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State v. Fields Appellant's Reply Brief Dckt. 46422

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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. vs. CATHERYN D. FIELDS, Defendant-Appellant,	S.Ct. No. 46422-2018 Lewis Co. CR-2017-294

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Second Judicial District of the State of Idaho
In and For the County of Lewis

HONORABLE GREGORY FITZMAURICE,
District Judge

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II. ARGUMENT IN REPLY

The Trial Court Erred In Not Giving The Requested Instruction Regarding When An Officer May Make An Arrest.

Under *State v. Fetterly*, 126 Idaho 475 (Ct. App. 1994), a requested instruction must be given where: (1) it properly states the governing law; (2) a reasonable view of the evidence would support the defendant's legal theory; (3) it is not addressed adequately by other jury instructions; and (4) it does not constitute an impermissible comment as to the evidence. 126 Idaho at 476-77. Ms. Fields's proposed instruction met all four *Fetterly* requirements and should have been given.

1. The proposed instruction properly states the governing law.

The state does not dispute that the first paragraph of the proposed instruction correctly stated the law, as it existed at the time of trial.[1] But it then goes on to make the remarkable argument that an officer making an illegal arrest could be at that same moment also "engaged in the performance of his or her duties." Respondent's Brief, pg. 6. The state asserts the supposed duty in this case was responding to a call about a bar fight. *Id.* Apparently, the state believes that so long as a police officer starts out acting in the performance of his or her duties any deviation from the original act is irrelevant. By this logic, however, a police officer who investigates a domestic violence report but ends up stealing items from the victim's purse is also "engaged in the performance of his . . . duties." Consequently, as the state's argument goes, the victim could not grab the officer's wrist in an

[1] Since then, this Court has found that language to be unconstitutional insofar as it permits a warrantless arrest "for a mere misdemeanor not committed in his presence." *State v. Clarke*, --- Idaho ---, 446 P.3d 451, 457 (2019)

attempt to retrieve her stolen wallet without committing battery on a law enforcement officer because the officer was performing a lawful duty prior to engaging in the unlawful act. The Court should reject this absurd interpretation of I.C. § 18-915(3)(b) because it is not mandated by the plan language of the statute. *State v. Montgomery*, No. 43795, 2017 Ida. App. LEXIS 22, at *10-11 (Ct. App. Feb. 21, 2017)

The state next contends the proposed instruction was contrary to the "analysis of the statute" done by the Court in *State v. Kelly*, 158 Idaho 862, 865 (Ct. App. 2015), *i.e.*, "that the 'statute does not require that the officer be engaged in any specific duty.'" Respondent's Brief, pg. 6 quoting *Kelly*, 158 Idaho at 865. The state, however, has shortened the *Kelly* quotation, which states in its entirety: "The statute does not require that the officer be engaged in any specific duty--*only that he be engaged in the performance of his duties.*" *State v. Kelly*, 158 Idaho at 865 (omitted text italicized). The missing text is critical because an officer is not engaged in the performance of his or her duties when making an illegal arrest. To the contrary, it is a crime for a police officer to make an unlawful arrest. Any "public officer . . . who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will . . . without a regular process or other lawful authority therefor, is guilty of a misdemeanor." I.C. § 18-703. If an officer making an unlawful arrest is committing a crime it follows that "[a] peace officer making an unlawful arrest is not engaged in the performance of his or her duties," just as the proposed instruction says. R 96. Thus, in order to adopt the

state's absurd reading of I.C. § 18-915(3)(b), it would require this Court to ignore the Legislature's determination that making illegal arrests is not part of a police officer's duties, as expressed in I.C. § 18-703.

Moreover, in *Kelly,* the officer was not engaged in any unlawful activity at the time Mr. Kelly hit him. Unlike this case, the officer in *Kelly* had the suspect unshackled and then questioned him. (Had the police officers here followed that example, it is unlikely any of this would have come to pass.) The officer determined that Mr. Kelly was intoxicated and was assisting in getting him into a friend's car. "While being assisted into the car, Kelly stood up and punched the officer in the face with a closed fist." *State v. Kelly*, 158 Idaho at 864. The *Kelly* Court noted that "in order for Kelly to be found guilty under subsection (b), the state had to prove that the officer was performing his duty at the time he was struck and that Kelly knew or should have known he was an officer." *Id.* The Court continued, "Without question, an officer's duties include responding to calls for assistance and helping citizens." *State v. Kelly*, 158 Idaho at 865-66. Absent from this is any allegation that the officer was not acting in the performance of his duties, while here the officers were unlawfully arresting Ms. Fields. *Kelly* simply does not address the question presented in this case. The court's and the state's reliance upon it is misplaced.

Further, the state's reading of the statute would be contrary to the long-standing rule that "[s]tatues that are *in pari materia* must be construed together to effect legislative intent. Statutes are *in pari materia* if they relate to the same subject." *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65,

69 (2003) (internal citation omitted). Here, both I.C. § 18-915(3)(b) and I.C. § 18-703 relate to the subject of the duties of law enforcement officers. Thus, they should be read together. The "while in the performance" language in I.C. § 18-915(3)(b) should be read to exclude illegal arrests in light of the criminal prohibition of illegal arrests found in I.C. § 18-703.

The logical reading of I.C. § 18-915(3)(b) -- that a police officer is not in the performance of his or her duties while in the midst of committing a crime -- is supported by *State v. Wilkerson*, 114 Idaho 174, 178 (Ct. App. 1988), *aff'd* 115 Idaho 357, 358 (1988), where the Court found that the "duty" in I.C. § 18-705 included "only those lawful and authorized acts of a public officer." 114 Idaho at 180.

The state suggests that upon "closer analysis" *Wilkerson* does not support Ms. Fields's argument. Respondent's Brief, pg. 8. But the state's "closer analysis" is what does not withstand scrutiny.

First, the state cites to a passage in *Wilkerson* where it notes that "[i]n the arrest-resistance contexts courts have defined official duties broadly." Respondent's Brief, pg. 9, quoting *Wilkerson,* 114 Idaho at 179, in turn quoting *United States v. Heliczer*, 373 F.2d 241, 245 (2d Cir. 1967). But the *Wilkerson* Court did not adopt that broad definition from *Helcizer*, noting that "Wilkerson was not charged with resisting arrest." 144 Idaho at 179. Thus, what the state represents to be the "applicable test" in arrest-resistance cases was not adopted by *Wilkerson*.

Further, the language from *Heliczer* referred to in *Wilkerson* is itself a passage of *dicta*. The holding in *Heliczer* is that the issue was not properly preserved for appeal. The federal court held:

> Appellant's argument that the agents were not "engaged in * * * the performance of [their] duties" is closely allied to the point already mentioned concerning the unlawfulness of the arrest. It is his claim that if the arrest was unlawful, the agents were not engaged in performing their official duties, and Martin had a right to resist. *Defense counsel excepted to the court's charge on this essential element of an offense under § 111 without giving any reason for doing so, as required by Rule 30 F.R.Crim.P., and therefore it cannot be assigned as error.*

Id. (Emphasis added.) The passage relied upon by the state appears immediately after the holding above and was unnecessary for the federal court's actual decision. *Id.*

In addition, the trial court in *Heliczer* instructed the jury on the question of whether the police could lawfully arrest the defendants.[2] The Circuit Court noted that the federal agents did not have the power to make a warrantless arrest pursuant to federal statutes, but had the power under New York law if there was probable cause to believe the defendants had committed a felony. "The trial judge properly left it to the jury to find whether or not Martin's felonious act of threatening

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[2] The instruction read in relevant part that the government must prove beyond a reasonable doubt that the federal agents were engaged in the performance of their official duties. It went on to say:

> If you find that the defendant Martin had prior to August 11, 1965 threatened the Government informant and that the agents were effecting Martin's arrest for having made such a threat, then I charge you that these agents were then and there performing their official duty.

Heliczer, 373 F.2d at 245. Unlike here, the *Heliczer* jury was permitted to determine whether the arrest was in performance of the officers' official duties.

Cutler with death actually took place." *Heliczer*, 373 F.2d at 244-45. The jury found there was probable cause and thus the arrest was lawful. *Heliczer*, 373 F.2d at 247. Here, of course, the problem is that the court *did not* allow the jury to decide whether the arrest of Ms. Fields was legal. Thus, the state's reliance upon *Kelly* and *Heliczer* is misplaced.

In light of the above, this Court should conclude that the proposed jury instruction, specifically the second paragraph, was a correct statement of the law and that the first *Fetterly* requirement has been established

2. A reasonable view of the evidence supported Ms. Fields's legal theory.

The state argues that the facts did not support the giving of the instruction because "the first battery *preceded* the arrest, and the second and third battery were committed after Fields' arrest for the first battery[.]" Respondent's Brief, pg. 4. This argument, however, is based upon the erroneous belief that Ms. Fields was not under arrest until the police told her she was arrested. Here, the officers arrested Ms. Fields when they held her to the ground and handcuffed her upon arrival at the scene. From that point on, Ms. Fields was illegally arrested. Recall that Bowman was the first officer at the scene. T pg. 180, ln. 13-20. When he arrived, Ms. Fields was "being held down on the ground" by Trombetta, Busta, and the Hub's owner. *Id.,* ln. 4-11. Bowman placed Ms. Fields in handcuffs because she "was on the ground being combative," T pg. 182, ln. 1-10; that is, she was resisting the battery by the unannounced and off-duty police officers. Ms. Fields was under arrest at this moment. Idaho Code § 19-602 provides that, "An arrest is made by an actual

restraint of the person of the defendant, or by his submission to the custody of an officer." *Id.* Ms. Fields being restrained on the ground by the police officer after being handcuffed constituted an arrest. See *State v. Pannell*, 127 Idaho 420, 425 (1995) ("Based on this totality of circumstances, we hold that by handcuffing Pannell and placing him in a patrol car, the officers in this case employed a degree of force which exceeded that justified for an investigatory detention and which therefore amounted to an arrest.")

It was not until after Ms. Fields was arrested that Bowman and Robideau decided to move her to a patrol car. (The decision to place her in a patrol car is more proof that she was already under arrest.) When Ms. Fields began to struggle again, the two decided to "move her back over to the sidewalk." T pg. 185, ln. 11. It was at this point that Bowman saw Ms. Fields kick Robideau "[i]n the leg area." *Id.*, ln. 24. Robideau then told Ms. Fields that she was under arrest. T pg. 237, ln. 2-3. But when Robideau announced the arrest does not change the fact she was already under arrest. See *State v. Hobson*, 95 Idaho 920, 923 n.1 (1974) ("Even where the officer denies that he intended to make an arrest his actions may sufficiently manifest an arrest[.]"), quoting *Fuller v. United States*, 407 F.2d 1199, 1207 (D.C. Cir. 1968). In fact, she was under arrest before she kicked Robideau.

Moreover, the incidents which formed the basis for Counts I and II occurred after Robideau announced the arrest but still during the course of the illegal arrest. Bowman said that Ms. Fields was "still being verbally combative and [was] attempting to kick" but also said "[t]here were several points that she made contact

with both [him] and Deputy Robideau." T pg. 187, ln. 4-8. Ms. Fields was put on the sidewalk again. Her lip was bloodied during this procedure. T pg. 186, ln. 5-17. Bowman testified that while Ms. Fields was being held on the ground, the second time, she kicked him and made marks in his wrists with her fingernails. T pg. 190, ln. 1-4. During this time, Ms. Fields repeatedly stated, "I didn't do anything wrong" and repeatedly asked "what's my charge[?]" T pg. 217, ln. 15-22. And during closing argument, the state appears to rely upon the touching which occurred after the arrest was announced. It stated:

> We know that she committed a battery. Actually, multiple batteries. She used force or violence on Deputy Bowman when she kicked him, when she scratched him. Got pictures there. She used force or violence on Deputy Robideau when she kicked him. She scratched him. She bit him when she was in the jail and on Corporal Pagliaro, both from this closed fist strike (indicating) and from kicking him after that. So that's what the evidence shows.

T pg. 376, ln. 20 – pg. 377, ln. 5.

Thus, the evidence shows that Counts I and II occurred after Ms. Fields was illegally arrested but still during the time she was actively resisting the illegal arrest. A rational jury could have found that the officers were not in the performance of their duties at this point because they were still attempting to effectuate the illegal arrest. And while Count III occurred at the jail, Ms. Fields was still being subjected to the original illegal arrest. But even if Pagliaro was performing his duties when the acts in Count III occurred, that does not negate the fact that Bowman and Robideau were not performing their duties at the time of Counts I and II.

3. The proposed instruction is not adequately addressed by the court's instructions.

The state does not dispute this factor.

4. It does not constitute an impermissible comment as to the evidence.

A comment on the evidence is "[a] statement made to the jury or by counsel on the probative value of certain evidence." Black's Law Dictionary, Seventh Edition, pg. 262 (1999). See also, Webster's New World Law Dictionary (2010) (phrase defined as a statement "made during a trial by a judge or lawyer regarding his or her own opinion about the evidence and the credibility of the witnesses."). That was not the case here. The proposed jury instruction does not comment on the evidence because it does not address the probative valve of the evidence.

In response, the state writes, "As found by the district court, there are no ICJIs detailing what is and is not within the scope of an officer's duties, and to 'focus in solely on the issue of the purported and alleged arrest' would be 'improper comment upon the evidence.'" Respondent's Brief, pg. 12, citing T pg. 291, ln. 10-20. But this response is a non sequitur. The fact that there is no applicable pattern instruction does not make the proposed instruction a comment on the evidence. Nor does the fact that the proposed instruction focuses on legal propositions relevant to the defense of the case make the instruction a comment on the evidence. If setting forth the law was a comment on the evidence, the jury instructions on the elements of the charged offenses would also be such comments as they focused solely upon the state's theory of guilt. Thus, the fourth *Fetterly* requirement is present.

5. Conclusion.

As all four parts of the *Fetterly* test are present here, the district court erred in refusing Ms. Fields's proposed instruction.

The Error Is Not Harmless Beyond A Reasonable Doubt.

The state has not met its burden of proving the objected-to error was harmless beyond a reasonable doubt, as required by *State v. Perry*, 150 Idaho 209, 224 (2010). Had the jury been properly instructed, it could have found that all three counts occurred while the officers were not in the performance of their duties. As to Count I and II, the jury could have found that Bowman and Robideau were actively engaged in an illegal arrest at the time of the batteries. Likewise, the jury could have found that Pagliaro was not performing his duties because Ms. Fields would not have been in custody but for the illegal arrest. But even if the jury found that Pagliaro was performing his duties when the acts in Count III occurred, that would not prevent it from also concluding Bowman and Robideau were not performing their duties at the time of Counts I and II.

III. CONCLUSION

Ms. Fields asks the Court to vacate the judgments and sentences, and remand the case for a new trial.

Respectfully submitted this day 12th of December, 2019.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Catheryn Fields

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

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Dated and certified this 12th day of December, 2019.

/s/Dennis Benjamin
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