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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 42508**
Plaintiff-Respondent,	)	
	)	**Canyon Co. Case No.**
v.	)	**CR-2008-41816**
	)	
JAMES ROBERT MALEC,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE JUNEAL C. KERRICK
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

ERIC D. FREDERICKSEN
Deputy State Appellate
Public Defender
P. O. Box 2816
Boise, Idaho 83701
(208) 334-2712

ATTORNEY FOR
DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

James Robert Malec appeals from the judgment entered upon the jury verdict finding him guilty of voluntary manslaughter. On appeal, he challenges one of the trial court's evidentiary rulings and also argues the trial court deprived him of his due process right to an adequate appellate record by not preserving a video deposition that was played for the jury at trial. The latter issue is moot because, after Malec filed his Appellant's brief, the district court clerk produced the video deposition, and it has been augmented into the appellate record.

Statement of Facts and Course of Proceedings

On Christmas Day 2008, Malec shot and killed Justin Eilers. (Augmentation: Jury Instruction No. 9 (stipulated facts).) Malec was married to Mr. Eilers' mother, Gwen Moore, and Mr. Eilers was one of several people attending a Christmas party at Mr. Malec's and Ms. Moore's home. (Tr.,[1] p.88, L.12 – p.89, L.4, p.90, Ls.2-23, p.136, Ls.3-14, p.141, Ls.10-24, p.147, Ls.12-24, p.148, Ls.5-6, p.193, L.6 – p.194, L.12, p.320, Ls.6-23, p.338, Ls.16-25, p.356, Ls.21-22, p.367, L.3 – p.368, L.22.) Other guests included Mr. Eilers' eight-year-old son, T.E., and T.E.'s mother (Mr. Eilers' ex-girlfriend), Melanie Cox. (Tr., p.90, L.16 – p.91, L.19, p.141, Ls.18-20, p.148, Ls.5-6, p.191, Ls.13-21, p.193, Ls.6-21, p.208, Ls.12-14, p.368, Ls.19-23.)

[1] The appellate record contains two separately bound volumes of transcripts. All transcript citations herein are to the volume containing, *inter alia*, the transcript of the three-day jury trial.

Throughout the course of the evening Malec, Mr. Eilers and Ms. Cox all consumed alcohol. (Tr., p.92, Ls.4-9, p.93, L.22 – p.94, L.2, p.125, L.25 – p.126, L.21, p.131, Ls.19-21, p.139, Ls.10-20, p.148, Ls.7-17, p.195, Ls.1-17, p.196, Ls.5-11, p.220, L.21 – p.222, L.9, p.323, Ls.2-11, p.388, L.4 – p.389, L.8.) At approximately 10:00 p.m., Mr. Eilers and Ms. Cox began arguing about the rearing of their son. (Tr., p.92, L.17 – p.93, L.1, p.149, L.19 – p.150, L.1, p.162, Ls.11-21, p.196, Ls.5-24, p.325, L.17 – p.326, L.7, p.375, Ls.6-15.) The argument got loud and, in an attempt to keep the children in the home from hearing them yell at one another, Mr. Eilers and Ms. Cox took the argument outside. (Tr., p.93, Ls.7-16, p.149, L.19 – p.150, L.1, p.162, L.22 – p.163, L.9, p.196, L.25 – p.198, L.4, p.216, Ls.10-20, p.326, Ls.9-11, p.375, L.10 – p.376, L.13.) Mr. Eilers and Ms. Cox were outside for between 15 and 30 minutes before they stopped arguing and Mr. Eilers went back into the home. (Tr., p.124, Ls.14-17, p.150, Ls.20-21, p.164, L.25 – p.165, L.6, p.198, L.5 – p.199, L.6, p.376, L.21 – p.377, L.1.)

