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State v. Iverson Appellant's Brief Dckt. 40359

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. JOSEPH IVERSON, Defendant/Appellant.	)	APPELLANT'S BRIEF SUPREME COURT NO. 40359

APPELLANT'S BRIEF

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

HONORABLE JOHN STEGNER
District Judge

JOHN M. ADAMS
Kootenai County Public Defender

MARCUS O. DRAPER
Deputy Public Defender
400 Northwest Blvd.
P.O. Box 9000
Coeur d'Alene, ID 83816

ATTORNEY FOR APPELLANT

BARRY McHUGH
Kootenai County Prosecuting Attorney

EILEEN MCGOVERN
Deputy Prosecuting Attorney
501 Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

A. Nature of the Case.

On June 20, 2011, Deputy Gorham of the Kootenai County Sheriff's Office cited Joseph Iverson (hereinafter "Appellant") with a battery of Daryl Farnham (hereinafter "complaining witness") in violation of Idaho Code § 18-903. In accordance with that citation, the Kootenai County Prosecutor's Office (hereinafter "State") filed a case on the battery on June 21, 2011. On August, 9, 2011 the Appellant appeared in court and pled not guilty to the charge. On August 17, 2011, the Appellant requested discovery in this matter pursuant to Idaho Criminal Rule 16. On August 23, 2011, the State provided its initial response to discovery specifically stating that anyone listed in the discovery could be called as a witness. After the initial discovery had been completed, the trial court held a pretrial conference in this matter on October 5, 2011.

Following the pretrial conference, the State filed several additional witness lists and updates to its initial response to discovery and the matter was set for trial. On October 11, 2011, the State provided a formal witness list that listed Shawn Farnham (hereinafter "Farnham") as a witness for the first time. On October 17, 2011, the trial court held the jury trial status conference and the matter was set for trial on October 19, 2011. On this date, the State filed its first amended witness list provided the medical records for the first time. On October 18, 2011, the State filed two more amended witness lists and two supplemental responses to discovery. In the amended witness lists, the State listed Dr. Farr as a witness for the first time. In the supplemental responses to discovery, the State provided photographs of the complaining witness taken after he had had surgery. The State, however, failed to provide any statements of Farnham in compliance

with the Appellant's initial discovery request of August 17, 2011 to which the State did not object.

The matter went to trial on October 19, 2011 following which the jury found the Appellant guilty of battery. At the trial, the Appellant asserted that the battery was justified because he was acting in self defense. On the morning of trial, the trial Court heard several pretrial motions. The Appellant made several motions in limine during the hearing. He argued that Farnham and Dr. Farr should not be allowed to testify because the State's late disclosure of them impaired his ability to prepare for trial. The Appellant also argued that the late disclosure of the medical records and photographs impaired his ability to prepare for trial. The Appellant further argued that admission of the photographs violates Rule 403 of the Idaho Rules of Evidence. In response, the State argued that it disclosed the discovery as soon as it got it. The State further argued that the photographs had probative value because they lent support to the notion that the Appellant had an object in his hand when he punched the complaining witness and would, therefore, show that the Appellant had used excessive force in punching the complaining witness. The State also argued that Farnham would testify as a witness that was present at the time of the incident. The trial court ruled that Farnham could testify and that Dr. Farr could testify as a custodian of records to admit the medical records. The Court also stated that the medical records would not be excluded as untimely and overruled the Appellant's objection as to photos in relation to the timeliness of their disclosure and their admissibility under Rule 403.

Subsequent to the hearing, the matter proceeded to trial. During the trial, the State introduced the medical records[1] and photographs into evidence and called Farnham as a witness. Contrary to the State's prior assertions, Farnham provided no testimony as a witness to the incident Rather, testified as to a text message that the Appellant allegedly sent to him after the incident. The State also provided no evidence that the Appellant had any object in his hand.

After the close of evidence, the parties presented their closing arguments. In the State's closing argument, the prosecutor stated that the only way that the Appellant could be acquitted on a self defense claim was that if his "only and best option" would have been to harm the complaining witness. The prosecutor went on to say that the Appellant acknowledged that a wiser course of action would have been to retreat and call the police. The prosecutor later stated that the Appellant understood when he was punching the complaining witness that he would fracture his eye socket.

Following the closing arguments, the jury returned a verdict of guilty. On February 6, 2012, the Appellant filed a timely Notice of Appeal alleging abuse of judicial discretion in allowing evidence of the extent of the complaining witness' injuries, abuse of judicial discretion in allowing Dr. Farr to testify as custodian of the medical records, abuse of judicial discretion in allowing Shawn Farnham to testify, prosecutorial misconduct, and cumulative error. The Appellant additionally argues that the late disclosure of evidence and witnesses deprived him of due process.

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[1] The Appellant stipulated to the admissibility of the medical records after the trial court overruled the objection as to the timeliness of the disclosure of Dr. Farr as a witness (as custodian of records) and as to the timeliness of the disclosure of the medical records.

B. Statement of the Facts.

After the State charged the Appellant with battery, counsel for the Appellant entered an appearance on August 17, 2011 and requested discovery from the State. In the Appellant's Request for Discovery, he requested that the State provide papers, documents, and photographs intended for use as evidence at trial. The Appellant also requested the names of any witnesses that may be called at trial and any statements that those witnesses may have made to the prosecutor or to any agent of the prosecutor. In its response to discovery on August 23, 2011, the State did not object to any of these requests for discovery and, thus, acknowledged its obligation to comply with the Appellant's requests. In its initial response to discovery, the State provided a copy of Deputy Gorham's report and listed anyone mentioned in the report as its potential witnesses in this matter. Neither Farnham nor Dr. Farr is mentioned in the police report. The State first disclosed Farnham as a witness on October 11, 2011, more than six weeks after the State's initial response to discovery and a mere six days before the Jury Trial Status Conference. *See* Tr. Vol. I, p. 31, L. 19-20. The State, however, never provided a copy of any statements that Farnham made to the prosecutor or her agents. The State first provided the medical records admitted into evidence on October 17, 2011. *See* Tr. Vol. I, p. 21, L. 6-7. The State first disclosed Dr. Farr as a witness on October 18, 2011, the day after the Jury Trial Status Conference and the day before trial when it amended its witness list two more times. The State also first provided copies of photographs that were admitted at trial on October 18, 2011. *See* Tr. Vol. I, p. 21, L. 2-4. These photographs included pictures of the complaining witness after he had had surgery. *See* Tr. Vol. I, p. 24, L. 13-14.

Just prior to the trial of the matter on October 19, 2011, the trial court held a hearing on pretrial evidentiary issues. At the hearing, the Appellant made several motions in limine to exclude evidence and witnesses from the trial. *See* Tr. Vol. I, p. 20, L. 17 – p. 21, L. 25. The Appellant argued that the trial court should exclude the photographs provided to the defense the day before trial on the grounds that they violated Rule 403 of the Idaho Rules of Evidence and that their untimely disclosure impaired the Appellant's ability to prepare for trial. *See* Tr. Vol. I, p. 23, L. 24 – p. 26, L.14. The Appellant also moved to exclude the medical records based on their untimely disclosure. *See* Tr. Vol. I, p. 21, L. 6-7; *See also* Tr. Vol. I, p. 33, L. 9-10; *See* Tr. Vol. I, p. 26, L. 15-23. The Appellant also objected to the State presenting Farnham and Dr. Farr as witness because of their untimely disclosure. *See* Tr. Vol. I, p. 21, L. 19-20.

In response to the Appellant's motions, the State argued that the medical records and photographs should be allowed into evidence and the witnesses should be allowed to testify because the late disclosure was not the result of bad faith on the State's part and the evidence was necessary to rebut the Appellant's self defense claim. The State argued that it provided the information to the defense as soon as it came into the State's possession. *See* Tr. Vol. I, p. 23, L. 9-22. The State also argued that the evidence was necessary to show that the amount of force that the Appellant used was not reasonable in an effort to rebut his self defense claim. *See* Tr. Vol. I, p. 23, L. 4-8. Specifically, the State argued that it was going to raise the issue of whether or not the Appellant had an object in his hand that enabled him to fracture the complaining witness' eye socket. *See* Tr. Vol. I, p. 27, L. 22 – p. 28, L. 22. The State also argued that it disclosed its witnesses late because it was unaware that they were witnesses until the day before trial. *See* Tr.

Vol. I, p. 29, L. 16-20. The State argued that it was offering Farnham merely as a witness to the incident itself. *Id.*; *see also* Tr. Vol. I, p. 22, L. 23-25.

Following the arguments of the parties, the trial Court ruled on the Appellant's motions in limine. The trial court ordered that the medical records would not be excluded as a result of their untimely disclosure and that Dr. Farr could testify as their custodian. *See* Tr. Vol. I, p. 32, L. 2-5. The trial court also ruled that the photographs could come into evidence. *See* Tr. Vol. I, p. 31, L. 12-15. The trial court further ruled that Farnham could testify in the trial. *See* Tr. Vol. I, p. 31, L. 22.

After the hearing on the pretrial issues and motions in limine on the morning of October19, 2011, the matter went to trial and resulted in a guilty verdict of the crime of battery. At the trial, the State introduced the medical records, *see* Tr. Vol. II, p. 28, L. 9 – p. 29, L. 7, and the photographs, *see* Tr. Vol. II, p. 31, L. 2 – p. 33, L. 14; Tr. Vol. II, p. 33, L. 21 – p. 34, L. 19, into evidence. The State also called Farnham as a witness. *See* Tr. Vol. II, p. 86, L. 4 – p. 90, L. 17. Contrary to the State's prior assertions to the trial court and to defense counsel that Farnham would merely be testifying as a witness to the incident, *see* Tr. Vol. I, p. 29, L. 16-20; Tr. Vol. I, p. 22, L. 23-25, the State used him to introduce evidence of text messages that he claimed to have received from the Appellant subsequent to the incident. *See* Tr. Vol. II, p. 88, L. 10-24. At no point during the trial did the State ever introduce any evidence that would even suggest that the Appellant had any object in his hand when he struck the complaining witness, *see* Tr. Vol. II, p. 21, L. 1 – p. 98, L. 9. In fact, the State specifically argued that the Appellant was able to

fracture the complaining witness' eye socket as a result of his martial arts training. *See* Tr. Vol. II, p. 153, L. 13-17.

After the close of evidence, the parties made their closing arguments to the jury. During the State's closing argument, the prosecutor stated that the only way that the Appellant's actions were lawful was if he "found himself in a situation where his only and best option according to a reasonable person would have been to harm [the complaining witness.]" Tr. Vol. II, p. 149, L. 13-16. The prosecutor later argued that the Appellant knew that he was going to fracture the complaining witness' eye socket when he struck him. *See* Tr. Vol. II, p. 153, L. 13-17. The Appellant objected to this argument as misstating the facts. *See* Tr. Vol. II, p. 153, L. 19-22. The trial court overruled the Appellant's objection. *See* Tr. Vol. II, p. 153, L. 23.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did the prosecutor commit misconduct by misleading the tribunal?

2. Did the prosecutor commit misconduct by trying to present evidence to inflame the passions of the jury?

3. Did the prosecutor commit misconduct by misstating the law in closing argument?

4. Did the prosecutor commit misconduct by misstating the facts in closing argument?

5. Did the trial court abuse its discretion in admitting the photographs in exhibits 2 and 3?

6. Did the late disclosure and subsequent admission at trial of the medical reports, photographs, and Farnham and Dr. Farr as witnesses result in a denial of due process for the Appellant?

7. Does the cumulative error doctrine apply?

ARGUMENT

1. The Court should reverse the Appellant's conviction for battery because it is the result of the prosecutor's misconduct in misleading the tribunal, attempts to inflame the passions of the jury, misstatements of the law, and misstatements of fact.

The Court should reverse the Appellant's conviction on the basis that the prosecutor committed multiple acts of misconduct that prejudiced the Appellant. "Where a Appellant alleges error at trial that he had contemporaneously objected to, [the reviewing court] reviews the error on appeal under the harmless error test." *State v. Ellington*, 151 Idaho 53, 253 P.3d 727, 738 (2011). "When the alleged error is prosecutorial misconduct, first the Appellant must demonstrate that prosecutorial misconduct occurred, and then the Court must declare a belief beyond a reasonable doubt that the misconduct did not contribute to the jury's verdict, in order to find that the error was harmless and not reversible." *Id.*

If the Appellant fails to object to the misconduct, the appellate court reviews the misconduct for fundamental error. *State v. Perry*, 150 Idaho 209, 219 (2010). When the Appellant fails to object, he bears the burden of showing that misconduct occurred, that it rose to the level of fundamental error, and that it was not harmless. *Id.* To meet his burden in showing that an error is fundamental, the Appellant must show that the error affected one or more of his unwaived constitutional rights, that the error was plain, and the error was not harmless. *Id.* at 226.

The reviewing court, however, need not employ a harmless error analysis for prosecutorial misconduct when it is the result of repetitive conduct coming out of the same

office. In *Darden v. Wainwright*, Justice Blackmun in his dissenting opinion argued that in order to discourage prosecutorial misconduct the Supreme Court should cease to apply a harmless error analysis. *See* 477 U.S. 168 (1986) (Blackmun, J., dissenting). In his opinion, Justice Blackmun stated:

> Twice during the past year—in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), and again today—this Court has been faced with clearly improper prosecutorial misconduct during the summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:
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> "This Court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court-recalling the bitter tear shed by the Walrus as he ate the oysters-breeds a deplorably cynical attitude towards the judiciary." (footnote omitted). *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2nd Cir. 1946).

Id. at 205-206 (Blackmun, J., dissenting). In citing Justice Blackmun's dissent approvingly, the Idaho Court of Appeals has stated that "circumstances may arise, particularly if there is a pattern of repetitious conduct by an individual prosecutor or a particular prosecutor's office[] that would call for reversal for the reasons stated by Justice Blackmun despite the harmlessness of the

error." *State v Phillips.*, 144 Idaho 82, 89 (Ct. App. 2007). The *Phillips* Court did not decide the question because it deemed that the error in that case was not harmless. *Id.* It is noteworthy, however, that Judge Schwartzman concurred in the opinion on the basis of the Blackmun doctrine. In his concurring opinion, Judge Pro Tem Schwartzman stated that he was applying the Blackmun doctrine in voting with the majority in that case. Specifically, he states:

> I concur in the opinion of this Court despite the fact that I feel the conventional application of harmless error standards would not necessarily mandate reversal. This case represents yet another in a long line or pattern of repetitious misconduct from this prosecutorial office [the Kootenai County Prosecutor's Office]. A catalogue of cases in which the doctrine of "harmless error" has reared its head and saved the conviction on appeal creates a less than enviable appellate track record. *See State v. Vandenacre*, 131 Idaho 507, 960 P.2d 190 (Ct.App.1998); *State v. Brown,* 131 Idaho 61, 951 P.2d 1288 (Ct.App.1998); *State v. Lovelass,* 133 Idaho 160, 983 P.2d 233 (Ct.App.1999); *State v. Cortez,* 135 Idaho 561, 21 P.3d 498 (Ct.App.2001); *State v. Kuhn,* 139 Idaho 710, 85 P.3d 1109 (Ct.App.2003). Two unpublished opinions also come readily to mind: *State v. Blythe,* Docket No. 25557, 135 Idaho 493, 20 P.3d 29, 2000 WL 1344686 (Ct.App. April 7, 2000), and *State v. Gadberry,* Docket No. 26604/26605 (Ct.App. Sept. 26, 2001). As our own Supreme Court has noted in *State v. Guzman,* 122 Idaho 981, 984 n. 1, 842 P.2d 660, 663 n. 1 (1992):
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> Mistakes must not become the practice instead of the exception. A court on observing that a pattern of mistakes has developed, on seeing yet another "mistake," might readily decide to view such circumstance with jaundiced eye, and rule accordingly.

Phillips, 144 Idaho at 89 (Schwartzman, J., specially concurring). Since the *Phillips* decision, there has been a steady flow of prosecutorial misconduct coming from the Kootenai County Prosecutor's Office. *See, e.g., Ellington*, 151 Idaho 53; *Perry*, 150 Idaho 209; *State v. Beebe*, 145 Idaho 570 (Ct. App. 2007). Thus, this Court in reviewing this matter should decline to apply the harmless error doctrine.

A. This Court should find that the prosecutor engaged in misconduct when she affirmatively misled the trial court about the reason she was seeking to admit the photographs of the complaining witness and about the nature of Farnham's testimony.

This Court should find that the prosecutor's acts of deceiving the trial court constitute prosecutorial misconduct. When the Appellant made his motions in limine to exclude the photographs from evidence and Farnham as a witness, the prosecutor affirmatively misled the trial court in its argument. While arguing the issue of whether or not Rule 403 of the Idaho Rules of Evidence foreclosed the admission of the photographs of the complaining witness, the State argued that the photographs had probative value because it would substantiate other evidence that the Appellant had an object in his hand when he struck the complaining witness. Tr. Vol. I, p. 27, L. 22 – p. 28, L. 22. The trial court eventually denied the motion in limine and allowed the State to present the photographs. Tr. Vol. I, p. 37, L. 12-16. At no point in the trial did the State present any evidence to support its claim that Appellant had an object in his hand when he struck the complaining witness. Thus, the prosecutor's statement to the trial court in its argument to overcome the Appellant's objection to a potentially inflammatory piece of evidence as to its purpose in admitting the photographs was false or misleading and, therefore, constitutes misconduct.

The prosecutor also committed misconduct when she deceived the trial court as to the nature of Farnham's testimony. When the Appellant objected to the late disclosure of Farnham as a witness for the State, the prosecutor argued that he would testify as a witness to the incident at issue. *See* Tr. Vol. I, p. 22, L. 23-25; Tr. Vol. I, p. 29, L. 16-20. The trial court ultimately ruled

that the Appellant would not be prejudiced by the untimely disclosure of Farnham. *See* Tr. Vol. I, p. 31, L. 22. The prosecutor's statements, however, were demonstrably false. The prosecutor's false statements as to this issue constituted additional misconduct.

The prosecutor's misconduct in deceiving the tribunal constitutes reversible error. The photographs were published to the jury and the State repeatedly referenced the injuries that the complaining witness sustained. Due to the repeated references to the injuries and the availability of the photographs to the jury, the error is not harmless beyond a reasonable doubt. The jury may very well have used the photographs to aid in its determination that the Appellant used excessive force in defending himself.

The prosecutor's misleading statement as to the nature of Farnham's testimony prevented the Appellant from effectively cross examining him on the stand. The State did not provide any statements of Farnham to the defense, despite the fact that the Appellant requested any written or oral statements made to law enforcement or the prosecutor or an agent of the prosecutor of any witnesses for the State on August 17, 2011. The State did not object to this request and, thus, waived any objection to the request. The State's affirmative misrepresentation of the nature of Farnham's testimony by stating that he was present during the incident and would be testifying about the incident itself significantly reduced the amount of time which the Appellant had to prepare any cross examination strategy. Thus, this Court cannot say beyond a reasonable doubt that the misleading statement did not impact the jury's verdict.

This Court, however, should decline to apply the harmless error doctrine to this case. The repeated instances of prosecutorial misconduct coming from the Kootenai County Prosecutor's

Office necessitates reversal without application of the harmless error doctrine. Numerous instances of misconduct continue to occur at that office and the appellate courts need to send a message that it will not be tolerated.

B. Because the prosecutor for the State felt the need to deceive the trial court as to her purpose in admitting the photographs, this Court should infer that the true purpose was impermissible.

Since the prosecutor felt the need to deceive the trial court as to her reasons for seeking to admit the photographs, this Court should infer that the true purpose was improper. In argument, the Appellant argued that the photographs were inadmissible under Rule 403 of the Idaho Rules of Evidence because they had minimal probative value and their graphic nature could potentially inflame the passions of the jury. *See* Tr. Vol. I, p. 23, L. 24 – p. 26, L.14. In defending the photographs' admissibility, the prosecutor for the State argued that it needed the photographs to support its claim that the Appellant had used an object in striking the complaining witness. *See* Tr. Vol. I, p. 27, L. 22 – p. 28, L. 22. During the trial, the State did not present any evidence to support such a claim. Thus, the prosecutor deceived the tribunal as to her true purpose in admitting the photographs. The need for deception suggests that the prosecutor had an improper purpose in seeking to admit the photographs, such as seeking to inflame the passions of the jury against the Appellant.

The prosecutor's misconduct in seeking to admit the photographs for an improper purpose constitutes reversible error. The photographs were published to the jury and the State repeatedly referenced the injuries that the complaining witness sustained. Due to the repeated

references to the injuries and the availability of the photographs to the jury, the error is not harmless beyond a reasonable doubt. The jury may very well have used the photographs to aid in its determination that the Appellant used excessive force in defending himself.

This Court, however, should decline to apply the harmless error doctrine to this case. The repeated instances of prosecutorial misconduct coming from the Kootenai County Prosecutor's Office necessitates reversal without application of the harmless error doctrine. Numerous instances of misconduct continue to occur at that office and the appellate courts need to send a message that it will not be tolerated.

C. The prosecutor committed misconduct when she misstated the law that applies in a self defense case.

The prosecutor committed misconduct when she stated that the Appellant could only avail himself of the self defense doctrine if he "genuinely found himself in a situation where his only and best option according to a reasonable person would have been to harm [the complaining witness.]" Tr. Vol. II, p. 149, L. 13-16. This statement constitutes prosecutorial misconduct under the fundamental error doctrine.

Although the Appellant failed to object to this statement, it constitutes fundamental error. A prosecutor commits misconduct by misstating the law or reasonable doubt burden during closing argument. *Phillips*, 144 Idaho at 86. To meet his burden in showing that an error is fundamental, the Appellant must show that the error affected one or more of his unwaived constitutional rights, that the error was plain, and the error was not harmless. *Perry*, 150 Idaho at 219.

The prosecutor's statement regarding the Appellant's right to self defense was an inaccurate statement of the law and went to the core foundation of the Appellant's right to be found guilty only when the evidence shows beyond a reasonable doubt that he was not acting in self defense. Immediately after the trial court finished reading the final jury instructions, the State began its closing argument. In its argument, the prosecutor stated that the Appellant could only avail himself of self defense in the event that striking the complaining witness was his only and best option. This misstates the law as the Appellant has no duty to retreat, even if retreating is a better option. *See* Tr. Vol. II, p. 145, L. 2-12. This misstatement goes to the core of the Appellant's rights under the Sixth and Fourteenth Amendments to a fair trial and due process of law. These amendments require that the Appellant be convicted beyond a reasonable doubt. The prosecutor's misstatement of the law was plain and not harmless. Essentially, the prosecutor told the jury that the State did not need to prove beyond a reasonable doubt that the Appellant did not act in self defense. Since self defense was the only issue in the case, it may have had a profound impact on the jury. This is particularly true in context since the State was arguing that the Appellant was not truly motivated by self defense.

D. The prosecutor committed misconduct when she misstated the facts in arguing that the Appellant knew that he would fracture the complaining witness' eye socket when he punched him.

The prosecutor committed misconduct when she argued that the Appellant knew that he might fracture the complaining witness' eye socket when he punched him because there were no facts in evidence to support such an assertion. *See* Tr. Vol. II, p. 153, L. 13-17. It is prosecutorial

misconduct for a prosecutor to misrepresent or mischaracterize the evidence during closing arguments. *Phillips*, 144 Idaho at 86. Since the Appellant objected to this statement, the Court can find that it is harmless only if it is convinced beyond a reasonable doubt "that the misconduct did not contribute to the jury's verdict." *Ellington*, 151 Idaho 53, 253 P.3d at 738. Since there were no facts adduced at trial to support the prosecutor's statement, it is a misstatement of the evidence and constitutes misconduct. Because one of the prime issue during the trial was whether the Appellant used excessive force, this Court cannot say beyond a reasonable doubt that the jury did not use that statement in determining that the Appellant was not acting in self defense.

This Court, however, should decline to apply the harmless error doctrine to this case. The repeated instances of prosecutorial misconduct coming from the Kootenai County Prosecutor's Office necessitates reversal without application of the harmless error doctrine. Numerous instances of misconduct continue to occur at that office and the appellate courts need to send a message that it will not be tolerated.

2. The trial court abused its discretion in admitting the photographs.

The trial court abused its discretion in allowing the State to introduce the photographs of the complaining witness into evidence in violation of Rule 403 of the Idaho Rules of Evidence. "The [trial] court's determination of whether the probative value of the evidence outweighs its prejudicial effect is reviewed for an abuse of discretion." *Ellington*, 151 Idaho 53, 253 P.3d at 738. In evaluating whether the trial court abused its discretion, the reviewing court must determine whether the trial judge "perceived the issue as one of discretion, acted within the

bounds of that discretion, and reached its decision through the exercise of reason. *State v. Thorngren*, 149 Idaho 729, 732 (2010); *see also Ellington*, 253 P.3d at 739. When a trial court evaluates evidence under Rule 403 of the Idaho Rules of Evidence, "the trial judge must measure the probative worth of the proffered evidence." *Davidson v. Beco Corp.* 114 Idaho 107, 110 (1987); *see also Ellington*, 253 P.3d at 739. The Court must then determine "whether the probative value is substantially outweighed by the danger of unfair prejudice." *State v. Winn*, 121 Idaho 850 (1992). The trial court abused its discretion under the third prong of the *Thorngren* test when it failed to conduct this analysis. Furthermore, the trial court abused its discretion because it acted outside the bounds of its discretion under the second prong of the analysis.

The trial court abused its discretion in admitting the photographs because it failed to conduct the balancing test required under Rule 403 and, therefore, failed to come to its decision through the exercise of reason, as required under the third prong of the *Thorngren* test. In *Ellington*, the Idaho Supreme Court held that the trial court's failure "to evaluate at all whether the word 'homicide' has any probative value" constituted an abuse of discretion. Similarly, the trial court in this case failed to evaluate the probative value of the photographs and likewise failed to evaluate the level of unfair prejudice to the Appellant if the photographs were introduced into evidence. Rather, the trial court simply states "[t]he photos I – I have less of an issue with." Tr. Vol. I, p. 28, L. 23-24. Then, the trial court simply ruled "[a]s far as the motion in limine goes relative to the photos, I'm gonna deny that request at this time to exclude those photographs. So those photographs can be offered into evidence by the State." Tr. Vol. I, p. 31, L. 12-16. The trial court failed to conduct any analysis under Rule 403 as *Thorngren* and

Ellington require. Thus, the trial court abused its discretion in allowing the photographs into evidence.

Even if the trial court had conducted the proper balancing test under Rule 403, the trial court acted outside the bounds of its discretion in admitting the photographs into evidence. Although the State argued that the photographs were necessary to establish the existence of an injury and the extent of the injury so that the State could demonstrate that the Appellant had held some kind of object in his hand when he struck the complaining witness. *See* Tr. Vol. I, p. 22, L. 16-22; Tr. Vol. I, p. 27, L. 22 – p. 28, L. 22. As stated earlier, the State never presented any evidence that the Appellant had any object in his hand at the time he struck the complaining witness. Nor did the State ever argue that to the jury in its opening statement or closing argument that the Appellant had an object in his hand at the time he struck the complaining. The prosecutor, therefore, misled the trial court as to the purpose it was seeking admission. Thus, to the extent the trial court considered these factors in rendering its ruling, the trial court acted outside the bounds of its discretion.

The actual probative value of the photographs was minimal and the potential prejudicial impact was substantial. The parties agreed that the Appellant had struck the complaining witness one time. The only issue between the parties was whether the punch was unlawful or in self defense. The photographs were unnecessary to show the extent of the injuries as the complaining witness was available to testify and did in fact testify about his injuries. Thus, the probative value was minimal. The danger of unfair prejudice, however, was substantial. The photographs were quite graphic. They, therefore, carried a substantial danger of inflaming the passions and

prejudices of the jury. Given that the information that the State was seeking to introduce through the photographs was readily available through the complaining witness' testimony, the Court acted outside the bounds of its discretion in admitting them.

The trial court's error in admitting the evidence was not harmless beyond a reasonable doubt. "Error is harmless and not reversible if the reviewing court is convinced beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Keyes*, 150 Idaho 543, 544, (Ct. App. 2011) (citations and internal quotations omitted). In this case, the photographs were published to the jury and the State repeatedly referenced the injuries that the complaining witness sustained. Due to the repeated references to the injuries and the availability of the photographs to the jury, the error is not harmless beyond a reasonable doubt. The jury may very well have used the photographs to aid in its determination that the Appellant used excessive force in defending himself.

3. The trial court's ruling that the State could call Farnham and Dr. Farr as witnesses and could introduce the medical records and photographs evidence notwithstanding the late disclosure to the defense deprived the Appellant of due process.

The trial court deprived the Appellant of due process when it overruled the Appellant's objection to the introduction of the medical records and photographs into evidence and to Farnham and Dr. Farr as witnesses because the State's late disclosure prejudiced the Appellant in his preparations of his defense. "Due process demands an opportunity to be heard 'at a meaningful time and in a meaningful way.'" *State v. Bettwieser*, 143 Idaho 582, 588 (Ct. App. 2006) (quoting *Gray v. Netherland*, 518 U.S. 152, 182 (1996)). "Thus, due process is violated if

the Appellant is not afforded 'a reasonable opportunity to meet [the charges] by way of defense or explanation.'" *Id.* (quoting *In re Oliver*, 333 U.S. 257, 275 (1948)). "It is a necessary corollary that in order to muster a defense, the Appellant must have sufficient time to do so." *Id.* This is so because the Due Process clause requires "criminal prosecutions comport with prevailing notions of fundamental fairness. Fundamental fairness requires a meaningful opportunity to present a complete defense, which in turn requires 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" *State v. Lewis*, 144 Idaho 64, 66 (2007) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). "Where the late disclosure of evidence forms the basis of an alleged due process violation, the Appellant must show the late disclosure to have been so prejudicial to the Appellant's preparation of his or her case that a fair trial was denied." *State v. Barcella*, 135 Idaho 191, 199 (Ct. App. 2000).

The State's failure to timely disclose its witnesses and evidence deprived the Appellant of due process because the Appellant was unable to adequately prepare for trial as a result of the untimely disclosures. The State did not reveal that the complaining witness suffered any fractures until it filed its Motion to Amend on October 14, 2011, the Friday before the Jury Trial Status Conference and a mere five days before trial. The State then waited until the afternoon of October 17, 2011, a mere day and a half before trial, to disclose the medical records. The State then waited until October 18, 2011, the afternoon before the trial, to disclose the photographs. The State also waited until October 18, 2011 to disclose Dr. Farr as a witness.

If the State had timely disclosed the medical records, the photographs, and Dr. Farr as a witness, the Appellant would have had an opportunity to contact an expert regarding whether or

not the injuries did in fact occur as a result of the Appellant's punch. The Appellant could have prepared to effectively combat the State's assertion during the pretrial motions' hearing that the Appellant was potentially carrying a heavy object when he struck the complaining witness. The Appellant would have had the opportunity to combat the State's claim that the extent of the complaining witness' injuries showed that the Appellant used excessive force in defending himself.

The State's late disclosure of Farnham as a witness prejudiced the Appellant because it prevented the Appellant from effectively cross examining him on the stand. The State provided its initial discovery response on August 23, 2011. In this response, the State did not reference Farnham as a possible witness. The State failed to disclose his involvement in the case until October 11, 2011, after the pretrial conference and a mere eight days before trial. The State did not provide any statements of Farnham to the defense, despite the fact that the Appellant requested any written or oral statements made to law enforcement or the prosecutor or an agent of the prosecutor of any witnesses for the State on August 17, 2011. The State did not object to this request. The State then affirmatively misrepresented the nature of Farnham's testimony by stating that he was present during the incident and would be testifying about the incident itself. *See* Tr. Vol. I, p. 22, L. 23-25; Tr. Vol. I, p. 29, L. 2-11.

Had the State not disclosed Farnham's existence as a witness so late and then affirmatively misrepresented the nature of his testimony, the Appellant would have been able to prepare a more effective cross examination. The State used Farnham's testimony in its effort to show that the Appellant was motivated by something other than self defense when he punched

the complaining witness. His testimony was a key piece of evidence for the State. Had the State timely disclosed him, complied with its discovery obligations, and not affirmatively misrepresented the nature of his testimony, the Appellant would have been able to obtain Farnham's phone records and, thus, could have attempted to cast doubt on the veracity of his claim that the Appellant sent him a text message. Thus, the Appellant was deprived of his right to effectively confront this key witness as a result of the untimely disclosure, coupled with the State's affirmative misrepresentation as to the nature of his testimony.

4. Even if the errors of which the Appellant complains are individually harmless, the cumulative error doctrine mandates reversal in this case.

Even if each of the errors of which the Appellant complains is harmless when looked at individually, the cumulative error doctrine mandates reversal in this case because the Appellant was deprived of a fair trial. "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *State v. Perry*, 150 Idaho 209, 230 (2010). Because the errors as a whole show that the Appellant was deprived of a fair trial, the Court should reverse his conviction under the cumulative error doctrine.

Due to the many instances of prosecutorial misconduct, the late disclosure of evidence and witnesses limiting the amount of time the Appellant had to prepare his defense, and the potentially inflammatory nature of the photographs, the totality of circumstances suggests that the Appellant did not receive a fair trial. Even if each of the instances of misconduct, late disclosure of evidence and witnesses, and the production of photographs in violation of Rule 403 of the Idaho Rules of Evidence were individually harmless, the aggregation of these errors

certainly shows the absence of a fair trial. This is a situation in which the prosecutor committed several acts of misconduct, the Court admitted inflammatory pictures without undergoing the proper analysis, and the State disclosed evidence late. Even if each of these errors could individually be considered harmless, cumulatively they demonstrate that the Appellant did not receive a fair trial. This Court should, therefore, reverse the Appellant's conviction under the cumulative error doctrine.

CONCLUSION

This Court should reverse the Appellant's conviction in this matter. The several instances of prosecutorial misconduct constitute reversible error. Additionally, this Court should decline to apply the harmless error doctrine because the Kootenai County Prosecutor's Office extensive history in committing prosecutorial misconduct. This Court should reverse on the basis that the trial court abused its discretion in admitting the photographs. Additionally, this Court should find that the late disclosure of evidence and witnesses deprived the Appellant of due process. Finally, this Court should reverse under the cumulative error doctrine, even if each of the errors is individually harmless.

DATED this 15 day of January, 2013.

OFFICE OF THE KOOTENAI COUNTY
PUBLIC DEFENDER

BY: _____
MARCUS O. DRAPER
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this _____ day of January, 2013, served a true and correct copy of the attached NOTICE OF APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

X	Kootenai County Prosecuting Attorney via Interoffice Mail P.O. Box 9000 Coeur d'Alene, Idaho 83816-9000		
X	Lawrence G. Wasden Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	[X] [ ] [ ]	First Class Mail Certified Mail Facsimile (208) 854-8071
X	Reporter for District Judge John R. Stegner, Sheryl Engler PO Box 8068 Moscow, Id 83843	[X] [ ] [ ]	First Class Mail Certified Mail Facsimile (208) 883-5719