**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 34178**

| | | |
|---|---|---|
| **STATE OF IDAHO,** | ) | **2008 Unpublished Opinion No. 708** |
| | ) | |
| **Plaintiff-Respondent,** | ) | **Filed: November 13, 2008** |
| | ) | |
| **v.** | ) | **Stephen W. Kenyon, Clerk** |
| | ) | |
| **MICHAEL ROBERT OSBORN,** | ) | **THIS IS AN UNPUBLISHED** |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. Michael E. Wetherell, District Judge.

Judgment of conviction for robbery, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

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

---

PERRY, Judge

Michael Robert Osborn appeals from his judgment of conviction for robbery. For the reasons set forth below, we affirm.

## I.

## FACTS AND PROCEDURE

Osborn, accompanied by Bryson Lassiter, approached a man leaving a bank ATM and robbed him of $100 at gunpoint. Osborn was charged with robbery, I.C. §§ 18-6501 to -02; with an enhancement for use of a firearm during the commission of a crime, I.C. § 19-2520; and with unlawful possession of a firearm, I.C. § 18-3316. At trial, over the objection of Osborn's counsel, the district court allowed the prosecutor to play the videotape of the police interrogation of Lassiter before he was called to testify. Later at the trial, after Osborn testified that he performed the robbery under duress, the prosecutor cross-examined him as to why he never attempted to contact police with his version of the events until after he was arrested. In rebuttal

closing argument, the prosecutor again alluded to Osborn's pre-*Miranda*[1] silence as evidence that Osborn's claim that he committed the robbery under duress was not credible. The jury found Osborn guilty of robbery, but acquitted him of the enhancement for using a firearm during the commission of a crime. The prosecutor dismissed the charge for unlawful possession of a firearm. The district court sentenced Osborn to a unified term of twenty-five years, with a minimum period of confinement of ten years. Osborn appeals, challenging the district court's ruling allowing the prosecutor to play the videotape of Lassiter's interrogation before he was called to testify. Additionally, Osborn challenges the prosecutor's references to his pre-*Miranda* silence as violating his Fifth Amendment right to remain silent and argues that the cumulative effect of these errors deprived him of a fair trial.

## II.

## ANALYSIS

### A. Videotape of Lassiter's Interrogation

First we address Osborn's claim that the district court abused its discretion when it allowed the prosecutor to play the videotape of Lassiter's interrogation before he was called to testify. 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 videotape depicted an emotional Lassiter making many statements that were contrary to what he later testified to at trial. The prosecution argued that the videotape would allow the jury to observe Lassiter's demeanor and hear his allegedly false statements in context. Osborn's counsel argued in part that, because the prosecution was intending to later call Lassiter as a witness, the videotape with Lassiter's conflicting statements should only be admitted after he testified. The district court found that the videotape was relevant and that its probative value was not substantially outweighed by unfair prejudice and then held:

---

[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

> The State may clearly impeach its own witness under Idaho Rule of Evidence 607. While it might be argued that the State should only do so in rebuttal after an attack is made on Mr. Lassiter as to his motives, the Court believes in this instance strict adherence would result in wasted time for no good purpose. In addition, it would lead the jury to believe the State withheld critical evidence from them in the examination of Mr. Lassiter which could confuse the jury which does not understand the sometimes esoteric rules related to order of proof in criminal trials.
>
> The Court therefore exercises its discretion to the extent it may be asserted that it is necessary for the Court to do so in these circumstances where both parties alluded to Mr. Lassiter's lack of truthfulness in their opening statements and will allow the State to pursue these matters in its case in chief to put the testimony of Mr. Lassiter in context in the direct examination.

On appeal, Osborn argues that the state "sought to circumvent the Idaho Rules of Evidence by offering inadmissible hearsay evidence in its case in chief, to impeach its own witness, prior to that witness even testifying." Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c); *see also State v. Gomez*, 126 Idaho 700, 704, 889 P.2d 729, 733 (Ct. App. 1994). Hearsay is inadmissible unless otherwise provided by an exception in the Idaho Rules of Evidence or other rules of the Idaho Supreme Court. I.R.E. 802.

In this case, when the prosecutor addressed the district court regarding the admissibility of the videotape of the interrogation, he stated:

> I don't propose the videotape to prove the truth of the matter asserted. I think it's hearsay. I think it's not true for the most part, for a large part any way. But it is impeachment.

The prosecutor later re-emphasized this point when he offered the videotape into evidence. When the district court admitted the videotape and allowed it to be played to the jury, it gave the following limiting instruction:

> Ladies and gentlemen of the jury, you are about to hear or to hear and see tape recordings or videotape recordings of statements made by Bryson Darius Lassiter prior to this trial. Mr. Lassiter was previously a co-defendant of Mr. Osborn. These materials are played for you only for two limited purposes and not as proof of the matter of any matter asserted in the statements. The two purposes are to assist you in determining whether to believe or not to believe Mr. Lassiter's testimony which will be given at trial; and two, to determine the weight, if any, you will give to Mr. Lassiter's testimony given at trial in light of his prior statements made before trial.

