2-13-2018

State v. Salinas Appellant's Reply Brief Dckt. 44627

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 44627**
	)	
v.	)	**ADA COUNTY NO. CR-FE-2016-854**
	)	
JUAN SALINAS, JR.,	)	**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 STEVEN J. HIPPLER
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 1

ISSUE PRESENTED ON APPEAL 2

ARGUMENT 3

The District Court Erred By Admitting Evidence Of Other Acts Which Was Not Relevant To A Non-Propensity Purpose 3

A. The Other-Acts Evidence Was Not Relevant To Mr. Salinas' Alleged Motive 3

B. Those Aspects Of The State's Request For This Court Consider Other Exceptions To I.R.E. 404(b) Which Are Properly Before This Court Are Mistaken Because They Also Ignore The Applicable Standard Established By The Idaho Supreme Court 5

C. Applying The Proper Standard, This Error Was Not Harmless 7

CONCLUSION 9

CERTIFICATE OF MAILING 10

TABLE OF AUTHORITIES

Cases

Montgomery v. Montgomery, 147 Idaho 1 (2009) 8

Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC, 156 Idaho 709 (2014) 8

State v. Clinton, 155 Idaho 271 (2013) 4

State v. Cohagan, 162 Idaho 717 (2017) 6

State v. Field, 144 Idaho 559 (2007) 3

State v. Folk, 157 Idaho 869 (Ct. App. 2014) 3, 4, 6, 7

State v. Garcia-Rodriguez, 162 Idaho 271 (2017) 6

State v. Grist, 147 Idaho 49 (2009) 3, 4, 5

State v. Johnson, 148 Idaho 664 (2010) 3, 4, 6, 7

State v. Joy, 155 Idaho 1 (2013) 3

State v. Pepcorn, 152 Idaho 678 (2012) 3

State v. Perry, 150 Idaho 209 (2010) 7, 9

State v. Rossignol, 147 Idaho 818 (Ct. App. 2009) 3

Sullivan v. Louisiana, 508 U.S. 275 (1993) 7, 8, 9

U.S. Bank Nat'l Ass'n N.D. v. CitiMortgage, Inc., 157 Idaho 446 (2014) 8

Rules

I.R.E. 404(b) ..... *passim*

STATEMENT OF THE CASE

Nature of the Case

Juan Salinas contends the district court erroneously admitted propensity evidence in his bench trial. The State's responses ignore the Idaho Supreme Court's opinions which require there to be some connection other than mere similarity of the facts in order to admit such evidence under I.R.E. 404(b). In fact, the Court of Appeals' decision upon which the State predominanetnly relies has been abrogated by that Idaho Supreme Court precedent. Applying the proper standard, the other acts evidence in this case is merely propensity evidence masquerading as motive. Since the district court stated it would consider that improperly-admitted propenstiy evdience in reaching its verdict, this Court should vacate Mr. Salinas' conviction and remand his 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 Mr. Salinas's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the district court erred by admitting evidence of other acts which was not relevant to a non-propensity purpose.

ARGUMENT

The District Court Erred By Admitting Evidence Of Other Acts Which Was Not Relevant To A Non-Propensity Purpose

A. The Other-Acts Evidence Was Not Relevant To Mr. Salinas' Alleged Motive

The State does not contest Mr. Salinas' explanation about what sort of evidence the motive exception to I.R.E. 404(b) is designed to admit. (*See* App. Br., pp.5-6; *see generally* Resp. Br.) Instead, it simply argued that, because the other acts were similar in nature and occurred close in time to the charged conduct, they were admissible under that exception. (Resp. Br., pp.10-11.) However, the fact that the other conduct is factually similar does not inherently show what is driving the defendant to engage in either the charged act or the other acts. *Compare State v. Pepcorn*, 152 Idaho 678, 679 (2012) (explaining that motive is something like the defendant acted as he did to get back at his wife for not having sex with him, not the mere fact that he did something factually similar in the past). The Idaho Supreme Court has repeatedly made it clear that, without evidence of such a connection between the two events, mere factual similarities do not make other-acts evidence admissible under I.R.E. 404(b). *State v. Joy*, 155 Idaho 1, 9 (2013); *State v. Johnson*, 148 Idaho 664, 669 (2010); *State v. Grist*, 147 Idaho 49, 53 (2009); *State v. Field*, 144 Idaho 559, 570 (2007); *accord State v. Folk*, 157 Idaho 869, 878 (Ct. App. 2014).

Rather than apply the standard the Idaho Supreme Court established, the State instead relied on the Court of Appeals' decision in *State v. Rossignol*, 147 Idaho 818 (Ct. App. 2009). (*See* Resp. Br., p.11.) However, in comparing this case to *Rossignol*, the State fails to address the fact that *Rossignol* adopted the analysis of an Arizona case which was, in turn, based on Arizona's rules of criminal procedure which carve out a specific, special exception for the

admission of additional propensity evidence in sexual abuse cases. (*See* App. Br., pp.7-9; *see generally* Resp. Br.) As a result, the State's reliance on *Rossignol* is problematic because Idaho's rules contain no such exception and so, the Idaho Supreme Court has repeatedly, expressly rejected the idea that there are separate rules for propensity evidence in sexual abuse cases in Idaho. *Johnson*, 148 Idaho at 668 (explaining the decision in *Grist*, 147 Idaho at 53).[1] Since the analysis upon which *Rossignol*'s decision turned has been expressly rejected by the Idaho Supreme Court, the State's reliance on *Rossignol* is wholly misplaced.

