

3-1-2012

## State v. Banbury Appellant's Brief Dckt. 38110

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, ) NO. 38110  
 )  
 v. )  
 )  
 NATHAN TODD BANBURY, ) APPELLANT'S BRIEF  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

COPY

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**BRIEF OF APPELLANT**  
\_\_\_\_\_

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BINGHAM**

\_\_\_\_\_  
**HONORABLE DARREN B. SIMPSON**  
District Judge  
\_\_\_\_\_

**SARA B. THOMAS**  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 5867

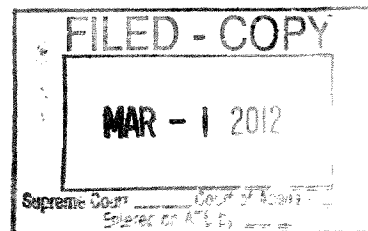
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## STATEMENT OF THE CASE

### Nature of the Case

Nathan Banbury was convicted of grand theft following a jury trial. However, during trial a police officer testified that Mr. Banbury had invoked his right to remain silent, following the provision of *Miranda*<sup>1</sup> warnings, when police attempted to question him about the theft allegation. Although this improper testimony was not objected to at trial, Mr. Banbury asserts that this instance of prosecutorial misconduct rose to the level of a fundamental error that was not harmless in this case.

### Statement of the Facts and Course of Proceedings

Nathan Banbury was charged by Information with grand theft based upon the allegation that he stole a car. (R., pp.23-24.) However, prior to the filing of this Information, the court ordered a competency evaluation for Mr. Banbury pursuant to I.C. §§ 18-211 and 18-212 upon the request of Mr. Banbury's trial counsel. (8/12/09 Tr.<sup>2</sup>, p.1, L.13 – p.2, L.8; R., pp.12-14.) Mr. Banbury was ultimately found to be competent to stand trial. (10/15/09 Tr., p.5, L.11 – p.6, L.2; 18-211 evaluation dated 9/25/09.)

Prior to trial, the State filed a notice of intent to present other-acts evidence pursuant to I.R.E. 404(b). (R., p.33.) The State was seeking to present the testimony of a police detective, "regarding his prior investigation and subsequent conviction of Nathan Todd Banbury for Grand Theft." (R., p.33.) The proposed basis for the admissibility of this evidence was to prove intent, common scheme or plan, or the

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

absence of mistake or accident. (R., p.33.) The district court denied the State's motion to present this evidence without prejudice, finding that the State had not presented sufficient facts that would demonstrate the admissibility of this evidence under the purposes proffered by the State and in light of the remoteness in time of the alleged prior bad acts. (1/19/10 Tr., p.5, L.22 – p.6, L.1.) However, the district court did note that it might revisit its ruling depending upon what evidence was presented at trial. (1/19/10 Tr., p.6, L.14 – p.8, L.1.)

At trial, the State presented the testimony of Carter Palmer, the owner of the car dealership from which Mr. Banbury was alleged to have stolen a car. (1/26/10 Tr., p.116, L.17 – p.117, L.20.) Mr. Palmer testified that Mr. Banbury was looking at a white Cadillac on the car lot and asked for the keys in order to take a look inside the car. (1/26/10 Tr., p.117, Ls.13-25.) When Mr. Banbury allegedly asked to drive the car, the dealer told him that he could not because the car was being held for another customer. (1/26/10 Tr., p.118, Ls.11-21.)

Mr. Palmer testified that he recognized Mr. Banbury because he had been on the car lot two or three times before. (1/26/10 Tr., p.119, Ls.15-22.) Each prior time he came in, he had asked about the same white Cadillac. (1/26/10 Tr., p.119, Ls.15-22.) Mr. Palmer also testified that the price listed on this car was \$10,500. (1/26/10 Tr., p.119, Ls.23-25.)

According to Mr. Palmer's testimony, he left Mr. Banbury alone on the car lot with the keys to the Cadillac and returned inside to his office. (1/26/10 Tr., p.120, L.23 – p.121, L.23.) After a while, Mr. Palmer looked outside the window of his office to the car

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<sup>2</sup> Because there are multiple copies of transcripts on appeal in Mr. Banbury's case, for ease of reference, citations made herein to the transcripts of proceedings are made in accordance with the date of the proceeding transcribed.

lot and noticed that the white Cadillac was gone. (1/26/10 Tr., p.122, Ls.4-8.) When he went outside and looked down the street, he saw the car at a nearby stoplight. (1/26/10 Tr., p.122, Ls.9-18.) Mr. Palmer then went inside his office and called the police who arrived at his car lot within minutes. (1/26/10 Tr., p.122, Ls.17-21.)

Mr. Palmer then gave police a description of the car, along with pictures and the car's vehicle identification number. (1/26/10 Tr., p.122, L.22 – p.123, L.5.) He also, according to his testimony, called several of his friends and asked them to be on the lookout for the car. (1/26/10 Tr., p.123, Ls.9-21.) One of these friends called him later that day and told Mr. Palmer that he thought he had seen the car. (1/26/10 Tr., p.123, L.22 – p.124, L.7.) Mr. Palmer then went to the location of where his friend thought he saw the car to verify it was the one taken from his lot. (1/26/10 Tr., p.124, Ls.1-7.)

The car, according to Mr. Palmer's testimony, had a front advertising license plate that reflected the name of his car dealership and there was likewise a sticker from the dealership on the trunk of the car. (1/26/10 Tr., p.124, Ls.8-19.) In addition, there was pre-existing damage to a bumper that was present on the Cadillac when it was first acquired by the dealership, and Mr. Palmer testified that he saw that same damage to the car that Mr. Palmer was told might be his. (1/26/10 Tr., p.124, L.20 – p.125, L.10.) At that point, Mr. Palmer called the police, who then came to the residence where the car was located. (1/26/10 Tr., p.125, Ls.11-14.)

Following Mr. Palmer's testimony, the State called Officer Stephen Simper of the Blackfoot Police Department to the stand to testify. (1/26/10 Tr., p.128, L.15 – p.129, L.4.) Officer Simper was the officer who first responded to the report of a theft at Mr. Palmer's car lot. (1/26/10 Tr., p.129, Ls.11-21.) He met with Mr. Palmer, who told

Officer Simper about the car alleged to have been stolen and described the man who took it. (1/26/10 Tr., p.130, Ls.1-16.)

Later that same day, when the car was located, Officer Simper went to the home where the car was found and identified the car as the one Mr. Palmer had reported as stolen. (1/26/10 Tr., p.130, L.24 – p.132, L.15.) The officer thereafter did a “security check” inside of the home. (1/26/10 Tr., p.133, Ls.14-16.) He noticed clothing consistent with that described by Mr. Palmer as that worn by the man who took the car. (1/26/10 Tr., p.133, L.24 – p.134, L.21.) In the living room, near where Mr. Banbury was sitting, Officer Simper noticed a car dealership placard and cut up warranty slip in the garbage can. (1/26/10 Tr., p.134, L.22 – p.135, L.16.)

The State’s final witness was Lieutenant Scott Gay. (1/26/10 Tr., p.142, L.18 – p.143, L.5.) Lieutenant Gay was among the officers who responded to Mr. Banbury’s residence upon the white Cadillac being found there. (1/26/10 Tr., p.143, L.22 – p.144, L.4.) He identified Mr. Banbury as the person who lived at this home. (1/26/10 Tr., p.144, Ls.5-13.)

The prosecutor also asked the officer about whether he had talked to Mr. Banbury regarding the alleged theft. (1/26/10 Tr., p.145, Ls.14-18.) During the State’s examination of Lieutenant Gay, the officer made two statements directly commenting on Mr. Banbury’s invocation of his right to remain silent. (1/26/10 Tr., p.147, Ls.1-9.) Specifically, the officer testified:

Q: And after you recovered the key, what happened at that time?

A: Got the keys. **I asked him some questions about whether or not he had taken the car. He said he wanted to remain silent.**

And I asked him also if his fingerprints would be located inside the car. He said probably.



I asked him if he washed the car. **He said he wanted to remain silent on several of the questions.**

(1/26/10 Tr., p.147, Ls.1-9.)

Mr. Banbury did not object to the officer's comments on his invocation of his right to remain silent. (1/26/10 Tr., p.147, Ls.1-14.)

Mr. Banbury was convicted of grand theft. (1/26/10 Tr., p.192, Ls.11-21; R., pp.108-109, 116.) Mr. Banbury was conditionally accepted into mental health court. (R., p.124.) However, this conditional acceptance was ultimately rescinded due to an incident that occurred while Mr. Banbury was incarcerated at the Bingham County Jail. (R., pp.126, 139.) Ultimately, Mr. Banbury was sentenced to eight years, with one year fixed, for his conviction of grand theft. (8/19/10 Tr., p.27, L.22 – p.28, L.4; R., pp.147-148.) Mr. Banbury timely appeals from his judgment of conviction and sentence. (R., p.149.)

## ISSUE

Did the prosecutor commit misconduct, rising to the level of a fundamental error, when a police officer testified at trial regarding Mr. Banbury's invocation of his right to remain silent for the purpose of inferring guilt?

## ARGUMENT

### The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When A Police Officer Testified At Trial Regarding Mr. Banbury's Invocation Of His Right To Remain Silent For The Purpose Of Inferring Guilt

#### A. Introduction

Mr. Banbury asserts that the prosecutor committed misconduct, rising to the level of a fundamental error, when a police officer made several statements at Mr. Banbury's trial regarding his invocation of his right to remain silent while being questioned by police. This testimony was non-responsive to the question asked, was irrelevant to the proper issues at trial, and was only provided for the purpose of having the jury infer Mr. Banbury's guilt. Moreover, this error was not harmless in light of the dispute at trial regarding whether Mr. Banbury harbored the required criminal intent to support the State's charge of grand theft.

#### B. Standard Of Review

This Court reviews an allegation of prosecutorial misconduct that was not objected to at trial under the fundamental error test as set forth by the Idaho Supreme Court in *State v. Perry*, 150 Idaho 209 (2010). This review is comprised of a three-part inquiry, for which the defendant bears the burden of proof. *Id.* at 228. First, the defendant must establish that the alleged error involved a violation of one or more of the defendant's unwaived constitutional rights. *Id.* Second, the error must be shown to be plain from the record, without the need of additional information not contained within the appellate record. *Id.* Finally, the defendant must show that the error was not harmless. *Id.* An error is not harmless where there is a reasonable possibility that the error affected the outcome of the trial. *Id.* at 226.

For purposes of analyzing prosecutorial misconduct, where a police officer testifies at trial in a manner that violates a defendant's right to a fair trial, the officer's response is imputed to the State for purposes of a misconduct claim. *State v. Ellington*, 151 Idaho 53, 67 (2011).

C. The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When A Police Officer Testified At Trial Regarding Mr. Banbury's Invocation Of His Right To Remain Silent For The Purpose Of Inferring Guilt

Mr. Banbury asserts that his Fifth and Fourteenth Amendment rights to the United State's Constitution, as well as Article I, § 13 of the Idaho Constitution, were violated when the prosecutor elicited evidence that he exercised his right to remain silent for purposes of having the jury infer his guilt, and that this misconduct rose to the level of a fundamental error. Pursuant to the Fifth and Fourteenth Amendments to the United State's Constitution, as well as Article I, § 13 of the Idaho Constitution, no person shall be compelled, in any criminal case, to be a witness against himself.

At trial, the prosecutor first asked Lieutenant Gay whether Mr. Banbury was advised of his right to remain silent pursuant to *Miranda v. Arizona*.<sup>3</sup> (1/26/10 Tr. p.145, Ls.14-18.) After eliciting testimony that he had been so advised, the following exchange took place:

Q: And after you recovered the key, what happened at that time?

A: Got the keys. **I asked him some questions about whether or not he had taken the car. He said he wanted to remain silent.**

And I asked him also if his fingerprints would be located inside the car. He said probably.

I asked him if he washed the car. **He said he wanted to remain silent on several of the questions.**

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<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

(1/26/10 Tr., p.147, Ls.1-9.)