> The Court has determined this testimony may be used by you for these limited purposes only and it is appropriate for you, the jury, to know the full context of the witness's statements and his demeanor for these purposes. You may use these recorded statements only for these limited purposes and for no others. What weight you give to this evidence, if any, is for you alone to determine.

The videotape was played to demonstrate Lassiter's demeanor and to serve as impeachment for his testimony, which both the prosecutor and counsel for Osborn acknowledged had fluctuated significantly from the time he was first taken into custody. It was not offered to prove the truth of Lassiter's statements that the robbery was entirely Osborn's idea and that Lassiter was innocently pulled into it against his will. Therefore, the videotape was not hearsay.

Having concluded that the videotape was not inadmissible hearsay, the question becomes whether it was properly admitted and played for the jury as impeachment evidence of Lassiter's credibility before he testified. Osborn argues that I.R.E. 607 and 613 require that a witness first testify before a party offers impeachment evidence through inconsistent out-of-court statements. Idaho Rule of Evidence 607 provides that "the credibility of a witness may be attacked by any party including the party calling the witness." Idaho Rule of Evidence 613(b) provides, in pertinent part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Neither rule requires that the witness first testify before extrinsic evidence of prior inconsistent statements may be admitted.[2] As found by the district court, the videotape was relevant and admissible in the determination of Lassiter's credibility. A limiting instruction was given to reduce any possible prejudicial effect. Osborn has not shown that the district court erred in allowing the videotape to be admitted and played to the jury as impeachment evidence before Lassiter testified at the trial.[3]

---

[2] However, a better practice would be for the district judge to allow such impeachment evidence to be admitted only after the witness has testified. While not explicitly required by the rules of evidence, this is more in harmony with the purpose behind their enactment.

[3] Osborn further argues that the district court erred in holding that defense counsel had waived any objection to the admission and playing of the videotape for failure to comply with a

**B. Prosecutor's References to Osborn's Pre-*Miranda* Silence**

Next Osborn asserts that the state violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 13 of the Idaho Constitution by impermissibly questioning him regarding his pre-*Miranda* silence during cross-examination. According to Osborn, the prosecutor further violated his due process rights by referencing his silence during rebuttal closing argument. The state counters by arguing that the use of Osborn's pre-*Miranda* silence during cross-examination was permissible to impeach Osborn's credibility after he testified at trial. Furthermore, the state contends that the use of his pre-*Miranda* silence during rebuttal closing argument was not error because it centered around how Osborn's necessity and duress defenses were inconsistent with his actions after the robbery and how this also rendered his trial testimony not credible. Alternatively, the state argues that any error was harmless.

At trial, Osborn chose to testify on his own behalf. He testified that he committed the robbery under duress, believing that Lassiter would hurt him or his mother if he did not. Throughout cross-examination and recross-examination, the prosecutor put great emphasis on Osborn's failure to notify the police regarding his version of the robbery. The prosecutor also alluded to Osborn's pre-*Miranda* silence during rebuttal closing argument and the inferences that might be drawn from his silence as they pertained to the credibility of his version of the robbery. Defense counsel made no objection to this line of questioning or statements made during the prosecutor's closing argument.

This Court will not address an issue not preserved for appeal by an objection in the trial court. *State v. Rozajewski*, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct. App. 1997). However, we may consider fundamental error in a criminal case, even though no objection was made at trial. *Id*. Fundamental error has been defined as error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived. *State v. Babb*, 125 Idaho 934, 940, 877 P.2d 905, 911 (1994).

---

pre-trial order. As the state points out, the district court eventually ruled on the merits of defense counsel's objections. Therefore, this argument need not be addressed further.

The United States Supreme Court has held that due process is violated if the prosecutor impeaches a testifying defendant with evidence that the defendant was silent after receiving *Miranda* warnings. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976). However, a testifying defendant may be impeached with evidence of his or her pre-arrest, pre-*Miranda* silence. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980); *State v. Moore*, 131 Idaho 814, 820, 965 P.2d 174, 180 (1998). In *Jenkins*, the Court explained:

> Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."
>
> Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.

*Id.* at 238 (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)). *See also Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (holding that the state's use of a defendant's failure to tell anyone that the shooting was an accident, before receiving *Miranda* warnings, to impeach his credibility after testifying was both proper and probative). This Court has likewise held that "evidence of a defendant's pre-*Miranda* silence can also be used more broadly, not just to directly contradict a defendant's testimony . . . but to more generally impeach a story the defendant has told on the witness stand." *State v. Stefani*, 142 Idaho 698, 702, 132 P.3d 455, 459 (Ct. App. 2005).

