in discovery, and it was simply an unsigned copy of the NCO already admitted in the trial. The district court did not apply the correct legal standards by failing to weigh Mr. Barber's right to a fair trial against the prejudice, if any, to the State. Therefore, Mr. Barber respectfully requests this Court vacate his judgment of conviction for the violation of a NCO and remand this case for a new trial on that charge.

B. Standard Of Review

When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of four essentials. Whether the trial 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.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018) (emphasis omitted).

C. The District Court Did Not Act Consistently With The Applicable Legal Standards When It Excluded Mr. Barber's Exhibit On Nondisclosure Grounds Without Weighing The State's Lack Of Prejudice Against Mr. Barber's Right To A Fair Trial

"The right to present a complete defense is rooted in the Confrontation Clause of the Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, and includes 'a meaningful opportunity to present a complete defense.'"

State v. Jones, 160 Idaho 449, 452 (2016) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). The right to present a complete defense is “subject to reasonable limitations,” however. *State v. Perry*, 139 Idaho 520, 523 (2003). “With the exercise of the defendant’s right to present evidence, the rules of procedure and evidence must be complied with to assure both fairness and reliability in the ascertainment of guilt or innocence.” *Id.* Accordingly, “[a] defendant has no right to present irrelevant evidence and even if evidence is relevant, it may be excluded in certain cases.” *Jones*, 160 Idaho at 452 (quoting *State v. Meister*, 148 Idaho 236, 241 (2009)).

While the defendant has a right to present evidence in his defense, “the State also has a legitimate interest in obtaining timely and complete discovery responses from a defendant.” *State v. Johnson*, 149 Idaho 259, 264 (Ct. App. 2010). Idaho Criminal Rule 16(c)(1) requires the defendant to disclose documents that the defendant intends to introduce a trial, upon the prosecutor’s written request. “To accommodate these competing interests” of the defendant’s constitutional right to a defense and the State’s interest in disclosure, “the trial court must weigh the prejudice to the State against the defendant’s right to a fair trial” when deciding on an appropriate sanction, if any, for a party’s failure to comply with a discovery request. *Johnson*, 149 Idaho at 264. “In addition to weighing the competing interests at stake, the trial court should consider whether less severe remedies would be sufficient for untimely disclosure” *Id.* (citations omitted). “The choice of an appropriate sanction, or whether to impose a sanction at all, for a party’s failure to comply with a discovery request or order is within the discretion of the trial court.” *State v. Wilson*, 158 Idaho 585, 588 (Ct. App. 2015).

In exercising this discretion, the district court must consider the prejudice to the State. “It is error for the trial court to exclude a witness based solely on late disclosure if there has been no showing of prejudice to the State.” *Johnson*, 149 Idaho at 264 (citing *State v. Lamphere*, 130

Idaho 630, 634 (1997)). In *Lamphere*, for example, the Court held the district court abused its discretion by excluding the defendant's witness for late disclosure because the district court failed "to analyze whether the State would suffer prejudice due to the late disclosure." 130 Idaho at 634. There,

the State did not show any prejudice, but simply stated an objection to the witness on the basis of late disclosure. In deciding this issue, the court merely stated: "[T]he State has not had ample notice of this witness, and I think the prejudice, even if it were relevant, is a burden that the State need not bear." The district court did not require the State to make any showing that it would have been prejudiced if [the witness] were allowed to testify.

Lamphere, 130 Idaho at 633–34. Likewise, in *State v. Harris*, the Court held the district court abused its discretion by excluding the defendant's witness as a sanction for nondisclosure because the district court "did not weigh any prejudice that might be suffered by the State against [the defendant's] right to a fair trial." 132 Idaho 843, 847 (1999). The Court of Appeals in *Johnson* came to a similar conclusion. 149 Idaho at 264–65. In *Johnson*, the Court of Appeals held the district court abused its discretion by excluding a witness because "[t]he record does not disclose that the district court conducted the required balancing of the prejudice to the State against [defendant's] right to a fair trial or considered whether other measures, such as a brief continuance . . . , would have mitigated any prejudice." *Id.* at 265.

As in *Johnson*, *Harris*, and *Lamphere*, the district court here did not apply the correct legal standards when it failed to consider or balance any prejudice to the State in excluding Defendant's Exhibit D. The State never claimed any alleged prejudice during either discussion when Mr. Barber tried to admit Defendant's Exhibit D. (Tr., p.135, L.11–p.138, L.14; p.187, Ls.5–18.) The State's silence in asserting any prejudice is not surprising given that the State provided this document to Mr. Barber in discovery. The State clearly had notice of this document and its contents. Like *Lamphere*, the State "simply" objected on the nondisclosure basis. 130

Idaho at 633. Moreover, the district court never inquired with the State on any alleged prejudice or weighed that in its exclusion of the exhibit. The district court chose the harsh sanction of exclusion without examining any less severe remedies, such as a brief recess to allow the State to review the document. Accordingly, Mr. Barber maintains the district court did not apply the correct legal standards and thus abused its discretion by deciding to exclude Defendant's Exhibit D "based solely on late disclosure if there has been no showing prejudice to the State." *Johnson*, 149 Idaho at 264.

Finally, the State will be unable to prove, beyond a reasonable doubt, that the district court's discretionary error was harmless. *See State v. Garcia*, No.46253, 462 P.3d 1125, 1137–40 (2020) (clarifying harmless error standard and applying it to evidentiary error). Mr. Barber's defense to the charge of the violation of a NCO was that, while he may have known about the NCO from the judge, Sergeant White did not serve him with the NCO, and his signature was added after the fact. (*See Tr.*, p.218, L.217–p.220, L.6 (Mr. Barber's closing argument on violation of NCO charge, including discussion on discrepancies between State's Exhibit 1 and refused Defendant's Exhibit D.); *see also State v. Hochrein*, 154 Idaho 993, 999 (Ct. App. 2013) (recognizing that a NCO is only effective "if served on or signed by the defendant" and the State must prove the defendant had notice of the NCO as an element of the offense). Defendant's Exhibit D was an unsigned copy of the NCO with checked boxes indicating copies were sent to various parties. (*Tr.*, p.136, Ls.14–19; p.138, L.23–p.142, L.6.) This evidence was relevant to Mr. Barber's defense and could have supported his theory. Therefore, the State will be unable to establish the exclusion of this evidence did not contribute to the jury's verdict.

CONCLUSION

Mr. Barber respectfully requests this Court vacate his conviction of conviction for the violation of a NCO and remand this case for a new trial on that charge.

DATED this 30th day of June, 2020.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2020, I caused a true and correct copy of the foregoing APPELLANT’S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

JCS/eas