11-18-2011

State v. Wright Respondent's Brief Dckt. 38017

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38017
	)	
vs.	)	
	)	
TIMOTHY EUGENE WRIGHT,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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STATEMENT OF THE CASE

Nature Of The Case

Timothy Eugene Wright appeals from his judgment of conviction for robbery.

Statement Of The Facts And Course Of The Proceedings

Two men armed with handguns robbed the Cash Store, a loan business in Idaho Falls, by entering, threatening the two employees, and taking about $2,700 in cash. (Trial Tr., p. 15, L. 1 – p. 30, L. 15; p. 35, L. 22 – p. 43, L. 12; p. 162, L. 8 – p. 168, L. 8.) The state charged Wright with robbery for that incident and also alleged a firearm enhancement. (R., pp. 22-23.) The enhancement was dismissed upon the state's motion. (R., pp. 41, 47.)

The case proceeded to jury trial, where the primary issue was identity, after which the jury convicted Wright as charged. (R., pp. 57-70, 72-81, 84-87; see generally Trial Tr.; see also 6/10/10 Tr., p. 92, L. 20 – p. 111, L. 25.) The evidence that indicated Wright was the robber included: he was of the same general height, stature and race as the robbers and had a similar voice (Trial Tr., p. 27, Ls. 9-18; p. 29, Ls. 21-25; p. 177, L. 22 – p. 178, L. 24); one of the victims had positively identified Kenneth Wright, Wright's brother and another passenger in the car in which Wright was stopped shortly after the robbery, as the other robber (Trial Tr., p. 168, L. 9 – p. 170, L. 14; p. 208, L. 8 – p. 210, L. 14); both Wright brothers possessed shoes matching the footprints left at or near the robbery (Trial Tr., p. 123, L. 15 – p. 145, L. 14; p. 146, L. 15 – p. 151, L. 12); Wright and his associates were in possession of bills in numbers and

denominations closely matching the money stolen in the robbery (Trial Tr., p. 275, L. 21 – p. 276, L. 8; p. 326, L. 24 – p. 327, L. 12; p. 359, L. 12 – p. 366, L. 12); ski masks consistent with those worn by the robbers were found in the car in which Wright was a passenger (Trial Tr., p. 95, Ls. 8-15; p. 175, Ls. 15-21; p. 272, Ls. 1-8; p. 342, L. 3 – p. 343, L. 6); the car in which Wright was later stopped was seen fleeing near the scene of the robbery shortly after the robbery (Trial Tr., p. 72, L.7 – p. 80, L. 13); Wright lied to police about his whereabouts and activities at the time of the crime and even about his shoe size (Trial Tr., p. 267, L. 3 – p. 268, L. 1; p. 332, Ls. 11-22); Wright was present (and photographed) at businesses near the scene of the robbery shortly before the robbery (Trial Tr., p. 293, L. 13 – p. 299, L. 21; p. 301, L. 25 – p. 320, L. 11; p. 327, L. 13 – p. 332, L. 10; p. 333, L. 3 – p. 341, L. 6); Wright tried to conceal the money in his physical possession (Trial Tr., p. 216, L. 25 – p. 219, L. 7); and photographs taken near the time and place of the robbery showed Wright wearing a hoody jacket identical to one worn by one of the robbers (Trial Tr., p. 255, L. 25 – p. 256, L. 22; p. 259, L. 18 – p. 263, L. 4; p. 276, L. 9 – p. 278, L. 2; p. 333, L. 3 – p. 341, L. 6).

The district court entered judgment, sentencing Wright to life with fifteen years determinate. (R., pp. 98-99.) Wright filed a timely notice of appeal. (R., pp. 102-06.)

ISSUES

Wright states the issues on appeal as:

1. Did the district court violate Mr. Wright's due process rights to a fair trial and the presumption of innocence when it placed him in restraints and informed the jury that he was so restrained?

