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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46608-2018**
Plaintiff-Respondent,	)	
	)	**Bannock County Case No.**
v.	)	**CR-2017-9261**
	)	
CARI LEONE OXFORD,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE STEPHEN S. DUNN
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Cari Leone Oxford appeals from her judgment of conviction for burglary and second degree kidnapping. She argues, for the first time on appeal, that the district court violated her constitutional rights to due process and equal protection by denying her motion for funds to retain an expert witness. Additionally, she claims the district court abused its discretion by refusing to allow her expert witness to testify at trial. Finally, Oxford argues the district court abused its discretion by ordering restitution.

Statement Of The Facts And Course Of The Proceedings

Oxford was "neighbor[s] across the hall" from Bambie Thometz. (Tr., p.167, Ls.3-6.)[1] On the night of August 13, 2017, Thometz had "gotten off work" and "was arriving home," carrying her eighteen-month old son. (Tr., p.167, Ls.14-23.) As Thometz approached her apartment, Oxford "opened her apartment door" and was "yelling at [Thometz] about not going into the laundry room." (Tr., p.169, Ls.2-8.) Thometz tried to get inside her own apartment and close her front door, but Oxford "stopped [her] from doing so." (Tr., p.170, Ls.10-14.)

Using "her body and her hands," Oxford prevented Thometz from closing her apartment door; Oxford, still yelling, "forcibly pushed" the door open and entered Thometz's apartment. (Tr., p.171, L.14 – p.172, L.13.) Thometz "believed that [Oxford] was going to strike at" her so she set her baby down and "tried to stay in front of him." (Tr., p.173, L.21 – 174, L.4.) Oxford started "punching [Thometz] in the head" and body, kicked her, and placed her in a headlock.

[1] Citations to "Tr." refer to the 272-page volume that contains, among other things, the jury trial transcripts. The other transcripts in the record will be denoted according to their date.

(Tr., p.174, Ls.5-14.) After several minutes of being attacked Thometz was able to knock Oxford down and break free. (Tr., p.175, L.14 – p.177, L.4.)

Oxford then "reached over" and "grabbed [Oxford's baby] by his arm." (Tr., p.177, L.16 – p.178, L.1.) Oxford dragged the screaming baby "across the floor," fled with him into her own apartment, and "shut the door." (Tr., p.177, L.5 – p.178, L.11.)

Thometz called 911 and law enforcement responded to the scene. (Tr., p.178, Ls.17-18; p.204, Ls.5-12.) The officers knocked on Oxford's door and she eventually opened it. (Tr., p.205, L.11 – p.206, L.4.) Oxford was holding on to the baby and acting as if he were her own child—she was shouting, "It's my son," and referred to the child as "Javon Oxford." (Def. Ex. 2; Tr., p.208, Ls.15-18.) She also seemed "confused about the baby's age," at times stating "he was a few months old" but later referring to him being in "his twenties." (Tr., p.208, L.24 – p.209, L.2.)

After assuring Oxford they would not "take the baby away" but just wanted to hold him, law enforcement "basically pried [Oxford's] arms from around the baby," freed him, and returned him to Thometz. (Tr., p.206, L.14 – p.209, L.6.) Thometz showed officers some "redness around her neck" from Oxford attacking her. (PSI, p.7.) Pocatello Emergency Services checked Thometz and felt "some bumps on the back of her head," and, based on her reports of jaw pain, "advised her she should respond to Portneuf Medical Center to see if she could have possibly had her jaw broken." (Id.)

Oxford was arrested for burglary and kidnapping. (R., pp.31, 36.) Prior to the preliminary hearing, Oxford's attorney moved for a Section 18-211 competency evaluation, which the district court granted. (R., pp.59-61.)

The evaluator, Dr. Traughber, interviewed and observed Oxford on October 3, 2017. (Def. Ex. 1, p.1.) He reviewed "her records" and "information regarding her behavior from Bannock County Jail staff," and completed a "mental status exam." (Def. Ex. 1, p.2.) Oxford "reported an extensive history of mental illness," including "numerous diagnoses including schizophrenia, anxiety, and bipolar disorder." (Id.) Oxford also reported that she had "been placed on some antipsychotic medications in the jail," which she thought had improved her concentration. (Id.) On the other hand, Oxford "indicated that she [had] not been psychotic … for some time." (Id.)

Regarding the kidnapping itself, Oxford had the following to say:

> Ms. Oxford interacted in an odd verbal manner during the interview. She provided a detailed account of the reasons behind her incarceration, indicating that her charges were completely inaccurate, and that she had been attempting to defend the child of a neighbor. She provided detail regarding how her neighbor was involved in "blood magic," and had been injuring her own child. She had further been told by the boyfriend of the mother that she had been injuring the child. By listening through the wall, she could hear the distress of the child, and as Ms. Oxford had been the victim of "blood magic" as a child, she "knew" that was the sound a child in distress made when being injured in such rituals. Throughout the evaluation, her primary focus was on ensuring that the psychologist would leave the jail and report the mother to child protective services, for the benefit of the child. The hope was that child protective services (which she had previously contacted and who had dismissed her claims) might pay more attention to a psychologist. She seemed quite firm and genuine in her concern regarding the protection of the child. Of note, during the other aspects for [sic] her interview, she was less focused and more confused and disorganized in her language.

(Id.)

Dr. Traughber found that "[i]t appears that Ms. Oxford is currently, and has likely suffered from a mental illness for some time." (Def. Ex. 1, p.3.) Dr. Traughber also found, however, that "[a]t this point, it is difficult to be precise in her diagnosis, due to her confusion and the limitations of this evaluation." (Id.) He concluded that Oxford "[met] criteria for a

mental illness" (an unspecified psychotic disorder), was "in need of treatment/support," and was "not fit to proceed" with the case. (Def. Ex. 1, pp.3-4; R., p.82.) The district court accordingly found Oxford "lack[ed] the capacity to make informed decisions about treatment" and entered a Section 18-211 commitment order. (R., pp.82-85.)

Oxford's competency was eventually restored and the case proceeded. (R., p.100.) Following a preliminary hearing, the state charged Oxford with one count of burglary and one count of second degree kidnapping. (R., pp.101-02.)

Prior to trial, Oxford filed a "Motion for Appointment of [an] Expert Witness." (R, pp.113-14.) In it, she "move[d] the Court for an order approving the retention of a licensed psychiatrist or psychologist to review the facts in this matter, including an interview of the Defendant, and to advise the Defendant regarding her defense in this matter that her mental health situation on the date of the incident charged in this matter was such that she could not have possessed the requisite intent to have committed the offenses charged." (R., p.113.) Oxford's motion cited no supporting legal authority; it simply requested, based on Oxford's "indigency status," "that the court approve the Defendant's request to retain a licensed psychologist or psychiatrist to assist the Defendant in investigating the defense and to testify at the trial in this matter." (R., pp.113-14.)

The district court took up the motion at a subsequent hearing:

> [THE COURT:] As to the appointment of the expert, I think that that's—this makes some sense, that you want to at least explore that possibility, and we can argue at some later date as to whether anything you find is admissible or not on the question of intent.
>
> So I'm going to grant that motion, with one exception: And that is the [public defender's] office does have, I think, an expert witness portion of their budget. So—and we're in January. So I would think that—I'm reluctant to order the district court to pay for it if there is a budget amount for that.

[DEPUTY PUBLIC DEFENDER] MR. ANDREW: Okay. I'll ask—

THE COURT: Take a look at that.

MR. ANDREW: I'll ask Dave and Randy about that.

THE COURT: Okay. Very good.

(Tr., p.10, L.18 – p.11, L.8.)

The deputy public defender representing Oxford later filed a discovery request response stating that Oxford "intend[ed] to call Daniel Traughber, Ph.D," and that the "substance of and basis for Dr. Traughber's testimony are those facts, conclusions, and opinions set forth" in Oxford's competency evaluation. (R., p.170.) Oxford's counsel also filed a motion in limine seeking a variety of pretrial rulings. (R., pp.172-80.) Among other things, the motion informed the district court that the public defender's office had decided to use its existing expert witness budget for a different case:

> On January 18, 2018, a motion was filed for appointment of an expert. The motion set forth the Defendant's intent to raise a defense against the specific intent portions of the charged crimes based on her mental state at the time of the alleged offenses. The motion requested that the Court approve the Defendant's request for an expert to assist in pursuing the defense and to testify at trial. The Court denied the motion, indicating that the Defendant access funds allocated to the public defender's office in its budget for the retention of experts. Counsel for the Defendant made a request for funds to be allocated from the public defender's office budget, but was denied because the funds were necessary for the defense of a capital case ….

(R., p.174.)

Thus, Oxford's motion explained, she "intend[ed] to call Dr. Traughber to testify about the observations and conclusions he reached during his competency evaluation." (Id.) Because Oxford "desire[d] to move forward with trial with Dr. Traughber," "both as a fact witness" and as an expert witness, she sought a pretrial ruling on "the issue of his ability to testify." (R.,

pp.176-77.) The state filed its own motion to exclude Dr. Traughber's testimony, arguing that it was irrelevant and confusing. (R., p.229.) The state went on to argue that Oxford "only produced a competency evaluation which does not determine the ability of the defendant to form the necessary intent to commit the crime," and that "whether or not the defendant was competent to stand trial is irrelevant to the elements in this case." (R., pp.229-30.) The district court took the motions under advisement. (Tr., p.26, L.22.)

The following day, prior to opening statements, the district court revisited the parties' motions. It gave Oxford an opportunity to make an offer of proof; counsel offered "Dr. Traughber's [18-211] evaluation," and noted his "intent to just have [Dr. Traughber] testify as to his interview with her and the contents of that report." (Tr., p.139, L.19 – p.140, L.11.) With that, the district court issued its ruling:

> THE COURT: All right. I did review this report at some length yesterday, actually. And I do note for the record that I don't think Dr. Traughber specifically was addressing the questions that the defense seeks to have him testify to. It's interesting, I think, that—I'll read one sentence from page 3:
>
> "It is difficult to be precise in her diagnosis, due to [Oxford's] confusion and the limitations of this evaluation."
>
> I think it's fair to say that Dr. Traughber did not view his role in preparing this report as determining whether or not she did have a mental health diagnosis. He makes reference, some vague references actually, to a variety of different historical records which he seemed to review, but he doesn't—he's not very specific about what those records were, except for some more specific references to her behavior in the Bannock County Jail and things that the persons in the Bannock County Jail indicated that she was saying there.
>
> But his role in preparing this report was to determine her competency. And he did not make a formal diagnosis of her mental health condition. He did not make any reference at all to whether or not that mental health condition impacted her state of mind or her ability to form an intent at the time that these crimes were allegedly committed.

> And as a result of that, I do not believe that the report itself or the conclusions there are relevant to the issues that the defense seeks to raise here, particularly as to whether or not Ms. Oxford suffers from a mental health condition, and as a result of that whether those instructions should be given and whether or not he should be allowed to testify concerning her state of mind at the time.
>
> So I don't think his report goes to that.
>
> I don't think any more disclosure was ever made. I think that disclosures could have been made at some point in time, 90 days ago, as to individuals who may have been treating her for mental health conditions at the time that this crime occurred or allegedly occurred. Those opinions have not been offered.
>
> ...
>
> I do think this falls very closely to the [State v. Arrasmith, 132 Idaho 33, 42, 966 P.2d 33, 42 (Ct. App. 1998)] case and the statute that we're relying on or referring to here as Idaho Code Section 18-2073 which provides that expert evidence on the issue of mens rea, that is intent and state of mind, subject to the Rules of Evidence, can be admitted. But I don't think we have such evidence in this case. And as a result of that, 18-207 does not apply, in my view.
>
> So I'm not going to allow Dr. Traughber to testify, and I'm not going to permit those instructions to be given to the jury on mental health issues.

