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

STATE OF IDAHO,	)	
	)	**No. 47557-2019**
Plaintiff-Respondent,	)	
	)	**Bonneville County Case No.**
v.	)	**CR-2017-11589**
	)	
JESSE STEPHEN BARBER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jesse Stephen Barber was convicted at trial of intimidation of a witness and violation of a no-contact order. On appeal, he challenges his conviction for violation of a no-contact order.

Statement Of Facts And Course Of Proceedings

The following facts are taken from testimony presented at trial in regard to Barber's conviction for violation of a no-contact order.

Sergeant Theresa White was working at the Bonneville County Jail on October 23, 2017. (Tr., p.120, L.14 – p.121, L.21; p.122, Ls.5-8.[1]) On that day, Barber had an initial court appearance, and afterwards, Sergeant White received a no-contact order, relating to Barber, from a booking clerk who printed it off from the computer system. (Tr., p. 124, L.20 – p.125, L.16.) Upon receiving no-contact orders, Sergeant White would "take it to the individual and have – let them know who they are not to have contact with, that person's address, that they are not to go to that address, and let them know that there'll be another hearing on it, but this is their initial with an expiration date on it, and then they sign it." (Tr., p.125, L.23 – p.126, L.2.) On this occasion, Barber was sitting in the hallway, and Sergeant White took the no-contact order to him, explained it, and had him sign and date it – both of which she watched him do. (Tr., p.127, Ls.5-14.) The officer then signed and dated the no-contact order herself, made a copy of it, and took it back and handed it to Barber. (Tr., p.127, Ls.15-21; p.128, Ls.18-20.)

State's Exhibit 1, admitted into evidence, is a true and correct copy of the no-contact order Sergeant White handed to Barber on October 23, 2017, which he signed in her presence, followed

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[1] Citation to the trial transcript is in accordance with the sequential numbering of pages in the electronic computer file entitled "Transcript Record.pdf."

by her signature attesting that "Mr. Barber signed it as well." (Tr., p.128, Ls.1-21; p.129, L.22 – p.130, L.10.)

The signed no-contact order identified the "protected person" as April Kay Lloyd, and read in relevant part:

> This COURT, having personal and subject matter jurisdiction, finds that a no contact order is appropriate and HEREBY ORDERS THAT, with regard to the protected person(s) named below, YOU must not engage in any of the following conduct:
>
> Do not contact or attempt to contact, either personally or through another person, the protected persons named below *in any manner, including*: 1) *do not communicate* in person or in writing or *through any electronic means, including telephone*, email, text, through social networking, or facsimile 2) do not harass, stalk, threaten, use, attempt to use or threaten use of physical force, engage in any other conduct that would place the protected person(s) in reasonable fear of bodily injury 3) do not knowingly remain within 900 feet of the protected person(s). However, you may attend court proceedings involving you and the protected person(s), and you may communicate through attorneys about legal issues involving you and the protected person(s).

(46590 St. Ex. 1, p.1 (underlining original, italics added).[2])

Lieutenant Ed Vitacolonna of the Bonneville County Sheriff's Office worked in the jail as the main jail operations lieutenant, making sure established policies and procedures were followed, including the "Telmate" phone system available to inmates. (Tr., p.144, Ls.4 – p.145, L.19.) Inmates' "voice biometrics" are used to create unique "A" numbers, from which Telmate accounts are made. (Tr., p.146, Ls.6-23.) Phone calls through the Telmate system are recorded and maintained on the Telmate website (on the cloud), where Lieutenant Vitacolonna had access to

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[2] Because Barber's post-conviction case resulted in an order that an Amended Judgment of Conviction be filed to allow him to appeal from "the Judgment of Conviction in this matter[,]" the exhibits from that criminal proceeding should be deemed part of the appellate record in this appeal, despite different appeal case numbers. (See Limited Clerk's Record, p.21.) However, to be certain of their consideration, the state is contemporaneously filing a motion to augment the record with the exhibits from the underlying criminal trial.

them. (Tr., p.147, Ls. 10-21.) The system records who makes the call, and the date and time the calls are initiated. (Tr., p.148, Ls.2-12.)

