6-24-2010

State v. Jackson Appellant's Brief Dckt. 36968

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. PONY L. JACKSON, Defendant-Appellant.	)	NO. 36968 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLARK

HONORABLE JOEL E. TINGEY
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender
I.S.B. # 7259
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

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

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

In Idaho, Pony Jackson has the right to a fair trial. The misconduct committed in this case was not slight nor an isolated incident, but instead, cumulatively deprived Mr. Jackson of a fair trial. The prosecution violated its duty to see that Mr. Jackson had a fair trial not by submitting only competent, admissible evidence to the jury, but instead commented that Mr. Jackson failed to present evidence of his innocence, encroached upon the province of the jury by denying them of their right to be the ultimate judges of the credibility of the witnesses, blatantly disregarded the district court's order prohibiting the use of overly prejudicial evidence, and appealed to the passions and prejudices of the jury asking that they not punish the alleged victim.

Mr. Jackson contends that the misconduct committed in his case constituted fundamental error. He also asserts that if each instance of prosecutorial misconduct is found to not rise to the level of fundamental error individually, aggregated the errors are fundamental. Further, Mr. Jackson asserts that the errors are not harmless or, alternatively, that the errors amount to cumulative error, depriving him of his right to a fair trial.

Statement of the Facts and Course of Proceedings

On September 30, 2008, a Prosecutor's Information was filed charging Mr. Jackson with two counts of lewd conduct and two counts of penetration by foreign object. (R., pp.7-9.) Mr. Jackson entered a not guilty plea to the charges. (R., pp.13-14.) The case proceeded to trial.

Prior to selecting a jury, the district court dismissed both counts of penetration by a foreign object because the alleged incidents occurred outside of the statute of limitations. (Tr., p.30, Ls.7-14.) The district court also took up some pre-trial business addressing the State's concern about how to deal with why the alleged victim came forward to report the abuse when she did:

> MR. SIMPSON (Prosecutor): Okay. The other issue I've got is, Kendra Ward, she is now 21. This happened when she was four years old. The way this came about is, is that a couple of years ago, in 2007, she was watching the news and Pony Jackson had been arrested for child pornography and the news said if anyone out there has been molested by Pony Jackson, would you please contact the law enforcement. I mean, that's kind of my paraphrasing of it.
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> And so my question is, is I'm sure Todd [defense counsel] is going to object if that – to that kind of information coming in; and I just – I want to know the boundaries of this. Again, I don't want any mistrials or appealable issues. Do you want me to avoid that issue unless Todd raises it? I mean, I think I can get – I think I can say, "Did you contact law enforcement and for what reason did you contact law enforcement," without getting into the –
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> THE COURT: Right. If you can, I mean, that's going to be much better. It's going to be problematic if she's – if this evidence of charges for child pornography come in because that can be unfairly prejudicial. I mean, certainly she can testify that she became aware that he was involved. Well—
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> MR. SIMPSON: Yeah. I mean, how do we – how does the jury understand that all of a sudden she – because I think part of Todd's defense is that why wait all this time and then all of a sudden you do it. So how do I –
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> THE COURT: Well, she can testify – and this may take some coaching on your part so we don't get into a problem – but that she saw a report about Pony Jackson and –
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> MR. SIMPSON: But don't mention it was on child pornography; she saw a report?
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> THE COURT: Yeah, it wasn't based on child pornography issues but that he was involved – that was – that he was involved – there was a

law enforcement inquiry regarding Pony Jackson and that prompted her to come forward, something general and innocuous like that. Certainly she can talk about this was generated by a law enforcement inquiry; but if she can stay away from the charges, we're going to be a lot better off.

MR. SIMPSON: Okay. I think I can coach her on that. I talked to her about that yesterday too. And, of course, a lot of that depends on what you ask her on cross-examination, what I can get into, I'm assuming, after that. But that's the way – those are my –

THE COURT: So, I mean, that – the evidence of prior crimes and prior acts can come in if the door gets opened on that. But, I mean, right now that – you want to treat that as being unfairly prejudicial, the prejudice doesn't outweigh the probative value. But if there's a door gets [sic] opened, then that does come in.

(Tr., p.33, L.21 – p.36, L.1.)

After selecting a jury, the State made its opening statement. (Tr., p.133, L.1 – p.137, L.11.) During its opening statement, the prosecution violated the district court's order regarding the alleged victims reason for reporting, stating, "If I remember right, she, when this initially happened, she told her mother as I recall; but it wasn't until 2007, in January of 2007, when there was a report on the news that anybody who had been molested by Pony Jackson, if they would contact the sheriff's office or law enforcement office had wanted them to do that. . . . " (Tr., p.136, Ls.1-8.)

The State presented its first witness, Detective Steven Anderson. (Tr., p.142, Ls.1-6.) Detective Anderson testified about his investigation regarding the alleged sexual abuse of the victim. (Tr., p.142, L.1- p.172, L.11.) The next witness was the alleged victim, K.W. (Tr., p.173, Ls.1-3.) K.W. testified about the alleged sexual abuse committed by Mr. Jackson. (Tr., p.179, Ls.15 – p.184, L.25.) The prosecution then asked K.W. the following:

Q. When you were older, did there come a time when you reported this incident?

A. Yes.

Q. What brought that about?

A. My mom called me and told me that on the news they had said that Pony Jackson had been arrested and that anybody else that had been molested by him, to please come forward.

(Tr., p.185, L.23 – p.186, L.5.)

The State's next witness was Ms. Brenda Ward, the alleged victim's mother. (Tr., p.236, Ls.19-21.) Ms. Ward testified that she was K.W.'s mother, had left her daughter with her parents during the time the alleged crimes where to have been committed, while she went to drug rehab, and that Mr. Jackson was living on the property at that time. (Tr., p.236, L.19 - p.254, L.25.) The State then rested. (Tr., p.261, Ls.6-7.)

Defense counsel then presented its case, recalling the State's witnesses and presenting the testimony of two other individuals who lived on the property during the time the alleged crimes where said to have occurred. (Tr., p.261, L.10 – p.328, L.25.) During the State's cross-examination of Brenda Ward, who had been called by the defense, the State asked Ms. Ward to vouch for her daughter's credibility:

Q. Do you have any reason to disbelieve what Kendra has testified to and what she has told you?

A. No, I don't.

Q. And why don't you disbelieve her?

A. I raised her. I know if she is lying. I know if she's telling the truth. And you can see the hurt in her. And I've seen the changes in her.

(Tr., p.278, L.24 – p.279, L.5.)

After giving the final instructions to the jury, the State presented its closing argument. (Tr., p.339, L.9.) During the closing argument, the prosecutor stated:

> . . . What is – what's her motive to say these things other than if it isn't true. I mean, did she just wake up one morning and say, "Hmm, gee, I'm going to accuse Pony Jackson of molesting me"? [sic] I mean, I don't – we just – we don't do that. I mean, it happened. It's believable. Pony Jackson did the things to her that she said he did. Whether she remembers them in exact detail, whether there's a variation over the years, it happened.
>
> . . .
>
> And the reason she came forward then is, when she heard the news article – or I should say media report – that those who have something to say about Pony Jackson molesting them ought to come forward, she came forward. And she ought not to be held or punished again for waiting to come forward.
>
> . . .
>
> There's just so many things that she has talked about that are so credible that I believe that the only right and just verdict in this case – and I know it's difficult for you to do, it's difficult for you to find this – but that Pony Jackson sexually abused [K.W.] in the summer of 1992 at the home or the ranch of Cleo and Sybil Wilding. How could you make these facts up? I mean, how – a mirror, I mean, think about it. I mean, scissors. What she says happened happened. And I would urge you to find Mr. Jackson guilty of both counts.

(Tr., p.340, L.19 – p.344, L.11.)

In rebuttal argument, the State commented on Mr. Jackson's failure to present evidence of his innocence, stating, "Did we hear any testimony that it didn't happen? I don't recall hearing any testimony that it didn't happen. The only testimony I recall was that it happened." (Tr., p.356, Ls.12-15.)

The case was then submitted to the jury, who returned guilty verdicts for both counts of lewd conduct. (Tr., p.361, Ls.1-7.)

Following the trial, Mr. Jackson filed a Motion for Judgment of Acquittal and a Batson Motion requesting a mistrial. (R., pp.63-64, 67-68.) Both motions were denied. (R., pp.74-76.) Mr. Jackson was sentenced to a unified sentence of twenty years, with ten years fixed, for each count, to be served concurrently. (R., pp.85-88.) Mr. Jackson filed a Notice of Appeal timely from the district court's Judgment of Conviction. (Augmentation: Notice of Appeal.)

ISSUE

Did the State violate Mr. Jackson's right to a fair trial by committing prosecutorial misconduct?

ARGUMENT

The State Violated Mr. Jackson' Right To A Fair Trial By Committing Prosecutorial Misconduct

A. Introduction

Mr. Jackson asserts that the prosecutor committed misconduct in his case which rises to the level of fundamental error because the misconduct was so egregious that any ensuing prejudice could not have been remedied by a curative jury instruction. The unfairness created by the prosecutor's misconduct resulted in Mr. Jackson being denied due process of law and was in violation of his right to a fair trial, guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution. The violations occurred when the prosecutor commented on his failure to present evidence proving his innocence, encroached upon the province of the jury by denying them of their right to be the ultimate judges of the credibility of the witnesses, blatantly disregarded the district court's order prohibiting the use of overly prejudicial evidence, and appealed to the passions and prejudices of the jury asking that they not punish the alleged victim. Although defense counsel did not object to the misconduct, Mr. Jackson asserts that the prosecutorial misconduct amounted to fundamental error, were not harmless and, as such, this Court should vacate Mr. Jackson's conviction.

B. Standard Of Review

Because Mr. Jackson's prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2, 137 P.3d 388, 389 (2006). In

State v. Field, the Idaho State Supreme Court articulated the standard by which the appellate courts review prosecutorial misconduct claims. 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). First, the prosecutor's actions will be reviewed to determine whether they constitute misconduct. *Id.* When the defense objects, the prosecutorial misconduct will be reviewed for harmless error. *Id.* When the defense fails to object, prosecutorial misconduct will first be reviewed for fundamental error, then if fundamental, the misconduct will be reviewed for harmlessness. *Id.*

C. The State Violated Mr. Jackson's Right To A Fair Trial By Committing Prosecutorial Misconduct

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon,* 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). 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, 576 P.2d 1052, 1053 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *State v. Sanchez,* 142 Idaho 309, 318, 127 P.3d 212, 221 (Ct. App. 2005); *Greer v. Miller,* 483 U.S. 756, 765 (1987). In order to constitute a due

process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. *Id.* The hallmark of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips,* 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

The Court's inquiry is two-fold: 1) whether the conduct complained of was improper; and, 2) if so, did it violate the defendant's right to a fair trial or can the appellate court declare, beyond a reasonable doubt, that the jury would have reached the same verdict and thus was harmless. *State v. Reynolds*, 120 Idaho 445, 448, 816 P.2d 1002, 1005 (Ct. App. 1991) (citing *State v. Hodges,* 105 Idaho 588, 671 P.2d 1051 (1983); *State v. Garcia,* 100 Idaho 108, 594 P.2d 146 (1979)). In evaluating the second prong of this inquiry, this Court must "determine whether the prosecutor's statements were so egregious that the curative instruction from the judge was insufficient." *State v. Hairston*, 133 Idaho 496, 513, 988 P.2d 1170, 1187 (1999).

1. The Prosecution Committed Misconduct By Informing The Jury That Mr. Jackson Had Failed To Provide The Jury Evidence Of His Innocence And Asking Them To Infer His Guilt From Such Failure To Present Evidence

Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Phillips,* 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007) (quoting *Herring v. New York,* 422 U.S. 853, 862 (1975)). Its purpose "is to enlighten the jury and to help the jurors remember and interpret the evidence." *Id.* (quoting *Reynolds,* 120 Idaho at 450, 816 P.2d at 1007). "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." *Id.* (quoting *State v. Sheahan,* 139 Idaho 267, 280, 77 P.3d 956, 969 (2003)). However, considerable latitude has its limits, both in matters expressly stated and those implied. *Id.*

The law does not impose upon the defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. *State v. Medrain*, 143 Idaho 329, 332, 144 P.3d 34, 37 (Ct. App. 2006). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). It is equally fundamental that the government bears the burden of overcoming this presumption by proving the defendant's guilt beyond a reasonable doubt. *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978). This reasonable-doubt standard is strictly required by the due process clause of the Fourteenth Amendment. *In re Winship*, 397 U.S. 358, 364 (1970).

The Fifth Amendment guarantees "[n]o person ... shall be compelled in any criminal case to be a witness against himself...." U.S. CONST. amend. V. In a criminal case, a prosecutor may not directly or indirectly comment on a defendant's invocation of his constitutional right to remain silent, either at trial or before trial, for the purposes of inferring guilt. *Griffin v. California,* 380 U.S. 609 (1965); *Phillips,* 144 Idaho at 86, 156 P.3d at 587. However, a prosecutor's general references to uncontradicted evidence do not necessarily reflect on the defendant's failure to testify, where *witnesses other than the defendant* could have contradicted the evidence. *State v. McMurry,* 143 Idaho 312,

314, 143 P.3d 400, 402 (Ct. App. 2006). Even so, prosecutorial comments on the lack of contradicting defense evidence may *necessarily* result in an indirect *Griffin* violation depending on the number and nature of those comments. *Id.* at 315, 143 P.3d at 403. Courts uniformly criticize this prosecutorial tactic due to the difficulty of determining whether *Griffin* violations are constitutionally harmless. *Id.*

The reviewing court must decide, looking at the comments in context, including the likely effect of any curative instruction, "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Id.* (quoting *State v. Wright,* 97 Idaho 229, 232, 542 P.2d 63, 66 (1975)). Although a prosecutor may not intend an inference of guilt, "sufficiently ambiguous language indicates indirect *Griffin* error under the objective portion of this test." *Id.* Courts generally hold that it is improper to comment on the absence of evidence contradicting the State's case where the defendant is the *sole witness* who would be able to contradict the evidence in question. *Id.*

During rebuttal closing arguments, the Prosecutor made the following arguments: "Did we hear any testimony that it didn't happen? I don't recall hearing any testimony that it didn't happen. The only testimony I recall was that it happened." (Tr., p.356, Ls.12-15.)

In the case at hand, the prosecutor's comment on the defendant's failure to present evidence of his innocence did more than simply refer to the state of the evidence or the failure of the defense to introduce material evidence, but referenced evidence that only Mr. Jackson could contradict, i.e., if he had been alone with the

alleged victim K.W. and had engaged in inappropriate conduct with her while the two where alone. These remarks, amounting to a comment on his failure to testify, suggested that Mr. Jackson's silence at trial was evidence of guilt.

Mr. Jackson's decision not to be a witness means that the prosecutor may not profess a duty for him to testify in support of his innocence. As the *Griffin* Court indicates:

> The [Fifth Amendment] was framed with due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand.

Griffin, 380 U.S. at 613.

In the case at hand, the prosecutor commented directly on Mr. Jackson's failure to present evidence of his innocence. It is a most egregious type of misconduct for a prosecutor to infer to the jury that a defendant is guilty because he failed to produce evidence of his innocence. The presumption of innocence is the touchstone of criminal law. The prosecutor's comments that Mr. Jackson failed to present critical evidence of his innocence is blatant misconduct. These statements were clearly designed to influence the jury to infer the guilt of Mr. Jackson from his failure to present evidence of his innocence and, as a result, are undoubtedly misconduct which deprived him of his right to a fair trial.

2. The Prosecution Committed Misconduct By Encroaching Upon The Province Of The Jury By Engaging In Impermissible Vouching For The Victim, Denying The Jury Their Right To Be The Ultimate Judges Of The Credibility Of The Witnesses

The prosecution committed misconduct in this case by engaging in vouching, both by asking a witness to testify about the credibility of the alleged victim, and by stating that the prosecutor believed the victim and her story during closing arguments. "Statements by a witness as to whether another witness is telling the truth are prohibited." *State v. Johnson,* 119 Idaho 852, 857, 810 P.2d 1138, 1143 (Ct. App. 1991) (citing *United States v. Azure,* 801 F.2d 336 (8th Cir. 1986); *Batangan*, 71 Haw 552, 799 P.2d 48; *State v. Lindsey,* 149 Ariz. 472, 720 P.2d 73 (1986); *State v. Fitzgerald,* 39 Wash. App. 652, 694, P.2d 1117 (1985); *State v. Keen,* 309 N.C. 158, 305 S.E.2d 535 (1983)). Testimony from lay witnesses regarding issues of credibility is inadmissible. *See Reynolds v. State,* 126 Idaho 24, 31, 878 P.2d 198, 205 (Ct. App. 1994).

During the State's cross-examination of Brenda Ward, who had been called by the defense, the State asked Ms. Ward to vouch for her daughter's credibility:

Q. Do you have any reason to disbelieve what [K.W.] has testified to and what she has told you?

A. No, I don't.

Q. And why don't you disbelieve her?

A. I raised her. I know if she is lying. I know if she's telling the truth. And you can see the hurt in her. And I've seen the changes in her.

(Tr., p.278, L.24 – p.279, L.5.)

This type of questioning is strictly prohibited and is clearly prosecutorial misconduct. However, this was just one piece in what became an underlying theme of

the prosecution, that everyone believed K.W., those closest to her and the State, and so should the jury.[1] The vouching theme continued in the State's closing arguments.

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 will give to counsel for the accused. *State v. Irwin,* 9 Idaho 35, ___, 71 P. 608, 610 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.* The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*

In *Lovelass,* the prosecutor informed the jury in closing argument that Lovelass had committed "full-fledged perjury," that Lovelass had lied on more than one occasion, and everything he said to the jury was fabricated. *Lovelass*, 133 Idaho at 169, 983 P.2d at 242. The *Lovelass* Court stated that in closing argument, "both the prosecutor and defense counsel are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom," and that this includes "the right to identify how, from the party's perspective, the evidence confirms or calls into doubt the credibility of particular witnesses." *Id.* at 168, 983 P.2d at 241 (citation omitted). However, "it is improper for a prosecutor to express a personal belief or opinion regarding the truth or falsity of any testimony or evidence or as to the guilt of the defendant." *Id.* (citation omitted).

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[1] Although not claimed as misconduct, the State also elicited testimony from K.W. about why the jury should believe her, allowing her to vouch for herself as well. (Tr., p.187, Ls.1-6.)

The Court of Appeals held that the comments did not constitute fundamental error as they appeared to have fallen within the broad range of fair comment on the evidence rather than an expression of the prosecutor's personal belief, but also recognized that the prosecutor's comments were troubling and less than artful. *Id.* at 169, 983 P.2d at 242. In *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), even though the Idaho Supreme Court held that the prosecutor's statement that Hairston was a "murdering dog" did not constitute fundamental error, the statement was criticized as "clearly improper." *Id.* at 507, 988 P.2d at 1181. The Idaho Supreme Court cautioned that, "[t]rial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument and persist in its use, they should not be members of The ... Bar." *Id.* at 508, 988 P.2d at 1182 (citing *Luce v. State*, 642 So.2d 4 (Fla. Ct. App. 1994)).

Here, the prosecutor's complained of comments during closing argument were not directed toward the evidence, or inferences drawn therefrom. Instead, the prosecutor expressed his opinion and belief that the alleged victim, K.W., was a credible and truthful witness. The prosecution's statements went much further than the permissible bounds allowed to encourage a jury to question the credibility of witnesses. The prosecutor committed misconduct when he stated the following:

> . . . What is – **what's her motive to say these things other than if it isn't true.** I mean, did she just wake up one morning and say, "Hmm, gee, I'm going to accuse Pony Jackson of molesting me"? [sic] I mean, I don't – we just – we don't do that. **I mean, it happened. It's believable.** Pony Jackson did the things to her that she said he did. Whether she remembers them in exact detail, whether there's a variation over the years, it happened.
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> **There's just so many things that she has talked about that are so credible that I believe** that the only right and just verdict in this case – and I know it's difficult for you to do, it's difficult for you to find this – but that Pony Jackson sexually abused [K.W.] in the summer of 1992 at the home or the ranch of Cleo and Sybil Wilding. **How could you make these facts up? I mean, how – a mirror, I mean, think about it. I mean, scissors. What she says happened happened.** And I would urge you to find Mr. Jackson guilty of both counts.

(Tr., p.340, L.19 – p.344, L.11 (emphasis added).)

These improper statements were not a fair comment on the evidence, nor were they couched in such a way as to advise the jury that the statements were based upon inferences at trial. The jury could have reasonably believed that the prosecutor was expressing his personal opinion that K.W. was telling the truth. Mr. Jackson contends that the statements created a fundamental error because they were calculated to inflame the minds of jurors, and arouse passion or prejudice against him, and the jurors may have been influenced to determine guilt on factors outside the evidence.

3. The Prosecution Committed Misconduct By Violating A District Court Order Excluding Overly Prejudicial Evidence And, In So Doing, Appealed To The Passions And Prejudices Of The Jury

Violation of a district court order governing the presentation of evidence may constitute misconduct. *State v. Field*, 144 Idaho 559, 572, 165 P.3d 273, 286 (2007). Recently our Idaho Supreme Court stated:

> We long ago held, "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." *State v. Irwin,* 9 Idaho 35, 44, 71 P. 608, 611 (1903). They 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.*

State v. Christiansen, 144 Idaho 463, 469, 163 P.3d 1175, 1181 (2007).

In the case at hand, the district court addressed the State's concern about how to deal with why the alleged victim came forward to report the abuse when she did before the start of trial:

> MR. SIMPSON (Prosecutor): Okay. The other issue I've got is, Kendra Ward, she is now 21. This happened when she was four years old. The way this came about is, is that a couple of years ago, in 2007, she was watching the news and Pony Jackson had been arrested for child pornography and the news said if anyone out there has been molested by Pony Jackson, would you please contact the law enforcement. I mean, that's kind of my paraphrasing of it.
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> And so my question is, is I'm sure Todd's [defense counsel] is going to object if that – to that kind of information coming in; and I just – I want to know the boundaries of this. Again, I don't want any mistrials or appealable issues. Do you want me to avoid that issue unless Todd raises it? I mean, I think I can get – I think I can say, "Did you contact law enforcement and for what reason did you contact law enforcement," without getting into the –
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> THE COURT: Right. If you can, I mean, that's going to be much better. **It's going to be problematic if she's – if this evidence of charges for child pornography come in because that can be unfairly prejudicial.** I mean, certainly she can testify that she became aware that he was involved. Well—
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> MR. SIMPSON: Yeah. I mean, how do we – how does the jury understand that all of a sudden she – because I think part of Todd's defense is that why wait all this time and then all of a sudden you do it. So how do I –
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> THE COURT: **Well, she can testify – and this may take some coaching on your part so we don't get into a problem – but that she saw a report about Pony Jackson** and –
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> MR. SIMPSON: But don't mention it was on child pornography; she saw a report?
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> THE COURT: Yeah, **it wasn't based on child pornography issues but that he was involved – that was – that he was involved – there was a law enforcement inquiry regarding Pony Jackson and that prompted her to come forward, something general and innocuous like that. Certainly she can talk about this was generated**

by a law enforcement inquiry; but if she can stay away from the charges, we're going to be a lot better off.

MR. SIMPSON: Okay. I think I can coach her on that. I talked to her about that yesterday too. And, of course, a lot of that depends on what you ask her on cross-examination, what I can get into, I'm assuming, after that. But that's the way – those are my –

THE COURT: So, I mean, that – the evidence of prior crimes and prior acts can come in if the door gets opened on that. But, I mean, right now that – you want to **treat that as being unfairly prejudicial, the prejudice doesn't outweigh the probative value**. But if there's a door gets [sic] opened, then that does come in.

(Tr., p.33, L.21 – p.36, L.1 (emphasis added).)

At that time, the prosecution had been informed that any evidence about the charges mentioned in the television report were not admissible, overly prejudicial evidence, and that the prosecution's witnesses must be coached to avoid any mention of the evidence. However, the prosecutor quickly disregarded the district court's order stating the following in his opening statement: "If I remember right, she, when this initially happened, she told her mother as I recall; but it wasn't until 2007, in January of 2007, when **there was a report on the news that anybody who had been molested by Pony Jackson**, if they would contact the sheriff's office or law enforcement office had wanted them to do that. . . . " (Tr., p.136, Ls.1-8 (emphasis added).)

The prosecution again crossed the line when it asked K.W. the following and allowed her to present an answer clearly in violation of the order:

Q. When you were older, did there come a time when you reported this incident?

A. Yes.

Q. What brought that about?

A. My mom called me and told me that on the news they had said that Pony Jackson had been arrested and that **anybody else that had been molested by him**, to please come forward.

(Tr., p.185, L.23 – p.186, L.5.)

Later, in closing, the prosecution again committed misconduct by stating, "And the reason she came forward then is, when she heard the news article – or I should say media report – **that those who have something to say about Pony Jackson molesting them ought to come forward**, she came forward." (Tr., p.341, L.22 – p.342, L.1 (emphasis added).)

Each of the comments implied that Mr. Jackson was on the news because he had been molesting other children. While they did not specifically reference his possession of child pornography charges, they referenced something arguably worse, that he had been actively involved in molesting numerous children, the same type of prejudicial evidence that the district court ruled was inadmissible because the prejudicial effect was outweighed by any probative value. The district court's rule was clear and the prosecutor's total disregard of the order is deliberate misconduct.

The prosecutor's statements and the un-coached answer from the alleged victim resulted in an improper plea for the jury to decide his case based on its fears, passions, and prejudices, namely that Mr. Jackson was a notorious child molester that should be punished, not based on the evidence in the case at hand, but because of his propensity to commit similar offenses. In *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), the Ninth Circuit held that such pleas are wholly improper:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or

> innocence. Jurors may be persuaded by such appeals to believe that, convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

Id. at 1149 (quoting *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994) (quoting *United States v. Monaghan*, 741 F.2d 1434, 41 (D.C. Cir. 1984))). In *Weatherspoon*, where the defendant was charged with being a convicted felon in possession of a firearm, portions of the prosecutor's closing argument focused on the personal comfort and community safety which is attendant to taking armed ex-cons off the streets. *Id.* at 1149. The Ninth Circuit held that, "[t]hat entire line of argument ... was improper." *Id.* Then, after quoting the above language from *Koon* and *Monaghan*, it observed that since Mr. Weatherspoon's case turned solely on the question of whether he had, in fact, been in possession of a firearm on the night in question, the prosecutor's arguments about the "potential social ramifications of the jury's reaching a guilty verdict," were "irrelevant and improper" because "[t]hey were clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact." *Id.* at 1149-1150. *See also State v. Payne*, 260 Conn. 446, 462-463 (2002) (finding prosecutorial misconduct where the prosecutor made a closing argument statement that was "a direct and unabashed appeal for the jury to find the defendant guilty out of sympathy for the victim and his family").

Because the prosecutor's statements and the un-coached answer from the alleged victim in this case, much like the prosecutor's pleas in *Weatherspoon* and *Payne*, were calculated to encourage the jury to reach a guilty verdict based on its emotion, rather than the facts of the case, they were irrelevant and improper and their

admission violated Mr. Jackson's rights to a fair trial and due process under the Sixth and Fourteenth Amendments.

4. The Prosecution Committed Misconduct By Appealing To The Passions And Prejudices Of The Jury

During the closing argument, the prosecutor again committed misconduct by appealing to the passions and prejudices of the jury. Authority supporting this proposition can be found in section 3 above which is incorporated herein by reference. The prosecution stated, "And the reason she came forward then is, when she heard the news article – or I should say media report – that those who have something to say about Pony Jackson molesting them ought to come forward, she came forward. **And she ought not to be held or punished again for waiting to come forward."** (Tr., p.341, L.22 – p.342, L.2 (emphasis added).) This comment was a direct and unabashed appeal for the jury to find the defendant guilty out of sympathy for the victim. Such a comment is misconduct and deprived Mr. Jackson of his right to a fair trial.

D. The Prosecutorial Misconduct Was Fundamental

Mr. Jackson contends that the misconduct in his case, which was not objected to, constituted fundamental error. He asserts that prejudice from the prosecutor's misconduct could not have been remedied by the standard jury instructions given (informing the jury that closing arguments are not evidence) instructing the jury to disregard the comments, or through any potential curative instruction and, therefore, the errors were fundamental. (Jury Instruction No. 19.)

An error is considered fundamental where the comments were so egregious or inflammatory that any prejudice could not have been remedied by a ruling from the trial

court instructing the jury to disregard the comments. *State v. Sheahan,* 139 Idaho 267, 280, 77 P.3d 956, 939 (2003). The Idaho Court of Appeals has held:

> Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence.

State v. Kuhn, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003) (citing *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997)); *State v. Lovelass,* 133 Idaho 160, 167, 983 P.2d 233, 240 (Ct. App. 1999)). Furthermore, "[t]he rationale of this rule is that even a timely objection to such inflammatory statements would not have cured the inherent prejudice." *Id.* (citing *State v. Brown,* 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998)).

> It is well settled that a prosecutor in a criminal case "has a special obligation to avoid 'irnproper suggestions, insinuations, and especially assertions of personal knowledge.'" *United States v. Roberts,* 618 F.2d 530, 533 (9th Cir.1980) (quoting *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). A prosecutor may not impart to the jury his belief that a government witness is credible. *United States v. McKoy,* 771 F.2d 1207, 1210-11 (9th Cir.1985). Such improper vouching may occur in at least two ways. The prosecutor may either "place the prestige of the government behind the witness or ... indicate that information not presented to the jury supports the witness's testimony." *Roberts,* 618 F.2d at 533. When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial. *United States v. Molina,* 934 F.2d 1440, 1445 (9th Cir.1991).

U.S. v. Edwards, 154 F.3d 915, 921 (9th Cir, 1998).

Mr. Jackson has a fundamental right to have a jury trial. He has a fundamental right to have the jury be the fact finder and determine his guilt or innocence based upon the vital presumption that he is innocent until proven guilty. The prosecutor in this case impermissibly attempted to eliminate Mr. Jackson's rights by misinforming the jury that

he must present evidence to contradict the State's evidence, in essence forcing him to prove his innocence. In this case, the prosecutor's actions diminished Mr. Jackson's fundamental right to a presumption of innocence and, therefore, the misconduct was fundamental.

Additionally, the prosecutor presented any underlying theme based upon witness vouching for the veracity of the alleged victim K.W. The prosecutor elicited testimony that K.W.'s mother believed her and that she knew she was telling the truth because she could tell when her daughter was lying. In a last attempt to convince the jury, the prosecutor in closing arguments finalized its impermissible theme and told the jury that he found K.W.'s story believable and, therefore, the jury should too. Mr. Jackson has a fundamental right to have the jury be the fact finder and to judge the credibility of each witness. The prosecutor in this case impermissibly attempted to remove the role of judging the credibility of each witness from the jury by improperly vouching for the witnesses. In this case the credibility of the victim was crucial and, therefore, the impermissible vouching was fundamental.

Further, the prosecutor blatantly disregarded the district court's order to not mention, and to coach witnesses to avoid mention, of Mr. Jackson's alleged involvement with child pornography. Instead, the prosecution mentioned time and again that Mr. Jackson was on the news for child molestation and implied that the news was reporting on other child abuse victims. The district court specifically found that this evidence was overly prejudicial in finding that the State should find an innocuous way to mention that seeing a television report led K.W. to come forward. This misconduct led the jury to decide the case, not based upon the relevant evidence, but based upon an

idea that Mr. Jackson had a propensity to commit lewd acts with children and that society must be protected from him. The prosecution also requested that the jury return a guilty verdict out of sympathy for the alleged victim. These appeals to the passions and prejudices of the jury could not have been cured by a limiting instruction, and as such, amount to fundamental error.

Mr. Jackson additionally asserts that if this Court finds that the instances of misconduct do not individually amount to fundamental error, the combined misconduct amounts to a denial of a fair trial and constitutes a fundamental error.

