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State v. Woods Appellant's Reply Brief Dckt. 45094

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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,	)	**NO. 45094**
	)	
v.	)	**CANYON COUNTY NO. CR 2016-7911**
	)	
JAYSON L. WOODS,	)	**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

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jayson L. Woods appeals from his judgment of conviction, asserting that the district court violated his Confrontation Clause rights by permitting a data acquisition and recovery technician to testify via Skype video conferencing, and that the district court committed fundamental error, violating his right to be free from double jeopardy, by failing to merge his conspiracy charge with the robbery, and thus, the murder, charges.

In regard to the Skype testimony issue, Mr. Woods addresses the State's preservation and harmless error arguments. In regard to the merger issue, the State's argument on the first prong of the fundamental error test misapplies the applicable test under the Idaho Constitution and misreads the relevant law. The State's argument on the third prong of that test represents mistaken understanding of how the remedy analysis impacts the analysis as to whether the error prejudiced Mr. Woods. As such, this Court should reject those arguments and remand this case for an order vacating the duplicitous charge.

Statement of the Facts and Course of Proceedings

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

ISSUES

I. Whether the district court erred by permitting Steve Barrios to testify via Skype?

II. Whether the district court committed fundamental error by imposing sentences for both the conspiracy charge and the felony murder charge in violation of Mr. Woods's right to be free from double jeopardy?

ARGUMENT

I.

The District Court Erred By Permitting Steve Barrios To Testify Via Skype

A. Introduction

Mr. Woods submits that district court erred by permitting Steve Barrios to testify via Skype because the State failed to establish an important public policy necessary to excuse traditional in-court testimony. Mr. Woods responds to the State's argument that his arguments regarding Idaho Criminal Rule 43.2 are not preserved and that any error is harmless.

B. The District Court Erred By Permitting Steve Barrios To Testify Via Skype

1. Idaho Criminal Rule 43.2

On appeal, Mr. Woods noted that, although not addressed by the parties or the district court below, that Idaho Criminal Rule 43.2 provided:

> Forensic testimony may be offered by video teleconference. For testimony by video teleconference to be admissible:
>
> **(a) Witness Visible to Participants.** The forensic scientist must be visible to the court, defendant, counsel, jury, and others physically present in the courtroom.
>
> (1) The court and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.
>
> (2) The defendant, counsel from both sides, and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.
>
> (3) A defendant who is represented by counsel must be able to consult privately with defense counsel during the proceeding.
>
> **(b) Written Notice Required**. The party intending to submit testimony by video teleconference must give written notice to the court and opposing party 28 days before the proceeding date.

> **(c) Written Notice of Objection or Affirmative Consent.** A party opposing the giving of testimony by video teleconference must give the court and opposing party written notification of objection or affirmative consent at least 14 days before the proceeding date.
>
> **(d) Party Responsible for Coordinating.** The party seeking to introduce testimony by video teleconference is responsible for coordinating the audiovisual feed into the courtroom. Nothing in this rule requires court personnel to assist in the preparation or presentation of the testimony provided by the provisions of this rule.
>
> The testimony must be recorded in the same manner as any other testimony in the proceeding.

I.C.R. 43.2. (*See* Appellant's Brief, p.12.) Mr. Woods asserted that, to the extent the Rule is considered in this issue, the Rule conflicted with *Maryland v. Craig*, 497 U.S. 836 (1990). The State asserts that this issue is not preserved because it was not addressed by the district court. (Respondent's Brief, p.18.) The State is incorrect.

The issue in this case, both in the district court and on appeal, is whether it violated Mr. Woods's Confrontation Clause rights to have Mr. Berrios testify via a two-way videoconference. Citing *State v. Garcia-Rodriguez*, 162 Idaho 271 (2017), the State argues that because the Rule was not considered in district court, in cannot be considered on appeal. (Appellant's Brief, p.18.) Mr. Woods agrees with the State that neither party nor the district court addressed the Rule in the district court. However, *Garcia-Rodriguez* has nothing to do with this case.

In *Garcia-Rodriguez*, the district court determined that an officer lacked reasonable grounds to arrest the defendant pursuant to an Idaho statute. *Id.* at 274. The State appealed, and raised a new theory not raised in the district court: whether the arrest was valid pursuant to the Fourth Amendment. *Id.* This Court reaffirmed its prior decisions, where "we have generally held that this court will not review issues not presented to the trial court, and the parties will be

held to the theory on which the cause was tried." *Id*. (quoting *Frasier v. Carter*, 92 Idaho 79, 82 (1968). Because the State was asserting a wholly new theory for relief, this Court declined to address the issue. *Id*.

Here, the argument and the theory is the same: that the two-way videoconference violated Mr. Wood's Confrontation Clause rights. *Garcia-Rodriguez* does not require that every relevant authority for an issue be presented to the district court; it just prohibits new issues. *See also Ada County Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017) (explaining that arguments in support of a position on a substantive issue may evolve on appeal so long as the "substantive issue" was raised below, and therefore ACHD's arguments citing to statutory provisions which had not been referenced below were properly made on appeal). And there can be no doubt that the Rule is relevant to the issue; indeed, the State itself cites the Rule as a basis for this Court to affirm the judgment just prior to making the argument that Mr. Woods's claim is not preserved. (Respondent's Brief, p.18.) Mr. Woods submits that the State cannot have it both ways: if the Rule cannot be considered in determining whether the district court erred, then the State cannot take advantage of the Rule and assert it as a basis to affirm.

The Rule is simply a relevant authority for this Court to consider in deciding the issue raised. Mr. Woods is not raising a new issue by discussing the Rule, he is simply arguing that to the extent the Rule is in conflict with United States Supreme Court precedent that is relevant to the constitutional issue raised, the precedent controls.

2. Harmless Error

Next, the State contends that "an error is harmless if the State proves beyond a reasonable doubt that the verdict would have been the same had the error not occurred." (Respondent's Brief, p.21 (citing *State v. Almaraz*, 154 Idaho 584 (2013); *State v. Perry*, 150 Idaho 209 (2010)).

The harmless error test articulated in *Chapman v. California*, 386 U.S. 18 (1967), applies in cases of objected-to error. *See Perry*, 150 Idaho 209. Under the *Chapman* harmless error analysis, where a constitutional violation occurs at trial, and is followed by a contemporaneous objection, a reversal is necessitated, unless the State proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id*. In fact, the United States Supreme Court has rejected the formulation of the harmless error test the State now advocates. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) ("The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would have surely rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.") (emphasis from original). The State has been unable to show that the error complained of did not contribute to the verdict.

The State asserts that "Mr. Berrios' testimony only related to the foundational procedure by which Detective Lukasik access the data in Woods' phone. However, Detective Lukasik had already testified, without objection, that Mr. Berrios had extracted the data and provided him a forensic image of Woods' phone." (Respondent's Brief, pp.21-22.) Because of this, the State asserts that evidence of Mr. Woods' phone would still have been admitted into evidence.

However, the State never asserts that Detective Lukasik's testimony was used to admit the extraction report itself; it simply quotes Detective Lukasik's testimony stating that he received an image and printed it off. Mr. Berrios' testimony laid the foundation for the extraction report (State's Exhibit 200), which was only admitted *after* Mr. Berrios testified. (Tr., p.1437, Ls.7-8.) There would have been insufficient foundation for the report absent Mr. Berrios' testimony because he was the one who actually performed the data extraction. Thus, it was only through Mr. Berrios' testimony that the jury was able to consider the evidence

in that extraction report. Because of this, Mr. Woods submits that the State has failed to demonstrate beyond a reasonable doubt that the error complained of did not contribute to the verdict.

II.

The District Court Committed Fundamental Error By Imposing Sentences For Both The Conspiracy Charge And The Felony Murder Charge In Violation Of Mr. Woods's Right To Be Free From Double Jeopardy

A. Proper Application Of Idaho's Pleading Theory Reveals That Convictions For Conspiracy And The Felony Murder Should Have Been Merged Under The Idaho Constitution

On the first prong of the fundamental error analysis, the State improperly mixed the standards for the test under federal Constitution and Idaho Constitution to argue there is no constitutional violation because "not all the elements in conspiracy to commit robbery are pled in robbery." (Respondent's Brief, p.34.) However, the question of whether the elements of one offense are encompassed by the elements of the other (*i.e.*, whether the elements of one would be pled as part of the other) is the test under the federal Constitution, and Mr. Woods has raised this issue under the more-protective Idaho Constitution. *See, e.g., State v. Sepulveda*, 161 Idaho 79, 87 (2016).

