4-25-2016

State v. Montgomery Appellant's Brief Dckt. 43795

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43795**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
	)	**NO. CR 2014-18207**
v.	)	
	)	
DANIEL MONTGOMERY,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

_____

HONORABLE CYNTHIA K C MEYER
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Mr. Montgomery appeals from the district court's Judgment – Suspended Execution. Mr. Montgomery was found guilty of unlawful discharge of a firearm at an occupied motor vehicle. On appeal, Mr. Montgomery asserts that the district court abused its discretion when it allowed the State to present the testimony of two non-disclosed rebuttal witnesses. He asserts that the district court misinterpreted the language of I.C.R. 16(b)(6), stating that the State must disclose all witness that may testify, regardless of whether they will testify. While Idaho Courts have previously held that the State does not have to disclose rebuttal witnesses, these cases are based solely upon the now amended statute, I.C. § 19-1302, and are either not biding precedent, as they are not based upon an analysis of the Idaho Criminal Rules or must be overturned.

Additionally, Mr. Montgomery asserts that the prosecution committed misconduct when the prosecutor repeatedly made unfounded statements during closing that Mr. Montgomery and his witnesses had lied during their testimony. The prosecutorial misconduct was not objected to; however, Mr. Montgomery asserts that the misconduct amounted to fundamental error, that it was not harmless, and that his conviction must be overturned.

Statement of the Facts and Course of Proceedings

On November 19, 2014, an Information was filed charging Mr. Montgomery with aggravated assault and unlawful discharge of a firearm at an occupied motor vehicle. (R., pp.63-64.)

The case proceeded to trial. The State's first witness was James Newell, the passenger in the vehicle that Mr. Montgomery fired his firearm toward. (Tr., p.100, L.15 – p.121, L.17.) He testified that after turning on to a street too quickly and hitting a trashcan, the vehicle he was riding in was stopped by an individual pointing a handgun towards the windshield of the vehicle. (Tr., p.108, Ls.5-15, p.110, Ls.2-18.) After the driver exited the Jeep, had a limited conversation with Mr. Montgomery, and returned into the driver's seat, the Jeep began rolling forward and Mr. Newell heard gunshots. (Tr., p.114, L.25 – p.118, L.20.) Some of the shots fired hit the Jeep. (Tr., p.121, L.2 – p.122, L.24.) Mr. Newell did not remember the Jeep making contact with Mr. Montgomery. (Tr., p.135, Ls.13-24.)

Macey Haddorff was at her home near where the events of the evening transpired. (Tr., p.153, L.8 – p.157, L.10.) She testified that after the Jeep hit the trashcan, her neighbor, Mr. Montgomery, stopped the vehicle with his gun drawn. (Tr., p.156, L.5 – p.159, L.3.) Eventually the Jeep began rolling forward and as it drove off, Mr. Montgomery started shooting at the vehicle. (Tr., p.159, L.22 – p.160, L.20.)

Madeline Detar, a guest of Ms. Haddorff's, also witnessed the events of that evening. (Tr., p.172, L.21 – p.176, p.11.) She testified that after the Jeep hit the trashcan, the vehicle stopped, a man (Mr. Montgomery) had a gun out and was talking to the driver, the driver got back in the Jeep, inched forward, Mr. Montgomery moved

out of the way, and then he began shooting at the vehicle as it drove away. (Tr., p.174, L.2 – p.176, L.11.)

Brian Beeler, another neighbor of Mr. Montgomery's, was not home at the time of the altercation, but had home video cameras pointed in the direction of the altercation and provided those recordings to police. (Tr., p.196, L.5 – p.204, L.23.) The videos taken from his home were admitted as State's Exhibits 8 and 9 and depict the altercation. (Tr., p.206, L.6 – p.208, L.1; State's Exhibit's 8 and 9.)

Jacob Nielsen, one of the first officers to respond, made contact with Mr. Montgomery who turned over the hand gun involved in the incident. (Tr., p.220, L.8 – p.226, L.9.) Following Officer Nielsen's testimony, the State rested. (Tr., p.231, Ls.24-25.)

Mr. Montgomery's first witness was his wife, Sonia Montgomery. (Tr., p.242, L.6 – p.243, L.1.) Ms. Montgomery testified about hearing the Jeep hit the trashcan and screeching tires. (Tr., p.245, L.1 – p.248, L.5.) She saw her husband stop the Jeep and talk with the driver. (Tr., p.249, L.15 – p.250, L.3.) When the driver got back into the Jeep, he accelerated and made contact with Mr. Montgomery. (Tr., p.250, Ls.5-18.) Ms. Montgomery thought that her husband had been run over and killed. (Tr., p.250, Ls.19-22.) She suffered what she thought was a panic attack and some of her memories from that night were fuzzy. (Tr., p.251, L.2 –p.252, L.10.)

Lindsay Montgomery, Mr. Montgomery's daughter, also witnessed the events of that night. (Tr., p.263, L.10 – p.266, L.7.) She tried to contact a neighbor to get help and recorded some of the events that transpired on her cell phone. (Tr., p.266, L.11 – p.267, L.15; Defense Exhibit A.)

Kyle Decker, another neighbor, testified that he was home and observed the events that evening. (Tr., p.273, L.7 – p.282, L.21.) He saw Mr. Montgomery get in front of the Jeep and confront the driver. (Tr., p.276, L.20 – p.277, L.23.) Mr. Decker thought that Mr. Montgomery had his weapon holstered until the Jeep began moving forward after the driver got back inside. (Tr., p.285, L.14 – p.286, L.6.) He noted, "[f]rom what I remember, he did not [have the gun out]." (Tr., p.285, Ls.20-22.) He saw the Jeep hit Mr. Montgomery, Mr. Montgomery somehow get out of the vehicle's path, and Mr. Montgomery fired shots at the vehicle shortly after he was hit. (Tr., p.280, L.10 – p.282, L.21.)

The next witness, Sai Wills, was another neighbor of Mr. Montgomery's. (Tr., p.289, Ls.2-21.) She called 911 shortly after the Jeep entered the neighborhood. (Tr., p.292, L.6 – p.293, L.23.) She observed the Jeep lurch toward Mr. Montgomery forcing him to have to jump out of the way. (Tr., p.295, Ls.7-14.) It was only after the Jeep lurched towards Mr. Montgomery that he "pulled" the handgun and shot at the vehicle. (Tr., p.295, L.20 – p.296, L.1.)

Cory Megis, another neighbor testified that he heard the screeching of tires and a crash and then ran out to see what had happened. (Tr., p.303, L.5 – p.304, L.21.) He saw Mr. Montgomery stop the Jeep, the driver exit and walk towards Mr. Montgomery, the driver return to the vehicle, the vehicle move forward, Mr. Montgomery pushed himself out of the way of the Jeep, and then discharged his weapon towards the Jeep. (Tr., p.306, L.11 – p.309, L.23.) Mr. Megis noted that Mr. Montgomery's gun was holstered until the driver got back into the Jeep, "but that's what I remember." (Tr., p.311, L.23 – p.312, L.3.)

Mr. Montgomery then took the stand in his defense. He testified that, based on the way the Jeep was being driven, it was a danger to his family, his neighbors, and himself. (Tr., p.322, Ls.12-16.) He stopped the vehicle, the driver showed signs of intoxication, walked towards Mr. Montgomery in a way that made him believe he was reaching for his gun, and eventually the driver got back into the drivers seat. (Tr., p.323, L.14 – p.325, L.20.) After the driver got back in the Jeep, it began moving forward and struck Mr. Montgomery, the driver then accelerated. (Tr., p.326, L.8 – p.327, L.4.)

Mr. Montgomery then testified that:

> I thought he was going to try to kill me. I had to quickly move out of the way as quickly as possible. At the same time, I knew there were people behind me. I knew they were in danger, I was in danger, and I tried to disable the vehicle and fired a shot as I was moving – while I was still in front of the vehicle. And I don't know how I got out from in front of the vehicle. I don't how I did that.

