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State v. Neaderhiser Appellant's Brief Dckt. 48015

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

STATE OF IDAHO, Plaintiff/Respondent, vs. JIM EUGENE NEADERHISER, Defendant/Appellant.	)	Supreme Court No. 48015-2020 Ada County District Court Case No. CR01-18-19936

OPENING 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 THOMAS F. NEVILLE
District Judge

Dennis Benjamin
ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

ATTORNEYS FOR APPELLANT

Office of the Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-4534

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

II. STATEMENT OF THE CASE

A. *Nature of the Case*

Jim Neaderhiser asks this Court to vacate his conviction for the financial Exploitation of a Vulnerable Person. A new trial is required because a physician was permitted to testify at trial regarding an exhibit listing the alleged victim's mental and physical conditions even though the document and testimony were inadmissible hearsay.

B. *Procedural History and Statement of Facts*

1. Pre-trial proceedings

Mr. Neaderhiser was charged by Information with one count of Exploitation of a Vulnerable Adult, in violation of I.C. § 18-1505(3). R 30. The information alleged that Mr. Neaderhiser "on or between July 2013 and November 2014 . . . did with another, exploit Lee Tachman, a vulnerable adult, by taking money and/or property, where the monetary damages from such exploitation exceeds one thousand dollars[.]" R 31.

2. Trial proceedings

The other person referred to in the Information was Linda DeAnn Bassett. Mr. Neaderhiser is Ms. Bassett's boyfriend. Trial Transcript ("T") (Day 1) p. 193, l. 17-22. Ms. Bassett had taken care of her elderly grandfather, Lee Tachman, for about four years before she moved in with him as he began to need more care. T (Day 3) p. 131, l. 19 – p. 132, l. 2. On August 26, 2013, Mr. Tachman executed a durable power of attorney for finance, making Ms. Bassett his attorney in fact.

State's Exhibit 7. The "Power relating to Gift Transfers" section of the power of attorney stated:

> I empower my attorney-in-fact with the following authority with respect to gift transactions, whether the gift is to be made outright, in trust, in custodial account or otherwise, whether the object of the gift is located in the state or elsewhere:
>
> > 1. make gifts from any or all of the principal's real and personal property, and in the kinds or shares that the agent considers prudent for any purpose, including that the agent or a person whom the agent has a legal obligation to support when the gift is in full or partial satisfaction of that obligation may be the beneficiary of the gift;
> >
> > . . . .
> >
> > 4. do any other act or acts that the principal can do through an agent. with respect to any gift.

State's Exhibit 7, p. 12. At the same time, the "Limitations on Powers" section provided that:

> My Agent shall not exercise any of the powers for my Agent's own benefit or in satisfaction of a legal obligation of my Agent except and unless specifically provided for above.

Id., p. 13.

After a year of Ms. Bassett providing in-home care, Mr. Tachman moved to the Idaho State Veteran's Home on September 17, 2013. T (Day 3) p. 131, l. 19 – p. 132, l. 2; State's Exhibit 3. On October 1, 2013, Lee Tachman executed his Last Will and Testament. Defense Exhibit B. The main beneficiary of the will was Ms. Bassett. While the Tachman children received some specific items of personal property, Ms. Bassett received Mr. Tachman's home, all remaining personal property, and the residuary estate. Exhibit B.

Tambra Hunter is a medical social work who works at the Idaho Veteran's Home. T (Day 1) p. 179, l. 10-14. Her job there is to ensure "that a resident is safe; secure, their psycho-social issues are met." *Id.,* p. 180, l. 1-6. She has worked at the Veteran's Home for 15 years. *Id.,* l. 12-13. Mr. Tachman was one of the 50 or so residents she worked with. T (Day 1) p. 181, l. 1-23.

Mr. Neaderhiser would visit Mr. Tachman at the Veteran's Home. Ms. Hunter testified:

> Mr. Tachman would call him his friend. When Jim would come in, he would bring him Cheetos. He loved Cheetos. Mr. Tachman didn't get a lot of visitors, and to have someone come in and visit him he was always welcome.

Id, p. 194, l. 3. On two occasions Mr. Neaderhiser wanted Mr. Tachman to sign a document. On both occasions Mr. Neaderhiser "seemed aggressive" and "almost desperate" to get the document signed. *Id.* p. 197, l. 11-14. But, to her knowledge, Mr. Tackman never signed. *Id.,* p. 197, l. 25.

On November 14, 2014, Ms. Hunter wrote a letter. State's Exhibit 1. In it, she noted that Mr. Tachman "has a diagnosis of dementia, depressive disorder, myocardial infarc, hypoxemia, chronic airway obstruction and anorexia." *Id.* She then opined: "At this time he is no longer competent to handle his financial affairs independently and requires his sons to take over with his Power Attorney utilizing his best interest." *Id.* (verbatim). Two weeks later, on December 3, 2014, Mr. Tachman executed another financial power of attorney making two of his sons his attorneys in fact and purporting to revoke the August 26, 2013 document. Defense Exhibit A. Ms. Hunter testified that she believed Mr. Tachman was competent to

execute that power of attorney, even though she earlier wrote that he was not competent to handle his financial affairs. Compare: State's Exhibit 1 and *Id.*, p. 213, l. 5-8.

Ken Sheldon was an "adult protection agent for the State" of Idaho. *Id.* p. 216, l. 5-6. He "would determine whether an adult or an elderly adult . . . was a vulnerable adult." *Id.*, p. 216, l. 10-12. He met with Mr. Tachman on November 7, 2014. *Id.*, p. 221, l. 3-5, p. 233, l. 1. Based on that interview, he became concerned about Mr. Tachman and contacted law enforcement. *Id.*, p. 232, l. 11-18. Mr. Sheldon admitted he had no information about how Mr. Tachman presented during the time in 2013 when he executed the will and first power of attorney. *Id.*, p. 23, l. 17-23.

Detective Wade Spain started an investigation after receiving Mr. Sheldon's letter. He spoke to Ms. Bassett, Mr. Tachman, and Mr. Neaderhiser as part of the investigation. Mr. Neaderhiser voluntarily appeared at the police station and spoke to the detective. T (Day 2) p. 17, l.21-24. The interview was audio recorded. State's Exhibit 8. Mr. Neaderhiser provided copies of the will and power of attorney. *Id.*, p. 16, l. 6-16; State's Exhibit 7.

Mr. Neaderhiser admitted that he had been using Mr. Tachman's funds for his own purposes, including paying off his motorcycle loan. *Id*, p. 25, l. 1-9. He explained, however, that Mr. Tachman was a very charitable person and "that anything that was done was done either with the knowledge and permission of Mr. Tachman and/or Ms. Bassett, his granddaughter." *Id.*, p. 25, l. 18 – p. 26, l. 14. Mr.

Neaderhiser also told the detective that he and Ms. Bassett had used funds to pay for a trip to Las Vegas, and to help fund an automotive repair business he was starting. *Id.,* p. 27, l. 4 – p. 28, l. 24. There was also some remodeling done at Mr. Tachman's home, where Ms. Bassett was living. *Id.*, p. 40, l. 7 -p. 41, l. 15.

The detective reviewed multiple financial documents and then made a timeline setting forth the transactions above along with several others. State's Exhibit 16. The total of the financial transactions was well in excess of $1000. *Id.*, p. 104, l. 3.

The detective admitted that he did not meet Mr. Tachman until April 16, 2015 and had no idea what Mr. Tachman's mental state was when he executed the 2013 power of attorney and will. *Id.*, p. 107, l. 24; p. 113, l. 8-21.

Mr. Tachman's attending physician, Robert Smith, M.D., testified. T (Day 1) p. 240, l. 13. Dr. Smith began treating Mr. Tachman in February of 2014. *Id.*, pg. 240, ln. 13-16. During the doctor's testimony, Mr. Tachman's Admission Record from the Veteran's Home was offered into evidence. *Id.*, p. 245, l. 12-13; Exhibits p. 67-68 (State's Exhibit 3). The "Diagnosis Information" section for the exhibit noted 54 medical conditions. *Id.* The entries began upon admission on September 17, 2013, and 20 were made prior to Dr. Smith's attendance. State's Exhibit 3.

Dr. Smith testified to the contents of Exhibit 3, including all the entries made before he was the attending physician. Compare Exhibit 3 and T (Day 1) p. 258, l. 22 – p. 261, l. 5. Among them was an entry dated June 18, 2014, coded as "F03.90 Unspecified Dementia Without Behavioral Disturbance," and one dated September

27, 2016, coded "F01.50 Vascular Dementia without Behavioral Disturbances." *Id* There was also a notation of "adult failure to thrive," which was made at the time of his initial admission into the Veteran's Home. T (Day 1) p. 260, l. 24 – p. 261 l. 1.

Dr. Smith testified that Exhibit 3 was "not an unusual list for a gentleman in his mid 90s who required nursing home level care." *Id.,* p. 261, l. 15-17. During Dr. Smith's attendance from 2014 to 2017, the trend in Mr. Tachman's health was "overall decline" but the records did not "indicate that there was a rapid or abrupt change in his cognitive function during that date range." *Id.*, p. 262, l. 5-17.

Unlike Ms. Hunter, Mr. Sheldon, Dr. Smith, and Detective Spain, Linsey Thimsen, Mr. Tachman's great-granddaughter, did have knowledge of his mental condition in 2013. T (Day 3) p. 130, l. 17-19. She would see him "about every week or so accompanied by [her] mother." *Id.* At the time in 2013 when the power of attorney and will were executed, Mr. Tachman was in a good mental state. She testified:

> He was clear. Most days obviously there's always a slight decline as you get with age, but he was clear. Competent; most days he would crack jokes. Would ask me about college, what I was planning on doing with my life, my career, things that I was enjoying doing. He asked a lot about my golf and was just really warm at that time.

Id., p. 132, l. 12-19. She also testified to Mr. Tachman's close relationship with her mother, Ms. Bassett:

> It was a warm relationship. Since she was his caretaker for so long, they had developed a really close bond. He kind of saw her potential, and she was always there for him so they were very warm to each other.

Id., p. 134, l. 8-14. While Mr. Tachman began to go downhill in 2015-2016, those

problems were not present in 2013. *Id.*, 133, l. 1 -12.

Mr. Tachman died on December 31, 2017, prior to the trial. *Id.*, p. 132, l. 5. Ms. Thimsen was the executor of his estate. While the will was still in probate at the time of the trial, no one had contested the will. *Id.*, p. 134, l. 14 – p. 135, l. 14.

The jury found Mr. Neaderhiser guilty. R 1633.

3. Post-trial proceedings

By the time of sentencing, Mr. Tachman's estate had been probated and Ms. Bassett inherited the bulk of the estate under the terms of the will. No restitution was sought by the state as Ms. Bassett had inherited the residual estate. T (Sentencing) p. 18, l. 18 – p. 19, l. 3.

The court imposed a judgment of conviction. R 1656. Mr. Neaderhiser filed a timely Notice of Appeal. R 1661.

III. ISSUE PRESENTED ON APPEAL

Did the court abuse its discretion in admitting the Veteran's Home Admission Record (Exhibit 3) and permitting testimony from Dr. Smith about it when the document contained hearsay and was not admissible as a business record or as the underlying facts and data from which an expert opinion was derived?

IV. ARGUMENT

The Trial Court Abused its Discretion When it Admitted Exhibit 3, a List of Medical Diagnoses Created by Unknown Medical Coders Regarding Their Impressions of Doctor's Diagnoses and by Allowing Dr. Smith to Testify About it.

A. *Pertinent Facts*

The diagnoses in Exhibit 3 would have been made by a physician but "the

wording on some of them may have come from manuals . . . used by non-physicians who are trying to put the correct numbers to the diagnoses in question." T (Day 1) p. 245, ln. 4-11. Dr. Smith stated that he reviewed prior medical records when taking over a new patient. *Id.*, p. 240, l. 21 – p. 241, l. 3. He did not testify that he relied upon any of those pre-February 2014 diagnoses in forming an opinion about Mr. Tachman's medical condition.

Mr. Tachman objected to the admission of Exhibit 3 on several bases. First, the diagnoses not made by Dr. Smith were hearsay. Further, since Dr. Smith was a fact witness (there was no expert witness disclosure by the state) the evidence was not admissible for purposes of his expert opinion. Therefore, the evidence should be "limited to the diagnoses that Dr. Smith himself did." *Id.*, p. 247, l. 7 – p. 248, l. 3. To this, the state asserted that it was "not asking for an ultimate opinion related to something that he doesn't have first-hand knowledge of." *Id.*, p. 248, l. 19-22. At the same time, it asserted that "when it comes to expert disclosure . . . I'm asking the opinion of a trained physician who has had firsthand access to and opinions of a patient." *Id.*, p. 249, l. 5-11.

The court overruled the lack of disclosure under I.C.R. 16 objection. *Id.*, p. 249, l. 11-12. "I think the treating physician is certainly in a position to talk about his own diagnoses as part of his treatment without offering a separate opinion[.]" *Id.*, l. 11-16. As to the other diagnoses, the court merely noted that "those I think can be further described on your cross-examination." *Id.*, l. 17-23. It then overruled Mr. Tachman's objections and admitted State's Exhibit 3. *Id.*, p. 250, l. 8-9; p. 251, l.

13.

As noted above, Dr. Smith then testified to the exhibit's contents. Compare Exhibit 3 and T (Day 1) p. 258, l. 22 – p. 261, l. 5. This was reversible error,

B. *Standard of Review*

A trial court's determination as to the admissibility of evidence at trial is reviewed for an abuse of discretion. *State v. Zimmerman*, 121 Idaho 971, 973-74 (1992). This Court will conduct a multi-tiered inquiry to determine whether the lower court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion; (3) acted consistently with any legal standards applicable to the specific choices before it; and (4) reached its decision by an exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018).

C. *Why Relief Should be Granted*

1. Exhibit 3 and the testimony about pre-February 2014 diagnoses were inadmissible hearsay.

"Hearsay" means an out-of-court statement which "a party offers in evidence to prove the truth of the matter asserted in the statement." I.R.E. 801. Hearsay is not admissible unless an exception to this general rule applies. I.R.E. 802.

The out-of-court statements of the medical coders and/or doctors other than Dr. Smith in Exhibit 3 were offered to prove the truth of those assertions. Consequently, they were hearsay statements. I.R.E. 801; s*ee e.g., Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 1008 (1992) (report showing result of paternity test was hearsay); *State v. Mubita*, 145 Idaho 925, 937 (2008) (results of laboratory report testified to by doctor was hearsay). As hearsay, they

were not admissible unless an exception applied. I.R.E. 802. None did.

2. The state did not establish an adequate foundation to admit Exhibit 3 as a business record.

The only hearsay exception suggested by the state was the one for business records. T (Day 1) p. 249, l. 1-4. However, the court did not analyze the evidence under that theory of admission. In addition, that exception does not apply. Idaho Rule of Evidence 803(6) provides that "[a] record of an act, event, condition, opinion, or diagnosis if:

> (A) **the record was made at or near the time by – or from information transmitted by – someone with knowledge;**
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) **all these conditions are shown by the testimony of the custodian or another qualified witness,** or by a certification that complies with Rule 902(11) or (12); and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Id. (emphasis added).

Dr. Smith did testify that "the diagnoses that appear on this document appear to be generally correct" but could not "say that it is absolutely comprehensive[.]" *Id.*, p. 244 l. 25 – p.245, l. 3. Further, he noted that the entries were not necessarily made by the physician. Instead, "some of them – the wording on some of them may come from manuals – manuals used by non-physicians who are trying to put the correct numbers to the diagnoses in question." *Id.*, p. 245, l. 7-

11. Thus, it is not clear whether the record was made from information transmitted by someone with knowledge. Instead, Dr. Smith testified that non-physicians would use the medical code and description which seemed to the coder to best fit the physician's diagnoses. *Id.* Thus, requirement 6(A) of the rule was not established.[1]

Second, Dr. Smith was not the custodian of the record nor was he a "qualified witness" under I.R.E. 803(6)(D) because he did not "have supervision of its creation" as required by *Dep't of Health & Welfare ex rel. Osborn v. Altman*, 122 Idaho 1004, 1008 (1992). In *Altman*, this Court affirmed the result of paternity test was hearsay and not admissible as a business record because the witness was not custodian of the record or an"other qualified witness." In doing so, it explained that "[i]t is not necessary to examine the person who actually created the record so long as it is produced by one who has the custody of the record as a regular part of [the person's] work *or has supervision of its creation*." *Id.* (emphasis in original), *quoting Cantrill v. American Mail Line*, 257 P.2d 179, 189 (Wash. 1953). There was no evidence presented that Dr. Smith supervised the creation of Exhibit 3, and he could not have done so prior to his participation in Mr. Tachman's care beginning in February of 2014. Thus, Exhibit 3 was not admissible under the hearsay exception for business records.

Third, the court did not enter into any analysis of the hearsay objection. It only said that Mr. Neaderhiser's objections to the pre-February 2014 diagnoses that

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[1] After the admission of Exhibit 3, Dr. Smith further explained that "in this list I believe a non-physician coder, looking at medical records probably from multiple sources, listed every diagnosis he was felt to have." T p. 254, l. 21-24.

were not made by Dr. Smith "can be further described in your cross-examination." T (Day 1) p. 249, l. 17-24. This was an abuse of the court's discretion because it did not act "consistently with any legal standards applicable to the specific choices before it" nor did it "reach[] its decision by an exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho at 863.

3. The trial court abused its discretion in admitting the facts and data of the pre-February 2014 diagnoses because it failed to engage in the proper weighing of probative value and prejudice.

Another exception to the hearsay rule exists when an expert uses hearsay to form an opinion. In limited circumstances, that hearsay may be disclosed to the jury under I.R.E. 703. That rule provides that:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion or inference on the subject, they need not be admissible for the opinion to be admitted. **But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.**

That exception does not apply here because Dr. Smith was not disclosed as an expert witness. T (Day 1) p. 247, l. 11-17. He could not offer an expert opinion based upon his own observations under I.R.E. 702 because the notice requirements of I.C.R. 16(b)(7)[2] had not been followed, much less an expert opinion based upon the observations of others. And, in fact, he did not base an expert opinion on the pre-

[2] That rule requires the prosecutor to provide a written summary or report of any testimony that the state intends to introduce at trial or at a hearing pursuant to I.R.E. 702, 703 or 705.

February 2014 diagnoses. All he said was that it was a "fair characterization" that "Mr. Tachman had some health challenges in that [time] range." T (Day 1) p. 261, l. 18-23. No expertise was required to come to that conclusion. Thus, the I.R.E. 703 exception to the general hearsay rule did not apply here.

To the extent the "health challenges" comment could be considered an opinion, the court admitted the hearsay basis of it without determining that the "probative value in helping the jury evaluate the opinion substantially outweigh[ed] their prejudicial effect," as required by I.R.E. 703. This was an abuse of the court's discretion because it did not act "consistently with any legal standards applicable to the specific choices before it" nor did it "reach[] its decision by an exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho at 863.

4. The error was not harmless.

"A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222 (2010). Here, Mr. Neaderhiser has met his burden of proving objected-to error, but the state cannot meet its high burden of proof.

The state used the improperly admitted evidence to show that Mr. Tachman was not competent to execute either the will or the financial power of attorney. It argued in closing argument that the failure to thrive diagnosis, which was made upon admission to the Veteran's Home, proved that Mr. Tachman was a vulnerable

person at the time he executed the will and the financial power of attorney. He said:

> He was failing to thrive. His health was failing. . . . We know that he executed this will and this power of attorney within weeks of receiving a failure to thrive, dying, his body is shutting down, diagnosis.
> I submit to you, ladies and gentlemen, that physical impairment, that physical impairment, coupled with a diminished psychological capacity or cognitive function made him vulnerable.

T (Day 3) p. 204, l. 14-25. The state used the improperly admitted evidence to prove Mr. Tachman was a vulnerable person at the time he executed the will and the power of attorney. That evidence also undercut Mr. Neaderhiser's defense that he could legitimately receive the money from Mr. Tachman under the terms of those documents. In short, the admission of Exhibit 3 and the related testimony by Dr. Smith was highly prejudicial and reversible error under *State v. Perry*, *supra.*

5. Conclusion.

Dr. Smith should not have been permitted to testify about the diagnoses purportedly made by other doctors and interpreted by medical coders because that testimony was hearsay. I.R.E. 802. That evidence was not admissible under the I.R.E. 803(6) business records exception because the state did not lay a proper foundation for the document's admission. The evidence as also inadmissible under I.R.E. 703 because the doctor did not rely on it in forming an opinion or inference. In addition, the court abused its discretion in admitting the evidence because it failed to determine that the probative value of the evidence in helping the jury evaluate the opinion substantially outweighed their prejudicial effect. The error was prejudicial because the state used the inadmissible evidence as proof that Mr.

Tachman was not competent to execute the 2013 documents.

V. CONCLUSION

Mr. Neaderhiser asks the Court to vacate the judgment and sentence and remand the case for a new trial.

Respectfully submitted this day 12th of November 2020.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Jim Neaderhiser

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

Attorney General, Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 12th day of November 2020.

/s/Dennis Benjamin
Dennis Benjamin