2. Was Mr. Wright deprived of his constitutional rights to due process and a fair trial when the prosecutor elicited testimony that Mr. Wright invoked his Fourth Amendment right and referred to that fact in opening statements and closing arguments?

3. Did the district court err when it permitted the State to offer irrelevant prior bad acts evidence over Mr. Wright's objection?

4. Under the doctrine of cumulative error, was Mr. Wright's right to a fair trial denied as a result of the accumulation of serious errors throughout his trial?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Wright failed to show that the district court abused its discretion when it ordered that Wright appear for at least a short while in restraints after Wright became combative and threatening to court security personnel?

2. Has Wright failed to show prosecutorial misconduct for using evidence of Wright's attempts to obstruct the investigation as evidence of consciousness of guilt?

3. Has Wright failed to show that evidence he had entered a bank and behaved suspiciously the day before the robbery was irrelevant?

4. Has Wright failed to show that there was more than one preserved error to cumulate?

ARGUMENT

I.
Wright Has Failed To Show That The District Court Abused Its Discretion When It Ordered That Wright Appear For At Least A Short While In Restraints After Wright Became Combative And Threatening To Court Security Personnel

A. Introduction

During the second day of trial, just after the first witness had been cross-examined by his counsel, Wright interrupted the judge in order to try to make a statement. (Trial Tr., p. 48, Ls. 11-12.) The judge told Wright he "may not" make a statement. (Trial Tr., p. 48, L. 13.) Very shortly thereafter, and immediately after the next witness had been sworn but before he could testify, the court spontaneously ordered an unscheduled recess for defense counsel to consult with the defendant. (Trial Tr., p. 48, L. 25 – p. 49, L. 2.) Upon reconvening outside the presence of the jury the court put on the record that the marshal had informed it that "Mr. Wright has become combative and threatening to the Marshal and I have authorized, as a result of that, that he be restrained and continue to be restrained until further order." (Trial Tr., p. 49, Ls. 12-18.) Neither Wright nor his counsel disputed the marshal's report. (Id.)

The court then granted Wright's motion to proceed without counsel. (Trial Tr., p. 49, L. 18 – p. 55, L. 12.) During that colloquy the court made sure Wright was aware that if he was disruptive he could be removed from the courtroom or gagged and that if that happened he would be left without representation in the courtroom. (Trial Tr., p. 52, L. 20 – p. 53, L. 12.)

Before the jury was brought in Wright asked for removal of the restraints, but the court declined, referencing an incident "downstairs" and stating that it was

not going to have Wright "threatening the Marshals." (Trial Tr., p. 57, Ls. 7-13.) Again Wright did not dispute that there had been an incident or that he had threatened the marshals. (Id.) Once the jury was in place the court informed it that Wright had elected to represent himself and that there had been a "little fuss" and the court had ordered that "Mr. Wright be restrained," but that he would "loosen that up" if Wright "behaves himself here." (Trial Tr., p. 57, L. 22 – p. 58, L. 7.) The record does not indicate whether the restraints were either removed or in place at any other point of the trial. (See generally Trial Tr.; R., pp. 57-70, 72-81.)

Wright does not claim that using restraints because he threatened a marshal was an abuse of discretion. (See generally Appellant's brief, pp. 6-12.) Rather, he argues on appeal that the district court erred because it (1) ordered restraints to be used "without an evidentiary hearing," (2) informed the jury of the restraints, and (3) "failed to use the least restrictive and visible restraints available." (Appellant's brief, p. 8.) Application of the relevant law shows that Wright has failed to show an abuse of discretion.

B. Standard Of Review

The determination of whether to restrain a defendant at trial is discretionary. Deck v. Missouri, 544 U.S. 622, 629 (2005). A discretionary decision will be reversed on appeal only where there is a showing by the appellant of an abuse of discretion. See, e.g., State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 970 (2010) (abuse of discretion standard applied to challenge to admission of evidence).

