

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41355

STATE OF IDAHO,) 2015 Unpublished Opinion No. 388
)
Plaintiff-Respondent,) Filed: March 3, 2015
)
v.) Stephen W. Kenyon, Clerk
)
JOSHUA THOMAS BENNETT,) THIS IS AN UNPUBLISHED
) OPINION AND SHALL NOT
Defendant-Appellant.) BE CITED AS AUTHORITY
)
_____)

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Joel E. Tingey, District Judge.

Judgment of conviction for delivery of marijuana, affirmed.

Sara B. Thomas, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Joshua Thomas Bennett was convicted of delivery of marijuana following a jury trial. Bennett contends that the district court improperly limited his cross-examination of the confidential informant to whom Bennett allegedly delivered the drugs.

I.

BACKGROUND

Bennett was the target of a drug sting. A paid confidential informant arranged to buy half an ounce of marijuana from Bennett. Law enforcement officers gave the informant buy money and placed an audio recording device on his body. Because the officers wanted to continue to use the confidential informant, they did not plan to arrest Bennett immediately after he sold the

drugs. Before the informant went to buy the marijuana, officers searched the informant and his car and did not find any drugs.

Officers maintained visual surveillance of the convenience store parking lot where Bennett and the informant had agreed to meet. They saw the informant arrive at the parking lot and also observed Bennett and a compatriot. Bennett was easily identified because he has a large tattoo on his neck. When Bennett arrived on scene, the confidential informant offered the money. On the audio recording, Bennett confirmed the amount, asking “One ninety?” and then explained that he would be back. The informant waited while Bennett and the third man went behind the store. Once there, Bennett observed law enforcement officers. At that point, he became concerned that the exchange might be a sting and asked the informant to meet him at a different convenience store. The informant agreed to do so.

On the drive between convenience stores, approximately an hour after the recording began, the audio recording device stopped recording. Also, officers lost sight of the informant. Nonetheless, the informant completed the sale. He arrived at the second convenience store, where Bennett gave him half an ounce of marijuana. The informant then delivered the marijuana to law enforcement officers.

Bennett was charged with delivery of a controlled substance in violation of Idaho Code § 37-2732(a)(1)(B). The case proceeded to trial where the confidential informant admitted that he “used to be a drug dealer,” and had been charged with the delivery of cocaine. He said that he had previously worked as an informant in exchange for the dismissal of that delivery charge. At the time of the alleged sale to Bennett, the informant was no longer working off any charges, but was being paid to act as an informant. During cross-examination, Bennett attempted to provide further evidence of the confidential informant’s criminal past by asking how many times the informant had sold cocaine. When instructed to lay further foundation, Bennett asked when the witness last sold cocaine and the informant testified he had last sold cocaine in 2009. Thereafter, the State objected to any discussion of “specific instances” of misconduct. Bennett responded that he wanted to establish “what this gentleman’s knowledge of the drug trade is.” The court sustained the objection. In the remainder of his cross-examination, Bennett solicited additional testimony reiterating that the informant had sold cocaine, that he had been caught and charged, and that the charges were dismissed.

Bennett did not testify. His closing arguments focused on defects in the evidence of the controlled buy, most notably that the officers were unable to observe or record the sale. He argued that the entire case relied upon the credibility of the informant, who was not credible because of his prior criminality and contemporary relationship with police.

The jury returned a guilty verdict. Bennett appeals from the resulting judgment, arguing that the district court erred by limiting his cross-examination of the informant.

II. ANALYSIS

On appeal, Bennett argues that the limitations placed upon his cross-examination of the informant were inconsistent with Idaho Rule of Evidence 611 and violated the Sixth Amendment right to confront witnesses. Generally, I.R.E. 611 discusses the scope and manner of questioning witnesses. The provision upon which Bennett relies, I.R.E. 611(b), *limits* the scope of cross-examination: “Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.” More generally, Idaho courts have held that control of cross-examination is committed to the sound discretion of the trial judge. *State v. Brummett*, 150 Idaho 339, 344, 247 P.3d 204, 209 (Ct. App. 2010); *State v. Rauch*, 144 Idaho 682, 685, 168 P.3d 1029, 1032 (Ct. App. 2007). When a trial court’s discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

The right of an accused to confront adverse witnesses is safeguarded by the Sixth Amendment to the United States Constitution. Its “main and essential purpose” is to secure the opportunity of cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). This includes the right to expose a prosecution witness’s possible bias and motive for testifying so the jury can make an informed judgment as to the weight to be given the witness’s testimony. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974); *State v. Gomez*, 137 Idaho 671, 674-75, 52 P.3d 315, 318-19 (2002); *State v. Harshbarger*, 139 Idaho 287, 293, 77 P.3d 976, 982 (Ct. App. 2003); *State v. Green*, 136 Idaho 553, 556-57, 38 P.3d 132, 135-36 (Ct. App. 2001). That is not to say,

however, that a defendant is entitled to conduct a cross-examination that “is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Rather, trial judges have wide latitude to “impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’[s] safety, or interrogation that is repetitive or only marginally relevant.” *Van Arsdall*, 475 U.S. at 679. *See also State v. Pierce*, 107 Idaho 96, 104, 685 P.2d 837, 845 (Ct. App. 1984).

Bennett did not raise the constitutional claim below. Issues not raised below may not be considered for the first time on appeal unless the issue presented rises to the level of fundamental error. *See State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971). In *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court defined fundamental error as error that: (1) violates one or more of the defendant’s unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings. *Id.* at 226, 245 P.3d at 978.

A. It Appears That the District Court Ruled the Evidence Was Cumulative

The district court limited Bennett’s cross-examination, holding that the issue had “been argued sufficiently.”¹ The district court did not address the I.R.E. 611 issue or confrontation

¹ Our analysis of these issues is impeded by deficiencies in the arguments raised below. The State objected to Bennett inquiring into “specific instances” because that “is completely inappropriate.” The Idaho Rules of Evidence use the phrase “specific instances” in three places. Of those three rules, Idaho Rule of Evidence I.R.E. 412(c)(1) and I.R.E. 405 are plainly irrelevant, as the former concerns “past sexual behavior” and the latter involves character witnesses and crimes which require the proof of a trait of character. Accordingly, it appears that the State’s objection was made pursuant to I.R.E. 608. That rule *authorizes* the admission of specific instances of conduct on cross-examination to attack the witness’s credibility, but prohibits proof by extrinsic evidence. *See State v. Bergerud*, 155 Idaho 705, 711, 316 P.3d 117, 123 (Ct. App. 2013) (stating that I.R.E. 608(b) “specifically authorizes inquiries into specific instances of the witness’s conduct during cross-examination of that witness if the conduct is probative of truthfulness or untruthfulness”). On appeal, the State argues that the evidence was properly excluded pursuant to I.R.E. 608, but below the State appeared to argue that “specific instances” were not admissible as a general matter and that contention is mistaken.

Bennett’s argument was no better. He argued that the evidence should be admitted to explain the witness’s “knowledge of [the] drug trade,” but he failed to explain why that was relevant and he does not argue this point on appeal.

issue because neither was raised below. Instead, in context, it appears that the district court was holding that the evidence would be cumulative. A trial court is authorized to exclude the “needless presentation of cumulative evidence.” I.R.E. 403. If that was the court’s ruling, it may have been legally correct. However, when excluding evidence pursuant to I.R.E. 403, “the trial court must address whether the probative value is substantially outweighed by one of the considerations listed in the Rule.” *State v. Ruiz*, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010). In prior cases, the Idaho Supreme Court has held that similarly terse rulings amount to reversible error because the record does not show whether the district court performed the correct analysis. *Id.*; see also *State v. Parker*, 157 Idaho 132, 139, 334 P.3d 806, 813 (2014). Here, however, we need not determine whether the question called for the “needless presentation of cumulative evidence” or whether the district court properly weighed the probative value of the evidence. Here, even assuming that the court erred by sustaining the objection, we conclude any error was harmless.

B. Any Error Was Harmless

Error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* Thus, we examine whether the alleged error complained of in the present case was harmless. See *State v. Lopez*, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005). In this case, as to the constitutional issue, because Bennett must prove fundamental error, he bears the burden of showing that the constitutional error “affected the outcome of the trial proceedings.” *Perry*, 150 Idaho at 226, 245 P.3d at 978. To the extent Bennett’s I.R.E. 611 issue was raised below, the State bears the burden of showing that any error was harmless. In this case, the placement of the burden is immaterial. As we will explain, even assuming that the State bears the burden, the error is harmless.

In this case, the evidence that Bennett was prevented from introducing--the number of times that the witness had sold cocaine--would have been of little or no probative value. The informant’s possible bias stemmed from the fact that his cooperation with police was rewarded by the State dropping a serious felony charge and also paying him for his services as an informant; it did not stem from the precise number of his past offenses.

Moreover, the jury could infer from the admitted evidence that the informant had sold drugs on many occasions. At trial, he admitted that he had been a “drug dealer,” which implies

that he had been involved in more than one transaction. He also said that he had ruined the lives of “many kids” and that he was sorry that so “many mamas’ babies is out doing drugs.”

In evaluating whether the exclusion of defense evidence was prejudicial, we also take into account the strength of the State’s case. Here, the State’s case was strong and did not rely solely upon the paid informant’s veracity. The audio recording of Bennett’s initial meeting with the confidential informant shows that Bennett accepted one hundred ninety dollars, in cash, in a convenience store parking lot, but did not exchange any goods or services for the money at that time. Shortly after the informant’s second contact with Bennett, he possessed a half-ounce of marijuana that he did not possess before. This was significant evidence that Bennett had delivered drugs that did not depend upon the credibility of the informant. Because the State presented persuasive evidence of guilt and because the evidence excluded was, at most, of only the most marginal probative value, we conclude beyond a reasonable doubt that if error occurred, it was harmless.

Because Bennett has shown no reversible error, the judgment of conviction is affirmed.

Judge GUTIERREZ and Judge GRATTON CONCUR.