During cross-examination in this case, regarding the events immediately following Osborn's flight after the robbery, the state questioned Osborn as follows:

> Q: All right. When -- did you call to the police from the hill top?
> A: No, like I said, I didn't want --
> Q: You didn't want any contact with the police; did you?
> . . . .
> Q: Okay. When you got to a main street, did you stand out in the street with your hands up and wait for a police officer to come by?
> A: There was nobody on the roads.

. . . .
Q: Did you wait to see if a police car would come by?
A: I had no reason to believe there was a police car in that area.
. . . .
Q: Let me ask you this. Did you knock on anybody's doors and ask them to call the police for you?
A: No.
. . . .
Q: Okay. When you were at the [convenience store], did you ask the clerk to call the police for you?
A: No.
. . . .
Q: . . . Did you call 911 from the [convenience store]?
A: No.
. . . .
Q: All right. Did you call the police and tell them that they needed to be on the lookout for Mr. Lassiter? That he was actually the guy that had done the robbery?
A: He had already turned himself in, so no.
Q: Okay. So if you know that he turned himself in, did you call the police and say you got the right guy here?
A: No.
. . . .
Q: Did you offer any assistance to the police that night before you turned yourself in to the courthouse suggesting that you had been framed, you were innocent, and Mr. Lassiter was really the bad guy here?
A: No.
. . . .
Q: Okay. [Did] you give your mother specific instructions that you want her to call the police and tell them that this whole thing is a mistake?
A: We just -- no.
Q: All right. And you certainly didn't do that yourself that night?
A: No, I didn't.
. . . .
Q: All right. And you know where the sheriff's office and the Boise Police Department are . . ., right?
A: Yes.
Q: All right. And you know that there would be police officers there that you could go talk to; correct?
A: Yes.
Q: And you didn't go there?
A: No.

The exchange continued further along the same line of questioning, including questions regarding the behavior of Osborn's mother when she allegedly learned of Osborn's version of the

events, and also regarding Osborn's behavior at the police station when he went to turn himself in. During rebuttal closing argument, the state argued to the jury:

> And so the question will be, 'Did the defendant act reasonably as an innocent man would act?' Because would you have acted the way the defendant did if you were innocent or if this was your son and you believed him to be innocent?
>
> Or did he act unreasonably because that's not what you would have done. That's how you make the judgment. If it's not what you would have done and it is not reasonable then the defendant was not acting consistently with his story.

The state continued in its rebuttal closing argument to refer to Osborn's actions and inactions, as well as those of his mother, as being inconsistent with the version of events that he testified to at trial. Therefore, the state argued that the jury should not find his testimony to be credible if it was unreasonable, based on his actions or inactions, to believe that he committed the robbery under duress.

In *Stefani*, this Court noted:

> In *Jenkins*, a defendant on trial for first degree murder testified that the killing was in self defense. On cross-examination of the defendant, the prosecutor elicited admissions that the defendant had not immediately reported to the police the alleged occurrence in which the defendant defended himself from an attack and that he had, rather, waited two weeks before reporting the matter to authorities. Through cross-examination and closing argument, the prosecutor attempted to impeach the defendant's credibility by suggesting that he would have spoken out sooner if he had killed in self defense. The United States Supreme Court held that this prosecutorial comment upon the defendant's silence neither violated his Fifth Amendment right to remain silent nor deprived him of fundamental fairness guaranteed by the Due Process Clause.

*Stefani*, 142 Idaho at 702, 132 P.3d at 459. This Court then held that the prosecutor's use of Stefani's pre-*Miranda* silence was indistinguishable from the method approved by the United States Supreme Court in *Jenkins* and its progeny. Likewise, we conclude in this case that the prosecutor's impeachment, in cross-examination and rebuttal argument, of Osborn's testimony with his pre-*Miranda* silence is also indistinguishable from the impeachment technique approved by the Supreme Court. Accordingly, we conclude that the prosecutor's conduct here was not fundamental error but, to the contrary, was permissible impeachment.

### C. Cumulative Error

The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's right to due process. *Moore*, 131 Idaho at 823, 965 P.2d at 183. The presence of errors alone, however, does not require the reversal of a conviction because, under due process, a defendant is entitled to a fair trial, not an error-free trial. *Id.* Because we conclude that playing the videotape of Lassiter's interrogation before he testified was not error, and that the prosecutor's use of Osborn's pre-*Miranda* silence during cross-examination and rebuttal closing argument was not error, we need not address the application of the cumulative error doctrine to this case.

## III.

## CONCLUSION

The Idaho Rules of Evidence did not require that the prosecution's impeachment evidence of a future witness be reserved until after the witness testified. Therefore, the district court's ruling admitting the videotape of Lassiter's interrogation and allowing it to be played to the jury before he testified was not an abuse of discretion. The prosecutor's use of Osborn's pre-*Miranda* silence during cross-examination and rebuttal closing argument was permissible impeachment. Because we conclude that the playing of the interrogation videotape and that the use of Osborn's pre-*Miranda* silence were not error, the cumulative error doctrine does not apply. Therefore, Osborn's judgment of conviction for robbery is affirmed.

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