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State v. Ellington Respondent's Brief Dckt. 33843

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. JONATHAN W. ELLINGTON, Defendant-Appellant.	)	NO. 33843

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN L. LUSTER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

DANIEL W. BOWER
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

ERIK R. LEHTINEN
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEY FOR
DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Jonathon W. Ellington appeals from his judgment of conviction for second degree murder and two counts of aggravated battery.

Statement Of The Facts And Course Of The Proceedings

At 3:30 am, Ellington got in a disagreement with his live-in girlfriend and drove his Chevy Blazer, which had no license plates, to Ronald Cunningham's house on Sacrcello Road to drink beer and watch TV. (Tr., p.1064, L.20 - p.1066, L.9; p.1162, L.5 - p.1166, L.12; p.1165, L.18 - p.1166, L.23.) Ellington arrived at his friend's residence at 6:00 am. (Tr., p.1064, Ls.20-22.) Upon leaving the Cunningham residence in his Blazer, Ellington ended up behind a white Honda. (Tr., p.1193, L.3 - p.1194, L.16.) The occupants of the Honda were two girls: Javon and Joleen Larsen. (Tr., p.349, Ls.7-10.) Javon was 22 years old and Joleen was 18. (Tr., p.342, Ls.7-21.) Javon was taking Joleen back to her parents' home. (Tr., p.1193, Ls.3-6.)

Ellington appeared upset that the Honda was driving slow and he was unable to pass her because of an on-coming vehicle. After the on-coming vehicle passed, Ellington sped-up, passed the Honda, and then stopped at the next intersection. (Tr., p.1194, L.18 - p.1195, L.17.) Ellington got out of the Blazer, approached the car, swore at Javon and Joleen, challenged them to a fight, and punched the Honda's window on the driver's side. (Tr., p.353, L.3 - p.354, L.9; p.1195, L.15 - p.1196, L.5.) The girls called 911 (Tr., p.355, Ls.17-20) and, not being able to give a license description to the 911 operator, followed

Ellington. (Tr., p.356, Ls.18-24.) Ellington, aware that the girls were following him and believing that the girls had or were going to call the police, drove past his home and turned around. (Tr., p.359, Ls.4-16; p.1168, L.21 - p.1169, L.2.) After turning around, Ellington drove his vehicle in the wrong lane directly at the girls, swerving at the last instant into the other lane. (Tr., p.359, L.15 - p.360, L.3; p.1200, L.21 - p.1201, L.7.) Ellington was ultimately able to lose the girls who were still on the phone with the 911 operator. (Tr., p.361, Ls.17-23.) After losing sight of Ellington, the girls waited for an officer from the sheriff's department. (Tr., p.362, L.20 - p.363, L.3.) During this time the 911 call ended and the girls called their parents, Joel and Vonette Larsen. (Tr., p.363, Ls.13-19.) A sheriff's deputy arrived, gave them a witness statement form to fill out, and left to investigate. (Tr., p.365, Ls.18-25; Tr., p.1104, Ls.4-9.) The girls' parents, driving a maroon Subaru, also arrived at the location. (Tr., p.363, L.23 - p.365, L.11.) They also left to look for the Blazer. (Tr., p.363, L.23 - p.365, L.11.)

After losing the girls, Ellington returned to his home where he got in yet another disagreement with his girlfriend. (Tr., p.1171, L.6 - p.1172, L.19.) After Ellington's girlfriend left to go to a friend's house (Tr., p.1172, Ls.14-19), Ellington got back in his Blazer and drove back by the location where Javon and Joleen where filing out their police paperwork (Tr., p.367, Ls.10-16). Ellington flipped them off as he passed them. (Tr., p.368, Ls.7-10.) The two girls got back on the phone with the 911 operator to inform the police that Ellington was back

on the road and that they were following Ellington a second time -- this time with their parents following close behind. (Tr., p.368, L.19 - p.369, L.17.)

Ellington was traveling at very high speeds driving back toward the residence on Scarcello Road where he had been earlier. (Tr., p.369, L.21 - p.371, L.14.) Ellington drove past the residence around a curve and then turned around. (Tr., p.371, L.12 - p.372, L.2.) The girls stopped their Honda in front of Ellington's Blazer; the girls' parents pulled up in front of the Honda in the Subaru. (Tr., p.372, Ls.4-23.) As the Subaru was coming to a stop, Ellington drove around the driver's side of the Subaru, clipped it with the side of his vehicle, and rammed the Honda with Joleen and Javon inside -- accelerating and driving the Honda across the road approximately forty-five feet until the car's wheels furrowed in the dirt. (Tr., p.767, L.12 - p.772, L.25.) The girls' mother, Vonette Larsen, got out of the vehicle and ran in the direction of the Honda. (Tr., p.773, Ls.23-25; p.774, L.25 - p.775, L.3.) Joel Larsen also exited the vehicle and removed a handgun that was in the vehicle. (Tr., p.773, L.25 - p.774, L.2.) Joel also ran to where the Blazer had rammed the Honda. (Tr., p.773, L.25 - p.774, L.2.) Joel Larson never made it to the Honda. Ellington, after pushing the Honda all the way across the road, reversed the Blazer back on the road. (Tr., p.775, L.12 - p.776, L.21.) Ellington made a hard left and accelerated toward Vonette Larsen who was still running to the Honda. (Tr., p.779, L.18 - p.780, L.17.) As the Blazer travelled toward Vonette Larsen, in an attempt to stop the Blazer from hitting his wife, Joel Larsen shot the passenger side front panel of the Blazer. (Tr., p.779, L.18 - p.780, L.17.) The shot had no effect on the path

of the vehicle. Ellington hit Vonette Larsen with his Blazer causing her body to come down on the hood of the Blazer and then to the ground where she was ultimately run over and killed. (Tr., p.781, Ls.11-12, p.781, L.21 - p.782, L.3; p.1466, Ls.8-24.) The entire incident was recorded by the 911 operator who was on the phone with Joleen Larsen. (Tr., Ex. 151.)

After Ellington ran over Vonette Larsen, he left the scene and returned to the Cunningham residence. (Tr., p.1069, L.5 - p.1071, L.16.) Ellington went inside where he continued to drink and watched football on the television. (Tr., p.1070, L.4 - p.1071, L.19.) Law enforcement eventually located his Blazer at the residence and subsequently placed Ellington under arrest. (Tr., p.1079, L.17 - p.1084, L.25.) Ellington was charged with second degree murder and two counts of aggravated battery. (R., Vol. I, pp.127-29.)

At trial the state proffered testimony from three eye-witnesses: Joel Larsen, Joleen Larsen, and Javon Larsen. (Tr., p.342, L.3 - p.400, L.24; p.741, L.22 - p.793, L.12; p.1189, L.16 - p.1216, L.17.) There was extensive testimony from the investigating officers regarding the physical evidence at the scene of the accident. (Tr., p.142, L.9 - p.341, L.18; p.1075, L.21 - p.1154, L.3; p.1178, L.6 - p.1178, L.6 - p.1189, L.15.) The state also provided testimony from audio forensic analyst, Eric Hartmann, who enhanced sound quality on the 911 recording of the incident. (Tr., p.470, L2 - p.580, L.24.) The state also submitted testimony from an accident reconstruction expert, Idaho State Police Inspector Sean Daly (Tr., p.686, L.1 - p.989, L.4) and a pathologist who described injuries sustained by Vonette Larsen (Tr., p.1246, L.9 - p.1261, L.11).

After the state rested, Ellington also provided fact and expert witnesses. The expert testimony came from a forensic engineer, Dr. William Skelton (Tr., p.1377, L.20 - p.1642, L.8) and an audio analyst, Greg Stutchman (Tr., p.1577, L.9 - p.1617, L.12).

Following instructions and closing argument the case was submitted to the jury. The jury convicted Ellington on all charges. (R. Vol. II, pp.379-80.) Ellington timely appeals from the judgment. (R. Vol. II, pp.432-34.)

ISSUES

Ellington states the issues on appeal as follows:

1. Did the State engage in numerous acts of misconduct which, when considered in context, render Mr. Ellington's trial so fundamentally unfair that he is now entitled to a new trial?

2. Did the district court err in admitting certain highly prejudicial evidence?

3. Is Mr. Ellington entitled to a new trial based on the fact that the entire panel of prospective jurors in his case was tainted by three prospective jurors who expressed their opinions that he was guilty?

4. Did the accumulation of errors in this case deprive Mr. Ellington of a fair trial?

(Appellant's Brief, p.5.)

The state rephrases those issues on appeal as:

1. Has Ellington failed to show the prosecutor vouched for the credibility of the state's witnesses in her closing argument or that the claimed vouching had any prejudicial effect on his right to a fair trial?

2. Has Ellington failed to show that the district court abused its discretion allowing the expert testimony of two witnesses and by not striking a word from one exhibit?

3. Has Ellington failed to show that the district court abused its discretion when it did not dismiss the entire jury venire because three jurors admitted that they had pre-conceived views of Ellington's guilt?

4. Has Ellington failed to show any error, let alone an accumulation of errors, that deprived Ellington of a fair trial?

ARGUMENT

I.
Ellington Has Failed To Carry His Burden Of Establishing Prosecutorial Misconduct

A. Introduction

Ellington claims his rights were "abridged through various instances of prosecutorial misconduct in this case." (Appellant's Brief, p.30.) Ellington alleges the prosecutor committed misconduct in two ways: 1) "when the prosecutor elicited testimony from the lead police detective which allowed the jury to draw a negative inference" regarding Ellington's guilt from his silence (Appellant's Brief, p.31 (capitalization removed)) and 2) by making "appeals to the emotions of the jurors" (Appellant's Brief, p.30). Ellington also alleges this claimed misconduct and other actions by the prosecutor showed the "State's strategy from the outset of trial . . . to prevail through the use of prejudice." (Appellant's Brief, p.47.) Neither the law nor the record support Ellington's misconduct claims. Contrary to his assertions, none of the instances of claimed misconduct were improper and his claim of a "strategy" to prevail through the use of prejudice is both legally irrelevant and factually without basis. Furthermore, Ellington has failed to show his trial was rendered unfair and, therefore, he has not provided a basis for overturning his conviction.

B. Standard Of Review

Appellate courts conduct a two-tiered inquiry to review allegations of prosecutorial misconduct. First, courts determine whether the alleged misconduct was improper. If the court concludes that the conduct was improper,

the court must then consider whether such misconduct resulted in prejudice to the defendant or was harmless error. State v. Romero-Garcia, 139 Idaho 199, 202, 75 P.3d 1209, 1212 (Ct. App. 2003).

C. Ellington Has Failed To Establish Prosecutorial Misconduct Or That Any Possible Misconduct Interfered With His Right To A Fair Trial

"The right to due process does not guarantee a defendant an error-free trial but a fair one." State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991). Similarly, the function of appellate review is "not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial." Id. If the jury would have reached the same result had the prosecutor's error not occurred, the error is deemed harmless. Id.

Ellington has failed to demonstrate misconduct by the prosecutor, much less conduct that would constitute reversible error.

D. Ellington Has Failed To Show That The State Used Evidence Of His Post-*Miranda* Silence To Establish Guilt Such That He Was Denied A Fair Trial

A defendant's decision to exercise his right to remain silent after receiving *Miranda* warnings cannot be used in the state's case-in-chief for the purpose of inviting the jury to infer guilt. Doyle v. Ohio, 462 U.S. 610 (1976); Fletcher v. Weir, 455 U.S. 603 (1982); State v. Lopez, 141 Idaho 575, 577, 114 P.3d 133, 135 (Ct. App. 2005); State v. Tucker, 138 Idaho 296, 62 P.3d 644 (Ct. App. 2003). Mere reference to silence is not a violation of this right; a defendant claiming a due process violation must demonstrate that the state used the

evidence to show an inference of guilt. Greer v. Miller, 483 U.S. 756, 764-65 (1987) ("The fact of Miller's post-arrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no Doyle violation occurred in this case."); Ellen v. Brady, 475 F.3d 5, 10-11 (1st Cir. 2007) (no constitutional error occurs if government not allowed to "use" silence to imply guilt).

Following his arrest at the Cunningham residence Ellington was placed in Officer March's patrol car. (Tr., p.235, L.17 - p.236, L.5; p.1084, Ls.22-25.) Sergeant Maskell arrived shortly thereafter to investigate and observed Ellington in the patrol car. (Tr., p.211, L.11 - p.212, L.5; p.235, Ls.17-23.) At trial Sergeant Maskell was asked about the investigation and about his interaction with Ellington. Ellington complains of the following exchange between the prosecutor and Sergeant Maskell:

> Q. At the time you got there [at the Cunningham's residence] and he [Ellington] was in the back of that patrol car, was he under arrest?
>
> A. Yes.
>
> Q. And so you did not interview him?
>
> A. I attempted to.

(Tr., p.236, Ls.3-7.)

As a threshold matter, even if this exchange could be inferred as commentary on Ellington's right to silence, it was a comment made by the witness and not by the prosecutor. The statement "I attempted to" was a nonresponsive answer to a leading question that would have avoided any possible inference related to whether Ellington had invoked his right to silence.

Consequently, there was no possible misconduct by the prosecutor. Indeed, the trial court made the following factual finding: "In this particular case I don't think there is a sufficient showing to satisfy the court that it was the government's manifest intention to do that which has occurred here in terms of any inference that could be drawn." (Tr., p.245, Ls.9-12.)

Furthermore, even if the statement could be attributed to the prosecutor, Ellington has not met has burden of showing that he invoked his right to remain silent and that this is the reason why the interview was not conducted. At best, the statement that the officer "attempted to" interview Ellington was only an indirect reference to a possible invocation of the right to silence with no inference of guilt based on that reference. Contrary to Ellington's claims, there was nothing in the prosecutor's question or the officer's response that suggests that the reason why the sergeant did not interview Ellington was because he invoked his right to silence and that this invocation inferred guilt. The record does not say whether Ellington was even informed of his right to remain silent, and if he was so informed, when he was so informed. As noted by the district court, "[t]here is certainly no evidence in front of the court, in front of this jury that any *Miranda* had been presented to Mr. Ellington for the jury's considerations." (Tr., p.246, Ls.2-4.) The trial court also noted that there was no explanation at all as to why any attempt to interview Ellington "did not follow through, whether it was because the detective didn't have time, take the time, somebody else didn't do it or was supposed to do it, or what the reasons behind this supposed failed attempt are." (Tr., p.246, Ls.6-9.) Consequently, in order to meet his burden the

jury would, in the words of the trial court, have to make a "quantum leap." (Tr., p.246, Ls.10-14.) The district court's determinations are correct. The statement made by law enforcement that he attempted to interview Ellington is insufficient to meet Ellington's burden of showing that he had invoked his right to remain silent and that this was the reason the interview was not conducted and that this infers guilt.

Even if Ellington could establish error, he has failed to show reversible error. Assuming, arguendo, that error exists, this case is similar in context to State v. Martinez, 128 Idaho 104, 910 P.2d 776 (Ct. App. 1995). In Martinez, this court addressed the same issue and concluded that a more egregious reference to a criminal defendant's right to silence was harmless. In Martinez, the detective testified that he "wanted to talk with [Martinez] about what had happened from his perspective. However, he chose not to talk to me." Martinez, 128 Idaho at 111, 910 P.2d at 783.

The Court of Appeals held that the admission of this testimony was error. However, the court also held that the error was harmless. Id. at 113, 910 P.2d at 785. The court highlighted the fact that 1) the testimony was not intentionally elicited by the prosecutor, 2) the testimony was quite brief, and 3) the testimony was not emphasized. Id. The court wrote, "[I]ndeed, upon mention by [the detective] that Martinez 'did not wish to speak to' him, the prosecutor immediately steered [the detective] away from this line of testimony." Id.

Similarly, here, the testimony was also 1) not intentionally elicited by the prosecutor, 2) extremely brief, and 3) not highlighted or emphasized in any way.

Indeed, as in Martinez, the prosecutor in this case avoided the issue and never referenced the testimony during the case-in-chief or in closing. (Tr., pp.100-105; 110-113.) Thus, all of the mitigating factors found in Martinez, and even more are present in this case. This one line of testimony challenged did not violate Ellington's due process right to a fair trial.

E. Ellington Has Failed To Show That The State Solicited Evidence That Aroused The Passions And Prejudices Of The Jury And Denied Him His Right To A Fair Trial

Ellington also contends prosecutorial misconduct claiming that the prosecutor sought to inflame the passions and prejudices of the jury. (Appellant's Brief, pp.38-40.) Ellington identifies three instances of misconduct on this basis and also claims that the prosecutor had a "strategy" of convicting Ellington on the basis of prejudice. First, Ellington claims misconduct on the basis of testimony elicited from a witness regarding his short employment history that ended with his work on this case. (Appellant's Brief, pp.36-40.) Second, Ellington argues the prosecutor sought to inflame the passions and prejudices of the jury because the prosecutor repeated the statement that Ellington "ran over" Vonette Larsen. (Appellant's Brief, pp.40-42.) Third, Ellington claims that the prosecutor improperly appealed to the passions and prejudices of the jury by introducing testimony from an expert that was inconsistent with the prosecutor's offer of proof. As set forth below, all three of these claims are without merit. Additionally, Ellington's contention that the "State's strategy from the outset of trial was to prevail though the use of prejudice" (Appellant's Brief, p.47) fails because it is both utterly unsupported by the record and is legally irrelevant.

Prosecutorial misconduct may occur when the prosecutor takes action that 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. Porter, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997) (quoting State v. Babb, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994)). Prosecutorial misconduct reaches the level of a constitutional violation only if the argument "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 642-45 (1974). Here, no such violation occurred.

1. The Prosecutor Did Not Elicit Testimony Or Make Statements To Arouse The Prejudices Of The Jury When He Questioned Mr. Hartmann Regarding The Reasons Why He Worked At RMIN Only For A Short Period Of Time

Ellington claims the prosecutor engaged in prosecutorial misconduct during the direct examination of Eric Hartmann, the forensic audio analyst that enhanced the sound quality on the 911 digital recording of the incident between Ellington and the Larsen family. (Appellant's Brief, pp.37-40.) Specifically, Ellington challenges the following portion of that direct examination as arousing the passions and prejudices of the jury:

Q. And at some point you worked on a 911 call that involves this matter?

A. That is correct?

Q. Can you tell us, please, why you only worked at RMIN for two months?

A. The simple answer is this case in particular left me with the inability to sleep and I decided that--

Q. Objection, Your Honor, relevance, move to strike and admonish the jury not to consider that.

(Tr., p.525, Ls.13-21.) Ellington claims there was "no proper purpose for [the prosecutor] to have posed the question that he did" and that it was an "attempt to once again influence the jury with an emotional appeal." (Appellant's Brief, p.40.) Ellington's claim is without basis and misstates the law.

It was entirely relevant for the prosecutor to explain that Hartmann's short time working as a forensic analyst -- that ended with his work on this case -- was not because of poor performance or for a reason related to his ability to do his job well. The fact Hartmann only worked as a forensic audio analyst for only two months could have led to inferences that he was incompetent or otherwise unable to do perform his job. Consequently, the question, "Can you tell us, please, why you only worked at RMIN for two months?" and the answer were relevant.

Even assuming that the answer was excludable under the probative/prejudicial balancing of Idaho Rule of Evidence 403, the statement was not so inflammatory as to cause the jury to determine guilt on factors outside the evidence. See Porter, 130 Idaho at 785, 948 P.2d at 140. The gruesome and tragic nature of what happened was well documented and clearly before the jury in various forms of evidence and testimony. The jury heard three eye-witness accounts describing in detail the accident. (Tr., p.342, L.3 - p.400, L.24; p.741, L.22 - p.793, L.12; p.1189, L.16 - p.1216, L.17.) The jury viewed pictures of the accident scene -- including Ms. Larsen's body after she had been run over and

killed. (Tr., p.175, Ls.15-16; p.632, Ls.13-15; Tr., Ex. 10, 28, 38, 39, and 45.) The jury also heard the audio recording of the incident including the collision between Ellington and the Larsen girls and the traumatic nature of Vonette Larsen's death (including the emotional reaction of the girls). (Tr., Ex. 151.) Hartmann's statement that the case was gruesome for him and that is why he stopped doing forensic analysis added nothing to the what the jury obviously knew -- that this case involved gruesome details and context.

Despite the gruesome nature of the death of Vonette Larsen, the case turned on whether Ellington intended to batter the Larson girls with his Blazer and intended to run over Mrs. Larsen. In light of the evidence before the jury, Mr. Hartmann's statement did not deprive Ellington of his right to have the jury decide his guilt based solely on the evidence.

2. The Prosecutor Did Not Engage In Misconduct By Repeatedly Referencing The Fact That Ellington Ran Over Mr. Larsen's Wife

Ellington claims the repeated use of the phrase "running over your wife" or similar questioning statements during Mr. Larson's testimony constituted prosecutorial misconduct. (Appellant's Brief, p.40.) Ellington is mistaken. The fact that Ellington ran over Mr. Larsen's wife was an undisputed fact of this case. Ellington's guilt turned not on whether he ran over Mrs. Larsen but whether his acts were intentional.

A review of questioning of Joel Larsen by the prosecutor shows the focus of the repeated statements was not on the fact that Ellington ran over Mr. Larsen's wife, but that he ran her over in the wrong lane -- indicating that he

intentionally ran her over. "After he got done running over your wife, *was he still in the wrong lane* of travel there?" (Tr., p.783, Ls.13-14 (emphasis added).) "How long after--he ran over your wife *in the wrong lane* of travel, is that right?" (Tr., p.783, Ls.17-18 (emphasis added).) "After he got done running over your wife, *when did he get back in the correct lane of travel* to go eastbound on Scarcello? How long after he got done running over her was it that *he got back into the correct lane*?" (Tr., p.783, Ls.20-23 (emphasis added).) The thrust of this examination was on the fact that Ellington ran over Vonette Larsen while traveling in the wrong lane of traffic, indicating that he *intentionally* ran her over -- the controlling issue in the case. The prosecutor's use of the event of running over Mrs. Larsen in questioning to provide context was proper.

Even if repeating the statements could be construed as misconduct they were not statements that added anything to what the jury obviously knew or felt. It was undisputed that Ellington ran over Vonette Larsen killing her and that this happened in front of Joel Larsen and his two girls. Indeed, Joleen Larsen's real time reaction was heard in the 911 call. (Tr., Ex. 151.) The fact that the prosecutor repeated the statement "he ran over your wife" had no effect on the jury's ability to determine guilt on the issue that needed to be decided -- whether he intentionally ran over Vonette Larsen.

3. The Prosecutor Did Not Engage In Misconduct By Offering The Testimony Of The Pathologist

Ellington claims the prosecutor engaged in misconduct by successfully proffering Dr. Marco Ross's testimony describing the injuries sustained by

Vonette Larsen. (Appellant's Brief, p.42.) Ellington further claims that the prosecutor was able to accomplish this by committing a "[f]raud" upon the court by making an offer of proof that was inconsistent with the testimony ultimately provided by Dr. Ross. (Appellant's Brief, p.42.) Ellington's claim lacks merit. The testimony that Dr. Ross provided was relevant and admissible. Because Dr. Ross's testimony was admissible, it cannot be the basis of a claim that Ellington was deprived of his right to a fair trial. Further, a review of the record shows that Dr. Ross's testimony was consistent with the prosecutor's offer of proof and that there was no "fraud."

At trial, Ellington moved the court to exclude Dr. Ross's testimony on the basis that it was "just testimony about her injuries" and, therefore, would be cumulative and irrelevant. (Tr., p.1241, Ls.6-21; p.1243, Ls.12-22.) On appeal, Ellington continues to argue that Dr. Ross's testimony was inadmissible. (Appellant's Brief, p.44.) Ellington fails to appreciate the significance of Dr. Ross's testimony. Dr. Ross did not simply describe Vonette Larsen's injuries, but described how those injuries were inflicted and provided information that could be used by the jury to determine whether Ellington intentionally ran over Vonette Larsen. Dr. Ross testified that Vonette Larsen's injuries to her chest were consistent with a "blunt force impact as opposed to a crushing type of force." (Tr., p.1255, L.11 - p.1256, L.5.) Dr. Ross also testified that the injuries on her body did not suggest that her body was dragged. (Tr., p.1255, Ls.7-10) This testimony was significant to the question of how fast Ellington was traveling in his Blazer at the time he hit Vonette Larsen which was material to the question

of whether Ellington's actions were intentional. In other words, his testimony indicated that at least some of the victim's injuries were caused by the impact of a vehicle moving at great speed not a vehicle hitting her at a slow speed then dragging her and crushing her with its weight as it moved over her. Accordingly, Dr. Ross's testimony was not cumulative but relevant to the issue of intent.

Because the Dr. Ross's testimony was admissible, the question of whether the Dr. Ross's testimony matched the prosecutor's offer of proof, which offer of proof was never provided to the jury, is legally irrelevant to the question of unfairly prejudicing the jury. Nevertheless, there was no fraud. The prosecutor's offer of proof was that Dr. Ross was going to distinguish Vonette Larsen's injuries -- those injuries that she suffered from being struck as opposed to those she suffered from being run over:

> The Court: You feel your physician is going to be able to distinguish those two injuries? In other words, those that were the result of being struck and those that were the result of being run over.
>
> Prosecutor: Yes.
>
> The Court: And that's the offer your presenting?
>
> Prosecutor: That's the main purpose. And I do feel that's what the doctor is going to testify in regards to.

(Tr., p.1243, Ls.3-10.)

Consistent with that offer of proof, Dr. Ross testified that the injuries to Vonette Larsen's abdomen and chest area were caused by "blunt force impact" (Tr., p.1255, L.11 - p.1256, L.5) and that the injuries to her head were consistent with being run over by a tire (Tr., p.1257, L.22 - p.1258, L.18).

Accordingly, not only was Dr. Ross's testimony admissible, but it was consistent with the offer of proof given by the prosecutor. Ellington's claims of misconduct and his assertion that he is entitled to a new trial are entirely without basis and were properly denied by the trial court.

F. Ellington's Claims Of Misconduct Did Not Preclude Him From Receiving A Fair Trial And, Therefore, Ellington Was Not Entitled To A New Trial

Ellington contends that the above cited claimed misconduct was indicative of "a larger pattern of attempting to prejudice the jury" and that this, along with the specific instances of claimed misconduct, establish prosecutorial misconduct and entitled Ellington to a new trial. (Appellant's Brief, p.47 (internal capitalization removed).) This claim lacks merit. There was no basis for granting Ellington a new trial based on any individual instances of claimed misconduct or any other conduct identified by Ellington that he claims is was part of a strategy to prejudice the jurors.

Motions for mistrial are governed by Idaho Criminal Rule 29.1. State v. Barcella, 135 Idaho 191, 197, 16 P.3d 288, 294 (Ct. App. 2000). A "mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a). Here, as set forth above, Ellington has not met his burden of establishing any prosecutorial misconduct. Furthermore, the "examples of conduct" that Ellington claims demonstrate a strategy to prevail

through the use of prejudice also fall woefully short of showing that Ellington was deprived of a fair trial.

Ellington also argues that his claims of prosecutorial misconduct, combined with other statements by the prosecutor, statements "not presented as individual claims of misconduct," demonstrate that the "State's strategy from the outset of trial was to prevail though the use of prejudice." (Appellant's Brief, p.47.) Ellington points to the fact that the prosecutor attempted to introduce a large number of photographs and testimony regarding the extent of Vonette Larsen's injuries. (Appellant's Brief, p.50-52.) Ellington's argument misses the mark.

The United States Supreme Court has made clear that "the constitutional obligation [of determining whether a defendant receives a fair trial]" is not "measured by the moral culpability, or willfulness, of the prosecutor." United States v. Agurs, 427 U.S. 97, 110 (1976). In Agurs, the Court noted that it had previously and "expressly rejected the good faith or the bad faith of the prosecutor as the controlling consideration" in determining whether a defendant received a fair trial. Id. at 110 n.17. The court recognized that purpose is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." Id.; see also State v. Smith, 116 Idaho 553, 557, 777 P.2d 1226, 1230 (Ct. App.1989) ("This approach [as outlined in Agurs] is consistent with a recent trend in criminal procedure away from focusing on subjective

prosecutorial motives and toward an objective determination of whether a defendant has received a fair trial.").[1]

Thus, here, regardless of whether Ellington can show a pattern of attempts that indicate the prosecutor's intent, the controlling determination of prosecutorial misconduct and entitlement to a new trial is whether the actual misconduct deprived Ellington of a fair trial -- a burden Ellington has not met.

Even if the prosecutor's intent was relevant to this case, the conduct Ellington identifies does not support his contention that a pattern of misconduct existed. In addition to the four instances of claimed misconduct addressed above, Ellington claims the prosecutor exhibited other conduct that showed that the state *intended* to convict Ellington on the basis of prejudice. (Appellant's Brief, p.47.) Ellington first claims the prosecutor's bad intent was shown at the beginning of the trial when the prosecutor "responded to the district court's request that he introduce himself" by "presenting the State's interpretation of the evidence, as if it was established fact." (Appellant's Brief, p.48.) In support of this claim, Ellington cites instances where the prosecutor was permitted to present the State's interpretation of the evidence to prospective jurors and where he "offered the State's interpretation of the evidence as if it was established fact"

[1] The state concedes that the prosecutor's intent can be relevant to prosecutorial misconduct. See, e.g., State v. Babb, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994). However, as alluded to by the United States Supreme Court, the motives only become relevant if there is something that has happened that has had an affect on the trial. At that point courts look to see if that prejudicial act was intentional. However, to find a due process violation solely because of a bad intent, without an indication that misconduct occurred and precluded the defendant from receiving a fair trial, is placing the cart before the horse.

and that this was "an attempt to predispose the jury to find Mr. Ellington guilty." (Appellant's Brief, p.48.)

As an initial matter, the fact that a prosecutor presents "State's evidence" as fact does not support the argument that prosecutor intended to convict a criminal defendant on the basis of prejudice. Rather, it shows that the prosecutor was trying to convict on the basis of evidence not prejudice. Regardless, Ellington has cited no authority or law that would preclude the prosecutor from making the statements made he made -- reasonable interpretations based on what was to be presented by the state in their case-in-chief. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (court will not consider arguments not supported by citation to law).

Ellington also takes issue with the fact that the prosecutor "fought to have a large number of extremely graphic and disturbing photographs of Mrs. Larsen's injuries admitted into evidence to be shown to the jury." (Appellant's Brief, p.50.) Ellington concedes that "most of those photos were ruled inadmissible by the district court" but claims that this attempt and continued attempts to admit photographs of the victim were attempts to "try this case based on extraneous considerations." (Appellant's Brief, p.52.) Because these photos were never admitted and never submitted to the jury, it is impossible for these photos to have precluded Ellington from receiving a fair trial. In addition, Ellington's claim that a prosecutor commits misconduct merely by arguing that evidence should not be excluded under I.R.E. 403 is without legal basis.

Finally, Ellington claims that the prosecutor "elicited opinion testimony from [Idaho State Police Investigator] Daly to the effect that the collisions at issue in this case were intentional, not accidental" and that this supported his claim that the "state [was] attempting to try this case based on extraneous considerations." (Appellant's Brief, p.52.) Evidence that Ellington ran over and *intentionally* killed Vonette Larsen was not an extraneous consideration. Moreover, there was nothing in the Idaho Rules of Evidence that precluded Investigator Daly from testifying, based on his experience as an investigator, that Ellington pushing the white Honda across the road and into the dirt in his Blazer -- approximately 45 feet -- was not accidental.

In sum, there is no basis for Ellington's motion for mistrial or claims of prosecutorial misconduct because there was no action that deprived him of receiving a fair trial. Further, the conduct that he contends is support for his claimed pattern of misconduct, does not support his argument.

II.
The District Court Properly Exercised Its Discretion In Admitting Evidence

A. Introduction

Ellington's second argument on appeal is that the district court erred by admitting an exhibit with the word homicide and by allowing two of the state's experts, an accident reconstruction expert, Investigator Daly, and pathologist, Dr. Marco Ross, to testify. Ellington's claims have no merit. The testimony of Investigator Daly was consistent with the Idaho Rules of Evidence and the testimony of Dr. Ross was relevant and not substantially outweighed by

prejudice. With regard to the exhibit, as conceded by defense counsel, the word "homicide" accurately described the accident scene; therefore, it was within the discretion of the district court to not strike the word "homicide" from the exhibit after it had been admitted without objection.

B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been an abuse of that discretion. State v. Howard, 135 Idaho 727, 731-32, 24 P.3d 44, 48-49 (2001); State v. Zimmerman, 121 Idaho 971, 974, 829 P.2d 861 (1992). The admissibility of expert testimony is discretionary and will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Crea, 119 Idaho 352, 806 P.2d 445 (1991); State v. Parkinson, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996).

C. The District Court Did Not Abuse Its Discretion By Admitting An Exhibit That Contained The Word Homicide

Ellington claims the district court abused its discretion by failing to strike the word "homicide" off a large diagram that had been admitted and used by Trooper Robnett to layout the scene of the accident. (Apppellant's Brief, p.56.) As conceded by the defense counsel, the word was in "small print" along the top of the diagram and not readily apparent to jury members. (Tr., p.628, Ls.3-10.) Ellington claimed that "homicide" would be the same as "murder" in the jurors' minds and, therefore, that it should stricken from the exhibit. (Tr., p.628, Ls.20-24.) The district court denied the motion making the following determinations:

> It seems to be really undisputed that Mrs. Larsen's demise was a result of a traffic accident which involved vehicles being operated by people, and there are a number of people involved and her death was as a consequence of that. Certainly was not suicide, there's nothing here to indicate Vonette Larsen's murder scene, crime scene even.

(Tr., p.628, L.25 - p.629, L.5.) The district court concluded the word "homicide" was an accurate description and did not need to be removed from the already admitted exhibit. (Tr., p.628, L.25 - p.629, L.17.) Ellington makes no attempt to show how the court's determinations were clearly erroneous. Indeed, Ellington admits "the district court got the technical definition of 'homicide' right." (Appellant's Brief, p.57.) Accordingly, Ellington has failed to show how the district court abused its broad discretion in the admission of evidence.

D. The District Court Did Not Abuse Its Discretion By Allowing Trooper Daly To Testify That Ellington's Ramming Of The Honda Was Not Accidental

Ellington claims the district court abused its discretion by allowing an accident reconstruction expert, Investigator Daly, to testify that Ellington intentionally pushed the Honda with his Blazer across the road. Ellington claims that Investigator "Daly's opinion was not a valid expert opinion and it should never have been admitted under Rule 702." (Appellant's Brief, p.62.) Ellington makes two arguments, both without basis. First, Ellington claims that the Investigator Daly was allowed to usurp the function of the jury by allowing the expert to testify on one of the ultimate issues in the case. (Appellant's Brief, pp.59-60.) Second, Ellington claims that the expert's testimony should have been excluded because there "were other highly plausible inferences that could be drawn" to show that Ellington unintentionally hit the white Honda and drove it

forty-five feet across the road. (Appellant's Brief, p. 61.) Both arguments are without support.

Per Idaho Rule of Evidence 702, expert testimony is admissible when the expert's specialized knowledge will assist the trier of fact to understand the evidence and determine a fact in question. See State v. Walters, 120 Idaho 46, 55, 813 P.2d 857, 866 (1991); State v. Hopkins, 113 Idaho 679, 680-81, 747 P.2d 88, 89-90 (Ct. App.1987). Rule 704 allows testimony in the form of an opinion even if it "embraces an ultimate issue to be decided by the trier of fact." See State v. Crawford, 110 Idaho 577, 581, 716 P.2d 1349, 1353 (Ct. App. 1986); State v. Dragoman, 130 Idaho 537, 542, 944 P.2d 134, 139 (Ct. App. 1997) superseded by statute on other grounds as stated in State v. Ransom, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002). Consequently, here, it was entirely within the discretion of the court and consistent with the rules of evidence for Investigator Daly, a qualified expert with specialized knowledge, to give his opinion based on his observations of the accident scene regarding a controlling issue in this case -- whether Ellington intentionally drove into the Honda.

Similarly, Investigator Daly is not precluded from giving his opinion simply because there are other "plausible inferences" that could be drawn from the facts of the case.[2] Here, consistent with Rule 703, there was no question regarding Investigator Daly's training or qualifications as an accident reconstruction expert.

[2] There is no authority or support for this argument and, therefore, it is an argument that should not be considered. See Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (court will not consider arguments not supported by citation to law).

(Tr., p.686, L. - p.691, L.6.) There was also no question as to how Investigator Daly reconstructed accidents (Tr., p.692, L.2 - p. 694, L.12) or that he used this experience and training to reconstruct the present accident based on evidence that was gathered in this case (Tr., p.694, L.21 - p.736, L.10; p.864, L.11 - p.919, L.16). Consequently, the district court did not abuse its discretion by allowing Investigator Daly give his expert opinion.

E. The District Court Did Not Abuse Its Discretion By Allowing Dr. Marco Ross To Testify About The Type Of Injuries Sustained By Vonette Larson

Ellington also claims the district court abused its discretion by allowing Dr. Marco Ross, a pathologist, testify. (Appellant's Brief, p.62.) Ellington claims Dr. Ross's testimony was irrelevant and that the probative value of Dr. Ross's testimony was substantially outweighed by prejudice. (Appellant's Brief, p.62-63.) Ellington's claim is without merit. Dr. Ross's testimony was admitted to show that there were injuries to both Vonette Larsen's head and abdomen and that those injuries were consistent with first being hit by a fast moving object, e.g., a fast moving Blazer, as opposed to being hit by a slow moving Blazer. Consistent with the prosecutor's offer of proof, Dr. Ross described the injuries to Vonette Larsen's abdomen and chest area (Tr., p.1251, Ls.3-10) and the injuries to her head (Tr., p.1252, L.13 - p.1255, L.6). Based on his observations and expertise, Dr. Ross concluded that the injuries were consistent with being hit by a blunt fast-moving object as opposed to being drug. (Tr., p.1255, Ls.11-15.) Whether Ellington was driving the Blazer fast, possibly accelerating, was a relevant factor in determining whether Ellington intended to kill Vonette Larsen.

Moreover, because Ellington's intent was the primary issue in the case, the value of Dr. Ross's testimony was particularly probative and was not substantially outweighed by the prejudice of exposing the jury to additional detail of Vonette Larsen's gruesome injuries.

III.
Ellington Has Failed To Demonstrate That His Due Process Rights Were Violated By The Voir Dire Process Of Excusing Jurors

A. Introduction

Ellington's argues that "his right to an unbiased jury was violated when three prospective jurors tainted the entire panel of prospective jurors by expressing their pre-conceived views" that Ellington was guilty of the charged offenses. (Appellant's Brief, pp.68-69.) Ellington's claim fails because he has not shown on the record that any of the actual jurors that sat on his case were biased or that district court abused its discretion when it determined that the statements did not preclude Ellington from receiving an unbiased jury.

B. Standard Of Review

"The determination of whether a juror can render a fair and impartial verdict rests in the sound discretion of the trial court." State v. Luke, 134 Idaho 294, 298, 1 P.3d 795, 799 (2000); State v. Hedger, 115 Idaho 598, 600, 769 P.2d 1331, 1333 (1989). Similarly, a trial judge is given broad discretion in supervision of the jury selection process to ensure that a panel of competent jurors is selected. State v. Merrifield, 109 Idaho 11, 16, 704 P.2d 343, 349 (Ct. App. 1985).

C. Ellington Has Failed To Show That The District Court Abused Its Discretion In Determining That Ellington Failed To Show That He Could Not Select A Fair And Impartial Jury From The Jury Panel

Any claim that the jury was impartial must focus on the jurors who actually sat on the case. State v. Santana, 135 Idaho 58, 63, 14 P.3d 378, 383 (2000) (citing Ross v. Oklahoma, 487 U.S. 81 (1988)). A due process challenge "must fail" where a defendant "does not allege or cannot demonstrate that a member of his or her jury was biased or prejudiced." Santana, 135 Idaho at 63, 14 P.3d at 383.

Ellington broadly asserts that all the jurors were tainted by three prospective jurors that expressed their pre-conceived determinations that Ellington was guilty. (Appellant's Brief, p. 68-70.) Despite his broad assertions, Ellington has submitted no evidence that any of the jurors that sat on his case were biased because three prospective jurors expressed their preconceptions as part of the jury selection. Indeed, Ellington concedes that "no actual bias can be shown." (Appellant's Brief, p.76.) Further, the trial court explicitly found that the jurors were not "tainted" by comments made by the prospective jurors. (Supp. Tr., p.61, Ls.5-25.) Consequently, Ellington has not met his burden of establishing a due process violation, see State v. Scroggins, 91 Idaho 847, 433 P.2d 117 (1967) (exposure of the jury to an article reporting that Scroggins also faced other, separate charges did not violate Scroggins' due process rights), or that the district court abused its discretion when it determined that the remaining jury pool was not biased and that Ellington could receive a fair trial.

IV.
Ellington Has Failed To Establish Any Error Or An Accumulation Of Errors That Deprived Him Of A Fair Trial

"Cumulative error" refers to a number of errors which prejudice a defendant's right to a fair trial. Under the cumulative error doctrine, an accumulation of irregularities, each of which in itself might be harmless, may in the aggregate deprive a defendant of a fair trial. State v. Missamore, 119 Idaho 27, 803 P.2d 528, 533 (1990). Cumulative error may only be found when the court determines that there is merit to more than one alleged error and that the errors, when aggregated, denied the defendant a fair trial. State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000).

Ellington asserts on appeal that cumulative effect of the errors alleged above deprived him of a fair trial. (Appellant's Brief, p.76.) Ellington's contention is without merit, however. Ellington has failed to show that two or more errors occurred in his trial, and, therefore, the doctrine is inapplicable to this case. See State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998) (reaffirming the principle that a necessary predicate to application of the doctrine is a finding of more than one error).

Even if Ellington could establish more than one error, he has failed to show that he did not receive a fair trial. In this case there can be no question that Ellington received a fair trial. When viewed in the full context of the trial record, it cannot reasonably be said that the cumulative effect of the errors alleged by Ellington contributed to his conviction or otherwise affected his substantial rights. Based on the arguments set forth above and the

overwhelming evidence of guilt presented at trial, the state submits that any error that did exist was harmless and did not singularly or in combination result in a denial of due process such as would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997).

CONCLUSION

The state respectfully requests Ellington's convictions be affirmed.

DATED this 19th day of June 2008.

Daniel W. Bower
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of June 2008, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ERIK R. LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

Daniel W. Bower
Deputy Attorney General

DWB/pm