(Tr., p.140, L.17 – p.143, L.9.)

The state called Thometz and the responding officer to testify. Oxford did not call any witnesses, but admitted an officer's audio recording of the arrest into evidence. (Tr., p.218, Ls.1-16.) The jury found Oxford guilty of burglary and second degree kidnapping. (Tr., p.257, Ls.5-22; R., p.246.)

Oxford's presentence investigation showed she had a criminal history with "violent tendencies," had a long history of substance abuse issues and mental health issues, and was a high risk to reoffend. (PSI, pp.9-12, 15-20.) The district court sentenced Oxford to concurrent sentences of ten years, with three years fixed, for the kidnapping charge, and five years, with two years fixed, for the burglary charge. (R., p.294.) The district court additionally ordered Oxford

pay $6,072.09 for "payments made" by the Crime Victims Compensation Program "on behalf of Bambie Thometz." (R., pp.224-25, 289.)

Oxford timely appealed. (R., pp.293-95, 299-301.)

ISSUES

Oxford states the issues on appeal as:

I. Did the district court deny Ms. Oxford her constitutional right to due process and equal protection when it denied her motion for funds to retain an expert witness?

II. Did the district court err in refusing to allow Dr. Traughber to testify as an expert witness for the defense at trial?

III. Did the district court err in ordering Ms. Oxford to pay restitution in the amount of $6,072.09 to the Idaho Industrial Commission for expenses ostensibly incurred by Ms. Thometz for medical treatment?

(Appellant's brief, p.7.)

The state rephrases the issues as:

I. Did Oxford fail to preserve her claim of constitutional error by never raising it below, and by not alleging fundamental error on appeal?

II. Has Oxford failed to show the district court abused its discretion by excluding Dr. Traughber's testimony?

III. Has Oxford failed to show the district court erred in ordering restitution?

ARGUMENT

I.
Oxford Never Made Her Claims Of Constitutional Error Below And Has Not Argued Fundamental Error On Appeal; This Issue Is Therefore Plainly Not Preserved For Review

It is well-settled by now that "[i]ssues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (quoting Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands, 99 Idaho 793, 799-800, 589 P.2d 540, 546-47 (1979)). Time and time again, this Court has declined to consider claims that parties failed to raise below. See, e.g. State v. Gonzalez, Jr., ___ Idaho ___, 450 P.3d 315, 320 (Idaho 2019) ("We require 'both the issue and the party's position on the issue [to] be raised before the trial court for it to be properly preserved for appeal.'"); State v. Wolfe, 165 Idaho 338, 445 P.3d 147, 151 (2019) (noting "[t]his is not a new approach," and pointing out that "the Territorial Supreme Court of Idaho recognized over 150 years ago" that it "is manifestly unfair for a party to go into court and slumber, as it were, on his defense, take no exception to the ruling, present no point for the attention of the court, and seek to present his defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the [S]upreme [C]ourt one for deciding questions of law in the first instance") (quoting Smith v. Sterling, 1 Idaho 128, 131 (1867)); State v. Gonzalez, 165 Idaho 95, 439 P.3d 1267, 1271 (2019) ("We will not hold that a trial court erred in making a decision on an issue or a party's position on an issue that it did not have the opportunity to address…. A groomed horse is expected on appeal, but a different horse is forbidden.")

Oxford claims, for the first time on appeal, that by "den[ying] her request for funds to retain" an expert, the district court violated her constitutional[2] rights to due process and equal protection. (Appellant's brief, p.11.) This claim is not preserved. Oxford never cited any constitutional authority in her request for district court funding for an expert; in fact, her request for funding did not cite any authority at all. (R., pp.113-14.) And Oxford never claimed that the district court's funding decision violated the constitution or was even in error—much less did the district court rule on any constitutional issues. (See Tr., p.10, L.18 – p.11, L.10; R., p.174.) Parties are held to the issues they raise below, and because Oxford never raised or even hinted at these issues below—much less did the court rule on them—they are not preserved for review.

