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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 43124
	)	
v.	)	Latah Co. CR 2013-1358
	)	
CHARLES ANTHONY CAPONE,	)	
	)	
Defendant-Appellant.	)	
_____	)	

\_\_\_\_\_  
**APPELLANT'S REPLY BRIEF**  
\_\_\_\_\_

**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF LATAH**

\_\_\_\_\_  
**HONORABLE CARL B. KERRICK**  
**Presiding Senior District Judge**  
\_\_\_\_\_

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## ARGUMENT

### I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS AND THE ACCOMPLICE TESTIMONY WAS UNCORROBORATED

#### A. Introduction

In short, Appellant asserts that Stone was an accomplice to murder so his testimony must be corroborated. His own testimony established he helped during the commission of the murder in addition to helping afterwards.

However, even if Stone was not an accomplice to murder, but only an accomplice to failure to report a death to coroner or law enforcement and conspiracy to commit that crime, all of his testimony still needs to be corroborated.

The state provides no authority for its proposition that there must be perfect parity of crimes between the defendant and accomplice in order to invoke the accomplice corroboration requirement. Stone had also been charged with murder, and it was only his self-serving statement which exculpated himself from the murder charge while at the same time inculpated Mr. Capone for the murder. Thus, to not require corroboration on the charge Stone exculpated himself from would defeat the reason for the accomplice corroboration requirement, to wit, accomplices lie to get themselves out of trouble and blame others.

There is also no evidence corroborating Stone's story. When his testimony and his interpretation of the evidence are removed, as they must be, what is left does not corroborate his story. Further, even assuming *arguendo* that there is sufficient circumstantial evidence for the jury to have found that Rachael was

dead or even that Mr. Capone killed her, there was zero remaining evidence upon which the jury could have found that it was murder, much less first degree murder.

B. Stone was an accomplice to murder

First, the state argues Stone is not an accomplice to all three crimes so his testimony related to first degree murder need not be corroborated. In short, the state is wrong because by his own admission Stone did help while Mr. Capone was supposedly committing the murder.

Again, the pattern jury instruction defines accomplice as follows:

An accomplice is a person who intends to promote or assist in the commission of a crime and who either directly commits the acts constituting the crime or who, before or during its commission, aids, assists, facilitates, promotes, encourages, counsels, solicits, invites, helps or hires another to commit the crime. Mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not [in the absence of a duty to act] sufficient to make one an accomplice.

ICJI 313.

Contrary to the state's argument which simply ignores Stone's own testimony of what he did to help, Stone was not merely a bystander to the murder. Stone testified on that Friday evening he heard a loud noise and walked out of the shop and saw Mr. Capone on top of Rachael strangling her. (Tr. p. 1781.) According to Stone, Rachael was still alive (she was moving a little). (Tr. p. 1782.) Stone testified Mr. Capone told him to go into the shop and get a tarp. (Tr. p. 1784.) Stone testified he went into the shop and found a tarp, but it was in the loft area which he couldn't reach without a ladder. (Tr. p. 1785.) He went

back outside and Mr. Capone was still on top of Rachael strangling her, but she was not moving. (Tr. p. 1787.) Stone testified that he told Mr. Capone there were a couple tarps up top and “[w]hat do you want me to do?” Tr. p. 1787, In. 22.

So when Stone first came upon them, Rachael was still alive so ipso facto, it was during the alleged commission of the murder which had not yet been completed. Then, Stone was not merely present or silently consented, he affirmatively tried to help by going to get a tarp and was only thwarted because he couldn’t get up to the loft. Simply put, he was an accomplice to murder.

More to the point, the state actually charged Stone with first degree murder and established probable cause for this charge when he was bound over on it. If the state had not needed Stone’s testimony to use against Mr. Capone it cannot seriously be believed that the state would not be arguing that Stone was also guilty of murder due to his participation.

- C. Even if Stone was not an accomplice to murder, his testimony still must be corroborated because it exculpates him of murder and inculpates Mr. Capone

The state grudgingly admits Stone was an accomplice to the charges of failure to notify coroner or law enforcement of death and conspiracy to commit failure to notify coroner or law enforcement of death.<sup>1</sup> (Respondent’s brief, p. 21.) The state then argues since Stone was not an accomplice to murder, that

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<sup>1</sup> The state also appears to concede that Stone was an accessory after the fact to murder. (Respondent’s brief, p. 15.)

the corroboration requirement was not applicable to Mr. Capone's murder charge, but only to the other charges.

Assuming for the sake of argument that Stone was not an accomplice to the murder itself, this does not mean there is no corroboration requirement when he blames Mr. Capone for the murder while exculpating himself from it.

The state provides no authority for its proposition that a co-defendant's testimony can be parsed out between that which concerns like charges with the defendant and thus must be corroborated and testimony which concerns crimes of which he was exculpated by his own word and thus need not be corroborated. This clearly cannot be correct, particularly given that the very reason for the corroboration requirement is because accomplices lie and blame others to help themselves. Again, Stone was charged and bound over for murder, and it was only his statement that removed criminal liability from himself for murder and placed it solely on Mr. Capone.

Instructive is *State v. Emmons*, 94 Idaho 605 (1972), where the Idaho Supreme Court explained the purpose of the accomplice corroboration requirement.

The Oregon Supreme Court's opinion in *State v. Carr, supra*, wherein a criminal conviction was reversed because it was based on uncorroborated testimony of an accomplice, contains a clear statement of the purpose of a statute such as I.C. § 19-2117:

"\* \* \* This statute [essentially the same as I.C. § 19-2117] absolutely prohibits a conviction in a criminal case upon the uncorroborated testimony of an accomplice, even although [sic] the jury may believe such testimony to be entirely true, and that it establishes the defendant's guilt beyond a reasonable doubt. It proceeds upon the theory that experience in the administration of the criminal law has



shown the sources of such testimony to be generally so corrupt as to render it unworthy of belief, and that it is therefore better as a matter of public policy to forbid a conviction on the uncorroborated testimony of an accomplice, although the guilty may thereby sometimes escape punishment, than to leave it possible for the conviction of an innocent person on such testimony. Whether this rule of law is wise or unwise is not for us to inquire. It is so written, and must be applied by the court \* \*

\*." 42 P. at 216.

*Id.* p. 609.

In short, given the purpose of the accomplice corroboration requirement, which is that accomplices lie to help themselves and do it by placing the blame on others, Appellant asserts that determining whether one is an accomplice is not a narrow test focusing solely on whether that person was charged, or remains charged, with the exact same crimes. Rather, consideration of the accomplice's participation in the same criminal episode (and his motive to lie about said participation) is what is important, particularly where the only evidence exculpating the accomplice from one or more of the charges is his own word.

D. The murder and Mr. Capone's connection to it were not corroborated

In its brief, Respondent claims "[t]he state presented sufficient evidence to corroborate Mr. Stone's testimony and establish, beyond a reasonable doubt, the essential elements of all of the charged crimes." Respondent's brief p. 12. A review of what the state claims is corroborating evidence shows it completely and utterly fails to establish first degree murder.

For example, the state points to evidence that suggests that Rachael was at Mr. Capone's shop that Friday, that she was dead, and that he was upset after her disappearance.<sup>2</sup>

Even assuming arguendo there is sufficient circumstantial evidence for the jury to find that Rachael is dead, or even that Mr. Capone killed her, there is zero evidence aside from Stone upon which the jury could find beyond a reasonable doubt that it was murder, much less first degree murder.

The state argues that Tim Fountain witnessed "a confrontation" between Mr. Capone and a woman outside of his shop. This does not tell the whole story. Mr. Fountain testified that the woman was confronting Mr. Capone and he was responding calmly. Specifically, Tim Fountain testified that the Yukon rapidly approached the shop and slightly skidded to a stop and a woman got out flailing her arms and hollering at Mr. Capone, but his reaction was very calm. (Tr. p. 1697, 1705.) The woman approached right up into his face shouting at him and when she would take a breath occasionally he would answer smoothly. (Tr. p. 1697, 1705.) Mr. Fountain testified that Mr. Capone walked back to his shop and she followed and continued to scold him. (Tr. p. 1705.)

This in itself strongly suggests that even if Mr. Capone did kill Rachael, the killing would not have constituted first degree murder. Of course, simply killing someone does not make it murder, it can be self-defense, involuntary

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<sup>2</sup> Incidentally, Mr. Capone did not tell Captain Hally that he had been stalking and harassing Rachael. Captain Hally testified that Mr. Capone told him that he and Rachael were playing a stupid game and they had made spoof.com calls to each other. (Tr. p. 1185-7.) In other words, Captain Hally construed that as stalking and harassing. Mr. Capone did not literally admit to stalking and harassing.

manslaughter, or voluntary manslaughter if acting under the heat of passion or sudden quarrel. But even if it is murder, there is no corroborating evidence it was a willful, deliberate, and premeditated killing. In short, Stone provided the only evidence that could establish beyond a reasonable doubt that Mr. Capone killed Rachael, that it was murder, and that it was first degree murder.

E. There was no corroborating evidence connecting Mr. Capone to the crimes of failure to report a death and conspiracy to do so

The state concedes that Stone was an accomplice to the crimes of failure to notify coroner or law enforcement of death and conspiracy to commit that offense, but then argues that there was evidence corroborating Stone's testimony that Mr. Capone had committed those offenses as well.

The problem with the state's argument is that it does not actually remove Stone's testimony from the mix when determining whether it was corroborated.

The relevant pattern jury instruction provides as follows:

Corroborative evidence is evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice tends to connect the defendant with the commission of the offense charged.

However, it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

ICJI 314 (emphasis added).

A few easy examples of the flaw in the state's argument are shown by the following passage from the state's brief where the (underlined) testimony of Stone must be removed to determine whether the remaining evidence connects the defendant to the offense:

Mr. Stone also testified that Capone instructed him to get a chain. (9/9/14 Tr., p. 1801, L. 23 – p. 1803, L. 17.) Mr. Stone went to his place of work, the City of Moscow, and got a long chain from a scrap iron pile. (9/9/14 Tr., p. 1806, L. 8 – p. 1816, L. 13; Exs. 121 - 124, 139.) Capone and Mr. Stone used that chain to help wrap Rachael's body in the tarp. (9/9/14 Tr., p. 1817, L. 23 – p. 1821, L. 6.)

Rick Benjamin, a fleet supervisor with the City of Moscow, testified the city has a scrap iron pile where old tire chains are placed, and they do not take inventory of that scrap iron. (9/11/14 Tr., p. 2115, L. 14 –p. 2117, L. 5.)

The day after the murder, Mr. Stone and Capone met at Shari's restaurant. (9/9/14 Tr., p. 1838, L. 9 – p. 1840, L. 2.) During this meal Capone reminded Mr. Stone to keep his mouth shut about Rachael's death. (Id.) The state introduced into evidence a receipt showing that Mr. Stone paid for breakfast at Shari's Restaurant at 11:11 a.m. Saturday , April 17, 2010. (Ex. 150.)

Respondent's brief, p. 24 (emphasis added).

Obviously, when Stone's aid, interpretation or direction is removed, the remaining evidence is innocuous like the city has scrap chains or Stone had breakfast, neither one of which suggests, much less establishes, that a crime occurred or that Mr. Capone committed it.

## II. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE CORROBORATION REQUIREMENT FOR ACCOMPLICE TESTIMONY

First, the state argues that since the accomplice corroboration requirement is statutory, it cannot be the basis for fundamental error. While Idaho has enacted a special statute regarding accomplice testimony, its very purpose is to ensure that all elements of the crime are found by the jury beyond a reasonable doubt. Thus, it is Mr. Capone's due process rights which are violated by the failure to instruct the jury as to the corroboration requirement. See, *In Re: Winship*, 397 U.S. 358 (1970). In other words, since Mr. Capone's convictions could only be based on Stone's uncorroborated testimony, they were not based on proof beyond a reasonable doubt.

Second, the state claims that the error was not clear from the record because it was not clear that Stone was an accomplice or that counsel's failure to request an accomplice corroboration instruction was not a tactical decision. Both are red herrings.

As discussed above, it is clear that Stone was an accomplice and the state's novel idea that he is not is what is far from clear. As to the failure to request the accomplice corroboration instruction, the state argues that counsel may have not requested it because the defense was that Stone was lying and no crime had been committed. This is absurd. An instruction to the jury specifically instructing it to remove Stone's testimony and look for independent corroborating evidence is perfectly consistent with the defense theory that Stone was lying and no crime was committed, not somehow inconsistent with it.

However, it does not even matter if defense counsel intentionally did not want that instruction. If that was the case, it was not an unreviewable legitimate tactical decision, but rather was based on a misunderstanding of the law because the failure to instruct the jury of the corroboration requirement made it easier for Mr. Capone to be convicted.

Finally, the state argues there is sufficient corroboration and any error was harmless. For all the reasons discussed in Appellant's opening brief and above, this is not correct.

### III. THE COURT ERRED BY ADMITTING I.R.E. 404(b) EVIDENCE

#### A. The evidence of Mr. Capone's federal firearms arrest is inadmissible I.R.E. 404(b) evidence

The state is wrong about the court's ruling on the May 6, 2010, arrest. At a motion hearing on April 9, 2014, the state argued the evidence that Mr. Capone was arrested on May 6, 2010, was relevant because it was contextual as to why Mr. Capone was taken down to the police department and why there were federal agents there when he made a statement. (Tr. 4/19/2014, p. 56.)

Since the court suppressed the statements from May 6, 2010, there could be no reason why the jury needed to know that he was arrested on that day since it was for the federal felon in possession charge which had nothing to do with the murder charge.

B. The state's theory that Mr. Capone was afraid of being turned in for guns makes no sense and was a pretextual way to introduce his felon status

Contrary to the state's recharacterization of Appellant's argument, he is not asserting that the court must find sufficient evidence of the motive for the murder. Rather, Appellant is arguing that the state's ostensible motive for the murder, to wit, that Mr. Capone was afraid Rachael might turn him in because he had a gun, made no sense under the circumstances of the case (and was also unsupported). Thus, evidence of his felon status was not relevant, in that it could not make any fact of consequence any more or less likely. Rather, the state's theory was merely a pretext in which to place bad character evidence before the jury.

The state did not argue below, as it does for the first time on appeal, that evidence of his arrest for possession of a gun was admissible because it concerned his legal problems regarding guns. Instead, the state argued only that it offered context to his statements which were then suppressed, and expressly stated that it would not be eliciting testimony about the underlying gun charges from the witnesses (but an inmate nevertheless testified to this). Further, Rachael did not turn him in because of guns so there was absolutely no connection between that arrest and the instant crime.

While the fact that Mr. Capone was incarcerated may well have been relevant because of the jailhouse snitches, the reason for it (felon in possession

of a firearm) was not. As argued by defense counsel, the jury would just assume he was incarcerated on the murder charge.

C. The alleged prior act of violence was inadmissible I.R.E. 404(b) evidence

As to evidence of Mr. Capone's alleged prior act of violence against Rachael (attempted strangulation), again, the court did not perform the two tier I.R.E. 404(b) analysis including whether there was sufficient proof that a prior act of violence even occurred. The charges were dismissed and even the state admits that Mr. Capone stated repeatedly that there was no physical altercation, but instead there was an accident.

The state next argues that the I.R.E. 404(b) evidence of the physical altercation was relevant to provide context to the supposed admissions made by Mr. Capone that Rachael was not coming back to testify against him in the attempted strangulation case. This is circular, the state is arguing that I.R.E. 404(b) evidence is admissible to provide context for the I.R.E. 404(b) evidence.

The state also argues another ostensible grounds for its admission, that it is relevant to motive. The state argues that the physical altercation is what caused their separation and without the separation, Rachael would not have been at Mr. Capone's shop on the day in question. This is not motive, but seems like an attempt at establishing proximate cause. The actual motive according to the state is Rachael divorcing him, not the remote reason for the divorce.



IV. THE COURT ERRED BY REFUSING TO ALLOW TWO DIFFERENT STATE'S WITNESSES TO BE IMPEACHED WITH THEIR LESS THAN 10 YEAR OLD BURGLARY CONVICTIONS

The state concedes that burglary and robbery are somewhat less relevant to credibility than say, perjury. The state also concedes that I.R.E. Rule 609 requires a case by case analysis is required to determine whether burglary is relevant to credibility.

While detailed in Appellant's opening brief, Appellant will repeat the state's entire argument from below, which is simply declaring the burglary convictions are not relevant to credibility with absolutely no reasoning or basis.

As to Voss, the state's entire argument was "[t]he fact that Mr. Voss has a prior burglary conviction from 2010 is not relevant to his credibility and not admissible." (R. p. 485.)

The state's entire argument as to Glass was:

The State submits that none of these convictions are relevant to credibility, and all but the 2006 First Degree Burglary conviction are more than ten (10) years old. Consequently, evidence of these convictions is not admissible.

State's Motions in Limine, p. 12. (R. p. 486.)

At the hearing on April 19, 2014, the state's argument about why the burglary convictions should not be permitted for impeachment was as follows:

Thank you. Your Honor, ... . to decide which felonies come in, obviously there are three different levels of types of crimes that the Court can consider, whether they're relevant or not. The first would be perjury. That, of course, is clearly admissible as impeachment evidence. The next category would be one such as robbery and burglary, under *State vs. Ybarra* and *State vs. Pierce*, and the State's argument is that a burglary conviction from 2010 does not fit under the issue of whether the witness is credible or not, and so feels that it would be barred based on Idaho Rule of Evidence 609.

Tr. 4/19/2014, p. 11, ln. 15—p. 12, ln. 1 (emphasis added).

The court's written order on the motions in limine also simply declares the convictions not relevant with absolutely no reasoning or basis:

The state's motion in limine to prohibit the defense from mentioning or introducing evidence of Joshua Voss' criminal history (a 2010 conviction for Burglary, misdemeanor theft, and probation violations) is granted. Such evidence is not relevant to the witness' credibility.

The state's motion in limine to prohibit the defense from mentioning or introducing evidence of Brent Glass' criminal history (a 2006 conviction for Burglary, and 4 other felony convictions that occurred more than 10 years ago) is granted. Such evidence is not relevant to the witness' credibility.

Order Re: Motions in Limine, p. 1. (R. p. 1571.)

The district court did not acknowledge Idaho law which holds that burglary can be relevant to credibility, much less conduct a case by case analysis. The same is true as to whether the 2002 burglary conviction was too remote or not. The court simply ignored the provision in I.R.E. 609 providing that the 10 year limit runs from the conviction or release from custody on the conviction.

#### V. THE COURT ERRED BY DENYING THE MOTION FOR NEW TRIAL

To flesh out the facts surrounding this issue, on March 9, 2015, law enforcement obtained a statement from Tyler Byer, who had been housed in the same jail cell as David Stone in the Latah County Jail in July of 2013. Tyler Byer reported that Stone said they would never find the body (Rachael Anderson's) in the river because it was not there. Mr. Byer was being booked for DUI by a deputy and was drunk. However, Lieutenant Besst talked to Mr. Byer the next

day at his place of employment and he confirmed the statement. (Augmentation, p. 7.)

Back to the point, Stone's statement that Rachael's body was not in the river was not hearsay because it was an admission of a party opponent. I.R.E. 801(d)(2).

The state's own argument shows it is a statement of a co-conspirator. I.R.E. 801(d)(2)(E). The state points out that in order to be a co-conspirator statement the declaration must be while the conspiracy is actually in progress and in furtherance of it. The state also argues that the statement is not substantive because when he made it, Stone was still living his lie about his involvement with Rachael's disappearance. The state opines "[t]his lying would presumably include lying about Rachael's body not being in the river-especially if that is where it was." Respondent's brief at p. 54.

To begin with, whether or not a declarant is still lying does not determine whether a statement is substantive or not. But more to the point, the conspiracy to not report Rachael's death is a continuing conspiracy which can extend after arrest. Under the state's theory, Stone's statement was in furtherance of the conspiracy because it was made to throw off the discovery of the body by having the investigation look elsewhere. While the parties only learned of the statement after trial, Stone actually made it in July of 2013 prior to even the preliminary hearing when he was still charged with murder.<sup>3</sup>


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<sup>3</sup> This is why Stone can be also considered a party and his statement admitted against him under I.R.E. 801(d)(2)(A).

CONCLUSION

For all these reasons and those in his opening brief, Mr. Capone requests this Court reverse and vacate his convictions due to insufficient evidence, or in the alternative, to reverse and vacate his convictions and remand this matter for a new trial.

DATED this 21<sup>st</sup> day of March, 2016.



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Greg S. Silvey  
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF by emailing it to the Idaho Attorney General at [ecf@ag.idaho.gov](mailto:ecf@ag.idaho.gov)



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Greg S. Silvey