The analysis in *Sepulveda* demonstrates the difference. Rather than just looking at the elements of the two offenses in question, the Court in *Sepulveda* looked to the language of the charging document and found that "[*n*]*either Count II nor Count III makes reference to* whether L.M. was a witness or whether Sepulveda did or did attempt to intimidate, influence, impede, deter, obstruct, or prevent L.M. from testifying." *Id.* at 88 (internal quotation marks and alterations omitted) (emphasis added). Thus, the analysis in *Sepulveda* focused on whether the

charging document alleged conduct in one charge that would also speak to the alleged violation in the second charge (*i.e.*, whether it was the means or method by which the other charge was committed). *Id.*

The State's argument, however, looks more generally to whether all the elements of conspiracy were pled in the robbery. (Respondent's Brief, p.34.) First, that analysis ignores half of the relevant analysis because it ignores the possibility that the conspiracy charge could fully encompass the substantive offense, and thus, be the greater offense. *See, e.g., State v. Gallatin*, 106 Idaho 564, 570 (Ct. App. 1984) (vacating the conviction on the substantive offense because the conspiracy was the greater charge in that case). Second, by focusing on whether the elements of one charge were plead as part of the elements of the other, the State's argument would essentially recast Idaho's pleading test in a way that would make it equivalent to the federal test. That is improper because, as the Idaho Supreme Court has repeatedly held, the test under the Idaho Constitution affords broader protections than its federal counterpart. *See, e.g., State v. McKinney*, 153 Idaho 837, 841 (2013); *State v. Thompson*, 101 Idaho 430, 435 (1980). Rather, as *Sepulveda* demonstrates, the analysis is not on the elements themselves, but whether the facts alleged in the charging document, in the charges themselves, speak to the elements of both charged offenses. *See Sepulveda*, 161 Idaho at 87-88. Since the State's argument misconstrues the appropriate test, this Court should reject the State's argument.

Properly applying Idaho's pleading theory, it is clear that the conspiracy and the substantive offense are included offenses in Mr. Woods' case. The allegations in the charging document allege that Mr. Woods participated in the conspiracy by driving various other participants to different locations before sharing in the proceeds of the clandestine effort. (R., pp.33-34.) Those acts are the same by which he "aided, abetted, assisted, facilitated, and/or

encouraged" the actual robbery. (*See* R., pp.33-34.) As a result, unlike *Sepulveda*, the alleged facts in regard to the conspiracy charge also speak to the elements of the robbery charge (and thus, the resulting murder charge). Since they are included offenses, imposing multiple punishments for that single criminal conduct violates the Idaho Constitution's protection against double jeopardy. *See, e.g.*, *Sepulveda*, 161 Idaho at 87.

The State also attempts to draw a similarity between Mr. Woods' case and the Supreme Court's decision in *State v. Sanchez-Castro*, 157 Idaho 647, 648 (2014). (Respondent's Brief, p.23.) In that case, the Supreme Court acknowledged that the question of whether conspiracy and the substantive offense need to merge if they are included offenses is a question on which the Supreme Court has not directly spoken. *Sanchez-Castro*, 157 Idaho at 648; *but see State v. Sterley*, 112 Idaho 1097 (1987). However, the Court did not need to answer that question in *Sanchez-Castro* because it concluded the allegations did not overlap at all; the only similarity was a reference to the goal of the conspiracy. *See Sanchez-Castro*, 157 Idaho at 648-49. Since the offenses in *Sanchez-Castro* were not included offenses, the Court did not consider whether, when the conspiracy and the substantive offense are included offenses, that would trump the general rule that conspiracy does not merge with the substantive offense. *See id*. (quoting *Gallatin*, 106 Idaho at 567).

