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State v. Ortiz Appellant's Brief Dckt. 35278

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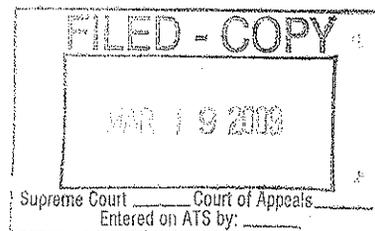
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 v.)
)
 HUMBERTO PASQUINAL ORTIZ,)
)
 Defendant-Appellant.)

NO. 35278

APPELLANT'S BRIEF

BRIEF OF APPELLANT



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

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

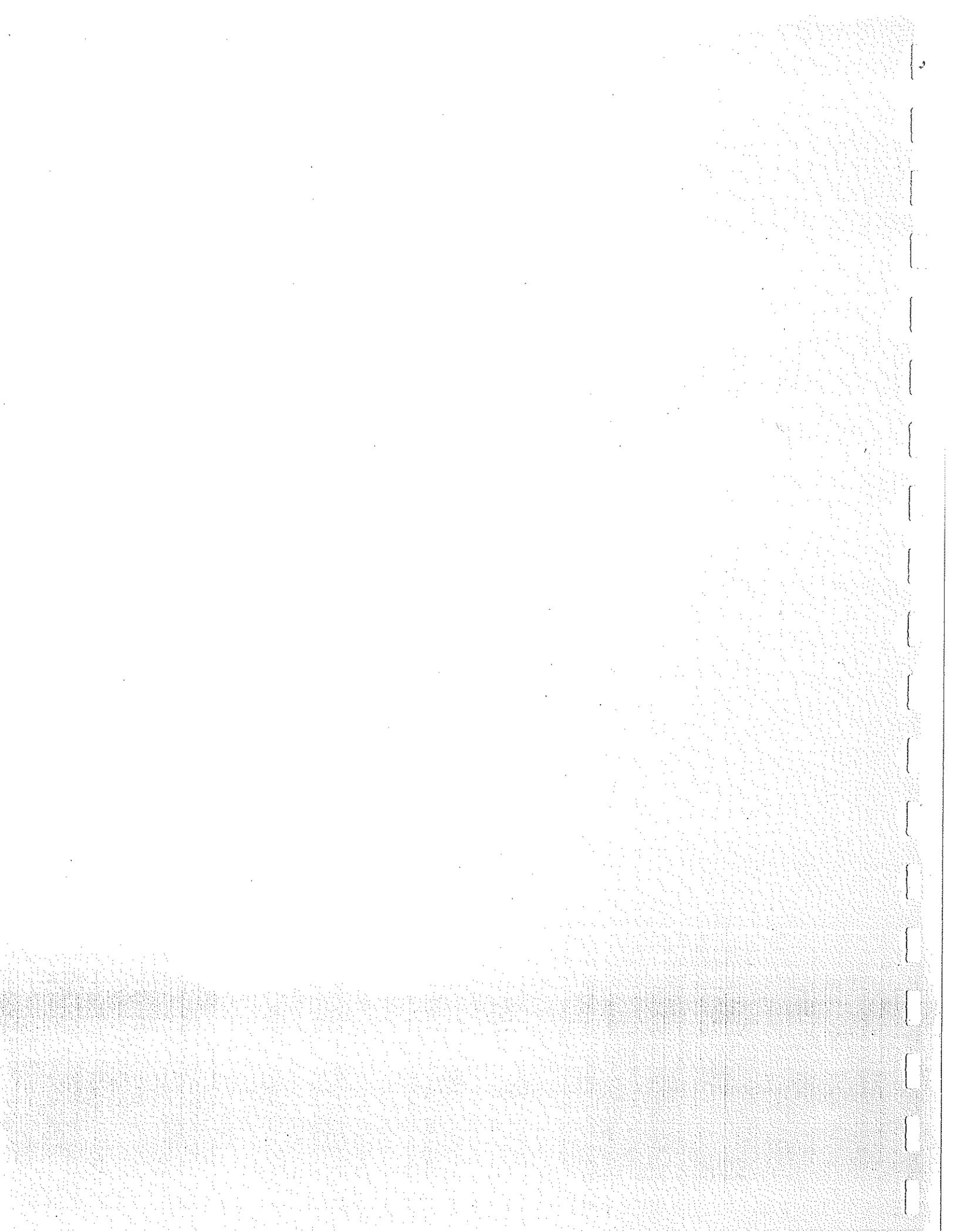
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DEFENDANT-APPELLANT**