Oxford could have conceivably argued on appeal that the district court's funding decision amounted to fundamental error. See State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010); State v. Miller, 165 Idaho 115, ___, 443 P.3d 129, 133 (2019). She has chosen not to do so. Oxford has not bothered to articulate this Court's fundamental error standard, much less has she shown, or even argued, that the district court committed fundamental error. (See Appellant's brief, pp.8-13.) Because parties cannot raise issues for the first time in a Reply brief, any fundamental error argument has been waived. I.A.R. 35(a)(4); Patterson v. State, Dep't of Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011); The David & Marvel Benton Tr. v. McCarty, 161 Idaho 145, 155, 384 P.3d 392, 402 (2016) ("In order to be considered by this

[2] Though not expressly set forth in her statement of the issues on appeal, at times Oxford argues that the district court's funding decision also violated Idaho Code § 19-852(a)(2). (See Appellant's brief, pp.8-9.) Like her constitutional claim, this issue is not preserved; below Oxford never argued that the district court's funding decision violated Section 19-852(a)(2). (R., pp.113-14.) To the extent the district court's denial of Oxford's request for public funds amounted to an implicit ruling on Section 19-852(a)(2), preserving a claim of statutory error (see State v. Jeske, 164 Idaho 862, 436 P.3d 683, 689 (2019), Oxford fails to show any error on the merits for all the reasons articulated herein.

Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief.").

Alternatively, even if a fundamental error claim had inadvertently been made here, Oxford does not come close to showing fundamental error. Perry, 150 Idaho at 227, 245 P.3d at 979; Miller, 165 Idaho at ___, 443 P.3d at 133. Oxford cannot show the court committed a clear constitutional violation, first because the court's "den[ial]" of Oxford's "motion for funds" was not a denial. (See Appellant's brief, p.1.) The district court did not deny Oxford public funding; it simply instructed Oxford that her public funds would need to come from the public defender's existing expert witness budget. (Tr., p.11, Ls.1-8.) Oxford made her request in January, after all, and "the [public defender's] office" had "an expert witness portion of their budget." (Tr., p.10, Ls.23 – p.11, L.1.) And it was ultimately the public defender, not the district court, who concluded that those funds were better spent in a different case. (See Tr., p.11, Ls.1-8; R., p.174 (stating Oxford's counsel, a deputy public defender, "made a request for funds to be allocated from the public defender's office budget, but was denied because the funds were necessary for the defense of a capital case")). Thus, Oxford's true complaint is not with the district court, but with her own counsel—which chose not to use the public funds it already had for this case.

Even assuming the funding decision can be blamed on the district court, Oxford still fails to show any error. As it turns out, the funding decision did not prevent Oxford from acquiring an expert. Oxford found[3] an expert to testify at trial: Dr. Traughber, who was the psychologist who conducted Oxford's 18-211 evaluation. (R., pp.176-77.) Oxford undoubtedly had a right to any

[3] Oxford's chosen expert, Dr. Traughber, did not testify at trial due to the district court's ruling on the motion in limine. The propriety of this ruling is a separate issue, addressed in section II.C herein.

necessary "expert assistance at public expense," but she did not "have a constitutional right 'to choose an [expert] of [her] personal liking.'" State v. Brackett, 160 Idaho 619, 634, 377 P.3d 1082, 1097 (Ct. App. 2016) (citing Ake v. Oklahoma, 470 U.S. 68, 83 (1985)). Because Oxford ultimately secured an expert witness, her essential gripe is that she was unable to hire some *other* expert, more to her liking. This is not enough to show a clear constitutional violation. See Ake, 470 U.S. at 83 (finding no "constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own"). Much less can Oxford show that the choice to use Dr. Traughber, as opposed to some other expert, was not tactical, or that it "actually affected the outcome of the trial proceedings," as she must do to show fundamental error. Miller, 165 Idaho at ___, 443 P.3d at 134.

