

6-20-2017

## State v. Diaz Appellant's Reply Brief Dckt. 43870

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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

\_\_\_\_\_  
**REPLY 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**  
\_\_\_\_\_

**ERIC D. FREDERICKSEN**  
State Appellate Public Defender  
State of Idaho  
I.S.B. #6555

**BRIAN R. DICKSON**  
Deputy State Appellate Public Defender  
I.S.B. #8701  
322 E. Front Street, Suite 570  
Boise, Idaho 83702  
Phone: (208) 334-2712  
Fax: (208) 334-2985

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**ATTORNEYS FOR  
DEFENDANT-APPELLANT**

**ATTORNEY FOR  
PLAINTIFF-RESPONDENT**

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## STATEMENT OF THE CASE

### Nature of the Case

Amanda Diaz contends that the State elicited improper testimony from two different officers during her trial, and that each instance amounts to prosecutorial misconduct and fundamental error. The State responds, asserting that each of Ms. Diaz's claims fail because they do not violate unwaived constitutional rights, and are not prejudicial, per the analysis set forth in *State v. Perry*, 150 Idaho 209 (2010). The State's arguments are mistaken.

First, the elicited testimony improperly comments on Ms. Diaz's refusal to consent to a blood draw (*i.e.*, her refusal to waive the Fourth Amendment's protections with respect to a blood draw), and offers an improper opinion on the ultimate question of fact. Since both are improper points to make to a jury, eliciting each point amounts to prosecutorial misconduct, and that misconduct violates Ms. Diaz's constitutional rights to a fair trial and due process. Second, the State's evidence is not near as strong as the State seems to believe, and as a result, there is the reasonable possibility that each of these instances of misconduct affected the verdict by contributing to the jurors' decision to put aside otherwise-reasonable doubts and convict Ms. Diaz of driving under the influence of drugs or other intoxicating substances.

As such, both instances of improper testimony are prejudicial, and thus, are reversible fundamental errors. Therefore, this Court should vacate the verdict and judgment and remand this case for further proceedings.

### Statement of the Facts and Course of Proceedings

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

## 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. 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

The State contends that Ms. Diaz cannot show Officer Moe's testimony violates an unwaived constitutional right because she consented to a different type of search, which, in the State's view, means Ms. Diaz waived all her Fourth Amendment rights. (Resp. Br., pp.6-7.) That argument is wrong for several reasons.

First, consensual waiver of the Fourth Amendment rights is not an all-or-nothing proposition. Rather, the person may limit the scope of their consent (in other words, the scope of their waiver of their waiver of the Fourth Amendment's protections), and "the State must conform its search to the limitations placed upon the right granted by the consent." *State v. Tyler*, 153 Idaho 623, 627 (Ct. App. 2012). The scope of consent is measured by what a reasonable person would understand from the exchange between the suspect and the officer. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *Tyler*, 153 Idaho at 627. If the officers act beyond the scope of the person's consent, they violate that person's still-unwaived Fourth Amendment rights. *See, e.g., Tyler*, 153 Idaho at 627-28.

Based on the evidence in this case, a reasonable person would understand the scope of Ms. Diaz's consent to be limited to just providing a urine sample,<sup>1</sup> and that she specifically did not waive her Fourth Amendment rights in regard to a blood draw. As Officer Moe testified,

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<sup>1</sup> In fact, the district court found Ms. Diaz's consent to providing that sample to be particularly narrow, in that it did not even extend to allow a forceful extraction of the urine sample. (R., p.57.)

“There was a discussion of whether she would submit to a blood draw having Meridian Fire and Paramedics come take a blood sample from her. *She did not consent to that*, but did agree to provide a sample at the jail.” (Tr., p.201, Ls.14-17 (emphasis added); *see also* R., p.55 (the district court finding in regard to a motion to suppress that Ms. Diaz agreed to provide a urine sample at the jail).) Since she specifically refused to consent to a blood draw, the blood draw was not within the scope of her consent, and thus, she did not waive the Fourth Amendment’s protections vis-à-vis the blood draw. As a result, the comment on Ms. Diaz’s refusal to consent to a blood draw is a violation of her still-unwaived Fourth Amendment rights despite the fact that she gave limited consent to provide a urine sample. *See State v. Christiansen*, 144 Idaho 463, 470-71 (2007) (holding that commenting on a refusal to consent to a search is a violation of the Fourth Amendment).

Second, the State’s argument on the first prong of the *Perry* analysis is unpersuasive because it ignores the fact that Ms. Diaz is actually raising a claim of prosecutorial misconduct – that *eliciting* that improper comment was, itself, error. (*See* App. Br., p.7.) Prosecutorial misconduct, which includes eliciting (intentionally or otherwise) improper testimony, would violate the defendant’s constitutional rights to a fair trial and due process. *See, e.g., State v. Ellington*, 151 Idaho 53, 61 (2011). Therefore, it is more than just Ms. Diaz’s Fourth Amendment rights which are violated by Officer Moe’s improper testimony; her Fifth and Fourteenth Amendment rights are violated as well. For all those reasons, the first prong of the *Perry* analysis is satisfied in this regard – the error infringes on at least one of Ms. Diaz’s unwaived constitutional rights.

The State also contends that Ms. Diaz has failed to meet the third prong of the *Perry* analysis because she was just making a choice between two options, and so, “[t]here was no



implication, no inference that could be drawn” in regard to her guilt from her refusal to consent to the blood test. (Resp. Br., pp.7-8.) The State’s argument is belied by Officer Moe’s testimony. Specifically, Officer Moe testified he could not effectively collect a urine sample at the police station, and so, asked Ms. Diaz if she would consent to a blood draw instead. (Tr., p.200, L.16 - p.201, L.17.) After Ms. Diaz refused to consent to that search, she agreed to provide a urine sample at the jail. (Tr., p.201, Ls.17-22; R., p.55.) Thus, Ms. Diaz was not, as the State believes, simply presented with two options and asked to select one; rather, the two requests, though related, were chronologically distinct, and thus, independent, events. Therefore, there was an inference to be drawn from her independent refusal to consent to a blood test.

Regardless, the fact that Ms. Diaz agreed to provide the urine sample means there was no relevant reason to mention the blood test alternative at all. *Cf. State v. Kralovec*, 161 Idaho 569, \_\_\_, 388 P.3d 583, 587-88 (2017) (disapproving of admitting otherwise-inadmissible evidence just to complete the story or give context to the evidence). She had agreed to a viable method (which was, in fact, the preferred method)<sup>2</sup> by which the State could get the information it sought. Therefore, the only reason to mention her refusal to consent to the blood test was to get the jury thinking that Ms. Diaz was trying to hide something (*i.e.*, to infer her guilt). *Compare Christiansen*, 144 Idaho at 470 (finding fundamental error in a similar situation). Therefore, given the reasonable possibility that this particular line of questioning would illicit an improper comment on Ms. Diaz’s decision to not consent to the blood draw, from which the jurors might infer Ms. Diaz’s guilt, that misconduct was prejudicial under *Perry*. *Compare Ellington*, 151 Idaho at 61.

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<sup>2</sup> Officer Moe testified that, “[w]ithin the City of Meridian, more often than not, try to collect a urine sample” when conducting a DRE. (Tr., p.200, Ls.16-24.)

The State also contends that the comment about Ms. Diaz's refusal to consent to the blood draw would not have affected the verdict in this case because of the perceived strength of the other evidence it presented. (Resp. Br., p.8.) However, the State's case is not nearly as strong as it believes. The critical fact to remember is that the question was whether Ms. Diaz's ability to drive was *actually impaired* by drugs or intoxicating substances. (See R., pp.23-24.) The record reveals there are several points on which a juror may have had a reasonable doubt about the answer to that question.

For example, Ms. Diaz's performance on most of the physiological tests conducted during the DRE was within normal limits. (See generally Tr., pp.257-269.) As such, that evidence indicates her physical behavior was not actually being impaired by drugs or intoxicating substances. Furthermore, Ms. Diaz's poor performance on several of the psychophysical tests was not particularly telling in regard to whether Ms. Diaz's actions were influenced by drugs or intoxicating substances because, as Officer Carter admitted, that performance could have been attributable to her underlying medical conditions. (See Tr., p.285, L.16 - p.286, L.4, p.287, Ls.5-25.) Similarly, the hospital test results which indicated Ms. Diaz had drugs or intoxicating substances in her system were only "preliminary" and "presumptive," and so, the jurors could have harbored reasonable doubt about whether those results showed actual impairment, as opposed to the presence of trace amounts from hours or days prior. (See Exhibits, p.12; Tr., p.338, L.21 - p.339, L.1.)

The State glosses over all these weaknesses in arguing about the illusory strength of its case. (See Resp. Br., p.8.) In doing so, its argument runs contrary to the Idaho Supreme Court precedent on point, which explains that, when these sort of weaknesses exist in the State's case, there is a reasonable possibility that the inference of guilt from improper comments about the

defendant's refusal to consent to a search would affect the jurors' decision to overlook those reasonable doubts and convict her anyway. *See Christiansen*, 144 Idaho at 470-71 (explaining that, only because such weaknesses did not exist in that case, the improper comment was not prejudicial, but "[i]f the evidence of Christiansen's guilt were less cut, we would vacate the judgment because of the prosecuting attorney's misconduct"). Thus, because of those weaknesses in the State's case, there is a reasonable possibility that the prosecutor's misconduct in eliciting Officer Moe's improper comment on Ms. Diaz's refusal to consent to a blood draw affected the outcome in this case.

As a result, the prosecutorial misconduct of eliciting Officer Moe's improper testimony constitutes reversible fundamental error.

B. 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

The State's first argument in response to Ms. Diaz's claim about improperly eliciting Officer Carter's opinion is that she cannot raise that challenge as fundamental error because the underlying statement – Officer Carter's improper opinion – would have violated only a rule of evidence, not a constitutional right. (Resp. Br., pp.9-10.) However, as with the argument about Officer Moe's impermissible testimony, the State ignores the fact that Ms. Diaz has actually raised a claim of prosecutorial misconduct – that eliciting that improper testimony was, itself, erroneous. (*See App. Br.*, pp.11-15.) The Idaho Supreme Court has indicated this precise claim (eliciting improper opinion testimony from an officer) can be raised as prosecutorial misconduct on appeal:

Not only was his [the officer's] answer an inadmissible intrusion into the jury's domain . . . , it was also completely unsolicited and wholly unnecessary. 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. Had 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.

*Ellington*, 151 Idaho at 67.<sup>3</sup> Prosecutorial misconduct violates the defendant's constitutional rights to a fair trial and due process. *See, e.g., Christiansen*, 144 Idaho at 469. As such, even though the admission of Officer Carter's underlying opinion testimony may also violate the rules of evidence (which actually shows why it is improper testimony), analyzing the claim Ms. Diaz has raised in this appeal, rather than addressing the strawman the State has erected in its place, the error (prosecutorial misconduct) would violate at least one of Ms. Diaz's unwaived constitutional rights. Therefore, this argument satisfies the first prong of *Perry*.

As to the third prong of *Perry*, the State continues to contend that Ms. Diaz has not shown prejudice based on its erroneous belief in the strength of its case. (Resp. Br., pp.10-11.) However, as discussed in Section I, *supra*, the State's case is not nearly as strong as it believes. Furthermore, the State's argument ignores the more insidious problem which arises when the prosecutor elicits improper opinion testimony – that the jurors *will defer to* that improper opinion when weighing evidence. *See, e.g., State v. Johnson*, 119 Idaho 852, 857 (Ct. App. 1991). This is particularly true when the improper opinion testimony speaks to the precise point on which the jurors may be harboring reasonable doubts. (*See App. Br.*, p.14 n.7 (identifying numerous other courts which have recognized this problem with such improper testimony).) Therefore, the risk that the jurors would defer to Officer Carter's improper opinion, rather than conduct their own evaluation of the evidence, demonstrates that, regardless of the perceived strength of the State's

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<sup>3</sup> In *Ellington*, the admissibility of the underlying opinion testimony had been challenged by trial counsel. *See Ellington*, 151 Idaho at 66. However, there is no indication that Mr. Ellington's trial counsel also made a prosecutorial misconduct argument. *See generally id.* Therefore, it appears the Idaho Supreme Court was also acknowledging that this sort of prosecutorial misconduct issue could be raised as fundamental error. *See id.*

case, there is still a reasonable possibility that the prosecutorial misconduct in eliciting that improper opinion “affected the outcome at trial” by causing the jurors to not even evaluate the evidence, and defer to the improper opinion instead. *Perry*, 150 Idaho at 226 (summarizing the proper analysis on the third prong).

As noted *supra*, there are plenty of areas in which the jurors may have harbored reasonable doubt, such as the fact that Ms. Diaz was within normal limits on most of the physiological tests conducted during the DRE. (*See generally* Tr., pp.257-269.) And, notably, it was Officer Carter himself who admitted that Ms. Diaz’s poor performance on several of the psychophysical tests could be attributable to her medical conditions rather than to the influence of drugs or intoxicating substances. (Tr., p.285, L.16 - p.286, L.4, p.287, Ls.5-25.) With those weaknesses in the State’s case, the impact of Officer Carter’s improper opinion testimony is more pronounced – he is effectively asking the jurors to disregard the reasonable doubts they, like he, have about what Ms. Diaz’s performance on the individual parts of the DRE shows in regard to whether Ms. Diaz was actually impaired, and adopt his opinion that the tests showed she was impaired at the time she was driving the car instead. (*See* Tr., p.276, Ls.21-22.)

In fact, in offering that particular opinion – that Ms. Diaz was “impaired *while she was driving that vehicle*” (Tr., p.276, Ls.21-22 (emphasis added) – Officer Carter’s testimony went beyond what even a potentially-proper opinion could express because his opinion went to the ultimate question of fact. *See State v. Hester*, 114 Idaho 688, 696 (1988) (holding it is impermissible for a witness to opine about the ultimate conclusion the jury is being asked to consider); *compare State v. Corwin*, 147 Idaho 893, 896-97 (Ct. App. 2009) (holding there was no error where the DRE investigator only testified that the DRE showed the defendant was impaired because that witness did not go further and testify that the defendant was impaired

while he was driving). Therefore, the fact that Officer Carter's opinion was not an opinion about some side question, but rather, was an opinion about the central question which the jurors were being asked to evaluate, reinforces the conclusion that there is a reasonable possibility his improper testimony affected the outcome of the trial, and thus, was prejudicial.

As a result, the prosecutorial misconduct of eliciting Officer Carter's improper opinion testimony constitutes reversible fundamental error.

### 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 20<sup>th</sup> day of June, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20<sup>th</sup> day of June, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

AMANDA LUCY BELLE DIAZ  
FRANKLIN HOUSE  
1610 FRANKLIN ST  
BOISE ID 83702

DEBORAH A BAIL  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

BRIAN C MARX  
ADA COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BRD/eas