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State v. Troutman Appellant's Reply Brief Dckt. 35033

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MAURICE RONALD TROUTMAN, Defendant-Appellant.	)	NO. 35033 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Maurice Troutman was charged with a single count of rape after having had sex with a woman at the Grove Hotel in Boise. The State's theory was that the alleged victim was either unconscious at the time, or unable to resist, due to her ingestion of alcohol and a prescription sleeping aid, Ambien. The alleged victim had very little recollection of the sex with Mr. Troutman.

Mr. Troutman's defense was that the sex was purely consensual, the alleged victim was an active participant, and the fact that the alleged victim simply did not remember it did not make it rape. In support of this defense, he presented evidence that one of the side effects of Ambien is that people using it can appear wide awake and fully functional at times during the night, but have no recollection of the night's activities the following morning. This phenomenon is known as intro grade amnesia.

Ultimately, however, a jury found Mr. Troutman guilty and the district court imposed a sentence of twenty years, with five years fixed.

Mr. Troutman timely appealed. On appeal, he contends that, throughout her opening, closing, and rebuttal arguments, the prosecutor in his case engaged in numerous acts of misconduct which, whether considered individually, or in the aggregate, constitute fundamental error entitling Mr. Troutman to a new trial. In response, the State argues that Mr. Troutman "has failed to establish error, much less fundamental error, in relation to any of the prosecutor's statements." (Respondent's Brief, p.9.) In support of this proposition, it addresses each of Mr. Troutman's claims in turn, arguing in each instance that no misconduct was committed (Respondent's Brief,

pp.13-28), and then it concludes by briefly asserting that Mr. Troutman's Appellant's Brief failed to offer any argument in support of his contention that the prosecutor's misconduct rises to the level of fundamental error (Respondent's Brief, pp.28-29).

The present Reply Brief is necessary to point out where the State has mischaracterized the prosecutor's arguments in an effort to make them appear proper, and where it is mistaken as to the law.

Statement of the Facts and Course of Proceedings

The procedural history of this case was accurately detailed in Mr. Troutman's Appellant's Brief. Because that summary of the procedural history of the case was sufficient for purposes of the present appeal, no further discussion of the procedural history is necessary at this time.

Likewise, the factual history of this case was accurately summarized in Mr. Troutman's Appellant's Brief. Thus, further discussion of the facts is not strictly necessary at this point. However, because the State's attempt to highlight certain facts may have created a misleading picture of the trial evidence, a brief further discussion is prudent.

First, in describing events occurring in the hours leading up to the alleged rape, the State discusses the fact that, after Ms. Schillereff had taken an Ambien pill and gone to bed, Ms. Relano (accompanied by the Blitz player she ultimately spent the night with) returned to the hotel room she had rented with Ms. Schillereff to change her clothes. (Respondent's Brief, p.2.) While these are accurate statements about the evidence, it is worthwhile to point out that the State has omitted the fact that, while Ms. Relano and the football player were in the room in the middle of the night, Ms. Schillereff was awake

and functional, and even took a picture of her friend kissing the football player, *but had no memory of that event in the morning.* (*See* Tr., p.100, L.18 – p.101, L.18, p.132, L.21 – p.134, L.10, p.140, L.10 – p.143, L.7; *see also* Exs.15 & 15A (picture taken by Ms. Schillereff).) Obviously, these facts support the inference that the Ambien caused intro grade amnesia such that, although awake and functional, Ms. Schillereff simply could not remember some of what she did on the night in question.

