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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 35410
)	
vs.)	
)	
EUGENE RAY COBELL,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

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

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District Judge**

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JUL 29 2009

Supreme Court _____ Court of Appeals _____
Entered on ATS by: _____

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STATEMENT OF THE CASE

Nature Of The Case

Eugene Ray Cobell appeals from the judgment of conviction and concurrent sentences of life with ten years fixed, imposed following jury verdicts of guilty to rape and penetration by a foreign object.

Statement Of The Facts And Course Of The Proceedings

In November of 2007, 72 year old Cobell was in Boise visiting a sick family member. (Tr., p. 392, L.s 11-15; p. 405, L. 24 – p. 406, L. 21.) He was staying with his niece, Cheryle "Cookie" Zwang, and her family in Boise. (Tr., p. 37, Ls. 6-10.) Cheryle's 20 year old daughter Danielle and her younger sister lived there with Cheryle and her husband Brian. (Tr. p. 27, L. 10 – p. 28, L. 7.)

In the early morning hours of November 12, 2007, Cobell returned to the Zwang residence after an evening of drinking with family members. (Tr., 39, L. 15 – p. 48, L. 25; p. 407, L. 15 – p. 418, L. 3.) Cobell sat next to Danielle on the couch, talking to her and eventually putting his arm around her. (Tr., p. 51, L. 22 – p. 54, L. 17; 419, L. 2 – p. 422, L. 2.) Danielle had fallen asleep with her head on Cobell's shoulder when she was awakened by his fondling and groping her. (Tr., 55, L. 16 – p. 56, L. 12.) Cobell then threw Danielle to the ground took her clothes off, and forcibly performed oral sex on her, penetrated her with his penis, and digitally penetrated her anus while holding her head back by pulling on her pony tail. (Tr., p. 56, L. 16 – p. 61, L. 15.) Danielle eventually broke away from Cobell and made her way upstairs to her family where the police were called and responded to the scene. (Tr., 61, L. 20 – p. 67, L. 3.)

The state charged Cobell with rape and penetration by a foreign object. (R., pp. 17-18.) The matter proceeded to a jury trial where Cobell testified that he did have sexual contact with his 20 year old grand-niece Danielle, but it was in fact initiated by and consented to by her. (Tr., p. 422, L. 12 – p. 432, L. 4.) The jury found Cobell guilty of both rape and penetration by a foreign object. (R., pp. 70-71; Tr. p. 523, L. 10 – p. 526, L. 2.) Cobell was sentenced to life with ten years fixed on each charge, to run concurrently. (R., pp. 80-82; Tr., p. 569, Ls. 10-19.)

Cobell timely appeals from the judgment of conviction. (R., pp. 70-71, 80-82.)

ISSUES

Cobell states the issues on appeal as follows:

1. Did the district court violate Mr. Cobell's Fifth Amendment rights when it allowed the prosecution to question him about previous assertions of his rights and allow the jury to infer guilt from such assertions?
2. Did the State violate Mr. Cobell's right to a fair trial by committing prosecutorial misconduct?
3. Did the errors in Mr. Cobell's trial amount to cumulative error?
4. Did the district court abused [sic] its discretion when it imposed, upon Mr. Cobell, unified sentences of life, with ten years fixed, following his convictions for rape and penetration with a foreign object?

(Appellant's brief, p. 7)

The state rephrases the issues as follows:

1. Has Cobell failed to show that the district court violated his Fifth Amendment rights by allowing the state to engage in cross-examination conducted for the permissible purpose of impeaching the truth of the version of events testified to at trial?
2. Has Cobell failed to establish that the prosecutor committed misconduct in closing argument?
3. Has Cobell failed to establish at least two trial errors that warrant application of the cumulative error doctrine?
4. Has Cobell failed to show that the district court abused its discretion in imposing concurrent life sentences with 10 years fixed following a jury's verdict of guilt for the offenses of rape and forcible penetration by a foreign object?

ARGUMENT

I.

Cobell Has Failed To Show That The District Court Violated His Fifth Amendment Rights By Allowing The State To Engage In Cross-Examination Of Cobell For The Purpose of Impeaching His Version Of Events Testified To At Trial

A. Introduction

Cobell asserts on appeal that “the district court committed reversible error when it overruled defense counsel’s objection to the State’s questions regarding Mr. Cobell’s previous assertion of his Fifth Amendment rights.” (Appellant’s brief, p. 8.) He contends that the “line of questioning was designed to prejudicially persuade the jury to infer guilt from [his] assertion of his rights.” Id. Cobell does concede that “[although] some very limited questioning about his silence on the night in question may be proper cross-examination for impeachment purposes, the questioning in this case was clearly designed to provide an inference of guilt,” (Appellant’s brief, p. 13) and the district court erred in allowing the questioning to continue over objection. (Appellant’s brief, pp. 8, 13.)