C. Wright Has Failed To Show An Abuse Of Discretion In Relation To Ordering The Use Of Restraints

"[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." Deck v. Missouri, 544 U.S. 622, 629 (2005). "We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." Illinois v. Allen, 397 U.S. 337, 343 (1970). "The use of any restraint must be based upon a finding of the necessity for that restraint." State v. Hyde, 127 Idaho 140, 147, 898 P.2d 71, 78 (Ct. App. 1995).

Here the district court ordered restraints based on the finding that Wright had become combative and threatened the marshals. (Trial Tr., p. 49, Ls. 14-18; p. 57, Ls. 9-13.) On appeal Wright does not argue that his actions of becoming combative and threatening the marshals were insufficient grounds for the court's exercise of discretion. (Appellant's brief, pp. 6-12.) Instead, Wright argues on appeal that the district court erred by not holding a hearing (Appellant's brief, pp. 8-10); by informing the jury of the restraints (Appellant's brief, p. 10); and by not using the "least visible restraint possible" (Appellant's brief, pp. 11-12). None of these issues were preserved at trial, however.

The appellate court will address an issue raised for the first time on appeal only if the appellant shows fundamental error. State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 979 (2010). To demonstrate fundamental error the appellant

must show that the alleged error "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Id. at ___, 245 P.3d at 980. Application of this standard in this case shows Wright has failed to demonstrate fundamental error.

1. Wright Has Failed To Show Fundamental Error In The Lack Of A Hearing

Depriving the defense of an opportunity to challenge the need for restraints prior to the defendant's appearance before the jury in restraints can violate due process:

> We hold, therefore, that under the circumstances of this case, where the district court had originally ordered that the defendant stand trial without physical restraints, but then rescinded the order based upon information obtained in a hearing which neither the defendant nor his counsel were advised of or attended, where neither the defendant nor his attorney had any opportunity to contest the order or suggest a less visible means of restraint before the defendant was first exposed to the jury, and where timely objection to the restraints was made, the defendant's rights to a fair trial and to appear and defend in person and with counsel guaranteed by the due process clauses ... were violated, and he is entitled to a new trial.

State v. Crawford, 99 Idaho 87, 98, 577 P.2d 1135, 1146 (1978) (internal quotation marks omitted). However, if "counsel for the accused desires to object to the defendant being brought before the court in leg restraints, he or she should do so before the jurors arrive or after requesting a hearing outside the presence of the jury." State v. Knutson, 121 Idaho 101, 105, 822 P.2d 998, 1002 (Ct. App. 1992).

In this case the marshal informed the court that Wright had become combative and was threatening the marshal. (Trial Tr., p. 49, Ls. 14-16.) A court may rely upon such representations. State v. Moen, 94 Idaho 477, 479, 491 P.2d 858, 860 (1971) ("In exercising its discretion, the judge need not rely only upon evidence formally offered and admitted at trial. His knowledge may properly stem from official records or what law enforcement officers have told him."). The district court informed Wright in court before the jury entered that this was the ground for ordering Wright restrained during the proceedings. (Trial Tr., p. 49, Ls. 12-18.) Neither Wright nor his soon-to-be-discharged counsel objected or challenged the marshal's version of events. (Trial Tr., p. 49, L. 12 – p. 57, L. 13.) Wright did not dispute the marshal's representations or request a hearing to present additional evidence despite the opportunity to do so. He must therefore demonstrate on appeal fundamental error from the lack of a formal hearing.

Wright has failed to show constitutional error, the first prong of the fundamental error standard. Indeed, he has failed to show error at all. It is the defendant's burden to object prior to being seen by the jury. Knutson, 121 Idaho at 105, 822 P.2d at 1002. Only if the district court acted in a way to deprive Wright of the ability to make a timely objection is there constitutional error. Crawford, 99 Idaho at 98, 577 P.2d at 1146. Here the court provided ample opportunity for Wright to challenge the evidence that he had been combative and threatening. Wright has shown no constitutional error in the lack of a hearing.

