4-11-2013

# State v. Iverson Respondent's Brief Dckt. 40359

IN THE SUPREME COURT OF THE STATE OF IDAHO



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| STATE OF IDAHO, | ) | |
| | ) | No. 40359 |
| Plaintiff-Respondent, | ) | |
| | ) | Kootenai Co. Case No. |
| vs. | ) | CR-2011-10633 |
| | ) | |
| JOSEPH THOMAS IVERSON, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |
| | ) | |

# BRIEF OF RESPONDENT

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

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## STATEMENT OF THE CASE

### Nature of the Case

Joseph Iverson appeals from the district court's appellate order affirming Iverson's conviction for battery.

### Statement of Facts and Course of Proceedings

Iverson punched Darryl Farnham in the side of the face, causing fractures which required surgery. (JT Tr., p.26, L.21 – p.30, L.25.) The state issued Iverson a citation charging him with battery. (R., p.5.)

On the morning of jury trial, Iverson argued to exclude for late disclosure the testimony of three state witnesses, Shawn Farnham (brother of the victim), Darren Potter, and Dr. Robert Farr; and challenge the admissibility of photographs of the victim before and after the surgery to repair Darryl Farnham's injuries, Darryl Farnham's medical reports, and X-rays of Darryl Farnham taken after he was struck by Iverson. (10/19/11 Motions Hearing Tr., p.20, L.17 – p.21, L.20.) At the conclusion of the hearing, the trial court issued a ruling allowing the admission of the photographs of the victim as well as the testimony of Shawn Farnham. (10/19/11 Motions Hearing Tr., p.31, Ls.10-23.) The trial court ruled Darren Potter was not allowed to testify at trial because he was not disclosed by the state as a witness until 5:00 pm the evening before trial. (10/19/11 Motions Hearing Tr., p.31, L.24 – p.32, L.2.) The trial court further declined to allow Dr. Farr to offer any "expert medical testimony" as to Darryl Farnham's injuries as a sanction for the state's late disclosure, instead only permitting the doctor's testimony in his capacity as a records custodian for the purpose of admitting

Darryl Farnham's medical records and X-ray. (10/19/11 Motions Hearing Tr., p.32, Ls.2-13.)

The matter proceeded to jury trial where Iverson's self-defense claim boiled down to his claim that although he did not feel threatened by Darryl Farnham specifically, he did feel threatened by the nature of Darryl Farnham and his friends' trespass on the property where he resided and an altercation with Darryl Farnham seemed like it would be easier for Iverson than engaging in a confrontation with Darryl Farnham's much larger friend, Dustin North. (JT Tr., p.121, L.14 – 124, L.16.)

During the state's closing argument, Iverson objected to the state's presentation of facts brought up in trial regarding Iverson's Taekwondo training. (JT Tr., p.153, L.s19-22.) The trial court overruled Iverson's objection. (JT Tr., p.153, L.23.)

The jury returned a verdict of guilty to battery. (JT Tr., p.169, L.18 – p.170, L.2; R., p.105.) The trial court sentenced Iverson to 180 days in jail with 105 days suspended, 30 of those days to be utilized by the probation officer as discretionary and 45 days to serve and placed him on a two year period of supervised probation with a suspended fine in the amount of $1000 and an order that he pay restitution to the victim. (JT Tr., p.192, L.19 – p.195, L.8; R., pp.109-110.)

Iverson timely appealed his conviction to the district court (R., pp.113-115), arguing the same seven issues he presents on this appeal (R., pp.144-171). Following a hearing on Iverson's appeal, the district court affirmed the

decision of the trial court, finding the prosecutor did not commit misconduct, the trial court did not abuse its discretion in admitting photographs of the victim at trial, nor did it abuse its discretion in allowing late disclosed evidence to be admitted at trial. (7/31/12 Tr., p.46, L.6 – p.48, L.21; R., pp.200-201.) Iverson timely appeals. (R., pp.202-205.)

## ISSUES

Iverson states the issues on appeal as:

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?

