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

STATE OF IDAHO,	)	
	)	**No. 47009-2019**
Plaintiff-Respondent,	)	
	)	**Bannock County Case No.**
v.	)	**CR-2017-8319**
	)	
ROCCO JOSEPH CHACON, JR.,	)	
	)	
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

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District Judge

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Nature of the Case

Rocco Joseph Chacon, Jr., appeals from the judgment of conviction entered upon the jury trial verdicts finding him guilty of felony eluding, unlawful possession of a firearm, and possession of methamphetamine.

Statement of Facts and Course of Proceedings

In March 2017, officers received information that Rocco Chacon, who was wanted on felony warrants, was located in a particular house in Bannock County, and was driving a white Honda Civic. (Tr., p.260, L.7 – p.261, L.11; p.373, L.9 – p.374, L.23; p.426, L.25 – p.427, L.6.) Officers arranged a plan to surround Chacon with their vehicles and arrest him when he left the house. (Tr., p.262, L.25 – p.263, L.12; p.376, L.23 – p.378, L.8.)

Chacon and a female passenger left the house, entered the white Honda Civic, and began driving. (Tr., p.264, Ls.5-16; p.375, L.22 – p.376, L.10.) Multiple police vehicles converged on the area and attempted to box Chacon in. (Tr., p.264, L.21 – p.274, L.2; p.378, L.12 – p.384, L.3.) The officers gave commands for Chacon to show them his hands (Tr., p.416, Ls.8-14), and to get out of his vehicle (Tr., p.467, Ls.11-14). One officer positioned himself in front of Chacon's vehicle (Tr., p.274, Ls.12-22). The officers arrived in unmarked vehicles due to their role as narcotics officers. (Tr., p.282, L.6 – p.283, L.2). They wore tactical vests with "Police" written on the front, and "Idaho State Police," written on the back; however, the officer who was in front

of Chacon's vehicle was wearing a jacket over his tactical vest. (Tr., p.266, L.5 – p.267, L.14; p.275, Ls.5-15; p.408, L.23 – p.409, L.8.)

Chacon made eye contact with the officer in front of him, and then drove forward, striking the officer, who rolled onto Chacon's hood and then fell into the road. (Tr., p.274, L.3 – p.279, L.1.) Chacon fled the scene. (Tr., p.280, L.11 – p.282, L.2.) The officer who was struck, and several others, fired shots at Chacon in the course of the melee. (Tr., p.279 L.2 – p.280, L.25; p.385, Ls.6-25; p.417, L.20 – p.419, L.6.) Officers initiated a vehicle pursuit of Chacon. (Tr., p.282, Ls.3-5.) During the pursuit, several of the officers chasing Chacon activated their overhead emergency lights. (Tr., p.284, L.23 – p.285, L.17; p.511, Ls.3-12.) Chacon would later admit that he saw these lights and understood them to be coming from police vehicles. (Tr., p.788, L.15 – p.789, L.18.) Still, Chacon continued his attempted escape for another seven miles. (Tr., p.790, L.3 – p.792, L.22; p.811, L.22 – p.812, L.5.) One of Chacon's rear tires came off, which caused him to have difficulty controlling his vehicle on the windy mountain roads. (Tr., p.290, L.13 – p.291, L.22.) Chacon was "in the oncoming lane on blind corners," "all over the road," and "having a really difficult time not going off of the road." (Id.)

Eventually, Chacon stopped his vehicle and attempted to flee on foot. (Tr., p.292, L.22 – 293, L.25.) He was quickly apprehended by officers. (Tr., p.294, Ls.1-22.) A subsequent search of Chacon's person revealed a container with a substance that was later determined to be methamphetamine. (Tr., p.295, L.23 – p.296, L.13; p.657, Ls.14-19; p.693, L.20 – p.696, L.10; State's Exhibit 4.) A search of Chacon's vehicle revealed: a reported-stolen World War II-era handgun in the center console on top of the emergency brake (Tr., p.645, L.10 – p.647, L.9; p.702,

L.24 – p.705, L.4; State's Exhibits 31, 34); a drug pipe in the passenger side door (Tr., p.643, L.17 – p.645, L.6; State's Exhibits 29, 30); and two safes, collectively containing marijuana and additional drug paraphernalia (Tr., p.946, L.22 – p.953, L.9).

