2-11-2009

State v. Schultz Appellant's Reply Brief Dckt. 33255

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 33255 & 33256
	)	
v.	)	
	)	
WALLY KAY SCHULTZ,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

HONORABLE JOHN M. MELANSON
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

ERIK R. LEHTINEN
Deputy State Appellate Public Defender
I.S.B. # 6247
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

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 33255 & 33256
	)	
v.	)	
	)	
WALLY KAY SCHULTZ,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

HONORABLE JOHN M. MELANSON
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

ERIK R. LEHTINEN
Deputy State Appellate Public Defender
I.S.B. # 6247
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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 2

ISSUE PRESENTED ON APPEAL 3

ARGUMENT 4

The Prosecutor Engaged In Misconduct Necessitating A New Trial 4

A. This Court Has Jurisdiction To Decide Mr. Schultz' Appeal On Its Merits 5

B. Contrary To The State's Assertion, Prosecutors Do Not Have Greater Leeway To Engage In Misconduct In Closing Arguments Because Of Their "Improvisational Nature" 7

C. The Prosecutor Engaged In Misconduct When He Implicitly Asked The Jury To Draw A Negative Inference From Mr. Schultz' Decision Not To Testify 9

D. The Prosecutor Engaged In Misconduct When He Urged The Jury To Find Mr. Schultz Guilty In Order To Show The Alleged Victim That "The System Works," And To Protect Her And Others Like Her 11

E. The Prosecutorial Misconduct Complained Of In This Case Constitutes Fundamental Error 15

F. The Prosecutorial Misconduct Complained Of In This Case Constitutes Reversible Error 16

CONCLUSION 17

CERTIFICATE OF MAILING 18

TABLE OF AUTHORITIES

Cases

Chapman v. California, 386 U.S. 18 (1967) 16

State v. Baruth, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984) 13

State v. Beebe, 145 Idaho 570, 181 P.3d 496 (Ct. App. 2007) 14

State v. Field, 144 Idaho 559, 165 P.3d 273 (2007) 8

State v. Fortin, 124 Idaho 323, 859 P.2d 359 (Ct. App. 1993) 7

State v. McMurry, 143 Idaho 312, 143 P.3d 400 (Ct. App. 2006) 11

State v. Pecor, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998) 13

State v. Peite, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992) 14

State v. Phillips, 144 Idaho 82, 156 P.3d 583 (Ct. App. 2007) 14

Sullivan v. Louisiana, 508 U.S. 275 (1993) 16

United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005) 13

Statutes

I.C. § 19-2601(4) 6

Rules

I.A.R. 17(e)(2) 7

STATEMENT OF THE CASE

Nature of the Case

Wally Schultz was charged with possession of a controlled substance (methamphetamine) in one case and felony domestic violence (battery) in another. Although the two cases were largely unrelated, they were, at times, handled together in the district court and then consolidated in the present appeal.

Pursuant to a plea agreement, Mr. Schultz pled guilty in the possession case. On appeal, he raises no issues related to that case.

The battery case, however, proceeded to a jury trial wherein the prosecutor made certain arguments which Mr. Schultz now contends were improper. Specifically, Mr. Schultz asserts that the prosecutor engaged in misconduct by implicitly commenting on Mr. Schultz' failure to testify, and by exhorting the jury to convict Mr. Schultz based on sympathy for the alleged domestic violence victim, a desire to protect her from further abuse, and a desire to cure society's domestic violence problems generally.

The State has responded with a number of arguments. Preliminarily, the State contends that this Court lacks jurisdiction to even consider Mr. Schultz' appeal because, the State alleges, the notice of appeal was untimely. (Respondent's Brief, pp.5-8.) Turning to the merits of Mr. Schultz' claims, after setting forth a questionable recitation of the legal standards applicable to claims of prosecutorial misconduct during closing arguments, the State attempts to characterize the prosecutor's arguments in such a way that they are not comments on Mr. Schultz' silence or exhortations to convict Mr. Schultz based on matters outside the evidence, and then asserts that those arguments do not constitute misconduct, much less misconduct that is so egregious as

to rise to the level of fundamental error. (Respondent's Brief, pp.11-19.) Finally, the State argues that, because it believes that evidence against Mr. Schultz is overwhelming, any errors arising out of the prosecutor's arguments are harmless. (Respondent's Brief, pp.19-20.)

This Reply Brief highlights a number of flaws in the State's arguments. First, this Court does, in fact, have jurisdiction to consider Mr. Schultz' appeal because the notice of appeal in this case was, in fact, timely. Second, the State's recitation of the legal standards applicable to claims of prosecutorial misconduct during closing arguments is misleading. Third, the State has mischaracterized the prosecutor's comments on Mr. Schultz' silence in an effort to make them appear to be comments on the evidence. Fourth, the State has mischaracterized the prosecutor's emotional pleas in an effort to make them appear to be comments on the evidence. Fifth, the State's "harmless error" argument is based on a misunderstanding of the standard articulated in *Chapman v. California*, 386 U.S. 18 (1967).

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case were previously articulated in Mr. Schultz' Appellant's Brief and, therefore, are not repeated herein.

ISSUE

Did the prosecutor engage in misconduct necessitating a new trial?

ARGUMENT

The Prosecutor Engaged In Misconduct Necessitating A New Trial

In his Appellant's Brief, Mr. Schultz argued that the prosecutor committed misconduct (rising to the level of fundamental, reversible error) at two points during his closing argument. First, Mr. Schultz argued that the prosecutor improperly commented on Mr. Schultz' exercise of his Fifth Amendment right not to testify. (Appellant's Brief, pp.8-10.) The offending argument was as follows:

> There are five things that have to be present in order for there to be self-defense, and I want you to think about the evidence in this case, and particularly the only testimony that touched on this, and that would be the testimony of Laurie Morrill. *Nobody else testified about it. There wasn't any other testimony about it because there were only two people present: Laurie Morrill and the defendant.*

(Battery Case Augmented Tr., p.52, Ls.7-14 (emphasis added).) Mr. Schultz argued that prosecutor improperly exhorted the jury to convict Mr. Schultz based on matters outside the evidence, namely its sympathy for the alleged victim, its desire to protect her from further abuse, and to protect others and cure society's domestic problems generally. (Appellant's Brief, pp.11-14.) This time, the offending argument was as follows:

> A wise judge once told me that we're in the business of giving out hope. *Laurie Morrill needs some hope. She needs to know that the system works. Show her the system works. You can protect Laurie Morrill and other Laurie Morrill's* [sic] by weighing the evidence and returning a just and correct verdict. You can hold the defendant accountable. I ask you to do that.

(Battery Case Augmented Tr., p.63, L.25 – p.64, L.6 (emphasis added).)

As noted above, the State has responded with a number of arguments. Preliminarily, the State contends that this Court lacks jurisdiction to even consider

Mr. Schultz' appeal because, the State alleges, the notice of appeal was untimely. (Respondent's Brief, pp.5-8.) Turning to the merits of Mr. Schultz' claims, after setting forth a questionable recitation of the legal standards applicable to claims of prosecutorial misconduct during closing arguments, the State attempts to characterize the prosecutor's arguments in such a way that they are not comments on Mr. Schultz' silence or exhortations to convict Mr. Schultz based on matters outside the evidence, and then asserts that those arguments do not constitute misconduct, much less misconduct that is so egregious as to rise to the level of fundamental error. (Respondent's Brief, pp.11-19.) Finally, the State argues that, because it believes that evidence against Mr. Schultz is overwhelming, any errors arising out of the prosecutor's arguments are harmless. (Respondent's Brief, pp.19-20.)

For the reasons set forth in detail below, however, the State's arguments are without merit.

A. This Court Has Jurisdiction To Decide Mr. Schultz' Appeal On Its Merits

As was discussed in Mr. Schultz' Appellant's Brief (p.4), he was sentenced in the Battery Case on December 12, 2005, receiving a unified sentence of ten years, with five years fixed, and a rider. (Battery Case, R., pp.150, 153; Battery Case Augmented Tr., p.105, Ls.16-24.) The district court filed its judgment of conviction on December 15, 2005. (Battery Case R., pp.151-55.)

Following his rider, at a review hearing on May 22, 2006, Mr. Schultz' sentence was suspended and he was placed on probation for a term of five years. (Battery Case Augmented Tr., p.111, Ls.21-24.) That same day, the district court issued a one-paragraph "*Temporary* Order on Rider Review," stating as follows:

> NOW, THEREFORE, IT IS HEREBY ORDERED that the above defendant be sentenced to: Previously ordered sentence is suspended and defendant is placed on five (5) years supervised probation with the usual terms and conditions imposed by the Court plus specific terms identified by the Court on 5-22-06. Defendant to report to Probation and Parole office before 5:00 p.m. today. (*A copy of the formal paperwork will be forthcoming as soon as possible.*)

(Battery Case R., p.162 (underlining in original; italics added).) Three days later, on May 25, 2006, the district court entered a formal seven-page Order Upon 180-Day Review Hearing, I.C. § 19-2601(4). (Battery Case R., pp.164-70.)

Exactly forty-two days after the district court's issuance of its formal order placing Mr. Schultz on probation, on July 6, 2006, Mr. Schultz filed his notice of appeal. (Battery Case R., pp.164-70.) In his Appellant's Brief (p.6), Mr. Schultz asserted that this notice of appeal was timely from his judgment of conviction pursuant to I.A.R. 14(a) because it was filed 42 days from the date of the formal order placing him on probation.

The State now contends, however, that this Court lacks jurisdiction to consider any matters related to Mr. Schultz' conviction and original sentence because the notice of appeal was not filed within 42 days of the time that Mr. Schultz was placed on probation. (Respondent's Brief, pp.5-8.) Critical to the State's argument is the assumption that the defendant is placed "on probation" for purposes of I.A.R. 14(a), and, thus, his time to appeal the judgment of conviction begins to run, when the district court orally pronounces its decision to place him on probation or issues a temporary order to that effect, not when the district court enters a formal order summarizing the facts and the law, and spelling out the terms of probation. (*See* Respondent's Brief, pp.6-8.)

The State's argument is flawed, however, because, where the district court has made an oral ruling placing the defendant on probation and its only written order on the

subject states on its face that that order is only "temporary" (and, thus, will presumably expire or be vacated in the near future) such that a formal order will be forthcoming, the defendant has no realistic expectation in his ability to appeal because he might believe his notice of appeal to be premature as to the district court's forthcoming formal probation order.[1] Thus, if the State's position is to be adopted, defendants in cases such as this one would potentially be in the position of filing two notices of appeal—one from the judgment of conviction and one from the formal probation or relinquishment order. Such an approach is not only inefficient, but also confusing. A far more sensible and equitable approach is to hold that a defendant is placed "on probation" for purposes of Idaho Appellate Rule 14(a) when a formal written order is entered placing the defendant on probation. That way the defendant has an order certain from which to appeal, and a date certain from which to measure his time to appeal.

B. Contrary To The State's Assertion, Prosecutors Do Not Have Greater Leeway To Engage In Misconduct In Closing Arguments Because Of Their "Improvisational Nature"

In reciting the legal standards applicable to claims of prosecutorial misconduct during closing arguments, the State implies that misconduct committed during that stage of the trial is less likely to warrant relief for the defendant because the prosecutor is less culpable for his misconduct due to the "improvisational nature" of closing arguments. (*See* Respondent's Brief, p.11.) Specifically, the State cites *State v. Field*,

[1] *But see* I.A.R. 17(e)(2) ("A notice of appeal filed from an appealable judgment, order or decree before formal written entry of such document shall become valid upon the filing and the placing the stamp of the clerk of the court on such appealable judgment, order or decree, without refiling the notice of appeal."); *State v. Fortin*, 124 Idaho 323, 326, 859 P.2d 359, 362 (Ct. App. 1993) (noting that Idaho Appellate Rule 17(e)(1)(C) provides that a notice of appeal from a judgment is deemed to include all post-judgment orders and decrees).

144 Idaho 559, 571, 165 P.3d 273, 285 (2007), for the proposition that "[t]he Idaho Supreme Court has recently reiterated the importance of reviewing closing arguments in light of their improvisational nature . . . ." (Respondent's Brief, p.11.) Such an argument, however, is meritless. First, it defies logic, as there is no reason to believe that closing arguments are any more improvisational in nature than any other portion of a trial, such as the examination of a witness. Second, even assuming that the prosecutor's closing argument is particularly improvisational, the *Field* Court certainly did not "recently reiterate[ ] the importance of reviewing closing arguments in light of their improvisational nature," as the State now claims. In fact, *Field* involved a claim of prosecutorial misconduct in the questioning of a witness, not during closing arguments. *Field*, 144 at 571-72, 165 P.2d at 285-86. Third, the State fails to explain how, if, as it argues elsewhere in its brief, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor" (Respondent's Brief, pp.9-10 (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982))), it should be entitled to any leeway because the prosecutor's statements were made "on the fly" and the prosecutor was, therefore, less culpable. In other words, the State's request is inconsistent with United States Supreme Court precedent and overlooks the fact that the crux of Mr. Schultz' prosecutorial misconduct claim is that he was denied a fair trial by the prosecutorial arguments in question. Accordingly, contrary to the State's claim, The State ought not to be cut any slack simply because the prosecutor may have been improvising when he made arguments that had the effect of denying Mr. Schultz a fair trial.

C. The Prosecutor Engaged In Misconduct When He Implicitly Asked The Jury To Draw A Negative Inference From Mr. Schultz' Decision Not To Testify

The State claims that the prosecutor did not comment on Mr. Schultz' silence when, in his closing argument, he argued as follows:

> There are five things that have to be present in order for there to be self-defense, and I want you to think about the evidence in this case, and particularly the only testimony that touched on this, and that would be the testimony of Laurie Morrill. *Nobody else testified about it. There wasn't any other testimony about it because there were only two people present: Laurie Morrill and the defendant.*

(Battery Case Augmented Tr., p.52, Ls.7-14 (emphasis added).) The State asserts that the above-quoted language was a permissible "comment on the state of the evidence." (Respondent's Brief, p.12.) Specifically, the State argues that "a fair reading of the prosecutor's statement in this case is not that it was made to ask the jury to infer Schultz's guilt from his failure to testify. Rather, the prosecutor's statement expressly called attention to the 'five things that have to be present in order for there to be self-defense' and the absence of any evidence indicating Schultz hit and kicked Ms. Morrill out of self-defense." (Respondent's Brief, p.13.) Although the State apparently concedes that the prosecutor's argument would have constituted misconduct if Mr. Schultz had been the only witness who could have contradicted Ms. Morrill's testimony (*see* Respondent's Brief, pp.12-13 (quoting *State v. McMurry*, 143 Idaho 312, 143 P.3d 400 (Ct. App. 2006))), it claims that the prosecutor's argument was nothing more than a general discussion of the state of the evidence because witnesses other than Mr. Schultz could have refuted Ms. Morrill's testimony and supported a self-defense argument:

> While Schultz' reasonable belief in the need to act in self-defense could have been shown through his testimony at trial, evidence of his

> alleged self-defense could also have been shown by circumstantial evidence through the testimony of other witnesses. For example, the officer who observed Schultz in response to the 9-1-1 call could have testified as to whether he observed any scratches or injuries to Schultz or whether Schultz's clothing appeared ripped or torn. The prosecutor's comment was a fair comment on the state of the evidence and the insufficiency of the evidence, in general, to demonstrate Schultz's reasonable belief in the necessity to defend himself. As the context of the prosecutor's closing argument reflects, this statement simply encouraged the jury to weigh the evidence of self-defense and reject it.

(Respondent's Brief, pp.13-14.)

The State's present attempt to re-characterize the above-quoted portion of the prosecutor's closing argument as a proper discussion of the state of the evidence generally, as opposed to an overt reference to Mr. Schultz' exercise of his right not to testify, is extremely disingenuous. In fact, the prosecutor's closing argument, *on its face*, disproves the State's present characterization of that argument. As quoted above, the prosecutor's closing argument specifically made reference to the fact that the only possible evidence on the self-defense issue would have been the testimony of Ms. Morrill and Mr. Schultz: "There wasn't any other testimony about it because there were only two people present: Laurie Morrill and the defendant." (Battery Case Augmented Tr., p.52, Ls.12-14.) Accordingly, the prosecutor's statements simply cannot be interpreted (as the State now suggests) as an argument that the defense could have supported its self-defense theory with testimony from any number of witnesses. Indeed, contrary to the State's claims on appeal, the argument in question necessarily suggested that, because only two people could have testified about the self-defense issue, and because one of those two people, Mr. Schultz, did not take the witness stand to contradict the other's, Ms. Morrill's, testimony, the jury should infer that

Mr. Schultz is guilty. As noted, this suggestion was plainly improper. *See State v. McMurry*, 143 Idaho 312, 315-16, 143 P.3d 400, 403-04 (Ct. App. 2006).

D. The Prosecutor Engaged In Misconduct When He Urged The Jury To Find Mr. Schultz Guilty In Order To Show The Alleged Victim That "The System Works," And To Protect Her And Others Like Her

The State also claims that the prosecutor did not seek to have the jury find Mr. Schultz guilty based on matters outside the evidence, *i.e.*, the jurors' emotions, when, in his closing argument, he argued as follows:

> A wise judge once told me that we're in the business of giving out hope. *Laurie Morrill needs some hope. She needs to know that the system works. Show her the system works. You can protect Laurie Morrill and other Laurie Morrill's* [sic] by weighing the evidence and returning a just and correct verdict. You can hold the defendant accountable. I ask you to do that.

(Battery Case Augmented Tr., p.63, L.25 – p.64, L.6 (emphasis added).) The State asserts that the above-quoted language "did not appeal to the emotions of the jurors, but instead merely requested the jury to fulfill its duty and 'show . . . the system works . . . by weighing the evidence and returning a just and correct verdict.'" (Respondent's Brief, p.16 (quoting a portion of the prosecutor's closing argument) (emphasis omitted); *see also* Respondent's Brief, p.18 (providing the same partial quote of the prosecutor's closing argument), p.19.) In support of this claim, the State attempts to distinguish many of the cases (cited in Mr. Schultz' Appellant's Brief) in which the Idaho courts have found misconduct in prosecutors' pleas to convict defendants based on matters outside the trial evidence. (*See* Respondent's Brief, pp.17-18.)

The State's present attempt to re-characterize the above-quoted portion of the prosecutor's closing argument as a proper request for the jury to weigh the trial evidence and return a guilty verdict based on that evidence, as opposed to a plea to

convict Mr. Schultz based on matters outside the evidence, is almost as disingenuous as its attempt (discussed in section C, above) to re-characterize the prosecutor's comment on Mr. Schultz' silence. This is so for a number of reasons.

First, although the State does fully quote the argument that is in question at one point in its Respondent's Brief (pp.14-15), in re-characterizing that argument as a request for the jury to consider only the trial evidence, the State repeatedly misleading quotes only a portion of the argument in question. (*See* Respondent's Brief, pp.16, 18, 19.) Twice, the State misleading quotes the prosecutor's argument as asking the jury to "show . . . the system works . . . by weighing the evidence and returning a just and correct verdict." (Respondent's Brief, pp.16, 18.) In so doing, the State conveniently omits the improper portions of the prosecutor's argument: those portions where the prosecutor urged the jury to reach a guilty verdict to give the victim "some hope," to show the victim that "the system works," to protect the victim from future abuse, and to protect all women ("other Laurie Morrill's [sic]") from domestic violence. (*Compare* Respondent's Brief, pp.16, 18 *with* Battery Case Augmented Tr., p.63, L.25 – p.64, L.6.) In addition, later in its brief, although the State acknowledges some of the improper portions of the prosecutor's argument (*see* Respondent's Brief, p.19 (acknowledging that the prosecutor asked the jury to "[s]how her [Laurie] the system works," and to give the victim hope)), it still neglects to mention what are probably the most egregious portions of the prosecutor's argument: those portions where the prosecutor urged the jury to reach a guilty verdict to protect the victim from future abuse, and to protect all women ("other Laurie Morrill's [sic]") from domestic violence. (*Compare* Respondent's Brief, p.19 *with* Battery Case Augmented Tr., p.63, L.25 – p.64, L.6.)

Second, with regard to the most egregious portions of the prosecutor's argument, *i.e.*, the portion described above wherein the prosecutor urged the jury to convict Mr. Schultz in order to protect Ms. Schultz from future abuse, and to protect all women from domestic violence, the State offers no explanation of how that argument could possibly be proper. (*See generally* Respondent's Brief, pp.14-19.) Indeed, although the State discusses *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), it offers no cogent explanation of why such a plea did not violate the Ninth Circuit's admonishment, quoted in Mr. Schultz' Appellant's Brief (p.12 n.9), that prosecutors not ask jurors to convict defendants in order to cure societal problems[2]:

> 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, by 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.

Weatherspoon, 410 F.3d at 1149. Moreover, the State's attempts to distinguish *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998), on the basis that, "[t]his is . . . not a case where the prosecutor made 'reference to the jurors' families and hypothesized the commission of a crime against them," and *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984), on the basis that this is not "a case where the prosecutor told the jury it was responsible for protecting the community," are unavailing since there is no meaningful difference between the pleas that were found to be improper in *Pecor* and

---

[2] The State's attempt to distinguish *Weatherspoon* consisted of: (a) pointing out that, in this case, the prosecutor's improper plea was made only once, while in *Weatherspoon* it had been made repeatedly; and (b) asserting, in wholly conclusory fashion, that, unlike in *Weatherspoon*, the prosecutor's argument in this case "did not appeal to the emotions of the jurors . . . ." (Respondent's Brief, p.16.)

Baruth, and those that were made in this case. The reality is that asking the jury to convict Mr. Schultz in order to protect not only the alleged victim, Laurie Morrill, but all of the other potential victims in society is tantamount to a plea to convict Mr. Schultz based on the jurors to protect themselves, their own families, and the community at-large.

Third, the State attempts to distinguish *State v. Phillips*, 144 Idaho 82, 156 P.3d 583 (Ct. App. 2007), based on the conclusory claim that in this case, unlike in *Phillips*, "the prosecutor's isolated remark . . . was neither inflammatory nor obviously calculated to appeal to the jury's passion or emotion." (Respondent's Brief, p.17.) However, this argument by the State overlooks the fact that there was no reason for the prosecutor to have talked about giving the victim "hope" and showing "her the system works" if not to ask the jury to render a guilty verdict out of sympathy for her.[3]

Fourth, the State attempts to distinguish *State v. Beebe*, 145 Idaho 570, 181 P.3d 496 (Ct. App. 2007), based on the claim that "*[c]ontrary to Schultz's assertions*, this is not a case where the prosecutor mischaracterized Schultz's defense to appeal to concerns about protecting the public." (Respondent's Brief, p.17.) However, this attempt to distinguish *Beebe* is based on a false premise since Mr. Schultz never

---

[3] The State also attempts to distinguish *State v. Peite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992), which, like *Phillips*, made it clear that emotional appeals are improper. Interestingly though, the State seeks to distinguish *Peite*, not on the basis that the prosecutor here did not attempt to evoke sympathy for the victim, but on the basis that this case did not involve "the prosecutor's *questioning* of a victim for the purpose of evoking sympathy." (Respondent's Brief, p.18 (emphasis added).) Obviously though, this attempted distinction is artificial, as it is not the timing of the attempt to generate sympathy for the victim which is important to the question of whether misconduct occurred, but the fact that the prosecutor attempt to generate sympathy for the victim at all. And, as noted above, there was no reason for the prosecutor to have talked about giving the victim "hope" and showing "her the system works" if not to ask the jury to render a guilty verdict out of sympathy for her.

argued that the prosecutor mischaracterized Mr. Schultz' defense. (*See generally* Appellant's Brief.) In fact, a close look at *Beebe* reveals that that case is instructive here. In *Beebe*, part of the prosecutor's misconduct was his attempt to highlight concerns about the protection of the public at-large, *Beebe*, 145 Idaho at 575-76, 181 P.3d at 501-02, which, as noted above, is exactly what the prosecutor did in this case when he urged the jury to convict Mr. Schultz, not only to protect the alleged victim from future harm, but also to protect "other Laurie Morrill's [sic]." (*See* Battery Case Augmented Tr., p.64, Ls.3-4.)

Despite the State's mischaracterization of the relevant portion of the prosecutor's closing argument, the reality is that the prosecutor did ask the jury to convict Mr. Schultz based on matters outside the evidence. For that reason, this Court should conclude that the prosecutor engaged in misconduct.

E. The Prosecutorial Misconduct Complained Of In This Case Constitutes Fundamental Error

In his Appellant's Brief, Mr. Schultz argued that, not only did the above instance of prosecutorial misconduct constitute error, but they rose to the level of fundamental error. (Appellant's Brief, pp.14-16.) Because the State has chosen not to offer any specific argument in response to Mr. Schultz' contention in this regard (other than to assert generally that, because there was no prosecutorial misconduct, then certainly there was no misconduct which rose to the level of fundamental error (Respondent's Brief, pp.14, 19)), no reply is necessary.

F. The Prosecutorial Misconduct Complained Of In This Case Constitutes Reversible Error

An alternative argument presented by the State is that, even if it is incorrect in arguing that no prosecutorial misconduct occurred, any misconduct that was committed was harmless beyond a reasonable doubt. (Respondent's Brief, pp.19-20.) In making this argument, the State articulates the harmless error standard as follows: "An error is harmless beyond a reasonable doubt if the Court can conclude, based upon the evidence and argument present during the trial, that the jury would have reached the same result absent the error." (Respondent's Brief, pp.19-20 (quoting *State v. Christiansen*, 144 Idaho 463, 471, 163 P.3d 1175, 1183 (2007)).) The State then goes on to assert that the jury would have inevitably reached its guilty verdict, even without the prosecutorial comments in question, because "[t]he jury was presented with overwhelming evidence" of Mr. Schultz' guilt. (Respondent's Brief, p.20.)

Notwithstanding *Christiansen*, which is correctly quoted by the State, Mr. Schultz submits that the State argues for application of the wrong harmless error standard. As was argued in Mr. Schultz' Appellant's Brief (pp.16-18), constitutional errors (such as prosecutorial misconduct) are governed by the standard set forth in *Chapman v. California,* 386 U.S. 18 (1967). Under *Chapman*, the reviewing court determines whether it appears, beyond a reasonable doubt that the error did not contribute to the jury's verdict. *Chapman,* 386 U.S. at 24. Under this standard, "*[t]he inquiry . . . 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 U.S. 275, 279 (1993) (emphasis added). For the reasons articulated in Mr. Schultz' Appellant's Brief (pp.17-18), it

cannot be said that the prosecutor's misconduct in this case surely did not impact the jury's verdict.

CONCLUSION

For the foregoing reasons, as well as those set forth in his Appellant's Brief, Mr. Schultz respectfully requests that this Court vacate his conviction in the Battery Case and remand that case for a new trial.

DATED this 11th day of February, 2009.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

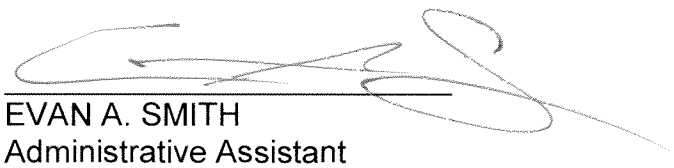
I HEREBY CERTIFY that on this 11th day of February, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

WALLY KAY SCHULTZ
INMATE # 19376
ISCI
PO BOX 14
BOISE ID 83707

JOHN M MELANSON
DISTRICT COURT JUDGE
E-MAILED COPY OF BRIEF

DAVID G PENA
ATTORNEY AT LAW
E-MAILED COPY OF BRIEF

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



EVAN A. SMITH
Administrative Assistant

ERL/eas