When Mr. Eilers reentered the home his mother and Malec were in the kitchen. (Tr., p.94, Ls.6-15, p.150, Ls.11-21, p.376, L.24 – p.377, L.24.) Mr. Eilers was angry and apparently believed others in the home had been teasing his son. (Tr., p.94, Ls.16-18, p.113, Ls.3-14.) Ms. Moore assured Mr. Eilers that his son was "fine," but Mr. Eilers became "[m]ore angry" and used his arm to "swipe[] everything off the counter." (Tr., p.94, L.20 – p.95, L.12, p.377, L.25 – p.378, L.4.) Ms. Moore told Mr. Eilers to "stop it," at which point Mr. Eilers "backed off a little bit." (Tr., p.95, Ls.14-24.) Mr. Eilers was still angry, however,

and he again used his arm to "swipe[] the rest of the items off the counter." (Tr., p.95, L.24 – p.96, L.6, p.382, L.12 – p.383, L.8.) Ms. Moore and Malec both told Mr. Eilers to leave, but Mr. Eilers refused and said something like, "Bring it on old man, give me your best shot" and/or "What do you got, old man? Put one in me. Put one in me." (Tr., p.96, Ls.7-11, p.98, Ls.17-25, p.117, Ls.3-14, p.118, L.12 – p.119, L.16, p.121, L.17 – p.122, L.1, p.171, L.2 – p.172, L.24, p.379, Ls.16-25, p.383, L.15 – p.384, L.2, p.386, Ls.16-24.) Mr. Eilers walked toward Malec, but Ms. Moore stepped in between them and pushed Mr. Eilers back toward the entrance to the kitchen. (Tr., p.98, L.17 – p.99, L.5, p.102, L.18 – p.103, L.4, p.117, L.17 – p.118, L.11.) Believing that the confrontation was over, Ms. Moore turned away from Mr. Eilers who at that time was backing out of the kitchen. (Tr., p.99, Ls.11-24, p.103, Ls.20-23, p.104, L.25 – p.105, L.10.) However, before Ms. Moore could even turn all the way around Malec drew a loaded .45 caliber pistol and, from a distance of five to six feet away, shot Mr. Eilers in the chest. (Tr., p.99, Ls.21-25, p.102, Ls.6-17, p.103, L.20 – p.104, L.9, p.120, L.12 – p.121, L.12, p. 152, L.7 – p.157, L.19, p.166, L.21 – p.169, L.9, p.174, L.8 – p.175, L.6, p.384, Ls.3-12, p.385, L.25 – p.386, L.2, p.391, L.23 – p.394, L.18, p.407, Ls.23-25.) Mr. Eilers died as a result of the gunshot wound. (Tr., p.259, L.1 – p.263, L.3.)

The state charged Malec with second degree murder. (R., Vol. I, pp.62-63.) The evidence at trial established that Malec is an experienced marksman and has been trained in the use of deadly force. (Tr., p.101, Ls.3-17, p.339, L.10 – p.354, L.21.) He served in the military for almost 20 years and, after that, he

was a deputy sheriff. (Tr., p.101, Ls.3-7, p.339, L.10 – p.347, L.19.) On December 25, 2008, Malec owned 15 firearms, eight of which were handguns. (Tr., p.354, L.22 – p.355, L.6.) He frequently carried a gun "for personal protection," and Christmas Day 2008 was no exception. (Tr., p.101, Ls.13-17, p.333, L.24 – p.334, L.1, p.355, L.7 – p.356, L.12, p.369, L.17 – p.371, L.4.) In fact, earlier in the day, Malec had been carrying a .45 caliber revolver in a holster on his leg or chest. (Tr., p.144, Ls.9-16, p.370, Ls.16-20.) Malec switched guns after a friend who was attending the Christmas gathering gave him the .45 caliber pistol. (Tr., p.92, Ls.1-3, p.136, L.3 – p.137, L.8, p.370, L.21 – p.371, L.4, p.380, L.7 – p.381, L.10.) The pistol did not have any ammunition in it when Malec's friend gave it to him but Malec, who had been drinking for most of the day, loaded the pistol and put it in his shirt pocket. (Tr., p.131, Ls.19-21, p.136, L.15 – p.137, L.8, p.380, L.25 – p.381, L.7.)

Malec testified at trial that he shot Mr. Eilers in self-defense. (Tr., p.381, L.11 – p.390, L.8, p.397, Ls.7-10, p.403, L.3 – p.408, L.5.) Mr. Eilers was a professional mixed martial arts fighter, and Malec testified he had personally watched Mr. Eilers participate in three mixed martial arts fights. (Tr., p.106, L.15 – p.107, L.25, p.163, Ls.11-13, p.358, L.24 – p.360, L.6.) Malec testified that, although Mr. Eilers had never physically assaulted Ms. Moore or himself, his "reputation in the family" was that "when he goes out drinking, he gets very belligerent. He's been known to start fights." (Tr., p.399, L.16 – p.400, L.19, p.405, Ls.10-21.) He also testified, contrary to Ms. Moore's account, that at the time he shot Mr. Eilers, Mr. Eilers had threatened to kill him and was coming at

him with his hands raised. (Tr., p.383, L.22 – p.386, L.10, p.396, L.11 – p.397, L.3, p.405, L.22 – p.408, L.5.)

At the conclusion of the trial, the jury acquitted Malec of second degree murder but found him guilty of voluntary manslaughter. (R., Vol. II, p.172.) The district court entered judgment and imposed a unified sentence of 15 years, with six and one-half years fixed. (R., Vol. II, pp.210-11.) Following a post-conviction action in which Malec's appellate rights were reinstated, the district court reentered the judgment and Malec timely appealed. (R., Vol. II, pp.241-49.)

ISSUES

Malec states the issues on appeal as:

> 1. Did the district court err by excluding Defendant's Exhibit C, a DVD depicting Mr. Eilers participating in a mixed martial arts match, which was relevant to Mr. Malec's claim of self[-] defense and not unduly prejudicial?
>
> 2. Did the district court deprive Mr. Malec of his right to due process when it failed to preserve the video deposition of Gary John which was viewed as evidence in Mr. Malec's trial?

(Appellant's brief, p.5.)

The state rephrases the issues as:

1. Has Malec failed to establish the district court abused its discretion in excluding the video of Mr. Eilers participating in a mixed martial arts match on the basis that any probative value of the video was substantially outweighed by the danger of unfair prejudice?

2. Is Malec's due process issue moot because the video deposition he claims was not preserved has since been produced and augmented into the appellate record?

ARGUMENT

I.
Malec Has Failed To Establish The District Court Abused Its Discretion By Excluding Irrelevant, Unfairly Prejudicial Evidence

A. Introduction

Before trial, the state moved *in limine* to exclude two proposed defense exhibits, one of which was a video recording of Justin Eilers participating in a mixed martial arts match. (R., Vol. II, pp.136-37.) The video shows Mr. Eilers striking his opponent, taking him to the ground and repeatedly elbowing him in the head. (Augmentation: Defense Exhibit C.) The defense argued the video was relevant to Malec's self-defense claim because it was "demonstrative of [Mr. Eilers'] fighting abilities," of which Malec claimed to be personally aware at the time he shot Mr. Eilers. (Tr., p.55, L.21 – p.56, L.19, p.58, Ls.9-23.) The state argued the video was irrelevant because Mr. Eilers' conduct in a sanctioned mixed martial arts match was not probative of his conduct outside of the ring. (Tr., p.46, L.17 – p.47, L.5.) Alternatively, the state argued any probative value of the evidence was substantially outweighed by the danger of unfair prejudice – specifically, that the jury would "see the level of violence that is there [in the mixed martial arts match]" and "translate that level of violence to a completely unrelated, dissimilar activity." (Tr., p.47, Ls.6-21, p.56, L.21 – p.57, L.23.) The district court deferred ruling on the admissibility of the video until trial. (Tr., p.59, L.3 – p.62, L.2.)

Malec testified at trial and, during his testimony, defense counsel attempted to introduce the video recording of Mr. Eilers participating in a mixed

martial arts fight as "demonstrative … of how Justin Eilers fights and the level of violence." (Tr., p.360, L.7 – p.363, L.23.) During an offer of proof, Malec testified that he had reviewed the video, that he recognized Mr. Eilers in the video and was familiar with his fighting style, that he had personally seen Mr. Eilers fight on at least three occasions, and that he believed the video would "assist [him] in describing the level of violence that's involved in UFC fighting," and "would assist the jury in understanding certain techniques that UFC fighters utilize," "[p]articularly with the ability to close quickly," "[t]o put a person down … on the mat," "[a]nd the[n] to pummel them to submission." (Tr., p.361, L.3 – p.362, L.11.) Malec acknowledged, however, that he had not seen "[t]his particular video" until "after "December 25, 2008" and, therefore, there was "absolutely no way that this video could have had any impact on [his] decision on December 25, 2008," to shoot Mr. Eilers. (Tr., p.362, L.19 – p.363, L.16.)

Following the offer of proof, the district court excluded the video. (Tr., p.4 – p.366, L.2.) The court stated, "I can understand the argument that it is – that there is some relevance to it" but, based on its "view of that [video] clip and … the fact that the circumstances would be dissimilar," the court determined that "the danger of the unfair prejudice substantially outweighs the relevance that it would serve as a demonstrative exhibit." (Tr., p.365, Ls.15-25.) The court subsequently elaborated on its ruling, explaining:

> I said the unfair prejudice, but there are other things under [I.R.E.] 403, and – for purposes of making a record. Confusion, possibility of misleading the jury. I think that misleading of the jury is potentially a real problem with that. So in the balancing under Rule 403, the court has considered those matters and believes that that supports the exclusion of it.

(Tr., p.366, Ls.15-21.)

Malec challenges the district court's evidentiary ruling, arguing as he did below that video "was relevant to his self defense claim and presented very little if any prejudice to the State." (Appellant's brief, p.6.) Malec's arguments fail. Correct application of the law to the facts of this case shows the video was not relevant to Malec's self-defense claim. Even if marginally relevant, Malec has failed to show the trial court abused its discretion in excluding the video on the basis that it was unfairly prejudicial. Finally, even assuming the court erred in excluding the video, a review of the record shows such error did not contribute to the jury's verdict in this case and was therefore harmless beyond a reasonable doubt.

B. Standard Of Review

A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009) (citations omitted). Whether evidence is relevant, however, is a question of law reviewed *de novo*. State v. Thomas, 2015 WL 300944 *3 (Idaho, Jan. 23, 2015) (citing State v. Russo, 157 Idaho 299, 308, 336 P.3d 232, 241 (2014)); State v. Shackelford, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010); State v. Meister, 148 Idaho 236, 220 P.3d 1055 (2009).

In reviewing a discretionary decision, the appellate court "examine[s] whether: (1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer bounds of its discretion and with applicable legal

standards; and (3) the trial court reached its decision through an exercise of reason." Grist, 147 Idaho at 51, 205 P.3d at 1187 (citations omitted); accord Shackelford, 150 Idaho at 363, 247 P.3d at 590. "However, an abuse of discretion may be deemed harmless if a substantial right is not affected. In the case of an incorrect ruling regarding evidence, this Court will grant relief on appeal only if the error affects a substantial right of one of the parties." Shackelford, 150 Idaho at 363, 247 P.3d at 590 (internal citations and quotation marks omitted).

C. Malec Has Failed To Show The District Court Abused Its Discretion In Excluding The Proffered Video

1. The Video Was Not Relevant To Malec's Self-Defense Claim

"Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Shackelford, 150 Idaho at 364, 247 P.3d at 591 (quoting I.R.E. 401) (additional citation omitted). "Whether a fact is 'of consequence' or material is determined by its relationship to the legal theories presented by the parties." Id. (citing State v. Yakovac, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008)).

The state's theory at trial was that Malec acted with malice aforethought, and without any legal justification, when he shot and killed Mr. Eilers. (Augmentation: Jury Instruction No. 14 (elements of second degree murder).) Malec, on the other hand, claimed to have acted in self-defense. (Augmentation: Jury Instruction No. 20 (elements of self-defense).) The jury was instructed that,

in order to find that Malec acted in self-defense: (1) Malec must have believed he "was in imminent danger of death or great bodily harm" and that "the action [he] took was necessary to save [him] from the danger presented"; (2) the circumstances were "such that a reasonable person, under similar circumstances, would have believed that [Malec] was in imminent danger of death or great bodily injury and believed that the action taken was necessary"; and (3) Malec "must have acted only in response to that danger and not for some other motivation." (Id.) The jury was also instructed that "[w]hen there is no longer any reasonable appearance of danger, the right of self-defense ends" and "[a] bare fear of death or great bodily injury is not sufficient to justify a homicide." (Id.) Contrary to Malec's assertions below and on appeal, the video of Mr. Eilers participating in a mixed martial arts match was not relevant to any of the elements of Malec's self-defense claim.

Malec specifically testified that the first time he saw the video was after December 25, 2008. (Tr., p.362, L.19 – p.363, L.8.) Thus, as correctly noted by the prosecutor and conceded by Malec below, there was "absolutely no way that [the proffered] video could have had any impact on what Malec was thinking" when he shot and killed Mr. Eilers on December 25, 2008. (Tr., p.363, Ls.9-16.)

Nor was the video in any way relevant to demonstrate that Mr. Eilers was being aggressive at all, much less that he was the first aggressor, in the confrontation that led to his death. The video shows Mr. Eilers participating in sanctioned, mutual combat with another willing participant. (Augmentation: Defense Exhibit C.) Nothing about Mr. Eilers' participation in that match is

probative of whether, at the time Malec shot and killed him in the kitchen of Malec's home, Mr. Eilers was actually acting in the manner depicted on the video or in such other manner that a reasonable person in Malec's position would conclude he was in imminent danger of death or great bodily injury.

Finally, and contrary to Malec's assertions on appeal (Appellant's brief, p.10), the video was not relevant to show the objective reasonableness of Malec's subjective beliefs that he was in imminent danger of great bodily harm and that the action he took was necessary to save him from the danger presented. Malec testified he had personally observed Mr. Eilers participate in at least three mixed martial arts fights, and he sought to admit the video as demonstrative of Mr. Eilers' athleticism and "fighting abilities." (Tr., p.358, L.24 – p.363, L.23; see also Tr., p.55, L.21 – p.56, L.19, p.58, Ls.9-23.) While the video was certainly demonstrative of Mr. Eilers' abilities to fight against a willing opponent in a sanctioned mixed martial arts match, it was in no way probative or demonstrative of his conduct and abilities outside of the ring or of his behavior on the date of his murder. The video shows Mr. Eilers participating in a violent sport in a violent manner. (Augmentation: Defense Exhibit C.) It does not follow, however, that Mr. Eilers would have – or even could have – been equally violent outside of the controlled environment of the boxing ring. There was no evidence that Mr. Eilers' conduct on the video was in any way representative of his conduct either generally, or on the night he was murdered. To the contrary, Malec testified that Mr. Eilers had never physically assaulted him or Ms. Moore and, in fact, he had never seen Mr. Eilers assault anyone outside of the ring.

(Tr., p.399, L.16 – p.400, L.19.) Because the video is only demonstrative of Mr. Eilers' fighting abilities and tendencies in a sanctioned mixed martial arts match, the video was not relevant to show the objective reasonableness of Malec's beliefs and actions outside of that environment.

For all of the reasons state above, the proffered video was not relevant to any of the elements of Malec's self-defense claim. The district court's order excluding the evidence should therefore be affirmed on that basis.

2. Even If Relevant, The District Court Correctly Exercised Its Discretion In Concluding The Probative Value Of The Video Was Substantially Outweighed By The Danger Of Unfair Prejudice

Even if the proffered video were relevant to Malec's self-defense claim, the district court correctly excluded the video pursuant to I.R.E. 403. Under that rule, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." I.R.E. 403. "Unfair prejudice" is the tendency to suggest a decision on an improper basis. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010).

Although Malec argues otherwise (Appellant's brief, pp.11-12), any probative value of the proffered video to support Malec's claim that he shot Mr. Eilers in self-defense was substantially outweighed by the danger of unfair prejudice. As set forth above, while the video was demonstrative of Mr. Eilers' athleticism and ability to fight in sanctioned mixed martial arts match, there was no evidence that the video was also representative of Mr. Eilers' abilities and behavior outside of the ring, either generally or on the night in question. However, even assuming, as the district court appears to have done, that the

video had "some relevance" to Malec's self-defense claim (see Tr., p.365, Ls.15-16), the district court correctly exercised its discretion in excluding the video because it had the very real potential to cause confusion and mislead the jury (see Tr., p.365, L.16 – p.366, L.21).

As argued by the prosecutor below, "[t]here's a huge difference between [Mr. Eilers] getting into a fair fight with a referee sitting there" and the conduct Mr. Eilers was alleged to have engaged in in this case. (Tr., p.47, Ls.10-17.) Again, there was no evidence that Mr. Eilers ever engaged in the level of violence depicted in the video at any time outside of the ring, much less on the night in question. Had the jury been permitted to view the video and "see the level of violence that is there," there is a real danger that "they may [have] translate[d] that level of violence to a completely unrelated, dissimilar activity." (Tr., p.47, Ls.18-20.)

For all of the reasons set forth above, the proffered video was irrelevant or, alternatively, any probative value of the video was substantially outweighed by the danger of unfair prejudice from its admission. Because the video was irrelevant and/or unfairly prejudicial, Malec has failed to show the court abused its discretion in excluding it.

D. If The Trial Court Erred In Excluding The Proffered Video, Such Error Was Harmless

Even if this Court concludes the trial court erred by excluding the proffered video, reversal is not warranted. The rules of evidence expressly provide that "[e]rror may not be predicated upon a ruling which admits or excludes evidence

unless a substantial right of the party is affected." I.R.E. 103(a); see also I.C.R. 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Consistent with this evidentiary rule, the appellate courts of this state will grant relief from an incorrect ruling regarding the admissibility of evidence "only if the error affects a substantial right of one of the parties." Shackelford, 150 Idaho at 363, 247 P.3d 582 at 590 (internal quotation marks and citation omitted); accord State v. Ehrlick, 158 Idaho 900, 911, 354 P.3d 462, 473 (2014). An erroneous evidentiary ruling is harmless beyond a reasonable doubt if it did not contribute to the verdict. State v. Perry, 150 Idaho 209, 222, 245 P.3d 961, 974 (2010). Contrary to Malec's assertions on appeal, a review of the record in this case clearly shows that, if the trial court erred in excluding the proffered video, such error did not contribute to the verdict and was therefore harmless.

The proffered purpose of the video was to demonstrate Mr. Eilers' athleticism and fighting capabilities. (Tr., p.358, L.24 – p.363, L.23; see also Tr., p.55, L.21 – p.56, L.19, p.58, Ls.9-23.) Even if the video was relevant and admissible for this purpose, Malec was not prejudiced by its exclusion from evidence at trial. Multiple witnesses, including Malec, testified regarding Mr. Eilers' stature, his athleticism and his occupation as a professional fighter. (Tr., p.106, L.17 – p.107, L.25, p.163, L.18 – p.164, L.13, p.358, L.24 – p.359, L.2, p.367, Ls.3-24.) Malec testified that mixed martial arts is a "[v]iolent and vicious … contact sport," and that he had personally observed three of Mr. Eilers' mixed martial arts fights. (Tr., p.359, Ls.3-16.) Malec also testified that, during the last

fight he observed, Mr. Eilers used his "[h]ands, elbows, anything that was available at the time" to strike his opponent, and that his opponent and the mat were "bloody." (Tr., p.359, L.17 – p.360, L.6.) The proffered video was, at best, cumulative of the foregoing testimony. Given the strength of the state's case, and the weakness of Malec's claim that Mr. Eilers was engaging in any aggression warranting a lethal reaction, much less the type of aggression depicted on the video (see Statement of Facts and Course of Proceedings, supra), there is no reasonable possibility that the exclusion of the video in any way contributed to the jury's verdict. Any error in the exclusion of the proffered video was therefore harmless and did not affect Malec's substantial rights.

II.
Malec's Due Process Claim Is Moot

Malec argues the district court deprived him of his due process right to an adequate appellate record because, according to Malec, the court "did not properly preserve a copy of the deposition testimony of Gary John, which was viewed by the jury during Mr. Malec's trial." (Appellant's brief, pp.13-17; see also Tr., p.278, L.1 – p.279, L.18 (video deposition played for jury); p.281, L.10 – p.282, L.11 (video deposition marked as Joint Exhibit 1).) This issue is moot. After Malec filed his Appellant's brief, the district court clerk produced a copy of the video deposition (Joint Exhibit 1) and, pursuant to the Idaho Supreme Court's order granting Malec's motion to augment, the video deposition is now part of the appellate record. (See 11/13/15 Order Granting Motion To Augment The Record with, *inter alia*, "Joint Exhibit 1(DVD)"; 11/28/15 e-mail notice re: Supplemental

Exhibits Filed, including "Joint Exhibit 1 (DVD).") Because the video deposition exists and is part of the appellate record, Malec's claim that the district court erred by "not properly preserv[ing] a copy of the deposition" is necessarily moot. See, e.g., State v. Barclay, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) ("An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief.").

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Malec guilty of voluntary manslaughter.

DATED this 2nd day of February 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 2nd day of February, 2016, served a true and correct digital copy of the foregoing BRIEF OF RESPONDENT by emailing the brief to:

ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender
briefs@sapd.state.id.us

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

LAF/dd