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**



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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings.....	2
ISSUES PRESENTED ON APPEAL.....	6
ARGUMENT.....	7
I. The District Court Erred By Allowing The State To Introduce Testimony Regarding Typical Methamphetamine Use, Packaging, And Sales, Because This Testimony Was More Prejudicial Than It Was Probative.....	7
A. Introduction	7
B. The District Court Erred By Allowing The State To Introduce Evidence Regarding Typical Methamphetamine Use, Packaging, And Sales, Because This Testimony Was More Prejudicial Than It Was Probative.....	7
C. The Error In Admitting This Evidence Was Not Harmless	11
II. The State Violated Mr. Ortiz' Right To A Fair Trial By Committing Prosecutorial Misconduct During Closing Arguments When He Misrepresented The Testimony Of Ms. Cutler	12
A. Introduction	12
B. Fundamental Error Occurred In This Case When The State Misrepresented The Testimony Of The Forensic Specialist, Ms. Cutler, Regarding The Weight Of The Methamphetamine In This Case	13
C. The State's Misconduct In This Case Is Not Harmless Error.....	16

III. The Erroneous Admission Of Prejudicial Evidence And The Prosecutor's Misconduct Resulted In Cumulative Error Depriving Mr. Ortiz Of A Fair Trial	17
CONCLUSION	18
CERTIFICATE OF MAILING	19

TABLE OF AUTHORITIES

Cases

<i>Chapman v. California</i> , 386 U.S. 18 (1967)	16
<i>Masters v. Dewey</i> , 109 Idaho 576, 709 P.2d 149 (Ct. App. 1985)	7
<i>Miller v. Pate</i> , 386 U.S. 1 (1967)	15
<i>State v. Christiansen</i> , 144 Idaho 463, 163 P.2d 1175 (2007).....	13
<i>State v. Enno</i> , 119 Idaho 392, 807 P.2d 610 (1991)	8
<i>State v. Eytchison</i> , 136 Idaho 210, 30 P.3d 988 (Ct. App. 2001).....	8
<i>State v. Field</i> , 144 Idaho 559, 165 P.3d 273 (2007).....	13, 17
<i>State v. Groce</i> , 133 Idaho 144, 983 P.2d 217 (Ct. App. 1999).....	10
<i>State v. Hedger</i> , 115 Idaho 598, 68 P.2d 1331 (1989).....	8
<i>State v. Kuhn</i> , 139 Idaho 710, 85 P.3d 1109 (Ct. App. 2003)	13
<i>State v. Mauro</i> , 121 Idaho 178, 824 P.2d 109 (1991)	13
<i>State v. Phillips</i> , 144 Idaho 82, 88 n.2, 156 P.3d 583, 589 n.2 (Ct. App. 2007) ..	14
<i>State v. Seitter</i> , 127 Idaho 356, 900 P.2d 1367 (1995)	11
<i>State v. Sharp</i> , 101 Idaho 498, 616 P.2d 1034 (1980).....	16
<i>State v. Spor</i> , 134 Idaho 315, 1 P.3d 816 (Ct. App. 2000)	10
<i>United States v. Fearn</i> s, 501 F.2d 486(7th Cir. 1974).....	15

Constitutional Provisions

Idaho Const. art. I § 13.....	17
U.S. Const. amends. VI, XIV.....	17

Rules

I.R.E. 4038, 10

STATEMENT OF THE CASE

Nature of the Case

Mr. Ortiz was charged with possession of methamphetamine after officers found methamphetamine on the floorboard of the passenger compartment of the car he was driving. The methamphetamine was collected, along with other debris on the floor, and sent to the lab for testing. At trial, Rachel Cutler, a forensic scientist, testified that when she weighed the substance she did not separate the debris from the methamphetamine, stating that it was not necessary as weight was not an issue in this case.

Following her testimony, the State was allowed to introduce evidence regarding the typical amount of methamphetamine used at one time, how methamphetamine is usually packaged on the street, and the cost of one dose, over the objection of defense counsel. The State used this information to argue that Mr. Ortiz knew the methamphetamine was there because it was a significant amount of the drug. During its closing arguments, the State also argued that the forensic scientist testified that the amount of methamphetamine at issue was over 3.5 grams, although she never testified to how much the methamphetamine weighed versus the debris.

Mr. Ortiz contends the district court erred when it allowed the State to elicit testimony regarding how methamphetamine is used, packaged, and sold because this information was more prejudicial than probative in this case. Mr. Ortiz also asserts that the prosecutor violated his right to a fair trial when he committed misconduct by impermissibly misrepresenting the testimony of Rachel Cutler, resulting in fundamental error. Finally, he contends the cumulative effect of these errors deprived him of his right to a fair trial, resulting in cumulative error.

Statement of the Facts and Course of Proceedings

Mr. Ortiz was pulled over by Officer Wiggins after Mr. Ortiz pulled out from what the officer believed was a known drug house. (Trial Tr., p.82, Ls.3-8, p.84, Ls.2-13.) According to Officer Wiggins, he paced Mr. Ortiz going over the speed limit. (Trial Tr., p.85 L.11 – p.87, L.13.) While Officer Wiggins was writing a citation due to Mr. Ortiz failing to provide insurance, he called Officer Case, the canine handler, to respond to the scene and have his canine perform a free air sniff around the vehicle. (Trial Tr., p.89, Ls.1-25.) After Officer Case deployed his dog, the dog indicated on the door handle of the vehicle's front passenger side. (Trial Tr., p.166, L.22 – p.168, L.19.) Mr. Ortiz was then asked to get out of the vehicle, and because his demeanor was agitated, Officer Case patted him down for weapons. (Trial Tr., p.168, L.22 – p.169, L.23.) While patting Mr. Ortiz down, Officer Case found what he believed was a methamphetamine pipe. (Trial Tr., p.170, Ls.1-20.) Mr. Ortiz was then placed under arrest for possession of paraphernalia. (Trial Tr., p.93, Ls.7-9.) Officer Wiggins then continued to search Mr. Ortiz and discovered \$3,000 in cash in one of Mr. Ortiz' pockets. (Trial Tr., p.93, Ls.10-21.)

Officer Wiggins subsequently also searched Mr. Ortiz' car. (Trial Tr., p.94, L.12 – p.95, L.6.) When he opened up the passenger side door of the Dodge Stratus, he saw a white crystal substance on the floorboard, just in front of the passenger seat area. (Trial Tr., p.94, L.12 – p.95, L.6.) Officer Wiggins suspected that this substance was methamphetamine so he contacted Ken Mencl, a narcotics investigator, and asked him to respond to the scene. (Trial Tr., p.96, Ls.12-20.) Investigator Mencl collected the majority of the crystals, scrapping up as much of the crystals as he could with a card

and placing them in a plastic bag, and turned them over to Officer Wiggins. (Trial Tr., p.102, Ls.14-18, p.203, Ls.3-8, p.204, L.24 – p.205, L.2.) Although the substance was not sticking to the carpet, it was mashed down into the carpet and required a significant amount of effort to try to gather it up. (Trial Tr., p.204, Ls.14-21.) Officer Wiggins collected the remainder of what he could and later placed it into evidence. (Trial Tr., p.102, Ls.19-23.) Once the vehicle was taken into custody, Investigator Mencl used a vacuum cleaner with a filter to try to vacuum any remaining evidence and placed this filter into evidence as well. (Trial Tr., p.205, Ls.3-22.) There was also some other debris that was collected with the crystals when they were gathered up by the officers. (Trial Tr., p.102, Ls.11-13.) A plastic baggie was also found in the vehicle and collected. (Trial Tr., p.206, Ls.11-17.) The plastic bag and filter of suspected methamphetamine were sent to the State lab for testing. (Trail Tr., p.135, L.2 - p.139, L.14; State's Exhibit 1.)

Mr. Ortiz was ultimately charged by Information with possession of a controlled substance, and an enhancement for this being his second offense of the Uniform Controlled Substance Act. (R., pp.57-60.) The case eventually proceeded to trial. (R., pp.174-76.)

At trial, Rachel Cutler, a forensic scientist with the State Police Forensic Services testified that she tested the evidence in State's Exhibit 1. (Trial Tr., p.128, L.7 – p.152, L.11.) She explained that the evidence she received contained a tied plastic baggie with crystals and various debris. (Trial Tr., p.135, Ls.2-3.) When she weighed the substance and debris it weighed 3.82 grams total. .11 grams were used to test the substance, leaving 3.71 grams, which were repackaged. (Trial Tr., p.139, L.24 – p.140,

L.5.) Ms. Culter testified that from the tests she performed she was able to identify the substance as methamphetamine. (Trial Tr., p.139, Ls.10-14.)

During her testimony, Ms. Cutler also testified that she was not able to determine how much of the 3.82 grams was methamphetamine and how much was debris, explaining that it was too time consuming to separate the debris from the crystals and that she did not believe doing so was necessary in this case. (Trial Tr., p.142, Ls.10-23.) She explained that because she was not looking at a trafficking quantity, and because the debris was not substantial enough to "greatly affect" her weight, she chose not to remove it. (Trial Tr., p.142, Ls.15-23.)

Later, when the State began asking Officer Mencl about quantities of methamphetamine and how much is usually used at one time, the defense objected to this line of questioning. (Trial Tr., p.209, L.8 – p.211, L.9.) Counsel for Mr. Ortiz argued that this testimony was more prejudicial than probative, noting that in this case the methamphetamine was not separated from the debris and that the State had already taken pains to elicit answers that the amount of methamphetamine was not a concern in this case. (Trial Tr., p.210, L.8 – p.212, L.24.) The district court overruled the objection and allowed the testimony to continue stating the quantity of drugs was relevant to show an inference that Mr. Ortiz had knowledge of their presence and that it was not unduly prejudicial to Mr. Ortiz. (Trial Tr., p.213, L.4 – p.214, L.11.) Officer Mencl then testified that "one hit" of methamphetamine is usually between an eighth and a quarter of a gram, and that an eighth of a gram would sell for approximately \$25, a quarter of a gram would sell for about \$50, and a gram would sell for about \$100. (Trial Tr., p.214, L.20 – p.215, L.4.) He also testified that it is not very common for people to purchase

more than one, two, maybe three hits at a time, and that a gram usually lasts about three to five hits. (Trial Tr., p.215, Ls.10-21.)

The State relied on this testimony throughout its arguments to the jury, arguing that based on Investigator Mencl's testimony Mr. Ortiz had a significant amount of drugs and that someone would not have this much drugs and not know it. (Trial Tr., p.254, Ls.5-13, p.275, L.21 – p.276, L.4.) In his closing statements, the prosecutor also argued "As 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." (Trial Tr., p.253, L.25 – p.254, L.4.)

Mr. Ortiz was found guilty of possession of a controlled substance and pled guilty to Part II of the Information alleging this was his second drug offense. (R., p.176.) He was sentenced ten years, with two years fixed, and the district court retained jurisdiction for 180 days. (R., pp.188-99.) Mr. Ortiz filed a timely Notice of Appeal from the district court's Judgment of Conviction. (R., pp.200-02.) Following the period of retained jurisdiction, Mr. Ortiz' sentence was suspended and he was placed on probation for three years. (Augmentation: Order Upon 180-Day Review Hearing.)¹

¹ A Motion to Augment the record with a copy of the Order Upon 180-Day Review Hearing was filed with the Idaho Supreme Court on March 18, 2009. As of this writing an Order has not been issued on this motion.

ISSUES

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, by 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?

ARGUMENT

I.

The District Court Erred By Allowing The State To Introduce Testimony Regarding Typical Methamphetamine Use, Packaging, And Sales, Because This Testimony Was More Prejudicial Than It Was Probative

A. Introduction

The district court erred when it allowed the State to elicit testimony from Investigator Mencl regarding the typical amount of methamphetamine used at one time, how methamphetamine is usually packaged on the street, and the cost of one dose, because the risk of prejudice from this information substantially outweighed the probative value in this case. Moreover, that error cannot be harmless as it was used by the State to support its argument that Mr. Ortiz had knowledge of the methamphetamine found on the floor of his passenger compartment.

B. The District Court Erred By Allowing The State To Introduce Evidence Regarding Typical Methamphetamine Use, Packaging, And Sales, Because This Testimony Was More Prejudicial Than It Was Probative

Mr. Ortiz contends that the district court should not have allowed the State to question Investigator Mencl regarding typical methamphetamine use, packaging, and sales, because the risk of prejudice from this testimony outweighed the probative value. Under Idaho Rule of Evidence 403, the determination to admit or exclude relevant evidence is made by the trial court by balancing the probative value of the evidence against the dangers of unfair prejudice, distraction, confusion of the issues, and waste of time. *Masters v. Dewey*, 109 Idaho 576, 579, 709 P.2d 149, 152 (Ct. App. 1985). Therefore, once it is determined that the evidence is relevant and material as to an issue of fact, the court must then determine whether the risk of prejudice to the

defendant from the admission of the evidence is outweighed by its probative value. I.R.E. 403; *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

The determination of whether the prejudicial effect of the evidence outweighs the probative value is reviewed for an abuse of discretion. *State v. Eytchison*, 136 Idaho 210, 215, 30 P.3d 988, 993 (Ct. App. 2001). On appeal, to determine whether the district court exercised its discretion, the appellate court conducts a multi-tiered inquiry, looking at: (1) whether the district court correctly perceived the issue as a discretionary one; (2) whether the lower court acted with the outer bounds of its discretion and consistently with the applicable legal standards; and (3) whether the district court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 68 P.2d 1331, 1333 (1989). Here, even though, as the defense admitted, the testimony in question had some relevance, the district court abused its discretion when admitting the evidence because the probative value of the testimony was outweighed by its prejudicial effect because the evidence was unfairly prejudicial, misleading, and could easily confuse the jury.

When the State began asking Officer Mencl about quantities of methamphetamine and how much is usually used at one time, the defense objected to the line of questioning. (Trial Tr., p.209, L.8 – p.211, L.9.) Counsel for Mr. Ortiz explained that he was objecting to this line of questioning based on relevance arguing that this was more prejudicial than probative. (Trail Tr., p.210, Ls.9-14.) He explained,

[T]he state has gone to pains, especially with Rebecca Culter in eliciting answers that the weight is not a concern here, that any amount is against the law....

And now the state wishes to go into how was it packaged, what's an eight ball, how much value does it bring and into any number of questions that can be asked regarding that issue, when that is not the

issue as to my client, since any amount can be an indicia of guilt and that has already been shown.

(Trial Tr., p.219, Ls.14-25.) Counsel for Mr. Ortiz explained that there was "some relevancy to the questioning;" however, the prejudice in going into this line of inquiry when Mr. Ortiz was not charged with delivery, attempted delivery, trafficking, etc. where weight and distribution would be relevant, outweighed the probative value of this testimony. (Trial Tr., p.211, Ls.1-9.)

The State then explained that it was offering this testimony to demonstrate Mr. Ortiz' knowledge stating, "this evidence is to rebut any inference that a person who may have placed it there wouldn't have placed that amount of methamphetamine accidentally." (Trial Tr., p.211, Ls.14-18.) The prosecutor explained further that this evidence would go to whether it would be reasonable for anyone else to have lost that amount of methamphetamine in the car without realizing it or intentionally placed such a significant amount there and that, because the jury does not know anything about drug culture. they are not going to understand this unless they are familiarized with the standard amounts used. (Trial Tr., p.211, L.21 – p.212, L.9.)

The district court overruled the objection and allowed the testimony to continue stating the quantity of drugs was "relevant to show by inference that that knowledge was present." (Trial Tr., p.213, Ls.4-12.) In addressing the prejudicial effect versus the probative value of allowing the testimony in, the district court stated "[o]f course it's prejudicial, but I don't find that it's unduly prejudicial under Rule 403." (Trial Tr., p.213, Ls.10-20.) Officer Mencl then testified that "one hit" of methamphetamine is usually between an eighth and a quarter of a gram, and that an eighth of a gram would sell for approximately \$25, a quarter of a gram would sell for about \$50, and a gram would sell

for about \$100. (Trial Tr., p.214, L.20 – p.215, L.4.) He also testified that it is not very common for people to purchase more than one, two, maybe three hits at a time, and that a gram usually lasts about three to five hits. (Trial Tr., p.215, Ls.10-21.)

However, this evidence should not have been allowed in because even if relevant, there was a significant risk of prejudice by allowing the evidence in. The appropriate test under I.R.E. 403 is not whether prejudicial evidence is unduly prejudicial, but whether the risk of unfair prejudice substantially outweighs the probative value. I.R.E. 403; *State v. Spor*, 134 Idaho 315, 319, 1 P.3d 816, 820 (Ct. App. 2000). Therefore, the district court failed to apply the proper legal standard to its determination. *See id.*

Furthermore, application of the proper standard reveals that the risk of unfair prejudice outweighed any probative value the testimony may have had because the actual weight of methamphetamine in this case was unknown. 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). However, in this case evidence regarding the significance of the weight should not have been admitted because the weight was not the exact weight of the methamphetamine but, rather, it was the weight of the substance mixed with debris. During her testimony, Ms. Cutler testified that she was not able to determine how much of the 3.82 grams was methamphetamine and how much was debris. (Trial Tr., p.142, Ls.10-23.) She explained that because the weight was not at issue in this case and because the debris was not substantial enough to “greatly affect” the weight she chose not to remove it.

(Trial Tr., p.142, Ls.15-23.) Therefore, the weight of the methamphetamine specifically is unknown; however, this line of questioning encourages the jury to proceed or assume that the weight of everything in the baggie is the weight of the methamphetamine, unduly prejudicing the defendant and confusing the jury.

Therefore, the district court erred in allowing the State to present testimony regarding the typical amount of methamphetamine used at one time, how methamphetamine is usually packaged on the street and the cost of one dose because the prejudicial effect of this testimony outweighed any probative value it had.

C. The Error In Admitting This Evidence Was Not Harmless

Idaho Criminal Rule 52 provides that, "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." In *State v. Seitter*, 127 Idaho 356, 900 P.2d 1367 (1995), the Idaho Supreme Court stated for error to be harmless, "we must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that [the] evidence complained of contributed to the conviction." *Id.* at 358, 900 P.2d at 1369. It cannot be said beyond a reasonable doubt that the testimony admitted in this case was not harmless.

Here, the State used the testimony regarding the typical amount of methamphetamine used at one time, how methamphetamine is usually packaged on the street, and the cost of one dose, to argue that Mr. Ortiz had to have placed the methamphetamine on the floor because no one would just leave this amount of methamphetamine in someone's car. In his closing statements, the prosecutor argued that as Investigator Mencl told the jury, a gram of methamphetamine goes for \$100; therefore, there was \$350-\$400 worth of methamphetamine. (Trial Tr., p.254, Ls.6-10.)

The prosecutor then asked, "is this the type of amount that someone would accidentally leave there on the floorboards or is it an amount that was placed there for some purpose?" (Trial Tr., p.254, Ls.5-13.)

Later in his rebuttal, the prosecutor again stated,

And so ask again whether it makes sense that someone would just inadvertently spill and leave that amount of methamphetamine in that particular car. Officer Mencl told you that kind of a single user amount would be about one-sixteenth to on-eighth of a gram and you can do the math. And if you go with one-sixteenth, that's going to come out to about in excess of 50 uses. At one-eight its [sic] going to be around 27 to 30 uses.

(Trial Tr., p.275, L.21 – p.276, L.4.)

Furthermore, the prosecutor acknowledged that this was a circumstantial case as far as proving that Mr. Ortiz had knowledge of the substance. (Trial Tr., p.276, Ls.5-10.) Therefore, the evidence presented regarding methamphetamine use, packaging and sales went to the heart of the prosecutor's case and its use cannot be deemed harmless.

II.

The State Violated Mr. Ortiz' Right To A Fair Trial By Committing Prosecutorial Misconduct During Closing Arguments When He Misrepresented The Testimony Of Ms. Cutler

A. Introduction

Mr. Ortiz asserts that the prosecutor violated his right to a fair trial, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, when he impermissibly misrepresented the evidence presented at trial during the testimony of Rachel Cutler. Furthermore, this misconduct amounted to fundamental error and was not harmless.

B. Fundamental Error Occurred In This Case When The State Misrepresented The Testimony Of The Forensic Specialist, Ms. Cutler, Regarding The Weight Of The Methamphetamine In This Case

Although there was no objection to the prosecutor's comments during closing arguments in this case, prosecutorial misconduct can be reviewed for fundamental error when there has not been an objection made below. See *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). A fundamental error is one that "so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process." *State v. Christiansen*, 144 Idaho 463, 470, 163 P.2d 1175, 1182 (2007) (quoting *State v. Sheahan*, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003); *State v. Mauro*, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991)). It has been defined as an error which "goes to the foundation or basis of a defendant's rights or...to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *Id.* (quoting *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989)).

The Idaho Court of Appeals has held that "[p]rosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of the jurors and arouse prejudice or passion against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *Kuhn*, 139 Idaho at 715, 85 P.3d at 1114. The prosecutor's actions or comments must be so egregious or inflammatory that a curative jury instruction could not have remedied the misconduct. *Id.* This reflects the rationale behind the rule, that even if the defendant had made a timely objection to the inflammatory statements, the objection would not have cured the

inherent prejudice. *Id.* This also reflects the fact that the trial court itself possesses the power to *sua sponte* intervene when prosecutorial misconduct is sufficiently egregious and prejudicial. *State v. Phillips*, 144 Idaho 82, 88 n.2, 156 P.3d 583, 589 n.2 (Ct. App. 2007) (noting that “[t]he trial courts of this state possess authority and are encouraged to monitor the course of closing arguments, to *sua sponte* intervene as warranted, and to impose remedies or sanctions as appropriate to protect an accused’s right to a fair trial”). Therefore, when reviewing a question of prosecutorial misconduct, the appellate Court must first determine whether the complained about conduct was improper, then, if so, whether the misconduct impinged on the defendant’s right to a fair trial, or whether the misconduct was harmless. *Kuhn*, 139 Idaho at 715, 85 P.3d at 1114.

In this case, the prosecutor committed misconduct in his closing argument when he misrepresented Ms. Culter, the forensic specialist’s testimony. In his closing statements the prosecutor argued “As 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.” (Trial Tr., p.253, L.25 – p.254, L.4.) However, in her testimony, Ms. Culter never testified that the weight of the methamphetamine by itself was approximately the same as the weight including the debris or that it was “in the neighborhood of three and a half grams weight full of methamphetamine.”

During her testimony, Ms. Culter repeatedly testified that she could not determine the weight of the methamphetamine versus the weight of the debris in this case. (Trial Tr., p.128, L.7 – p.152, L.11.) She explained that it was too time consuming to separate the debris from the crystals and that she did not believe doing so was necessary in this

case. (Trial Tr., p.142, Ls.10-23.) She also explained that because she was not looking at a trafficking quantity and because the debris was not substantial enough to “greatly affect” her weight, she chose not to remove it. (Trial Tr., p.142, Ls.15-23.) Later she did testify that by looking at the sample one could tell that the controlled substance outweighed the debris. (Trial Tr., p.142, L.24 – p.143, L.13.) However, she also stated she could not guess what percentage of the substance was methamphetamine explaining,

We’re not allowed to do any guessing in my field to determine the percent, you would have to do something called quantitative analysis. Idaho Code does not require knowing what percent the substance is, just the presence thereof is illegal. So quantitative testing was not performed in this case.

(Trial Tr., p.149, Ls.3-9.)

Finally, when questioned by the prosecutor regarding whether the debris was of an insignificant weight, Ms. Cutler explained “I just noted that I didn’t feel the debris was substantially affecting my total weight.” (Trial Tr., p.149, Ls.15-24.) The prosecutor then asked if it was still her opinion that whatever debris was contained with the methamphetamine would be insignificant, to which she responded affirmatively. (Trial Tr., p.150, Ls.4-7.)

The Fourteenth Amendment due process clause’s prohibition on knowingly using false evidence to obtain a conviction, applies not only to entirely fabricated evidence, but to arguments that misstate the evidence adduced at trial. *See Miller v. Pate*, 386 U.S. 1, 7 (1967); *United States v. Fearn*, 501 F.2d 486, 488-89 (7th Cir. 1974). Although counsel for both sides are generally afforded considerable latitude in closing arguments, and are entitled to discuss fully the evidence adduced at trial and inferences

that can be drawn from that evidence, it is improper for the prosecutor to misstate the evidence. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. Therefore, a prosecutor cannot misrepresent or mischaracterize the evidence during his closing arguments. *Id.*

Here, 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 minuscule amount it is insignificant, but that whatever the weight is, it is not significant to her results in this case. Furthermore, during her testimony, it was never solicited what amount she would consider insignificant or not substantially affecting the total weight. This, coupled with the fact that Ms. Culter refused to give any estimate of what proportion was methamphetamine and what proportion was debris, indicates that the state was misrepresenting her testimony when he stated the weight of just the methamphetamine in this case was over three and a half grams.

Therefore, the prosecutor committed misconduct when he misrepresented Ms. Cutler's testimony regarding the amount of methamphetamine versus the amount of debris in this case, and this misconduct should be reviewed for fundamental error.

C. The State's Misconduct In This Case Is Not Harmless Error

Here it simply cannot be said, *beyond a reasonable doubt*, that the misconduct of the prosecutor in this case did not contribute to Mr. Ortiz' conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Sharp*, 101 Idaho 498, 507, 616 P.2d 1034, 1043 (1980). As argued above in Section I(C), and incorporated herein by reference, the State heavily relied on the weight in question to demonstrate that Mr. Ortiz knew of the methamphetamine's presence. This went to the heart of the only real element at issue in this case, whether Mr. Ortiz "knowingly" possessed methamphetamine.

Therefore, the State's misrepresentations regarding Ms. Culter's testimony about the weight of the evidence cannot be deemed harmless in this case.

III.

The Erroneous Admission Of Prejudicial Evidence And The Prosecutor's Misconduct Resulted In Cumulative Error Depriving Mr. Ortiz Of A Fair Trial

Under the cumulative error doctrine, the reversal of a conviction is required when there is "an accumulation of irregularities, each of which by itself might be harmless, but when aggregated...show the absence of a fair trial, in contravention of the defendant's constitutional right to due process." *State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007) (quoting *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998)). Here, even if each of the errors by themselves were harmless, the accumulation of these errors demonstrates that Mr. Ortiz was denied his right to a fair trial under the United States and Idaho Constitutions. See U.S. Const. amends. VI, XIV; Idaho Const., art. I § 13.

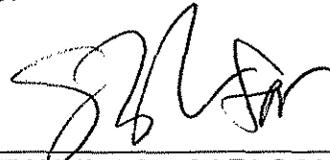
Throughout this case, the prosecution used the total weight of the debris and methamphetamine to demonstrate that Mr. Ortiz had to have knowledge of the methamphetamine in his car because it was a significant amount and someone would not likely leave this amount of methamphetamine behind in someone else's car accidentally. (Trial Tr., p.254, Ls.5-13, p.275, L.21 – p.276, L.4.) Unfortunately, because debris was mixed in with the methamphetamine, the exact amount of methamphetamine was not known. (Trial Tr., p.128, L.7 – p.152, L.11.) However, the State was allowed to proceed to introduce evidence regarding the typical consumption, packaging, and sales of methamphetamine and argued as if the amount weighed was entirely methamphetamine. Thereby, the State gained their conviction by arguing this

was a substantial amount of methamphetamine this was when the actual weight of the methamphetamine in this case was unknown. Therefore, in light of these errors, Mr. Ortiz was deprived of a fair trial and his convictions should be vacated and the case remanded for a new trial.

CONCLUSION

Mr. Ortiz respectfully requests that his judgment of conviction be vacated and that this case be remanded to the district court for a new trial.

DATED this 19th day of March, 2009.



HEATHER M. CARLSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of March, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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