E. The Prosecutorial Misconduct Requires Vacation Of The Conviction

The United States Supreme Court has held that, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith*, 455 U.S. at 219. Neither misconduct objected nor prosecutorial misconduct constituting fundamental error, will require vacating a conviction, unless the errors demonstrate that they were not harmless beyond a reasonable doubt. *See State v. Christiansen,* 144 Idaho 463, 471, 163 P.3d 1175, 1183 (2007); *see also State v. Field,* 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). In determining whether a constitutional error is harmless, the reviewing court determines whether it appears, beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California,* 3 U.S. 18, 24 (1967); *State v. Roy,* 127 Idaho 228, 231, 899.2d 441, 444 (1995). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt,* 500.S. 391, 403 (1991); *see also Arizona v. Fulminante,* 499 U.S. 279, 308 (1991). The issue is whether the jury actually

rested its verdict on evidence beyond a reasonable doubt, independently of the inadmissible evidence. *Yates v. Evatt,* 500 U.S. at 404-405. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana,* 508.S. 275, 279 (1993).

In the present case, this Court should find that the misconduct denied Mr. Jackson his right to a fair trial because it cannot say beyond a reasonable doubt that the jury would have returned the same verdict if the misconduct had not occurred. In reviewing the trial as a whole, the prosecutor's improper comments, constituting misconduct, likely influenced the jury.

F. Under The Doctrine Of Cumulative Error, The Accumulation Of Irregularities During The Trial Was Sufficient To Warrant A New Trial

Mr. Jackson asserts that the errors which occurred throughout his trial were not individually harmless. However, assuming *arguendo* that this Court finds that they were, the accumulation of the errors and irregularities that took place negated his right to a fair trial and, thus, mandate reversal and a new trial. Mr. Jackson asserts that if the Court finds that the above errors were harmless individually, the errors combined amount to cumulative error. The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process. *State v. Paciorek,* 137 Idaho 629, 635, 51 P.3d 443, 449 (Ct. App. 2002). In order to find cumulative error, this Court must first conclude that there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated,

denied the defendant a fair trial. *Lovelass,* 133 Idaho at 171, 983 P.2d at 244. Errors in the admission of evidence will be deemed harmless if the appellate court is able to say, beyond a reasonable doubt, that the error did not contribute to the verdict. *Chapman v. California,* 3 U.S. 18, 24 (1967). Under that doctrine, even when individual errors are deemed harmless, an accumulation of such errors may deprive a defendant of a fair trial. *State v. Martinez,* 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). However, a finding of cumulative error must be predicated upon an accumulation of actual errors. *State v. Medina,* 128 Idaho 19, 29, 909 P.2d 637, 647 (Ct. App. 1996).

Mr. Jackson asserts that the misconduct in his trial amounted to actual errors depriving him of a fair trial. His arguments in support of this assertion are found in section C, and need not be repeated, but are incorporated herein by reference.

G. If This Court Finds That The Error Was Harmless, It Should Nonetheless Remand The Case In Order To Discourage Further Prosecutorial Misconduct

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *State v. Wilbanks*, 95 Idaho 346, 509 P.2d 331 (1973), the Idaho Supreme Court, when reviewing a claim of prosecutorial misconduct, quoted the language of the United States Supreme Court which found:

> 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and ***whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done***. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. ***But, while he may strike***

> ***hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one***.'

Id. at 353-354, 509 P.2d at 338, 339 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added)).

Although this Court, when determining whether there was prejudice in this case, must focus on whether Mr. Jackson received a fair trial and not on the culpability of the prosecutor, Mr. Jackson requests that this Court follow the urging of Justice Blackmun in *Darden v. Wainwright*, 477 U.S. 168 (1986), and discourage prosecutorial misconduct by remanding his case for a new trial.

> Twice during the past year. . . and again today -- this Court has been faced with clearly improper prosecutorial misconduct during 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:
>
> "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).

Darden, 477 U.S. at 205-206 (internal citations omitted) (emphasis added). In the case at hand, the prosecutor struck "foul blows" and deprived Mr. Jackson of his right to a fair trial.

CONCLUSION

Mr. Jackson respectfully requests that his conviction be vacated and his case remanded for further proceedings.

DATED this 24th day of June, 2010.

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

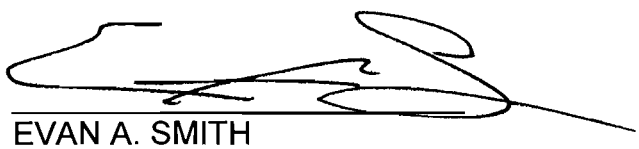
I HEREBY CERTIFY that on this 24th day of June, 2010, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

PONY L JACKSON
INMATE # 92782
MADISON COUNTY JAIL
145 E MAIN
REXBURG ID 83440

JOEL E TINGEY
DISTRICT COURT JUDGE
E-MAILED COPY OF BRIEF

TODD R ERIKSON
ATTORNEY AT LAW
E-MAILED COPY OF BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH
Administrative Assistant

EAA/eas