10-10-2008

Cooke v. State Respondent's Brief Dckt. 32447

IN THE SUPREME COURT OF THE STATE OF IDAHO

MAX RITCHIE COOKE,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 32447 & 34820

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature of the Case

Max Ritchie Cooke appeals from the judgment entered upon a jury verdict finding him guilty of second-degree kidnapping, aggravated battery, and assault, challenging the admission of prior threats against the victim and the prosecutor's reference to those threats. Cooke also appeals from the denial of post-conviction relief claiming the district court erred in concluding his counsel was not ineffective for failing investigate or challenge the victim's competency to testify at trial.

Statement Of The Facts And Course Of The Criminal Proceedings[1]

Cooke and his wife, Alison Cooke, separated in November, 2002, and Alison moved in with her brother. (#34820 Tr., p.63, L.21 – p.69, L.10, p.325, Ls.10-12.) Just prior to and following the separation, Cooke made various threats directly to Alison and to others about Alison because he believed she was involved with another man. (#34820 Tr., p.116, L.25 – p.117, L.18, p.127, Ls.15-

[1] There are two records relating to the criminal proceedings – Docket No. 30187 and Docket No. 34820. Cooke voluntarily dismissed the appeal in Docket No. 30187 because the notice of appeal was timely only from the Amended Judgment of Conviction, which dealt only with the issue of credit for time served, an issue Cooke did not wish to pursue on appeal. (Notice of Voluntary Dismissal filed April 8, 2004, Docket No. 30187.) The district court, however, entered a Second Amended Judgment of Conviction on November 15, 2007, for the purpose of permitting Cooke to pursue the instant appeal (Docket No. 34820) (#34820 R., p.81), after finding Cooke's trial counsel was ineffective for failing to file a timely notice of appeal (#32447, Findings of Fact and Conclusions of Law filed November 13, 2007, p.4 (augmentation)). The Idaho Supreme Court has issued an order taking judicial notice of the transcript and Clerk's Record filed in Docket No. 30187 and ordered the preparation of a limited Clerk's Record to include any additional documents listed in the Notice of Appeal filed in Docket No. 34820. (#34820 R., p.3.) The record and transcript prepared for Docket No. 34820 will be referred to as "#34820 R." and "#34820 Tr." The record previously prepared in Docket No. 30187 will be referred to as "#30187 R."

18, p.275, L.10 – p.276, L.11, p.278, L.22 – p.279, L.4, p.295, Ls.23-25, p.336, Ls.11-15.) Those threats included threats to kill.

On January 18, 2003, Cooke sat outside Alison's brother's home in the cold for over an hour, waiting for Alison to come home from a night out with friends. (#34820 Tr., p.410, L.16 – p.411, L.7.) When Alison pulled up to the house, Cooke came out from behind a "bush or a tree" and over to Alison's truck window. (#34820 Tr., p.339, L.23 – p.340, L.5.) Cooke started interrogating Alison about where she had been and yelling at her for being a "bad mother." (#34820 Tr., p.340, Ls.8-13.) At some point, Cooke got into Alison's truck with her and a struggle ensued over the keys. (#34820 Tr., p.340, L.25 – p.341, L.10.) Cooke ultimately gained control of the keys and sped off, driving erratically, with Alison in the truck. (#34820 Tr., p.341, L.9 – p.342, L.22.) Alison subsequently crawled into the backseat to get away from Cooke who was pushing her and pulling her hair. (#34820 Tr., p.342, L.3 – p.343, L.8.) Cooke then stopped the truck, got out, opened the back door, pulled Alison's pants and underwear down, pulled his pants down, and told her "he was going to be the last one." (#34820 Tr., p.344, L.9 – p.345, L.8.) Fortunately, for some reason, Cooke abandoned his apparent plan to rape Alison, and instead got back in the truck and, once again, began driving erratically and at a high rate of speed. (#34820 Tr., p.346, L.11 – p.347, L.5.) Unfortunately, however, the incident did not end there.

Alison decided to "get back up in the front seat" and "start hitting or kicking" Cooke in an effort to get him to "slow it down so [she] could jump out or

something just to get away." (#34820 Tr., p.347, Ls.8-11.) As Alison began climbing over the seat, Cooke drove the truck across the road, through a fence, and sped toward a tree, and accelerated just prior to hitting the tree. (#34820 Tr., p.347, L.12 – p.349, L.4; see #30187 Exhibits 10-23.) Alison hit the dashboard and fell to the floorboard on the passenger side of the truck. (#34820 Tr., p.151, Ls.5-24, p.349, Ls.6-14.)

Jennifer Novasio, who lived on the property where the crash occurred awoke and saw Cooke approaching her home, talking on a cell phone. (#34820 Tr., p.147, L.9 – p.148, L.16.) Cooke handed his phone to Mrs. Novasio and told her to give her address to dispatch, which she did. (#34820 Tr., p.148, L.17 – p.149, L.9.) Mrs. Novasio then went out to the truck where she saw Alison laying on the floorboard. (#34820 Tr., p.151, Ls.5-24.) Mrs. Novasio warned Cooke not to move Alison due to concern for her injuries. (#34820 Tr., p.151, L.25 – p.152, L.6.) Nevertheless, while Mrs. Novasio went to direct the emergency personnel to Alison's location, Cooke dragged Alison out of the truck. (#34820 Tr., p.152, L.22 – p.153, L.14.)

Cooke told Deputy Brenda Glenn that Alison had been driving and was drunk, but told one of the firefighters that he had been driving and Alison grabbed the wheel, causing him to lose control. (#34820 Tr., p.160, Ls.10-13, p.163, L.4 – p.164, L.2.) A subsequent investigation of the scene revealed the truck veered off the road, to the left, at an estimated speed between 61 and 71 miles per hour, corrected direction into the path of the tree, and accelerated prior to the collision. (#34820 Tr., pp.208-47.)

Alison was critically injured as a result of the crash. (#34820 Tr., p.161, L.22 – p.162, L.15, p.254, L.15 – p.255, L.17.) Alison's injuries included a brain injury, a broken jaw, a severe laceration to her lip and face, eight broken ribs, a punctured lung, and a shattered right leg, which had to be repaired with a rod and 12 pins. (#34820 Tr., p.351, L.14 – p.352, L.22; #30187 R., Exhibits 2-5.) Alison was in the hospital for several weeks. (See Tr., p.469, L.24 – p.470, L.3 (Alison still in hospital on February 11, 2003, more than three weeks after wreck).) Comparatively, Cooke's injuries were minor. (#34820 Tr., p.250, L.22 – p.251, L.7; #30187 Attachments to PSI, pp.104-06.)

The state indicted Cooke on charges of first-degree kidnapping, aggravated battery, and assault with intent to commit rape. (#30187 R., pp.5-7, 25-26.) Prior to trial, the state filed a Brief in Support of Idaho Rule 404(b) Evidence ("Brief"). (#34820 R., pp.13-19.) In its Brief, the state indicated its intent to offer evidence that "would show that the defendant made several threats to Alison Cooke in the approximately six weeks prior to the crash" including threats "that he would kill her if he found out that she was talking to another man or seeing another man." (#34820 R., p.14.) The state noted Cooke made "these directly to Alison Cooke" as well as "told other people that he would kill Alison if he found out that she was speaking to another man." (#34820 R., p.14.) The state's Brief included reference to a specific threat Cooke made to the man Cooke believed Alison was seeing – namely, that if Cooke "found out that Alison was speaking to that man, [Cooke] would make 'headline news.'" (#34820 R., p.15.) The basis for offering the statements was to show Cooke's intent and to

rebut any claim the wreck was "merely an accident." (#34820 R., pp.15-18; see #34820 Tr., pp.6-9.) At the hearing on the state's request to introduce the threats, the court concluded the threats were relevant to Cooke's intent and noted that "though there is always prejudice in those statements," the prejudicial effect did not outweigh the probative value. (#34820 Tr., p.12, L.16 – p.13, L.8.)

A jury convicted Cooke of second-degree kidnapping, aggravated battery, and misdemeanor assault. (#30187 R., pp.39-40.) On August 21, 2003, the court imposed a unified twenty-five year sentence with twelve years fixed for second-degree kidnapping and a concurrent unified fifteen-year sentence with seven years fixed for aggravated battery. (#30187 R., pp.48, 63.) The court also imposed a 90-day sentence for the assault conviction, with credit for 90 days. (#30187 R., pp.48-49.)

Course Of Post-Conviction Proceedings[2]

On October 5, 2004, Cooke filed a *pro se* petition for post-conviction relief alleging, in relevant part, ineffective assistance of counsel based on counsel's failure to "discredit" Alison's testimony and have her testimony "stricken from the record" based on her "short term memory loss." (#32447 R., pp.11-17.) Cooke also filed a motion for appointment of counsel, which the district court granted. (#32447 R., pp.21-23, 30.)

[2] Cooke's post-conviction appeal and his criminal appeal have been consolidated for purposes of appeal. (Order Granting Motion to Consolidate dated May 8, 2008.) The record and transcripts relating to Cooke's post-conviction case will be cited as "#32447 R." and "#32447 Tr."

The state filed a response to Cooke's petition denying he was entitled to relief and, with respect to Cooke's allegations relating to Alison's testimony, noting Cooke failed to allege how Alison's memory was any different than what she testified to at trial. (R., pp.34-41.) The court dismissed Cooke's petition but gave him an opportunity to file an amended petition. (R., pp.43-46.)

Cooke, through counsel, filed an amended petition again alleging counsel was ineffective in failing to investigate or challenge Alison's competency to testify at trial. Specifically, Cooke alleged:

> [T]he petitioner relies upon the attached affidavit of Alison Cooke of May 25, 2005, her letter of July 22, 2004, the medical report of Clay H. Ward, PhD., and the prior petition filed herein including its exhibits and attachments. These materials clearly show that Dr. Ward would have testified that Alison Cooke was not a competent and reliable witness and at risk for false memories. Had Alison Cooke been properly cross-examined, her testimony would have confirmed that and provided the jury with her best recollection that the defendant did not kidnap her and did not mean to hurt her.

(#32447 R., p.49.)

The Affidavit of Alison Cooke filed in support of Cooke's amended petition averred:

> 1) That I was a witness in the underlying criminal case (H0300279) involving my former husband Max Ritchie Cooke.
>
> 2) That the letter dated July 22, 2004, attached hereto as "Exhibit A," is a true and correct copy of my letter that details my best recollection as to what happened in the accident of January 18, 2003.
>
> 3) That the medical report of Clay H. Ward, PhD, attached hereto as "Exhibit B," is a true and correct copy of his medical report diagnosing my injuries, including his opinion that:
>
> > I do not believe that the patient is competent or even appropriate for a police or forensic evaluation or interview at

> this time. She does not have any recall of events leading up to the accident and is still very much in posttraumatic amnesia. My impression is that her information will likely be misleading, unreliable, and she is at risk for developing new memories or false memories rather than accurately recalling what happened prior to the impact.
>
> 4) That I testified at the above petitioner's jury trial on June 12, 2003, although I did not want to, and that Dr. Ward's opinion of my memory state was still correct at that time, and I was not mentally competent to understand what was going on at that time.

(#32447 R., pp.54-55.)

The letter attached to Alison's affidavit as "Exhibit A" is dated July 22, 2004. (#32447 R., pp.56-58.) In the letter, Alison states her recollection of the accident and the events leading up to it but claims she has "no memory of the trial" and states she is "not sure of even how [she] could have been able to testify." (#32447 R., pp.56-58.) Alison's letter also states her "belie[f]" that Cooke "lost control of the truck for some reason," and that she did not "feel" she was "kidnapped." (#32447 R., pp.57-58.) It appears the letter was prepared for purposes of "reconsidering [Cooke's] sentence on the kidnapping charge." (#32447 R., p.58.)

Dr. Clay Ward's report, attached as "Exhibit B," was dictated January 23, 2003 (#32447 R., pp.59-61), five days after the accident, 19 days before she was interviewed by law enforcement (#34820 Tr., p.469, L.24 – p.470, L.3), and five months prior to her testimony at trial (#34820 Tr., pp.312-391). In addition to the information excerpted in Alison's affidavit, Dr. Ward noted Alison was able to give a "fairly reliable biographical history" and was "improving rapidly." (#32447 R., pp.59-60.)

The state filed a response and motion to dismiss Cooke's amended petition and an affidavit from Cooke's trial counsel, who averred he saw "no reason" to call any medical expert to discuss Alison's "mental ability" because her "mental ability was clearly before the jury." (#32447 R., pp.76-78.) The court held a hearing and granted the state's motion. (#32447 9/28/2005 Tr.; R., pp.85-88.) With respect to the dismissal of Cooke's claim that counsel was ineffective in relation to Alison, the court stated:

> The Court finds that there is no showing in the Amended Petition that trial counsel was ineffective in any respect as to cross examination of the victim, Allison [sic] Cooke. There is no evidene that Ms. Cooke was incompetent to testify regardless of her current opinion. The Court takes notice that when Ms. Cooke testified, she was oriented as to time and place and was able to testify that she remembered certain things and did not remember others. She was responsive to questions and was appropriate in every respect. The jury was informed through her testimony that she had some memory lapses.
>
> The report of Dr. Clay Ward, which is attached to the Amended Petition, refers to Allison [sic] Cooke's condition at the time of the crash. It gives the Court no information concerning Allison [sic] Cooke's condition at the time she testified, which was about five months later. The Court is satisfied that Ms. Cooke was competent to testify. The petitioner has not carried his burden to show that trial counsel was ineffective in any respect regarding Ms. Cooke.

(#32447 R., p.86.) The court's opinion relating to Alison's trial testimony was based on the court's recollection, not upon a review of the trial transcript.

Cooke filed a timely notice of appeal. (R., pp.89-91.) The case was subsequently remanded, pursuant to the state's motion, for a hearing on one of Cooke's ineffective assistance of counsel claims and for consideration of Alison's trial testimony. (#32447 Motion for Remand and Statement in Support Thereof

filed December 28, 2006; Order Granting Motion to Remand dated February 2, 2007.)

On remand, the court conducted an evidentiary hearing. (#32447 9/26/2007 Tr.) At the hearing, Alison testified that she understood the questions she was asked at trial and answered those questions to the best of her ability. (#32447 9/26/2007 Tr., p.53, Ls.1-9.) Alison further testified that she does not know whether Cooke was trying to hurt her when he drove her truck into a tree and that she was in the truck with him against her will. (#32447 9/26/2007 Tr., p.57, L.6 – p.58, L.7.) The court then discussed some of Alison's specific trial testimony regarding what happened just prior to the wreck and asked her if there was anything "that would cause [her] to alter or change that testimony from the trial that you testified to under oath earlier?" (#32447 9/26/2007 Tr., p.61, Ls.1-23.) Alison responded, "No." (#32447 9/26/2007 Tr., p.61, L.24.)

Cooke's trial counsel also testified. (#32447 9/26/2007 Tr., pp.74-103.) Trial counsel admitted he did not consult a medical professional regarding Alison's competency, but indicated he did not do so because he believed she was "competent within the spirit of what she recollected and what she didn't" and he saw no reason to file a motion to exclude her testimony. (#32447 Tr., p.85, Ls.17-19, p.96, L.20 – p.97, L.6.)

At the conclusion of the hearing, the court made certain findings on the record, which included a finding that even if trial counsel was deficient in failing to seek an expert opinion on whether Alison was competent to testify at the time of trial, Cooke failed to establish prejudice because Cooke failed to present any

evidence that Alison's trial testimony was "inaccurate or untruthful." (#32447 9/26/2007 Tr., p.166, L.20 – p.170, L.19.) The court subsequently issued a written order, in which it made the following findings:

> The Court heard evidence from both the Petitioner and Respondent in this case. The Court will find that Allison [sic] Cooke did in fact have an accurate recall of the events at the time she testified during the trial and that she was competent to testify. Ms. Cooke signed an affidavit that on its face appeared to assert that because of her head injuries, she was not testifying accurately and truthfully during the course of the trial. The Court, after hearing her testimony, will find that she had an accurate recollection of what occurred on the date of this crime and that her testimony has not been impeached. The Court will further find that there is no basis to find that the victim was not competent to testify during the trial.
>
> There is no medical evidence before the Court that demonstrates that at the time of her testimony, she was not competent to testify. Although there is a letter from a treating doctor that indicates that she was not competent to testify, that letter was authored during a period of time that she was hospitalized shortly after Ms. Cooke had come out of a coma. The letter does not relate at all to the date of the trial which was several months later.
>
> The Court, during the course of the trial, went over the victim's affidavit that was filed in support of the Petitioner's affidavit and she testified that her recollection was accurate and that she testified truthfully at the time of the trial. The Court then cannot find that there is a basis in fact for a new trial because of newly discovered evidence.
>
> . . . .
>
> The Petitioner also asserts that there should have been medical testimony presented that the victim's memory and recall of this incident would be subject to question and therefore would create reasonable doubt on the part of the jury. No such evidence was presented during the course of this proceeding and clearly the Court will not speculate on this issue.

(#32447 Findings of Fact and Conclusions of Law filed November 13, 2007, pp.2-3 (augmentation).)

ISSUES

Cooke states the issues on appeal as:

1. Did the district court at trial abuse its discretion when it permitted the State to introduce several of Mr. Cooke's prior statements into evidence despite the fact that the prejudice of these prior bad acts outweighs any possible probative value of this evidence?

2. Did the prosecutor commit misconduct and seek to inflame the passions and prejudice of the jury against Mr. Cooke when the State argued evidence of Mr. Cooke's prior bad acts as demonstrating his propensity to commit the crimes that he was accused of in this case?

3. Does the cumulative effect of the district court's error in admitting the prior bad acts evidence and of the prosecutor's improper argument regarding this evidence require reversal of Mr. Cooke's convictions?

4. Did the district court misapprehend the relevant standard of competence and make factual findings not supported by substantial evidence when the court found that Ms. Cooke was competent to testify at trial and that Mr. Cooke had not received ineffective assistance of counsel?

(Appellant's Brief, p.16.)

The state rephrases the issues on appeal as:

1. Has Cooke failed to establish error in the admission of Cooke's prior threats towards Alison?

2. Has Cooke failed to show the prosecutor committed misconduct during his closing argument, much less that his comments rose to the level of fundamental error?

3. Is the doctrine of cumulative error inapplicable since Cooke has failed to establish any error?

4. Has Cooke failed to establish the district court erred in concluding Cooke did not receive ineffective assistance of counsel in relation to Alison's testimony?

ARGUMENT

I.
Cooke Has Failed To Establish The District Court Erred In Admitting Cooke's Threatening Statements

A. Introduction

During trial, the state presented testimony that Cooke made threats to Alison directly and to others about Alison and a man with whom he believed she was having a relationship. Prior to trial, the district court ruled this evidence was relevant and not unduly prejudicial. On appeal, Cooke claims this ruling was in error because the court "was without any knowledge of how many of the State's witnesses would be presenting this evidence or how many of Mr. Cooke's past threats each of these witnesses would present." (Appellant's Brief, p.17.) Thus, Cooke concludes, "the district court was without a proper legal or factual basis upon which to conclude that the probative value of these allegations was not substantially outweighed by the danger of unfair prejudice . . .." (Appellant's Brief, p.17.) Cooke's argument lacks legal or factual merit.

B. Standard Of Review

Whether evidence is relevant is a question of law reviewed *de novo*. State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993) (citations omitted). However, the abuse of discretion standard applies to the district court's determination that the probative value of the evidence is not substantially outweighed by unfair prejudice. Id.

C. Evidence Of Cooke's Prior Threats Was Not Unduly Prejudicial

Evidence is admissible if it is relevant so long as it is not unduly prejudicial or otherwise subject to exclusion. I.R.E. 402, 403. On appeal, Cooke does not challenge the district court's determination that Cooke's threats were relevant, but instead argues only that the district court abused its discretion when it determined Cooke's threats "did not substantially outweigh the probative value of these statements." (Appellant's Brief, p.19.) More specifically, Cooke asserts the court could not conduct a proper I.R.E. 403 analysis because it was "without necessary information about how many witnesses would testify to these statements, how many statements each witness would testify to, and the specific content of these statements." (Appellant's Brief, p.19.) This argument is unsupported by fact or law.

The state provided the court with adequate information upon which to base its decision, and Cooke never objected to the adequacy of that information. In its Brief, the state outlined its theory of the case and advised that Cooke made "several threats to Alison Cooke" and "told other people that he would kill Alison if he found out that she was speaking to another man." (#34820 R., p.14.) At the hearing wherein the parties discussed the threats, the prosecutor further detailed the nature of the evidence the state intended to offer:

> And about November of 2002, particularly about Thanksgiving-time until the crash, which was the middle of January, so roughly six or seven weeks, the defendant made a number of statements about his intention to kill Alison Cooke if she attempted to leave him or if he found out that she was talking to a fellow on the telephone who he was suspicious of. That fellow's name is Shane. And he made those statements to her. And he made the statements to a couple of her friends and a couple of her relatives, her brother and sister.

. . . .

> On the very night that [the wreck] happened, which was - - actually, it occurred early in the morning on Saturday, but it was Friday night - - the defendant made a call to this Shane, who he believed was - - or who he believed either was trying to have an affair with Alison or that Alison was talking to him on the telephone and said to this Shane on the telephone, "if I find out that Alison has been talking to you, I'll make headline news." That was within a couple of hours of the crash, itself.

(#34820 Tr., p.6, L.18 – p.7, L.18.)

That the prosecutor did not specifically identify the precise number of statements the state sought to admit did not render the information provided inadequate for purposes of determining whether the prejudicial value of the statements substantially outweighed their probative value. Nor was the prosecutor required to relay precisely the threat each witness would testify about or the precise number of witnesses who would testify in that regard (although the state did indicate "he made the statements to a couple of her friends and a couple of her relatives, her brother and sister," to Shane, and to Alison herself (#34820 Tr., p.6, L.25 – p.7, L.3, p.7, Ls.10-18; R., p.14)). Cooke has failed to cite any authority to the contrary (see generally Appellant's Brief, pp.17-20), and he failed to complain below about the adequacy of the information provided to the district court in considering the admissibility of the threats (see #34820 Tr., p.9, L.17 – p.11, L.3). Cooke's argument that the court lacked adequate information to conduct a proper analysis as required by I.R.E. 403 is without merit.

Cooke alternatively argues "[e]ven assuming, *arguendo*, that the district court could adequately assess the overall prejudice to Mr. Cooke without knowing how many statements the State was seeking admission for, the probativeness of the majority of these statements was low, and was substantially outweighed by the potential for prejudice." (Appellant's Brief, p.20.) The centerpiece of this alternative argument appears to be the timing of some of the threats relative to the wreck. (Appellant's Brief, p.20.) Cooke does not identify what specific statements he believes should have been excluded as unduly prejudicial due to their time, but instead generally asserts, "Most of the witnesses testifying regarding Mr. Cooke's prior alleged threats testified to statements made seven weeks prior to the charges at issue" and gives a reference to several blocks of pages in the trial transcript. (Appellant's Brief, pp.20-21.) A review of the pages cited reveals that the testimony relates Cooke's threats and actions at various times between the end of November, when he and Alison separated, up to the night before the wreck occurred. That some of Cooke's threats were made at the end of November, approximately seven weeks prior to the wreck, does not render them unduly prejudicial. Cooke began making threats around the time he and Alison separated and he continued doing so up until he committed the crimes in this case. All of those threats were relevant to prove Cooke's intent and the absence of an accident and any potential prejudice relating to those statements did not substantially outweigh their probative value. Cooke has failed to establish otherwise.

II.
Cooke Has Failed To Show The Prosecutor Committed Misconduct During Closing Argument, Much Less That His Comments Rose To The Level Of Fundamental Error

A. Introduction

Cooke did not object at trial to the prosecutor's *closing argument*. Nevertheless, he contends on appeal that the prosecutor made *improper* comments during closing argument that prejudiced his right to a fair trial. (Appellant's Brief, pp.24-27.) Cooke has failed, however, to show that the prosecutor committed misconduct, much less that his comments amounted to fundamental error.

B. Standard Of Review

When a defendant fails to timely object at trial to alleged improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only when the conduct is sufficiently egregious to result in fundamental error. State v. Phillips, 144 Idaho 82, 88, 156 P.3d 583, 589 (Ct. App. 2007) (citing State v. Sheahan, 139 Idaho 267, 280-81, 77 P.3d 956, 969-70 (2003)). Such error is fundamental only if it is

> "calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *State v. Babb*, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994). More specifically, "[p]rosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded." *State v. Cortez*, 135 Idaho 561, 565, 21 P.3d 498, 502 (Ct. App. 2001).

Sheahan, 139 Idaho at 280, 77 P.3d at 969.

C. The Prosecutor's Comments Did Not Constitute Misconduct, Much Less Fundamental Error That Can Be Raised For The First Time On Appeal

Prosecutors have considerable latitude in closing argument and have the right to discuss the evidence and the inferences and deductions arising therefrom. Sheahan, 139 Idaho at 280, 77 P.3d at 969; Phillips, 144 Idaho at 86, 156 P.3d at 587. The purpose of the prosecutor's closing argument is to enlighten the jury and help the jurors remember and interpret the evidence. State v. Reynolds, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991).

Cooke admits he did not object to any of the prosecutor's closing argument at trial. (Appellant's Brief, p.24.) As such, this Court cannot consider his claims of prosecutorial misconduct during closing argument unless the prosecutor's comments constituted fundamental error. State v. MacDonald, 131 Idaho 367, 956 P.2d 1314 (Ct. App. 1998). Such error is fundamental only if the comments were so egregious or inflammatory that any prejudice arising therefrom could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded. State v. Smith, 117 Idaho 891, 898, 792 P.2d 916, 923 (1990); State v. Missamore, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988); State v. Ames, 109 Idaho 373, 707 P.2d 484 (Ct. App. 1985). Cooke cannot meet this burden.

During his closing argument, the prosecutor discussed the evidence from which the jury could conclude Cooke had the intent necessary to be convicted of aggravated battery. (#34820 Tr., p.500, L.4 – p.515, L.9.) In doing so, he

discussed the threats Cooke made to Alison directly and to others about her and Cooke's verbal abuse towards Alison. (#34820 Tr., p.500, L.18 - p.505, L.24.) Cooke argues the prosecutor's comments were not offered to show intent, but "to show propensity to commit the acts charged in the case" and to "inflame the passions and prejudice of the jury so as to induce them to find Mr. Cooke guilty based on prior bad acts, rather than on the basis of the actual crimes alleged." (Appellant's Brief, pp.24-25.) Cooke's argument fails to show error, much less fundamental error reviewable for the first time on appeal.

All of the testimony regarding Cooke's threats, which the prosecutor discussed in closing argument, was properly admitted and Cooke has failed to show otherwise. Cooke has failed to cite any authority for the proposition that it is misconduct for a prosecutor to refer to evidence that has been admitted at trial, and has therefore failed to properly present this issue for review. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

Moreover, Cooke cannot establish the prosecutor's discussion of the evidence was so egregious or inflammatory that any resulting prejudice could not have been remedied by a curative instruction. Indeed, Cooke seems to suggest otherwise in that he complains about the lack of an instruction informing the jury the "prior bad acts evidence was only admissible to demonstrate Mr. Cooke's intent on the night in question." (Appellant's Brief, p.26 n.5.) Absent such an instruction, Cooke reasons, "it is entirely probable that the jury believed that it was entitled to consider the prior bad acts that Mr. Cooke was alleged to have

committed as evidence that he acted in conformity with those prior acts." (Appellant's Brief, pp.26-27.) This argument fails for two reasons.

First, Cooke is incorrect that the jury was not instructed regarding the limited purpose of the "prior bad acts" evidence. (Appellant's Brief, p.26 n.5.) Instruction 12(a) advised the jury:

> Evidence has been introduced for the purpose of showing that the defendant committed wrongs or acts other than that for which the defendant is on trial.
>
> Such evidence, if believed, is not to be considered by you to prove the defendant's character or that the defendant has a disposition to commit crimes.
>
> Such evidence may be considered by you only for the limited purpose of proving the defendant's motive, preparation, plan or absence of mistake or accident.

(#34820 R., p.44.)

Second, even absent Instruction 12(a), the failure to give or request an instruction does not establish misconduct on the part of the prosecutor. The prosecutor was entitled to discuss evidence of Cooke's prior threats, which was properly admitted to demonstrate Cooke's intent in relation to the crimes with which he was charged. That Cooke believes an instruction would have assisted the jury in limiting the purpose for which it considered that evidence is not relevant to whether the prosecutor engaged in misconduct by discussing it in the first instance. More importantly, Cooke's belief demonstrates there was no fundamental error.

The prosecutor's discussion of Cooke's prior threats during closing argument was nothing more than a fair comment on the evidence properly

admitted at trial and the inferences and deductions arising therefrom. Sheahan, 139 Idaho at 280, 77 P.3d at 969; Phillips, 144 Idaho at 86, 156 P.3d at 587. Cooke has thus failed to establish the prosecutor committed misconduct, much less made comments so egregious and inflammatory they resulted in a denial of due process.

III.
There Is No Trial Error To Accumulate

Under the doctrine of cumulative error, a series of errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Stevens, ___ Idaho ___, 191 P.3d 217, 226 (2008). A necessary predicate to application of the doctrine is a finding of more than one error. Id.; State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). Cooke has failed to show that two or more errors occurred in his trial, and therefore the doctrine is inapplicable to this case. See, e.g., Stevens, ___ Idaho at ___, 191 P.3d at 226; LaBelle v. State, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997). Even if errors in the trial had been shown, they would not amount to a denial of due process that would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997); State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2001) (accumulation of errors deemed harmless).

IV.
Cooke Has Failed To Establish The District Court Erred In Concluding He Was Not Entitled To Post-Conviction Relief Based Upon His Claim That Counsel Was Ineffective In Relation To Alison's Testimony

A. Introduction

In his petition for post-conviction relief, Cooke asserted, *inter alia*, his attorney was ineffective in failing to investigate Alison's competency to testify at trial. Cooke offered an affidavit from Alison in support of his petition, which was admitted at the evidentiary hearing, and called Alison as a witness at the hearing. The district court ultimately denied relief, concluding Cooke failed to establish Alison was incompetent to testify at trial and failed to establish prejudice in relation to her trial testimony. On appeal, Cooke claims the district court erred for three reasons: (1) the court abused its discretion by failing to admit Alison's affidavit as evidence at the hearing; (2) the court "entered clearly erroneous findings of fact, and misapplied those facts to the relevant law, when it determined that the new evidence presented regarding Ms. Cooke's lack of competence as a witness did not warrant a new trial;" and (3) the court erred in determining Cooke's attorney was not ineffective. (Appellant's Brief, pp.28-38.) All of these arguments lack merit.

Alison's affidavit, with the exception of paragraph 3, was admitted at the evidentiary hearing. Cooke's claim to the contrary is unsupported by the record.

Cooke has likewise failed to establish error in relation to the district court's factual findings, and he has failed to establish the district court misapplied the law. The district court correctly concluded Cooke failed to meet his burden of

establishing Alison was incompetent to testify at trial or that counsel was ineffective in failing to challenge her competency.

B. Standard Of Review

Where the district court conducts a hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998); Gabourie v. State, 125 Idaho 254, 869 P.2d 571 (Ct. App. 1994). A claim of ineffective assistance of counsel presents mixed questions of law and fact. A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. Idaho Criminal Rule 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his or her burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Furthermore, the credibility of the witnesses and the weight to be given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

A district court's determination that a witness is competent to testify is reviewed for an abuse of discretion. State v. Vondenkamp, 141 Idaho 878, 884, 119 P.3d 653, 657 (Ct. App. 2005).

C. Cooke's Claim That Alison's Affidavit Was Not Admitted As Evidence At His Post-Conviction Hearing Is Contradicted By The Record

Cooke's first claim of error in relation to his post-conviction proceedings is that the district court "erroneously ruled that Ms. Cooke's affidavit that was submitted by Mr. Cooke in support of his amended post-conviction petition could not be considered by the district court because the affidavit contained hearsay." (Appellant's Brief, p.29.) In support of this argument, Cooke cites to page 38, lines 17 through 20, of the hearing transcript wherein the following exchange took place between the court and post-conviction counsel:

> [Counsel]: Just so I know, Judge, the affidavit we've already had admitted?
>
> THE COURT: It's not admitted. I'm going to sustain on that. It's - - it contains hearsay.

Although the court did not admit the affidavit as evidence at that time, the affidavit was later admitted, with the exception of paragraph 3, which was an excerpt from Dr. Ward's report.[3] (#32447 Tr., p.54, L.25 – p.55, L.3, p.135, Ls.1-7.) Moreover, it is evident from the court's final order that the affidavit was considered by the court. (#32447 Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel filed November 13, 2007,

[3] Although this portion of Alison's affidavit was not admitted, it appears Dr. Ward's report was nevertheless considered by the district court in relation to Cooke's petition as it was filed with the court (#32447 R., pp.59-60) and referenced in the court's final order (#32447 Findings of Fact and Conclusions of Law on Petitioner's Claim of Ineffective Assistance of Counsel filed November 13, 2007, pp.2-3 (augmentation).)

pp.2-3 (augmentation); 9/26/2007 Tr., p.165, Ls.21-24.) Cooke's first claim of error in relation to his post-conviction case, therefore, fails.[4]

D. The District Court's Findings Were Supported By Substantial And Competent Evidence And The Court Correctly Applied The Law To The Facts In Concluding Cooke Failed To Establish His Attorney Was Ineffective For Failing To Investigate Or Challenge Alison's Competency To Testify At Trial

1. General Legal Standards Governing Ineffective Assistance Of Counsel Claims

In order to establish a prima facie case of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999).

[4] Furthermore, Cooke's claim the district court was required to admit the affidavit pursuant to I.C. § 19-4907(a) is without merit. (Appellant's Brief, p.29.) Section 19-4907(a) merely provides a court "may" "receive proof by affidavits," nothing in the statute requires it to do so. Moreover, to the extent I.C. § 19-4907(a) purports to govern the admissibility of evidence, it is "of no force and effect" where it conflicts with the Idaho Rules of Evidence. I.R.E. 1102.

Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

An appellate court "does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." State v. Payne, ___ P.3d ___, 2008 WL 2447447 *7 (2008) (citing Pratt v. State, 134 Idaho 581, 584, 6 P.3d 831, 834 (2000)). What evidence to introduce at trial and cross-examination are tactical decisions. Id. at *24 and *9 n.2; State v. Osborne, 130 Idaho 365, 372-73, 941 P.2d 337, 344-45 (Ct. App. 1997).

When a post-conviction petitioner claims that his counsel was ineffective for failing to file a motion in his underlying criminal case, the court "may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance." Sanchez v. State, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995) (citing Huck v. State, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993)). "[A] conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the [Strickland] test." Id. Thus, "[i]f the motion lacked merit and would have likely been denied, counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner could not have been prejudiced by the want of his pursuit." Id.

2. The District Court's Factual Findings Regarding Alison's Competency And Cooke's Failure To Present Evidence Demonstrating She Was Not Competent To Testify At Trial Are Supported By The Record

As an initial matter, Cooke contends the district court's factual findings in relation to his ineffective assistance of counsel claim were clearly erroneous. Specifically, Cooke "disputes" the court's findings that Alison's "recollection of events was accurate at the time of trial, that she was a competent witness, that there was not medical evidence indicating her incompetence to testify at trial, and that the medical evidence did not relate to Ms. Cooke's competence on the date of trial." (Appellant's Brief, p.30.) According to Cooke, these findings are clearly erroneous because, he contends, Dr. Ward's report, "[co]upled with" Alison's "actual personal recollection" as set forth in the letter she wrote on July 22, 2004, demonstrates she was not competent to testify at trial. (Appellant's Brief, p.31.) Neither Dr. Ward's report nor Alison's July 2004 letter, however, establish Alison was incompetent to testify at trial.

Dr. Ward's report was prepared five days after the wreck and five months prior to trial. It is devoid of any statement that Alison's memory would be permanently impaired and it did not contain any opinion regarding Alison's competency to testify at some later date. Dr. Ward merely stated his opinion Alison was not "competent or even appropriate for a police or forensic evaluation or interview at th[at] time." (#32447 R., p.60.) The district court correctly concluded Cooke presented no evidence that Dr. Ward held the same opinion at the time of trial or any other evidence that Alison was incompetent to testify.

That Alison wrote a letter one year after she testified in an effort to have Cooke's kidnapping sentence reconsidered does not establish otherwise.

Moreover, Alison explained at the evidentiary hearing that she understood the questions she was asked at trial and answered the questions to the best of her ability. (#32447 9/26/07 Tr., p.53, Ls.1-9.) Cooke failed to establish any of her testimony was incorrect, inaccurate, or based on a "false memory." The district court's finding that Alison was competent to testify is supported by substantial and competent evidence.

With respect to trial counsel's actions in relation to Alison, Cooke has failed to establish counsel was ineffective. Cooke asserts counsel should have either filed a motion to exclude Alison as a witness entirely or cross-examined her more thoroughly regarding her ability to remember the wreck. (Appellant's Brief, pp.35-37.) Because Cooke did not present any evidence that Alison was not competent to testify at trial, his claim that counsel was ineffective for failing to move to exclude her testimony based on her alleged incompetence must be rejected because there is no reason to believe such a motion would have been granted. See Sanchez, 127 Idaho at 713, 905 P.2d at 646.

As for Cooke's claim that counsel did not adequately cross-examine Alison, counsel's cross-examination strategy is a tactical decision that will not be second-guessed. Payne, ___ P.3d at ___, 2008 WL 2447447 *9 n.2; Osborne, 130 Idaho at 372-73, 941 P.2d at 344-45. Moreover, the extent of Alison's injuries, including her brain injury, was before the jury and a review of the trial transcript reveals counsel repeatedly inquired into her ability to remember details

and Alison admitted there were things she did not remember. (#34820 Tr., p.351, L.14, p.357, L.8 – p.358, L.6, p.359, L.22 – p.360, L.4, p.361, Ls.3-6, p.362, L.5 – p.364, L.3, p.365, L.4 – p.366, L.4, p.367, Ls.1-9, p.369, L.8 – p.370, L.8, p.371, L.8 – p.373, L.11.) That Alison's trial testimony was contradicted by certain prior statements to law enforcement and the fact she minimized Cooke's intent in her July 2004 letter (Appellant's Brief, p.37), does not establish counsel's cross-examination strategy was constitutionally inadequate.

The district courts factual findings regarding Alison's competency are supported by the record and the court correctly applied the law to those facts in concluding Cooke failed to establish he received ineffective assistance of counsel. Cooke's claims to the contrary, therefore, fail.

CONCLUSION

The state respectfully requests this Court affirm Cooke's convictions for second-degree kidnapping, aggravated battery, and assault and the district court's order denying post-conviction relief.

DATED this 10th day of October 2008.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October 2008, I served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defenders' basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General