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State v. Neaderhiser Appellant's Reply Brief Dckt. 48015

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

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 THOMAS F. NEVILLE
District Judge

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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. *Why the State's Arguments are Without Merit.*

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

The state first claims Mr. "Neaderhiser argues for the first time on appeal that Dr. Smith's testimony about those diagnoses was inadmissible hearsay." State's Brief, p. 13. In fact, however, hearsay was the objection made below: "So I guess *our objection would be that some of those are hearsay that* aren't valid exceptions because there's no foundation for those diagnoses." T (Day 1) p. 247, l. 7-10 (emphasis added). That is a hearsay objection to the diagnoses which were not made by Dr. Smith. Mr. Neaderhiser also objected that the diagnoses which were not made by Dr. Smith did not fit within an exception to the hearsay rule:

> I think that the diagnoses that Dr. Smith himself diagnoses and the ones that he saw are relevant, and I think that he can lay sufficient foundation for those. But as far as the other diagnoses that came before Dr. Smith was put on this case in February of 2014, I think that the admission of this is insufficient – or there's been insufficient foundation for admission.

T (Day 1) p. 247, l. 20 – p. 248, l. 3. Thus, the claim of error has been preserved under I.R.E. 103(a)(1)(A) because there were hearsay and lack of foundation objections.

To the extent the state's argument is that Mr. Neaderhiser did not renew his objection to testimony about the Exhibit after it had been admitted into evidence,

such an objection was unnecessary. "Once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal." I.R.E. 103(b). Here the court definitively overruled the objection "to other diagnoses prior in time and other diagnoses on this two-page document that were not those of this physician, those I think can be further described on your cross-examination." T (Day 1) p. 249, l. 17-22; p 250, l. 8-9.

The court's ruling, however, was non-responsive to the objection. 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). To this, the state counters that "[a]lthough Dr. Smith was not responsible for making Mr. Tachman's pre-February 2014 diagnoses, he testified about those diagnoses based on his own review of Neaderhiser's medical history and his firsthand treatment of those previously diagnosed, yet ongoing, medical conditions." State's Brief p. 9. But that proves Mr. Neaderhiser's point: Dr. Smith testified about the hearsay statements in Exhibit 3. He was not testifying about them under the hearsay exception which permits an expert's opinion to be based upon hearsay statements. See I.R.E. 703. He could not do so because the state never disclosed him as an expert witness under I.C.R.

16(b)(7). As the prosecutor explained:

> I'm not asking for an ultimate opinion related to something he doesn't have firsthand knowledge of. Dr. Smith is the treating physician. And within the realm of his treatment he is able to either ratify or is the sole source of these diagnoses.

T (Day 1) p. 248, l. 19-25. The court agreed that "the treating physician is certainly in a position to talk about his own diagnoses as part of his treatment[.]" T p. 249, l. 14. Thus, the doctor could testify about his own diagnoses. As to the objection to the other diagnoses, the court stated, "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.

The court abused its discretion in admitting the hearsay evidence about diagnoses made by others because it failed to act consistently with the legal standards applicable to the specific choices before it. Exhibit 3 contained hearsay. Hearsay is not admissible except as provided by the Rules of Evidence "or other rules promulgated by the Supreme Court of Idaho." I.R.E. 802. To admit hearsay evidence under the rationale that it could be "further described" on cross-examination is inconsistent with I.R.E. 802 and thus an abuse of discretion. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018).

Further the court did not reach its decision by an exercise of reason. Mr. Neaderhiser was not able to cross-examine Dr. Smith about the bases for the pre-February 2014 diagnoses because Dr. Smith was not Mr. Tachman's attending physician at the time. He had no personal knowledge of the facts underlying those diagnoses. Nor did he direct the coding of those entries. Again, the court abused its

discretion. *Lunneborg v. My Fun Life*, *supra.*

2. The exhibit was not admitted as a business record nor is it admissible under that exception.

As previously noted, there is no indication in the record that the court admitted the exhibit as a business record under I.R.E.803(6). So, the state is howling at the moon when it argues that Mr. Neaderhiser has failed to show the trial court abused its discretion in admitting the evidence as such. There is no reason to think that the court admitted the evidence under that exception. It did not reference the rule. Nor did it find the foundational facts needed for admission. *Compare* I.R.E. 803(6)(A)-(E) *with* T (Day 1) p. 245, l. 12 – p. 250, l. 9. And 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 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.

In addition, the state did not establish the foundational requirements for admission as a business record. 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). To this, the state argues that Dr. Smith had supervision over the admission record's creation because he was the medical

director of the Idaho Veteran's Home when Mr. Tachman was readmitted to the Veteran's Home on 10-6-2016. State's Brief p. 12. That is not the case, however. Dr. Smith, while holding the title of "Medical Director" is not even an employee of the facility. He is "a physician that was under contract to provide those services there." T (Day 1) p. 238, l. 20-23. There is no finding by the district court that Dr. Smith had supervision of the creation of the exhibit. (Most likely a regular employee of the facility who supervised the non-physician coders handled those duties.) And Dr. Smith did not testify that he supervised the creation of the exhibit.

The state also argues that Dr. Smith had "access to the admission records in the regular course of his business." State's Brief, p. 11. But that is not germane to the admissibility of the exhibit. While a business record must be "kept in the course of regularly conducted activity," I.R.E. 803(6)(B), the fact that Dr. Smith had access to it does not show he was a qualified witness to establish its foundation under subsection (6)(D).

Thus, the state cannot point to evidence in the record that Dr. Smith was a qualified witness to testify to the foundational requirements of I.R.E. 803(6)(A)-(C).

If anything, the testimony of Dr. Smith showed that the "method or circumstances of preparation indicate a lack of trustworthiness" which would bar admission under I.R.E. 803(6)(E). Dr. Smith 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, Dr.

Smith was not a qualified witness to testify to the foundational requirements. Even if he was, his testimony showed a lack of trustworthiness in the method the medical coders used.

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.

The state does not attempt to justify the admission of the exhibit under this exception. Thus, no reply is needed.

B. *The State has not met its Burden of Proving Harmless Error.*

"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, the state has not met its high burden of proof.

All the state does in its response is to argue its case was strong. State's Brief p. 14-16. But it continues to ignore the fact that it used the improperly admitted evidence to show that Mr. Tachman was not competent to execute either the will or the financial power of attorney. The validity of those documents was central to Mr. Neaderhiser's defense. He admitted that he had been using Mr. Tachman's funds for his own purposes (T (Day 2) p. 25, l. 1-9), explaining 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. Linda Bassett is Mr. Neaderhiser's girlfriend. T (Day 1)

p. 193, l. 17-22. On August 26, 2013 (prior to Dr. Smith's involvement in Mr. Tachman's care), 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 gave Ms. Bassett the authority to "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[.]" *Id.*, p. 12.

It was the defense theory of the case that Ms. Bassett gifted the money to Mr. Neaderhiser, as she was empowered to do under Mr. Tachman's will and financial power of attorney. See T (Day 1) p 177, l. 2-6 (defense opening statement: "[T]hat power of attorney allowed Linda to do whatever she wanted with his assets. Including making gifts from the estate to whomever she chose[.]"); T (Day 3) p. 194, l. 3-6 (defense closing argument: "The power of attorney that he granted in favor of his granddaughter allowed her to do whatever she wanted with his estate, whatever he wanted.") p. 197, l. 11-12 ("She did what she was allowed to do, and in turn he did what she allowed him to do."); p. 198, l. 11-13 ("Because of that, Mr. Neaderhiser did nothing wrong. He did exactly what he was allowed to do with his then fiancee [sic].").

To counter the defense, the state relied upon the September 17, 2013, diagnosis of failure to thrive, made prior to Dr. Smith's involvement in Mr. Tachman's care, to prove that Mr. Tachman was a vulnerable person at the time he executed the will and the financial power of attorney. It said, "in State's Exhibit 3, he has a diagnosis of failure to thrive." T (Day 3) p. 202, l. 8-9. "He was failing to

thrive. His health was failing." *Id.*, l. 14-15. It continued:

> 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.

Id., l. 17-25

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 in favor of Ms. Bassett. That was the only evidence presented by the state to that effect and it severely undermined Mr. Neaderhiser's defense. Thus, it cannot be deemed harmless beyond a reasonable doubt and the state has failed to meet its burden of proof under *State v. Perry*, *supra.*

III. 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 error was prejudicial because the state used the inadmissible evidence as proof that Mr. Tachman was not competent to execute the 2013 documents.

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

Respectfully submitted this day 15th of April 2021.

/s/ Dennis Benjamin
Dennis Benjamin
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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

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Dated and certified this 15th day of April 2021.

/s/Dennis Benjamin
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