Second, in describing the alleged rape, the State describes *some* of the evidence regarding Detective Brechwald and Detective Vucinich's interrogations of Mr. Troutman, asserting that the evidence was that Mr. Troutman admitted that he initiated physical contact, Ms. Schillereff mumbled something incoherent, and then he penetrated her from behind. (Respondent's Brief, p.5.) Again, while these are accurate statements on the State's part, they are somewhat misleading because of the information omitted by the State. In fact, according to Detective Brechwald's testimony, as well as the transcript of the interrogation with Detective Vucinich, Mr. Troutman also maintained that, after he lay down next to Ms. Schillereff, he woke her up, whereupon she "scooted her buttocks over towards his groin area and started grinding on him," and that she not only unzipped Mr. Troutman's pants and helped him remove them, but removed her own pants and, later, while the couple was having sex, changed positions such that she was on top of him. (Tr., p.457, L.25 – p.458, L.16; Ex. 22A, p.12, Ls.5-16; *see also* Ex. 22A, p.19, Ls.1-4 (transcript of interrogation with Det. Brechwald, wherein Mr. Troutman again described Ms. Schillereff as having been on top of him during sex).) Obviously, these facts undercut the State's attempt to portray Ms. Schillereff as a virtually unconscious victim.

ISSUE

Did the prosecutor engage in misconduct depriving Mr. Troutman of due process of law and a fair trial, such that he is now entitled to a new trial?

ARGUMENT

The Prosecutor's Misconduct Warrants A New Trial

A. Introduction

In his Appellant's Brief, Mr. Troutman raised five distinct claims of prosecutorial misconduct arising out of the prosecutor's closing arguments. He argued that, not only were many of the prosecutor's comments improper but, whether considered individually or in the aggregate, they were so egregious as to rise to the level of fundamental error. In response, the State argues that, not only was there no misconduct that was so egregious as to rise to the level of fundamental error, but there was no misconduct at all. For the reasons set forth in detail below, the State is wrong on both points.

B. Standard Of Review And Other Applicable Legal Standards

The standard of review applicable to prosecutorial misconduct claims (*de novo* review) was identified in Mr. Troutman's Appellant's Brief (p.8), and it does not appear that the State takes issue with that standard. (*See* Respondent's Brief, pp.9-11.) The State does, however, go on to make a curious claim as to the legal standard applicable to claims of prosecutorial misconduct committed during closing arguments. This claim warrants further discussion.

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*, 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 committed 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, p.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 prayer for leniency is inconsistent with United States Supreme Court precedent and overlooks the fact that the crux of Mr. Troutman's prosecutorial misconduct claim is that he was denied due process and 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 she made arguments that had the effect of denying Mr. Troutman a fair trial.

C. The Prosecutor Engaged In Numerous Acts Of Misconduct

1. The Prosecutor Engaged In Misconduct By Asking The Jury To Draw Inferences Which She Knew To Be False And Were Wholly Inconsistent With The State's Theory In Another Case, And By Doing So For The Purpose Of Prejudicing The Jury Against Mr. Troutman

In his Appellant's Brief (pp.8-14), Mr. Troutman argued that the prosecutor committed misconduct when she argued as follows:

> At 4:53 a.m. we know that room has been entered a second time. I don't have to prove if there was a rape or theft there, because the victim is unconscious. She is unaware these multiple entries are happening. She doesn't know who is coming into the room, to tell us again at 5:09 a.m., 16 minutes later, the room is entered again.
>
> The same key card the defendant had in his possession. That key card never went back to [Ms. Relano] and was never placed back into the room, so he had it, and he says he handed off to a third party unknown to the victim. Okay?
>
> So either he [Mr. Troutman] or someone that he designated, by passing it along, is going into that room again. And that happens, a second entry happens. Again, don't know if there is rape or theft happening again.
>
> [The key card] again is used one hour later. There is a fourth entry. Again, do not know what other crimes were committed against this woman during that time frame. We do know at some point the iPod was taken from the room. Her other luggage was searched. The wires that go with it are taken out of the room as well, and again, I don't know—that's a side issue. I don't know if Mr. Troutman did that beyond a reasonable doubt or if his buddy that he passed the card to did that, but I do know that Mr. Troutman returned it all to the front desk when he knew the police was [sic] on them, and he would be getting caught.
>
> All of that, mere inability to know who's in there, how many times he is coming in, she is not aroused. She is not awakened. She does not know, and she does not even realize a theft has happened, because she is that unaware and sedated and unconscious and helpless.
>
> And their repetitive entering into the room obviously speaks squarely to the point of her ability to be able to appreciate the nature of the act, which is penetration in this case.

(Tr., p.642, L.5 – p.643, L.20 (emphasis added).) Mr. Troutman contends that this portion of the prosecutor's closing argument was improper because, as the underlined portions make clear, it sought to have the jury infer that Mr. Troutman entered Ms. Schillereff's hotel room to victimize her on *multiple* occasions, even though the prosecutor knew (based on both the trial evidence and the outside evidence) that, of the four entries to Ms. Schillereff's room during the relevant timeframe, Mr. Troutman entered only once, and that Mr. Reynolds entered the room the other three times. (Appellant's Brief, pp.8-14.) Specifically, Mr. Troutman asserts that the prosecutor's implication constituted misconduct for three reasons: it sought to have the jury draw an inference that the prosecutor knew to be false; it was inconsistent with the evidence within and outside the case; and it was clearly calculated to prejudice the jury against Mr. Troutman. (Appellant's Brief, pp.11-14.)

In response, the State provides a number of reasons why the above-quoted argument is, in its view, perfectly acceptable. (Respondent's Brief, pp.13-20.) First, the State claims that "the *clear* import" of the prosecutor's argument was that the fact that there were multiple entries to Ms. Schillereff's hotel room indicates that she was unconscious and, thus, unable to have consented to sex with Mr. Troutman during the first entry. (Respondent's Brief, pp.14-15 (emphasis added).) However, while that could certainly be said to be the clear import of a portion of the above-quoted argument (the two paragraphs beginning with "[a]ll of that"), it most certainly is *not* the clear import of the statements tending to raise the inference that Mr. Troutman had been the one to re-enter the room and victimize Ms. Schillereff repeatedly.

Second, the State asks this Court to believe that the prosecutor did not commit misconduct because she did not know for certain that Mr. Troutman did not re-enter Ms. Schillereff's hotel room. (Respondent's Brief, pp.15-16.) The problem, however, is that under this reasoning, a prosecutor could make any wildly speculative argument, even if all of the evidence suggests that that argument is false, and then hide behind a claim that she did not know *for sure* what the truth was because she was not there to personally see what happened. Surely prosecutors are held to a higher standard than that. *See, e.g., State v. Irwin*, 9 Idaho 35, _, 71 P. 608, 610 (1903) ("Nothing should tempt [the prosecutor] to . . . make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce [the prosecutor] to endeavor to obtain a verdict by arguments based on anything except the evidence in the case, and the conclusions legitimately deducible from the law applicable to the same . . . .").

Third, the State now defends the inference it asked the jury to draw by speculating that Mr. Troutman *could have* re-entered the room with Mr. Reynolds at some point. (Respondent's Brief, pp.15-16.) However, this is rank speculation on the State's part. The best the State can do to support this speculative argument is point to one portion of the grand jury transcript where one of the detectives, while being asked about Mr. Reynolds' interrogation, testified that "I believe that he mentioned a camera" while discussing what he saw the first time he entered Ms. Schillereff's room. (Grand Jury Tr., p.168, Ls.14-21.) The State tries to reason that, since there is evidence that Mr. Troutman took Ms. Schillereff's camera (*see* Tr., p.216, Ls.8-24), but Mr. Reynolds *might* have seen a camera in Ms. Schillereff's room after Mr. Troutman had left,

Mr. Troutman must have gone back with Mr. Reynolds to take the camera during a subsequent entry to the room. (*See* Respondent's Brief, pp.15-16.) This, however, is far from a reasonable inference, especially since the grand jury testimony summarizing Mr. Reynolds' admissions to the police makes it quite clear that entered Ms. Schillereff's room alone on three occasions. (*See* Grand Jury Tr., p.164, L.20 – p.175, L.11 (repeatedly using the word "he," not "they," while referring to Mr. Reynolds' entries into Ms. Schillereff's hotel room, thus making it clear that Mr. Reynolds told the police, or at least implied, that he had acted alone on those occasions).) Moreover, as if the State's "logic" is not tenuous enough on its face, one must remember that the State did not even seek an indictment against Mr. Troutman for any successive entries into the hotel room, much less get an burglary indictment for any such entry.[1] (*See* R., pp.11-13.) Rather, the State went after Mr. Reynolds for the re-entries, seeking indictments on two counts of burglary for the second and third (of the four) entries in question (*see* R., pp.12-13), the two instances where he admitted entering the room with the intent to have sex and/or steal (*see* Grand Jury Tr., p.165, L.22 – p.172, L.20).[2] The bottom line

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[1] With regard to Mr. Troutman, the State sought an indictment on one count of rape, *and* one count of burglary. (*See* R., p.12.) Presumably, the burglary count, since it alleged the intent to commit a rape *or* a theft, related only to Mr. Troutman's readily-admitted entry into the room, *i.e.*, the first of the four entries in question. (R., p.12.) However, even if that burglary count was intended to be broad enough to cover any entry by Mr. Troutman into the room, the reality is that the grand jury did not find probable cause of any burglary. (*See* R., p.12.) Accordingly, it is clear that the grand jury rejected the notion that Mr. Troutman ever entered Ms. Schillereff's room with the intent to commit a crime, which surely would have had to have been the case had he re-entered the room after having sex with Ms. Schillereff.

[2] Apparently, the State did not seek an indictment for Mr. Reynolds' third entry (*see* R., pp.12-13), the fourth of the night, where he told the police he did not know why he went in the room (*see* Grand Jury Tr., p.172, L.21 – p.173, L.17).

is that there is no reasonable basis to believe that Mr. Troutman ever re-entered Ms. Schillereff's room after the visit where he had sex with her.

Fourth, turning its focus away from the evidence and onto the law, the State seeks to distinguish the cases cited in Mr. Troutman's Appellant's Brief in support of the proposition that a prosecutor cannot offer inconsistent theories as to how a crime was committed. (Respondent's Brief, pp.16-17.) In making this attempt, the State focuses on the facts that: (a) Mr. Reynolds did not take his case to trial and, instead, entered into a plea agreement; and (b) Mr. Troutman and Mr. Reynolds were ultimately convicted of different offenses. (Respondent's Brief, pp.16-17.) However, the State presents two distinctions without any meaningful differences. The trial/plea distinction is meaningless because the fact is that, since the State obtained a conviction of Mr. Reynolds based on the claim that he was the one who re-entered Ms. Schillereff's room on numerous occasions, it ought not to be allowed to turn around and obtain a conviction of Mr. Troutman on the theory that he was the one who re-entered the room (especially where, as noted above, the prosecutor knew all the evidence suggested otherwise). Likewise, the different offense distinction is meaningless because, although Mr. Reynolds and Mr. Troutman were not ultimately convicted of the same offense, the fact is that they have both lost their liberty based on the prosecutor's manipulation of the evidence.

Fifth, the State points to language in *Nguyen v. Lindsey*, 232 F.3d 1236 (9th Cir. 2000), to the effect that "trial preparation is not a static process," arguing that this Court would have to ignore that truism in order to find misconduct in this case. (Respondent's Brief, p.18.) However, the State's argument is misleading since the above-quoted

portion of *Nguyen* appeared as part of a larger discussion of how new evidence coming to light between one case and the next will justify inconsistent positions. *Nguyen*, 232 F.3d at 1240. In this situation though, there is no allegation that conditions changed, or that new evidence came to light, between the grand jury proceedings and Mr. Troutman's trial, or between Mr. Troutman's trial and Mr. Reynolds' guilty plea.

Finally, as a point of clarification, the State mistakenly asserts that Mr. Troutman has claimed a violation of Idaho Rule of Evidence 404(b). (Respondent's Brief, p.19.) This is not so. In fact, as should have been clear from Mr. Troutman's Appellant's Brief, Mr. Troutman contends that the prosecutor engaged in misconduct by using the false inference that Mr. Troutman had made repeated entries into Ms. Schillereff's room to prejudice the jury against Mr. Troutman. (Appellant's Brief, p.14.) In making this argument, Mr. Troutman cited Rule 404(b) merely to show that Idaho law recognizes that evidence of other crimes, wrongs, or bad acts (besides that those that are charged) is potentially highly prejudicial to the defendant. (*See* Appellant's Brief, p.14.)

2. The Prosecutor Engaged In Misconduct By Distorting Mr. Troutman's Defense, Asking The Jurors To Convict Mr. Troutman In An Effort To Cure Societal Problems And Out Of Fear For Their Own Safety (Or The Safety Of Others), And By Seeking To Reduce The State's Burden Of Proof

In his Appellant's Brief (pp.15-20), Mr. Troutman argued that the prosecutor committed misconduct when she began her rebuttal argument with the following comments:

> [H]e would have a done deal if, based on this argument, we are all going to have to put heavy locks on our doors, on the windows in our house and wear chastity belts when we go to bed, because in case you are lawfully ingesting any substance that makes you unable to fend for yourself and the next day you can't remember much about what's happened, but the law enforcement has done their absolute best and has figured out the

criminal involved and the crime that's committed, you are at fault, and there is no crime.

Under this suggestion, if your house door is unlocked and a person walking by decides that they are going to check all the doors in the neighborhood in the middle of the night and see who's got something they can take, comes into your house, and you happen to have taken a sleeping pill, or whatever, or are just a really heavy sleeper and someone comes through your house, take everything you have and goes, "Hey, buddy, I'm taking your car," and you don't wake up, and he leaves.

When he is caught later, he is going to go, "I was in his house. It was unlocked. He didn't tell me I couldn't come in."

And then I said to him, "Dude, I'm taking your car, and he doesn't remember, and he did not follow the warnings on the Ambien he was taking that said don't mix it with alcohol, that's his fault."

When you start shifting the blame in a case like this onto the victim for her inability to remember every detail of what she was doing behind her locked door, in her own bedroom, in her own bed, then you are turning the world upside down. Justice not in its real sense, but what conceptual sense is.

(Tr., p.665, L.2 – p.666, L.15.) He argued that this misconduct continued, when a short while later, the prosecutor argued as follows: "People who are victimized, you cannot blame them later that they may have a mental illness, maybe they have Alzheimer's. This means that those folks are open target. They might not know what happens to them, because they can't remember tomorrow what happened." (Tr., p.670, Ls.5-10.) Specifically, Mr. Troutman asserts that these arguments distorted and mischaracterized Mr. Troutman's defense, exhorted the jury to convict based on a desire to cure a greater societal problem and/or out of fear for themselves or others, and sought to reduce the State's burden of proof. (Appellant's Brief, pp.15-20.)

In response, the State offers a number of arguments, none of which has any merit. First, ironically enough, the State accuses Mr. Troutman of a mischaracterization; it claims that his description of the prosecutor's closing argument is "false" insofar as he

argued that it mischaracterized his trial defense as one of "I didn't hear her say 'no,' so I took that as a 'yes.'" (Respondent's Brief, p.21.) The State claims that "[n]owhere in the arguments cited by Troutman, and excerpted above, did the prosecutor characterize the defense in this manner." (Respondent's Brief, p.21.) However, once again, the State is being less than honest. As quoted above, the prosecutor tried to scare the jury with a hypothetical situation involving a heavy sleeper who had all of his belongings, including his car, taken, and then she warned that "[w]hen he [the perpetrator] is caught later, he is going to go, "I was in his house. It was unlocked. He didn't tell me I couldn't come in." (Tr., p.665, L.15 – p.666, L.3.) Clearly, the intent with this hypothetical was to mischaracterize the defense in this case as one of "I didn't hear her say 'no,' so I took that as a 'yes,'" and then portray the precedent that would be set if Mr. Troutman were to be acquitted.

Second, the State asserts, in conclusory fashion, that the above-quoted arguments "simply urged the jury to reject Troutman's argument that the jury could not find him guilty because Heather could not remember whether the sex was consensual." (Respondent's Brief, pp.21-22.) However, this attempt re-cast the prosecutor's rebuttal argument in terms that would not be considered improper is quite disingenuous. The above-quoted argument was much more than a simple plea to focus on the circumstantial evidence in the case. By conjuring up images of a world where decent citizens need "heavy locks" and "chastity belts" to protect themselves from home invaders, the prosecutor engaged in an unabashed attempt to frighten the jurors into convicting Mr. Troutman out of fear for their safety, the safety of their friends and loved

ones, and the safety of society as a whole. As such, this portion of her argument was plainly improper.

Third, although the State specifically attempts to refute the foregoing argument, asserting that "[t]he prosecutor was not, as Troutman suggests, urging the jury to convict Troutman to 'alleviate' a 'societal problem[ ]'—she was using an analogy in response to describe the practical effect of the defense's theory of the case" (alteration in State's brief; footnote omitted), and then asserting baldly that "[t]his is not improper" (Respondent's Brief, p.22), the reality is that even if this argument was not clearly belied by a plain reading of the prosecutor's argument, the State's current argument in defense of the prosecutor demonstrates that her rebuttal argument was, in fact, improper. Indeed, even the State concedes that the prosecutor sought to portray "the practical effect" of an acquittal; however, the "practical effect" of an acquittal, *i.e.*, how and acquittal in this case would affect future cases or society as a whole, should not have factored into the jury's decision-making process in this case; the jury should have been concerned only with the evidence in the case at hand. As the Ninth Circuit Court of Appeals has held, arguments such as those that were made here run the risk of causing a conviction "for reasons wholly irrelevant to [the defendant's] 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."[3] *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005).

[3] Notably, in its Respondent's Brief, the State feigns ignorance, claiming that it cannot figure out what "societal problem" Mr. Troutman has argued that the prosecutor improperly sought to have the jury concern itself with. (*See* Respondent's Brief, p.22 &

Fourth, the State denies that the portion of the above-quoted argument which implied that law enforcement had done "their absolute best" and had found "the criminal" was an attempt to lower the State's burden of proof by essentially vouching for law enforcement's opinion that Mr. Troutman is guilty of a crime. (Respondent's Brief, pp.22-23.) The State defends the prosecutor's comments as "an assertion that the jury was not required to acquit Troutman simply because [Ms. Schillereff] could not 'remember much about what[ ] happened'" (Respondent's Brief, pp.22-23 (quoting prosecutor's closing argument).) However, if that truly had been the prosecutor's intent, there was no need to discuss law enforcement at all, much less imply that it had done its "absolute best" and caught "the criminal" because the manner by which the investigation is handled is completely irrelevant to the question of whether a conviction can be had despite Ms. Schillereff's faulty memory (unless, of course, the prosecutor was trying to frighten the jurors with a parade of horrible societal repercussions of a "not guilty" verdict).

3. The Prosecutor Engaged In Misconduct By Attempting To Generate Sympathy For Ms. Schillereff And/Or Derision For Mr. Troutman

In his Appellant's Brief (pp.17-18 & n.7, pp.20-23), Mr. Troutman argued that the prosecutor committed misconduct when she repeatedly employed tactics that were clearly calculated to engender sympathy for Ms. Schillereff and resentment toward Mr. Troutman. With regard to the tactics intended to generate sympathy for Ms. Schillereff, the State argues that the prosecutor's tactics "hardly constitute

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n.6.) Obviously, the societal problem that Mr. Troutman referred to (and, indeed, the societal problem that the prosecutor sought to have the jurors be concerned with) was the problem of home invasions involving sex crimes and thefts.

misconduct," and that, even if the prosecutor did engage in misconduct, "it is unlikely the prosecutor's characterizations of [Ms. Schillereff] and her experience further influenced the jury to convict Troutman." (Respondent's Brief, pp.23-24.) Since these are conclusory arguments on the State's part, no further response is necessary; Mr. Troutman's Appellant's Brief and the trial transcript speak for themselves.

With regard to the tactics intended to generate resentment toward Mr. Troutman, the State argues that, because the evidence underlying the arguments in question was in the record, it was perfectly acceptable for the prosecutor to highlight that evidence in any fashion she so chose during her closing argument. (Respondent's Brief, p.24.) However, there are two significant flaws with this argument. First, as noted above, there was no evidence in the record to support the prosecutor's claim that Mr. Troutman had repeatedly entered Ms. Schillereff's room, repeatedly assaulted her, or took her iPod. Second, the fact that a certain piece of evidence is in the record does not give the prosecutor license to argue that the jury should consider that evidence for an improper purpose. *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997). In this case, the fact that Mr. Troutman did not use a condom when he had sex with Ms. Schillereff was wholly irrelevant to any fact that was at issue in this case; it was only in the trial record at all as part of the *res gestae* of the case. Accordingly, the prosecutor's decision to highlight that fact repeatedly during her closing arguments, and to do so in the manner in which she did,[4] was clearly an attempted to appeal to the passions and prejudices of the jury and, as such, was plainly improper.

[4] In a comment that was clearly an attack on Mr. Troutman's character, the prosecutor argued first that "[h]e did not care enough to protect who he is going to have sex with." (Tr., p.650, Ls.4-6.) Later, in a comment that was both an attack on his character, and a

4. The Prosecutor Engaged In Misconduct By Attacking Mr. Troutman's Credibility Based Her Own "Testimony"

In his Appellant's Brief (pp.23-24), Mr. Troutman argued that the prosecutor committed misconduct when she essentially made herself a witness when she interjected new evidence (her own life experiences) into the case during her closing argument by stating "I am yet to hear from a single woman who has done that—this is anecdotal from him—that there are women who have sex with multiple members at one time, willingly have sex with multiple members at one time . . . ." (Tr., p.652, Ls.1-9.) In response, the State attempts to characterize the prosecutor's comment as possibly relating to the evidence presented (or not presented, as the case may be) by the defense at trial, not her own life experiences. (Respondent's Brief, p.25.) This argument, while creative, is unconvincing since the prosecutor said she had "*yet* to hear from a single woman who" would be willing to engage in sexual activity with a number of professional football players. The word "yet" implied that she might still hear from such a woman in the future and, since the prosecutor surely knew that all the evidence had been heard (such that no such woman could be called to testify in Mr. Troutman's case) by the time she began her closing arguments, she must have meant that she had "yet" to hear from such a woman in her own life. Thus, it is reasonably clear that, as Mr. Troutman argued in his Appellant's Brief, the prosecutor interjected her own life experience into the case, which was improper. *See State v. Martinez*, 136 Idaho 521,

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plea for sympathy for Ms. Schillereff, she made a point of reminding the jury that "[s]he [Ms. Schillereff] has to take protective measures later to make sure she doesn't get pregnant by him or she doesn't get all the things that come along with unprotected sex she doesn't know about." (Tr., p.669, Ls.6-11.)

525, 37 P.3d 18, 22 (Ct. App. 2001); *State v. Cortez*, 135 Idaho 561, 566, 21 P.3d 498, 503 (Ct. App. 2001).

5. The Prosecutor Engaged In Misconduct By Asking The Jury To Convict Mr. Troutman Based On A Presumption Of Rape And/Or In An Effort To Change Existing "Lenient" Cultural Views Regarding Sex

In his Appellant's Brief (pp.24-26), Mr. Troutman argued that the prosecutor committed misconduct when, while discussing her assertion that Mr. Troutman had stolen Ms. Schillereff's camera, she launched into a discussion about how, "I don't know what it is about our culture . . . we give more importance to someone taking a tangible thing from us without our permission, but we are more lenient about the issue of someone having sexual penetration. . . . [W]ith sex, we are willing to sort of go into the realm of unreasonable, unfortunately." (Tr., p.656, Ls.9-24.) Mr. Troutman argued, *inter alia*, that this argument mischaracterized the defense as being one of "she didn't say 'no,' so it's not rape"; effectively sought to lower the State's burden of proof by implying that, without express permission, the sex between Mr. Troutman and Ms. Schillereff was necessarily non-consensual; and exhorted the jury to find Mr. Troutman guilty in order to change, or at least make a statement against, societal views about sex which the prosecutor feels are too lax. (Appellant's Brief, pp.24-26.)

In response, the State devotes much energy to useless disparagement of Mr. Troutman's argument. (Respondent's Brief, pp.25-28.) However, it does argue, in part, as follows:

> [I]t is certainly apparent when the entire argument is read in context that the prosecutor was not urging the jury to presume anything or to be more sympathetic to the prosecution based on "cultural norms." Rather she was highlighting that there is no distinction between taking a piece of property without someone's permission and taking something more personal and intimate without their permission. This is improper.

(Respondent's Brief, pp.27-28.) With this argument, the State does actually raise a valid point: it probably would not have been improper for the prosecutor to have argued simply that there is no distinction between taking personal property and raping someone, in the sense that they have been deemed criminal by the Idaho Legislature. Unfortunately, the prosecutor did not confine her argument to that in this case; here, she argued about cultural norms, society's "lenient" treatment of cases involving "sexual penetration," and society's willingness "to sort of go into the realm of unreasonable, unfortunately," in cases involving sex, and she asked the jury to make a statement against society's "lenient" norms by convicting Mr. Troutman. (Tr., p.656, Ls.8-24.) Thus, despite the State's attempts to re-characterize the prosecutor's closing argument, it cannot conceal the fact that it was an improper appeal to convict Mr. Troutman based on matters outside the evidence—namely, a desire to ameliorate society's woes. *See Weatherspoon*, 410 F.3d at 1149.

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

In his Appellant's Brief, Mr. Troutman conceded that none of the instances of prosecutorial misconduct complained of were objected to by trial counsel, but argued that this Court should nonetheless consider his claims on their merits because the instances of misconduct in question, "whether considered individually, or in the aggregate, constitute fundamental error because so much of [the misconduct] was calculated [to] inflame the passions and prejudices of the jury and influence the verdict with matters outside the evidence." (Appellant's Brief, pp.27-28.) Since the nature of the individual instances of misconduct had already been discussed elsewhere in his Appellant's Brief (*see* Appellant's Brief, pp.8-26), it was unnecessary to again describe

the instances of misconduct or the reasons why those instances of misconduct constituted emotional appeals and other arguments to have the jury decide the case on matters outside the evidence in the section of his Brief discussing the fundamental error standard.

In response the State attempts to procedurally default Mr. Troutman's fundamental error argument. Citing *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996), the State claims that this Court cannot even reach the fundamental error question because "Troutman has failed to present any argument on this point . . . ." (Respondent's Brief, pp.28-29.) This argument is frivolous for two reasons. First, Mr. Troutman's fundamental error argument is not a claim for relief; it is an argument in support of all of his claims. Thus, *Zichko* does not even apply in this instance. Second, even if *Zichko* does apply, Mr. Troutman's fundamental error argument was, in fact, supported by argument (however brief that argument might have been). (*See* Appellant's Brief, p.28.)

The reality is that the fundamental error analysis in the present case is quite straightforward: the prosecutor improperly asked the jury to draw certain inferences in an effort to generate resentment toward Mr. Troutman; she tried to generate sympathy for Ms. Schillereff; she repeatedly sought to have the jury decide the case based on fear or in order to vindicate or, in one case, make a statement against, societal norms; and she repeatedly distorted Mr. Troutman's defense. Under these circumstances, it is clear that the misconduct was "calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or [was] so inflammatory that the jurors may [have been influenced to determine guilt on factors outside the evidence," *State v. Babb*, 125

Idaho 934, 942, 877 P.2d 905, 913 (1994), and, thus, meets the criteria for fundamental error.

CONCLUSION

For the foregoing reasons, as well as those set forth in his Appellant's Brief, Mr. Troutman respectfully requests that the judgment of conviction in this case be vacated, and that his case be remanded for a new trial.

DATED this 9th day of April, 2009.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of April, 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:

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INMATE # 88091
NFCF
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