3-11-2009

State v. Ortiz Respondent's Brief Dckt. 35278

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 35278
	)	
vs.	)	
	)	
HUMBERTO PASQUINAL ORTIZ,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE RANDY J. STOKER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Humberto Pasquinal Ortiz appeals from the judgment entered upon the jury verdict finding him guilty of possession of methamphetamine. (Appellant's brief, p.1.)

Statement of Facts and Course of Proceedings

On the evening of January 31, 2007, Officer Jay Wiggins of the Twins County Sheriff's Office observed people standing outside a known drug house. (Trial Tr., p.82, L.23 – p.84, L.10.) As Officer Wiggins passed the house, he saw a vehicle back out of the driveway, and then exceed the posted speed limit on a nearby street. (Trial Tr., p.84, L.2 – p.85, L.21.) Officer Wiggins effectuated a traffic stop. (Trial Tr., p.85, L.22 – p.86, L.2.) The registered owner and sole occupant of the vehicle was identified as Humberto Ortiz. (Trial Tr., p.86, L.13 – p.87, L.24.) Ortiz appeared to Officer Wiggins to be agitated, nervous, and was visibly shaking. (Trial Tr., p.88, Ls.13-17.) Ortiz was unable to provide proof of insurance, so Officer Wiggins returned to his patrol vehicle to issue a citation. (Trial Tr., p.88, L.18 – p.89, L.3.) While at his vehicle, Officer Wiggins called for Deputy Morgan Case, who is the sheriff's office's narcotics canine handler. (Trial Tr., p.89, Ls.4-13.)

Deputy Case arrived, made contact with Ortiz, and observed that Ortiz' leg was shaking. (Trial Tr., p.165, L.19 – p.166, L.6.) Deputy Case deployed his canine to sniff the air around Ortiz' vehicle, and the canine alerted on the front passenger door. (Trial Tr., p.166, L.18 – p.168, L.19.) A subsequent search of

Ortiz revealed a lighter, more than $3,000 cash, and what officers believed to be a methamphetamine pipe, with a white residue substance inside. (Trial Tr., p.169, L.12 – p.170, L.20; p.93, Ls.16-24; p.90, L.23 – p.91, L.12.) A large amount of a white crystal substance was visible on the floorboard of the front passenger side of Ortiz' vehicle, within arm's length of where Ortiz had been seated. (Trial Tr., p.201, L.12 – p.202, L.13.) A torn plastic bag and a vial were also located in the vehicle. (Trial Tr., p.117, Ls.8-17; p.207, Ls.12-17.) The white crystal substance was collected, tested at the state lab, and identified as methamphetamine. (Trial Tr., p.131, L.18 – p.139, L.14.)

The substance received by the state lab also included some debris collected from the floorboard of Ortiz' vehicle. (Trial Tr., p.134, L.25 – p.135, L.3.) Rachel Cutler, the forensic scientist that tested the substance, was unable to easily separate the debris from the methamphetamine crystals. (Trial Tr., p.142, Ls.13-16.) Cutler reasoned that since the weight of the methamphetamine would not amount to a trafficking quantity, and since the amount of the debris was "not substantial enough to greatly affect" the total weight, that it was unnecessary to separate the debris. (Trial Tr., p.142, Ls.16-23.) Cutler did indicate that the controlled substance "definitely" outweighed the debris, and that in her opinion, the debris would be insignificant to the total weight of the substance. (Trial Tr., p.142, L.24 – p.143, L.6; p.149, L.17 – p.150, L.7.) The total weight of the crystals and debris, before a sample of crystals was taken for testing, was 3.82 grams. (Trial Tr., p.135, Ls.4-17.) After a small amount of the

methamphetamine was consumed for testing, the total weight of the crystals and debris was 3.71 grams. (Trial Tr., p.139, L.24 – p.140, L.3.)

In order to establish Ortiz' knowledge of the presence of the methamphetamine, educate the jury about the drug culture, and to rebut any inference that the methamphetamine in Ortiz' car may have been spilled or placed there accidently, the state presented evidence of typical methamphetamine use and value. (Trial Tr., p.211, L.10 – p.212, L.9.) Officer Kenneth Mencl testified that that the smallest one-hit type of dosage of methamphetamine that is commonly sold on the street was "anywhere between an eighth and a quarter of a gram," and that a gram would sell for approximately $100. (Trial Tr., p.214, L.20 – p.215, L.4.) He also testified more generally about typical methamphetamine use. (Trial Tr., p.215, Ls.5-21.)

The defense objected to this testimony, on the grounds that it would be "more prejudicial than probative." (Trial Tr., p.210, Ls.9-14.) Defense counsel appeared to argue that since the precise amount of methamphetamine found in Ortiz' car was unknown, and since even a trace amount of methamphetamine would be a sufficient quantity under the possession charge Ortiz faced, then general testimony regarding methamphetamine use and amounts should not be admitted. (Trial Tr., p.210, L.9 – p.211, L.9; p.212, Ls.11-24.) The judge overruled the objection and allowed the testimony, ruling that the evidence was relevant, and "not unduly prejudicial" in violation of Idaho Rule of Evidence 403. (Trial Tr., p.213, Ls. 4-20.)

Ortiz was convicted by a jury of possession of methamphetamine, and pled guilty to a second-offense enhancement. (Trial Tr., p.279, L.21 – p.280, L.7; p.281, L.13 - p.283, L.10.) Ortiz filed a timely appeal from his judgment of conviction (R., pp.189-193, 200-202).

ISSUES

Oritz states the issues on appeal as:

1. Did the district court err allowing the State to introduce testimony regarding typical methamphetamine use, packaging, and sales, because this testimony was more prejudicial than it was probative?

2. Did the State violate Mr. Ortiz' right to a fair trial, but committing prosecutorial misconduct during closing arguments when he misrepresented Ms. Cutler's testimony?

3. Did the erroneous admission of prejudicial evidence and the prosecutor's misconduct result in cumulative error depriving Mr. Ortiz of a fair trial?

(Appellant's brief, p.6.)

The state rephrases the issues on appeal as:

1. Has Ortiz failed to show that the district court abused its discretion in determining that the probative value of evidence regarding typical methamphetamine use was not substantially outweighed by the danger of unfair prejudice?

2. Has Ortiz failed to show prosecutorial misconduct in the prosecutor's factually accurate summary of the evidence presented at trial, or the reasonable inferences drawn from that evidence?

3. Has Ortiz failed to show cumulative error?

ARGUMENT

I.
Ortiz Has Failed To Meet His Burden Of Establishing That The District Court Abused Its Discretion In Admitting Evidence Of Typical Methamphetamine Use At Trial

A. Introduction

During trial, the district court permitted the state to present testimony of Officer Mencl, who testified about the typical use amounts and monetary value of methamphetamine. (Trial Tr., p.209, L.14 – p.214, L.13.) Ortiz objected to this evidence at trial, arguing that pursuant to I.R.E. 403, the risk of unfair prejudice substantially outweighed the evidence's probative value. (Trial Tr., p.209, L.14 – p.212, L.24.) The district judge overruled the objection, and Ortiz challenges this ruling on appeal. (Appellant's brief, p.1.) Ortiz has failed to show that the district court abused its discretion.

B. Standard Of Review

Whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice under I.R.E. 403 is a discretionary matter that will be disturbed on appeal only if the appellant demonstrates that the district court abused its discretion. State v. Enno, 119 Idaho 392, 406, 807 P.2d 610, 624 (1991); State v. Birkla, 126 Idaho 498, 500, 887 P.2d 43, 45 (Ct. App. 1994).

C. The District Court Utilized The Proper Standard

Ortiz first contends that the district court failed to apply the proper legal standard to its determination in overruling the defense counsel's objection. (Appellant's brief, p.10.) Ortiz objected to the evidence at trial on the grounds "that it is more prejudicial than it is probative..." (Trial Tr., p.210, Ls.12-14.) Upon overruling Ortiz' objection, the district judge stated, "Of course it's prejudicial, but I don't find that it's unduly prejudicial under Rule 403." On appeal, Ortiz contends that because the appropriate test under I.R.E. 403 is not whether prejudicial evidence is "unduly prejudicial," but whether the risk of unfair prejudice substantially outweighed the probative value of the evidence, the district judge utilized the wrong standard. (Appellant's brief, p.10.) Ortiz makes a distinction without a difference.

While Ortiz correctly recites I.R.E. 403, he has not shown that the district court relied on an improper legal standard. Ortiz' argument relies entirely on the fact that the district judge did not recite I.R.E. 403 verbatim, but instead merely referenced the rule, stating, in part, "...I don't find that it's unduly prejudicial under Rule 403." (Trial Tr., p.213, Ls. 18-10.) Ortiz apparently contends that the district judge utilized an improper "unduly prejudicial" test, and not I.R.E. 403, despite the fact that the judge specifically cited I.R.E. 403. The more plausible interpretation is that the district judge simply described evidence whose probative value was substantially outweighed by the risk of unfair prejudice (I.R.E. 403 standard) as "unduly prejudicial under Rule 403." Ortiz has failed to show any

other support for his contention in the record, and has thus failed to show that the district judge used an improper standard.

D. The District Court Properly Exercised Its Discretion In Determining That The Probative Value Of The Evidence Was Not Substantially Outweighed By The Danger Of Unfair Prejudice

Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice -- which is the tendency to suggest a decision on an improper basis -- substantially outweighs the probative value of the evidence. State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 907 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993). As previously explained by this Court:

> Under the rule, the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence.

State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. See State v. Leavitt, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989) ("Certainly that evidence was prejudicial to the defendant, however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant."). Rather, the rule protects only against evidence that is unfairly prejudicial – that is, evidence that tends to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908.

The evidence challenged by Ortiz, however, does not tend to suggest a decision on an improper basis, and Ortiz has not shown that the district court abused its discretion. Ortiz argues that since the precise weight of the methamphetamine found in Ortiz' vehicle was unknown, then evidence regarding typical methamphetamine use amounts and costs is improper under I.R.E. 403, because such evidence would tend to improperly suggest to the jury that the weight of the substance found in Ortiz' car (which included some amount of debris) was actually the precise weight of the methamphetamine. (Appellant's brief, pp.10-11.) This argument is not supported by the record or logic.

Ortiz appears to contend that the probative value of this evidence was limited because Ortiz was not charged with delivery, attempted delivery, trafficking, or another charge where weight and distribution would be a specific element of the crime. (Appellant's brief, p.9.) However, this view discounts the significant probative value of the evidence to the charge Ortiz actually faced. The prosecutor explained the probative value of this evidence at trial, outside of the presence of the jury, while responding to Ortiz' objection to the evidence:

> Your Honor, it [the evidence] is to rebut the inference that the defense has, I think, indicated that this goes to whether or not Mr. Ortiz knew of the presence of the methamphetamine. And this evidence is to rebut any inference that a person who may have placed it there wouldn't have placed that amount of methamphetamine accidently. This is not a situation where someone accidently spills a trace amount doesn't realize that they spilled that.
>
> This, I think, goes to whether or not it would be reasonable for anyone else to have placed that and have lost that amount of methamphetamine without realizing that. . . they had lost that or to have actually intentionally placed it in that particular vehicle. It just doesn't make any sense.

> But the jury, where they really don't know anything about the drug culture, they are not going to understand the significance of that amount of methamphetamine found on that floorboard. So I think that it is relevant to show that no reasonable person would have accidently or intentionally have left it there for someone else to have been in the situation like Mr. Ortiz is claiming.

(Trial Tr., p.211, L.12 – p.212, L.9.)

Indeed, Officer Mencl's testimony regarding typical methamphetamine use and value was significantly probative in that it provided context for the significance of various amounts of methamphetamine. Even taking the most conservative view of the evidence, the probative value of the evidence is clear and substantial. Before testing, the methamphetamine crystals plus debris weighed 3.82 grams. (Trial Tr., p.135, Ls.4-17.) Cutler testified that the methamphetamine "definitely" outweighed the debris. (Trial Tr., p.142, L.24 – p.143, L.6.) Even ignoring the other evidence regarding the insignificance of the debris relative to the methamphetamine, if the methamphetamine outweighed the debris at all, it would weigh at least 1.92 grams (just over one-half of the pre-test methamphetamine plus debris weight of 3.82 grams).

According to Officer Mencl's general testimony regarding methamphetamine use and value, such an amount of methamphetamine would have a street value of approximately $192, and would constitute between approximately 7.5 and 15 one-hit dosages. (See Trial Tr., p.214, L.20 – p.215, L.4.) As the prosecutor noted, this was not a "trace amount" of methamphetamine. (Trial Tr., p.211, Ls.18-20.) And as Ortiz points out, the Idaho Court of Appeals has stated that "[t]he greater the amount of a controlled

substance found in a defendant's possession, the greater the inference of knowledge and control." State v. Groce, 133 Idaho 144, 152, 983 P.2d 217, 225 (Ct. App. 1999); (Appellant's brief, p.10.)

Ortiz has stated no authority that would require the precise weight of a controlled substance to be known in order for this inference from Groce to take effect. Surely, the amount of methamphetamine found on the floorboard of Ortiz's vehicle creates more of an inference of possession under Groce then would a smaller amount, for example, a trace amount of minimal value found in the vehicle, even if evidence of the two amounts was something other than a precise weight measurement.

At best, Ortiz is pointing out the potential weakness of the evidence regarding typical methamphetamine use to the state's case, and making a jury argument on appeal. It was clear from the evidence that the precise weight of the methamphetamine was unknown. Cutler testified that the weight of the substance found in Ortiz' car included some debris. (Trial Tr., p.135, Ls.4-17.) She testified that she could not easily separate the debris from the methamphetamine crystals. (Trial Tr., p.142, Ls.13-23.) It is unclear how, as Ortiz appears to claim, evidence regarding typical methamphetamine use might unfairly confuse the jury into disregarding the presence of this debris.

Though the precise weight of the methamphetamine was unknown, other testimony provided evidence of the relative amount of methamphetamine vs. debris. Cutler testified that the "controlled substance outweighed the debris definitely" (Trial Tr., p.135, Ls.8-17; p.142, L.24 – p.143, L.6), and that the debris

was "not substantial enough to greatly affect" the total weight. (Trial Tr., p.142, Ls.21-23.) She also answered affirmatively to the state's question regarding whether the debris in the substance was insignificant. (Trial Tr., p.150, Ls.4-7.) Also, the actual substance of methamphetamine and debris was admitted as evidence. (Trial Tr., p.141, L.15 – p.142, L.9.)

Thus, while the state could not offer evidence of the precise weight of the methamphetamine, it could and did offer other evidence regarding its amount. Balancing this evidence is the province of the jury. Evidence is rarely so precise to the degree of a specific scientific measurement. Such precision is not a prerequisite to the admission of evidence at trial, nor does lack of such precision condemn evidence to inadmissibility pursuant to I.R.E. 403. One of the very purposes of a jury is to determine the facts in a trial, even when the evidence of those facts may be imprecise, or even contradictory. This jury was presented evidence regarding the weight of the substance containing methamphetamine and debris, the relative amount of methamphetamine vs. debris, and the typical use amounts and monetary costs of methamphetamine. Officer Mencl's testimony regarding the latter was not unfairly prejudicial.

Notably, Officer Mencl's testimony did not include opinions as to the value and significance of the methamphetamine and debris actually found in Ortiz' vehicle, and therefore did not tend to suggest the existence of a specific known weight and value of the methamphetamine found. Because Officer Mencl testified only generally about methamphetamine use and amounts, he made no such suggestion. Officer Mencl merely provided a potential tool for evaluation of

other evidence. It was up to the jury to determine, based on this evidence, how or if to utilize this tool.

The district court did not abuse its discretion in admitting Officer Mencl's testimony regarding typical methamphetamine use and cost. Ortiz has not shown a risk of unfair prejudice from this evidence, let alone a risk that would outweigh its clear and substantial probative value.

II.
Ortiz Has Failed To Establish Error, Much Less Fundamental Error, In Relation To Any Of The Prosecutor's Comments During Closing Argument

A. Introduction

Ortiz claims that a portion of the prosecutor's closing argument, which was not objected to, misrepresented the evidence, and constituted prosecutorial misconduct amounting to fundamental error and a deprivation of his due process rights. (Appellant's brief, pp. 13-17.) A review of the record, however, shows that the prosecutor's arguments did not misrepresent the evidence, and that in making inferences from the facts presented at trial, the prosecutor did nothing contrary to what he was entitled to do. Ortiz has thus failed to establish error, much less fundamental error, in relation to the prosecutor's closing argument.

B. Standard Of Review

A defendant is not entitled to relief based upon a claim of prosecutorial misconduct unless he can establish two things: (1) the complained of conduct was improper; and (2) the improper conduct prejudiced him. State v. Romero-Garcia, 139 Idaho 199, 202, 75 P.3d 1209, 1212 (Ct. App. 2003). Thus, a mere

assertion or finding that a particular question or statement was objectionable or improper is insufficient to establish prosecutorial misconduct. As explained by the United States Supreme Court: "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations and citations omitted); see also Smith v. Phillips, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.")

C. The Prosecutor Did Not Misstate The Evidence

The Supreme Court has indicated prosecutorial misconduct may occur where the prosecutor "manipulate[s] or misstate[s] the evidence." Darden, 477 U.S. at 181-82. However, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11 (1985). Thus, the Court must consider the probable effect that the prosecutor's argument "would have on the jury's ability to judge the evidence fairly." Id. at 11-12.

Consistent with Darden and Young, the Idaho Supreme Court has held that a conviction will be set aside for prosecutorial misconduct only when the

conduct is sufficiently egregious as to result in fundamental error. State v. Hairston, 133 Idaho 496, 507, 988 P.2d 1170, 1181 (1999). Misconduct by a prosecutor is fundamental only if the alleged misconduct is so egregious or inflammatory that any prejudice arising from it was not, or could not have been, remedied by a ruling from the trial court informing the jury that it should be disregarded. State v. Porter, 130 Idaho 772, 785-786, 948 P.2d 127, 140-141 (1997); State v. Smith, 117 Idaho 891, 898, 792 P.2d 916, 923 (1990); State v. Missamore, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988); State v. Ames, 109 Idaho 373, 707 P.2d 484 (Ct. App. 1985). With respect to prosecutorial conduct in the context of closing argument the Supreme Court has stated:

> The 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974).

The Idaho Supreme Court has recently reiterated the importance of reviewing a prosecutor's conduct in trial in light of its improvisational nature, noting that "in reviewing allegations of prosecutorial misconduct [the appellate court] must keep in mind the realities of trial." State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007) (quoting State v. Estes, 111 Idaho 423, 427-28, 725

P.2d 128, 132-33 (1986)). The Idaho Court of Appeals has further recognized "[t]he right to due process does not guarantee a defendant an error-free trial but a fair one," and the function of appellate review is "not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial." State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991). Applying the foregoing standards to Ortiz' claims of prosecutorial misconduct reveals that these claims are without merit.

Ortiz contends that the prosecutor misstated the evidence during his closing argument when he said, "[a]s the criminalist Rachel Cutler told you, that debris, as far as the weight of it towards the total weight, was insignificant. And so this basically was in the neighborhood of three and a half grams plus weight full of methamphetamine." (Appellant's brief. p.14, (quoting Trial Tr., p.253, L.25 – p.254, L.4).) These arguments from the prosecutor, however, simply re-state the facts of the case, and discuss reasonable inferences from the facts presented at trial.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. State v. Phillips, 156 P.3d 583, 587 (Ct. App. 2007) (citing Herring v. New York, 422 U.S. 853, 862 (1975)). Its purpose "is to enlighten the jury and to help the jurors remember and interpret the evidence." Id. (citing State v. Reynolds, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991)). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their

respective standpoints, the evidence and the inferences to be drawn therefrom. State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003).

Ortiz first contends that prosecutor's statement, "[a]s. . . Rachel Cutler told you, that debris, as far as the weight of it towards the total weight, was insignificant," misstates the evidence. (Appellant's brief, pp.14-15.) The state's redirect examination of Cutler, from which the prosecutor's statement arose, was as follows:

> [THE STATE]: Now you said that you made some notes and at the time that you looked at the substance, that as far as the debris was concerned, it was of an insignificant weight as far as what you could see in that substance when you first opened up the envelope, correct?
>
> [RACHEL CUTLER]: I just noted that I didn't feel the debris was substantially affecting my total weight.
>
> [THE STATE]: Okay. And you have had a chance now today to relook at that baggy and it's a total weight of 3.71, correct?
>
> [RACHEL CUTLER]: Yes, now.
>
> [THE STATE]: Is it still your opinion that whatever debris that there was contained in that baggy would be insignificant?
>
> [RACHEL CUTLER]: Yes.

(Trial Tr., p.149, L.17 – p.150, L.7.)

Cutler specifically stated that she didn't feel that the debris was substantially affecting the total weight. She indicated that she had a chance, the day of trial, to again look at the baggy containing the methamphetamine and debris. It is in this context, following these questions about the total weight of the methamphetamine with debris, that Cutler answered affirmatively when the prosecutor asked whether the weight of the debris was "insignificant." Cutler was

thus clearly referring to weight of the debris "towards the total weight" of the methamphetamine, just as the prosecutor had stated in closing argument.

Ortiz notes on appeal that, "taken in context with her earlier statements, Ms. Cutler's statement that the debris was insignificant is not a statement that the weight is such a miniscule amount it is insignificant, but that whatever the weight is, it is not significant to her results in this case." (Appellant's brief, p.16.) That Ortiz draws a different inference from the evidence does not show error, however.

Second, Ortiz argues that the prosecutor's statement, "[a]nd so this basically was in the neighborhood of three and a half grams plus weight full of methamphetamine", misstated the evidence because Cutler never testified about the weight of the methamphetamine by itself, and that, in fact, explained that it was too time consuming to separate the crystals from the debris, and that she could not guess what percentage of the substance was methamphetamine. (Appellant's brief, pp.14-15.)

While it is correct that there was no evidence at trial pertaining to the exact weight of the methamphetamine independent of the debris, Ortiz had not cited authority nor provided argument as to why it is prosecutorial misconduct for a prosecutor to make a qualified and reasonable inference regarding a weight measurement at closing argument, when the precise weight of a substance is unknown. Ortiz has not shown why weights or measurements should be treated differently from any other type of evidence, from which prosecutors may draw reasonable inferences in closing argument.

The prosecutor did not state, as a fact, that the methamphetamine weighed exactly three and a half grams. Nor did he state that the Mr. Cutler testified as to an exact weight of the methamphetamine. Instead, he carefully qualified this inference as just that, an inference: "and so this basically was in the neighborhood of three and a half grams plus weight full of methamphetamine." (Trial Tr., p.253, L.25 – p.254, L.4.) The words "basically" and "in the neighborhood" indicate an uncertainty, an approximation, and an unavailability of an exact measurement. The fact that the precise weight of the methamphetamine was unknown did not preclude the prosecutor from properly making any reasonable inferences regarding the weight of the methamphetamine. The fact that only a trace amount of methamphetamine was sufficient for conviction in this case did not preclude the prosecutor from properly making any argument that the actual weight of the methamphetamine was something more than a trace.

The prosecutor's summary of the weight of the methamphetamine was in fact, well supported by the evidence:

- Cutler testified that the "controlled substance outweighed the debris definitely." (Trial Tr., p.135, Ls.8-17; p.142, L.24 – p.143, L.6.)
- Cutler testified that the debris was "not substantial enough to greatly affect" the total weight." (Trial Tr., p.142, Ls.21-23.)
- Cutler answered affirmatively to the state's question regarding whether the debris in the substance was insignificant. (Trial Tr., p.150, Ls.4-7.)

- The actual baggy, with methamphetamine crystals plus debris, was admitted as evidence, which allowed a visual approximation regarding the quantity of debris v. methamphetamine crystals. (Trial Tr., p.73, Ls.6-19; p.141, L.15 – p.142, L.1.) The state presented evidence regarding the visual appearance of methamphetamine crystals, and of the nature of some of the debris. (Trial Tr., p.100, L.25 – p.101, L.15; p.142, Ls.15-23.)

In addition, prior to deliberation, the jury was properly reminded that the lawyers in the case are not witnesses, and what they say in their closing arguments is not evidence. (Trial Tr., p.243, Ls.9-15.) The jury was further cautioned that if the facts as they remembered them differed from the way the lawyers have stated them, that they should follow their memory. (Trial Tr., p.243, Ls.13-15.) The prosecutor did not encourage the jury to disregard these instructions. He simply summarized the facts from trial and drew reasonable inferences therefrom.

To prevail on appeal, Ortiz must demonstrate that the comments he complains of were so egregious or inflammatory that they could not have been cured by an instruction. Sheahan, 139 Idaho at 280, 77 P.3d at 969. Ortiz has failed to show that the prosecutor's closing argument was all improper, much less that it was so egregious and inflammatory as to be incurable by jury instruction.

III.
There Is No Cumulative Error

Under the doctrine cumulative error, a series of errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate

to application of the doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). Ortiz has failed to show that any errors occurred in his trial, let alone more than one, and therefore the doctrine is inapplicable to this case. See, e.g., LaBelle v. State, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997). Even if errors in the trial had been shown, they would not amount to a denial of due process that would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997); State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000) (accumulation of errors deemed harmless)

CONCLUSION

The state respectfully requests that this Court affirm Ortiz's judgment of conviction.

DATED this 11th day of May 2009.

MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of May 2009, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

HEATHER M. CARLSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

MARK W. OLSON
Deputy Attorney General

MWO/pm