Because the cross-examination Cobell complains of involved his statements to the victim’s mother and to first responders on the night of the events in question which were inconsistent with his trial testimony, it was proper impeachment cross-examination. Cobell’s rights were never implicated.

B. Standard Of Review

“Whether the admission of evidence violates a defendant’s right to remain silent is a constitutional question which this Court reviews de novo.” State v. Moore, 131 Idaho 814, 820, 965 P.2d 174, 180 (1998).

C. Cobell Has Failed To Show That His Fifth Amendment Rights Were Affected, Let Alone Violated, By The State's Impeachment Of His Trial Testimony Through Cross-Examination

Cobell asserts that the "line of questioning [on cross examination] was plainly an attempt by the prosecution to have the jury infer Mr. Cobell's guilt based upon his previous silence and invocation of his Fifth Amendment rights." (Appellant's brief, p. 13.) The record, however, shows that Cobell did not invoke his right to silence, but instead made statements to the victim's mother and the police. The state therefore properly cross-examined Cobell and attempted to impeach his credibility based upon differences between his statements and his trial testimony. *Such impeachment does not implicate any rights of Cobell.*

Cobell mistakenly refers to factual omissions in his statements to the victim's mother and law enforcement on the scene as invocations of his right to silence. (Id.) Applicable law, however, allows cross examination about why trial testimony contains factual allegations not asserted in previous statements. In Anderson v. Charles, 447 U.S. 404 (1980), the United States Supreme Court addressed and clarified this very issue in light of its previous holding in Doyle v. Ohio, 426 U.S. 610 (1976), that prohibited the unconstitutional use of post-*Miranda* silence at trial. Anderson, 447 U.S. at 408 (citations omitted). In Anderson, the state cross-examined the defendant regarding an inconsistency in his statement to officers and his trial testimony and the Court determined that "[t]he questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." Id. at 409. The Court held that

the omission of facts from the earlier statement did not constitute silence. Id. at 409.

The Idaho Court of Appeals has similarly found that the omission of facts from one inconsistent statement of a defendant to another does not constitute silence for the purposes of evaluating a potential violation of a defendant's constitutional right against self-incrimination. See State v. Wolverton, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991) (prosecutor's cross-examination of the defendant regarding inconsistent positions material to the case was not an impermissible infringement on his right to remain silent); State v. Rodgers, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990) (state's cross-examination regarding inconsistencies in trial testimony with prior statements to police was permissible).

In the present case, Cheryle Zwang testified on direct by the state about her interaction with Cobell upon being told that he had raped her daughter:

Q: So did you confront him?

A: I did. I said - - I said, 'What did you do?' And he goes, 'Oh Cheryle'. And I said, 'What did you do?' And he goes, 'Oh, Cheryle' again.

Q: He called you Cheryle?

A: Yes. And so I said, 'Stop calling me that.' I said, 'Why are you calling me that? You know my name.' Like he was trying to distance himself from us, like he was trying to pretend we weren't family anymore.

Q: What did you say to him?

A: I said, 'What did you do to my baby?' And he goes, 'I didn't do nothing.' And then I said, 'What did you do to my daughter?' And he said - - he goes, 'We were just - -.' He had his hands like this.

Q: Okay. You've got your hands clasped together one inside the other?

A: Yeah. And he would kind of rub them like this. And he goes, 'We didn't - - I didn't do - - we were just being close and everything.' And I said, 'What do you mean close?' And he said, 'We were just being friendly and everything.' And I said, 'What do you mean friendly and everything?' And then he goes, 'I can't do nothing. I can't.' And I said, 'You did something, you son of a bitch. You did something. You hurt her. You raped her.'

(Tr., p. 229, L. 17 – p. 230, L. 19.) Officer Cambron also testified regarding his interaction with Cobell in an attempt to determine what was happening when he first arrived on scene:

Q: What was the first thing you asked him that you can recall?

A: The first thing that I asked him was if he knew why we were there.

Q: What was his response?

A: He said he knew.

Q: What did he say?

A: He indicated he knew why we were there. And then I inquired as to try and get some information from him about what happened because - - if he knows what happens he could probably explain it to me. The explanation was very vague, and I had to start digging into it with some leading questions. And - -

Q: What sort of vague response did he give you?

A: The initial story that he explained to me was he was downstairs with his - - I guess the relationship is a niece or a grandniece - - and the two of them were downstairs. All the other family members had since gone to bed after a family outing. They were downstairs talking about another family member that had been diagnosed terminally ill with cancer and then the story would just trail off and he would stop talking.

- Q: When you say 'trail off', how do you mean?
- A: It just - - he would be explaining it and then that would be the end of it. He would stop talking. So I would have to ask, keep going - - just keep pushing and then what happened and then what happened.
- Q: And in that context - - in pushing him a little bit - - how did you do that?
- A: I just kept - - like I just showed you. Asking him 'and then what happened?', you know, 'who was there?' Asking all these questions because there wasn't a lot of information offered. So I had to keep asking questions about, okay, well, what happened, what were you guys talking about. And that's when he described the terminally ill family member. And then what happened, and - -
- Q: Did it get to a point where you said 'what were you doing with Danielle?'
- A: Yeah. I finally asked him, 'Did anything occur between you two?' And - -
- Q: What was his explanation to that?
- A: Well, he said nothing - - nothing had happened and then I got more direct about - - really specific questions as far as 'did you two kiss?' And he told me that he had kissed her on the neck. And then I asked, 'Well, did you guys kiss on the lips?' And he gave a negative response on that. And then I went into the sexual questions about 'did you engage in intercourse, the two of you?' And he said no. Then I listed different types of intercourse, vaginal/penile, manual/vaginal, anal.
- Q: What was he doing through all that?
- A: He was denying all of those as I asked them.
- Q: When you say 'denying', what was his demeanor like?
- A: Just sitting there saying no.

Q: Did he register any sense of dismay or shock or embarrassment?

A: No, not really. It was just simply stating no.

Q: Okay. Did you ever ask him or did he ever provide an explanation for what - - for what he considered he was doing with Danny, Danielle?

A: He - - after we established that he was kissing her on the neck, I kind of pushed more on that topic, as far as I knew these two were related. They are family members so I found that odd that that would be happening. That's just not something that normally occurs, so I asked him questions about that and got an explanation of 'we were being friendly' is how he described it.

Q: That they were being friendly?

A: Correct.

Q: What did you say with that?

A: I asked him to clarify what he meant by 'being friendly'.

Q: What was his response?

Q: He would just go back to the beginning of the story of we were sitting there, she has her head on my shoulder, I was kissing her neck, we were being friendly. So I'd keep digging about what do you - - what are you describing as 'friendly'? How are you defining 'friendly'?

Q: At some point did you actually give him an analogy?

A: I did. I - - since I wasn't getting anywhere with him asking him to further explain what friendly meant, I gave him the analogy that Officer Crimmen who's standing next to me that we were friendly, but he doesn't put my head on his shoulders, vice versa. No one kisses each other's neck, but we are friendly. So I was trying to give him the idea that friendly can mean different types of things.

Q: With that, did he provide any additional explanation?

A: No, it was back to the beginning of the story - - the head on the shoulder, kissing the neck and the stopping.

(Tr., p. 150, L. 3 – p. 154, L. 8.)

Cobell later took the stand in his own defense and presented a new version of events. Cobell testified that he did in fact have sexual contact with Danielle, but for the first time claimed that it was Danielle doing the instigating and his sexual advances were in no way against her will:

Q: Then what happened?

A: Well, she asked me about this kiss again and she said, 'Show me', and so I kissed her. Well, when I kissed her everything went goofy.

Q: What do you mean went goofy?

A: She got real aroused and - -

Q: What do you mean aroused?

A: She opened her mouth. We started kissing and we had our tongues in each other's mouth. She turned toward me and we were kissing. And it was a long kiss. And we kept kissing.

(Tr., p. 422, L. 19 – p. 423, L. 5.) Cobell continued with his new version of events to explain how the contact escalated between himself and his victim.

Q: That's fine. Why didn't you break it off?

A: We were just locked in an embrace and she was moving against me.

Q: What do you mean she was moving against you?

A: She was actually making sexual - - she had her leg over my leg and I turned towards her and we just continued to kiss and it was for quite a while and - -

Q: Was there any point during this, up until now, to where you thought that this was inappropriate?

A: You know, I thought - - when I thought it was inappropriate is when I first sat down and I had my arms around her and I thought then about it being - -

Q: You thought it was inappropriate at that time?

A: Yes. Because to me, anymore, sex is hugging and kissing and caressing and - - because that's all it is for me anymore.

Q: So why didn't you break it off?

A: Well, I didn't - - that really didn't enter my mind and I don't know. You know, I just - - I don't have an answer for that other than when she started to react to me like she did, I thought, 'Well, she wants sex. She wants sex and I can't give her that, but - -'

(Tr., p. 424, L. 1 – p. 425, L. 4.)

After Cobell gave his new version of events, the state properly cross-examined him about inconsistencies between his trial testimony and his statements to Cheryle Zwang and Officer Cambron. The state cross-examined Cobell about his comments to his niece:

Q: Okay. And in this night she [Cheryle Zwang] came to you and she said 'You raped my baby'; didn't she?

A: Yes.

Q: And you didn't take the opportunity to explain what really happened, did you? You didn't tell her; did you?

A: Would you repeat?

Q: You never told her that it was Danny who came on to you; did you?

A: I didn't get a chance.

Q: Oh, wait a minute. She - - you were in her room, in her guest bedroom, sitting in her home and she is asking you questions.

A: I wasn't in her room.

Q: You were in the guest bedroom of the Zwang home; right?

A: Yes.

Q: And when asked if you raped her, you said, 'No'; correct? Just yes or no, Mr. Cobell.

A: No, it was in the hall.

(Tr., p. 443, L. 15 – p. 444, L. 9.) The complained of portions of the state's cross-examination of Cobell as it relates to his communication with law enforcement is as follows:

Q: All right. And when law enforcement came to the house and they told you that they were there because Danny had accused you of sexually assaulting her, you didn't tell them that story either; did you?

A: I don't understand.

Q: You never told the police this story; have you? Yes or no?

A: No.

Q: And when you went down and were taken to the detective's office and were given an opportunity to explain your side of the story, you never offered up any of this; did you?

A: No.

Q: So the same - - story that you want this jury to believe, that would exonerate you if it was quote 'consensual', you didn't tell anybody about it that night, did you?

Q: No.

(Tr., p. 444, L. 10 – p. 445, L. 3.)

The state attempted to illustrate through cross-examination that Cobell hadn't sufficient time to come up with the version of events testified to at trial on the evening of the accusation.

Q: When Cheryle Zwang accused you of raping her daughter, you told Mr. Carr on direct examination something to the effect of, 'I had no idea it was coming. I wasn't prepared to be quizzed that way.' Do you recall that?

A: Yes.

Q: And that was the explanation that you gave for why you couldn't tell Cheryle what was going on, correct?

A: That's correct.

Q: Wouldn't it be more fair to say, Mr. Cobell, that you weren't - - in saying that you just simply weren't prepared with an explanation?

Q: I was shocked.

A: You weren't prepared - -

A: I was shocked.

Q: - - is what I'm asking. The truth is the truth.

A: I couldn't prepare for anything because I didn't know what was coming.

Q: You knew that she was accusing you of rape; right?

A: Pardon me?

Q: You knew that you were being accused of rape?

A: I knew she accused me of rape.

Q: Right. Cheryle accused you of that as well, right?

A: No, I didn't know Danielle had. What I'm saying is I knew Cheryle had accused me of rape. And I didn't know anything else. That's all I knew is that she had accused me of rape.

(Tr., p. 453, L. 6 – p. 454, L. 13.) The state further inquired as to why Cobell did not tell law enforcement that he didn't rape Danielle:

Q: So when you are being led away in handcuffs at four in the morning and taken to jail, you didn't think then would be a good time to set the record straight? That didn't occur to you?

A: No.

Defense: Objection. Asked and answered.

A: No, no because - -

Court: I will allow the question because I believe the witness put another spin on his answer earlier and I will allow the State to follow-up.

A: Would you repeat the question for me? Okay. You said when I was being taken to jail?

Q: It never occurred to you to tell the police that this was all just a big misunderstanding, did it?

A: My hope - -

Q: It is really just a yes or no question, sir. Did it occur to you to tell them?

Q: I don't know.

Defense: Judge, I'm going to object. The defendant has a right to remain silent upon questioning, upon being with the police and remaining silent. And Counsel is badgering him about that.

Court: I will overrule the objection. When the defendant chooses to take the witness stand, he waives his right to be silent and the State can pursue the reason that he chose to remain silent on the night of the arrest. So I don't believe it is improper cross-examination and I will overrule the objection.

(Tr., p. 455, L. 4 – p. 456, L. 11.)

The state continued with its line of questioning regarding Cobell's initial statements that he *could not* have raped Danielle as opposed to having said he *did not* rape her.

Q: Mr. Cobell, when Cheryle Zwang confronted you and said, 'You raped my daughter', you told her in response, 'No Cheryle. I can't.' Correct?

A: Correct.

Q: You didn't say, 'No Cheryle. I didn't.' Did you? You didn't say that?

A: No.

(Tr., p. 460, Ls. 10-17.)

Contrary to Cobell's assertion, the intended goal of these lines of cross-examination was to impeach the truthfulness of Cobell's story to the jury by pointing out that Cobell's version of the facts just after the crime made no mention of the encounter being consensual or instigated by the victim. That version of the facts was first revealed when Cobell took the stand in trial some five months later. Because a defendant has no right to avoid being confronted with prior inconsistent statements, Cobell has failed to show that his rights were even implicated in cross-examination. Further, Cobell has no basis to argue that the cross-examination relating to his discussion with Officer Cambron was improper because Cobell once again failed to actually remain silent. When law enforcement first arrived on scene, Cobell answered questions posed by the police in their attempt to gather information about what had taken place at the Zwang home. Officer Cambron testified about an actual conversation with Cobell

and that conversation took place in the home before Cobell was arrested and taken to the police station. (Tr. 145, L. 23 – p. 165, L. 13.)

The questioning of Cobell was limited in scope and was proper cross-examination. The state was within its right to conduct an inquiry in an attempt to impeach Cobell by showing that although he answered questions of the victim's mother and law enforcement prior to being taken down to the station, he did not come up with the story of Danielle as the aggressor/willing participant until he took the stand at trial. The district court was correct in determining the line of questioning was proper and did not, as Cobell asserts, invite the jury to consider any pre-arrest silence as evidence of guilt. Cobell chose to make statements, not to remain silent, about what occurred with his victim. As such, the state had the right to inquire as to why those statements were different than his version of events at trial. Cobell has failed to show that the district court violated his Fifth Amendment rights by allowing the state to engage in a proper cross examination of Cobell.

II.

Cobell Has Failed To Establish Prosecutorial Misconduct

A. Introduction

Cobell also contends his right to a fair trial was violated by the prosecutor's closing argument. (Appellant's brief, p. 14.) He asserts the state's argument based on inconsistencies between Cobell's trial testimony and statements on the night in question was improper and that the prosecutor misstated evidence. (Id.) Trial counsel for Cobell did not object the state's

closing argument, but instead argues on appeal that the nature of the comments rises to the level of fundamental error. (Id.) Cobell's argument fails as he is unable to establish any misconduct.

B. Standard Of Review And General Legal Standards Governing Claims Of Prosecutorial Misconduct

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.") In that regard, the Supreme Court has indicated prosecutorial misconduct may occur where the prosecutor "manipulate[s] or misstate[s] the evidence" or "implicate[s] other specific rights of the accused such as the right to counsel or the right to remain silent." Id. 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).

With respect to prosecutorial misconduct in the context of closing argument the Supreme Court has stated:

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 [as do consistent and repeated misrepresentations of a dramatic exhibit in evidence]. 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 reiterated the importance of reviewing closing arguments in light of their 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 Supreme Court 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).

Application of the foregoing standards to Cobell’s claims of prosecutorial misconduct reveals he was not deprived of a fair trial.

C. Cobell Has Failed To Show Any Error In Argument Addressing Inconsistencies In Cobell’s Pre-Trial Statements And His Trial Testimony

Cobell asserts that the state committed misconduct by improperly commenting on his right to remain silent in closing argument. (Appellant’s brief, pp. 16-18.) Cobell again erroneously asserts that the only purpose for the state’s cross-examination on his pre-arrest silence was to infer Cobell’s guilt from such silence. (Appellant’s brief, 17.) Cobell’s argument follows that since the cross-examination was improper, so must the comments relating to such cross-examination during closing argument be. (Appellant’s brief, p. 17.) As fully discussed above, the state’s cross-examination of Cobell did not even bring his Fifth Amendment rights or due process into question. The state properly cross-examined Cobell in an attempt to impeach him by pointing out the vast difference between his own version of events on the night in question and on the day he

took the stand at trial. It follows that the state's comments on such in closing argument were likewise without error.

Cobell asserts the following statement is improper:

When Cheryle, Cookie Zwang, approaches him and tells him, 'What did you do to my daughter? You raped her', it is significant, ladies and gentlemen, that the defendant said, 'I can't.' He didn't say, 'I didn't, I didn't rape her'. Why is that significant? It is not just that the nuance of the words because the defendant himself from the stand is testifying that what he engaged in he doesn't really consider sex. Because apparently he has decided that unless it is full penetration, penile-vaginal penetration, that that doesn't qualify.

So when he says 'I can't' versus 'I didn't', that is not a slip. That is not a small nuance. It is a huge thinking error in his head.

(Appellant's brief, pp. 17-18 (citing Tr. p. 482, L. 15 – p. 483, L. 4).) Cobell also asserts that a statement made on rebuttal close was improper because the statements were designed to influence the jury to infer guilt from Cobell's previous silence:

But for the defendant to say to you today through his attorney that he didn't have to explain anything to this family, that he didn't have to explain anything to the police, but to just simply come here today and give you this dilly of a story is pretty incredible. To want to comment that there is a divide in this family with an aisle down the middle and to express how painful that may be, when he has an opportunity to explain what? That he engaged in an incestual relationship with your daughter? And that somehow that would be okay?

Credibility is huge in this case. But ladies and gentlemen, again, you don't have to leave that at the door. Where is his shame and his humiliation when he takes that stand and tells you this story in this fashion?

He never protests, 'I didn't do it.' He never protests and says, 'I didn't rape Danny.' He say's, 'I can't', because he is confusing intent with ability. And you should not be persuaded by that at all.

(Appellant's brief, p. 18 (quoting Tr. p. 507, L. 21 – p. 508, L. 17).) Neither of these arguments was in any way improper.

Prosecutors have considerable latitude in closing argument and have the right to discuss the evidence and the inferences and deductions arising therefrom. State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). The purpose of the prosecutor's closing argument is to enlighten the jury and help the jurors remember and interpret the evidence. State v. Reynolds, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991).

Because Cobell willingly answered the questions of his victim's mother and Officer Cambron on scene, giving an entirely different version of events than his trial testimony, the cross-examination of Cobell was a proper impeachment technique to point out the inconsistencies of such. The state properly presented its theory of the case based on the evidence presented. Cobell has failed to establish any error by the state in these statements.

D. Cobell Has Failed to Establish Prosecutorial Misconduct Based On A Stand Alone Statement About Erectile Dysfunction

Cobell asserts the state committed misconduct when the prosecutor said "[h]e has a problem with erectile dysfunction, but it is situational" in closing argument, contending it was without support in the evidence. (Appellant's brief, p. 19; Tr. 508, Ls. 19-20.) This was a small part of a bigger point the state was making on rebuttal close in response to Cobell's trial counsel's assertion that Cobell didn't have the intent to rape because of his erectile dysfunction. (Tr., p.

499, L. 25 – p. 500, L. 4.) Additionally, the statement was not objected to by trial counsel. Cobell failed to establish that he is entitled to review of this claim for the first time on appeal under the fundamental error doctrine.

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). The full context of the statement makes it clear that the statement was not calculated to encourage the jury to reach a verdict based on improper facts and therefore it was not in violation of his due process rights as asserted by Cobell:

[Cobell] says, 'I can't', because he is confusing intent with ability. And you should not be persuaded by that at all. You have nothing in front of you to believe that the defendant in fact penetrate Danny. He has a problem with erectile dysfunction, but it is situational.

You know that through the testimony that the State elicited in this case that the issue about going to the strip bars is important because it shows an intent that he has got going on in here. That he was very sexually interested and aroused that night. And that he was interested in going into a strip bar for that arousal and that gratification. That's why it becomes important in this case.

The fact whether or not he was able to obtain the gratification - - we don't have to prove. Only that it was done for the purpose of arousal or gratification. That's why the issue of the strip bars is important. Because it was on his mind. It was what he was thinking about. And that is why he attacked Danny in the fashion and manner in which he did.

He had sexual arousal. Whether he was able to achieve the end and means, we don't have to prove that. He himself told you that he was grinding himself on her vaginal opening.

(Tr., p. 508, L. 15 – p. 509, L. 16.)

When taken in full context, including that it was a response to Cobell's closing argument, the statement complained of does not rise to the level necessary to constitute such prejudice that could not have been remedied by a court ruling. The statement did not call for a guilty verdict based on improper evidence. It was a stand-alone, unexplained statement about erectile dysfunction which appears to neither add to nor detract from the state's argument that Cobell had the intent to commit the rape of his grand-niece even if he did not necessarily have the ability to receive ultimate sexual gratification from such act. Cobell has failed to show misconduct, let alone fundamental error.

III. There Is No Cumulative Error

Under the doctrine of 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). Cobell has failed to show that two or more errors occurred in his trial, 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).

IV.

Cobell Has Failed To Establish An Abuse Of The Sentencing Court's Discretion By Imposing Concurrent Life Sentences With Ten Years Fixed Following The Jury's Finding Of Guilt For Rape And Penetration By Foreign Object

A. Introduction

Cobell argues that his concurrent life sentences with ten years fixed are excessive given any view of the facts. (Appellant's brief, p. 25.) He contends the district court did not give proper consideration to the mitigating factors in the case, specifically his status as a first time offender. (Appellant's brief, p. 26.) Cobell further cites his advanced age, poor health, and family support as factors the court gave insufficient weight to in fashioning his sentence. (Appellant's brief, pp. 26-32.) Cobell has failed to meet his burden and thereby failed to establish that the district court abused its discretion in imposing concurrent life sentences with 10 years fixed upon the jury's guilty verdicts for rape and penetration by foreign object upon his 20 year old grand-niece.

B. Standard Of Review

When a defendant alleges an excessive sentence on appeal, the appellate court independently reviews "all of the facts and circumstances of the case" and considers the nature of the offense and the character of the offender. State v. Cope, 142 Idaho 492, 500, 129 P.3d 1241, 1249 (2006). To prevail, the

appellant must establish that, under any reasonable view of the facts, the sentence is excessive considering the objectives of criminal punishment. Cope, 142 Idaho at 500, 129 P.3d at 1249. Those objectives are “(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.” State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). The fixed portion of the sentence is considered the probable duration of confinement. State v. Sanchez, 115 Idaho 776, 777, 769 P.2d 1148, 1149 (Ct. App. 1989). A sentence that does not exceed the statutory maximum will not be disturbed on appeal absent a clear abuse of discretion. State v. Reinke, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). Where reasonable minds might differ as to the length of sentence, the appellate court will not substitute its view for that of the sentencing court. State v. Brown, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992).

C. Cobell Has Failed To Establish That The District Court Abused Its Discretion

The district court properly took into consideration the goals of sentencing when formulating Cobell’s sentence. (Tr., p. 563, L. 2 – p. 564, L. 16.)

Cobell claims that the district court failed to “properly consider” the mitigating factors in his case. (Appellant’s brief, pp. 26-32.) Specifically, Cobell asserts he was entitled to more lenient treatment based on his status as a first time offender, as a person of advanced age, as one who has multiple health concerns, and an individual who has ample family and community support.

(Appellant's brief, pp. 26-32.) The district court considered all of these factors in turn, conceding that the appropriate sentence was "not an easy decision." (Tr., p. 564, Ls. 13-16.) The court considered "such factors as age, such factors as health and such factors as the circumstances," (Tr., p. 569, Ls. 13-14) including:

First of all, I do not believe that the defendant is feigning his physical problems. I have reviewed the prior medical history and the reports of his physicians and, yes, indeed, he does have the physical problems which he claims to have. And he does in fact suffer from the diseases that he claims to suffer from.

(Tr., p. 564, Ls. 17-23.) Further, the court noted Cobell was "72 years old. You have lived a long life. And you have lived apparently a pretty good darn life. A lot of people think very highly of you." (Tr., p. 567, Ls. 6-9.)

Against the mitigation, the court considered the evidence presented at trial which resulted in jury convictions for rape and forcible penetration by foreign object:

[T]he defendant was not the only person there that night. There were other people in that house. And it was not just the victim. Without objection, Mr. Cobell, every individual who was in that house that night and saw your behavior and saw the behavior of the victim believed the victim. Every one of them. Not just immediate family members, but the police, everyone who dealt with the victim that night believed she had in fact been raped. So don't just say it is a he said she said. Because there were others there and every one of them believed the victim's story in this case.

And ultimately when the matter was presented to the jury after both of you had had the opportunity to explain the facts and to testify and to be examined and cross-examined, a jury of 12 members determined that they believed the victim's story as well and found you guilty of both of these crimes.

(Tr., p. 565, L. 15 – p. 566, L. 10.) The district court also weighed the impact of Cobell's actions on his victim. "This young lady who you raped or assaulted or

battered, depending on what term you want to use, is never going to have the benefit of putting this behind her. Never totally." (Tr., p. 567, Ls. 10-13.)

The presentence investigator refrained from making a recommendation, deferring instead to the district court judge who presided over the jury trial, but did include recommendations of the psychosexual evaluator. (PSI, pp. 17-19.) Although the psychosexual evaluator concluded Cobell was a low to medium risk sexually re-offend, he determined that Cobell did "not appear to be an appropriate candidate for community supervision or treatment in the community." (Psychosexual Evaluation, pp. 8-9 (attached to PSI).) The examiner weighed Cobell's mitigating factors against the negative contributing factors in reaching this conclusion:

It is this examiner's conclusions [sic] that Mr. Cobell is a LOW to MEDIUM risk to sexually, violently, or criminally re-offend. He scored LOW risk to re-offend on all of the risk assessments and he possesses a number of factors and traits supportive of a low risk to re-offend. He has a positive employment history, no prior criminal history, this is his first documented offense of this type, and he has been a rather stable member of the community for all of his life. On the other hand, Mr. Cobell continues to deny that he raped his victim and does not see a need to obtain any sex offender treatment. He places blame on his victim and believes that the only person he has wronged is his wife. He does not have an explanation for his actions and appears to only be concerned about how this offense will affect him and not necessarily the victim. Therefore, Mr. Cobell does not appear to be amenable for treatment at this time, which in this examiner's opinion increases his risk to re-offend.

(Psychosexual Evaluation, p. 8 (attached to PSI)).

Cobell is of advanced age, does suffer from a number of health issues, and appears to have the support of a community. Although Cobell lived many decades as a law-abiding citizen, his first run-in with the legal system was for the

commission of incredibly serious crimes. Cobell was convicted by a jury of raping and using a foreign object to forcibly penetrate his 20 year old grand-niece while pulling her head back with her ponytail to maintain her compliance. Cobell committed a series of violent acts against a young family member and continued to maintain the interaction was consensual. He continued to hold to this position following a jury verdict establishing his guilt. Although Cobell points to his low risk to re-offend (Appellant's brief, p. 32), he fails to address the ultimate effect of his denial on his amenability to treatment and therefore his potential risk to re-offend. The psychosexual evaluation, however, considers just that:

Since Mr. Cobell does not accept the fact that he raped his victim, he does not appear to be an appropriate candidate for community supervision or treatment in the community.

...

Therefore, Mr. Cobell does not appear to be amenable for treatment at this time, which in this examiner's opinion increases his risk to re-offend.

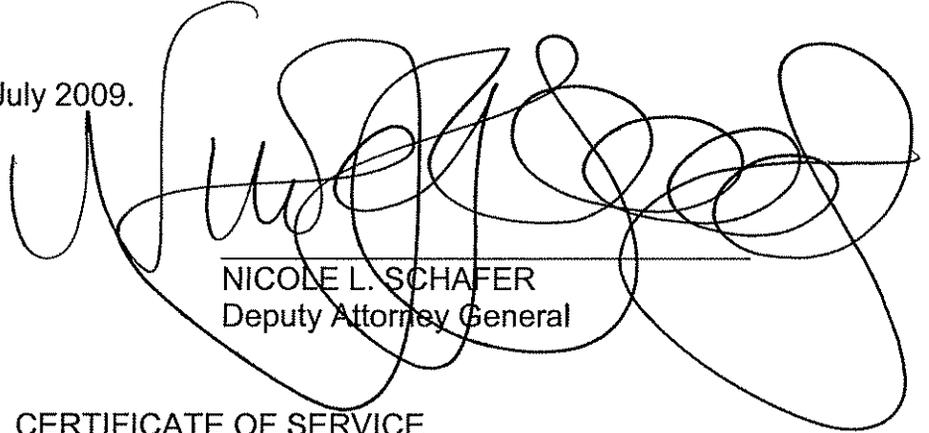
(Psychosexual Evaluation, p. 8 (attached to PSI).)

Cobell has failed to show that the sentences of life with 10 years fixed are excessive considering his potential risk to the community based on the seriousness of his convictions combined with his continued denial of wrong doing and inability to take responsibility for his actions.

CONCLUSION

The state respectfully requests that this Court uphold Cobell's convictions and affirm the district court's sentence.

DATED this 29th day of July 2009.



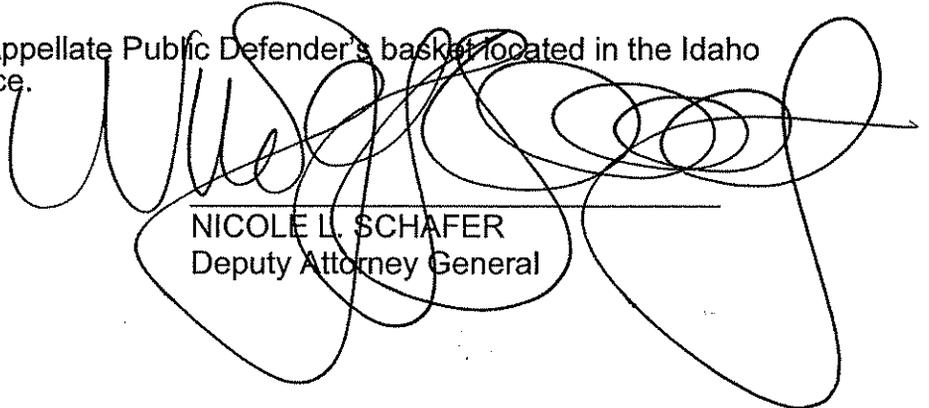
NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of July 2009, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ELIZABETH ANN ALLRED
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.



NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm