

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35040

STATE OF IDAHO,)	2009 Unpublished Opinion No. 456
)	
Plaintiff-Respondent,)	Filed: May 7, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
DIANE GALE ANDERSON,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge. Hon. Theresa Gardunia, Magistrate.

District court decision on appeal affirming magistrate court judgment of conviction for violating no contact order, reversed. Case remanded.

Alan E. Trimming, Ada County Public Defender; Benson Barrera, Deputy Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

WALTERS, J. Pro Tem

Diane Gale Anderson (Anderson) appeals from her conviction in the magistrate division of the district court for violating a no contact order. She contends that the trial court erred by refusing to admit a note which Anderson proffered as evidence. The district court on an intermediate appeal upheld the trial court’s decision to exclude the evidence. We reverse the district court’s decision and remand the case for further proceedings in the magistrate division.

I.

FACTS AND PROCEDURAL BACKGROUND

A no contact order was entered restraining Anderson from contacting or attempting to contact Richard Mark Anderson (Richard). The State alleged that Anderson violated the no contact order by passing a note to Richard during a church service. The State claimed that Anderson gave the note to their son who passed the note to Richard.

On the first day of trial, the prosecutor advised the trial court that Anderson's attorney had just that day disclosed to him a note which Anderson intended to introduce into evidence and which Anderson claimed was the note passed at the church service. At the same time, the prosecutor advised the court that he too had some documentary evidence that he wished to introduce into evidence, *viz.*, a motion previously filed by Anderson, which would demonstrate Anderson's knowledge of the no contact order. Neither of these items of documentary evidence had been disclosed in advance of trial as required. The trial court refused to allow either item of documentary evidence. The jury subsequently found Anderson guilty of violating the no contact order. On appeal, the district court affirmed the trial court's evidentiary ruling. This appeal followed.

II. ANALYSIS

On review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008).

Anderson contends that the trial court abused its discretion in excluding the evidence at trial. The decision whether to admit evidence at trial is generally within the province of the trial court. *State v. Gilpin*, 132 Idaho 643, 646, 977 P.2d 905, 908 (Ct. App. 1999). A trial court's determination as to the admission of evidence at trial will be reversed only where there has been an abuse of that discretion. *State v. Zimmerman*, 121 Idaho 971, 973-74, 829 P.2d 861, 863-64 (1992). 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).

Upon raising the existence of evidence newly disclosed by both parties, the prosecutor stated:

What it is is a note. We're alleging that a note was passed at church. They do have a note that they say is the note that was, in fact, passed. I'm not honestly sure if I would be opposed to it, however, I've had no opportunity to show my witnesses said note. And I feel that it's a bit untimely.

....

So, if you would like to get this in, if you feel that that is appropriate, I, too, would like to get in the motion that she filed. I'm just kind of letting the court know about this. I don't know that I object, but I haven't had any opportunity to show my witnesses this. And so, I feel I would be disadvantaged.

Then the court inquired as to the availability of the prosecutor's witnesses to review the note, and was advised that they were present. This portion of the dialogue concluded:

THE COURT: Would you have an opportunity if we took some time to show them that note? I mean, it couldn't take that long if they're here. They would be able to recognize it just by looking at it.

[PROSECUTOR]: That's true. I think that that would be fine.

THE COURT: All right.

Anderson's attorney, Mr. Barrera, had been given no opportunity to speak to either issue.

The discussion then turned to the prosecutor's newly disclosed evidence, with the prosecutor concluding: "However, if we're letting in other evidence at this point, I think that I should be entitled to that, and it would be fair." Thereupon Anderson's counsel objected to the State's evidence by arguing that the situation regarding the evidence Anderson was offering was materially different from the situation regarding the evidence offered by the State. Anderson's counsel argued that the State's case was based upon the existence of a note and so the prejudice to the State from Anderson's late disclosure was much less than the prejudice to Anderson from the State's newly disclosed evidence. In his remarks, Anderson's counsel stated that "the whole basis of this case is the communication by a note from Ms. Anderson to Mark Anderson." He further stated that "here is a note that Ms. Anderson conveys to me was passed the other way."

At this point, having no objection to Anderson's evidence by the prosecutor, having addressed the issue of prejudice from Anderson's late disclosure of the evidence by providing for its review by the prosecutor's witnesses and having given Anderson's counsel virtually no opportunity to address the evidence which Anderson proposed, the court stated:

All right. The note is not getting in. You've had the note, or at least the note -- you've known about the note for months now, and it hasn't been disclosed to the prosecution. And the note really is not relevant. Whatever the note says is not relevant to the issue in this case. The issue in this case is whether or not the no contact order was violated. And the note could have said nothing. The fact that there was an attempt to communicate is what violates the no contact order. So, the note is not getting in.

It should have been disclosed earlier. You should have given the state notice that you were going to be introducing the note. It's not getting in. I don't see it as a relevant issue. If it was -- if I believed that it was critical to your defense in this case, Mr. Barrera, I might reconsider it, but it's not.

Anderson's counsel then attempted to speak to the issue, resulting in the following dialogue:

MR. BARRERA: I -- can I respond just for a moment? Just going off the police report, it says that Mr. -- Mr. Anderson responded on the exact same note that she sent him. This note has only Mr. Anderson's handwriting on it. So, if she had responded -- it says, "So, Mark sent the note back to Diane stating as much." It's, like, responding on the exact note that she allegedly wrote to him. So, if he were to recognize this as the note he wrote, it would seem, according to his statement to the police, that he would -- her first note to him would also be on this same tithing envelope.

THE COURT: And your claim is that there is no note on there from her?

MR. BARRERA: No. It's all Mr. Anderson to her.

THE COURT: Why didn't you disclose that earlier, Mr. Barrera?

Mr. BARRERA: I just received it from Ms. Anderson last night at about 7:00.

The prosecutor then began to speak, but the transcript ends.¹ There is, therefore, no further trial court record on the issue.

On appeal, the district court noted that the trial court had excluded the note on two grounds, relevance and as a sanction for violating discovery. The district court held that Anderson's counsel should have made an offer of proof showing the substance of the note, when it was written, and how Anderson came into its possession in order to provide a record for an appellate court to properly analyze the proffered evidence. The district court held that the record was insufficient to determine relevance or prejudice from the exclusion and, thus, affirmed the trial court's decision to exclude the note.

We agree with the district court that the record was insufficient to determine whether the note should be admitted. However, we hold that the district court erred in affirming the trial court's decision to exclude the note.

It is clear that the trial court correctly perceived the issue as one of discretion, but it is not clear whether the trial court reached its decision by an exercise of reason consistent with the applicable legal standards. The trial court excluded the note on the ground that it was irrelevant

¹ The parties stipulated that the transcript, as it exists, contains all the essential discussions relevant to the issue on appeal.

and also as a sanction for late disclosure. The trial court's repeated comments regarding late disclosure were entirely unnecessary if the evidence was irrelevant. When a defendant asks to present evidence at trial that was not timely disclosed to the prosecution, the trial court must consider whether the State would be prejudiced from the late disclosure if the evidence were admitted and weigh that prejudice against the defendant's right to a fair trial. *State v. Thomas*, 133 Idaho 802, 797, 992 P.2d 795, 797 (Ct. App. 1999). Here, there was no objection by the State to the note as evidence and, initially, the trial court appeared to address any prejudice to the State by providing time for the State's witnesses to review the note. Under the circumstances, providing the State's witnesses with time to review the document was the proper way to address any prejudice to the State. The prosecutor agreed to this procedure. Thereafter, however, the trial court repeatedly intermixed the late disclosure issue with its comments on relevance issues, but did not expressly modify its prior method of ameliorating prejudice to the State. Thus, to the extent the trial court excluded the note as a discovery violation, the court abused its discretion.

Evidence is relevant if it has "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." Idaho Rule of Evidence 401; *State v. Karpach*, 146 Idaho 736, 739, 202 P.3d 1282, 1285 (Ct. App. 2009). We review questions of relevance de novo, as an issue of law. *State v. Raudebaugh*, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993). Generally, when a physical object is offered in evidence and a question of fact arises as to its connection with either the defendant or the crime, the object should be admitted for such weight and effect as the jury decided to give it, unless it is clearly irrelevant. *State v. Simmons*, 120 Idaho 672, 678, 818 P.2d 787, 793 (Ct. App. 1991). Idaho Rule of Evidence 403 authorizes the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. *State v. Kerchusky*, 138 Idaho 671, 674, 67 P.3d 1283, 1286 (Ct. App. 2003).

The note was excluded without any objection by the State, and Anderson's offer of proof indicated what she intended to show, how it related to the issues in the case, and through what witness it was proposed to be authenticated and admitted. The asserted import of the note was to demonstrate that it was Richard who attempted the communication, not Anderson, and to rebut the expected testimony from Richard and their son that the note originated from Anderson.

Anderson advised the court that Richard had told the police that Anderson passed a note on a tithing envelope through their son, on which tithing envelope Richard provided a written response. If, though, as Anderson argued, the State's evidence would be that Richard wrote a note on the same paper containing Anderson's alleged note to him, and if Anderson can lay a foundation for the tithing envelope as the actual note passed between them, and if it contained only writing from Richard, and not Anderson, then it is relevant to rebut the State's evidence that Anderson attempted a communication with Richard with that note.

The State has argued on appeal that the note was properly excluded because Anderson did not lay a foundation for its admission. However, Anderson was preempted in addressing foundation and relevance issues. The note was excluded by the trial court before Anderson had formally offered the note into evidence or attempted to lay the necessary foundation. There was no foundation objection from the State. It remains to be seen whether Anderson can produce evidence to authenticate and otherwise lay a foundation for the note she purports to have or demonstrate the note's actual relevance. Therefore, rather than vacating Anderson's judgment of conviction, we will remand this matter to the trial court to make this determination in an evidentiary hearing where Anderson shall be required to make a complete offer of proof or present testimony to show the admissibility and relevance of the evidence she seeks to present. If the trial court determines that the note is admissible, the court must weigh the impact of the exclusion of that evidence from Anderson's trial and determine whether the trial court's error was prejudicial to her defense such that a new trial is necessary. This will ensure that Anderson will be able to produce the evidence she claims to possess if the trial court ultimately decides a new trial should be ordered. Whether that should occur is a question which cannot be answered based on the record before us.

III.

CONCLUSION

The trial court committed error in failing to use applicable rules of evidence to determine the admissibility of the note and, therefore, abused its discretion. Accordingly, we reverse the district court's decision and remand the case to the magistrate division for further proceedings to determine the admissibility of the note and to make the ultimate determination of whether a new trial is necessary.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**