The language of the charging document in Mr. Woods' case contradicts the State's assertion that a similar conclusion is appropriate here. While the alleged goal of the conspiracy was, indeed, to take property from Mr. Nelson (R., p.33), Mr. Woods' alleged participation in the conspiracy was not limited to possessing the property in question (*i.e.*, achieving the goal of the conspiracy) as it was in *Sanchez-Castro*. Rather, Mr. Woods' alleged participation in the conspiracy was by driving various participants in the conspiracy to different locations before

receiving a portion of the money taken. (R., pp.33-34.) Thus, the charging document in Mr. Woods' case does more than just refer to the goal of the conspiracy, and so, this case is distinguishable from *Sanchez-Castro.*

More importantly, the acts by which Mr. Woods was alleged to have participated in the conspiracy were the same acts by which he aided, abetted, assisted, facilitated, and/or encouraged the actual robbery. As such, his case directly asks the question that was left open after *Sanchez-Castro* – whether, when conspiracy and the substantive offense are included offenses, the Idaho Constitution requires those two convictions to merge. The answer to that question is "yes" because allowing the two convictions to coexist would amount to multiple punishments for the same criminal conduct, which would violate the constitutional protections against double jeopardy. (*See* Appellant's Brief, pp.13-20.)

Finally, the State argues that there is no need for merger because, under I.C. § 18-204, there is no distinction between principals and abettors. (Respondent's Brief, p.28.) However, the State misunderstands I.C. § 18-204. That code section eliminates any distinction in *the culpability* of the principal and the abettor – an abettor is equally guilty of committing the overarching offense as the person who actually committed the act constituting the offense. I.C. § 18-204. However, even within the language of I.C. § 18-204 itself, a distinction remains in regard to *the means by which* an abettor and a principal actually commit the overarching offense: "All persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense or aid and abet in its commission . . . ." *Id.* Therefore, the State's argument under I.C. § 18-204 is meritless.

In fact, the State's argument is contradicted by *Sterley* and *Gallatin,* in which Idaho's appellate courts found that an abettor's convictions on the substantive offense and the related

conspiracy charge needed to merge even though I.C. § 18-204 was in effect at the time both cases were decided. *See* 1994 Idaho Laws Ch. 131 § 2; 1972 Idaho Laws Ch. 336 § 1. As such, I.C. § 18-204 does not change the conclusion that the dual convictions in Mr. Woods' case violate his state constitutional right to be free from double jeopardy.

Since the failure to merge the conspiracy and murder convictions in this case violated Mr. Woods' state constitutional right to be free from double jeopardy, the first prong of the fundamental error analysis is satisfied in this case. *See State v. Perry*, 150 Idaho 209, 226 (2010).

B. The Error Is Clear From The Face Of The Record

The State's argument on the second prong of the fundamental error analysis is essentially a reiteration of its arguments on the first prong. (*See* Respondent's Brief, p.36.) As such, no further reply is needed. That there are multiple punishments imposed for the same charged conduct is clear from the face of the record, and that means this prong of the test is met. *See State v. Vasquez*, 163 Idaho 557, ___, 416 P.3d 108, 113 (2018) (holding that, where there was no need for additional information for the appellate record to show that the trial court failed to follow I.C.R. 23(a), the record established a clear violation of the defendant's right to a trial by jury); *State v. Easley*, 156 Idaho 214, 221 (2014) (explaining that, where additional facts were not needed to identify the constitutional violation, the error was clear from the record, such that the defendant had satisfied the second prong of the *Perry* analysis).

C. Regardless Of What The Proper Remedy Is, The Error Prejudiced Mr. Woods

Finally, the State contends that any error in this regard is harmless based on its mistaken understanding of Mr. Woods' argument about the appropriate remedy. (*See* Respondent's Brief,

p.36 (mistakenly asserting that Mr. Woods argued that conspiracy was the lesser included offense, but then arguing that it should be the conviction that survived).) As an initial matter, the State's argument is irrelevant to the analysis on the third prong of the *Perry* analysis. *See Perry*, 150 Idaho at 226 (requiring only that the defendant show the error prejudiced him). Regardless of what the proper remedy is, the district court's failure to merge the two convictions based on the same charged criminal conduct resulted in Mr. Woods being punished multiple times for the same criminal conduct. That is prejudice resulting from the error sufficient to satisfy the third prong of the *Perry* analysis.