Wright has also failed to show error that can be considered clear on the record. Wright was made aware of the district court's determination that he had

been combative and threatening and the source of the court's information to that effect. Yet Wright did not deny that he had been combative or threatening or otherwise challenge that finding of fact. There is nothing in the record suggesting that Wright disagreed with the court's finding that he had been combative and threatening or that he had any evidence to present that would show he had not been combative and threatening. There is a perfectly logical explanation for why Wright did not object: he knew he had been combative and threatening.

Finally, Wright bears the burden of showing prejudice. The record here suggests that Wright did not dispute the fact that he had been combative and threatening. The record certainly shows no contrary evidence. Lack of a formal hearing on this apparently uncontested fact did not prejudice Wright.

2. Wright Has Failed To Show Fundamental Error From The Court Telling The Jury About The Restraints

After returning from the break the court stated to the jury that there were two changes during the break—the discharge of defense counsel and the use of restraints. (Trial Tr., p. 57, L. 17 – p. 58, L. 8.) The court informed the jury of the reason for the change in restraint. (Id.) There was no objection or motion for a mistrial at that (id.), or any other, time. Wright apparently claims that the court could have avoided any prejudice to him by not speaking about the restraints. He has failed to demonstrate how informing the jury of the restraints constituted fundamental error.

First, Wright has shown no constitutional violation. It is "axiomatic" that the use of restraints cannot violate due process if the use of restraints was

unknown to the jury. State v. Miller, 131 Idaho 288, 293, 955 P.2d 603, 608 (Ct. App. 1998) (factual finding that jurors did not see restraints foreclosed due process violation claim). As set forth above, a defendant may be visibly restrained if the court, in the exercise of its discretion, finds sufficient grounds to do so. Deck v. Missouri, 544 U.S. 622, 629 (2005); Illinois v. Allen, 397 U.S. 337, 343 (1970); State v. Hyde, 127 Idaho 140, 147, 898 P.2d 71, 78 (Ct. App. 1995). The jury being aware of the restraints is therefore a necessary, but not sufficient, condition for finding a due process violation. Because the district court properly exercised its discretion to restrain him, Wright has failed to show any due process violation arising merely from the fact that the jury was aware of the restraints.

Nor is the error clear on the record. The record does not indicate that the jury was or would have remained unaware of the restraints. To the contrary, the district court informed the jury informed the jury of the reason for the restrains "so there's no question as far as what's going on" (Trial Tr., p. 58, Ls. 3-6), strongly indicating that the district court was aware that the jury would see the restraints. Thus, there is nothing clear in the record that the court could have avoided any potential prejudice arising from the use of restraints by merely not commenting on them.

Finally, Wright has shown no prejudice from the court's comments. Because the record does not support the inference that the jury would have remained ignorant of the restraints but for the court's comments, Wright's claims of prejudice are entirely speculative.

3. Wright Has Failed To Show Fundamental Error By The Alleged Failure To Use The Least Visible Means Of Restraint

Corollary to the rule that due process is not implicated if the jury is unaware of the restraints, some courts have held that a court ordering restraints that cannot be completely concealed from the jury must still use the "least visible" restraints necessary to secure the defendant to avoid undue prejudice. Stephenson v. Wilson, 619 F.3d 664, 668-69 (7th Cir. 2010) (and cases cited) (cited at Appellant's brief, p. 11.) A similar rule has been adopted in Idaho by statute prohibiting "any more restraint than is necessary." I.C. § 19-108; State v. Miller, 131 Idaho 288, 293, 955 P.2d 603, 608 (Ct. App. 1998). Because Wright did not at trial object that his restraint was more than necessary or show that less visible restraints could have been used, he has the burden of showing fundamental error on appeal.

There is no fundamental error because Wright has failed to show constitutional error, the first prong of the fundamental error test. As set forth above, a defendant may be visibly restrained if the court, in the exercise of its discretion, finds sufficient grounds to do so. Deck v. Missouri, 544 U.S. 622, 629 (2005); Illinois v. Allen, 397 U.S. 337, 343 (1970); State v. Hyde, 127 Idaho 140, 147, 898 P.2d 71, 78 (Ct. App. 1995). Indeed, such restraint may extend to gagging the defendant. Allen, 397 U.S. at 344 (defendant can be shackled and gagged "as a last resort"). Wright has failed to show that the restraints used were so prejudicial in relation to the risk he presented as to be an abuse of the trial court's discretion.

The error is not clear on the record. Nowhere in the record are the types of restraints used made clear. It is possible we are dealing with handcuffs, leg restraints, a shock belt, or even a belly chain. We simply do not know because Wright never asserted the claim that less visible restraints should be employed. Wright has failed to show on the record a clear abuse of discretion.

Finally, because Wright has failed to show that a less visible restraint was even possible, he has failed to show prejudice. Wright has failed to show fundamental error by his claim that the district court should have used a less visible restraint.

II.
Wright Has Failed To Show Prosecutorial Misconduct For Using Evidence Of Wright's Attempts To Obstruct The Investigation As Evidence Of Consciousness Of Guilt

A. Introduction

During the trial the prosecutor used evidence of Wright's attempts to obstruct the investigation, including not cooperating with efforts to photograph the soles of his shoes, hiding money, and lying in his interview, as evidence of consciousness of guilt. (7/7/10 Tr., p. 23, L. 5 – p. 24, L. 23; Trial Tr., p. 99, L. 8 – p. 100, L. 24; p. 111, L. 19 – p. 112, L. 9; p. 210, L. 24 – p. 212, L. 23; p. 216, L. 8 – p. 219, L. 15; p. 234, L. 11 – p. 235 L. 4; p. 251, L. 20 – p. 272, L. 17; 7/10/10 Tr., p. 105, L. 23 – p. 106, L. 7; p. 107, L. 19 – p. 108, L. 3; State's Exhibits 6, 7, 56.) For the first time on appeal Wright invokes the fundamental error rule and claims that his efforts at obstructing the investigation in relation to the photographing of the soles of his shoes were actually attempts to invoke his

Fourth Amendment rights. (Appellant's brief, pp. 12-21.) Wright's claim of fundamental error does not withstand analysis.

B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989).

C. Wright Has Failed To Show Fundamental Error In The Prosecution's Use Of Evidence That Wright Attempted To Obstruct The Investigation

Wright concedes that this appellate claim of error is unpreserved by timely objection to the trial court. (Appellant's brief, p. 13.) An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) the "defendant must demonstrate that the

error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Id. at ___, 245 P.3d at 978. Review shows that Wright has failed to show any of the three prongs necessary to prevail on his claim of fundamental error.

1. Wright Has Shown No Constitutional Error

Wright has failed to show that he was asserting a constitutional right by resisting efforts by police to view the bottoms of his shoes.[1] In State v. Curry, 103 Idaho 332, 334-35, 647 P.2d 788, 790-91 (Ct. App. 1982), officers stopped Curry and his companions on suspicion of burglary. They "asked Curry to hold his foot up so the officers could look at the sole of his shoe." Id. at 338, 647 P.2d 788, 794. In addressing Curry's claim that this constituted a search the Idaho Court of Appeals applied the expectation of privacy test of the Fourth Amendment, compared looking at the sole of the shoe to obtaining a handwriting or voice exemplar, in which there are no privacy rights, and held that "Curry did not have a reasonable expectation of privacy with respect to the physical characteristics of the soles of his shoes." Id.

The holding of the Idaho Court of Appeals that there is no privacy concern arising from a viewing of the bottom of a shoe in the course of a proper investigative stop is consistent with the holdings of other courts that have

[1] Wright does not assert that introduction of evidence of resistance to lawful police actions based upon a mistaken belief that such actions are unlawful raises due process concerns. (Appellant's brief, pp. 12-21.) The state therefore does not address that issue in this brief.

considered the question. There is no privacy expectation in the pattern of one's shoes, which are "shown to the world with every footstep." State v. Selvidge, 635 P.2d 736, 740 (Wash App., Div. 2, 1981). "The soles of a person's shoes, and especially the pattern on the soles of a person's shoes, are constantly exposed for public view, such as when we kneel to pray, when we lift our feet to walk or run, when we cross our legs or prop them up on a table or chair, when we remove our shoes and leave them lying idly on the floor, or as in this case, when we leave footprints in the mud or dirt." State v. Bates, 495 A.2d 422, 427 (N.J. App. 1985). Like a voice exemplar, examination of the physical characteristics of the soles of a suspect's shoes "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." State v. Coleman, 593 P.2d 684, 686-87 (Az. App. 1978), *approved in relevant part* 593 P.2d 653 (Az. 1979) (internal quotation marks omitted).

> The physical characteristics of the soles of a person's shoes, like one's voice, face, and handwriting, are constantly exposed to the public. Footprints on the ground are visible for all to see. People display the soles of their shoes when they cross their legs, climb stairs, or put their feet up on furniture. Viewing the soles of a person's shoes does not "constitute [ ] the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny. ..."

Commonwealth v. Billings, 676 N.E.2d 62, 65 (Mass. App. 1997) (brackets original) (quoting Cupp v. Murphy, 412 U.S. 291, 295 (1973)).

In addition, compelling a defendant to provide ink printing of his shoes and feet as part of a grand jury investigation has been held to be like fingerprinting and therefore not an intrusion into privacy protected by the Fourth Amendment. United States v. Ferri, 778 F.2d 985, 994-96 (3rd Cir. 1985). Indeed, Wright cites

to no court that has found a privacy expectation in the pattern on the soles of one's shoes such that requiring a suspect to show it to officers constitutes a search. (Appellant's brief, pp. 12-21.)

Wright first argues that the analysis in Curry—that there is no reasonable expectation of privacy in the soles of the shoes—is *dicta*. (Appellant's brief, pp. 16-17.) Although the holding of the case was that the *seizure* of Curry's shoes without a warrant was proper upon his arrest based on probable cause, that holding was based on the analysis that the evidence leading to probable cause to arrest (matching footprints to Curry's shoes) was not obtained by an improper search. Curry, 103 Idaho at 338, 647 P.2d at 794. That Curry had no privacy interest infringed by looking at the soles of his shoes was thus central to the court's holding that the seizure of the known relevant evidence (the shoes) was lawful, not mere *dicta*.

Even if the analysis in Curry could be characterized as *dicta* the analysis is still correct: Wright had no reasonable expectation of privacy infringed by photographing the soles of his shoes. Curry, 103 Idaho at 338, 647 P.2d at 794; Ferri, 778 F.2d at 994-96; Coleman, 593 P.2d at 686-87; Billings, 676 N.E.2d at 65; Bates, 495 A.2d at 427; Selvidge, 635 P.2d at 740. Wright argues that the "logic" of these cases has been "overruled" by precedent of the Supreme Court of the United States. (Appellant's brief, pp. 17-18.) He asserts that in Arizona v. Hicks, 480 U.S. 321 (1987), where the Court stated that moving stereo equipment in the defendant's house to find serial numbers constituted a search, the "Supreme Court[] reject[ed] the idea that a *de minimis* search is of no

constitutional significance." (Appellant's brief, p. 18.) The flaw in this argument is that nowhere in Curry is the concept of a *de minimis* search even mentioned. Rather, the case was decided on the lack of a reasonable expectation of privacy, Curry, 103 Idaho at 338, 647 P.2d at 794 ("Curry did not have a reasonable expectation of privacy with respect to the physical characteristics of the soles of his shoes."); a concept, to undersigned's knowledge, that has not been overruled by the Supreme Court.

If Wright had left fingerprints instead of shoe prints at the scene of the crime, there is little doubt that taking his fingerprints for comparison would not have been a search. See United States v. Dionisio, 410 U.S. 1, 14 (1973) (requiring the provision of a voice exemplar, like fingerprinting, is not a search). That he left shoe prints instead is not of constitutional significance. Taking a photograph of the bottom of his shoe, like inking his fingers and taking impressions, did not intrude on his reasonable expectation of privacy and was therefore not a search. Wright's claim of fundamental error fails.

2. Wright Has Shown No Clear Error

Wright's claim of fundamental error fails on the second prong of the test because the error is not plain on the record. It is improper for a prosecutor to request a jury to infer guilt from the invocation of a constitutional right. Greer v. Miller, 483 U.S. 756, 764-65 (1987) (mere reference to silence not enough; state must use evidence to create inference of guilt). Thus, it is improper for a prosecutor to comment on "a defendant's refusal to consent to a search." State

v. Betancourt, ___ Idaho ___, ___ P.3d ___, 2011 WL 3305382, *5 (Idaho App., Aug. 3, 2011). Wright has failed to show plain error for two reasons.

First, as noted above, Wright had no right to refuse the photographing or other observation of the physical characteristics of his shoes. Wright has not argued, much less presented authority, suggesting that a prosecutor may not talk about resistance to lawful police efforts to gather evidence. Because it is not clear from the record that any reference to any legitimate effort to invoke any actual constitutional right is involved in this case, Wright has failed to show clear error.

Second, the error is not clear on the record because the evidence does not show that Wright was in fact attempting to assert any Fourth Amendment right. At the scene of the stop Wright "voiced some concerns that I was violating his rights [by photographing his shoes], *picking on him because he is a black man* and that I was fishing because we hadn't found anything at that point." (Trial Tr., p. 100, Ls. 9-13 (emphasis added).) Another officer testified that Wright at one point stated he was not going to give permission to photograph the shoes, but that statement was apparently not in response to a request for a consent search but was instead in the face of officer insistence that he allow the shoes to be photographed. (Trial Tr., p. 212, Ls. 17-20.) A third officer, called by the defense, testified that Wright refused to cooperate with photographing his shoes unless the photographing was witnessed by his brother. (Trial Tr., p. 387, L. 13 – p. 389, L. 23.) The record suggests that, rather than asserting a Fourth Amendment right, Wright was refusing to cooperate with the officers' lawful

insistence that his shoes be photographed by claiming that the officers' attempt to look at the soles of his shoes was racial harassment and insisting that his brother witness the police investigation.

Wright's appellate argument that the prosecution was trying to get the jury to infer guilt from the exercise of a Fourth Amendment right is not supported by the record. On the contrary, the record appears to support the inference that Wright was simply resisting the lawful directives of the police for reasons unrelated to any assertion of Fourth Amendment rights.

3. Wright Has Shown No Prejudice

The entirety of Wright's prejudice argument is to note that the prosecutor acknowledged that the evidence of Wright's guilt was circumstantial.[2] (Appellant's brief, pp. 20-21.) Wright cannot prevail on this argument; his claim that any error is automatically prejudicial when the evidence is circumstantial is meritless.

[2] The evidence circumstantially showing Wright's guilt discussed by the prosecutor included evidence that one of the victims had positively identified Kenneth Wright as the other robber; both Wright brothers possessed shoes matching the footprints left at or near the robbery; Wright and his associates were in possession of bills in numbers and denominations closely matching the money stolen in the robbery; ski masks consistent with those worn by the robbers were found in the car in which Wright was a passenger; Wright generally matched the description of the robber (whose face was concealed by a ski mask); the presence of the car Wright was later stopped in being near the scene of the robbery shortly after the robbery; Wright lying about his whereabouts and activities at the time of the crime; Wright being present (and photographed) at businesses near the scene of the robbery shortly before the robbery; Wright trying to conceal the money in his possession; and the robber wore a hoody identical to one found in the car and worn by Wright in the photographs near the time of the robbery. (7/10/10 Tr., p. 101, L. 12 – p. 111, L. 25.)