Bonneville County Sheriff's Detective Elena Medrano was assigned to investigate the case against Barber, and verified that the no-contact order, State's Exhibit 1, ordered Barber to not have contact with April Lloyd. (Tr., p.153, L.16 – p.154, L.11; p.155, L.13 – p.156, L.20.) The no-contact order prohibited "any contact whatsoever. That means phone call, physical contact, third-party mail, any contact." (Tr., p.156, Ls.23-25.) Detective Medrano listened to a recorded Telmate phone call from Barber to April Lloyd that occurred on October 23, 2017 at 5:59 pm. (Tr., p.157, Ls.6-23; p.157, L.24 – p.158, L.10.) The detective recognized Barber's and April Lloyd's voices from prior phone calls they made and personal interactions she had with them. (Tr., p.158, Ls.11-18.) State's Exhibit 2 is a true and correct copy of a portion of the phone call Detective Medrano heard on October 23, 2017, and was admitted into evidence. (Tr., p.159, L.11 – p.160, L.7.)

Barber was April Lloyd's boyfriend in October 2017, and she was aware there was a no-contact order issued on Barber involving her. (Tr., p.162, L.23 – p.163, L.24.) On October 23, 2017, Ms. Lloyd received a phone call from Barber through the Telmate system, and at the beginning of the call, the caller was identified as Jesse. (Tr., p.164, L.12 – p.165, L.2.) Barber referred to Ms. Lloyd in the third person, which is when she knew he was pretending to be someone else. (Tr., p.165, Ls.6-17.) Barber told Ms. Lloyd that if she did not show up for court, he would be let go, and he made a few other statements which she understood as meaning that he wanted her to "not go" to his court date set for November 2017. (Tr., p.166, Ls.11-22.) Ms. Lloyd told Barber she would not go to court that day, and she did not. (Tr., p.166, L.23 - p.167, L.6.)

The state charged Barber with intimidation of a witness (felony) and violation of a no-contact order (misdemeanor), and a jury convicted him of both offenses. (46590 R., pp.121-123,

214, 216.[3]) The district court sentenced Barber to five years, with two years fixed, for intimidation of a witness, and 120 days for violation of a no contact order, concurrent. (46590 R., pp.222, 231-233.) Barber filed a Rule 35 motion for reduction of his sentence, which was denied. (46590 R., pp.227-228, 235-236.) After Barber filed a timely appeal from that ruling, the Idaho Court of Appeals affirmed the denial of his Rule 35 motion. (46590 R., pp.237-240); State v. Barber, Docket No. 46590 (May 20, 2019) (unpublished).

Barber filed a petition for post-conviction relief that was granted, and the post-conviction court ordered that he "be given an opportunity to appeal the Judgment of Conviction in this matter." (Limited R., p.21.) Pursuant to that order, the district court entered an Amended Judgment of Conviction (Limited R., pp.23-25), from which Barber filed a timely appeal (Limited R., pp.26-30).

[3] On November 14, 2019, the Idaho Supreme Court ordered the record on appeal to be augmented with the Clerk's Record and Reporter's Transcripts from Idaho Supreme Court Case No. 46590-2019, the initial appeal from the underlying criminal proceeding.

ISSUE

Barber states the issue on appeal as:

> 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?

(Appellant's brief, p.5.)

The state rephrases the issue on appeal as:

Has Barber failed to show the district court committed reversible error by denying his motion to admit into evidence an unsigned version of his no-contact order?

ARGUMENT

Barber Has Failed To Show The District Court Committed Reversible Error By Denying His Motion To Admit Into Evidence An Unsigned Version Of His No-Contact Order

A. Introduction

At trial, during re-cross examination of Bonneville County Jail Sergeant Theresa White, Barber sought to introduce into evidence an unsigned version of his no-contact order, arguing he was entitled to do so because the state disclosed the document to him through discovery. (Tr., p.120, Ls.14-21; p.136, L.1 – p.138, L.9.) After considering Barber's argument and the state's assertion that the document was inadmissible because Barber failed to disclose it as an exhibit to be admitted at trial (Tr., p.132, Ls.1-11; p.188, Ls.5-18), in response to the prosecutor's query of whether it was allowing Barber "to put that exhibit in?", the court said, "Not yet." (Tr., p.139, Ls.8-10.) Although the court allowed Barber to question Sergeant White extensively about the unsigned no-contact order, and to testify about it himself, he did not re-offer the document into evidence until after he testified, again claiming it was admissible because the state disclosed it in discovery. (Tr., p.139, L.19 – p.141, L.23; p.180, L.25 – p.182, L.24; p.188, Ls.5-15.) The court responded, "it's different between being a discovery document and a document identified as a potential exhibit." (Tr., p.188, Ls.16-18.) No further discussion was held in regard to Barber's unsigned no-contact order.

On appeal, Barber contends "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 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." (Appellant's brief, p.6.) Even assuming the court erred by not expressly weighing the

prejudice to the state against Barber's right to a fair trial, such error was harmless because Barber was allowed to question Sergeant White at length about the no-contact order.

B. Standard Of Review

"This Court reviews challenges to a trial court's evidentiary rulings under the abuse of discretion standard." Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 50, 995 P.2d 816, 820 (2000). "Trial courts maintain broad discretion in admitting and excluding evidence." State v. Weigle, 165 Idaho 482, 487, 447 P.3d 930, 935 (2019).

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected …." I.R.E. 103(a). See also I.C.R. 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). "The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even with[] the admission of the [proffered] evidence." State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (explanations added) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)).

C. Any Error Was Harmless

The district court denied Barber's motion after considering (1) Barber's argument that the state's discovery disclosure automatically made the document admissible at trial (Tr., p.136, L.1 – p.138, L.9), (2) the state's assertion that the document was inadmissible because Barber failed to disclose it as an exhibit to be admitted at trial (Tr., p.132, Ls.1-11; p.188, Ls.5-18); and (3) the court's observation that Barber's motion was not made in the proper sequence of presenting trial testimony and evidence (Tr., p.138, L.14 – p.139, L.6). Inasmuch as there is no authority to support Barber's "automatic admissibility" claim, and because Barber renewed his motion to admit the no-

contact order at a proper time during trial (i.e., at the end of his testimony), the only other considered basis for the district court's denial of Barber's motion is that he failed to disclose it under I.C.R. 16(c)(1)(C) as a document to be admitted at trial.[4] As Barber points out, the court did not engage in the required weighing of prejudice to the state against Barber's right to a fair trial. See State v. Lamphere, 130 Idaho 630, 633-634, 945 P.2d 1, 4-5 (1997); State v. Miller, 113 Idaho 454, 457, 988 P.2d 680, 683 (1999).

Under I.C.R. 52, "if there is an incorrect ruling regarding evidence, this Court will grant relief on appeal only if the error affects a substantial right of one of the parties." State v. Joy, 155 Idaho 1, 6, 304 P.3d 276, 281 (2013) (quotation omitted). See also State v. Watkins, 148 Idaho 418, 420, 224 P.3d 485, 487 (2009). "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. Svelmoe, 160 Idaho 327, 335, 372 P.3d 382, 390 (2016) (quotation marks omitted). Any error in the district court's failure to weigh the prejudice to the state against Barber's right to a fair trial was harmless.

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[4] Idaho Criminal Rule 16 states in relevant part:

> **(c) Disclosure of Evidence by the Defendant on Written Request.** Except as otherwise provided in this rule, the defendant must, at any time following the filing of charges against the defendant, on written request by the prosecuting attorney, disclose the following information, evidence and material to the prosecuting attorney:
>
> (1) Documents and Tangible Objects. On written request of the prosecuting attorney, the defendant must permit the prosecuting attorney to inspect and copy or photograph:
>
> . . . .
>
> (C) documents,
>
> . . . ,
>
> or copies or portions of them, that are in the possession, custody or control of the defendant, and that the defendant intends to introduce in evidence at the trial.

First, the record shows that Barber failed to meet the foundation requirement for admitting Defense Exhibit D into evidence. During Barber's re-cross examination of Sergeant White, she testified about several things that were written on the document: the date and time stamped on the top, the service boxes that were checked, and a certification stating the document "is a full and correct copy of the original." (Tr., p.139, L.23 – p.141, L.7.) Barber testified merely that he received Defense Exhibit D on February 8, and that it had no signatures on it. (Tr., p.181, Ls.12-14; p.182, Ls.14-15.) Sergeant White testified that the document was not the one that was faxed to her. (Tr., p.140, Ls.16-17.) Because Barber did not show any connection between Sergeant White and Defense Exhibit D, her testimony, and his, about several entries on that document were not sufficient to lay a foundation for its admission. Nor did Barber show that the document met the foundational requirements for admission as a self-authenticating public record. (See I.R.E. 803(8) (public records hearsay exception); I.R.E. 902(4) (self-authenticating certified copy of public records); I.R.E. 1005 (copies of public records to prove content). Because Barber did not lay a sufficient foundation to admit Defense Exhibit D into evidence, any error in the district court's exclusion of that document is harmless.

Further, the district court's ruling was rendered harmless by Barber's cross-examination of Sergeant White regarding the contents of the unsigned no-contact order. Barber initially attempted to enter the unsigned no-contact order into evidence during his recross-examination of Sergeant White so he could argue that inconsistencies between the two no-contact orders show that he did not sign the no-contact order entered into evidence by the state (State's Exhibit 1). (Tr., p.137, L.11 – p.138, L.13.) The district court advised Barber that, although his attempt to introduce evidence during his recross-examination of Sergeant White was out of sequence with how trials are run, it would allow him to ask questions of the officer about the unsigned no-contact order.

(Tr., p.138, L.14 – p.139, L.6.) Through his questioning of Sergeant White, Barber established the following facts regarding the unsigned no-contact order ("Defendant's Exhibit D"):

> - it was stamped with a time of 3:23 PM at the top;
>
> - the certification date was "2-8 of '18";
>
> - the document did not come from the arraignment room;
>
> - the document was not faxed to Sergeant White;
>
> - *there were "five boxes that are checked.* One says "File," one says "Sheriff's Office," "Prosecutor," "Defense Attorney," and "Protected Person[;]"
>
> - the stamp under Barber's name bears a certification "that the above and foregoing is a full and correct copy of the original thereof, on file in my office[;]"
>
> - the date on the bottom of the exhibit says "October 23rd, 2017," which would have been officially from the court.

(Tr., p.139, L.23 - p.141, L.23 (emphasis added).) During his own testimony, Barber testified further about the unsigned no-contact order, as follows:

> And I never got anything, never got anything, and I told some people about it. Then I got a discovery response February 8th with this Exhibit B in it with no signatures on it.
>
> Q. Okay. When you say "no signatures," what are you referring to?
>
> A. I'm referring to the last page on the part where it says "Defendant's Signature" and "Served by Law Enforcement." There's nothing there. There's nothing on it. It's blank.
>
> Q. And you would have signed that?
>
> A. Well, I probably would have signed it if it was – if it [sic] was told to sign it, but it was never given to me to sign.

(Tr., p.182, Ls.14-23.)

Equipped with the information about the unsigned no-contact order, Barber argued at length during closing argument that the inconsistencies between the signed no-contact order

(State's Exhibit 1) and the unsigned no-contact order (proposed Exhibit D[5]) – especially the service boxes that were checked in the unsigned order but not in the signed order – showed he did not sign or have notice of any no-contact order,[6] to wit:

> The other thing about the no-contact order, when Ms. White was on the stand, I entered – I gave her an exhibit of the no-contact order that I received on February 8th. She read the date off to you on the official stamp that said February 8th. She also looked at the back page of it. There were no signatures on the back page of it. *However, there were – each box was checked on the back page of it.* And if I can have you refer back to State's Exhibit l.
>
> . . . .
>
> State's Exhibit l, which is a later copy, the date and time of the one that was given to Ms. White on the stand yesterday was October 23rd at 3:23 PM. That was the one that was sent to the jail for me to sign. *And she testified that the boxes were checked on the signature page without signatures.* The date at the top of this is October 24th, and the time is 8:44 AM. I don't know how many hours that is. That's like 12 plus 5, 17 hours later. Seventeen hours later with signatures on them from the date prior. *However, no boxes are checked. How do you uncheck a box? How do you uncheck a box? The order was sent to the jail with the boxes checked saying that it was delivered to the file, the sheriff's office, the prosecutor, defense attorney, and the protected person. And Ms. White testified that each of those boxes were checked. How do you send – how do you uncheck a box? All of a sudden, my signature's on it and the boxes are unchecked. That doesn't make any sense to me. It doesn't make any sense whatsoever.*

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[5] During trial, Barber also referred to the unsigned no-contact order as Exhibit B. (See, e.g., Tr., p.136, Ls.11-14 ("I want to enter State's Exhibit B, which is – I mean it's Defendant's Exhibit D, which is actually entered in evidence by the State.")

[6] The district court instructed the jury:

> In order for the Defendant to be guilty of violating a no-contact order, the State must prove each of the following: On or about October 23, 2017, in the State of Idaho, the Defendant, Jesse Stephen Barber, had been charged with a crime for which a no-contact order could issue; and a no-contact order had been issued by a Court forbidding the Defendant from having contact with April Lloyd; and the Defendant had contact with April Lloyd in violation of the order; *and before such contact, the Defendant had notice of the order*. If any of the above has not been proven beyond a reasonable doubt, you must find the Defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the Defendant guilty.

(Tr., p.201, Ls.5-17 (emphasis added).)

> Also, the date, the date of this true and correct copy stamped on the back page instead of the front page like the exhibit was that I gave to her, stamped on the front page, and she said that the date was 2-8-2018. The date on this one has 2-16-2018. Why would all of the sudden eight days later the boxes be unchecked and the signature be on a document that was produced October 23rd at 3:23 PM? That doesn't make any sense. Doesn't make any sense whatsoever. And I've been muddling this over in my mind the entire time. How did my signature get on this paper? I don't remember signing it. I never got a copy of it until February 8th. February 8th. And when they gave it to me, it's a blank copy with boxes checked on it. So you get a blank – I may be beating a dead horse right here, but you get a blank copy, no signatures on it, it's got Riddoch's signature on it, *and the boxes are checked.* That was supposed to be sent over to the jail for me to sign. *The boxes don't uncheck themselves. If I would have signed that copy, the boxes would have been checked on that copy.* But I didn't. How easy is it for someone to put a light under something and sign over the top of it? How easy is it for someone to make a Xerox copy of someone's signature? I think what happened here is a case that was intended to be prosecuted was unable to be prosecuted, so the State decided to make a case out of nothing. That's why we're here today. And I think that's what you're going to decide as well.

(Tr., p.219, L.4 – p.221, L.6 (emphasis added).)

Barber's closing argument shows he accomplished his main goal in regard to the unsigned no-contact order through his questioning of Sergeant White – establishing that it, unlike State's Exhibit 1, had all five service boxes checked. From that fact, Barber competently argued that the signature on State's Exhibit 1 was not made by him, and that he never received notice the no-contact order.[7] Barber has not shown indicated that there was any pertinent information printed on the unsigned no-contact order that he was prevented from orally presenting to the jury through Sergeant White's testimony. (See generally Appellant's brief, pp.6-10.) In short, the admission of the unsigned no-contact order would have been cumulative.

[7] One possible explanation for the discrepancies between the two no-contact orders is that, instead of one order (proposed Defense Exhibit D) having been fraudulently modified to add Barber's signature and other information, an entirely separate version of the order (State's Exhibit 1) was created and issued by the court after the first order was issued and circulated.

The improper exclusion of evidence at trial is harmless where such evidence would have been cumulative of evidence admitted without an objection. State v. Moses, 156 Idaho 855, 867, 332 P.3d 767, 779 (2014) (concluding that even though the district court erred in excluding certain testimony, the error was harmless because the testimony was "merely cumulative"); see Pacheco v. Safeco Ins. Co. of Am., 116 Idaho 794, 798, 780 P.2d 116, 120 (1989); State v. Woodbury, 127 Idaho 757, 761, 905 P.2d 1066, 1070 (Ct. App. 1995). The non-admission of the unsigned no-contact order could not have contributed to the verdict obtained because, as explained above, the jury was informed through Sergeant White's and Barber's testimony about the aspects of that document that were relevant to Barber's defense. The unsigned no-contact order did not convey anything to the jury that it did not already know. Therefore, the court's ruling was harmless because it did not affect any of Barber's substantial rights, see Joy, 155 Idaho at 6, 304 P.3d at 281, and the state has shown that, beyond a reasonable doubt, it did not contribute to the verdict, see Svelmoe, 160 Idaho at 335, 372 P.3d at 390.[8]

Based on the cumulative nature of the unsigned no-contact order, and the testimony presented at trial as set forth in the Statement of Facts herein, any error was necessarily harmless.

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[8] Even with full knowledge of the inconsistencies between the signed and unsigned no-contact orders, the jury's verdict clearly indicates that it found Barber had notice of the no-contact order admitted into evidence (State's Exhibit 1). (See n.3, supra.)

CONCLUSION

The state respectfully requests that this Court affirm Barber's convictions for intimidating a witness and violation of a no contact order.

DATED this 11th day of August, 2020.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of August, 2020, 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/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

JCM/dd