The state initially charged Chacon with felony eluding of police officers, unlawful possession of a firearm (based upon Chacon's prior felony conviction), aggravated battery upon a law enforcement officer, and grand theft by possession (the firearm). (R., Vol. I, pp.87-89.)

Chacon filed a motion to sever these four charges (R., Vol. I, pp.156-157), and a separate motion asserting prejudicial joinder (R., Vol. I, pp.166-167). At the hearing on the motions, Chacon clarified that he sought three separate trials – one for the felony eluding charge, one for the aggravated battery charge, and one for the unlawful possession of a firearm and grand theft charges. (Tr., p.50, L.21 – p.51, L.25.) Chacon argued that there was no factual connection between the charges he sought to sever, and that the joinder of the cases was prejudicial because the jury could use his guilt on one of the charges to determine that he was guilty on one or more of the other charges. (Tr., p.45, L.21 – p.51, L.25.) The district court denied the motions. (Tr., p.57, L.5 – p.61, L.12.)

Later, in a separate case, the state charged Chacon with possession of the methamphetamine that was found on his person after fleeing police. (R., Vol. II, pp.198-199.) Several weeks later, the state filed a motion to join the methamphetamine possession charge with the other four charges arising from the police chase. (R., Vol. I, pp.193-198.) At a hearing on the state's motion, Chacon argued that there were "very minimal facts" connecting the methamphetamine charge with the other charges, and that joinder would be prejudicial. (Tr., p.74, L.21 – p.76, L.2.) The district

court granted the state's motion after concluding that joinder would be proper under Idaho law, and that the jury would be capable of appropriately sorting through the charges. (Tr., p.76, L.15 – p.78, L.4.)

The case proceeded to a four-day trial. (Tr., p.111, L.1 – p.1063, L.3.) Chacon testified in his own defense and asserted that he fled the officers' initial arrest attempt because he thought he was being robbed. (Tr., p.777, L.11 – p.788, L.5.) He also asserted that he did not intend to hit the officer with his car. (Tr., p.793, L.22 – p.795, L.7.)

The jury found Chacon guilty of possession of methamphetamine, unlawful possession of a firearm, and felony eluding; but acquitted him of grand theft and aggravated battery. (R., Vol. I, pp.382-383.) The district court imposed a cumulative 7-year unified sentence with four years fixed, with the sentences running concurrently with each other but consecutive to a sentence imposed in a separate case. (R., Vol. I, pp.475-481.) Chacon timely appealed. (R., Vol. I, pp.471-474.)

ISSUES

Chacon states the issues on appeal as:

I. Whether the district court erred by denying Mr. Chacon's motion to sever the charges in this case.

II. Whether the district court erred by admitting evidence of Mr. Chacon's prior drug use and possession of paraphernalia in violation of I.R.E. 404(b).

(Appellant's brief, p.8.)

The state rephrases the issues on appeal as:

1. Has Chacon failed to show that the district court erred by granting the state's motion to join the methamphetamine possession charge with the other charges?

2. Has Chacon failed to show that the district court erred by overruling Chacon's objections to the admission into evidence of: (a) photos of the drug pipe located in the car; or (b) Chacon's heroin use the day of the incident?

ARGUMENT

I.
Chacon Has Failed To Show That The District Court Erred By Granting The State's Motion To Join The Methamphetamine Possession Charge With The Other Charges

A. Introduction

Chacon contends that the district court erred in granting the state's motion to join the methamphetamine charge with the other four charges. (Appellant's brief, pp.9-12.) However, a review of the record reveals that these charges were properly joined. Chacon also contends on appeal that this joinder was prejudicial. (Id.) However, Chacon failed to preserve this argument for appeal because he raised it only in the context of responding to the state's joinder motion, and he did not make clear to the court that he was raising a distinct motion to sever the charges pursuant to I.C.R. 14. In any event, a review of the record reveals that Chacon was not prejudiced by the joinder. Finally, Chacon has waved any argument with respect to the district court's separate order denying his motion to sever the original four charged felonies because he has not supported such an argument with argument or authority.