(Appellant's brief, p.8.)

The state rephrases the issues on appeal as:

1. Has Iverson failed to establish any misstatements made by the prosecutor to the trial court which affected its ultimate rulings on discovery sanctions in a pretrial motion hearing?

2. Has Iverson failed to show prosecutorial misconduct, much less misconduct rising to the level of fundamental error?

3. Has Iverson failed to show error in the district court's evidentiary rulings?

4. Has Iverson failed to show any error, let alone cumulative error in this case?

## ARGUMENT

### I.
### Iverson Has Failed To Establish Any Misstatements By The Prosecutor In Statements Made To The Court During A Hearing On Pretrial Motions

#### A. Introduction

Iverson argues for the first time on appeal that the prosecutor made misrepresentations to the trial court during a motion hearing prior to trial. Specifically, Iverson asserts the prosecutor "affirmatively misled the trial court in its argument" to the court regarding the state's position in response to Iverson's motion to exclude photographs from evidence and that she "deceived the trial court as to the nature of [Shawn] Farnham's testimony." (Appellant's brief, p.12.) Because the record shows the prosecutor did not affirmatively misrepresent information to the trial court during the pretrial motions hearing, Iverson has failed to show misconduct, much less fundamental error.

#### B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The appellate court "examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." Id. "If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, [the appellate court] affirm[s]

the district court's decision as a matter of procedure." Id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been an abuse of that discretion. State v. Zimmerman, 121 Idaho 971, 974, 829 P.2d 861, 864 (1992).

C. Iverson Has Failed To Establish Any Affirmative Misstatements By The Prosecutor During The Pretrial Motion Hearing And Thus Failed To Establish Any Abuse Of Discretion By The Trial Court In Its Subsequent Rulings On Iverson's Request For Discovery Sanctions

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Relief without objection will be granted unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally

by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Id. at 226, 245 P.3d at 978.

1. The Prosecutor Did Not Mislead The Court In Arguing For The Admission Of Photographs Of The Victim At Trial

Iverson asserts on appeal the prosecutor "argued that the photographs [of the victim] had probative value because it would substantiate other evidence that the Appellant had an object in his hand when he struck the complaining witness." (Appellant's brief, p.12 (citation to the transcript omitted).) This was a misrepresentation, Iverson claims, because "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." (Appellant's brief, p.12.)

In arguing for the admission of the photographs of the victim at trial, the state argued:

> Okay. Okay. Um, and I agree with [defense counsel] that the main lead question probably today is whether or not this use of force was unlawful. Uh, and to that end I'll refer to the instruction that he submitted, uh, which states that the kind and degree of force which a person may lawfully use in self-defense are limited by what a reasonable person in the same situation as such person, uh, seeing what a person sees, knowing what that person knows, would reasonable believe to be necessary.
>
> Your Honor, the – the evidence uh, that we intend to present today is going to raise the question of whether or not um, Mr. Iverson had some other – had something in his hand, had some other object. The fact is that – that all of my witnesses are going to testify that he caught Mr. Farnham unawares and (inaudible). . . kind of walked up behind him, uh, but without Mr. Farnham expecting it, and then caught him off guard and punched him we think with – possible with the uh, use of some sort of object. Um, the medical testimony and the pictures we are seeking to introduce today, Judge go to that, and go to show the extent of force, go to show whether or not uh, a reasonable person would have believed

> that to be necessary, um, particularly in the context that we're um, intending to explain where there was no actual self-defense necessary given the way it went down. But to the extent that he's going to claim some kind of self-defense, uh, this goes a long way to showing that – that he used excessive amounts of force even – even in the context of one punch, Judge, if someone comes up with uh, some kind of heavy object in their hand, that shows, first of all, an intent to cause harm before the situation arises to the level that self-defense is necessary. So he comes prepared, Judge. There's a sense of premeditation here. Um, these pictures go to show that, that –

(10/19/2011 Motions Hearing Tr., p.27, L.12 – p.28, L.22.) The trial court ruled to allow the photographs over Iverson's objection of late disclosure and advised Iverson that the state could offer the photographs of the victim at trial and if he had any objections, he could "obviously" raise them at that time. (10/19/2011 Motions Hearing Tr., p.31, Ls.10-16.)

The photographs were offered and admitted through the testimony of Darryl Farnham with Iverson "renew[ing] [his] objection from earlier." (JT. Tr., p.31, Ls.20-21.) Iverson's initial bases for objecting to the introduction of the photographs of the victim were the late disclosure of the photographs in addition to the potential inflammatory nature of such photographs. (See 10/19/2011 Motions Hearing Tr., p.21, Ls.2-4, p.24, Ls.11-22.)

As the district court noted sitting in its intermediate appellate capacity, the photographs were admissible to the issue at trial of whether or not Iverson used excessive force. (7/31/2012 Tr., p.12, Ls.22-24.) The state had argued that one of the working trial theories was the possibility that Iverson had something in his hand when he struck Darryl Farnham:

> As I indicated to the Court at various times during the hearing, this is a possible theory. It's a possible theory, Your

> Honor, based on my conversations with witnesses in preparation for trial. They were positing to me that their question or belief that there must have been something in the defendant's hand in order to cause the kind of force that occurred in this situation, the kind of force sufficient to break an orbital socket.
>
> Throughout the course of the trial, You Honor, I chose not to put on evidence to that effect because the further I spoke to the witnesses about it, the more concerned I became that it might be speculative, and so we didn't put that on.
>
> However, what also became clear is that the defendant has martial arts training which explains why the force in this matter was so profound. It was one reasonable theory to conclude that there was some other object involved, but that theory never make it to the Court.
>
> The bigger picture again, Judge, is the issue of excessive force, which is obviously an issue in this case, and as the Court indicated earlier, there are a number of theories that one may adduce to get there.

(7/31/2012 Tr., p.30, L.5 – p.31, L.1.)

There is nothing in the record to contradict the prosecutor's statement to the trial court that the witnesses present believed Darryl Farnham was struck "possibly with the uh, use of some sort of object." (10/19/2011 Motions Hearing Tr., p.28, Ls.5-6.) The decision to ultimately not further develop at trial the theory that Iverson used an object to enhance the power of his blow did not violate any constitutional right, is not clear error on the record, and did not prejudice Iverson. Iverson has failed to show any misstatement by the prosecutor which led to the introduction of otherwise inadmissible evidence at trial or any abuse of discretion by the trial court in allowing the photographs be offered in spite of their late disclosure.

2. There Is Nothing In The Record To Support Iverson's Claim That The Prosecutor Deceived The Trial Court As To The Nature Of A Witness's Testimony

Iverson claims on appeal "[t]he prosecutor also committed misconduct when she deceived the trial court as to the nature of [Shawn] Farnham's testimony." (Appellant's brief, p.12.) Iverson asserts "[t]he prosecutor's misleading statement as to the nature of [Shawn] Farnham's testimony prevented the Appellant from effectively cross examining him on the stand." (Appellant's brief, p.13.) Because Iverson has failed to show any affirmative misstatement by the prosecutor he has failed to show fundamental error.

At a motion hearing the morning of trial, Iverson objected to the testimony of recently disclosed witnesses. (10/19/2011 motions Hearing Tr., p.21, Ls.15-20.) The trial court ultimately limited the testimony of one witness and excluded the testimony of another as a sanction for the state's late disclosure. (10/19/2011 Motions Hearing Tr., p.32, Ls.1-17.) In response to Iverson's objection to the late disclosure of Shawn Farnham, the state represented to the trial court that "the witnesses that [Iverson's] objection to, these are people who were present on that date . . .". (10/19/2011 motions Hearing Tr., p.22, Ls.23-24.) The trial court allowed the testimony of Shawn Farnham, a fact witness, after being advised Shawn Farnham had been previously disclosed to Iverson between the pretrial and the jury trial status conference. (10/19/2011 Motions Hearing Tr., p.31, Ls.19-23.)

At trial, Shawn Farnham testified that he became aware that Iverson punched his brother Darryl Farnham when Iverson texted Shawn Farnham telling

him he "just beat the fuck" out of his brother and that it had "been a long time comin'." (JT Tr., p.88, Ls.15-16.) The only objection to Shawn Farnham's testimony made by Iverson at trial was based on hearsay and overruled by the trial court. (JT Tr., p.87, L.14 – p.88, L.8.) Iverson cross-examined Shawn Farnham as to the existence of these text messages. (JT Tr., p.89, L.5 – p.90, L.10.)

Iverson argues for the first time on appeal that the state made a misrepresentation to the trial court that Shawn Farnham "would testify as a witness to the incident at issue." (Appellant's brief, p.12.) This was not the basis of an objection at trial and was therefore not preserved for appeal. "Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) (citations omitted). Where a claim is raised for the first time on appeal, the appellate court will consider whether the error alleged qualifies as fundamental error. Id. 150 Idaho at 228, 245 P.3d at 980.

Iverson does not argue that the introduction of Shawn Farnham's testimony at trial violates an unwaived constitutional right. His unpreserved argument therefore fails on the first prong of Perry. Although Shawn Farnham was not physically present at the battery he was a fact witness who testified that Iverson made admissions to him about his conduct shortly after the incident. It is also not clear from the record the prosecution was not talking about Darren Potter or Robert Farr, the witnesses ultimately excluded by the trial court. Finally, to the extent the prosecutor's statement is inaccurate where Shawn

Farnham was physically located at the time of the battery and such inaccuracy had nothing to do with whether Shawn Farnham's testimony should be excluded as a sanction for late disclosure, as such, Iverson has failed to show any error, much less fundamental error.

## II.
## Iverson Has Failed To Establish Prosecutorial Misconduct During The State's Closing Argument

### A. Introduction

Iverson argues that during trial the prosecutor committed misconduct "when she misstated the facts" in closing argument. (Appellant's brief, p.16.) Iverson did object to this statement during trial and his objection was overruled. (JT Tr., p.153, Ls.19-23.)

Iverson also argues, for the first time on appeal, that the prosecutor made an additional statement during closing argument that constituted prosecutorial misconduct and amounted to fundamental error. Specifically, he contends that the prosecutor committed misconduct when "she misstated the law that applies in a self defense case." (Appellant's brief, p.15.) A review of the record shows no misconduct by the prosecutor during closing argument, much less misconduct rising to the level of fundamental error.

### B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App.

2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The appellate court "examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." Id.

"[T]he standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). If the alleged error was followed by a contemporaneous objection at trial, the defendant bears the initial burden on appeal of establishing that the complained of conduct was improper. State v. Ellington, 151 Idaho 53, 59, 253 P.3d 727, 733 (2011); State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). "Where the defendant meets his initial burden of showing that a violation occurred, the State then has the burden of demonstrating to the appellate court beyond a reasonable doubt that the constitutional violation did not contribute to the jury's verdict." Perry, 150 Idaho at 227-28, 245 P.3d at 979-80. When, on the other hand, a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. Id. at 228, 245 P.3d at 980.

Whether preserved by objection at trial or reviewed for fundamental error, a mere assertion or finding that a particular question or statement was objectionable or improper is insufficient to establish prosecutorial misconduct. As explained by the United States Supreme Court: "[I]t is not enough that the

prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations and citations omitted); see also Smith v. Phillips, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.") State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991) (the function of appellate review is "not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial").

## C. Iverson Has Failed To Establish The Prosecutor Committed Misconduct During Closing Argument

### 1. Iverson Has Failed To Show That The Prosecutor's Statement About The Level Of Force Used By Iverson Was Misconduct

A closing argument may not misrepresent or mischaracterize the evidence, unduly emphasize irrelevant facts introduced at trial, refer to facts not in evidence, argue as substantive evidence matters admitted for limited evidentiary purposes, or misrepresent the law or the reasonable doubt burden. State v. Phillips, 144 Idaho 82, 86-87, 156 P.3d 583, 587-88 (Ct. App. 2007). However, it is well settled that both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. See State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); Phillips, 144 Idaho at 86, 156 P.3d at 587.

