2-11-2013

State v. Carmouche Respondent's Cross Appellant's Brief Dckt. 38554

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant/Cross-Respondent,	)	NO. 38554
	)	
v.	)	Canyon County CR 2010-16895
	)	
DARREN DUSTIN CARMOUCHE,	)	RESPONDENT'S/
	)	CROSS-APPELLANT'S
Defendant-Respondent/Cross-Appellant.	)	BRIEF
	)	

BRIEF OF RESPONDENT/CROSS-APPELLANT

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

HONORABLE JUNEAL C. KERRICK
District Judge

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

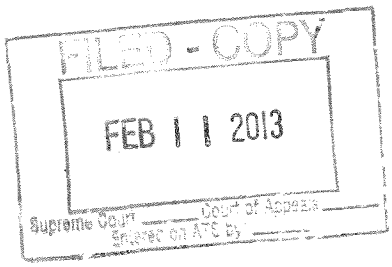
ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SARAH E. TOMPKINS
Deputy State Appellate Public Defender
I.S.B. #7901
3050 Lake Harbor Lane, Suite 100
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-RESPONDENT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-APPELLANT



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STATEMENT OF THE CASE

Nature of the Case

Darren Carmouche was convicted, following a jury trial, of attempted strangulation, second degree kidnapping, aggravated battery, and felony domestic violence with traumatic injury. He was acquitted, following a bench trial, of the State's persistent violator sentencing enhancement allegations for each of these offenses.

The State appeals from the district court's acquittals, and argues: (1) that the district court was required to consider improper hearsay evidence because that evidence was presented without objection during the bench trial; (2) that a new trial, rather than an acquittal, should have been the remedy for the evidentiary deficiency that occurred in the absence of the improper evidence; and (3) that the evidence aside from the improper hearsay evidence was nonetheless sufficient to convict Mr. Carmouche of the enhancement. Mr. Carmouche asserts that the State's appeal in this case seeks relief that would violate his Fifth Amendment protection against double jeopardy in light of the fact that the district court entered a factual acquittal on the merits of the persistent violator allegation, thus barring any attempt at retrial. Accordingly, the State's appeal is moot. Additionally, Mr. Carmouche asserts that, with regard to the first claim alleged by the State, this assertion is directly contrary to the standards attendant on trials where a judge, rather than a jury, is the trier of fact. Further, the State has failed to present a complete record of the relevant proceedings regarding this acquittal, and therefore the absent portions of the record should be presumed to support the district court's actions. Finally, even assuming any error occurred with regard to the acquittal of the persistent

violator enhancement, Mr. Carmouche asserts that any error was harmless in light of the court's statements and disposition at sentencing.

In Mr. Carmouche's cross-appeal, he asserts that the prosecutor in this case committed misconduct, rising to the level of a fundamental error, when the prosecutor elicited testimony regarding his invocation of his Fourth Amendment right to be free from unlawful searches, and then subsequently argued the invocation of Mr. Carmouche's constitutional rights as proof of his guilt of the charged offenses.

Statement of the Facts and Course of Proceedings

Darren Carmouche was charged with attempted strangulation, second degree kidnapping, aggravated battery, and felony domestic violence. (R., pp.32-34; 57-59.) The State subsequently alleged four separate sentencing enhancements – three persistent violator sentencing enhancements for the charges of attempted strangulation, kidnapping, and domestic violence, as well as an allegation that Mr. Carmouche used or attempted to use a deadly weapon during the commission of the alleged aggravated battery. (R., pp.41-43.) The State subsequently amended its allegations of sentencing enhancements to reflect four allegations that Mr. Carmouche was a persistent violator. (R., pp.60-64.)

At the jury trial in this case, the State presented the testimony of the alleged victim, Kirsteen Redmond. (Trial Tr.[1], p.71, Ls.12-15.) She testified that, at the time of the alleged altercation, she and Mr. Carmouche were living together. (Trial Tr., p.71, Ls.16-23.) Ms. Redmond testified that, on that day, she and Mr. Carmouche were using

[1] For ease of reference, citations to the primary transcript of the trial proceedings in this case are made herein by reference to "Trial Tr." All other citations to the transcript are made by reference to the date of the proceeding transcribed.

methamphetamine and had been for several days. (Trial Tr., p.73, Ls.6-10; p.109, Ls.1-5.) She claimed that she and Mr. Carmouche began fighting while high on methamphetamine. (Trial Tr., p.74, Ls.6-8.) The fight, according to Ms. Redmond, was based upon Mr. Carmouche's belief that she was having an affair with a man that the two of them worked with. (Trial Tr., p.74, Ls.9-12.) According to Ms. Redmond's testimony, the fight turned physical. (Trial Tr., p.74, Ls.17-23.)

Ms. Redmond testified that, when Mr. Carmouche was dissatisfied with the answers she was giving him to his questions about whether she was involved with this man, he started punching her in the face. (Trial Tr., p.74, L.19 – p.75, L.9.) By her estimate at trial, Mr. Carmouche punched her over 50 times throughout the fight. (Trial Tr., p.76, Ls.10-21.) She then claimed that Mr. Carmouche grabbed her head and slammed it into a wall, and then hit her in the chest and legs with the handle of a baseball bat. (Trial Tr., p.76, L.22 – p.78, L.7.) Ms. Redmond also testified that Mr. Carmouche grabbed her around the throat with both hands and choked her. (Trial Tr., p.78, L.16 – p.79, L.3.) When asked why she did not leave during the course of this fight, Ms. Redmond responded that Mr. Carmouche continually positioned himself between her and the door and threatened to kill her. (Trial Tr., p.79, Ls.7-15.) She further claimed that Mr. Carmouche threatened to kill her and her children if Ms. Redmond called the police. (Trial Tr., p.81, Ls.6-13.)

Ms. Redmond testified that, after the fight stopped, Mr. Carmouche made her some food and attempted to tend to her wounds. (Trial Tr., p.81, L.24 – p.82, L.4.) When police arrived later, she testified that she pretended to be asleep at first. (Trial Tr., p.85, L.19 – p.86, L.1.) According to Ms. Redmond's testimony, Mr. Carmouche

had pulled the blanket over her head to cover her completely when police began knocking on the door and instructed her to feign sleep. (Trial Tr., p.86, Ls.2-9.)

Ms. Redmond admitted that she did not initially tell police officers that her injuries were caused by Mr. Carmouche upon eventually speaking to police. (Trial Tr., p.87, Ls.3-5.) She claimed that she first told police that she was injured falling down the stairs, then claimed that "people" had caused her injuries without specifying who. (Trial Tr., p.87, Ls.6-18.) Eventually, however, Ms. Redmond told police that Mr. Carmouche was the person who inflicted her injuries. (Trial Tr., p.89, Ls.14-25.) Ms. Redmond testified that her injuries included swelling around her face and ears, bruising all over her face, blood coming from her ear, some cuts on her scalp, chest pain, and a large bruise on her left thigh. (Trial Tr., p.90, Ls.6-13.) Ms. Redmond also testified that she had a fractured rib. (Trial Tr., p.124, Ls.8-11.) She further testified that, following the alleged strangulation, her throat was tender, she had difficulty swallowing, and her voice was raspy for several weeks after that. (Trial Tr., p.93, Ls.1-18.)

With regard to her questioning by police, Ms. Redmond acknowledged that she was interrogated by two police officers for approximately an hour before claiming that Mr. Carmouche had harmed her. (Trial Tr., p.118, L.9 – p.119, L.25.) During this questioning, officers repeatedly suggested to Ms. Redmond that Mr. Carmouche was the source of her injuries. (Trial Tr., p.119, Ls.12-25.) She also testified that the officers made comments that Mr. Carmouche treated Ms. Redmond worse than their dog and that Mr. Carmouche could come back to kill her unless she told police that he harmed her. (Trial Tr., p.120, Ls.9-18.) However, Ms. Redmond denied that her accusations

against Mr. Carmouche were the product of police coercion. (Trial Tr., p.125, L.21 – p.126, L.7.)