At any rate, the State's assertion that Mr. Woods has argued that conspiracy is the "lesser included" offense misrepresents his argument and ignores the controlling precedent on that point. Mr. Woods specifically relied upon the Court of Appeals' precedent in regard to the remedy for a double jeopardy violation in *Gallatin*. (Appellant's Brief, pp.19-20.) In that case, the Court of Appeals held that, since the acts alleged in regard to how the defendant aided in the substantive offense were the means or method by which the defendant participated in the conspiracy, the substantive offense was the conviction which had to be vacated. *Gallatin*, 106 Idaho at 570; *see id*. at 570 (Burnett, J., dissenting particularly in regard to the remedy analysis). Effectively, *Gallatin* held that the substantive offense was the "lesser" offense. *See id.* As such, *Gallatin* demonstrates why the Court of Appeals has urged caution in the use of the terms "greater" and "lesser" in regard to included offenses – those terms are often misleading. *See, e.g., State v. Gilman*, 105 Idaho 892, 896 (Ct. App. 1983). In fact, the Supreme Court has illustrated that point by holding there is no problem with the fact that a conviction for inattentive driving subjecting the defendant to an arguably-greater penalty than reckless driving even though the

relevant statute says inattentive driving is a "lesser included offense" of reckless driving. *State v. Parker*, 141 Idaho 775, 779 (2005).

More importantly, though, *Gallatin* remains the only authority to directly address the remedy question in light of a double jeopardy violation. *Cf. Sterley*, 112 Idaho at 1101 (the Supreme Court simply remanding for the district court to determine which count merged, and the district court would have been bound to follow *Gallatin* in making that determination). Therefore, the State's assertion that Mr. Woods argued the conspiracy was the lesser included offense is mistaken; all he has argued is that they are included offenses, and per the holding in *Gallatin*, the substantive offense is the one which should be vacated.

Notably, the State has not argued that *Gallatin* is manifestly wrong or should be overruled. (*See generally* R.) In fact, since *Gallatin* and the Supreme Court's subsequent decision in *Sterley* are consistent with the other precedent discussed *supra*, they are not manifestly wrong. *See also Sanchez-Castro*, 157 Idaho at 648 (citing *Gallatin* with approval); *State v. McKinney*, 153 Idaho 837, 842 (2013) (citing *Sterley* with approval).[1] Rather, the State has only argued *Gallatin* and *Sterley* should be limited to the context of the now-repealed I.C. § 18-301. (*See* Respondent's Brief, p.35.) That argument is mistaken since the test under that former code section was similar to the test that this Court applies under the Idaho Constitution. *See, e.g., Bates v. State*, 106 Idaho 395, 401-02 (Ct. App. 1984) (applying the pleading theory analysis to a claim raised under I.C. § 18-301); *cf. Sterley*, 112 Idaho at 398-99 (noting that, because it focused on the "same act or omission," rather than the "same offense," I.C. § 18-301 was more protective even than the state constitution, though the Supreme Court

[1] The *McKinney* Court ultimately did not evaluate the double jeopardy claim in that case because it held the claim was not properly raised through a motion under I.C.R. 35. *McKinney*, 153 Idaho at 842.

still evaluated whether the acts could be separated into distinct temporal units, as opposed to alleging different aspects of the same act, to determine if there was a violation of the statutory protection). Therefore, *Gallatin* and *Sterley* remain useful in understanding how Idaho has understood the protection against double jeopardy and the test which Idaho has applied in that regard.

Even if this Court decides to abandon *Gallatin*'s reasoning about the proper remedy, that does not mean this Court should ignore the clear violation of Mr. Woods' constitutional rights, as the State's argument about the remedy analysis rendering the issue harmless essentially asks this Court to do. Rather, in that scenario, this Court should take this opportunity to definitively answer the question left open in *Sanchez-Castro* and remedy the clear violation of Mr. Woods' constitutional rights by remanding this case to the district court "with instructions to vacate the judgment of conviction and the sentence on one or the other of the two charges," just like the Supreme Court did in *Sterley*. *See Sterley*, 112 Idaho at 1101.

CONCLUSION

Mr. Woods requests that his convictions be vacated and his case remanded for further proceedings. Alternatively, he requests that this Court remand this case with instructions to simply vacate Mr. Woods's conviction and sentence on the murder charge.

DATED this 21st day of August, 2018.

/s/ Justin M. Curtis
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
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JMC/BRD/eas