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State v. Mobley Appellant's Reply Brief Dckt. 39074

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39074
)	
v.)	CANYON COUNTY NO. CR 2010-15105
)	
JOSEPH PAUL MOBLEY,)	REPLY BRIEF
)	
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

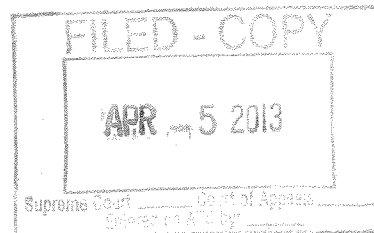
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL.....	2
ARGUMENT	3
The District Court Violated Mr. Mobley's Right To Due Process When The Court Provided The Jury A "Dynamite" Instruction Upon Being Informed That The Jury Was Deadlocked As To One Of The Counts In His Case	3
A. Introduction.....	3
B. The District Court Violated Mr. Mobley's Right To Due Process When The Court Provided The Jury A "Dynamite" Instruction Upon Being Informed That The Jury Was Deadlocked As To One Of The Counts In His Case, And This Error Rose To The Level Of A Fundamental Error	3
CONCLUSION.....	10
CERTIFICATE OF MAILING	11

TABLE OF AUTHORITIES

Cases

<i>Allen v. United States</i> , 164 U.S. 492 (1896)	5
<i>Remmer v. United States</i> , 350 U.S. 377 (1956)	7
<i>State v. Alsanea</i> , 138 Idaho 733 (Ct. App. 2003)	7
<i>State v. Bailey</i> , 94 Idaho 285 (1971)	6
<i>State v. Byerly</i> , 109 Idaho 242 (1985)	5, 6, 7
<i>State v. Day</i> , ___ Idaho ___, ___ P.3d ___, 2013 WL 264548, *4 (2013).....	8, 9
<i>State v. Flint</i> , 114 Idaho 806, 810-813 (1988)	4, 5, 6, 7
<i>State v. Higgins</i> , 122 Idaho 507 (Ct. App. 1992)	7
<i>State v. Newman</i> , 108 Idaho 5, 10 n.6 (1985)	5
<i>State v. Perry</i> , 150 Idaho 209 (2010).....	8, 9
<i>State v. Timmons</i> , 141 Idaho 376 (Ct. App. 2005).....	5, 6
<i>State v. Wallace</i> , 116 Idaho 930 (Ct. App. 1989).....	4

STATEMENT OF THE CASE

Nature of the Case

In this appeal, Joseph Mobley has challenged the district court's provision of a "dynamite instruction" in response to a question from the jury in his case that reflected the jury was deadlocked on one of the charges and did not know how to proceed. This Reply Brief is necessary to address the State's contentions on appeal with regard to this claim.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Mobley's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court violate Mr. Mobley's right to due process when the court provided the jury with a "dynamite" instruction upon being informed that the jury was deadlocked as to one of the counts in this case?

ARGUMENT

The District Court Violated Mr. Mobley's Right To Due Process When The Court Provided The Jury With A "Dynamite" Instruction Upon Being Informed That The Jury Was Deadlocked As To One Of The Counts In This Case

A. Introduction

Mr. Mobley asserts that the transcript in this case – which is presumptively correct and has been certified as such by the court reporter – reflects that the dynamite instruction provided by the district court was submitted to the jury prior to Mr. Mobley being afforded the opportunity to object and prevent this error. Accordingly, because a contemporaneous objection was not possible under the record of the proceedings in this case, Mr. Mobley asserts that the standards for fundamental error should not govern this Court's review.

However, even if this Court were to apply the standards for fundamental error to this claim, Mr. Mobley asserts that he has demonstrated that this instruction amounted to a fundamental error requiring reversal of his conviction.

B. The District Court Violated Mr. Mobley's Right To Due Process When The Court Provided The Jury With A "Dynamite" Instruction Upon Being Informed That The Jury Was Deadlocked As To One Of The Counts In This Case, And This Error Rose To The Level Of A Fundamental Error

As an initial matter, the State asserts in this appeal that there exists some latent ambiguity in the transcript of the proceedings, which reflects that the district court provided the improper dynamite instruction at issue prior to affording Mr. Mobley the opportunity to object to this instruction. (Trial Tr., p.332, Ls.6-17; Respondent's Brief, pp.5-8.) The primary basis for the State's claim is a selected portion of the minutes from Mr. Mobley's trial which indicates that a written response from the court was sent

back to the jury following the court's request for any objections on the part of trial counsel. (R., p.81; Respondent's Brief, pp.6-7.)

Mr. Mobley respectfully submits that the transcript in this case – being both a certified document of the proceedings and accorded a presumption of correctness on appeal – is the controlling record in this case. “The transcript in any case **certified by the reporter** shall be deemed prima facie a correct statement of the testimony taken and proceedings had.” *State v. Wallace*, 116 Idaho 930, 932 (Ct. App. 1989) (emphasis added). The transcript in this case, **unlike** the trial minutes, was certified as a “full, true, and accurate record of the proceedings had,” in this case. (Trial Tr., p.336.) Accordingly, to the extent that the minutes from this proceeding and the trial transcript may reflect inconsistent information, it is the trial transcript – as the document certified by the court reporter as accurate – that would be entitled to the presumption of correctness.

However, Mr. Mobley also asserts that, even if this Court applies the test for fundamental error to his case, he has demonstrated fundamental error in the court's improper exhortation to the jury to continue to deliberate.

First, and contrary to the State's assertion on appeal, the use of dynamite instructions in Idaho has been rendered *per se* inadmissible on constitutional grounds. See *State v. Flint*, 114 Idaho 806, 810-813 (1988). In adopting this rule, the *Flint* Court first noted the constitutional underpinnings of its holding – that, “the constitutional guarantee of due process demands that an accused person receive a fair and impartial trial. This guaranty is violated if jury deliberations are tainted by undue pressure.” *Id.* at 810 (quoting *State v. Clay*, 112 Idaho 261, 263 (Ct. App. 1987)). In response to this

constitutional demand, the Court thereafter held that, “[o]nly a blanket prohibition against dynamite instructions will sufficiently protect deadlocked jurors from coercion.” *Id.* at 812.

Although the State appears to argue that the United States Supreme Court has rejected a *per se* prohibition against dynamite instructions on constitutional due process grounds, this argument overlooks the fact that the *Flint* Court was already aware this was the case when it rendered its decision, but opted to provide heightened constitutional due process protections when it comes to protecting the sanctity of jury deliberations in the face of potential coercion. In fact, the *Flint* Court cited directly to the U.S. Supreme Court decision in *Allen v. United States*¹ and acknowledged that the U.S. Supreme Court had approved the use of dynamite instructions. State courts are free to establish heightened constitutional protections, rather than proceed in lockstep with the holdings of the United States Supreme Court. *See, e.g., State v. Newman*, 108 Idaho 5, 10 n.6 (1985). Accordingly, Mr. Mobley submits that the *Flint* Court has already recognized that the constitutional right of due process, as embodied in both the Fourteenth Amendment and Article 1, § 13 of the Idaho State Constitution, requires this *per se* prophylactic rule against the use of dynamite instructions to overcome an otherwise deadlocked jury.

Additionally, in arguing that the district court’s instruction in this case was not coercive, the State draws primarily on the rationale of two cases – *State v. Timmons*, 141 Idaho 376 (Ct. App. 2005) and *State v. Byerly*, 109 Idaho 242 (1985). The State’s reliance is misplaced. First, this case and *Timmons* are readily distinguishable.

¹ *Allen v. United States*, 164 U.S. 492 (1896).

Second, because the Idaho Supreme Court has overruled the *Byerly* opinion in *Flint* on the very grounds being advanced by the State on appeal, the *Byerly* opinion no longer reflects an accurate statement of the legal standards attendant on this Court's review.

As is set out more fully in the Appellant's Brief, in *Timmons*, the jury never indicated a definite split on any of the charges and the presiding juror affirmatively informed the district court that a verdict could be possibly reached with continued deliberations. *Timmons*, 141 Idaho at 376-377 (see also Appellant's Brief, pp.19-21.) Here, in contrast, the court was informed that the jury was actually split on one of the charges, and there was no additional information that would indicate that further deliberations could resolve this split. (Trial Tr., p.332, Ls. 6-12.) Moreover, as is also noted in the Appellant's Brief, the jury in Mr. Mobley's case was solely exhorted to continue deliberating with the aim of reaching a verdict. They were not told to consider, along with this directive, the corollary that no juror should surrender his or her honest opinion as to guilt or innocence solely because the majority feels otherwise or just to obtain a verdict. (Trial Tr., p.332, Ls.6-12; Instruction 28; see also Appellant's Brief, pp.19-21.)

Additionally, contrary to the State's apparent interpretation, the opinion in *Byerly* was not overruled in *Flint* on grounds independent of the analysis of the permissibility of the dynamite instruction— *Flint* overruled *Byerly* on those grounds. (See Respondent's Brief, p.9.) The *Flint* Court noted within its Opinion that it had previously approved of the giving of dynamite instructions within the case of *State v. Bailey*, 94 Idaho 285 (1971). *Flint*, 114 Idaho at 811. Thereafter, the Court in *Flint* noted several subsequent

opinions that relied upon *Bailey* in sanctioning the use of dynamite instructions at trial. *Id.* The opinion in *Byerly* was expressly listed as one of *Bailey*'s "progeny" – the cases in which a dynamite instruction was improperly given sanction. *Id.* Following the Court's explanation of why it was adopting a *per se* prohibition against the use of dynamite instructions, the *Flint* Court then further held that, "we overrule *State v. Bailey, and its progeny.*" *Id.* at 812 (emphasis added). Accordingly, the standards from *Byerly* as to when a dynamite instruction is permissible under due process principles – rooted as they are in the *Bailey* Opinion – are no longer good law in Idaho and the State's reliance thereupon is misplaced. *Id.*; see also *Byerly*, 109 Idaho at 243-246.

With regard to the State's claim that the record is inadequate to discern whether the failure to object was a tactical decision, Mr. Mobley respectfully submits that the right to a jury free from coercive influences is not subject to the tactical whims of defense counsel. As previously noted in the Appellant's Brief, the right to a jury trial is personal to the defendant alone and cannot be waived as a strategic matter by trial counsel. See, e.g., *State v. Alsanea*, 138 Idaho 733, 742 (Ct. App. 2003) (see also Appellant's Brief, pp.21-22). In fact, the right to a fair and impartial jury is bedrock to the right to a fair trial itself. See *State v. Higgins*, 122 Idaho 506, 601 (Ct. App. 1992). As was noted by the United States Supreme Court, "it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions improperly made." See *Remmer v. United States*, 350 U.S. 377, 382 (1956). Accordingly, because Mr. Mobley's right to a jury trial – in its substance – subsumes a right to a fair and impartial jury free from undue outside influence, and because trial counsel is not empowered to waive this right for the

defendant as a matter of strategy, Mr. Mobley asserts that the failure to object to the coercive instruction provided by the trial court could not be deemed proper trial strategy. See *State v. Day*, ___ Idaho ___, ___ P.3d ___, 2013 WL 264548, *4 (2013).²

Last, Mr. Mobley asserts that he has demonstrated a reasonable possibility that this error affected the outcome of the trial in his case. The State appears to argue in this case that, because the jury ultimately acquitted Mr. Mobley of only one of the two charges following the improper dynamite instruction, that Mr. Mobley cannot establish prejudice because he cannot establish whether the dynamite instruction may have prompted the conviction, as opposed to the acquittal. (Respondent's Brief, pp.11-12.) However, this argument misapprehends the legal standard of what constitutes a "reasonable possibility" that the error contributed to the verdict. See *State v. Perry*, 150 Idaho 209, 226 (2010).

The recent Idaho Court of Appeals opinion in *State v. Day* is instructive on this issue, as a similar argument as to the harmless nature of the error was raised and rejected in that case. See *Day*, 2013 WL 264548, *5. The primary issue in *Day* was whether the jury instructions provided by the district court constituted a variance that impermissibly permitted the jury to convict the defendant for conduct that did not constitute the underlying criminal offense. *Id.* at *1-5. Similar to this case, the State in *Day* argued that, because it was possible that the jury could have convicted solely for conduct criminal under the statute, the defendant could not establish a reasonable possibility that the error affected the outcome of the trial. *Id.* at *5.

² As of the writing of this brief, the decision in *Day* is not yet final and has not been released for publication in the permanent law reports, and therefore is subject to further revision or withdrawal.

The *Day* court rejected this argument as misstating the burden of a defendant with regard to the prejudice prong for fundamental error. Specifically, the *Day* court reasoned, "... *Perry* does not require that Day make such an affirmative showing. Rather, as Day asserts, *Perry* requires that Day must demonstrate there is a *reasonable possibility* that the error affected the outcome of the trial." *Id.* Because it was likewise possible that the jury could have convicted the defendant in *Day* based upon conduct not rendered criminal under the statute defining the charged offense, the *Day* court held that the defendant had established a reasonable possibility that the error affected the outcome of the trial. *Id.*

The same is true in this case. In acknowledging that the jury "may have" already reached the verdict of guilt for the domestic battery charge, and "may have" been pressured by the court into reaching an acquittal on the charge of attempted strangulation, the State is implicitly conceding that the opposite state of affairs is also a possibility. (See Respondent's Brief, p.11 (emphasis added).) That is, it is likewise possible that the judge's directive to continue deliberating with the aim of reaching a verdict pressured the jurors to convict Mr. Mobley of felony domestic battery, while they had previously decided to acquit him of attempted strangulation. Under this state of affairs, and under the standards articulated by *Perry* and *Day*, Mr. Mobley respectfully submits that he has established that a reasonable possibility that the district court's improper exhortation of the jury affected the outcome of this case.

CONCLUSION

Mr. Mobley respectfully requests that this Court vacate his judgment of conviction and sentence, and remand this case for further proceedings.

DATED this 5th day of April, 2013.



SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of April, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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