The State also presented the testimony of several law enforcement officers who were involved in the investigation of the charged offenses. First, the State presented the testimony of Officer Steven Uriguen of the Nampa Police Department. (Trial Tr., p.28, Ls.7-11.) Officer Uriguen was on patrol on the morning of the alleged altercation when he received a call for him to perform a welfare check regarding a potentially suicidal person. (Trial Tr., p.31, L.1 – p.32, L.7.) After unsuccessfully trying to find the man who placed a call to a suicide hotline, who Officer Uriguen knew as "Darren", the officer arrived at Mr. Carmouche's residence. (Trial Tr., p.32, L.2 – p.34, L.13.)

The officer initially received no response when he knocked on Mr. Carmouche's door. (Trial Tr., p.34, Ls.14-20.) After knocking harder, Officer Uriguen heard a male voice inside the home call out that everything was fine and the officer could leave. (Trial Tr., p.34, L.21 – p.35, L.5.) But Officer Uriguen told the man inside, subsequently identified as Mr. Carmouche, that he was not going to leave until the officer could verify that Mr. Carmouche was alright. Officer Uriguen further told Mr. Carmouche that the officer would break the door down if Mr. Carmouche did not come outside. (Trial Tr., p.35, L.22 – p.36, L.5.)

Mr. Carmouche then came out of his house to talk with the officers outside of his house. (Trial Tr., p.36, Ls.14-19.) Mr. Carmouche informed the police that he had called the suicide hotline, and explained that he was upset due to some individuals having "hit on" his girlfriend. (Trial Tr., p.37, Ls.16-24.) During Officer Uriguen's testimony, the prosecutor questioned the officer about the fact that Mr. Carmouche

initially did not permit police to look into or enter his home during the initial point of his being questioned and that he had invoked his Fourth Amendment rights in the process. (Trial Tr., p.37, L.25 – p.39, L.1.)

Although Mr. Carmouche expressed to the officers that he did not wish them to enter his house, he did allow Officer Uriguen to open the front door and call out to Ms. Redmond. (Trial Tr., p.38, L.20 – p.39, L.3.) The prosecutor again elicited further testimony from Officer Uriguen regarding Mr. Carmouche not permitting officers to enter his home. (Trial Tr., p.39, Ls.4-14.) Eventually, the officer convinced Mr. Carmouche to permit Officer Uriguen to stick his head in the doorway to try to talk to Ms. Redmond. (Trial Tr., p.39, Ls.9-14.)

After the officer again called out to Ms. Redmond and received no response, Officer Uriguen convinced Mr. Carmouche to allow him to put more of his body inside the house to check for Ms. Redmond. (Trial Tr., p.39, L.19 – p.40, L.9.) From this vantage, Officer Uriguen testified that he could observe disarray in the living room, along Ms. Redmond, who was laying on the couch with her back to the officer. (Trial Tr., p.40, Ls.4-15.) Officer Uriguen once again told Ms. Redmond that she needed to come outside and talk to the officers. (Trial Tr., p.40, Ls.19-25.)

Ms. Redmond did not respond at first to the officer's commands. (Trial Tr., p.41, Ls.1-2.) Mr. Carmouche then began to encourage Ms. Redmond to come outside and speak with police. (Trial Tr., p.41, Ls.3-8.) After a time, Ms. Redmond came outside of the house wrapped in a blanket. (Trial Tr., p.41, Ls.9-12.) When she came outside, Officer Uriguen testified that he observed a large bruise over Ms. Redmond's left and right eyes, along with dried blood on her face and a scratch on her chest. (Trial Tr.,

p.41, Ls.13-18.) Later, the officer saw a large bruise on Ms. Redmond's leg. (Trial Tr., p.43, Ls.13-17.)

Because there were several officers at the scene, Officer Uriguen had two other officers wait outside with Mr. Carmouche, and then the officer went inside the house to question Ms. Redmond about her injuries. (Trial Tr., p.41, L.25 – p.42, L.20.) After talking with her for about an hour, Officer Uriguen called for paramedics to treat Ms. Redmond's injuries. (Trial Tr., p.42, L.21 – p.43, L.12.) The officer then questioned Mr. Carmouche briefly. (Trial Tr., p.50, Ls.14-20.) Although Mr. Carmouche did not initially reveal that Ms. Redmond was injured or explain how she was injured, he eventually stated that someone else had caused her injuries. (Trial Tr., p.50, L.21 – p.51, L.4.) Officer Uriguen also received permission from Ms. Redmond to search the home. Inside, he found numerous items scattered around, as well as broken items, and a hole in one of the walls with what appeared to be blood nearby. (Trial Tr., p.44, L.15 – p.45, L.22.) Additionally, Officer Uriguen located a baseball bat in an upstairs room and saw clumps of hair in a bathroom garbage can. (Trial Tr., p.45, L.23 – p.46, L.3.)

Although the apartment looked to be in disarray, the officer could not testify as to whether this was the condition of the apartment at any time prior to the morning of the alleged altercation. (Trial Tr., p.61, Ls.19-22.) He also did not see any bloody rags, clothing, or signs of blood in any sink other than the small drop of what the officer believed to be blood near a hole in the wall. (Trial Tr., p.62, L.4 – p.64, L.21.)

Sergeant Mike Wagoner of the Nampa Police Department also testified on behalf of the State. (Trial Tr., p.129, Ls.11-13.) As with Officer Uriguen, Sergeant Wagoner responded to Mr. Carmouche's home on the morning of the alleged altercation. (Trial

Tr., p.134, Ls.10-17.) When the officer arrived at the scene, officers were already standing outside with Mr. Carmouche. (Trial Tr., p.135, L.10 – p.136, L.18.) Mr. Carmouche did not appear to be agitated or aggressive toward the officers, and Sergeant Wagoner could not observe any marks or blood stains on him anywhere. (Trial Tr., p.152, Ls.7-19.)

Shorty thereafter, Sergeant Wagoner testified that his attention was diverted when Ms. Redmond also came out of the house. (Trial Tr., pp.9-18.) The officer testified that Ms. Redmond was walking slowly out of the apartment, as though she were in pain. (Trial Tr., p.318, Ls.11-17.) He also saw that her face was swollen and bruised. (Trial Tr., p.139, Ls.4-15.) Given her observable injuries, Sergeant Wagoner and Officer Uriguen took Ms. Redmond inside the home to question her. (Trial Tr., p.139, L.24 – p.140, L.3.) This questioning took over an hour. (Trial Tr., p.140, Ls.4-6.)

During this questioning, Sergeant Wagoner testified that Ms. Redmond informed him that she had been struck by a bat. (Trial Tr., p.141, Ls.7-8.) Based on this, the officer located a baseball bat in an upstairs bedroom which Ms. Redmond stated was the bat that she had been hit with. (Trial Tr., p.141, L.6 – p.144, L.6.) The officer additionally testified that Ms. Redmond claimed that Mr. Carmouche slammed her head into a wall. (Trial Tr., p.145, Ls.5-9.) Sergeant Wagoner testified that he examined the wall in the kitchen, where Ms. Redmond claimed that this occurred, and that he did find a hole in the wall that was approximately the same height as Ms. Redmond's head. (Trial Tr., p.145, Ls.5-18.)

Another of the officers who responded to Mr. Carmouche's residence, Officer John Weirum, also testified at trial. (Trial Tr., p.176, Ls.7-12.) Officer Weirum is a crime

scene investigator who was called to Mr. Carmouche's home. (Trial Tr., p.176, L.16 – p.178, L.17.) After initially waiting outside with Mr. Carmouche for over an hour, Officer Weirum walked through the house to videotape various items of interest. (Trial Tr., p.181, L.23 – p.183, L.5.) Among the items noted by the officer in his testimony were a small baseball bat that had been removed from an upstairs bedroom, a couple of clumps of hair on an ottoman and on the floor of the living room, and a small amount of what appeared to be blood in the kitchen. (Trial Tr., p.183, L.19 – p.184, L.16.) However, Officer Weirum was unable to say whether the swabs taken of what appeared to be blood were ever actually tested. (Trial Tr., p.190, Ls.5-15.)

On cross-examination, Officer Weirum testified that he had never been in Mr. Carmouche's apartment prior to the morning following the alleged altercation, and therefore could not say what the condition of the apartment had been before entering it. (Trial Tr., p.197, L.22 – p.198, L.5.) The officer further acknowledged that he was not aware of any testing for blood or fingerprints of any items within the home. (Trial Tr., p.199, Ls.11-16.) Officer Weirum also did not recall seeing any injuries on Mr. Carmouche during the time he was outside of the residence on that morning. (Trial Tr., p.203, Ls.16-18.)

Detective Troy Hale was the next witness presented by the State. (Trial Tr., p.222, L.24 – p.223, L.3.) Detective Hale interviewed Mr. Carmouche at the police station. (Trial Tr., p.225, L.13 – p.226, L.14.) According to the detective, when asked how Ms. Redmond acquired her injuries, Mr. Carmouche stated that he thought she had left the apartment in the middle of the night and came home injured. (Trial Tr., p.227, Ls.2-11.) When asked who he thought injured Ms. Redmond, Mr. Carmouche

responded that he suspected two of his co-workers, but would not tell Detective Hale the names of these men. (Trial Tr., p.228, Ls.11-21.) According to the detective's testimony, Mr. Carmouche was skeptical when told that Ms. Redmond had told police that he was the source of her injuries. (Trial Tr., p.229, L.21 – p.230, L.9.) However, he admitted on cross-examination that Mr. Carmouche did not appear to be aggressive or angry towards Detective Hale during the interview. (Trial Tr., p.236, L.14 – p.237, L.15.)

Finally, the State presented the testimony of Detective Angela Weekes of the Nampa Police Department. (Trial Tr., p.244, Ls.7-16.) As the primary investigator in Mr. Carmouche's case, Detective Weekes was responsible for making decisions as to how the investigation would proceed. (Trial Tr., p.280, Ls.19-24.) In this capacity, Ms. Weekes testified that she decided not to forensically test any material suspected of being blood, and not to test the baseball bat recovered by police for finger prints. (Trial Tr., p.282, L.10 – p.283, L.10.) She testified that she did not do so because none of the information received by police from either Mr. Carmouche or Ms. Redmond indicated that any individuals other than those two had been present in the home. (Trial Tr., p.283, L.19 – p.284, L.3.)

However, on cross-examination, Detective Weekes admitted she was aware that Ms. Redmond had, at one point, made statements that other people had been the ones to have perpetrated the assault against her. (Trial Tr., p.285, Ls.3-8.) The detective further acknowledged that evidence of another person's fingerprints on the bat could be exculpatory evidence. (Trial Tr., p.285, Ls.9-14.) Additionally, Detective Weekes testified that x-ray examinations of Mr. Carmouche's hands did not reveal any evidence

of injuries, despite Ms. Redmond's claim that he had punched her more than 50 times over the course of several hours. (Trial Tr., p.286, L.10 – p.287, L.1.)

In addition to these officers, the State presented the testimony of Dr. Mark Burriesci, who was an emergency room physician who attended to Ms. Redmond's injuries. (Trial Tr., p.163, L.7 – p.165, L.9.) Dr. Burriesci testified that Ms. Redmond had bruising on her left ear, the left side of her face, and on the back of her head. (Trial Tr., p.168, Ls.12-18.) There was also bruising around her eyes and lacerations on her lip and right ear, along with a fractured tooth. (Trial Tr., p.168, Ls.16-21.) Dr. Burriesci testified that Ms. Redmond also had abrasions on her neck and complained of chest discomfort. (Trial Tr., p.168, Ls.22-24.) An x-ray revealed that one of Ms. Redmond's ribs was fractured. (Trial Tr., p.169, Ls.15-25.) The doctor testified that Ms. Redmond also had scattered bruising throughout her body. (Trial Tr., p.168, L.25 – p.169, L.8.)

Following the presentation of the State's evidence, Mr. Carmouche presented the testimony of his alibi witness, Richard Damore. (Trial Tr., p.293, Ls.14-16.) He testified that he was a friend of Mr. Carmouche. (Trial Tr., p.294, Ls.3-13.) According to Mr. Damore, Mr. Carmouche was with him at the time of the charged offenses. (Trial Tr., p.294, L.21 – p.295, L.2.) He testified that he had picked Mr. Carmouche up a couple of days before the charged offenses. According to Mr. Damore's testimony, he saw Ms. Redmond on the morning he picked up Mr. Carmouche, and she had no observable injuries at that time. (Trial Tr., p.295, L.3 – p.296, L.6.) He then drove Mr. Carmouche back to the place where he was staying at the time – in a shed behind a house – where the two men did methamphetamine over the course of the next two days. (Trial Tr., p.296, L.7 – p.299, L.3.)

Mr. Damore testified that, upon returning to Mr. Carmouche's home, the residence was in a state of disarray and Ms. Redmond looked "battered." (Trial Tr., p.299, L.10 – p.300, L.4.) Ms. Redmond was also very angry with Mr. Carmouche for being gone. (Trial Tr., p.299, L.21 – p.300, L.4.) Given the fact that Ms. Redmond looked injured, coupled with her angry response towards Mr. Carmouche, Mr. Damore then left Mr. Carmouche's home. (Trial Tr., p.300, Ls.5-15.)

Mr. Damore did admit that, in addition to being close friends with Mr. Carmouche, the two were also incarcerated together prior to his trial. (Trial Tr., p.298, Ls.7-11; p.303, Ls.7-21.) He denied that he and Mr. Carmouche discussed Mr. Carmouche's pending charges while they were incarcerated. (Trial Tr., p.303, L.12 – p.304, L.9.) Mr. Damore further claimed that no one witnessed Mr. Carmouche during the time that Mr. Carmouche was staying with Mr. Damore. (Trial Tr., p.304, Ls.18-21.) This included the woman who owned the home behind which they were staying. (Trial Tr., p.306, Ls.12-16.) In addition, Mr. Damore denied that Mr. Carmouche had sought to induce him to testify falsely in Mr. Carmouche's trial. (Trial Tr., p.312, L.22 – p.315, L.10.)

Mr. Carmouche also testified on his own behalf. (Trial Tr., p.326, Ls.8-13.) He testified, as was testified by Mr. Damore, that he was with Mr. Damore at the time of the alleged offenses; and that he only became aware of Ms. Redmond's injuries upon returning home thereafter. (Trial Tr., p.326, L.21 – p.328, L.12.) Mr. Carmouche testified that Ms. Redmond was very angry that he had not been home, and Mr. Damore left because of this. (Trial Tr., p.329, Ls.5-23.) According to Mr. Carmouche's testimony, Ms. Redmond told him that, on the prior evening, she had invited two other

men over while he was gone and she was injured by them. (Trial Tr., p.330, Ls.13-18.) Although he tried to get Ms. Redmond to go to police several times, Mr. Carmouche testified that this did not happen. (Trial Tr., p.330, L.25 – p.331, L.7.) Eventually, he and Ms. Redmond argued. (Trial Tr., p.331, Ls.8-20.) Mr. Carmouche testified that he called a suicide hotline as a result of this argument. (Trial Tr., p.331, L.21 – p.332, L.16.) Mr. Carmouche denied having struck, choked, or threatened Ms. Redmond. (Trial Tr., p.335, Ls.9-25.) He further testified that he had lied to police when he claimed to have been home the previous night – according to Mr. Carmouche, he was worried about the potential consequences of his drug use and therefore lied because he was scared. (Trial Tr., p.336, L.12 – p.337, L.10.)

On cross-examination, the State questioned Mr. Carmouche about the inconsistencies between his trial testimony and his prior statements to police, as well as his failure to provide police with the alibi that he testified to at trial. (Trial Tr., p.349, L.23 – p.355, L.1.) Mr. Carmouche also admitted that he had sent Ms. Redmond a letter while incarcerated in which he apologized to her. (Trial Tr., p.355, Ls.9-22.) Mr. Carmouche claimed that he apologized to Ms. Redmond out of guilt for not having been there at the time she was injured. (Trial Tr., p.359, L.15 – p.360, L.6.)

