IN THE SUPREME COURT, STATE OF WYOMING

2012 WY 120

APRIL TERM, A.D. 2012

September 11, 2012

JOHN RUSSELL REYNOLDS, Appellant (Defendant), v. THE STATE OF WYOMING, Appellee (Plaintiff).	S-11-0263

Appeal from the District Court of Campbell County
The Honorable Dan R. Price II, Judge

Representing Appellant:
Diane Lozano, State Public Defender, PDP; Tina N. Olson, Chief Appellate Counsel.

Representing Appellee:
Gregory A. Phillips, Wyoming Attorney General; David L. Delicath, Deputy Attorney General; D. Michael Pauling, Senior Assistant Attorney General; Paul S. Rehurek, Senior Assistant Attorney General.

Before KITE, C.J., and GOLDEN, HILL, VOIGT, and BURKE, JJ.

KITE, Chief Justice.

[¶1] John Russell Reynolds was convicted of felony driving while under the influence. He asserts he is entitled to a new trial because a computer malfunction resulted in part of the transcript of his jury trial being unavailable for appeal. We conclude that the record was properly settled pursuant to W.R.A.P. 3.03 and 3.04, and Mr. Reynolds has failed to demonstrate the settled record is insufficient or the settlement process could not have been used to collect the information he claims is still missing.

[¶2] We affirm.

ISSUE

[¶3] Mr. Reynolds presents the following issue on appeal:

> Is the record too incomplete to provide appellant a meaningful appeal?

The State provides a more detailed statement of the issue:

> After Reynolds filed his notice of appeal, the court reporter discovered that a computer malfunction had destroyed her electronic notes covering jury selection, opening statements, and the first trial witness. The court and parties settled the record by reconstructing the missing portions as prescribed by Wyo. R. App. P. 3.03 and 3.04. In his brief, Reynolds identifies four substantive issues that he contends are outside the purview of meaningful appellate review because of the state of the record. Would the settled record allow a meaningful review of Reynolds' conviction on each of these issues if he had chosen to present their merits to this Court with cogent argument and supporting authority?

FACTS

[¶4] At 4:24 p.m. on October 24, 2010, the Campbell County Sheriff's Department received a REDDI (Report Every Drunk Driver Immediately) report from Arrow Langston. She reported a green Ford Ranger pickup was traveling at varying speeds and weaving across the road on Highway 59 near Wright, Wyoming. Ms. Langston did not feel comfortable getting close enough to the vehicle to read the license plate, but she continued to follow it and reported to the 911 operator that the vehicle had parked at Hank's Bar and Lounge.

[¶5] Deputy Mark Raymond was dispatched to Hank's Bar and Lounge but could not locate the vehicle. A few minutes later an anonymous caller made a second REDDI report. Responding to that call, the deputy located a green Ford Ranger pickup parked off the road at milepost 79 on Highway 59 and Mr. Reynolds sitting in the driver's seat talking on his cell phone. The truck was running, but when the deputy approached, Mr. Reynolds turned it off, removed the key and threw it onto the passenger side floor board.

[¶6] The deputy smelled alcohol on Mr. Reynolds' breath and there was a twelve pack container of beer on the passenger seat and a spilled beer on the floor. Mr. Reynolds told the deputy that he had consumed only one beer, but he refused to perform field sobriety maneuvers or take a portable breath test. Deputy Raymond arrested him for driving while under the influence of alcohol.

[¶7] At the jail, Mr. Reynolds refused to take a breath test in accordance with the Wyoming implied consent law[1] but later he requested and was given a portable breath test, which showed the presence of alcohol in his system. Mr. Reynolds was charged with driving while under the influence and, because it was his fourth offense in ten years, the charge was a felony under Wyo. Stat. Ann. § 31-5-233(b)(iii)(A) and (e) (LexisNexis 2010). He pleaded not guilty and the matter was tried to a jury. The jury returned a guilty verdict, and the district court sentenced Mr. Reynolds to twenty to twenty-four months incarceration.

[¶8] Mr. Reynolds filed a notice of appeal and requested the trial transcript be prepared for appeal. The court reporter stated that she had experienced computer problems and the record of the morning session of the trial was lost and could not be transcribed. The missing session included voir dire, opening statements and the testimony of the first witness, Ms. Langston.

[¶9] Mr. Reynolds' trial counsel filed a "Supplemental to Transcript," in which he stated that he could not reconstruct the voir dire and asked that the following information about Ms. Langston's testimony be used to "complete" the transcript:

> The First witness was Arrow Langston who observed a green pickup truck being [driven] erratically on Highway 59 until it pulled off and parked at Hanks Bar. She did not get close enough to see the license plate and could not identify the driver. She did call in a Reddi report.

The State responded with objections and proposed amendments pursuant to W.R.A.P. 3.03 and 3.04. The State's response was compiled from notes taken by the State's

[1] Wyo. Stat. Ann. § 31-6-101, et. seq.

paralegal during the trial, the recollection of the district judge's law clerk who attended the entire trial and the prosecutor's recollection and notes. It included summaries of the parties' opening statements and a detailed rendition of Ms. Langston's direct, cross examination and redirect testimony.

[¶10] Mr. Reynolds' appellate counsel filed a motion to correct or modify the record on appeal pursuant to W.R.A.P. 3.04 asking that the record be supplemented with the parties' earlier submissions and an additional proposed supplement. The motion stated that appellate counsel had attempted to "obtain recollection of the trial from State's counsel, defense counsel, and Mr. Reynolds." The filings did not include any new substantive information regarding the trial proceedings or any objections to the State's earlier submission, although the proposed supplement did state: "Consultation with Mr. Reynolds reveals that Mr. Reynolds, after this lapse of time, cannot reconstruct the cross-examination of the first witness, but Mr. Reynolds recalls the cross-examination as being extremely important to his defense."

[¶11] After considering the various filings, the district court entered an Order Settling and Approving Statement of Evidence. It confirmed the accuracy of the defense trial counsel's submission and the State's response and provided its own detailed recollection of the voir dire.

STANDARD OF REVIEW

[¶12] Because the issue in this case requires our independent determination of the sufficiency of the record on appeal, our standard of review is *de novo*. *See generally*, *Eaton v. State,* 2008 WY 97, ¶¶ 101-102, 192 P.3d 36, 78 (Wyo. 2008); *Bearpaw v. State,* 803 P.2d 70, 78-79 (Wyo. 1990).

DISCUSSION

[¶13] The court reporter is charged with producing the official transcript of criminal proceedings, including the trial, and filing the transcript as part of the official court record. *See* Wyo. Stat. Ann. § 5-3-403 through 5-3-406 (LexisNexis 2011); *Bromley v. State,* 2009 WY 133, ¶ 17, 219 P.3d 110, 115 (Wyo. 2009). A criminal defendant is entitled to have his entire trial recorded and available for appeal. In *Bearpaw,* 803 P.2d at 78-79, we examined an early Wyoming decision which discussed a criminal defendant's right to a complete record for appeal, *Richardson v. State,* 15 Wyo. 465, 484, 89 P. 1027, 1034-35 (1907):

> In its early years, this court determined "[t]here is no more reason for permitting a party to be deprived of his legal rights through a failure or a refusal of the official stenographer to perform his duties than through the failure or refusal of the

> judge or any other officer of the court to perform a duty imposed by law." [*Richardson,* 89 P.] at 1030. The court recognized an absolute right of appeal in a criminal case and the corollary right to be provided a complete record. Otherwise, the court noted, the defendant is effectively deprived of the right of appeal. *Richardson* held that a new trial is required when a necessary record is absent.

We also discussed several cases from other jurisdictions with favor:

> [T]he rule that a mandatory requirement for the court reporter to record all proceedings in a criminal case establishes a principle which cannot be overridden by any local practice, *United States v. Brumley,* 560 F.2d 1268 (5th Cir.1977). That court, in quoting *United States v. Selva,* 559 F.2d 1303, 1306 (5th Cir.1977), emphasized that "'[w]hen . . . a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion . . . of the record' will result in a presumption of prejudice sufficient to mandate reversal * * *." *Brumley,* 560 F.2d at 1281.

Bearpaw, 803 P.2d at 79.

[¶14] Wyoming court rules, however, provide an alternative means of producing a record on appeal when a transcript is not available. *See generally Barela v. State,* 936 P.2d 66, 69 (Wyo. 1997). Under W.R.A.P. 3.03 and 3.04, the district court may settle the record when a transcript is unavailable or does not accurately reflect the court proceedings. W.R.A.P. 3.03 states:

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available means including appellant's recollection. The statement shall be filed and served on appellee within 35 days of the filing of the notice of appeal. Appellee may file and serve objections or propose amendments within 15 days after service. The trial court shall, within 10 days, enter its order settling and approving the statement of evidence, which shall be included by the clerk of the trial court in the record on appeal.

W.R.A.P. 3.04 states:

> If any difference arises as to whether the record discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, or the trial court either before or after the record is transmitted to the appellate court, or the appellate court on motion or its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court by motion.

[¶15] Unlike in *Bearpaw,* the parties in the case at bar used the procedures available under Rules 3.03 and 3.04, and the district court settled the record. Mr. Reynolds did not object to the settlement of the record or provide any additional information. The importance of the Rule 3.03 and 3.04 process is shown in other cases where we have rejected criminal defendants' claims that the record was inadequate when no effort was made to settle it. *See, e.g.*, *Eaton,* ¶¶ 101-02, 192 P.3d at 78; *Petersen v. State,* 594 P.2d 978, 979-80 (Wyo. 1979) (applying former rule).

[¶16] Because Fed. R. App. P. 10(c)[2] is very similar to our Rule 3.03, we look to federal precedent for guidance as to the adequacy of the record on appeal. *See, e.g.*, *DeLoge v. State,* 2010 WY 60, ¶ 17, 231 P.3d 862, 865 (Wyo. 2010); *Bromley,* ¶ 18, 219 P.3d at 115. Federal decisions emphasize the importance of the record settlement process and have noted the difficulty of challenging a district court's reconstruction of missing portions of transcripts. 16A Fed. Prac. & Proc. Juris. § 3956.3 (4th ed. 2012). "In rare cases, however, a party may persuade the court of appeals that the effort to reconstruct the record does not afford a sufficient foundation for effective review and that the case must be retried." *Id.* The Ninth Circuit conducted a comprehensive review of criminal

---

[2] Rule 10(c) states:

> **(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable.** If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

and civil cases addressing the sufficiency of a reconstructed record and adopted the following analysis:

> [A]n appellant seeking a new trial because of a missing or incomplete transcript must 1) make a specific allegation of error; 2) show that the defect in the record materially affects the ability of the appeals court to review the alleged error; and 3) show that a Rule 10(c) [here, Rule 3.03] proceeding has failed or would fail to produce an adequate substitute for the evidence.

Bergerco, U.S.A. v. Shipping Corp. of India, Ltd., 896 F.2d 1210, 1217 (9th Cir. 1990).

[¶17] The *Bergerco* test fulfills a number of purposes. It helps us identify when a substantial and significant portion of the record is absent, thereby adversely impacting the appellant's right of appeal. *Bearpaw,* 803 P.2d at 79. It also recognizes that a defect in the record will not result in reversal if the existing record is sufficient to review an alleged error. *See Lucero v. State,* 14 P.3d 920, 922 (Wyo. 2000) (refusing to grant the appellant a new trial even though the record did not include a transcript of the jury instruction conference because we were able to review the allegation of error from the existing record). Additionally, the test recognizes an appellant's responsibility to attempt to reconstruct the record using the rules of appellate procedure. *See United States v. Williams,* 2009 WL 4506411, p. 3-4 (D.Colo. 2009); *United States v. Locust,* 95 Fed. Appx. 507, 51213 (4th Cir. 2004) (recognizing appellants may not be entitled to a new trial if they do not attempt to reconstruct the record through the Fed. R. App. P. 10(c) process). In sum, the *Bergerco* test properly balances a criminal defendant's right to a record of his criminal proceedings with his obligation to participate in the process of creating an alternative record when the transcript is not available.

[¶18] Mr. Reynolds identifies a number of issues which he asserts the settled record is insufficient to resolve. His first argument pertains to the district court's ruling that the recording of Ms. Langston's REDDI report could be played for the jury. The recording was played during the testimony of the 911 dispatcher who took Ms. Langston's REDDI call. Defense counsel objected to the recording because it was improper "vouching," was not relevant and Ms. Langston had already testified. The district court overruled the objection, stating that "it's either [a] prior consistent statement or prior inconsistent statement depending upon how it compares with the testimony."

[¶19] On appeal, Mr. Reynolds does not identify the legal basis for his claim that the district court erroneously allowed the recording into evidence or provide any legal analysis to support his claim. As such, he has failed to make a specific allegation of error as required by the first factor of the *Bergerco* test. The second and third factors require Mr. Reynolds to demonstrate that the defect in the record materially affects our ability to

review his claim and that the Rule 3.03 process failed to produce an adequate substitute for the transcript. Mr. Reynolds argues the statement of the evidence is insufficient to allow proper review of this issue because it does not describe Ms. Langston's testimony in sufficient detail to determine whether the trial court's ruling was correct.

[¶20] As we described earlier, the defense provided a general statement of Ms. Langston's testimony and the State supplemented it with a more detailed statement. The State's submission included nearly two full pages describing Ms. Langston's direct, cross examination and redirect testimony. The district court confirmed the parties' submissions as accurate recollections of Ms. Langston's testimony, and Mr. Reynolds did not object to the statement as being incomplete or submit additional information relating to the supposedly missing parts of Ms. Langston's testimony. He also does not specify on appeal what specific information would be necessary for him to properly present the issue. Under these circumstances, Mr. Reynolds cannot be heard to complain that the record is incomplete, if, indeed, it could be considered so.

[¶21] In his second issue, Mr. Reynolds claims the record is insufficient to evaluate the effectiveness of his trial counsel. He provides two "examples" of possible ineffectiveness. First, he asserts his trial counsel may have improperly opened the door to admission of the second REDDI report when he mentioned it in his opening statement and he needs the transcript of the opening statement in order to effectively evaluate whether his counsel was effective. He also claims that his counsel may have been ineffective by stipulating that he was driving the vehicle when Deputy Raymond encountered him.

[¶22] Both of Mr. Reynolds' claims fail to satisfy the third *Bergerco* element because he does not establish that the Rule 3.03 proceeding, had it been properly used, would have failed to produce an adequate substitute for the transcript. He made no effort to reconstruct the portions of the transcript which would have shown these alleged errors, i.e., the opening statement and the part of the record where the stipulation was presented to the jury, and he does not explain why such an effort would have been unsuccessful.

[¶23] In addition, with regard to his first claim of ineffectiveness, Mr. Reynolds fails to fulfill the other *Bergerco* elements because the available transcript clearly shows that defense counsel objected to the admission of the contents of the second REDDI report and the district court partially upheld his objection. The district court ruled that the State could present evidence of the second REDDI report to establish the reason the dispatcher sent the deputy to the location where he encountered Mr. Reynolds, but the report itself could not be played for the jury. On appeal, Mr. Reynolds does not provide any legal analysis showing that the limited admission of the evidence of the second REDDI report was erroneous. He has not demonstrated that, even if his attorney referred to the report in his opening statement, he somehow opened the door to improper evidence. Mr. Reynolds

has, therefore, failed to make a specific allegation of error or show that the missing parts of the transcript materially affect our ability to review this issue.

[¶24] Mr. Reynolds' second claim of ineffective assistance of counsel suffers from similar problems. He questions his trial counsel's decision to stipulate that he was "driving" the vehicle when, in fact, he was parked when Deputy Raymond contacted him. He claims the lack of a record of whether the stipulation was presented to the jury, and if so how it was done, hampers his ability to prove his attorney was ineffective for entering into the stipulation.

[¶25] The extant parts of the record demonstrate that Mr. Reynolds stipulated that he would not "raise a defense to the element that he was driving a motor vehicle at the time of the stop by Deputy Mark Raymond on October 24, 2010." Defense counsel entered into the stipulation to avoid the State's introduction of W.R.E. 404(b) evidence that Mr. Reynolds had already been convicted in circuit court of two other crimes resulting from the same incident—driving while under suspension and driving with an open container. By entering into the stipulation, the defense was able to keep evidence of the other convictions from the jury.

[¶26] The available record clearly shows what was stipulated and why. Mr. Reynolds has not demonstrated that the unavailability of the portion of the trial transcript where the stipulation was read to the jury (if it was) would materially impact our ability to review his claim that his counsel was ineffective for entering into the stipulation. Despite having the information from the record, Mr. Reynolds does not provide any legal analysis of his ineffectiveness claim; consequently, we decline to address it. *See Fix v. South Wilderness Ranch Homeowners Ass'n,* 2012 WY 96, ¶ 15, 280 P.3d 527, 531-32 (Wyo. 2012) (stating we do not consider issues not supported by citation to pertinent authority or cogent argument).

[¶27] Mr. Reynolds' next allegation of error relates to questions posed by the jury and the district court's response to them. The jury asked the following questions during deliberation:

> # 5 While under the influence of alcohol → what indicates this? Blood level # or any alcohol?
>
> Who was the second call from? Was it reporting erratic driving[?]
>
> What about priors DUI???

The district court, with the consent of the attorneys, provided the following response: "The court cannot answer these questions. You must decide based upon the evidence

presented in court." Mr. Reynolds suggests he needs the testimony of Ms. Langston and/or the opening statements to analyze whether the district court's answer was appropriate.

[¶28] Mr. Reynolds falls short on the first factor of the *Bergerco* analysis because he does not identify a specific error or provide any analysis of how the judge's response was improper. Mr. Reynolds also fails to explain how the missing parts of the transcript, specifically opening statements and Ms. Langston's testimony, could possibly relate to the jury questions and, thus, does not establish that our review would be materially affected by the missing information. Finally, as we mentioned before, the reconstruction of Ms. Langston's testimony was quite detailed and Mr. Reynolds has failed to show that it was insufficient or that further efforts under Rules 3.03 or 3.04 would not have resulted in the information he says is missing.

[¶29] Mr. Reynolds' next claim relates to the jury question about his prior DUI convictions. He maintains the jury's question suggests the district court may have read the criminal information (with the reference to his prior DUI convictions) to the jury. According to Mr. Reynolds, the possibility that the information was read to the jury raises two issues—whether the district court erred by doing so and whether defense counsel was ineffective for failing to object to any such reading. This issue could have been simply resolved by using Rules 3.03 or 3.04 to determine whether the information was read to the jury or not. The details provided by the district court regarding voir dire and by the State concerning other aspects of the missing record indicate there is a good possibility that someone would have recalled whether the information was read to the jury or not. By failing to address this issue through the reconstruction process in the appellate rules, Mr. Reynolds failed the third element of the *Bergerco* test.

[¶30] In his final substantive issue, Mr. Reynolds claims the prosecutor may have committed misconduct during her final argument by stating that Ms. Langston's REDDI report related directly to "this defendant," when Ms. Langston did not identify Mr. Reynolds. He claims that, without more detail about Ms. Langston's testimony, it is impossible to know whether it was a reasonable inference for the prosecutor to link Ms. Langston's call to him. We conclude that the settled part of the record very clearly demonstrates the inference was appropriate and any "missing" part of her testimony does not materially affect our review of this issue. *See Bergerco,* 896 F.2d at 1217; *Lucero,* 14 P.3d at 922 ("This case is distinguishable from *Bearpaw* because the lack of the missing transcript does not frustrate our review of Lucero's claim of error . . . .").

[¶31] The statement of the evidence included the following relevant information about Ms. Langston's testimony:

> Ms. Langston testified that she was familiar with a REDDI report. Ms. Langston stated she called in a REDDI report to

the Campbell County Sheriff's 911 Dispatch on October 24, 2010. Ms. Langston stated that she remembered the call very well. Ms. Langston testified that the subject of the REDDI report was a single cab vehicle which she identified as a green Ford Ranger. . . . Ms. Langston testified that she traveled east from her residence to Hwy 59. When she reached Hwy 59, she was unable to pull onto the highway because there was an on-coming vehicle traveling north that she had to wait to pass. Once the vehicle passed, Ms. Langston was able to safely pull her vehicle onto Hwy 59 and travel [n]orth to Wright, Wyoming. Ms. Langston stated that she quickly caught up to the vehicle that she had just had to wait for prior to pulling onto the highway. Ms. Langston testified the vehicle, which she identified as a green single cab Ford Ranger, was traveling at varying speeds and was having great difficulty maintaining its lane of travel. When asked, Ms. Langston stated the green Ford Ranger was drifting all the way into the southbound lane, bumping the fog line on the southbound lane of travel, then drifting back into the northbound lane and bumping the fog line. . . . Ms. Langston stated she had her daughter and her daughter's friend with her in her vehicle and was afraid so decided to call 911 to report the green Ford Ranger as a REDDI report. Ms. Langston stated she followed the green Ford Ranger the rest of the way to Wright, Wyoming where she observed it pull off into the parking lot of Hank's Bar and Lounge. Ms. Langston testified she remained on the phone with the 911 dispatcher while she was following the green Ford Ranger. Ms. Langston stated since she had two children with her in her vehicle she was afraid to follow the green Ford Ranger into the parking lot, so she pulled into the gas station across the street and continued to watch the green Ford Ranger and updated the 911 dispatcher. Ms. Langston testified that there was only one occupant in the green Ford Ranger while she was following behind it on Hwy 59.

At approximately 1152 hours on February 28, 2011, the Defendant's attorney began his cross examination of Ms. Langston. During cross, Ms. Langston testified she could see the cab of the green Ford Ranger when it was parked at Hank's Bar and Lounge. Ms. Langston stated she watched the green Ford Ranger the entire time she was on the phone with 911 until she was informed a Deputy was on his way.

> Ms. Langston stated she was afraid to get too close to the green Ford Ranger to get a license plate number when it was driving on Hwy 59 due to the erratic driving. Ms. Langston was questioned if she was sure the vehicle was a Ford Ranger. She stated she was sure as she used to drive an identical Ford Ranger as the one she was following and observing.
>
> At approximately 1154 hours on February 28, 2011, the State conducted re-direct of Ms. Langston. Ms. Langston stated that while she was watching the green Ford pickup, nobody got in or out of the pickup and that the driver remained in the same position.

[¶32] Deputy Raymond testified that he responded to Ms. Langston's REDDI report by going to Hank's Bar, but could not locate the vehicle. In response to a second REDDI report, he went to milepost 79; it took him approximately three minutes to get there. Deputy Raymond found "the little green Ford Ranger pickup" off the side of the road. He called in the license plate number and learned the vehicle belonged to Mr. Reynolds. When he approached the vehicle, it was running and there was one person inside. The driver was talking on his cell phone and, when he realized the deputy was standing by the vehicle, he ended his call, turned off the vehicle, removed the key from the ignition, and threw it on the passenger side floorboard. The driver identified himself as John Reynolds.

[¶33] A prosecutor's closing argument must be based upon the evidence produced at trial. However, the prosecutor is entitled to draw reasonable inferences from the trial evidence. *Adams v. State,* 2005 WY 94, ¶ 18, 117 P.3d 1210, 1217 (Wyo. 2005); *Condra v. State,* 2004 WY 131, ¶¶ 21-22, 100 P.3d 386, 392 (Wyo. 2004). Ms. Langston's testimony, as reflected in the statement of the evidence approved by the district court, together with Deputy Raymond's testimony, clearly establish the prosecutor's statement that Ms. Langston's REDDI report referred to "this defendant" was a reasonable inference from the evidence produced at trial. The record was sufficient, and Mr. Reynolds has failed to demonstrate that a deficiency in the record materially affects our ability to address the issue. Under these circumstances, Mr. Reynolds is not entitled to a new trial.

[¶34] Affirmed.