Finally, the State points to the Idaho Supreme Court's decision in *Russo*, but in so doing, it again ignores the Idaho Supreme Court's standard for evaluating the evidence in question. The State believes that *Russo* simply allows evidence of sexual fantasies to be admitted wholesale because of their mere similarities to the charged conduct. (Resp. Br., p.12.) However, that represents an overly-broad reading of *Russo*. *See Folk*, 157 Idaho at 877-78. *Folk* explained that the critical part of the other-acts evidence presented in *Russo* was the evidence specifically linking the fantasies to the defendant's desire for power and control behavior, as that desire (not the sexual fantasies themselves) was his motive. *Id*. However, in *Folk*, like Mr. Salinas' case, where the State presented no such evidence tying the fantasies to an identified motive, the mere similarity between the fantasies and the charged act alone was not sufficient to make the fantasies admissible. *Id*. at 878 (expressly distinguishing *Russo* on this point).

[1] The Idaho Supreme Court does not overrule Court of Appeals' decisions. *State v. Clinton*, 155 Idaho 271, 272 n.1 (2013). Rather, it simply announces what the law is and contrary decisions of lower courts are, effectively, abrogated. *See id.* Therefore, though *Rossignol* was decided six months after *Grist* (and failed to take *Grist*'s rule into account), when *Johnson* subsequently reaffirmed *Grist*, it also effectively abrogated the contrary decision in *Rossignol*. Therefore, *Rossignol* is but a relic of the line of cases *Grist* itself actually overruled, *see Grist*, 147 Idaho at 54, not a viable source of precedent for this case.

The State attempts to distinguish *Folk* by reiterating its argument about the other acts in *Folk* having occurred several years prior to the charged conduct, whereas the other acts here occurred close in time to the charged conduct. (Resp. Br., p.13.) However, the remoteness or contemporaneousness of the other acts offers no insight on whether the two events are "*so related to each other* that proof of one tends to establish the other." *Grist*, 147 Idaho at 54-55 (internal citation omitted) (emphasis from original). As a result, the State is still trying to get other-acts evidence admitted based merely on factual similarities, an approach which the Idaho Supreme Court has repeatedly rejected. Basically, adopting the State's argument would allow precisely the type of evidence which I.R.E. 404(b) is designed to keep out of a trial to sneak into the trial.

Rather, as the Idaho Supreme Court has made clear, there must be limits on the use of other acts evidence in sexual abuse cases. *Grist*, 147 Idaho at 54. Since the State's argument would effectively eliminate the limits the Idaho Supreme Court has put in place, this Court should reject the State's attempt to apply a different analysis to that sort of propensity evidence.

B. Those Aspects Of The State's Request For This Court Consider Other Exceptions To I.R.E. 404(b) Which Are Properly Before This Court Are Mistaken Because They Also Ignore The Applicable Standard Established By The Idaho Supreme Court

In a footnote, the State asserts that this Court might affirm the district court's decision on under a different exception to I.R.E. 404(b), specifically, intent or common scheme or plan. (Resp. Br., p.10 n.5.) As an initial matter, the prosecutor below did not make any arguments under the common scheme or plan exception to I.R.E. 404(b). (*See, e.g.*, R., p.63 (identifying only the motive and intent exceptions in the State's amended notice of intent to use propensity evidence); Tr., Vol.1, p.33, Ls.10-11 (identifying the same two exceptions at the hearing on the State's notice of intent).) As such, the common scheme or plan exception is not properly raised

for the first time on appeal. *State v. Cohagan*, 162 Idaho 717, ___, 404 P.3d 659, 663 (2017), *reh'g denied*; *State v. Garcia-Rodriguez*, 162 Idaho 271, ___, 396 P.3d 700, 703-04 (2017), *reh'g denied*.

At any rate, the State's argument under the common scheme or plan exception continues to ignore Idaho Supreme Court precedent, as its argument under that exception was actually rejected in *Johnson*. In *Johnson*, the Supreme Court held that evidence which shows the defendant has a particular victim preference or engages in particular conduct toward such victims is not admissible as common scheme or plan when there is nothing which links the two events to each other. *Johnson*, 148 Idaho at 669. Those sort of similarities are "sadly too far unremarkable to demonstrate" the necessary connection to make the other acts relevant to some purpose other than propensity. *Id*. As those sort of similarities are all the State points to in this case (*see* Resp. Br., pp.10-11), even if this Court considers the State's argument under the common scheme or plan exception, it should still reject that argument. The two acts are simply not connected to each other by anything except the defendant's alleged propensity to engage in that type of conduct.

As to the State's other alternative argument – that this evidence could be admissible under the intent exception to I.R.E. 404(b) – the mere fact that Mr. Salinas had those other conversations does not speak at all to whether he actually intended to engage in the acts described in those conversations, as opposed to them being merely fantasies. The State's argument simply assumes that connection exists. (*See, e.g.*, Tr., Vol.1, p.24, Ls.6-15.) Operating on such an assumption is inappropriate; that the lack of evidence showing that sort of connection would make evidence of other acts is precisely what makes such evidence inadmissible under I.R.E. 404(b). *Folk*, 157 Idaho at 878 (distinguishing *Russo*, where the State

specifically presented evidence linking the sexual fantasies to the defendant's motive, from the case where the State presented no such evidence connecting the other-acts evidence to a non-propensity purpose).[2]

Thus, the State's argument under intent is no more compelling than its argument under motive – the mere similarity of facts, by itself, is not enough to make those other acts admissible under I.R.E. 404(b). *Id.*; *accord, e.g., Johnson*, 148 Idaho at 669. Therefore, this Court should reject the State's attempt to introduce this evidence under whichever exception it would seek to veil that otherwise-improper propensity evidence.

C. Applying The Proper Standard, This Error Was Not Harmless

The State's harmless error argument, like its arguments on the merits of this issue, ignores the standard set forth in the controlling precedent. Specifically, the State contends that, "[e]ven without the [propensity evidence], a rational fact-finder would still have found beyond a reasonable doubt, that [Mr.] Salinas attempted to engage in lewd conduct." (Resp. Br., p.15.) The United States Supreme Court has expressly rejected that sort of analysis in the harmless error context. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Idaho uses the *Sullivan* harmless error test in assessing all preserved errors. *State v. Perry*, 150 Idaho 209, 227 (2010).

As *Sullivan* succinctly put it: "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered," because "to hypothesize a guilty verdict that was never in fact rendered—*no matter how inescapable the*

[2] While the *Folk* Court did specifically consider the intent exception, it did not discuss the merits of the State's argument under that exception because it determined that the defendant's intent was not sufficiently at issue given the facts of that case. *Folk*, 157 Idaho at 879. Mr. Salinas acknowledges that his defense likely put his intent at issue, but maintains that the other-acts evidence is not relevant to prove his intent because of the lack of any evidence in those conversation showing he intended to follow through on the described conduct.

findings to support that verdict might be—would violate the jury-trial guarantee." *Sullivan*, 508 U.S. at 279 (emphasis added). That is exactly what the State is asking this Court should do in this case – usurp the fact-finder's role and hypothesize a guilty verdict based on this Court's own weighing of the evidence. (*See* Resp. Br., p.15 (asking this Court to weigh the evidence after taking the propensity evidence out of the equation).) As such, the State's argument is improper under the established standards for the harmless error analysis.

It is true that Mr. Salinas agreed to a bench trial instead of a jury trial, but that distinction makes little difference under *Sullivan*. In either case, the State's argument still asks this Court to hypothesize a verdict which was never, in fact, rendered. As the Idaho Supreme Court has explained, when the district court fails to consider the appropriate evidence in a bench trial, it is still the district court which should ultimately conduct the weighing of the proper evidence under the applicable burden of proof, not the appellate courts. *U.S. Bank Nat'l Ass'n N.D. v. CitiMortgage, Inc.*, 157 Idaho 446, 455 (2014) (explaining that, where the district court failed to evaluate the relevant evidence during a bench trial, the proper remedy was to remand the case so the district court could consider the appropriate evidence in light of the applicable burden of proof); *see also Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 714 (2014) (reiterating the reasons the district court, and not the appellate courts, should weigh the evidence in a bench trial scenario). Put another way, when the district court abuses its discretion in the consideration of evidence, as it has here, "the role of the appellate court is to note the error made and remand the case for appropriate findings." *Montgomery v. Montgomery*, 147 Idaho 1, 6-7 (2009).

Thus, the proper standard for evaluating harmless error in a bench trial remains for this Court to determine "whether the guilty verdict actually rendered in *this trial* was surely

unattributable to the error." *Sullivan*, 508 U.S. at 279 (emphasis from original); *see also Perry*, 150 Idaho at 221 (reiterating that the State must prove the error is harmless beyond a reasonable doubt). Applying that standard, the State has failed to prove, beyond a reasonable doubt, that the verdict in this case was surely unattributable to the improperly-admitted propensity evidence because the district court, the fact-finder in this case, expressly stated it would consider that evidence in reaching a verdict. (Tr., Vol.2, p.11, L.17 - p.12, L.6, p.14, Ls.10-14.) Since there was simply no proper basis for the district court to consider that evidence under I.R.E. 404(b), the record empirically reveals that the error contributed to the verdict. Therefore, under the proper standard, this error was not harmless.

CONCLUSION

Mr. Salinas respectfully requests this Court reverse the decision admitting the propensity evidence, vacate his conviction, and remand his case for further proceedings.

DATED this 13th day of February, 2018.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of February, 2018, 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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