Iverson argues "[t]he 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." (Appellant's brief, p.16 (citation to the trial transcript omitted).) Because the state's argument was a permissible inference from the facts presented at trial, Iverson's argument fails.

At trial, Iverson objected to the following portion of the state's closing argument:

> Now, I'm not a doctor and I don't have medical training and I don't know if – if any of you do, um, so I don't know exactly what we're talking about. But I do know that we're talking about numerous fractures. We're talking about some serious bodily harm. I would submit to you that that is excessive force. And I would also submit to you that Mr. Iverson, given the kind of training he had as a black belt in Taekwondo, understood that this is the sort of thing that's gonna [sic] result from the blow that he landed. He acknowledged that he's been doing this for a long time.

(JT Tr., p.153, Ls.8-18.) This argument was not inconsistent with Iverson's earlier testimony that he was a first degree black belt in Taekwondo and had been trained in proper technique and control when it came to punching people. (See JT Tr., p.115, Ls.1-17.) Based on Iverson's training, it was a reasonable inference that he knew the potential injuries he would inflict when he punched Darryl Farnham.

2. Iverson Has Failed To Show That The Prosecutor's Statement Regarding Self-Defense Amounted To Fundamental Error

An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to

remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Id. at 227-8, 245 P.3d at 978.

Iverson argues that the prosecutor committed misconduct rising to the level of fundamental error by misstating the law as it applies in a self defense case. (Appellant's brief, pp.15-16.) Iverson, however, has failed to show fundamental error from the record. Indeed, a review of the record and the applicable law shows that the argument singled out was not improper, and as such, Iverson has failed to satisfy even the first prong of the fundamental error analysis.

A prosecutor has considerable latitude in closing argument. State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009); State v. Porter, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997); State v. Priest, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995). He or she is entitled to argue all reasonable inferences from the evidence in the record. Severson, 147 Idaho at 720, 215

P.3d at 440; Porter, 130 Idaho at 786, 948 P.2d at 141 (citing State v. Garcia, 100 Idaho 108, 110, 594 P.2d 146, 148 (1979)). If a prosecutor exceeds this latitude and "attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." Perry, 150 Idaho at 227, 245 P.3d at 979.

In this case, Iverson contends that

> the prosecutor's statement regarding what 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.

(Appellant's brief, p.16.) Iverson asserts on appeal that in her closing 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." (Appellant's brief, p.16.) Iverson contends "this misstates the law as the Appellant has no duty to retreat, even if retreating is a better option." (Id.)

Iverson cites to a brief portion of the state's closing argument as a misstatement of the law, asserting the state's argument was that Iverson "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.]'" (Appellant's brief, p.15 (citation to the trial transcript omitted).) Although Iverson claims on appeal that this is a direct statement contrary to the law not requiring a person acting in self-defense

retreat (Appellant's brief, p.16), the prosecutor's statement was not inconsistent with the self-defense jury instructions as a whole. The prosecutor followed up the cited-to statement with a discussion of the self-defense jury instructions previously read to the jury by the trial court and the necessity that the jury find Iverson was in imminent danger before resorting to a reasonable level of self-defense. (See JT Tr., p.149, L.17 – p.152, L.17.) Iverson asserts 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" (Appellant's brief, p.16), but fails to show how the state's closing argument was inconsistent with the self-defense jury instructions (R., pp.98-100 (self-defense instructions, including no duty to retreat)). Iverson has failed to show error, much less error of constitutional significance.

Because a review of the record shows that the argument Iverson challenges was based on the state's proper review of the self-defense jury instructions, Iverson has failed to show that the argument was improper. He also has failed to show prejudice because there is no reason to believe the jury failed to follow its jury instructions on self-defense. His unpreserved claim of prosecutorial misconduct therefore fails under Perry.

## III.
## Iverson Has Failed To Show Error In The District Court's Evidentiary Rulings

### A. Introduction

Iverson argues that the trial court abused its discretion in admitting photographs of Darryl Farnham's injuries at trial because it failed to conduct the

balancing test as required by Idaho Rule of Evidence 403. (Appellant's brief, pp.7-19.) Additionally, Iverson asserts the trial court rulings "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." (Appellant's brief, p.20.) For the reasons set forth below, these claims are without merit.

B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of discretion. State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010) (citations omitted).

The relevancy of evidence is an issue of law subject to free review. State v. Raudebaugh, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993). A district court's decision to exclude evidence pursuant to I.R.E. 403 will be disturbed on appeal only if the appellant demonstrates that the district court abused its discretion. State v. Birkla, 126 Idaho 498, 500, 887 P.2d 43, 45 (Ct. App. 1994).

C. Iverson Has Failed To Show That The Trial Court Erred By Permitting The Admission Of Photographs Of The Victim's Injuries At Trial

Pursuant to I.R.E. 403, evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice — which is the tendency to suggest a decision on an improper basis — substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 907 (Ct. App. 1994). "The

rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990).

In this case, the trial court overruled Iverson's I.R.E. 403 pretrial objection to the admission of the photographs of Darryl Farnham's injuries. Iverson has failed to show that the trial court abused its discretion. The probative value of the photographs, which tended to show an excessive use of force by Iverson, and tended to disprove Iverson's self-defense claim, was not substantially outweighed by the danger of unfair prejudice.

At a hearing on Iverson's motion to exclude the photographs, Iverson argued they "could potentially prejudice and inflame the jury." (10/19/2011 Motions Hearing Tr., p.26, Ls.12-13.) After the state's argument that the photographs went to a showing that Iverson "used excessive amounts of force – even in the context of one punch" (10/19/2011 Motions Hearing Tr., p.28, Ls.15-16), the trial court indicated it had "less of an issue with" the photographs and "the prejudice that may have relative to [Iverson]." (10/19/2011 Motions Hearing Tr., p.28, L.23 – p.29, L.1.) In affirming the ruling allowing the photographs to be offered as evidence at trial, the district court concluded:

> The next question is: Did the trial court abuse its discretion in admitting the photographs of the victim's injuries? I'm unpersuaded that the Court did abuse its discretion, so I'm rejecting that as a basis for appeal. As I said earlier – or as I alluded to earlier, I think it would have been much more helpful had Judge Caldwell concluded what the relevance of the photographs were , and that the danger of unfair prejudice did not outweigh their relevance, but I think I can infer from what he decided, based on the argument made by you, [defense counsel], that that's what he did, although I could concluded other than that.

(7/31/2012 Tr., p.46, L.17 – p. 46, L.2.) The record, including the placement of the trial court's findings directly after the state's argument that the relevance of the photographs went to the excessive use of force used by Iverson, supports this conclusion.

Iverson has failed to show that the photographs showing the victim's injuries were unfairly prejudicial. Even if there was the potential for unfair prejudice, Iverson has failed to show the probative value of the admitted photographs was substantially outweighed. He has therefore failed to show that the trial court abused its discretion in admitting the evidence.

D. Iverson Has Failed To Show That The Trial Court Deprived Iverson Of Due Process By Allowing The Introduction Of Late Disclosed Evidence And Testimony of Late Disclosed Witnesses

Iverson asserts on appeal the trial court abused its discretion by ruling the state could introduce the testimony of Dr. Farr for a limited purpose at trial as well as the introduction of Darryl Farnham's medical records. (Appellant's brief, pp.20-21.) In light of Iverson's subsequent actions at trial, his argument is without merit.

The trial court ruled that Dr. Farr could not testify as an expert witness to the nature of the injuries sustained by Darryl Farnham as a sanction for the state's late disclosure. (10/19/2011 Motions Hearing Tr., p.32, Ls.2-23.) The trial court indicated Dr. Farr could testify as a records custodian for the introduction of Darryl Farnham's medical records but if the parties "stipulate[d] that those documents [could] be marked and admitted into evidence," the doctor would not have to testify at all. (10/19/2011 Motions Hearing Tr., p.32, Ls.4-9.)

At trial, Dr. Farr was not called as a witness. The medical records were admitted at trial without objection and pursuant to a previous stipulation by Iverson. (JT Tr., p.28, Ls.9-14.) The relief sought by Iverson was granted by the trial court: Dr. Farr was not allowed to give an opinion as to any level of force used by Iverson against Darryl Farnham. Ultimately, Dr. Farr did not testify at all. There is no other relief available to Iverson on this issue.

Further, Iverson stipulated to the introduction of the medical records through Darryl Farnham. Iverson has failed to show the trial court abused its discretion in light of the forgoing.

## IV.
## Iverson Has Failed To Establish Cumulative Error

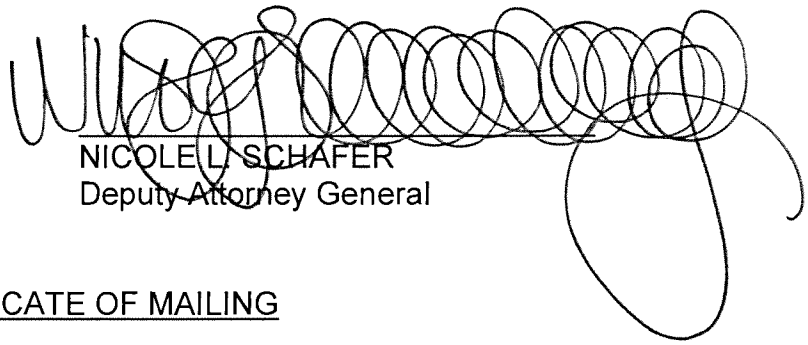
"The cumulative error doctrine requires reversal of a conviction when there is 'an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show the absence of a fair trial, in contravention of the defendant's constitutional right to due process." State v. Draper, 151 Idaho 576, 594, 261 P.3d 853, 871 (2011) (citations, quotations and alteration omitted). A necessary predicate to application of the cumulative error doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). In addition, cumulative error analysis does not include errors neither objected to nor found fundamental. Perry, 150 Idaho at 230, 245 P.3d at 982.

Iverson has failed to show any error, much less two or more objected-to errors. Thus, the doctrine of cumulative error does not apply in this case. See, e.g., LaBelle v. State, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997).

## CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Iverson guilty of battery.

DATED this 11th day of April 2013.

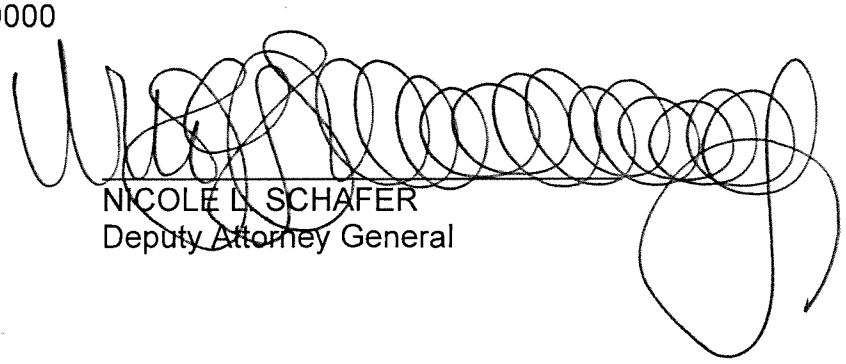


NICOLE L. SCHAFER
Deputy Attorney General

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of April 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JAY W. LOGSDON
Kootenai County Public Defender's Office
PO Box 9000
Coeur d'Alene, ID 83816-9000



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm