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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,
Plaintiff- Respondent,

vs.

SERRA J. FRANK,

Defendant-Appellant.

Supreme Court Case No. 47010-2019

Ada County Case No. CR-MD-2015-18202;
CR-MD-2016-23; CR01-17-00300

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE GERALD F. SCHROEDER
District Judge

HONORABLE MICHAEL J. OTHS
Magistrate Judge

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REPLY BRIEF

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Nature of the Case

In this appeal, Serra Frank asserts that the trial court, along with the district court, erred both when it denied her motion to present and instruct the jury regarding the necessity defense at her trial and when the trial court denied her motion to reconsider this ruling. This Reply Brief is necessary to respond to some of the contentions raised by the State in its Respondent's Brief, as well as to clarify the legal standards that apply to Ms. Frank's claim.

To the extent that the State's position and argument is already addressed in Ms. Frank's Appellant's Brief, so will rely on those arguments already presented to this Court and will not repeat them here.

Statement of Facts and Course of Proceedings

The Statement of Facts and Couse of Proceedings were previously contained in Ms. Frank's Appellant's Brief. She will not reiterate them herein, but instead incorporates them by reference.

ISSUE

Did The Trial Court Err In Not Permitting Ms. Frank To Present Evidence Of A Necessity Defense In Her Case And In Not Permitting A Jury Instruction On This Defense?

ARGUMENT

I. The Idaho Supreme Court In *State v. Hastings* Established A Threshold Of Evidence That Requires The Giving Of A Necessity Instruction

Both parties in this case appear to agree that the seminal case regarding the provision of a necessity defense instruction for the offense of possession of marijuana is *State v. Hastings*, 118 Idaho 854 (1990). *See* Appellant's Brief, pp.14-15; Respondent's Brief, pp.6-7. The Court in *Hastings* held that the defendant was, "entitled to present evidence at trial on the common law defense of necessity. It is for the trier of fact to determine whether or not she has met the elements of that defense." *Hastings*, 118 Idaho at 856. Despite this, the State in its Respondent's Brief has claimed that the *Hastings* Court, "remained silent as to whether there was *prima facie* evidence to support such instruction." Respondent's Brief, p.7 n.1.

Although relegated in the Respondent's Brief to a footnote, this argument appears to suggest a legal position about the holding in *Hastings*: that the Court may not have actually found the evidence of necessity to be sufficient to support—and **require**—the giving of the requested necessity instruction. To the extent that the State may suggest such a conclusion, it is contrary to the holding in *Hastings* itself. *Hastings* represents a determination by the Court that the evidence presented in support of a necessity defense was sufficient to entitle the defendant to present this defense at trial.

The defendant is *Hastings* never was permitted to present her necessity defense at trial, but preserved this issue through entry of a conditional guilty plea. For purposes of appeal, defense counsel in *Hastings* made an offer of proof, including affidavits from experts and potential witnesses, to "create a record for the appellate court to rule on whether or not the defendant would be allowed to present this evidence to a jury." *Hastings*, 118 Idaho at 855.

Accordingly, of the appellate review leading to the Court's holding included a review of the **evidence** tendered in support of the request to present this defense. It is therefore an evidentiary holding.

But more important for this Court, the remedy selected in *Hastings* specifically indicates a direct finding that the offer of proof tendered was sufficient to meet the evidentiary threshold entitling the defendant to present this defense to a jury. Had the Court in *Hastings* not made such a finding, the Court would likely have remanded the action back to the **trial court** to make the determination of whether the evidence was sufficient to present the necessity defense to a jury. *See, e.g., State v. Garcia,* Idaho, P.3d, 2020 WL 2029266, *18 (2020) (remanding to the trial court to properly consider statutory factors on restitution)[1]; *State v. Robins*, 164 Idaho 425, 435-437 (2018) (electing to remand the case to the trial court to consider whether dismissal is the proper remedy rather than make the determination on appeal); *Severson v. State*, 159 Idaho 517, 522 (2015) (remanding to the trial court to consider whether there existed a genuine issue of material fact); *State v. Turpen*, 147 Idaho 869, 871 (2009) (remanding to the trial court to consider whether to permit relief under I.C.A.R 32); *State v. Meister*, 148 Idaho 236, 239-243 (2009) (remanding to the trial court for a new trial, but leaving it to the trial court to make the determination as to whether the standards for alternate perpetrator defense were met). Thus, in those cases where the appellate court reverses a decision or ruling without making an evidentiary determination based on the record, reversal with instructions to the trial court for appropriate consideration on remand has been the remedy.

That is not what the *Hastings* Court did. Instead, the *Hastings* Court reached the substantive holding that the defendant was "**entitled** to present evidence at trial on the common

[1] As of the writing of this Appellant's Brief, the Opinion in *Garcia* has not yet been released for publication in the permanent law reports, and is therefore subject to revision or withdrawal.

law defense of necessity." *Hastings*, 118 Idaho at 856 (emphasis added). It is well established that a defendant is not entitled to an instruction on a defense theory if there is not a reasonable view of the evidence that would support the giving of the instruction. *See, e.g., State v. Eastman*, 122 Idaho 87, 90 (1992); *State v. Wright*, 147 Idaho 150, 159 (Ct. App. 2009). Accordingly, the holding in *Hastings* that the defendant was actually **entitled** to present this defense necessarily presupposes the legal ruling that there was a reasonable view of the evidence to support it.[2]

Finally, the gloss that the State's argument attempts to put on the *Hastings* Opinion is contrary to subsequent opinions from the Idaho Supreme Court and Idaho Court of Appeals applying this Opinion. These subsequent Opinions recognize that, "in order for a court to be required to give a necessity instruction to a jury, the moving party must provide at least some factual support for each element identified in *Hastings*." *State v. Meyer*, 161 Idaho 631, 635 (2017); *see also State v. Howley*, 128 Idaho 874, 879 (1996) (noting evidence of marijuana use to treat rheumatoid arthritis in *Hastings* was sufficient to establish a threat of immediate harm); *State v. Tadlock*, 136 Idaho 413, 415 (Ct. App. 2001) ("The Court held in *Hastings* that a defendant who claimed to use marijuana to combat pain and muscle spasms was entitled to have the jury instructed on the necessity defense.").

This particular point is significant because, in this case, Ms. Frank's condition has significant parallels to that of the defendant in *Hastings*, and the proof she tendered to the trial court in support of her request to present this defense exceeded that referenced in the *Hastings* Opinion.

[2] To conclude the contrary would essentially require a conclusion that the Idaho Supreme Court in *Hastings* affirmatively disregarded the legal standards applicable on its determination or that the Court arbitrarily decided upon this result.

II. The Evidence Presented By Ms. Frank In Support Of Presenting A Defense Meets Or Surpasses The Threshold In *Hastings*

Idaho Code § 19-2132 requires that a trial court to instruct the jury as to "all matters of law necessary for their information;" this statute further provides that, where an instruction is requested by a party, the instruction must be given if the court finds that the instruction is a correct statement of law and is pertinent to the issues presented by the case. *See* I.C. § 19-2132(a). "A defendant is entitled to have the jury instructed on every defense or theory of the defense having any support in the evidence." *State v. Hansen*, 133 Idaho 323, 328 (Ct. App. 1999). Critically, the threshold of proof to meet this test is quite low: "the defendant must present **at least some** evidence supporting his or her theory, and **any support will suffice** as long as his or her theory comports with a reasonable view of the evidence." *State v. Garner*, 159 Idaho 896, 898 (Ct. App. 2016). (emphasis added). Given this, a trial court errs in failing to instruct a jury on a defense if there is some evidence in the record that could support each element of that defense. *Id.* at 900-901.

Such a deferential standard in favor of permitting a defendant to present his or her defenses at trial has its underpinnings in the constitutional right to present a defense. In discussing this right under the Sixth and Fourteenth Amendments, the United States Supreme Court has described the right to present a defense as "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *See Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (quoting *Washington v. Texas*, 388 U.S. 14, 18 (1967)); *see also State v. Meister*, 148 Idaho 236, 239 (2009). The right to present a defense is "a fundamental tenet of due process of law." *Id.* While there is no right to present irrelevant evidence, the "right to present a complete defense is rooted in the Confrontation Clause of the

Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, and includes 'a meaningful opportunity to present a complete defense.'" *State v. Jones*, 160 Idaho 449, 452 (2016).

From the outset, the State does not appear to dispute that Ms. Frank presented at least **some** evidence for each of the elements of the necessity defense. Instead, the focus of the State's argument appears to be that the evidence she presented does not surmount every conceivable dispute regarding the weight to be accorded that evidence. The nature of this argument itself demonstrates why this was an issue that was properly for the jury to resolve. *See, e.g., State v. Mojica*, 95 Idaho 326, 327 (1973) (issue of whether to believe the evidence for or against a particular defense is the province of a jury to resolve as the finder of fact); *State v. Kay*, 108 Idaho 661, 666 (Ct. App. 1985) (whether alibi defense was established is a question of fact to be resolved by the jury). In every case that proceeds to a trial where an affirmative defense is presented to the jury, it may be safe to presume that the State disputes whether this defense applies. However, it solely the province of the jury to determine the weight, reliability, and credibility to accord the evidence through the process of a criminal trial. *See, e.g. State v. Tryon*, 164 Idaho 254, 258 (2018). In order to be entitled to this jury determination, Ms. Frank need only have presented "at least some evidence supporting his or her theory, and any support will suffice as long as his or her theory comports with a reasonable view of the evidence." *Garner*, 159 Idaho at 898.

Finally, it is worth noting that each of the State's objections to Ms. Frank having the opportunity to present her defense of necessity at trial would likewise apply with equal or greater force to the defendant in *Hastings*, who was permitted by the Idaho Supreme Court to present her

necessity defense for possession of marijuana used to a jury. Like Ms. Frank,[3] the defendant in *Hastings* suffered from a medical condition causing chronic and intermittent pain that can vary in intensity over time and can have sudden onslaught of symptoms: rheumatoid arthritis. *Hastings*, 118 Idaho at 854-855. The defendant in *Hastings* used marijuana to "control the pain and muscle spasms associated with the disease," also very much like Ms. Frank. *Id.*

It can hardly be said that marijuana is the only potential mode of treatment for arthritis, and there was nothing in the *Hastings* Opinion indicating that the defendant was in pain from her arthritis at the exact moment that police discovered the dozen marijuana plants growing in her basement. These are the two primary arguments that the State advances for denying Ms. Frank her opportunity to present this defense at trial. If the existence of other potential treatments, or the absence of proof that the person was in the throes of pain at the exact moment of his or her arrest, were controlling, the Court in *Hastings* would have reached the opposite conclusion. But the *Hastings* Court did not. Instead, the Court reversed the lower court's ruling disallowing this defense and held that, "it was for the trier of fact to determine whether or not she has met the elements of that defense." *Id.* at 856.

Ms. Frank respectfully requests that this Court do the same.

III. Ms. Frank Preserved Both Her Arguments Regarding Medical Necessity And Political Protest In This Case, And The State's Argument To The Contrary In This Appeal Regarding Political Protest Contravenes Its Argument Before The District Court

In the appeal before this Court, the State has asserted that, "[t]o the extent that Frank makes a 'political necessity' argument, she failed to preserve any such issue by failing to present it below; therefore, this Court should not consider the issue." *See* Respondent's Brief, p.18.

[3] Ms. Frank suffers from interstitial cystitis, a chronic and extremely painful condition whose symptoms are discussed in detail within the Appellant's Brief in this case.

However, the State's present argument in this appeal before this Court is belied by the record, and contradicts the position taken by the State before the district court.

In this case, the trial court held a status conference on December 1, 2017—the same day that Ms. Frank filed a pro se motion to reconsider the trial court's ruling on her necessity defense. This motion was brought up during the hearing once it became apparent that Ms. Frank intended on proceeding to trial *pro se* and was seeking reconsideration of the court's ruling preventing her from presenting a necessity defense at trial. (12/1/17 Tr., p.35, Ls.15-21.) At several points during this hearing, Ms. Frank made clear that part of her purpose in the possession of marijuana in the 2016 and 2017 cases was to protest laws that prevented people from medical uses of this substance. She referred to these cases as the "protest cases." (12/1/17 Tr., p.36, Ls.8-11.) Ms. Frank elaborated on this point later on in the hearing: "The case itself has to do with the marijuana. And it has to do with the protest of the marijuana and the necessity." (12/1/17 Tr., p.45, Ls.10-13.) To the extent that the State is now saying that Ms. Frank never incorporated any argument about protest as part of the necessity of her possession of marijuana in the 2016 and 2017 cases, Ms. Frank respectfully submits that the record demonstrates otherwise.

Beyond this, the posture taken by the State before this Court appears to be the opposite of the position taken by the State in front of the district court. In this case, the State is presently arguing that Ms. Frank did not preserve any argument regarding political protest as a basis for her necessity defense. *See* Respondent's Brief, pp.17-18. But at the intermediate appeal before the district court, the State argued the opposite: that Ms. Frank **had** presented a motive for direct political protest in the 2016 and 2017 cases, and therefore her medical necessity defense should

not apply. (*See* R., pp.200-201.) In actuality, the record shows that Ms. Frank presented **both** bases to the trial court.

It is no surprise that this issue was not addressed in Ms. Frank's initial Appellant's Brief in front of the district court. As the State acknowledges, it was **only** the district court after hearing argument—and not the trial court—that found that a motivation to engage in direct political protest somehow disqualified Ms. Frank from presenting a necessity defense at trial. Ms. Frank presented this claim before the trial court, and the trial court found in her favor. The trial court noted:

> The state argues that two of the citations were incurred on the steps of the Statehouse, in the midst of protest about the legalization of marijuana. But would possession in the privacy of one's home be a "less offensive" alternative? Possession of marijuana is still illegal, and the court is hesitant to endorse the notion that discreet violation of the law is less offensive than overt violation.

(R., p.26.)

Thereafter, the trial court found in Ms. Frank's favor that there was no less offensive alternative for all three of her charges, even in consideration of her being engaged in an act of direct protest at the time of her possession of marijuana for medical purposes. (R., p.26.) Notably, neither the district court nor the State has argued or explained how this finding by the trial court was clearly erroneous. The appellate courts must defer to the findings of fact of the trial court unless they are clearly erroneous. *See, e.g., State v. Cordingley*, 154 Idaho 762, 765-766 (Ct. App. 2013). Similarly, a litigant must show that a trial court's findings of fact are clearly erroneous if they wish to challenge them on appeal. *See, e.g. State v. Thomas*, 133 Idaho 682, 686 (Ct. App. 1999).

The State has made no argument in this appeal as to why the trial court's finding of fact regarding this issue were clearly erroneous. To the contrary, Ms. Frank submits that the trial

court's ruling on this issue was well-reasoned, and consonant with the decisions of the Idaho Supreme Court indicating that direct protest may provide a basis for a necessity defense. *See Hastings*, 118 Idaho at 855; *Meyer*, 161 Idaho at 635.

Accordingly, because it was only the **district court** on appeal that held against her in this regard, which represented a departure from the trial court's ruling, it is appropriately presented in this appeal for this Court's review. Moreover, for the reasons stated more fully in the Appellant's Brief, the district court's ruling on this matter were inconsistent with the legal standards regarding the necessity defense and should therefore be overruled by this Court. *See* Appellant's Brief, pp.20-24.

CONCLUSION

Ms. Frank respectfully requests that this Court reverse the Opinion on Appeal of the district court, and the trial court's judgments of conviction and sentences, and remand this case for new trials with instructions to permit the jury to be instructed on the defense of necessity.

DATED June 10, 2020.

SARAH E. TOMPKINS
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on June 10, 2020, I served a true and correct copy of the within instrument to the following via File and Serve:

JOHN C. MCKINNEY
Deputy Attorney General

Courtney Packer
Legal Assistant