The United States Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610 (1976), “that the use for impeachment purposes of petitioner’s silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.” In *Doyle*, the actions of the prosecutor in cross-examining the defendants as to the reason they had not given their version of events at the time of their arrests were actions that violated the defendants’ rights. *Id.* at 613-614 n.5.

The Idaho Supreme Court has held that, “[i]f a prosecutor is allowed to introduce evidence of silence, for any purpose, then the right to remain silent guaranteed in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), becomes so diluted as to be rendered worthless.” *State v. White*, 97 Idaho 708, 714-715 (1976). The Court went on to find, “[i]t is clearly erroneous to allow evidence of post-arrest silence at trial for the purpose of raising an inference of guilt.” *Id.* at 715 (citation omitted).

Similar holdings have been reiterated in multiple cases addressing the comment on the defendant’s invocation of his or her right to remain silent in the context of fundamental error. *See, e.g., State v. Dougherty*, 142 Idaho 1, 4 (Ct. App. 2005); *State v. Lopez*, 141 Idaho 575, 577-578 (Ct. App. 2005); *State v. Tucker*, 138 Idaho 296, 298-299 (Ct. App. 2003); *State v. Poland*, 116 Idaho 34, 36-37 (Ct. App. 1989).

For purposes of a claim of prosecutorial misconduct, Lieutenant Gay’s improper testimony about Mr. Banbury’s invocation of his right to remain silent is imputed to the prosecutor, regardless of whether these remarks were responsive to the prosecutor’s questions. *Ellington*, 151 Idaho at 67. This testimony, provided for the purpose of having the jury infer Mr. Banbury’s guilt, was a clear violation of Mr. Banbury’s

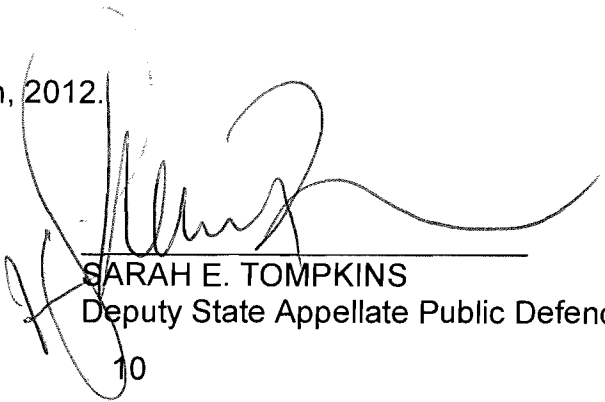
constitutional right to remain silent, and due process right to a fair trial that is plain from the record.

Moreover, this error was not harmless. The sole issue that was meaningfully in dispute in this case was whether Mr. Banbury had the requisite intent to support the State's allegation of grand theft. (1/26/10 Tr., p.183, Ls.7-14.) Toward this end, Mr. Banbury cross-examined the police officers in this case about Mr. Banbury's apparent failure to take rational steps to conceal the vehicle alleged to have been stolen. (1/26/10 Tr., p.141, Ls.10-21, p.147, L.18 – p.148, L.2.) He also tailored his closing statement to doubts raised about whether he harbored the intent required in order to sustain the grand theft charge. (1/26/10 Tr., p.183, Ls.7-14.) The State's impermissible implication of Mr. Banbury's guilt through his failure to cooperate with police was "an indirect attack on this defense." See, e.g., *Poland*, 116 Idaho at 37. Accordingly, because there was a meaningful question about Mr. Banbury's mental state regarding the vehicle alleged to have been stolen, and because the State's testimony sought to induce the jury to infer guilt from Mr. Banbury's failure to answer police questions, there is a reasonable possibility that this testimony contributed to the jury's verdict in this case.

CONCLUSION

Mr. Banbury asks that this Court vacate his conviction for grand theft and remand this case for further proceedings.

DATED this 1<sup>st</sup> day of March, 2012.



SARAH E. TOMPKINS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1<sup>st</sup> day of March, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

NATHAN TODD BANBURY  
INMATE # 82665  
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PO BOX 14  
BOISE ID 83707

DARREN B SIMPSON  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

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SET/eas