Oxford's constitutional claim is plainly not preserved and she has waived any claim of fundamental error. Even if a reviewable fundamental error claim had been made, it would fail on every prong on the merits. In any event, Oxford fails to show error.

II.
Oxford Fails To Show The District Court Abused Its Discretion Excluding Dr. Traughber's Testimony

A. Introduction

Prior to trial, Oxford moved the district court for an order allowing the testimony of Dr. Traughber, both as a fact and expert witness, "on the issue of whether she had the requisite intent" to commit kidnapping and burglary. (R., pp.176-77.) The district court excluded any such testimony after concluding Dr. Traughber, who examined Oxford more than seven weeks after the arrest, could not testify about the relevant issue: "her state of mind *at the time*" of the kidnapping. (Tr., p.141, Ls.18-25 (emphasis added).)

Oxford claims this was an abuse of discretion, arguing that "Dr. Traughber could have testified regarding his clinical diagnosis of Ms. Oxford, which is a concept beyond the common experience of most jurors, and would have assisted the jurors in evaluating the evidence." (Appellant's brief, p.16.) A review of Dr. Traughber's report shows his testimony would have been inadmissible and that the district court correctly excluded it.

B. Standard Of Review

When the appellate court reviews the trial court's evidentiary rulings, the appellate court applies an abuse of discretion standard. State v. Jones, 160 Idaho 449, 375 P.3d 279 (2016) (citing Dulaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160, 163-64, 45 P.3d 816, 819-20 (2002)). To determine whether a trial court abused its discretion, the appellate court considers whether the trial court "correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason." Id. (quoting Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 51, 995 P.2d 816, 821 (2000)). Whether evidence is relevant is reviewed de novo. State v. Raudebaugh, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993).

C. The District Court Properly Excluded The Testimony Of Dr. Traughber Because It Would Have Been Irrelevant, And Because He Lacked Foundation To Opine On Her Intent At The Time Of The Crime

"Relevant Evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. The appellate court reviews questions of relevance de novo. Raudebaugh, 124 Idaho at 764, 864 P.2d at 602.

The admissibility of expert testimony is governed by Idaho Rule of Evidence 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"To be admissible, the expert's testimony must assist the trier of fact to understand the evidence or to determine a fact in issue." State v. Joslin, 145 Idaho 75, 81, 175 P.3d 764, 770 (2007) (quotations omitted); see also I.R.E. 702. "The function of the expert is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror." State v. Arrasmith, 132 Idaho 33, 42, 966 P.2d 33, 42 (Ct. App. 1998) (citations omitted).

The district court understood that, pursuant to Idaho Code § 18-207, evidence of Oxford's mental state was "not a defense" or "an absolute defense" to the charges against her. (7/2/18 Tr., p.10, Ls.11-12); see I.C. § 18-207(1) ("Mental condition shall not be a defense to any charge" of criminal conduct). But the district court also correctly pointed that Oxford could have presented "evidence that goes to the question of ['']can the defendant form the requisite mental intent['']." (7/2/18 Tr., p.10, Ls.6-9.) Indeed, Idaho's statutes and "precedent hold[] that an independent defense of insanity is not required, and that evidence of mental illness can still be used to rebut the intent element of a crime." State v. Delling, 152 Idaho 122, 130, 267 P.3d 709, 717 (2011); see also I.C. § 18-207(3). Both second degree kidnapping and burglary have intent elements. I.C. §§ 18-1401; 18-4501(1).

The district court concluded, however, that Dr. Traughber's testimony could not have been used for the permissible purpose of rebutting the state's intent evidence:

> [Dr. Traughber's] role in preparing this report was to determine [Oxford's] competency. And he did not make a formal diagnosis of her mental health

> condition. He did not make any reference at all to whether or not that mental health condition impacted her state of mind or her ability to form an intent at the time that these crimes were allegedly committed.

(Tr., p.141, Ls.11-17.)

The district court concluded that there was an insufficient "foundation and basis for allowing Dr. Traughber to testify as to [Oxford's[mental health conditions or the specific intent requirements," and that Dr. Traughber's "report itself or the conclusions there" were not "relevant to the issues that the defense seeks to raise here." (Tr., p.141, L.18 – p.142, L.11.)

A review of the record shows that this was correct. Dr. Traughber examined Oxford seven weeks after the kidnapping. (R., p.23; Def. Ex. 1, p.1.) The report contained no opinions on Oxford's mental health on the night of the crime, nor did it blame the crimes on any particular mental illness. (See Def. Ex. 1.) The report gave no opinion on Oxford's intent during the kidnapping or whether any mental illness affected that intent. (See id.) Furthermore, the report's references to Oxford's mental health were vague; it only stated that "it appears that Ms. Oxford is currently, and has likely suffered from a mental illness for some time," and that she had an unspecified psychotic disorder. (Def. Ex. 1, pp.3-4.) And while Dr. Traughber concluded that "Oxford does meet criteria for a mental illness" he conceded that "[a]t this point, it is difficult to be precise in her diagnosis, due to her confusion and the limitations of this evaluation." (Def. Ex. 1, p.3.) In sum, the report shows that while Dr. Traughber had enough information to conclude Oxford was not competent at the time of the evaluation, he lacked the foundation to definitively weigh in on Oxford's mental state seven weeks earlier. It also shows Dr. Traughber could not offer any testimony on the relevant question: whether Oxford lacked intent to commit the crimes.

Oxford argues on appeal that the district court abused its discretion by excluding Dr. Traughber's testimony. (Appellant's brief, pp.13-17.) However, Oxford concedes on appeal that "the district court was correct to conclude that Dr. Traughber could not testify that, based on his evaluation, Ms. Oxford 'was unable to form the specific intent necessary to commit these crimes.'" (Appellant's brief, p.16 (citing Tr., p.22, Ls.12-21.) This concession necessarily relegates Dr. Traughber's testimony beyond the bounds of relevance. At best, Dr. Traughber could only testify as to Oxford's generalized mental health—which could not have constituted a defense to the crime—and he could not testify "on the issue of any state of mind which [was] an element of the offense"—the intent element.

The only items in the report arguably bearing on Oxford's intent during the kidnapping were Oxford's statements about wanting to shield Thometz's child from "blood magic." (See Def. Ex. 1, p.2.) But these statements only showed Oxford *did* intend to kidnap a child, albeit for deluded reasons. In other words, even granting that Oxford was hallucinating that "blood magic" was afoot in the apartment next door, this still would not have negated her intent. By Oxford's own explanation, she intended to remove the child from the apartment, to get him away from the imaginary "rituals," and intended to "keep" or "conceal" him from his parent. (R., p.102; Def. Ex. 1, p.6); I.C. § 18-4501(1).[4] Thus, Traughber's testimony could still not have "*rebut[ted]* state's evidence offered to prove criminal intent or mens rea"—it could only have bolstered it. Delling, 152 Idaho at 130, 267 P.3d at 717 (emphasis added).

[4] Even if these statements would have been admissible their exclusion was harmless, insofar as they cut directly against Oxford's theory of the case at trial—that Oxford was suffering from a delusion that the child was *her* baby, not Thometz's. (Tr., p.246, Ls.19-25.)

In sum, because Dr. Traughber had nothing to offer on the only permissible basis for discussing Oxford's mental health, and because he lacked foundation to offer any relevant testimony, the district court properly excluded him from testifying at trial.

III.
Oxford Fails To Show The District Court Erred In Ordering Restitution

The decision whether to order restitution and in what amount is committed to the trial court's discretion. State v. Hill, 154 Idaho 206, 211, 296 P.3d 412, 417 (Ct. App. 2013). A restitution award "will not be disturbed if supported by substantial evidence"; that is, "relevant evidence as a reasonable mind might accept to support a conclusion." State v. Nelson, 161 Idaho 692, 697, 390 P.3d 418, 423 (2017) (quoting State v. Straub, 153 Idaho 882, 885, 292 P.3d 273, 276 (2013)).

The state submitted a restitution request from the Crime Victims Compensation Program, "requesting restitution for payments" in the amount of $6,072.69 "made on behalf of Bambi Thometz." (R., pp.224-25.) The district court ordered restitution in the requested amount. (R., p.287.) Oxford subsequently objected to the restitution order, arguing that "there is no supporting information upon which the Court can find that the bills paid by the Industrial Commission relate to the offenses for which the Defendant was found guilty or, if the bills are related to the charges in this matter, that such injuries were directly related to the defendant's criminal conduct." (R., p.291.) The state later explained that the total bill of $6,072.09 was "just for medical expenses. None of it's for mental health. It was when Ms. Thometz had to go to the emergency room after she was beaten by the defendant. She had to do some CT scans." 2/7/19

Tr., p.2, L.25 – p.3, L.4; see also R., p.225 (showing payments made to "ID EM-I Medical Services, P.C.," "Medical Imaging Assoc," and "Portneuf Medical Center").

The district court concluded the state's request was "insufficient as far as providing adequate support"; in particular, the court wanted to know "what bills were incurred at what times and for what circumstances" and "what amounts were actually paid by the Industrial Commission." (2/7/19 Tr., p.3, Ls.10-23.) The state indicated that it could "have that submitted to the Court by next week" and "should be able to get that information to the Court." (2/7/19 Tr., p.5, Ls.12 – p.6, L.11.) Based on this the district court overruled Oxford's objection and sustained the restitution order "with the caveat that I want the information I've asked for":

> [THE COURT:] I think that there's no reason that that information could not be supplied within two weeks.
>
> [PROSECUTOR] MS. GRAHAM: Yes, Your Honor.
>
> THE COURT: So I'll give you two weeks to do that. No later than—what's today? The 7th—21st of February.
>
> And you can have a week to file a subsequent objection if you wish, Mr. Andrew.
>
> MR. ANDREW: Okay.
>
> THE COURT: And I'll deal with that at that point in time. But for now, the objection's overruled conditioned on the rulings I've made today. I'll make a final ruling after all submissions are made, no later than the 28th of February.

(2/7/19 Tr., p.10, L.23 – p.12, L.13.)

The state did not submit any additional restitution information (see R.), and the original restitution order of $6,072.69 was left in place.

Oxford fails to show a reviewable error on appeal. The state admittedly did not submit supporting information to the district court (see R.), but neither did Oxford renew her objection and request the Court to withdraw the conditional restitution order (see 2/7/19 Tr., p.12, Ls.6-8).

Because Oxford never requested a "final ruling" as invited by the district court, she fails to show this issue can be raised on appeal. Cf., Krempasky v. Nez Perce Cty. Planning & Zoning, 150 Idaho 231, 236, 245 P.3d 983, 988 (2010) (holding "that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error"; see also State v. Pickens, 148 Idaho 554, 557, 224 P.3d 1143, 1146 (Ct. App. 2010) ("In order for an issue to be raised on appeal, the record must reveal an adverse ruling that forms the basis for the assignment of error.").

In any event, even if the district court abused its discretion by leaving the original restitution order in place, the proper remedy would be a limited remand as opposed to "vacat[ing] the order of restitution." (See Appellant's brief, p.21.) The state assured the district court that it could "have that information submitted to the Court" in a week, and that it could "make that happen." (2/7/19 Tr., p.5, L.17 – p.6, L.11.) The appropriate remedy, therefore, would be a limited remand for the state to provide that information to the district court.

CONCLUSION

The state respectfully requests this Court affirm the judgment of conviction and sentence. Alternatively, the state requests this Court remand for the limited purposes of reviewing the state's restitution request.

DATED this 26th day of November, 2019.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of November, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KDG/dd