III.
Wright Has Failed To Show That Evidence He Had Entered A Bank And Behaved Suspiciously The Day Before The Robbery Was Irrelevant

A. Introduction

During the trial the state presented evidence of the activities of Wright and his associates—Wright's brother, Kenneth, and Roosevelt Hogg—on the day before and the day of the robbery. Specifically, the state presented evidence that the three men had twice entered the Bank of America down the street from the robbery site with no apparent business the day before the robbery (Trial Tr., p. 301, L. 23 – p. 320, L. 11; p. 333, L. 3 – p. 343, L. 8; State's Exhibits 59, 60, 70, 71, 74); and entered the Albertsons across the street from the robbery site the morning of the robbery (Trial Tr., p. 293, L. 13 – p. 299, L. 21; p. 327, L. 13 – p. 333, L. 2; State's Exhibit 58b). Wright objected to evidence about his presence in the bank on the grounds it was irrelevant. (Trial Tr., p. 305, Ls. 19-24; p. 313, Ls. 2-3; p. 315, Ls. 12-13.) The district court overruled the objections. (Trial Tr., p. 305, L. 25 – p. 306, L. 10; p. 313, Ls. 4-15; p. 315, Ls. 14-15.)

On appeal Wright argues that evidence he "behaved suspiciously in a bank" is not "relevant to the question of whether Mr. Wright robbed the Cash Store, and should not have been admitted." (Appellant's brief, p. 23.) On the contrary, evidence that Wright, wearing clothing associated with the robber of the Cash Store, was with his known associates scouting out a bank near the Cash Store for a robbery the day before the robbery of the Cash Store is relevant evidence.

B. Standard Of Review

Relevance of evidence is reviewed de novo. State v. Gomez, 137 Idaho 671, 674, 52 P.3d 315, 318 (2002); State v. Reid, 151 Idaho 80, 86, 253 P.3d 754, 760 (Ct. App. 2011).

C. The Evidence Was Relevant

To be admissible, evidence must be relevant. I.R.E. 401, 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401; State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989). "'Evidence of a plan or design or scheme is relevant, if it tends by reasonable inference to establish the commission of the crime charged.'" State v. Truman, 150 Idaho 714, 721, 249 P.3d 1169, 1176 (Ct. App. 2010) (quoting State v. Alford, 47 Idaho 162, 174, 272 P. 1010, 1013 (1928)). Evidence that Wright was out with his associates looking for a place to rob, the day before the charged robbery, in the vicinity of the robbery, while dressed in clothes later worn by the robbers, is undoubtedly relevant.[3]

IV.
Wright Has Failed To Show That There Was More Than One Preserved Error To Cumulate

Under the doctrine of cumulative error, a series of trial errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v.

[3] The state also asserts that any error in admitting irrelevant evidence is harmless in light of the overwhelming evidence of guilt as set forth in the Statement of the Facts and Course of the Proceedings, above.

Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the cumulative error doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). Cumulative error analysis does not, however, include errors neither objected to nor found fundamental. State v. Perry, 150 Idaho 209, 220, 245 P.3d 961, 982 (2010). Wright has failed to show any error, much less two or more preserved errors. Thus, the doctrine of cumulative error does not apply in this case. See, e.g., LaBelle v. State, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997).

CONCLUSION

The state respectfully requests this Court to affirm Wright's conviction for robbery.

DATED this 18th day of November, 2011.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of November 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
STATE APPELLATE PUBLIC DEFENDER

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

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm