9-15-2017

State v. Tryon Appellant's Reply Brief Dckt. 44489

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 44489**
	)	
v.	)	**CANYON COUNTY NO. CR 2016-2267**
	)	
GRACIE JEAN TRYON,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

REPLY BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

_____

HONORABLE JUNEAL C. KERRICK
District Judge

_____

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE

Nature of the Case

Gracie Jean Tryon appealed from her conviction for possession of a controlled substance, following a jury trial. Ms. Tryon asserted the district court erred when it permitted the admission of certain statements by a witness, Carl Ringcamp, touching on the identity of the substance at issue, because that violated her constitutional right to confront the witnesses against her. She also asserted the State did not present sufficient evidence to support her conviction for possession of a controlled substance.

In its Respondent's Brief, the State argues Ms. Tryon did not show any error in the admission of Mr. Ringcamp's statements, because she waived any objection by telling the jury about the statements during her opening statement, and the statements were not testimonial for purposes of the Confrontation Clause. (*See* Resp. Br., pp.6-16.) The State also argues Ms. Tryon did not show the evidence was insufficient to support her conviction. (*See* Resp. Br., pp.17-19.)

This Reply Brief is necessary to address the State's arguments, which are unavailing.

Statement of the Facts and Course of Proceedings

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

ISSUES

I. Did the district court err when it permitted the admission of Mr. Ringcamp's statements, because that violated Ms. Tryon's constitutional right to confront the witnesses against her?

II. Did the State present sufficient evidence to support Ms. Tryon's conviction for possession of a controlled substance?

ARGUMENT

I.

The District Court Erred When It Permitted The Admission Of Mr. Ringcamp's Statements, Because That Violated Ms. Tryon's Constitutional Right To Confront The Witnesses Against Her

A. Introduction

Ms. Tryon asserts the district court erred when it permitted the admission, through Detective Matthew Richardson, of Mr. Ringcamp's statements touching on the identity of the substance at issue. The admission of the statements violated Ms. Tryon's constitutional right to confront the witnesses against her. The district court determined there was no confrontation issue because Mr. Ringcamp's statements were nontestimonial. (*See* Tr., p.160, Ls.11-15.) However, Mr. Ringcamp's statements were actually testimonial, because the circumstances objectively indicate that the primary purpose of the interrogation in this case was to establish or prove past events potentially relevant to later criminal prosecution. *See Davis v. Washington*, 547 U.S. 813, 830 (2006). Because Ms. Tryon did not have a prior opportunity to cross-examine Mr. Ringcamp, his statements were inadmissible. The State has not proven the admission of Mr. Ringcamp's statements is harmless beyond a reasonable doubt.

B. Ms. Tryon Did Not Waive Her Objection To The Admission Of Mr. Ringcamp's Statements

As a preliminary matter, Ms. Tryon asserts she did not waive her Confrontation Clause objection to the admission of Mr. Ringcamp's statements. The State argues Ms. Tryon waived any objection to the admission of the statements. (Resp. Br., pp.7-8.) The State contends that, because Ms. Tryon mentioned the statements during her opening statement, she "waived any argument that her Sixth Amendment right to confrontation was violated by the subsequent

admission of such testimony." (*See* Resp. Br., p.8.) The State also argues, "[a]lthough the district court did not make a ruling on whether [Ms.] Tryon had waived her confrontation clause issue, the court's ruling admitting [Mr.] Ringcamp's statements should be affirmed on this alternative basis." (Resp. Br., p.8.)

The State suggests Ms. Tryon waived her objection under the "invited error" doctrine. (*See* Resp. Br., p.8.) The Idaho Supreme Court has held, regarding the invited error doctrine, "[i]t has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible." *State v. Owsley*, 105 Idaho 836, 838 (1983) (citation omitted).

Contrary to the State's argument, the invited error doctrine does not apply here. Ms. Tryon's mere mention of Mr. Ringcamp's statements in her opening statement did not mean she consented to, acquiesced in, or invited their admission. A civil fraud case, *Herrick v. Leuzinger*, 127 Idaho 293 (Ct. App. 1995), helps illustrate why. In *Herrick*, the Herricks sought to introduce into evidence a letter indicating they had been given the property at issue, but the district court excluded that exhibit for lack of foundation. *See Herrick*, 127 Idaho at 302. On appeal, the Court of Appeals noted, "[t]he Herricks made no effort to lay a foundation for admission of the letter through any witness. Instead, they argued only that the Leuzingers' attorney had opened the door for admission of this letter by referring to it in his opening statement to the jury." *Id.* at 302-03.

The *Herrick* Court wrote, "[t]his contention by the Herricks that reference to an exhibit during an opening statement will waive any objection when the exhibit is offered during the trial has not been supported by any citation of authority, and we find it to be without merit." *Id*. at 303. According to the Court, "[a]ttorneys' opening statements often comment upon anticipated

adverse evidence in order to defuse its impact or diminish its importance." *Id.* The Court perceived "no reason that such a comment should excuse the proponent of the evidence from laying an adequate foundation for its admission." *Id.* Thus, the *Herrick* Court held, "the trial court's exclusion of this letter was not in error." *Id.*

Based on *Herrick*, the State's contention that Ms. Tryon waived her objection is likewise without merit. That Ms. Tryon commented on Mr. Ringcamp's statements, as anticipated adverse evidence, did not excuse the State from showing the statements were admissible. *See id.* Put otherwise, the mere mention of Mr. Ringcamp's statements did not invite the district court's error in permitting the admission of the statements in violation of Ms. Tryon's constitutional right to confront the witnesses against her.

Additionally, this is not a situation where Ms. Tryon invited the error by stipulating or otherwise agreeing to the admission of Mr. Ringcamp's statements as evidence. *Cf. State v. Norton*, 151 Idaho 176, 187 (Ct. App. 2011) (holding any error in the admission of an interrogation transcript was invited error, where defense counsel had stipulated to the admission of the transcript). Opening statements are not evidence. The Idaho Supreme Court has held, "[o]pening statements serve to inform the jury of the issues of the case and briefly outline the evidence each litigant intends to introduce to support his allegations or defenses, as the case may be." *State v. Griffith*, 97 Idaho 52, 56 (1975). The *Griffith* Court also held that, "[g]enerally, opening remarks should be confined to a brief summary of evidence counsel expects to introduce on behalf of his client's case-in-chief. Counsel should not at that time attempt to impeach or otherwise argue the merits of evidence that the opposing side has or will present." *Id.* Indeed, the district court instructed the jury here, "[j]ust as the opening statements are not evidence, neither are the closing arguments." (Tr., p.110, Ls.18-20.)

The situation in this case also presents parallels with *State v. Boehner*, 114 Idaho 311 (Ct. App. 1988). In *Boehner*, the defendant referenced a certain matter (statements allegedly made by the defendant that he had a desire to "kill a cop") during voir dire, and the state later sought to introduce rebuttal evidence on that matter in its case in chief. *See id.* at 313. On appeal, the Idaho Court of Appeals held, "[t]he state cannot bootstrap rebuttal testimony into its case-in-chief by anticipating a defense and then characterizing the unmade defense as a material issue. If this does occur, the defendant is denied his right to choose whether, and how, to raise certain defenses." *Id.* at 318. Ms. Tryon's reference to Mr. Ringcamp's statements during her opening statement, much like the defendant's reference during voir dire in *Boehner*, did not open the door for the State to admit the statements.[1]

In sum, the State's invited error argument is unavailing. Ms. Tryon's mere mention of Mr. Ringcamp's statements during her opening statement did not mean she consented to, acquiesced in, or invited their admission. *See Herrick*, 127 Idaho at 303. Thus, the invited error doctrine does not apply here, and Ms. Tryon did not waive her Confrontation Clause objection to the admission of Mr. Ringcamp's statements.

C. The Admission Of Mr. Ringcamp's Statements Violated Ms. Tryon's Constitutional Right To Confront The Witnesses Against Her

Ms. Tryon asserts the admission of Mr. Ringcamp's statements violated her constitutional right to confront the witnesses against her. Mr. Ringcamp's statements were testimonial, because the circumstances objectively indicate that the primary purpose of the interrogation in

[1] For the Court's information, the Idaho Court of Appeals addressed another similar issue in an unpublished opinion, *State v. Agafonov*, No. 38764, 2012 WL 9496436 (Ct. App. Nov. 27, 2012). In *Agafonov*, the Court held, "statements during opening argument by the defendant do not open the door to rebuttal evidence by the prosecution during its case in chief." *Id.* at *6.

this case was to establish or prove past events potentially relevant to later criminal prosecution. *See Davis*, 547 U.S. at 830.

The State argues "the challenged statements were not testimonial, and, therefore, their admission did not violate [Ms.] Tryon's confrontation rights." (Resp. Br., p.10.) The State contends that the primary purpose of the interrogation, "whether viewed from Detective Richardson's question, [Mr.] Ringcamp's answer, or both, was not to create a record for trial, or an out-of-court substitute for trial testimony, in order to prove that the substance found in [Ms.] Tryon's purse was, in fact, methamphetamine." (Resp. Br., p.14.)

The State would essentially have the Court adopt the argument the United States Supreme Court rejected in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). Here, the State bases its argument above on the following remarks by the prosecutor before the district court: "I don't think anyone at the time would have possibly guessed that the statement, 'that's my meth,' which is made purely to exculpate this particular defendant, would be used later to prove that it was meth." (Resp. Br., pp.13-14 (quoting Tr., p.155, Ls.16-21).)

As Ms. Tryon previously discussed (*see* App. Br., p.13), the *Melendez-Diaz* Court rejected the argument that the analysts who prepared the forensic reports at issue were "not subject to confrontation because they are not 'accusatory' witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband." *See Melendez-Diaz*, 557 U.S. at 313. Thus, much like the testimony of the analysts in *Melendez-Diaz*, Mr. Ringcamp's statements were against Ms. Tryon, helping to prove one fact necessary for her conviction—that the substance at issue was methamphetamine. *See id.* at 313 Even though the statements were

"inculpatory only when taken together with other evidence linking [Ms. Tryon] to the contraband," *see id.*, they were still testimonial.

The State's argument also contradicts the Idaho Supreme Court's holding in *State v. Stanfield*, 158 Idaho 327 (2015). The State's argument appears to draw from the plurality opinion in *Williams v. Illinois*, 567 U.S. 50 (2012), which held evidence was nontestimonial because its primary purpose was not to create evidence against the defendant. *See Williams*, 567 U.S. at 84-85 (plurality opinion). However, Justice Thomas, in his concurrence, agreed the evidence was nontestimonial but solely because it lacked the requisite formality and solemnity, *id.* at 103-04 (Thomas, J., concurring), and the four dissenting justices rejected the plurality's accusatory requirement, *id.* at 134-35 (Kagan, J., dissenting).

In light of the fractured opinion in *Williams*, the Idaho Supreme Court held in *Stanfield*, "[b]ecause no position received support from a majority of the justices, *Williams* does not provide us a governing legal principle and this Court views the decision as limited to the unique set of facts presented in that case." *Stanfield*, 158 Idaho at 336. The State's argument would impose the *Williams* plurality's requirement that a statement must accuse or inculpate a particular defendant for the statement to be testimonial, contrary to the Idaho Supreme Court's holding in *Stanfield* that *Williams* does not provide a governing legal principle.

Despite the State's unavailing arguments, Mr. Ringcamp's statements were testimonial under the "primary purpose test" outlined in *Davis*. Because Mr. Ringcamp's statements were testimonial, their admission was permitted under the Confrontation Clause only if Mr. Ringcamp were unavailable and Ms. Tryon had a prior opportunity to cross-examine him. *See Stanfield*, 158 Idaho at 332. Here, even assuming Mr. Ringcamp was unavailable, Ms. Tryon did not have a prior opportunity to cross-examine him. Thus, Mr. Ringcamp's statements were inadmissible.

The district court erred when it permitted the admission, through Detective Richardson, of Mr. Ringcamp's statements, because that violated Ms. Tryon's constitutional right to confront the witnesses against her.

D. The State Has Not Proven That The Admission Of Mr. Ringcamp's Statements Is Harmless Beyond A Reasonable Doubt

Ms. Tryon asserts the State has not proven that the admission of Mr. Ringcamp's statements is harmless beyond a reasonable doubt.

The State argues, "[d]ue to the strength of the circumstantial evidence showing that the white crystalline substance found in [Ms.] Tryon's purse was methamphetamine, even if this Court finds error in the admission of [Mr.] Ringcamp's statements, it should conclude that, beyond a reasonable doubt, the statements did not contribute to the verdict." (Resp. Br., p.16.)

This argument by the State on appeal ignores the importance the State placed on Mr. Ringcamp's statements before the district court. As examined in the Appellant's Brief (App. Br., pp.16-17), the State during its closing argument advised the jury to consider Mr. Ringcamp's statements, and revisited the statements several times. (*See* Tr., p.288, Ls.24-25, p.289, Ls.8-17, p.290, Ls.19-21, p.328, Ls.24-25, p.329, Ls.2-18, p.331, Ls.22-24.) That the State presented other circumstantial evidence does not diminish the value of Mr. Ringcamp's statements as supporting the State's argument that the substance at issue was methamphetamine.

Because Mr. Ringcamp's statements were important circumstantial evidence for the State, there is a reasonable possibility the admission of the statements contributed to Ms. Tryon's conviction. *See State v. Sharp*, 101 Idaho 498, 507 (1980) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Thus, Ms. Tryon asserts the State has not proven that the admission of Mr. Ringcamp's statements is harmless beyond a reasonable doubt.

The district court erred when it permitted the admission of Mr. Ringcamp's statements touching on the identity of the substance at issue, because that violated Ms. Tryon's constitutional right to confront the witnesses against her. Thus, Ms. Tryon's conviction for possession of a controlled substance should be vacated, and the matter should be remanded to the district court for a new trial.

II.

The State Did Not Present Sufficient Evidence To Support Ms. Tryon's Conviction For Possession Of A Controlled Substance

Ms. Tryon asserts the State did not present sufficient evidence to support her conviction for possession of a controlled substance. The jury could not properly find that the substance at issue here was methamphetamine. *See State v. Mitchell*, 130 Idaho 134 (Ct. App. 1997).

The State argues, "[b]ased on the testimony and evidence presented at trial, the state provided substantial evidence upon which a rational [trier] of fact could conclude, beyond a reasonable doubt, that the white crystalline substance found in [Ms.] Tryon's purse was methamphetamine." (Resp. Br., p.19.) The State includes Mr. Ringcamp's erroneously admitted statements in its analysis. (*See* Resp. Br., p.19.) However, even when considering those erroneously admitted statements alongside the rest of the evidence, *see McDaniel v. Brown*, 558 U.S. 120, 131 (2010), the State did not present sufficient evidence to support Ms. Tryon's conviction for possession of a controlled substance.

The State did not present sufficient evidence, largely for the reasons discussed in the Appellant's Brief (App. Br., pp.21-22), which are incorporated herein by reference thereto. Additionally, the State did not present evidence that Mr. Ringcamp himself had previous experience with methamphetamine, or had been involved in previous methamphetamine

transactions. *Cf. Mitchell*, 130 Idaho at 136-37 (noting the State's confidential informant witness testified he had used methamphetamine five or six times, and bought methamphetamine from the defendant at least three times, before the incident at issue). Even taking Mr. Ringcamp's statements and the rest of Detective Richardson's testimony together, the State did not present sufficient evidence from which the jury could properly find that the substance here was methamphetamine.

The State did not present sufficient evidence to support Ms. Tryon's conviction for possession of a controlled substance. Thus, the judgment of conviction for possession of a controlled substance should be vacated, and the matter should be remanded to the district court for the entry of a judgment of acquittal on that charge.

CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Ms. Tryon respectfully requests this Court vacate her judgment of conviction for possession of a controlled substance, and remand the matter to the district court for a new trial. Alternatively, Ms. Tryon respectfully requests this Court vacate her judgment of conviction for possession of a controlled substance, and remand the matter to the district court for the entry of a judgment of acquittal.

DATED this 15th day of September, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of September, 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:

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