The State then called a rebuttal witness to the stand, Andrea Deaugustineo. (Trial Tr., p.367, Ls.16-17.) Ms. Deaugustineo owned the home where Mr. Damore claimed to have been staying with Mr. Carmouche at the time of the alleged offenses. (Trial Tr., p.367, Ls.20-21.) While she acknowledged that Mr. Damore stayed behind her house in a shed, Ms. Deaugustineo denied that she had ever seen Mr. Carmouche there. (Trial Tr., p.368, L.14 – p.370, L.6.)

During closing arguments, the State referenced the fact that Mr. Carmouche closed the door behind him when he first went outside his home to talk to police. (Trial Tr., p.378, Ls.6-7.) The prosecutor then continued:

> When they asked about his girlfriend he had a fight with, well, she's asleep. You can't see her. **I know my rights. You can't go in. Why? Why, if he came home and found her beaten this way and heard these stories? Would that be your response?**

(Trial Tr., p.378, Ls.8-12 (emphasis added).)

The jury convicted Mr. Carmouche of attempted strangulation, kidnapping, aggravated battery, and felony domestic battery. (Trial Tr., p.410, L.24 – p.411, L.8; R., pp.133-135.) Thereafter, Mr. Carmouche proceeded to a bench trial on the State's persistent violator allegations. (11/12/10 Tr., p.1, Ls.5-20.) During this trial, the State presented evidence of Mr. Carmouche's driver's license, and attempted to put into evidence an ILETS report regarding his driver's license information that included his social security number. (11/20/10 Tr., p.20, L.7 – p.31, L.10.) Although the officer testifying for the State claimed that she was familiar with how to run a criminal history check using this program, she admitted that she was not the custodian of these records, these records were not kept by the Nampa Police Department itself, and the officer was not even familiar with what the acronym "ILETS" stood for. (11/20/10 Tr., p.32, L.3 – p.33, L.17.) Although Mr. Carmouche did not object to the prior testimony during which the officer recited what the ILETS report indicated his social security number to be, the State's request for the admission of the ILETS report itself was withdrawn by the State in the face of Mr. Carmouche's hearsay objection. (11/20/10 Tr., p.31, L.4 – p.35, L.5.)

Following the presentation of the State's evidence, the district court determined that the State had "barely" met its burden of establishing the prior convictions necessary

to sustain the State's persistent violator allegations. (11/20/10 Tr., p.60, Ls.13-19.) The trial court then indicated its intent to enter a judgment reflecting such. (11/20/10 Tr., p.60, Ls.13-19.)

However, no such judgment or order was ever entered. Instead, the district court subsequently entered a written order of its factual findings and legal conclusion that Mr. Carmouche was **not** a persistent violator of the law. (R., pp.156-162.) After reviewing the testimony and evidence presented, the district court determined that its prior consideration of the officer's testimony as to the contents of the ILETS report was in error. (R., p.156.) The district court ultimately held that the State had not presented sufficient evidence to establish Mr. Carmouche's identity as the subject of the prior alleged felony convictions. (R., pp.158-162.) Accordingly, the district court entered an order acquitting Mr. Carmouche of these allegations. (R., pp.162; 180-181.)

Despite the fact that Mr. Carmouche had been factually acquitted of the persistent violator allegations by the district court, the State nevertheless filed a motion to reconsider this acquittal with the district court. (R., pp.169-172.) In this motion, the State argued that the proper remedy for the evidentiary error identified by the district court in acquitting Mr. Carmouche was to order a new trial. (R., pp.170-172.) The State did not acknowledge within this motion that the district court had found insufficient evidence to support the State's allegations. (R., pp.170-172.)

Following a hearing on the matter, the district court denied the State's motion for reconsideration and entered a formal judgment of acquittal on the State's persistent violator allegations. (R., pp.180-181.) Thereafter, Mr. Carmouche filed a motion for a

mistrial or, alternatively, a new trial with the district court. (R., pp.183-202.) This motion was denied by the district court. (R., pp.231-267.)

Mr. Carmouche was sentenced to 15 years, with four years fixed, for each of his convictions of attempted strangulation, second degree kidnapping, and aggravated battery. For his conviction of domestic battery with traumatic injury, Mr. Carmouche received a sentence of 10 years, with six years fixed. (6/20/11 Tr., p.54, L.15 – p.55, L.6; R., pp.299-300.) Each of these sentences was ordered to run concurrently. (6/20/11 Tr., p.55, Ls.7-8; R., p.300.)

The State filed a timely notice of appeal from the district court's judgment of acquittal on the persistent violator sentencing enhancement allegation. (R., p.212.) Mr. Carmouche likewise timely appealed from his judgments of conviction and sentences. (R., p.309.)

ISSUES

1. Should this Court dismiss the State's appeal because this appeal is barred by Mr. Carmouche's constitutional protection against double jeopardy?

2. Assuming, arguendo, that the State's appeal is not brought in violation of the Fifth Amendment prohibition against Double Jeopardy, has the State failed to show error on the part of the district court in acquitting Mr. Carmouche of the State's persistent violator enhancement allegations?

3. Did the prosecutor commit misconduct, rising to the level of a fundamental error, when the prosecutor argued evidence of Mr. Carmouche's refusal to permit police to enter his home as supporting an inference of guilt of the charged offenses?

ARGUMENT

I.

This Court Should Dismiss The State's Appeal Because This Appeal Is Barred By The Constitutional Prohibition Against Double Jeopardy Set Forth In The Fifth Amendment

A. Introduction

As part of its claims on appeal, the State asks this Court to hold that the district court erroneously entered a judgment of acquittal after excluding from its consideration improper hearsay evidence. The State now seeks a new trial as an alternative ground of relief. (Appellant's Brief, pp.7-10.) However, because the district court's order constituted a factual acquittal on the merits, and a resolution of a material element of the persistent violator allegation in Mr. Carmouche's favor, the Fifth Amendment's prohibition against double jeopardy precludes this remedy. Accordingly, because the relief requested by the State is constitutionally unavailable, the State's claims on appeal are moot and should be dismissed by this Court.

B. Standard of Review

Constitutional issues are issues of pure law that this Court reviews *de novo*. *See, e.g., State v. Grazian*, 144 Idaho 510, 513 (2007). This Court also exercises *de novo* review over questions of jurisdiction. *See Taylor v. Maile*, 146 Idaho 705, 709 (2009); *Weller v. State*, 146 Idaho 652, 653 (Ct. App. 2008). The question of the on-going justiciability of a case is likewise an issue of law that is reviewed *de novo*. *See, e.g., Chapman Lumber, Inc. v. Tager*, 952 A.2d 1, 15 (Conn. 2008). That is because, "justiciability is a question of the jurisdiction of the court over the matter at issue." *State v. Rhoades*, 120 Idaho 795, 801 (1991).

C. This Court Should Dismiss The State's Appeal Because This Appeal Is Barred By The Constitutional Prohibition Against Double Jeopardy

Mr. Carmouche asserts that the district court, upon excluding some of the State's evidence in this case, resolved an essential element of the offense of felony driving under the influence in his favor and, therefore, the State's instant appeal seeks a remedy in violation of his Fifth Amendment protection against double jeopardy. Because double jeopardy principles preclude the State from seeking retrial on its persistent violator sentencing allegation, Mr. Carmouche submits that the State's appeal is moot and therefore should be dismissed.

1. The Fifth Amendment Prohibition Against Double Jeopardy Precludes Retrial Of A Defendant Following An Acquittal That Resolved An Element Of The Offense In The Defendant's Favor, Regardless Of The Legal Soundness Of Any Ruling Excluding The State's Evidence

The Due Process Clause of the Fifth Amendment of the U.S. Constitution prevents the State from seeking a second prosecution for the same offense after an acquittal. *See, e.g., Ohio v. Johnson*, 467 U.S. 493, 497-498 (1984); *see also Ball v. United States*, 163 U.S. 662 (1896). It is this prohibition that generally precludes the State from seeking a new trial through the pursuit of an appeal after the defendant has been acquitted of the charged offense. *See, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). As noted by the U.S. Supreme Court, "it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear erroneous." *Green v. United State*, 355 U.S. 184, 188 (1957). This is because, "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense

and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 187-188.

Whether a defendant has been acquitted by a trial court of an offense for double jeopardy purposes turns upon whether the district court, in acquitting the defendant, resolved some or all of the factual elements of the offense in the defendant's favor. The U.S. Supreme Court in *Martin Linen Supply Co.* has held that the test for whether an acquittal has occurred is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571. And the result of an acquittal presents a double jeopardy bar regardless of the underlying soundness of the trial court's ruling upon which the acquittal is predicated. "The fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . . affects the accuracy of that determination but it does not alter its essential character." *United States v. Smalis*, 476 U.S. 140, 144 n.7 (1986) (quoting *United State v. Scott*, 437 U.S. 82, 98 (1978)) (omissions in the original).

Given this, when a trial court acquits a defendant of an offense, the State is precluded from seeking to appeal that acquittal in order to obtain a retrial or any other subsequent proceedings in which any factual issues regarding the underlying offense will be litigated:

> When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it

> might result in a second trial, but also if reversal would translate into "'further proceedings of some sort devoted to factual issues going to the elements of the offense charged.'"

Smalis, 476 U.S. at 145-146; *See also Sanabria v. United States*, 437 U.S. 54, 69 (1978) ("judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error").

2. The Existence Of Two Prior Felony Convictions Is An Essential Element Of The Sentencing Enhancement As A Persistent Violator Under I.C. 19-2514; And The District Court Resolved This Element In Mr. Carmouche's Favor Upon Excluding Some Of The State's Evidence, And Thereafter Acquitted Mr. Carmouche Of This Enhancement; And Therefore The State's Appeal Is Barred By Double Jeopardy

Mr. Carmouche was alleged to have been a persistent violator of the law, and therefore eligible for a sentencing enhancement with regard to each of the State's charged offenses. (R., pp.60-64.) Idaho Code § 19-2514 provides generally that any person who has been found to have two prior felony convictions, not arising within the same incident, is eligible for a sentencing enhancement as a persistent violator of the law upon a third conviction. *See* I.C. 19-2514; *State v. Brandt*, 110 Idaho 341, 344 (Ct. App. 1986). Upon proof of at least two prior felonies, the statutory maximum punishment for any felony offense is extended to up to life in prison, with a statutory minimum sentence of at least 5 years. *Id.*

Following the evidentiary portion of the bench trial on the State's persistent violator enhancement allegation, but prior to entering any formal order of conviction, the district court issued its findings of fact, conclusions of law, and order acquitting Mr. Carmouche of the persistent violator sentencing enhancement. (R., pp.156-163.) The district court also entered a separate written order acquitting him of this

enhancement. (R., pp.180-182.) In acquitting Mr. Carmouche, the district court rested its decision on the failure of the State to establish proof beyond a reasonable doubt of Mr. Carmouche's identity as the same individual formerly convicted in the prior judgments presented by the State. (R., pp.158-162.) After this acquittal, double jeopardy prohibitions attached to this allegation and the Double Jeopardy Clause precludes the State from seeking a second trial on the felony allegation through this appeal. As such, this Court should dismiss this appeal for want of jurisdiction.

The acquittal of Mr. Carmouche by the district court in this case is similar to that found by the Idaho Supreme Court in *State v. Howard* to preclude the relief sought by the State on appeal under double jeopardy grounds. *See State v. Howard*, 150 Idaho 471, 478-482 (2011). In *Howard*, the Court noted that an acquittal for double jeopardy purposes occurs whenever there is a "'resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Id.* at 478-479 (quoting *Martin Linen Supply*, 430 U.S. at 571). The *Howard* Court found that the district court's exclusion of evidence relating to prior convictions for purposes of a charge of felony driving under the influence fell within this definition. *Id.* at 479-480. Because the State bore the burden of proving, beyond a reasonable doubt, the prior convictions of driving under the influence in order to establish its charge of felony driving under the influence, the *Howard* Court held that the district court's acquittal of the felony enhancements barred the State from obtaining the relief sought on appeal. *Id.* at 480-482.

Because the state of the acquittal in *Howard* and that in this case are nearly identical, this Court should do the same. Moreover, the district court, although indicating its belief that the State had "barely" passed the threshold for proof beyond a

reasonable doubt at the persistent violator bench trial, never entered any formal or general verdict of guilty based upon factual findings that would open the door to permit the State's appeal. *See Howard*, 150 Idaho at 481; *United States v. Jenkins*, 420 U.S. 358, 366-367 (1975). For example, the United States Supreme Court in *Lee v. United States* noted that the trial court's comments that there was "no question about [the defendant's] guilt," and that guilt had been established, "beyond any reasonable doubt in the world" were insufficient to constituted a general verdict of guilt. *Lee v. United States*, 432 U.S. 23, 28 n.4 (1977).

Moreover, the recent United States Supreme Court Opinion in *Blueford v. Arkansas* sets forth that, where a formal entry of a finding of guilt has not yet been made, and where there is nothing to prohibit further deliberations on any finding of guilt or innocence prior to memorialization of the verdict, even a clear statement that the fact finder has determined guilt or innocence on an offense is not sufficient to terminate jeopardy. *See Blueford v. Arkansas*, ___ U.S. ___, 132 S. Ct. 2044, 2050 (2012). In *Blueford*, the jury in the defendant's first trial informed the trial court that the jury had unanimously rejected the State's charge of first degree murder, but could not reach a consensus as to the lesser charge of manslaughter. *Id.* at 2049. When the jury was unable to reach a verdict as to the lesser charge, the district court declared a mistrial prior to the entry of any formal verdict form by the jury that memorialized the jury's unanimous finding that the State had not established its capital murder charge. *Id.* When the State sought to retry the defendant in *Blueford* on the capital murder charge, the defendant asserted that this would violate his Fifth Amendment protection against double jeopardy in light of the jury's statement that it had acquitted him of the offense.

The *Blueford* Court rejected the notion that the jury's express statement that it had acquitted the defendant was sufficient for purposes of double jeopardy. *Blueford,* 132 S. Ct. at 2050-52. The crux of the reason why the Court reached this holding was that there was nothing to prevent the jury, after initially informing the district court that it had acquitted the defendant of the charge of capital murder, from reconsidering the issue of guilt or innocence and reaching a different result prior to the entry of a formal order regarding such a finding. *Id.*

Similarly, in this case there was nothing preventing the district court from revisiting the evidence presented at the bench trial on the persistent violator enhancement prior to the entry of its written findings of fact and conclusions of law – at which point the district court in this case made a finding of an acquittal. The district court's statement at the close of the presentation of evidence during the bench trial on the persistent violator enhancement is not meaningfully distinguishable from the oral statement rendered by the jury in *Blueford* indicating an acquittal. Accordingly, the district court's statements at this trial do not constitute a verdict, formal or otherwise, for double jeopardy purposes. The only actual verdict in this case with regard to the persistent violator enhancement is that acquitting Mr. Carmouche.

The Ninth Circuit Court of Appeals' Opinion in *United States v. Blanton* is also highly instructive for this Court given the similarity to the facts of this case. The defendant in *Blanton* was charged with a sentencing enhancement based upon the State's allegation that he had three prior violent felony convictions. *United States v. Blanton*, 476 F. 3d 767,768 (9th Cir. 2008). He faced a bifurcated trial in which his underlying criminal charge was tried to a jury, but the sentencing enhancement was

tried before the district court. *Id.* at 769. The defendant challenged the State's use of two of the three convictions alleged on the basis that the prior offenses were non-jury juvenile adjudications that could not stand as predicate offenses for the enhancement. *Id.* The district court agreed with the defendant's assertion, excluded the evidence of the prior juvenile convictions, and thereafter entered a judgment of acquittal based upon the legal insufficiency of the remaining State's evidence. *Id.* The State in *Blanton* filed a notice of appeal from the acquittal. *Id.* The defendant asserted that the State's appeal was barred by the Double Jeopardy Clause of the Fifth Amendment, and argued, in the alternative, that the district court's exclusion of the evidence was proper. *Id.*

The *Blanton* Court determined that, regardless of the legal soundness of the district court's exclusion of the State's evidence, the Double Jeopardy Clause barred the State's appeal because the district court rendered an acquittal of the sentencing enhancement by finding that the remaining evidence presented by the State was legally insufficient to sustain a conviction. *Id.* at 770. The court then noted that it was irrelevant for double jeopardy purposes whether the acquittal was based on legal error, therefore, jeopardy attached to the trial court's judgment of acquittal, "whether it was made in error or not." *Id.* at 771. Because double jeopardy barred the State's appeal, the court in *Blanton* dismissed the appeal. This Court should do the same.

This view is further consistent with what the Idaho Court of Appeals has recognized, in dicta, in *State v. Nichols*, 124 Idaho 651, 656 (Ct. App. 1993). There, the court recognized that if the district court excludes evidence in support of an element of a criminal offense and an acquittal ensues, "the state is given no second chance through

a retrial *nor an opportunity to reverse the acquittal by challenging the trial court's evidentiary ruling on appeal.*" *Id.* (emphasis added).

The district court's actions, in this case, are analogous to the trial court's actions in *Sanabria*. In that case, the court at first admitted evidence at trial that the defendant was a participant in an unlawful gambling business that participated in "numbers betting," even though the initial charge against the co-defendants was brought pursuant to a statutory section that only rendered unlawful gambling activity related to horse races. *Sanabria*, 437 U.S. at 56-58. Although the court had admitted the State's evidence regarding alleged numbers betting activity against the defendant, and further initially denied defense counsel's motion to exclude or strike the State's evidence, the trial court subsequently determined that the State's evidence should be excluded. *Id.* at 57-59. After excluding this evidence, the trial court then granted the defendant's motion for a judgment of acquittal. *Id.* at 59.

The *Sanabria* Court held that the prohibition against double jeopardy barred a second trial once the district court decided to exclude or strike the State's evidence, and then subsequently entered an order acquitting the defendant of the charged offense. *Id.* at 63-78. In addition, the trial court in *Sanabria* indicated that, had it not excluded the evidence regarding the "numbers betting," it would not have granted the judgment of acquittal. *Id.* at 60. (R., p.276.) However, this did not preclude the Court in *Sanabria* from concluding that double jeopardy precluded retrial of the defendant in light of the court's acquittal. *Id.* at 77-78.

At base, the State's main contention in this appeal is that the district court should not have excluded from its consideration the evidence proffered by the State in an

attempt to prove Mr. Carmouche's prior convictions. (*See* Appellant's Brief, pp.6-8.) However, such a purported basis for overcoming the prohibitions of Double Jeopardy has been rejected by the U.S. Supreme Court in *Sanabria*:

> The Government's real quarrel is with the judgment of acquittal. While the numbers evidence was erroneously excluded, the judgment of acquittal produced thereby is final and unreviewable. Neither 18 U.S.C. § 3731 not the Double Jeopardy Clause permits the government to obtain relief from all of the adverse rulings – most of which result from defense motions – that lead to the termination of a criminal trial in a defendant's favor. To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests, and would vitiate one of the fundamental rights established by the Fifth Amendment.

Sanabria, 437 U.S. at 77-78 (internal citations omitted).

The relief request by the State in this appeal is prohibited under the operation of the Fifth Amendment's prohibition against double jeopardy. Accordingly, the State's appeal in this case is moot and should be dismissed by this Court. *See State v. Long*, 153 Idaho 168, 169-171 (Ct. App. 2012).

II.

Assuming, Arguendo, That The State's Appeal Is Not Brought In Violation Of The Fifth Amendment Prohibition Against Double Jeopardy, The State Has Failed To Show Error On The Part Of The District Court In Acquitting Mr. Carmouche Of The State's Persistent Violator Enhancement Allegations

A. Introduction

As was previously argued, because Mr. Carmouche's constitutional protection against double jeopardy precludes the State from seeking retrial following his acquittal, the State's argument that a new trial on the persistent violator enhancement is without

merit. Additionally, even if this were not the case, the State has failed to show any error in the district court's exclusion of improper hearsay evidence from its consideration.

B. Assuming, Arguendo, That The State's Appeal Is Not Brought In Violation Of The Fifth Amendment Prohibition Against Double Jeopardy, The State Has Failed To Show Error On The Part Of The District Court In Acquitting Mr. Carmouche Of The State's Persistent Violator Enhancement Allegations

1. Because The State Has Failed To Present An Adequate Record Of The Full Proceedings Relating To Mr. Carmouche's Acquittal Of The Persistent Violator Allegation, The Missing Portions Of The Record Should Be Presumed By This Court To Support The District Court's Ruling In This Case; And The Invited Error Doctrine Should Be Applied By This Court To Estop The State's Claim That The District Court Erred By Failing To Consider Inadmissible Evidence

Following the entry of the district court's order setting forth its findings of fact and conclusions of law in acquitting Mr. Carmouche of the persistent violator sentencing enhancement, the State filed a motion with the district court seeking reconsideration of this ruling. (R., pp.156-162; 169-172.) A hearing was held on this motion on February 10, 2011, wherein the State and Mr. Carmouche presented their respective arguments on the acquittal and the issues in controversy were narrowed through the course of this argument. (R., pp.176-179.) Although the minutes for this proceeding are part of the appellate record in this case, the actual transcript of this proceeding is not in the present appellate record, despite the fact that the substance of this proceeding was devoted to the arguments surrounding the claims now being advanced by the State in this appeal.

Both the Idaho Supreme Court and the Idaho Court of Appeals have consistently held that missing portions of the appellate record relating to the order being challenged on appeal will be presumed to support the ruling of the district court. *See, e.g., State v.*

Willoughby, 147 Idaho 482, 488 (2009); *Esquivel v. State*, 149 Idaho 255, 258 (Ct. App. 2010). "This Court will not presume error on appeal, and an appellant bears the burden of demonstrating error through the record." *Willoughby*, 147 Idaho at 488. Accordingly, when the party appealing an issue presents an incomplete record, the Court presumes that the absent portion of the record supports the findings of the trial court." *Id.*

This presumption applies with greater force here, as the minutes from the hearing not presently a part of the record on appeal reflects that the State at the hearing on its motion to reconsider conceded one of the two issues that the State now seeks to press on appeal. To the extent that the minutes from this hearing reveal a rough sketch of the substance of this hearing (although not elucidating any detail on the specific arguments of the parties), these minutes show a critical concession by the State. Following the arguments of the parties, the minutes from the February 10, 2011, hearing show that the district court summarized several issues as **not** being in dispute. (R., pp.177-178.) This included the following:

> ... the State is not raising or disputing the issue that the hearsay does not fall within any exception to the hearsay rule as set forth in Idaho Rules of Evidence; **nor does the State contend that the Court lacked authority to correct it's erroneous oral ruling before entry of a Judgment and/or Order; or that the Court lacks the right to exclude from its consideration, inadmissible hearsay evidence that is not objected to and for which no motion to strike was made.**

(R., pp.177-178 (emphasis added).)

"Idaho courts have long held that 'one may not successfully complain of errors one has consented to or acquiesced in. In other words, invited errors are not reversible.'" *State v. Atkinson*, 124 Idaho 816, 819 (Ct. App. 1993) (quoting *State v. Caudill,* 109 Idaho 222, 226 (1985)). The minutes reflect that the State acquiesced in

the district court's determination that the court was permitted to do the very thing that the State now complains of on appeal. Given this, the doctrine of invited error should apply to preclude the State from asserting on appeal that the district court erred in excluding from its consideration improper hearsay testimony. In the alternative, the minutes from the February 10, 2011, indicate that this objection was expressly not made to the district court, and therefore has not been preserved for appeal. Accordingly, the arguments being advanced on appeal by the State with regard to the court's exclusion from its consideration of inadmissible hearsay testimony have been waived for purposes of appeal. *See, e.g., State v. Donohoe*, 126 Idaho 989, 991 (Ct. App. 1995) (holding that, absent fundamental error, unpreserved objections are waived for purposes of appeal).

2. The District Court Properly Excluded Improper Hearsay Evidence From Its Consideration With Regard To The State's Evidence Tendered In Support Of The Persistent Violator Allegation In This Case

The State has challenged, on appeal, the district court's exclusion from its consideration testimony in the form of hearsay evidence regarding Mr. Carmouche's social security number. (Appellant's Brief, pp.6-7.) The district court initially received this evidence at the bench trial on the persistent violator allegation without objection, but thereafter excluded the improper evidence from its review of the evidence in acquitting Mr. Carmouche of the persistent violator allegation. (R., pp.156-162.) The sole basis for the State's argument is its claim that the district court, sitting as the trier of fact during this bench trial, was legally required "to treat any hearsay admitted without objection as competent evidence supporting its verdict." (Appellant's Brief, pp.6-7.)

However, this is the opposite standard of what case law in Idaho dictates with regard to bench trials.

From the outset, the State relies almost entirely on only one case for its position in this appeal: *Phillips v. Erhart*, 151 Idaho 100, 105 (2011). In *Phillips*, part of the evidence admitted at the jury trial was evidence that the appellant asserted was inadmissible hearsay. *Phillips*, 151 Idaho at 104-105. In challenging the sufficiency of the evidence on appeal, the appellant argued that the reviewing court should exclude this evidence when reviewing whether the evidence at trial was sufficient to support the jury's verdict. *Id.* at 105. The *Phillips* Court held that, because the hearsay was admitted without objection, "**the jury** could consider it." *Id.* (emphasis added). This case is immediately distinguishable because Idaho applies a much different rule where the trier of fact is a judge, rather than a jury.

Rather, where the trier of fact is a judge, the presumption in Idaho has long been that the trial court did **not** consider legally inadmissible evidence that is presented to it in reaching its findings of fact and conclusions of law. *See, e.g., Shrum v. Wakimoto*, 70 Idaho 252, 259 (1950); *Goody v. Maryland Casualty Co.*, 53 Idaho 523 (1933); *Brinton v. Johnson*, 41 Idaho 583 (1925). This presumption that a trial court will not consider inadmissible evidence, even when admitted into evidence at a bench trial, was extended by the Idaho Supreme Court into criminal bench trials as well as civil ones. *State v. Powell*, 120 Idaho 707, 710 (1991). The *Powell* court explained as its holding as creating, "'a presumption on appeal that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making his findings.'" *Id.* (quoting *State v. Miles*, 464 P.2d 723, 728 (Wa. 1970)).

In fact, this legal distinction was noted by the trial court itself in acquitting Mr. Carmouche of the persistent violator sentencing enhancement. The district court noted, "When the Court is the trier of fact, the Court may disregard any inadmissible evidence in making its findings. The mere fact that a witness testifies as to inadmissible hearsay without objection or without a motion to strike does not require the Court to ignore that the evidence is inadmissible." (R., p.161.)

Contrary to the State's assertion, not only is the trial court in a bench trial **not** required to consider evidence known by the court to be inadmissible, the legal presumption exists that the trial court will not do so. This Court presumes regularity in the proceedings before it, and the State's position would require trial courts to ignore the very rules of law that judges are charged with knowing and upholding. Because the State's argument is contrary to controlling precedent regarding improperly received evidence at a bench trial, the State's argument is without merit.

3. Even Assuming Error In The District Court's Exclusion Of The Evidence, Any Error Is Harmless

Mr. Carmouche further asserts that, even assuming any error on the part of the district court in excluding the State's evidence, any such error is harmless. The case of *State v. Hairston* is instructive for this Court on this issue. In *Hairston*, the State argued that the district court should not have proceeded to directly sentence the defendant upon permitting the defendant to withdraw his plea to the persistent violator sentencing enhancement. *State v. Hairston*, 133 Idaho 563, 566 (Ct. App. 1999). However, under the Court of Appeals' review of the sentencing record, there was an absence of any indication that the district court would have imposed a higher sentence upon the finding

that the defendant in *Hairston* was a persistent violator of the law. *Id.* at 566-567. Accordingly, the Court of Appeals held that, even if any error was committed by the district court, this error was harmless. *Id.*

Mr. Carmouche submits that the record in this case fails to disclose any reason to believe that his sentences would be different in any respect had he been convicted of the persistent violator sentencing enhancements alleged by the State. Mr. Carmouche received three sentences with a 15-year aggregate term and a fourth unified sentence providing for up to 10 years' incarceration. (6/20/11 Tr., p.54, L.15 – p.55, L.6.) Each of his sentences were well above the mandatory minimum sentencing requirement established by I.C. § 19-2514. Moreover, the district court's own findings in support of the sentences imposed demonstrated that the court was both aware of, and materially considered, Mr. Carmouche's prior criminal history in setting these sentences. (6/20/11 Tr., p.50, L.11 – p.51, L.3.)

There is nothing in the record that suggests that the district court's sentencing determination would have been different in any manner had the court not acquitted Mr. Carmouche of the sentencing enhancements alleged by the State in this case. Accordingly, even if there had been any error in the district court's acquittal, such error was harmless.

III.

The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When The Prosecutor Argued Evidence Of Mr. Carmouche's Refusal To Permit Police To Enter His Home As Supporting An Inference Of Guilt Of The Charged Offenses

A. Introduction

The prosecutor in this case elicited testimony from police officers that Mr. Carmouche initially refused to permit police to enter and search his home. In closing arguments, the prosecutor urged the jury to consider this fact as evidence indicating Mr. Carmouche's guilt of the charged offenses. Mr. Carmouche submits that this constituted prosecutorial misconduct that rose to the level of a fundamental error.

B. Standard of Review

Because there was no contemporaneous objection to the elicitation of the testimony, and to the prosecutor's closing argument, that are being challenged in this appeal, this Court reviews Mr. Carmouche's allegation of prosecutorial misconduct under the three-part test for fundamental error articulated in *State v. Perry*, 150 Idaho 209, 226 (2010). Under this standard, fundamental error is established and reversal is required if the defendant can establish that: (1) the alleged error violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear and obvious from the record; and (3) there is a reasonable possibility that the error affected the outcome of the trial proceedings. *Perry*, 150 Idaho at 226.

C. The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When The Prosecutor Argued Evidence Of Mr. Carmouche's Refusal To Permit Police To Enter His Home As Supporting An Inference Of Guilt Of The Charged Offenses

In this case, the prosecutor both elicited testimony from police officers that Mr. Carmouche had initially refused to permit police to enter his home, and subsequently argued this evidence to the jury during closing arguments as proof of Mr. Carmouche's guilt. Mr. Carmouche asserts that this improper questioning and argument constituted prosecutorial misconduct rising to the level of a fundamental error.

The prosecutor, in presenting the testimony of Officer Uriguen in this case, intentionally elicited testimony regarding Mr. Carmouche having invoked his Fourth Amendment right against the warrantless entry of the officers into his home. (Trial Tr., p.37, L.25 – p.39, L.1; p.39, Ls.4-14.) During closing arguments, the prosecutor further noted that Mr. Carmouche closed the door behind him when he first went outside to speak with police. (Trial Tr., p.378, Ls.6-7.) The prosecutor then argued to the jury:

> When asked about his girlfriend he had a fight with, well, she's asleep. You can't see her. **I know my rights. You can't go in. Why? Why, if he came home and found her beaten this way and heard these stories? Would that be your response?**

(Trial Tr., p.378, Ls.8-12 (emphasis added).) In repeatedly asking the jurors in this case what reason Mr. Carmouche would have for refusing to consent to let police search his home, coupled with asking jurors whether they – as innocent parties to the charged offense – would have done the same, the prosecutor was implying that Mr. Carmouche's invocation of his Fourth Amendment right stood as proof of his guilt. The direct inference to the jury was that an innocent person would not have refused to permit police entry to search his or her home. This was misconduct.

As to the first prong of the *Perry* analysis, Mr. Carmouche asserts that the misconduct in this case violated his right to a fair trial and his Fourth Amendment right to refuse to consent to police searches.

The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall...deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be...deprived of life, liberty or property without due process of law." ID. CONST. art. I, §13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters,* 99 Idaho 18, 19 (1978).

The Idaho Supreme Court has recently reiterated, in the context of a prosecutorial misconduct claim, "'Every person accused of crime in Idaho has the right to a fair and impartial trial.'" *State v. Christiansen*, 144 Idaho 463, 469 (Ct. App. 2007) (quoting *State v. Sharp*, 101 Idaho 498, 504 (1980)). "'It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury.'" *Id.* (quoting *State v. Irwin*, 9 Idaho 35, 44 (1903)). "Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they would give to counsel for the accused." *Irwin*, 9 Idaho at 44. Prosecutors "should not 'exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the

accused.'" *Id.* Moreover, a prosecutor "should never seek by any artifice to warp the minds of the jurors by inferences or insinuations." *Id.*

In *Christiansen*, the Idaho Supreme Court addressed a prosecutor's act of eliciting testimony regarding Christiansen's refusal to consent to a search of his business. *Id.* Christiansen was charged with numerous arson-related counts after his business burned down in the middle of the night. *Id.* at 464-465. During the questioning of one of the police officers who interrogated Christiansen, the prosecutor asked whether the officer asked Christiansen for permission to search the property. *Id.* at 465. The officer responded that he had and that Christiansen refused to give consent to the search. *Id.*

On appeal, the *Christiansen* Court first held that although no contemporaneous objection was made to the testimony, the error was fundamental. *Id.* at 470-471. The Court deemed the improper testimony as being analogous to those cases where a prosecutor use of a defendant's silence as evidence of guilt. *Id.* at 470. The *Christiansen* Court stated, "The same rationale that precludes evidence of an accused's assertion of his or her Fifth Amendment Rights offered for the purpose of either impeachment or inferring guilt precludes evidence of the accused's assertion of his or her Fourth Amendment rights offered for the same purpose." *Id.* The Court then concluded that the prosecutor committed misconduct in Christiansen's case: "There was no excuse for the prosecuting attorney seeking to elicit Sergeant Clark's opinion as to Christiansen's veracity during police interrogation or testimony that Christiansen refused consent to a search of his business premises. The prosecuting attorney's actions were clearly misconduct." *Id.* at 471.

A prosecutor's elicitation of testimony regarding a defendant's invocation of his Fourth Amendment right to be free of warrantless searches, and subsequent use of that evidence in closing argument to support an inference of guilt, have since and consistently been recognized as a violation of due process that may provide the basis to support a finding of fundamental error. *See State v. Wright*, 153 Idaho 478, 488-489 (Ct. App. 2012); *State v. Betancourt*, 151 Idaho 635, 639-641 (Ct. App. 2011). The *Wright* court noted that, "eliciting testimony from a witness regarding a defendant's refusal to consent to a search, when used for purposes of inferring guilt, is prosecutorial misconduct and may be fundamental error."[2] *Wright*, 153 Idaho at 489.

The use of this evidence as proof of guilt by the prosecutor during closing arguments in this case is similar to that present in *Betancourt*, as both the prosecutor's remarks in *Betancourt* and those made by the prosecutor in this case called upon the jury to evaluate whether a refusal to permit police to search a premises was inconsistent with the actions of a person innocent of the charged offense. *See Betancourt*, 151 Idaho at 639-640. These remarks were deemed in *Betancourt* to meet the first prong of the *Perry* test for fundamental error, "because the prosecutor's comments during closing argument and rebuttal violated Betancourt's right to a fair trial." *Id.* at 640.

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[2] While the *Wright* court ultimately found that fundamental error had not been established, this conclusion was only due to the fact that the defendant in *Wright* had not established the violation of any reasonable expectation of privacy that would be protected under the Fourth Amendment – and therefore the alleged "search" did not implicate the Fourth Amendment. *Wright*, 153 Idaho at 489-490. In contrast, the invocation of Mr. Carmouche's Fourth Amendment right in this case was directed against a search of Mr. Carmouche's home – and a "person's home 'is accorded the full range of Fourth Amendment protections.'" *See State v. Johnson*, 110 Idaho 516, 523 (1986) (quoting *Lewis v. United States*, 385 U.S. 206, 211 (1966)).

And, just as in *Betancourt*, the due process violation in this case is clear from the record. By expressly arguing Mr. Carmouche's invocation of his constitutional rights, and then asking the jury why he would do so if he were innocent – even more, whether they themselves would do so if they were in Mr. Carmouche's place – the prosecutor was drawing a direct line between Mr. Carmouche's invocation of his Fourth Amendment rights and the conclusion that he did so due to his guilt of the charged offense. Accordingly, the second prong of the *Perry* test for fundamental error has been met.

Finally, the improper argument by the prosecutor regarding Mr. Carmouche's invocation of his Fourth Amendment rights for purposes of inferring guilt cannot be said to be harmless beyond a reasonable doubt. In this case, there was substantial dispute as to the source of Ms. Redmond's injuries. Mr. Carmouche consistently contended that they were inflicted by other individuals and further denied that he had struck, strangled, or otherwise threatened Ms. Redmond. (Trial Tr., p.326, L.8 – p.364, L.19.) By Ms. Redmond's own statements to police, "other people" were the source of her injuries. (Trial Tr., p.87, Ls.12-18; p.154, L.2 – p.155, L.7.) It was only after more protracted questioning by police, who suggested Mr. Carmouche as the source of her injuries, that Ms. Redmond implicated Mr. Carmouche as the individual who inflicted her wounds. (Trial Tr., p.118, L.9 – p.119, L.25; p.154, L.2 – p.155, L.7.)

Additionally, the evidence at trial showed that Mr. Carmouche did not have any blood on his person at the time police arrived at his home, nor did he have any observable injuries to his hands. (Trial Tr., p.76, Ls.10-21.) Actual x-ray examinations of his hands that were subsequently conducted likewise did not show any injuries. (Trial

Tr., p.286, L.10 – p.287, L.1.) This evidence casts strong doubt on the State's allegations that Mr. Carmouche repeatedly hit Ms. Redmond with a closed fist – by her estimate, over 50 times – over the course of many hours. (Trial Tr., p.76, Ls.10-21.)

The prosecutorial misconduct in this case violated Mr. Carmouche's due process right to a fair trial, and was apparent from the face of the record. Moreover, given the conflicting evidence presented at trial as to the source of Ms. Redmond's injuries, there is a reasonable possibility that this misconduct contributed to the jury's verdict. Accordingly, Mr. Carmouche asserts that the prosecutorial misconduct in this case rose to the level of a fundamental error entitling him to a new trial.

CONCLUSION

Mr. Carmouche respectfully requests that this Court dismiss the State's appeal as moot due to the fact that Mr. Carmouche's constitutional protection against double jeopardy precludes retrial on the State's persistent violator allegation. In the alternative, he asks that this Court affirm the district court's acquittal of the persistent violator allegation. Mr. Carmouche further asks that this Court reverse his judgment of conviction and sentences for attempted strangulation, kidnapping, aggravated battery, and felony domestic battery and remand this case for further proceedings in light of the prosecutorial misconduct that occurred in this case. In the alternative, has asks that this Court reverse the district court's order denying Mr. Carmouche's motion for a new trial and remand this case for further proceedings.

DATED this 8th day of February, 2013.

for SARAH E. TOMPKINS
Deputy State Appellate Public Defender

I HEREBY CERTIFY that on this 8th day of February, 2013, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DARREN DUSTIN CARMOUCHE
INMATE #60121
ICC
PO BOX 70010
BOISE ID 83707

JUNEAL C KERRICK
DISTRICT COURT JUDGE
1115 ALBANY STREET
CALDWELL ID 83605

MARK MIMURA
ATTORNEY AT LAW
2176 E FRANKLIN RD STE 12
MERIDIAN ID 83642

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
Hand deliver to Attorney General's mailbox at Supreme Court

NANCY SANDOVAL
Administrative Assistant

SET/ns