2-3-2017

State v. Diaz Appellant's Brief Dckt. 43870

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43870**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR 2015-7608**
v.	)	
	)	
AMANDA LUCY BELLE DIAZ,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

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

_____

HONORABLE DEBORAH A. BAIL
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Amanda Diaz contends two different officers offered improper testimony during her trial, one commenting on her decision to exercise her Fourth Amendment rights, and the other offering opinion testimony which spoke to the ultimate question the jury was being asked to decide. She asserts that each instance of improper testimony amounts to prosecutorial misconduct, and so, constitutes fundamental error. As such, this Court should vacate the verdict and judgment for driving under the influence of drugs and remand the case for further proceedings.

Statement of the Facts and Course of Proceedings

Officers pulled Ms. Diaz over after a third party reported her car had engaged in a reckless pattern of driving. (Tr., p.159, L.9 - p.160, L.20.)[1] However, the officer who initiated the stop testified he did not see any improper driving pattern as Ms. Diaz was stopped properly at a stoplight when he found her, and she immediately pulled over when he activated overhead his lights. (Tr., p.165, L.20 - p.166, L.12.) Nevertheless, based on the fact that Ms. Diaz was fidgety and talking rapidly and erratically, that officer suspected she was under the influence of something, and he asked Officer Moe to take over the investigation. (Tr., p.162, L.13 - p.163, L.22.)

Officer Moe decided to have Ms. Diaz perform the field sobriety tests (*hereinafter*, FSTs). (Tr., p.175, Ls.6-8.) Ms. Diaz told Officer Moe she suffered from

[1] While the transcripts in this case are provided in several independently bound and paginated volumes, unless otherwise indicated, all references to "Tr." in this brief refer to the volume containing the transcripts of the hearing on Ms. Diaz's motion to suppress and the jury trial.

several medical conditions, including fibromyalgia. (Tr., p.174, L.18 - p.178, L.22; *see also* Exhibit 1 (audio recording of Officer Moe's initial conversation with Ms. Diaz, in which she told him about her fibromyalgia at approximately 2:30).) Another officer acknowledged at trial that fibromyalgia could have affected her ability to perform some of the actions required in the FSTs adequately. (*See* Tr., p.285, L.16 - p.286, L.4.) Ms. Diaz also told Officer Moe she had prescriptions for several medications, including Oxycodone, Adderall, Zoloft, Navane, and Amitriptyline, but had not taken those medications for several days. (Tr., p.176, Ls.2-7.) Additionally, when Officer Moe asked about an apparent needle mark on her arm, she told him she had received treatment at a hospital a few days prior. (Tr., p.172, Ls.5-12.) During the FSTs, Ms. Diaz passed the horizontal nystagmus test, but failed the walk-and-turn and one-leg-stand tests. (Tr., p.182, Ls.13-16, p.191, Ls.10-11, p.195, Ls.7-8.) Ms. Diaz submitted to a breathalyzer test at that time, blowing .000 on both samples. (Tr., p.197, Ls.2-19.)

Based on the FSTs, Officer Moe suspected Ms. Diaz might be under the influence of drugs, and so, he asked Officer Carter to perform a drug recognition evaluation (*hereinafter*, DRE).[2] (Tr., p.198, Ls.14-23.) Officer Carter started the DRE at 12:30 a.m., almost two hours after he was asked to perform the DRE, and did not complete it until nearly 2 a.m. (*See* Tr., p.288, Ls.10-21.) He noted that Ms. Diaz continued to struggle on the psychophysical tests, such as the walk-and-turn and one-leg stand. (Tr., p.260, Ls.1-9, p.263, L.8 - p.265, L.5, p.266, Ls.1-25, p.267, Ls.7-22.) However, he admitted her performance on one of those tests, the modified Romberg,

[2] Officer Moe was present during the DRE. (Tr., p.199, Ls.13-16.)

though technically outside normal limits, “wasn’t a big influence” in his evaluation of her. (Tr., p.260, Ls.1-9, p.287, Ls.5-25.) Officer Carter also noted Ms. Diaz fell in the normal range on many of the physiological tests he performed as part of the DRE. (Tr., p.257, Ls.13-19 (all three pulse checks within normal limits), p.257, L.21 - p.258, L.1 (pupil dilation normal in normal light), p.258, Ls.4-13 (no unusual horizontal nystagmus), p.268, Ls.14-18 (body temperature within normal limits), p.269, Ls.3-6 (pupil dilation in a dark room with indirect light within normal limits), p.269, Ls.15-16 (pupil reaction to direct light in a dark room normal), p.269, Ls.22-25 (noting nothing of concern in her nose or mouth); *but see* Tr., p.259, Ls.7-24 (eyes unable to cross/converge), p.268, Ls.13-14 (low blood pressure), p.269, Ls.11-12 (seeing no rebound dilation in the dark room, direct light test).) Ultimately, Officer Carter testified at trial that it was his opinion that Ms. Diaz “was impaired while she was operating that vehicle.” (Tr., p.276, Ls.21-22.)

Officer Moe testified that the officers needed to verify the DRE conclusions by testing a blood or urine sample. (Tr., p.200, Ls.16-24.) Ms. Diaz agreed to provide a urine sample, but, as no female officers were available to take that sample, she agreed to provide the sample at the jail. (R., p.55.) However, when talking about that decision at trial, Officer Moe also told the jury, “There was a discussion of whether she would submit to a blood draw having Meridian Fire and Paramedics come and take a blood sample from her. She did not consent to that, but she did agree to provide a sample at the jail.” (Tr., p.201, Ls.14-17.)

On the way to the jail, Ms. Diaz passed out, and Officer Moe had her taken to the hospital for evaluation. (R., p.55.) At the hospital, Ms. Diaz was asked to provide the

urine sample. (R., p.55.) She attempted to do so, but was unable to provide a sufficient quantity. (R., p.55.) Officers told her she would be catheterized if she did not give a proper sample, but Ms. Diaz "screamed that she did not want to be catheterized," primarily due to the fact that she had been the victim of sexual assaults in the past. (R., p.55.) Working in concert with law enforcement, hospital staff proceeded to forcibly catheterized Ms. Diaz, collecting at least one sample of her urine.[3] (R., pp.55-56.) Both the State lab and the hospital lab tested Ms. Diaz's urine. (*See, e.g.,* R., pp.74-75.)

At Ms. Diaz's motion, the district court suppressed the results from the State lab's test as the product of an unlawful search. (R., pp.54-58.) However, the district court granted the State's motion to present the hospital's test results during the trial.[4] (Tr., p.314, L.18 - p.315, L.6; *see* Exhibits, p.12.) The hospital's test results, described as "preliminary" and "presumptive," indicated the presence of various substances, but did not indicate in what quantity those substances were present. (*See* Exhibits, p.12; Tr., p.338, L.21 - p.339, L.1.)

[3] According to a hospital nurse, she only took one sample with hospital equipment and sent that sample to the hospital lab. (Tr., p.298, Ls.8-23, p.321, L.11 - p.322, L.10.) However, as the district court found in regard to Ms. Diaz's motion to suppress, a urine sample had also been collected in an evidence kit provided by the officers. (R., pp.55-56.) The nurse could not account for how the State got a sample of Ms. Diaz's urine. (Tr., p.302, L.15 - p.303, L.8.) As defense counsel argued in response to the State's motion to admit the hospital test results, "It's clear from my review of the medical records that only one catheter was done." (11/2/15 Tr., p.11, Ls.10-11; *see also* 11/2/15 Tr., p.8, Ls.3-6 (the prosecutor noting "It wasn't documented in the medical records who it was that took the State sample.").)

[4] There was no argument that the hospital test results should also be suppressed as a product of an unlawful search. (*See generally* R; *see* R., pp.95-97 (only challenging the sufficiency of the foundation evidence offered for admitting those results); Tr., p.313, L.17 - p.314, L.17 (same).)

A jury ultimately found Ms. Diaz guilty of driving while under the influence of drugs.[5] (R., p.122.) The district court imposed a unified sentence of fifteen years, with three years fixed, and retained jurisdiction. (R., pp.125-27.) Ms. Diaz filed a Notice of Appeal timely from the Judgment of conviction. (R., pp.130-32.)

[5] The jury also found Ms. Diaz guilty of a related misdemeanor charge for driving without privileges. (R., p.123.) Additionally, after the jury returned its verdict, Ms. Diaz admitted to two different alleged sentencing enhancements. (*See generally* Tr., pp.394-400.)

ISSUE

Whether Officer Moe and Officer Carter offered improper testimony which constitutes prosecutorial misconduct.

ARGUMENT

Officer Moe And Officer Carter Offered Improper Testimony Which Constitutes Prosecutorial Misconduct

A. Standard Of Review

When an error was not objected-to in the district court, the appellate courts will only review it for fundamental error. *State v. Perry*, 150 Idaho 209, 226 (2010). To show fundamental error, the defendant must show that one of her unwaived constitutional rights was violated, that the violation is clear from the record, and that there is a reasonable possibility the error affected the outcome of the trial. *Id*.

Defendants have a constitutional right to a fair trial and due process therein. U.S. CONST. amends. V, XIV; IDAHO CONST. art. I, § 13. Prosecutorial misconduct in the form of eliciting improper testimony can deprive the defendant of those rights. *See, e.g., State v. Christiansen*, 144 Idaho 463, 469 (2007).

B. Officer Moe's Impermissible Comment On Ms. Diaz's Exercise Of Her Fourth Amendment Right To Refuse To Consent To A Blood Draw Constituted Prosecutorial Misconduct

Although Officer Moe explained the DRE could be verified by a test of either the suspect's urine or blood (Tr., p.200, Ls.16-24), it was clear that the State intended to use the tests of Ms. Diaz's urine to meet that requirement in this case. (*See, e.g.,* R., pp.74-75 (the State's motion to admit the hospital test of Ms. Diaz's urine after the State lab tests of Ms. Diaz's urine had been declared inadmissible).) In fact, there was no evidence that a blood test was ever performed. (*See generally* R.) As such, there was no need to get into anything about a potential blood test during Ms. Diaz's trial. Nevertheless, when asked about his discussion with Ms. Diaz in regard to the

procedure they would use to collect her urine sample, Officer Moe told the jury: "There was a discussion of whether she would submit to a blood draw having Meridian Fire and Paramedics come and take a blood sample from her. She did not consent to that, but she did agree to provide a sample at the jail." (Tr., p.201, Ls.14-17.) The comment about Ms. Diaz's refusal to submit to a blood draw was a gratuitous and prejudicial comment on Ms. Diaz's decision to exercise her Fourth Amendment rights.[6]

The Idaho Supreme Court has held that eliciting testimony about the defendant's exercise of her Fourth Amendment rights constitutes fundamental error. *Christiansen*, 144 Idaho at 470-71 (cross-applying the rule which developed in regard to violations of the Fifth Amendment by commenting on the defendant's silence). The prohibition against commenting on a defendant's exercise of her rights applies equally to police officers and prosecutors. *State v. Ellington*, 151 Idaho 53, 61 (2011) ("As a representative of the State, [the officer] had the same duty as the prosecutor not to improperly comment on Mr. Ellington's silence.") As such, "when an officer of the State gives any unsolicited testimony that is gratuitous and prejudicial to the defendant, that testimony will be imputed to the State for purposes of determining prosecutorial misconduct." *Id*. Therefore, under the first two prongs of *Perry*, Officer Moe's testimony about Ms. Diaz's exercise of her Fourth Amendment right to not consent to a blood draw violated one of her unwaived constitutional rights and that error is clear from the record. *Cf. Christiansen*, 144 Idaho at 471.

[6] Blood draws are searches under the Fourth Amendment. *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1558 (2013). As such, a defendant has the right to refuse to consent to such a search. *See, e.g., State v. Halseth*, 157 Idaho 643, 646 (2014).

The only remaining question under *Perry* is whether there was a reasonable possibility that error affected the outcome of the trial. There was such a possibility in this case. The only purpose Officer Moe's improper testimony could serve was to infer a consciousness of guilt. *Cf. Christiansen*, 144 Idaho at 470-71 (noting the State conceded that the sole purpose in eliciting such testimony in that case was to show consciousness of guilt). In this case, the jury had already heard Ms. Diaz had consented to take a breathalyzer, which had come back negative. (Tr., p.197, Ls.16-17.) It had also heard that she had also agreed to provide a urine sample. (*See* Tr., p.201, Ls.17-18.) In fact, Officer Carter testified that Ms. Diaz had been generally cooperative in their investigation. (*See, e.g.,* Tr., p.291, Ls.11-15.) However, with Officer Moe's improper comment, the jury now heard that, despite her cooperation and her trying to show her innocence on those other tests, Ms. Diaz nevertheless refused to submit to a blood draw. Thus, the jurors could have inferred she did not want officers to test her blood because it would show she was presently under the influence of some drug.

The fact that the jury could infer a consciousness of guilt from Officer Moe's testimony is important because the State's case otherwise hinged on the DRE and the hospital test results showing she was impaired while she was driving, and there were serious questions as to whether either of those evaluations actually showed that. For example, Ms. Diaz presented within normal limits on most of the physiological tests conducted during the DRE. (*See generally* Tr., pp.257-269.) And while she did not pass the psychophysical tests, as Officer Carter admitted, Ms. Diaz's poor performance on those tests could have been attributable to her medical conditions, such as her

fibromyalgia. (*See* Tr., p.285, L.16 - p.286, L.4.) In fact, Officer Carter testified he did not give particular weight to Ms. Diaz's failure on one of those tests, the modified Romberg. (Tr., p.287, Ls.5-25.) Thus, based on the testimony given at trial, the evidence from the DRE showing that Ms. Diaz was actually impaired while she had been driving that night was questionable at best.

The hospital test results have similar issues. Notably, they represented only a "preliminary" or "presumptive" finding, and so, did not indicate the quantity of the substances present. (Exhibits, p.12, Tr., p.338, L.21 - p.339, L.1.) Therefore, that test could have been identifying trace amounts of substances which Ms. Diaz had ingested hours, or even days, before. Given that Ms. Diaz had told officers she had taken containing those substances a few days prior, it would not be surprising to see traces of those substances in her urine, but their presence there would not show she was actually impaired while she had been driving on the night in question. Thus, the connection between the hospital test results and the criminal charge in this case is also tenuous.

As the Idaho Supreme Court indicated in *Christiansen*, when these sort of questions about the evidence exist, comments on the defendant's exercise of her constitutional rights for the purpose of inferring consciousness of guilt is prejudicial. Specifically, the *Christiansen* Court explained: "The evidence was uncontradicted that the fire was caused by arson and that Christiansen was the only person who had access to the premises at the time of the fire. *If the evidence of Christiansen's guilt were less clear-cut, we would vacate the judgment because of the prosecuting attorney's misconduct*." *Christiansen*, 144 Idaho at 471 (emphasis added). Since the other evidence of Ms. Diaz's impairment was far less clear-cut than the evidence in

Christiansen, there is a reasonable possibility that Officer Moe's improper comment about Ms. Diaz exercise of her Fourth Amendment right prejudiced her, that it affected the jury's decision to overlook the problems in the DRE and hospital test results and convict Ms. Diaz. Therefore, as the *Christiansen* Court indicated, the judgment of conviction should be vacated because of that misconduct.

C. Officer Carter's Impermissible Opinion Testimony, Which Invaded The Province Of The Jury By Speaking To The Ultimate Issue In The Case, Constituted Prosecutorial Misconduct

At the end of his testimony, the prosecutor asked Officer Carter, "[W]hat if any opinion were you able to form about whether she was impaired?" (Tr., p.275, Ls.24-25.) Officer Carter responded, "I came to the determination that she was impaired while she was operating that vehicle." (Tr., p.276, Ls.21-22.) Admittedly, an expert can, based on his observation of a person's performance on tests such as those given during a DRE, give an opinion that the person was under the influence of drugs. *See, e.g., State v. Gleason*, 123 Idaho 623, 66 (1992); *State v. Corwin*, 147 Idaho 893, 896-97 (Ct. App. 2009). However, that is not what Officer Carter did in this case. Instead, he offered the additional opinion that Ms. Diaz "was impaired *while she was operating that vehicle*." (Tr., p.276, Ls.21-22 (emphasis added).) That sort of opinion is improper for two reasons.

First, an opinion which serves to evaluate the circumstances in the case, or in other words, weigh the evidence, and thus, "render the same conclusion the jury was asked to render by its verdict," is impermissible. *State v. Hester*, 114 Idaho 688, 696 (1988). In DUI cases, the question the jury is asked to decide is: "whether [the defendant] was or was not guilty of having driven an automobile while under the

influence." *Corwin*, 147 Idaho at 896-97. Thus, while an officer can give his opinion that the defendant is under the influence, or that such impairment could affect his ability to drive safely, the question of whether the defendant was actually impaired *while driving* is a jury question. *See id*. Thus, Officer Carter's testimony on that point speaks to the question the jury is asked to answer and was based on his evaluation of the circumstances and weighing of the evidence. As such, it was not proper opinion testimony.

Second, "[e]xpert testimony that concerns conclusions or opinions that the average juror is qualified to draw from the facts utilizing the jurors' common sense and normal experience is inadmissible. This is because the function of the expert is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror." *Ellington*, 151 Idaho at 66 (internal quotations omitted). The determination of whether, based on the facts, the impairment Ms. Diaz was allegedly demonstrating in the DRE actually impaired her while she was driving is a determination well within the average juror's ability to make based on application of his or her common sense and normal experience. *Compare Ellington*, 151 Idaho at 66-67 (explaining that whether a person had control of his car, and so, could have avoided the accident in question, was a question the jury could answer without the assistance of an expert opinion). In fact, during *voir dire*, several potential jurors said they were capable of making precisely that sort of determination. (Tr., p.117, L.4 - p.121, L.19.) Because such a determination was not beyond the scope of what an average juror could draw, an opinion such as the one Officer Carter offered in this case constitutes "an inadmissible intrusion into the jury's domain." *Ellington*, 151 Idaho at 67.

Admission of this sort of improper opinion testimony may be raised as fundamental error because it amounts to prosecutorial misconduct which deprives the defendant of her due process right to a fair trial by a jury. The Idaho Supreme Court addressed a similar issue in *Ellington*. In that case, an officer who conducted an accident reconstruction in the case "expressed his opinion based on his specialization and knowledge in reconstructing the scene of the crash, that the scene indicated that Mr. Ellington was in 'full control' of his vehicle." *Ellington*, 151 Idaho at 65. Later, when asked about the speeds involved in "the accident," he testified "I'd like to define this as an incident, not an accident." *Id*. at 66. There were no objections at that time. *Id*. However, during redirect testimony, when the officer again testified "[t]here isn't an accident," the defense objected, arguing that it constituted improper opinion testimony. *Id*.

The *Ellington* Court held that the officer's testimony that there was "not an accident" was, in fact, improper opinion testimony because it spoke to a determination the average juror could make without the assistance of such testimony. *Id*. The Supreme Court added that, "[h]ad Mr. Ellington raised this issue as another instance of prosecutorial misconduct on appeal, we would have found, once again, that the State's conduct was improper." *Id*. at 67. That was so even though the opinion testimony had not been responsive to the question asked of the witness. *Id*. at 66-67 ("As an officer of the State, [the officer's] gratuitous and prejudicial response is imputed to the State, whether or not the State intended to elicit that response.")

Thus, *Ellington* indicates, even if it is not objected-to as misconduct, the presentation of this sort of improper testimony to the jury can still be raised on appeal.

See id. Furthermore, since that testimony was "an inadmissible intrusion into the jury's domain of determining the defendant's state of mind," that sort of misconduct would violate the defendant's due process right to a fair trial by a jury. *See id*. Therefore, under the first two prongs of *Perry*, Officer Carter's improper opinion testimony violated Ms. Diaz's unwaived constitutional rights to due process and a fair trial, and that error is clear from the face of the record.

There is also a reasonable possibility Officer Carter's improper opinion testimony affected the outcome of the trial under the third prong of *Perry*. As several courts, including the Idaho Court of Appeals, have recognized, it is reasonable to be concerned that jurors will defer to an improper expert opinion when weighing the evidence. *See, e.g., State v. Johnson*, 119 Idaho 852, 857 (Ct. App. 1991) ("In view of the deference that the jury may have held for the doctor's testimony," his improper opinion testimony about another witness's credibility should have been excluded); *United States v. Freeman*, 730 F.3d 590, 599 (2013) ("An agent presented to a jury with an aura of expertise and authority increased the risk that the jury will be swayed improperly by the agent's testimony, rather than rely on its own interpretation of the evidence.").[7]

[7] *See also United States v. Vera*, 770 F.3d 1232, 1243 (9th Cir. 2014) (vacating portions of a verdict based on the improperly-admitted expert testimony of a federal agent, even though the defendant had not contemporaneously objected to that testimony, because of the risk the jury deferred to that improper testimony); *United States v. Hampton*, 718 F.3d 978, 981-82, 984 (D.C. Cir. 2013) ("Judicial scrutiny of a law-enforcement witness's purported basis for lay opinion is especially important because of the risk that the jury will defer to the officer's superior knowledge of the case and past experiences with similar cases," and finding the reasonable possibility of such deference indicated the error in admitting that testimony was not harmless); *United States v. Grinage*, 390 F.3d 746, 751 (2nd Cir. 2004) (finding that, since the federal agent's testimony "went to the crux of the Government's case and the jury may well have afforded unusual authority to the agent, who was presented as having expertise, as well as knowledge beyond that available to the jury," the admission of the agent's improper opinion

That concern is present in this case since, as discussed in Section B, *supra*, there were as to what the DRE, upon which Officer Carter's opinion was based, actually showed in terms of Ms. Diaz's alleged impairment and whether it affected her ability to drive safely. Therefore, there is a reasonable possibility the jurors set aside their otherwise-reasonable doubts in that regard and relied on the Officer Carter's improper opinion testimony on that issue instead.

As such, there is a reasonable possibility Officer Carter's improper opinion testimony affected the outcome in this case, and thus, that misconduct was prejudicial to Ms. Diaz. Therefore, she should be afforded relief for that fundamental error as well.

CONCLUSION

Ms. Diaz respectfully requests this Court vacate the verdict and judgment of conviction in this case and remand this case for further proceedings.

DATED this * day of *, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

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testimony was not harmless); *cf. State v. Phillips*, 144 Idaho 82, 87 (Ct. App. 2007) (explaining that prosecutorial misconduct in the closing argument is problematic because prosecutors (like the officers in Ms. Diaz's case) "'occupy an official position, which necessarily leads jurors to give more credence to their statements, action and conduct in the course of the trial and in the presence of the jury than they will counsel for the accused.'") (quoting *State v. Irwin*, 9 Idaho 35, 43-44 (1903)); *Reynolds v. State*, 126 Idaho 24, 30 (Ct. App. 1994) ("Experts often possess special knowledge or training, giving their opinions of credibility great weight in the minds of the jury.")

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of February, 2017, 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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