B. Standard Of Review

The Idaho Supreme Court has recently clarified the standards of review applicable to preserved appellate challenges made to district court orders arising out of I.C.R. 8(a) (joinder) and I.C.R. 14 (severance). Sate v. Nava, ___ Idaho ___, ___ P.3d ___, No. 47439 at *5-7 (June 11, 2020) (slip opinion). Whether a court improperly joined offenses pursuant to I.C.R. 8(a) is a question of law over which the appellate court exercises free review; whether a court has properly

determined if joinder was prejudicial pursuant to I.C.R. 14 is reviewed for an abuse of discretion. Id. (citing State v. Field, 144 Idaho 559, 564-565, 165 P.3d 273, 278-279 (2007).)

C. The District Court Properly Granted The State's Motion To Join The Methamphetamine Charge With The Original Four Charges

The United States Supreme Court "has long recognized that joint trials conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused to trial." United States v. Lane, 474 U.S. 438, 449 (1986) (quotations and citation omitted).

In Idaho, matters of joinder and severance are governed separately by two distinct Idaho Criminal Rules, I.C.R. 8(a) and I.C.R. 14. See Nava, No. 47439 at *3-7 (clarifying Idaho law with respect to these rules).

The first such rule, I.C.R. 8(a), provides:

> Two or more offenses may be charged on the same complaint, indictment or information if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. The complaint, indictment or information must state a separate count for each offense.

There are thus two grounds to properly join charges pursuant to I.C.R. 8(a): (1) where the charges are based upon the same act or transaction, or two or more acts or transactions connected together; or (2) the charges constitute parts of a common scheme or plan. In the former instance, charges may be "connected together" by the unities of time, place, and modus operandi, among other factors. See State v. Radabaugh, 93 Idaho 727, 730, 471 P.2d 582, 585 (1970). The analysis as to whether offenses were part of a "common scheme or plan" pursuant to I.C.R. 8(a) is the same

as that conducted when determining whether prior acts evidence is admissible pursuant to I.R.E. 404(b). State v. Orellana-Castro, 158 Idaho 757, 760, 351 P.3d 1215, 1218 (2015). Whether joinder is proper is "determined by what is alleged, not what the proof eventually shows." State v. Cochran, 97 Idaho 71, 73, 539 P.2d 999, 1001 (1975).

The second rule, I.C.R. 14, provides a different procedural mechanism, that to sever charges. It provides:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information, the court may order the state to elect between counts, grant separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants that the state intends to introduce in evidence at the trial.

Thus, pursuant to I.C.R. 14, a defendant may seek to sever charges, even if the requirements of I.C.R. 8(a) have been met, where the joinder results in unfair prejudice. State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); State v. Anderson, 138 Idaho 359, 361 n. 1, 63 P.3d 485, 487 n.1 (2003). Generally, to get to the question of whether was prejudicial, it is "presume[d] joinder was proper in the first place." Field, 144 Idaho at 564-565, 165 P.3d at 278-279 (citation omitted). It is the defendant's burden to establish prejudice requiring severance of cases pursuant to I.C.R. 14. Thumm v. State, 165 Idaho 405, 413, 447 P.3d 853, 861 (2019). There are three potential sources of prejudice for a court to consider when analyzing a motion to sever based on I.C.R. 14:

> (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated; (2) the defendant may be confounded in

> presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.

State v. Williams, 163 Idaho 285, 293, 411 P.3d 1186, 1194 (Ct. App. 2018) (quoting State v. Abel, 104 Idaho 865, 867-868, 664 P.2d 772, 774-775 (1983).)

In this case, officers found Chacon to be in possession of methamphetamine at the conclusion of the incident underlying his original four felony charges. See R., Vol. II, pp.198-199. After initially filing the methamphetamine possession charge in a separate case (id.), the state filed a motion to join the methamphetamine charge with the other four charges (R., Vol. I, pp.193-198). In the motion, the state argued that the charges were connected because they arose out of the same facts and circumstances within a very short period of time. (Id.)

Chacon did not file a written response to the state's motion. At the subsequent hearing on the motion, he offered a blended argument that contained elements of both I.C.R. 8 and I.C.R. 14, without citing either rule. Chacon argued that there were "very minimal facts that connect" the charges, and that the joinder would prejudice him by "making him look bad" to the jury. (Tr., p.74, L.21 – p.76, L.2.) The district court granted the state's joinder motion. (Tr., p.76, L.15 – p.78, L.4.) The court stated that all of the charges arose out of the same facts and circumstances, and that the jury would be able to sort through every charge distinctly. (Id.)

The court correctly decided the issue put before it by the state's motion – whether the methamphetamine charge could be lawfully joined with the four other felony charges pursuant to I.C.R. 8(a). The methamphetamine charge arose out of the same facts and series of events as did

the other charges, and thus, the charges were "based upon…two or more acts or transactions connected together." All of the alleged criminal acts occurred in the distinct time and place of Chacon's flight from officers and subsequent arrest. This is not the more typical joinder case arising on appeal involving the other permissible ground for joinder – where the state asserts the charged acts constitute a common scheme or plan, and where the appellate court must compare criminal allegations distinct in time and place, such as a series of incidents of alleged sexual abuse occurring over time. Here, the state alleged Chacon possessed methamphetamine *while* he was committing the other crimes. The joined offenses are thus based upon acts which were connected together. This Court should therefore affirm the district court's order joining the charges.

In any event, even if Chacon showed error in the district court's granting of the joinder motion, any such error is harmless. Improper joinder, like other errors, may be deemed harmless if the state meets its burden of demonstrating beyond a reasonable doubt that the improper joinder was harmless. Orellana-Castro, 158 Idaho at 763, 351 P.3d at 1221 (citing State v. Thomas, 157 Idaho 916, 919, 342 P.3d 628, 631 (2015).) For all of the same reasons discussed below with respect to why there was no prejudice associated with the joinder of the methamphetamine charge with the original four charges, any initial improper joinder of the charges was also harmless.

D. Chacon Failed To Preserve His Argument That The Joinder Of The Methamphetamine Possession Charge With The Other Charges Was Prejudicial

On appeal, Chacon most directly challenges the district court's joinder of the methamphetamine charge on the ground that it was prejudicial pursuant to I.C.R. 14. (Appellant's brief, pp.10-12.) However, a review of the transcript of the hearing on the state's motion for

joinder reveals that this argument is not preserved for appeal. In any event, Chacon has failed to show that the district court erred.

"'Issues not raised below will not be considered by this [C]ourt on appeal, and the parties will be held to the theory upon which the case was presented to the lower court.'" State v. Hoskins, 165 Idaho 217, ___, 443 P.3d 231, 235 (2019) (brackets original) (quoting State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017)).

Chacon did not file a motion to sever the methamphetamine charge from the other four charges, either pursuant to I.C.R. 8(a) or I.C.R. 14. Instead, he made his blended argument containing elements of both rules in the context of his opposition to the state's I.C.R. 8(a) motion for joinder. Chacon never cited I.C.R. 14; and never made clear to the court that he was making his own distinct motion, or even that he was seeking a severance of the charges on some ground independent of that which was before the district court. Further, I.C.R. 47 provides that a party seeking a court order must do so by motion, and that such motion must be in writing unless the court permits the party to make the motion by other means. This rule protects a court from having to do what Chacon asserts the court should have done here – infer a separate motion on an unspecified ground from a party's argument in opposition to the motion actually before the court. Therefore, this issue is not preserved.

In any event, to the extent the issue is preserved, Chacon still cannot meet his burden to show that district court abused its discretion. The court fairly responded to the argument placed before it. Chacon argued that the state's motion to join the methamphetamine charge was "only an attempt to prejudice [Chacon] and paint him out to be a bad guy and draw attention away from

what actually happened at that intersection on the battery with intent," and that the evidence of the methamphetamine possession would not be admissible in a trial on the other charges. (Tr., p.74, L.21 – p.76, L.2.) This argument brushes against two of the three sources for potential prejudice set forth in Abel: that the jury may confuse the evidence and convict the defendant of a crime merely because the evidence was not properly segregated; and that jury may conclude the defendant is guilty of one crime and them find him guilty of another because of criminal disposition. The court's response—that the jury would be able to "sort through" each of the charges—addressed both asserted sources of prejudice. Indeed, in the particular circumstances of this case, the court acted well within its discretion in determining that there was nothing about the methamphetamine charge that would either confuse the evidence, or be so inflammatory as to result in a conviction based merely on criminal disposition. In fact, the jury acquitted Chacon on two of the five charges, including the most serious charge of aggravated battery. As the district court correctly surmised, the jury was, in fact, able to sort through each of the charges and consider them distinctly, based upon the evidence before it.

On appeal, Chacon notes that evidence of his methamphetamine possession would not be admissible in a trial consisting only of the other four charges. (Appellant's brief, p.12.) However, even if true, this is not dispositive to a proper I.C.R. 14 analysis. In State v. Wilske, 158 Idaho 643, 644-647, 350 P.3d 344, 345-348 (Ct. App. 2015), the Idaho Court of Appeals explained why the lack of perfect cross-admissibility of evidence between sets of charges if separate trials were held does not mean that a single trial would be prejudicial. While the admissibility of evidence supporting one charge in a trial of another charge disproves the existence of prejudice from a

joinder of those charges for trial, the inverse is not necessarily true. Id. at 646, 350 P.3d at 347 ("Accordingly, showing that evidence regarding one offense could not be admitted in a separate trial on the other offense does not *ipso facto* establish that severance is required.") This is illustrated by the fact that "[c]ountless Idaho cases have held" that the admission of some inadmissible evidence at trial, including evidence barred by I.R.E. 404(b), was not prejudicial and therefore did not warrant a new trial. Id. (citations omitted). Here, for reasons set forth above, the joinder of Chacon's methamphetamine possession charge was not prejudicial.

Chacon has failed to preserve his claim that the joinder of the methamphetamine charge to the other four charges was prejudicial pursuant to I.C.R. 14. In any event, the Chacon has not met his burden to demonstrate that the district court abused its discretion.

E. Chacon Waived Any Claim Regarding The District Court's Denial Of His Motion To Sever The Original Four Charges

"When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered." State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). It is also well settled that the appellate court will not search the record for errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983).

On appeal, Chacon briefly references his motion to sever the original four charges that was filed prior to the state's filing of its motion to join the methamphetamine charge. However, his argument cites to, and analyzes, only the district court's analysis and determination regarding the state's motion to join the methamphetamine charge. (Appellant's brief, pp.10-12.) Chacon does not provide any argument alleging that the district court erred with respect to its reasoning set forth

in the March 22, 2018 hearing on Chacon's motion alleging prejudicial and improper joinder. (See id.) Any assertion regarding the court's analysis and determinations made at that hearing are therefore waved.

In any event, Chacon has failed to demonstrate that the district court erred by denying his motions alleging improper and prejudicial joinder. For this proposition, the state adopts the reasoning set forth by the district court at the hearing on those motions. (See Tr., p.56, L.7 – p.61, L.17.)

II.
Chacon Failed To Show That The District Court Erred By Overruling Chacon's Objections To The Admission Into Evidence Of: (a) Photos Of The Drug Pipe Located In The Car; Or (b) Chacon's Heroin Use The Day Of The Incident

A. Introduction

Chacon contends that the district court abused its discretion by overruling his objections to the admission of: (a) photos of drug pipes located in the front passenger-side door of Chacon's vehicle; and (b) evidence that Chacon used heroin the morning of the incident. Chacon has failed to preserve his argument that this evidence should have been excluded pursuant to I.R.E. 404(b), since he did not make this assertion below. Further, a review of the record reveals that the district court acted well within its discretion to overrule the objections Chacon actually made pursuant to I.R.E. 403 and I.R.E. 401.

B. Standard Of Review

This Court reviews challenges to a trial court's evidentiary rulings under the abuse of discretion standard." Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 50, 995 P.2d 816, 820

(2000). "Trial courts maintain broad discretion in admitting and excluding evidence." State v. Weigle, 165 Idaho 482, 487, 447 P.3d 930, 935 (2019). An exception to this broad discretion is relevance, which is "a matter of law that is subject to free review." State v. Hall, 163 Idaho 744, 774, 419 P.3d 1042, 1072 (2018).

C. Chacon Has Not Preserved Any I.R.E. 404(b) Argument With Respect To The Photographs Or Admission of Heroin Use

As noted above, "'[i]ssues not raised below will not be considered by this [C]ourt on appeal, and the parties will be held to the theory upon which the case was presented to the lower court.'" Hoskins, 165 Idaho at ___, 443 P.3d at 235 (brackets original) (quoting Garcia-Rodriguez, 162 Idaho at 275, 396 P.3d at 704.) Further, "[a]n objection on one ground will not preserve a separate and different basis for excluding the evidence." State v. Vondenkamp, 141 Idaho 878, 885, 119 P.3d 653, 660, 653 (Ct. App. 2005) (citing State v. Norton, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000)).

On appeal, Chacon contends that the district court violated I.R.E. 404(b) by admitting evidence of photographs of a drug pipe found his vehicle, and of his heroin use on the day of the incident. (Appellant's brief, pp.13-15.) However, Chacon did not object to the admission of this evidence on that ground. Chacon objected to the photos of the drug pipe on the grounds that the pipe was irrelevant and prejudicial. (Tr., p.639, L.4 – p.641, L.20; p.644, L.22 – p.645, L.3.) Chacon objected to the state's cross-examination questions eliciting testimony about his heroin use on the ground of relevance. (Tr., p.805, Ls.9-15.) These objections did not preserve an

appellate issue on a separate ground for exclusion, I.R.E. 404(b). Vondenkamp, 141 Idaho at 885, 119 P.3d at 660. This Court should therefore decline to consider this argument.

D. The District Court Acted Well Within Its Discretion To Admit The Photographs Of The Pipe And The Evidence of Chacon's Heroin Use

1. The Photographs Of The Pipe

Evidence is relevant if it has "any tendency" to make a fact "of consequence in determining the action," "more or less probable." I.R.E. 401. "Whether a fact is 'of consequence' or material is determined by its relationship to the legal theories presented by the parties." State v. Garcia, ___ Idaho ___, ___ P.3d ___, No. 46253, 2020 WL 2029266, at *4 (Idaho Apr. 28, 2020) (quotation marks omitted).

"Even relevant evidence may be excluded by the district court if 'its probative value is substantially outweighed by a danger of ... unfair prejudice[.]'" Id. (brackets original, quoting I.R.E. 403). "A lower court's determination under I.R.E. 403 will not be disturbed on appeal unless it is shown to be an abuse of discretion." State v. Hernandez, 163 Idaho 9, 16, 407 P.3d 596, 603 (Ct. App. 2017).

In this case, the state sought to admit numerous photographs of the interior of the vehicle into evidence, including two photos of a pipe found in the vehicle's front-passenger door. (Tr., p.636, Ls.17-22; State's Exhibit's 29-30.) Chacon objected to admission of the two photos of the pipe on the ground that they were irrelevant and prejudicial. (Tr., p.636, L.23 – p.642, L.23.) The matter was discussed outside of the presence of the jury. (Id.) The state represented that the pipe was a methamphetamine pipe, and was thus relevant to the methamphetamine possession charge

against Chacon because it demonstrated Chacon's knowledge, use, and understanding of methamphetamine. (Tr., p.639, L.17 – p.640, L.13.) In response, Chacon stated that there was no evidence that the pipe in question was, in fact, a methamphetamine pipe. (Tr., p.640, L.16 – p.641, L.2.) The state acknowledged that it did not believe that the pipe had been tested. (Tr., p.641, Ls.13-14.) The district court overruled Chacon's objection and admitted the evidence. (Tr., p.644, L.22 – p.645, L.3.)

The pipe was relevant for the reasons set forth by the state. On appeal, Chacon contends that the pipe was actually a *marijuana* pipe, based upon the facts that pipe had a marijuana-leaf design on it; and because another officer, during the presentation of state rebuttal evidence occurring later in the trial, referred to the pipe as a bong. (Appellant's brief, pp.13.) However, the existence of alternative reasons or other explanations goes to the weight of the evidence and not to its relevance. State v. Pokorney, 149 Idaho 459, 465, 235 P.3d 409, 415 (Ct. App. 2010). Here, both parties could have further inquired of relevant witnesses regarding the identity of the pipe. The fact that no such conclusive evidence regarding the identity of the pipe was elicited does not speak to the relevance of the evidence. Additionally, the danger of unfair prejudice from admission of the photographs was low; and also speculative since the identity of the pipe is unclear.

Therefore, the district court acted within its discretion to overrule Chacon's objection to the admission of the photographs of the pipe.

2. Chacon's Heroin Use

As noted above, evidence is relevant if it has "any tendency" to make a fact "of consequence in determining the action," "more or less probable." I.R.E. 401. "Whether a fact is

'of consequence' or material is determined by its relationship to the legal theories presented by the parties." Garcia, ___ Idaho ___, ___ P.3d ___, No. 46253, 2020 WL 2029266, at *4 (quotation marks omitted).

In this case, the prosecutor asked Chacon, during cross-examination, whether he and his female passenger had used heroin during the morning of the incident. (Tr., p.805, Ls.9-10.) Chacon objected on the ground of relevance. (Tr., p.805, Ls.11-14.) The court overruled the objection without comment, and Chacon testified that he and his passenger had used heroin that morning. (Tr., p.805, Ls.15-24.)

Chacon's heroin use was relevant to his perception of the events of the incident. This is particularly true considering that several of the charges contained intent elements that required consideration of whether such intent was formed in the course of a series of fast-paced and chaotic events. (See Tr., p.1021, L.24 – p.1022, L.8 (during closing argument, the prosecutor arguing about Chacon's potentially heroin-influenced perspective during the incident).) One of the responding officers testified during the trial that, in his experience, people who are under the influence of heroin are "slow, have impaired memory, real slow movements," and that "they're kind of out there when you're talking to them, not really very responsive." (Tr., p.846, L.10 – p.847, L.1.) The officer testified that following the police chase, Chacon exhibited some of these characteristics. (Tr., p.847, Ls.2-14.)

On appeal, Chacon notes that previous to it overruling his objection to the state's cross-examination in this instance, the court sustained Chacon's objection to testimony that one of the responding officers was familiar with Chacon's' passenger because she was known to buy heroin.

(Appellant's brief, p.14 (citing Tr., p.478, Ls.12-20).) However, this prior evidentiary ruling is distinguishable because the perceptions of Chacon's *passenger* were not relevant to any of the elements before the jury. Further, the excluded evidence about the passenger's heroin use was even more remote because it did not concern heroin use occurring *that day*.

Therefore, the district court acted within its discretion to overrule Chacon's objection to the admission of evidence about his heroin use the morning of the incident.

3. Any Error Was Harmless

Even if the district court erred with respect to its evidentiary rulings regarding the photographs of the drug pipe and Chacon's heroin use, any such error was harmless.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected ...." I.R.E. 103(a). See also I.C.R. 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). "The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence." State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)).

Any error in the admission of the photographs of the drug pipe was harmless because cumulative officer testimony involving the pipe was entered into evidence during the state's rebuttal. In the defense case-in-chief, Chacon testified that he fled from the initial police attempt to arrest him because he thought he was being robbed. (Tr., p.779, Ls.2-9.) Chacon explained that he had a drug addiction, was familiar with "drug culture," including the violent encounters that

occur among people associated with that culture. (Tr., p.823, L.3 – p.825, L.10.) Chacon further testified that he himself had been involved in such violent encounters. (Tr., p.825, Ls.11-14.) Based upon this testimony, the district court permitted the state to elicit additional evidence explaining Chacon's connection with "drug culture," which included reference to the drug pipes found in his car door, as well as other paraphernalia and marijuana found elsewhere in his car. (Tr., p.940, L.13 – p.953, L.9.) In light of this rebuttal testimony, the prior admission of the photographs had little impact, and any error in the admission of these photographs was harmless.

The admission of the evidence of Chacon's heroin use, even if done in error, was also harmless. As noted above, Chacon's theory of the case was that, as a drug addict, he confused the officers' initial arrest attempts with a drug trade-associated robbery. Chacon introduced this theory and Chacon's drug addiction, which was supported by his trial testimony, in his opening statement. (Tr., p.256, Ls.10-16.) Additionally, by the time Chacon testified about his heroin use, the jury already knew that he had previously been convicted of heroin possession, after a judgment of conviction to that effect was entered into evidence. (Tr., p.302, L.13 – p.307, L.8.)

Additionally, any error in the admission of either the photographs or the testimony about Chacon's drug use was harmless in light of the overwhelming evidence of guilt on the charges Chacon was convicted of; as well as the fact that Chacon was acquitted of two of the charges – which indicates that the jury did not, as Chacon feared below, make its determinations of guilt on some charges based upon its determination of guilt on other charges.

With respect to the methamphetamine possession charge, Chacon was found to be in physical possession of the substance on his person. (Tr., p.295, L.23 – p.296, L.13; p.657, Ls.14-

19; p.693, L.20 – p.696, L.10; State's Exhibit 4.) Chacon's counsel essentially conceded guilt on this charge during closing argument, stating, "I'm not going to come in and tell you some crazy story like they weren't in his pants. You heard the evidence." (Tr., p.1025, Ls.4-6.) Next, with the respect to the felony eluding charge, Chacon admitted to recognizing the police emergency lights behind him during the pursuit, and that he traveled an additional seven miles anyway. (Tr., p.790, L.3 – p.792, L.22; p.811, L.22 – p.812, L.5.) Therefore, the jury's verdict essentially came down to its finding regarding whether the state proved that, after the eluding was proved to have commenced, Chacon either traveled in excess of 30 miles above the posted speed limit, or drove in a manner as to endanger the property or person or another. See I.C. § 49-1404. One of the pursuing officers presented substantial evidence to this effect. (Tr., p.290, L.13 – p.291, L.22.) Additionally, Chacon endangered his female passenger's life in that he was driving directly away from law enforcement and medial treatment, despite knowing that his passenger was injured. (Tr., p.812, L.24 – p.813, L.9.) In order to prove Chacon's intent in this instance, the state also presented evidence of a previous incident in which Chacon fled from officers out of fear of returning to jail. (Tr., p.333, L.16 – p.334, L.2; p.798, L.17 – p.800, L.12; p.814, L.1 – p.815, L.17.) Finally, with respect to the unlawful possession of a firearm charge, the state presented substantial testimony that the antique firearm was located in the center console of Chacon's vehicle, on top of the emergency brake, within arms-reach of Chacon while he was in the driver's seat. (Tr., p.645, L.10 – p.647, L.12; p.723, L.8 – p.724, L.8; State's Exhibit 31, 34.)

Therefore, even if the court erred in admitting any of the challenged testimony, any such error was harmless.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of conviction.

DATED this 16th day of June, 2020.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of June, 2020, 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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MWO/dd