(Tr., p.327, Ls.6-13.) He then fired a shot toward the engine compartment and, as the car drove past him and away, he fired additional shots towards the rear driver's side tire. (Tr., p.327, L.14 – p.328, L.9.)

The day after he was released from jail, Mr. Montgomery sought medical attention from the Kootenai Medical Center. (Tr., p.330, Ls.9-19.) He learned that he had suffered contusions and, later, that he had suffered a displaced hip from the impact of the vehicle. (Tr., p.330, L.20 – p.331, L.8.)

On cross-examination, the prosecution referenced a police interview where Mr. Montgomery had previously stated that he pulled out the gun after being hit, not that it was pulled as he initially entered the roadway. (Tr., p.335, L.4 – p.336, L.4.) Mr. Montgomery explained that at the time he was talking to officers, he was telling

them everything to the best of his recollection, but he knew the incident would be on video and anything that he had remembered incorrectly would be clarified by the video. (Tr., p.347, L.15 – p.348, L.5.)

Defense counsel then rested. (Tr., p.356, Ls.17-18.)

The State recalled Officer Nielsen as a rebuttal witness. (Tr., p.366, Ls.20-24.) When he booked Mr. Montgomery, the only injury he mentioned was bulging disks. (Tr., p.370, Ls.22-25.) Detective Johann Schmitz was also called as a rebuttal witness and testified that he had interviewed Mr. Montgomery. (Tr., p.375, L.5 – p.384, L.8.) During cross-examination, a portion of the video of the interview was then played for the jury. (Tr., p.389, Ls.5-15; Defense Exhibit B.)

Prior to the State's final rebuttal witnesses taking the stand, defense counsel objected noting that the witnesses, Officer Gilmore and Deputy Hart, had not been disclosed on the State's witnesses list and requested that they not be allowed to testify based upon an Idaho Criminal Rule 16(b)(6) discovery violation. (Tr., p.391, L.13 – p.395, L.24.) The district court allowed the witnesses to testify. (Tr., p.397, L.22 – p.400, L.6, p.401, Ls.17-20.)

Michael Hart testified that when he was booking Mr. Montgomery into jail, Mr. Montgomery told him that his health was good and that he had no injuries. (Tr., p.410, L.12 – p.411, L.5.) Joshua Gillmore testified that he examined the Jeep involved in the incident, specifically he took the tire that was flat and checked it for evidence. (Tr., p.415, Ls.3-13.) He noted that there were two bullet holes in the tire, a dent in the rim, and two bullet slugs found inside the tire. (Tr., p.415, L.19 – p.420, L.21.) The State then rested. (Tr., p.426, Ls.5-6.)

Mr. Montgomery was re-called to clarify that, at the time he was arrested, he did not think that he needed medical attention, but he later suffered abdominal pain and sought medical attention at that time. (Tr., p.426, L.23 – p.429, L.22.)

The jury was then instructed and both parties presented closing arguments. (Tr., p.430, L.24 – p.468, L.18.) During final closing argument, the prosecutor made comments that Mr. Montgomery and his witnesses had lied during their testimony. (Tr., p.460, L.10 – p.461, L.11, p.467, Ls.2-22.)

The jury returned its verdict, acquitting Mr. Montgomery of the aggravated assault charge and finding him guilty of the unlawful discharge of a firearm charge. (R., pp.214-215.) Ultimately, Mr. Montgomery was sentenced to a unified sentence of eight years, with four years fixed, suspended for a four year term of probation. (R., pp.225-228.) Mr. Montgomery filed a Notice of Appeal timely from the Judgment – Suspended Execution. (R., pp.233-235.)

ISSUES

1. Did the district court abuse its discretion when it allowed the State's non-disclosed witnesses to testify on rebuttal?

2. Did the State violate Mr. Montgomery's right to a fair trial by committing prosecutorial misconduct?

ARGUMENT

I.

The District Court Abused Its Discretion When It Allowed The State's Non-Disclosed Witnesses To Testify On Rebuttal

A. Introduction

Mr. Montgomery asserts that the district court abused its discretion when it allowed the State to present the testimony of two non-disclosed rebuttal witnesses. He asserts that under the plain language of I.C.R. 16(b)(6), the State must disclose all witness who may testify. He acknowledges that Idaho Courts have previously held otherwise, but he maintains that these cases are based solely upon the now amended statute, I.C. § 19-1302, and are either not biding precedent or must be overturned.

B. Standard Of Review

The choice of an appropriate discovery violation sanction is within the discretion of the trial court. *State v. Wilson,* 158 Idaho 585, 588 (Ct. App. 2015). To determine whether a sanction will be imposed and what it will be, the trial court must balance the culpability of the disobedient party with the resulting prejudice to the innocent party in light of the dual purposes of encouraging compliance with discovery and punishing misconduct. *Id.; Roe v. Doe,* 129 Idaho 663, 667 (Ct. App. 1996). In reviewing a discretionary decision, the reviewing court asks: (1) whether the trial court correctly perceived the issue as one of discretion, (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and (3) whether the trial court reached its decision by an exercise of reason. *State v. Hedger,* 115 Idaho 598, 600 (1989).

C. Relevant Factual Information

Two of the witnesses that the State wanted to call as rebuttal witnesses, Officer Gilmore and Deputy Hart, had not been disclosed despite a request for potential witness by the defense. (Augmentation:[1] Defendant's Request for Discovery; Plaintiff's Witness List; Supplemental Plaintiff's Witness List.) Prior to the State's final rebuttal witnesses taking the stand, defense counsel objected noting that Officer Gilmore and Deputy Hart had not been disclosed on the State's witnesses list, and defense counsel requested that they not be allowed to testify based upon an Idaho Criminal Rule 16(b)(6) discovery violation. (Tr., p.391, L.13 – p.395, L.24.) Defense counsel made her objection based upon a footnote in *State v. Wilson,* 158 Idaho 585, 589 n. 2 (Ct. App. 2015). (Tr., p.391, L.13 – p.395, L.24.) The State asserted that case law stands for the proposition that the prosecution does not have to disclose rebuttal witnesses. (Tr., p.394, Ls.8-16.) The district court allowed the witnesses to testify. (Tr., p.397, L.22 – p.400, L.6, p.401, Ls.17-20.)

D. The Failure To Disclose The Rebuttal Witnesses Was A Violation Of I.C.R 16

The relevant portion of Idaho Criminal Rule 16(b)(6) states that, "[u]pon written request of the defendant the prosecuting attorney shall furnish to the defendant a written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial . . ." Idaho Criminal Rule 16(b)(6)'s plain language appears to contradict current Idaho case law. However, as the Idaho Court of Appeals noted in the footnote in *Wilson*, the case law is based upon

[1] A Motion to Augment was filed contemporaneously with this Appellant's Brief.

a statute, I.C. § 19-1302 which required the prosecuting attorney to endorse on any information charging a felony the names of all witnesses known to the prosecutor at the time of the filing of the information, but also included a proviso "that the witnesses called by the state in rebuttal need not be endorsed upon the information." *Wilson,* 158 Idaho at 589 n. 2 (quoting *State v. Olsen,* 103 Idaho 278, 283 (1982)). *Olsen* specifically noted that "[t]he state was under no statutory duty to disclose [the witness'] identity . . ." *Olsen*, 103 Idaho at 283. The Court in *Olsen* did not address whether the Criminal Rules, as they existed at that time, required disclosure. *Id.* at 282-284. In 1989, an amendment to I.C. § 19–1302 removed the requirement that the names of witnesses be endorsed on the information and the associated proviso. 1989 Idaho Sess. Laws 867.

The series of cases following *Olsen* all broadly state that a prosecutor does not have a duty to disclose rebuttal witnesses: *State v. Pierce* held that "there is no constitutional duty, nor any requirement under Rule 16(a), for the state to disclose potentially inclupatory testimony of a rebuttal witness." *State v. Pierce,* 107 Idaho 96, 106–07 (Ct. App. 1984). The *Pierce* Court relied upon *Olsen* and I.C. § 19–1302 in support of the holding. *Id. State v. Lopez* stated that "[t]he prosecutor's duty to disclose witnesses does not extend to persons called for rebuttal." *State v. Lopez,* 107 Idaho 726, 739 (Ct. App. 1984). *Lopez* cited *Pierce* as the only support of this proposition. *Id.*

In a case following the 1989 amendment to I.C. § 19–1302, *State v. Dye,* the Court noted that "the state avoided the granting of Dye's motions for a mistrial and continuance by limiting the potential use of [the witness] to that of a rebuttal witness to testify as to a prior inconsistent statement should Dye testify." *State v. Dye,* 124 Idaho 250, 253 (Ct. App. 1993). In support of this assertion, the *Dye* Court cited only *Lopez*

and failed to acknowledge that I.C. § 19–1302 had been amended. *Id.* Similarly, *Queen v. State,* stated that "the state's disclosure duties pursuant to I.C.R. 16(b)(6) do not extend to persons called as rebuttal witnesses." *Queen v. State,* 146 Idaho 502, 504 (Ct. App. 2008). *Queen* again relied only upon *Lopez* in support of this conclusion. *Id.* In *State v. Jones*, the Court made a comment that the State does not need to disclose witnesses offered only for chain of custody or "during rebuttal." *State v. Jones*, 125 Idaho 477, 488 (1994). However, in *Jones*, the Court reasoned the testimony was not rebuttal testimony and provided no reference to the asserted rebuttal witness standard. *Id.*

The disclosure of witnesses is a procedural issue that is governed by the Criminal Rules as written and adopted by the Idaho Supreme Court. *See generally* I.C.R. 16. No case following the 1989 amendment to I.C. § 19–1302 has actually analyzed whether the language of I.C.R. 16(b)(6) requires the disclosure of rebuttal witnesses that are considered prior to trial, but have all merely relied upon precedent that does not actually stand for its stated proposition. As such, Mr. Montgomery asserts that this Court should find that this line of cases is not binding authority on the issue of whether I.C.R. 16(b)(6) requires the disclosure of rebuttal witnesses.

To the extent that the Court finds these case to have precedential value, Mr. Montgomery asks this Court to overrule cases following the 1989 amendment to I.C. § 19–1302 that hold that the State is not required to disclose rebuttal witnesses. Stare decisis dictates that the Court "follow controlling precedent, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overturning it is necessary to vindicate plain, obvious principles of law and remedy continued injustice."

State v. Bradshaw, 155 Idaho 437, 439 (Ct. App. 2013); *State v. Grant,* 154 Idaho 281, 287 (2013). The cases following the 1989 amendment no longer have any legal support and, in light of I.C.R. 16(b)(6), are now plainly, manifestly wrong.

Mr. Montgomery asserts that this Court must look to the language of I.C.R. 16 to determine if there was a discovery violation by the State. I.C.R. 16 does not limit the requirement to discover the names of potential witnesses to only those witnesses testifying in the State's case in chief, and contains no exception for rebuttal witnesses. I.C.R. 16(b)(6). The plain language of the Rule requires that all potential State witnesses, both testifying in the case in chief and in rebuttal, must be disclosed in the witness list. "The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *Verska v. Saint Alphonsus Reg'l Medical Ctr*., 151 Idaho 889, 893 (2011) (internal quotation omitted). Mr. Montgomery recognizes that I.C.R. 16 is not a statute, but asserts that the same logic should be used in construing the language of the Criminal Rules. Under the plain language of the rule - "the prosecuting attorney shall furnish to the defendant a written list of the names . . . of all persons . . .who may be called by the state as witnesses at the trial . . ." – the State must disclose all witnesses that may be called at trial. The State's failure to do so was a discovery violation.

E. The District Court Abuse Its Discretion When It Allowed The State's Non-Disclosed Witness To Testify On Rebuttal

Both of the State's non-disclosed witnesses were law enforcement officers who worked on the case. One of the witnesses had authored a report that had been previously disclosed. (Tr., p.391, Ls.18-23.) Presumably, neither witness was unknown to the State prior to the start of trial.

When a party has failed to comply with discovery, the trial court may impose sanctions, including the exclusion of a witness. *Wilson,* 158 Idaho at 588*;* I.C.R. 16(f)(2), 16(j). Mr. Montgomery asserts that the district court abused its discretion when it allowed the State to present non-disclosed witnesses on rebuttal. He maintains that exclusion of the witnesses was the proper sanction for the violation.

The plain language of I.C.R. 16(b)(6) does not provide any exception to the disclosure requirement and the case law related to the disclosure of rebuttal witnesses by the State is not legally based upon a motion made under the Criminal Rules. As such, the district court failed to act consistently with the applicable legal standards and did not reach its decision when it allowed Officer Gilmore and Deputy Hart to testify based upon an exercise of reason.

F. The State Will Be Unable To Prove That The Admission Of Non-Disclosed Rebuttal Witnesses Is Harmless Beyond A Reasonable Doubt

The harmless error doctrine has been defined by this Court: "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman v. California,* 386 U.S. 18, 24 (1967)). Where alleged error is followed by a contemporaneous

objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman*. *See State v. Perry*, 150 Idaho 209, 227 (2010). The State will simply be unable to prove that the admission of the non-disclosed rebuttal witnesses is harmless beyond a reasonable doubt.

II.

The State Violated Mr. Montgomery's Right To A Fair Trial By Committing Prosecutorial Misconduct

A. Introduction

Mr. Montgomery asserts that the prosecutor committed misconduct in his case which requires the vacation of his conviction. The violations occurred when the prosecutor repeatedly made unfounded statements during closing that Mr. Montgomery and his witnesses had lied during their testimony. Although defense counsel did not object to these instances of misconduct, Mr. Montgomery asserts that the prosecutorial misconduct amounted to fundamental error, was not harmless and, as such, this Court should vacate his conviction for unlawful discharge of a firearm into an occupied vehicle.

The prosecution committed misconduct which rises to the level of fundamental error because the misconduct was related to one or more of Mr. Montgomery's constitutional rights and was so egregious that it may have contributed to the jury's verdicts. The unfairness created by the prosecutor's misconduct resulted in Mr. Montgomery being denied due process of law and was in violation of his right to a

fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution.

B. Standard Of Review

Because Mr. Montgomery's prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2 (2006). Trial error ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v. Adams*, 147 Idaho 857, 861 (Ct. App. 2009). On appeal, Mr. Montgomery raises instances of un-objected to misconduct. Because these claims of error are raised for the first time on appeal, Mr. Montgomery must establish that the errors are reviewable as "fundamental error." *State v. Perry*, 150 Idaho 209, 222 (2010). The Idaho Supreme Court stated that to obtain relief on appeal for fundamental error:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, 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) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id. (footnote omitted). Thus, on a claim of fundamental error, a defendant must first show that the alleged error "violates one or more of the defendant's unwaived constitutional rights," and that the error "plainly exists" in that the error was plain, clear, or obvious. *Id.* at 228. If the alleged error satisfies the first two elements of the *Perry* test, the error is reviewable. *Id.* To obtain appellate relief, however, the defendant must further persuade the reviewing court that the error was not harmless, i.e., that there is a reasonable possibility that the error affected the outcome of the trial. *Id.* at 226-228.

C. The State Violated Mr. Montgomery's Right To A Fair Trial By Committing Prosecutorial Misconduct

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon,* 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall…deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be…deprived of life, liberty or property without due process of law." ID. CONST. art. I, §13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters,* 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *State v. Sanchez,* 142 Idaho 309, 318 (Ct. App. 2005); *Greer v. Miller,* 483 U.S. 756, 765 (1987). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. *Id.* The hallmark of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips,* 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

1. The Prosecution Committed Misconduct By Encroaching Upon The Jury's Function To Make Credibility Determinations When It Repeatedly Maligned Mr. Montgomery And His Witness By Asserting That They Had Lied To The Jury

In the case at hand, during final closing argument, the prosecutor made improper comments that Mr. Montgomery and his witnesses had lied during their testimony:

> You heard some testimony, some of Mr. Montgomery's witnesses took the stand. Mr. Kyle Decker took the stand. . . .
>
> He said Dan had the gun holstered and he only drew it after Mr. Camacho got back in the vehicle.
>
> That's not what you saw on the video. Mr. Kyle Decker is not to be believed. He lied to you. That's not what you saw on the video.
>
> . . .
>
> Sai Wills took the stand and testified for Mr. Montgomery. The gun was not drawn until after the vehicle stopped. That's not what you saw in the video. She lied to you.
>
> Cory Megis testified the gun was holstered. He only drew the gun after the driver got back in the car. That's not what you saw on the video. He lied to you, too.
>
> Mr. Montgomery's wife took the stand and lied to you. She thought he got run over.

(Tr., p.460, L.10 – p.461, L.11.)

> . . .[W]atch where Timothy Camacho's hands are while he's being held at gunpoint. You don't see him trying to grab the gun, like you heard. You don't see that on either video.
>
> Ladies and gentleman, you heard Mr. Montgomery lie to you. He told the officers, I didn't pull the gun out. I wasn't afraid until the driver got back in the car, that's when I started having fear.
>
> Well, if that's when he stared having fear, then why didn't he pull the gun out to stop the car? Why? Why did he change his story after he sees the video and what really happened?

> His witnesses testified inconsistently with what you saw on the video. Dan told the officers inconsistently with what was on the video until after he saw in court. Then he changes his story. And what did he tell you?
>
> Well, I knew my neighbor had a video, I knew it was being taped, and I knew if I was saying anything that wasn't true, you guys would just figure out what you saw on the video anyway.

(Tr., p.467, Ls.2-22.)

Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Phillips,* 144 Idaho 82, 86 (Ct. App. 2007) (quoting *Herring v. New York,* 422 U.S. 853, 862 (1975)). Its purpose "is to enlighten the jury and to help the jurors remember and interpret the evidence." *Id.* (quoting *State v. Reynolds,* 120 Idaho 445, 450 (Ct. App. 1991)). "Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *Id.* (quoting *State v. Sheahan,* 139 Idaho 267, 280 (2003)). However, considerable latitude has its limits, both in matters expressly stated and those implied. *Id.*

Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. *State v. Irwin,* 9 Idaho 35, ___, 71 P. 608, 610 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.* The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*

In the case at hand, the prosecution asked the jury to make a decision based upon the unfounded assertion that Mr. Montgomery and several of his witnesses had lied to the jury. The prosecution's statements went much further than the permissible bounds allowed to encourage a jury to question the credibility of witnesses.

Closing argument should not include the prosecutors personal opinions and beliefs about the credibility of a witness or inflammatory words employed in describing the defendant. *Phillips,* 144 Idaho at 86. Generally, it may be improper to label the defendant as a "liar," for testimony given in his or her defense. *See State v. Kuhn,* 139 Idaho 710, 716 (Ct. App. 2003). Even when the defendant admitted to lying in connection with the case, excessive labeling of the defendant as a "liar" could be viewed as an improper attempt to obtain a finding of guilt by disparaging the defendant before the jury. *State v. Gross*, 146 Idaho 15, 19 (Ct. App. 2008).

In *Lovelass,* the prosecutor informed the jury in closing argument that Lovelass had committed "full-fledged perjury," that Lovelass had lied on more than one occasion, and everything he said to the jury was fabricated. *State v. Lovelass*, 133 Idaho 160, 169 (Ct. App. 1999). The *Lovelass* Court stated that in closing argument, "both the prosecutor and defense counsel are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom," and that this includes "the right to identify how, from the party's perspective, the evidence confirms or calls into doubt the credibility of particular witnesses." *Id*. at 168 (citation omitted). However, "it is improper for a prosecutor to express a personal belief or opinion regarding the truth or falsity of any testimony or evidence or as to the guilt of the defendant." *Id*. (citation omitted). The Court of Appeals held that the comments did not

constitute fundamental error as they appeared to have fallen within the broad range of fair comment on the evidence rather than an expression of the prosecutor's personal belief, but also recognized that the prosecutor's comments were troubling and less than artful. *Id*. at 169.

In *State v. Garcia*, 100 Idaho 108 (1979), the Idaho Supreme Court found that the prosecutor's comments that, "Mr. Garcia has been caught in this rather apparent contradiction, the lie, he didn't have the beer pitcher," and, "I don't believe Mr. Garcia's story, too many coincidences, too many slips and slides around the facts," constituted fundamental error, but that the error was harmless. *Id*. at 110-11. The *Garcia* Court held that it was error for the prosecutor to express a personal belief or opinion as to the truth or falsity of the defendant's testimony, but in light of the overwhelming and conclusive evidence against Garcia, the error was harmless. *Id*. at 111.

In *Williams v. State*, 803 A.2d 927 (Del. Supr. 2002), reversible error was found due to the prosecutor's continued characterization of the defendant as a liar. The court found these improper comments as inflammatory, patently improper, and "so clearly impermissible that the trial judge had the duty to intervene, notwithstanding the absence of an objection by defense counsel." *Id*. at 930-31 (citations omitted). The *Williams* Court cautioned that the word "'liar' is an epithet to be used sparingly in argument to the jury." *Id*. at 930; *see also People v. Skinner*, 747 N.Y.S.2d 857, 858-59 (N.Y.A.D. 3rd Dept. 2002) (holding that even though trial counsel failed to object, reversal was warranted where, during closing argument, the prosecutor "made at least a dozen direct references to defendant being a liar, made other references to defendants 'false' and/or 'tailored story,'" and characterized the defendant's experts as his puppet, because such

prosecutorial misconduct "was so flagrant and pervasive as to compel the conclusion that defendant was deprived of a fair trial.") (citations omitted.)

One way a prosecutor can commit misconduct is by vouching during his closing arguments for the credibility of the evidence he presented. *State v. Wheeler*, 149 Idaho 364, 368 (Ct. App. 2010). A prosecutor improperly vouches for evidence when he puts the prestige of the state behind that evidence, expressing his personal opinions or beliefs about the quality of that evidence. *Id.*

Idaho Rule of Professional Conduct 3.4 provides, "A lawyer shall not ... in trial ... state a personal opinion as to ... the credibility of a witness ... or the guilt or innocence of an accused." The rule applies to both the prosecuting attorney and to defense counsel. *State v. Carson,* 151 Idaho 713, 721 (2011). With respect to due process, the United State's Supreme Court has explained why the prosecutor cannot vouch for a witness's credibility or express a personal opinion of the defendant's guilt stating:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. (quoting *United States v. Young,* 470 U.S. 1, 18–19 (1985)).

Mr. Montgomery recognizes that it is proper to explain how the evidence adduced at trial affects the credibility of various witnesses, including the defendant. *State v. Moses*, 156 Idaho 855, 873 (2014). However, he asserts that the repeated and

unfounded statements that witnesses had lied to the jury are more than a mere explanation of how the evidence affected the credibility of the witnesses.

Mr. Montgomery and his witnesses, like the witnesses from the State, testified regarding their memory of events that had transpired nearly a year prior. Certainly no witnesses for the State nor defense testified to the events of the altercation exactly as they occurred. State's Exhibits 8 and 9 accurately depict the events that transpired on the evening in question. The videos show that Mr. Montgomery had his gun pulled when he first confronted the driver of the Jeep and that after the driver got back inside the Jeep it moved forward and struck Mr. Montgomery. (State's Exhibits 8 and 9.) None of the State's eyewitnesses recalled that the Jeep had struck Mr. Montgomery.[2] Similarly, Mr. Montgomery's eyewitness did not recall all of the facts with 100% accuracy.

Ms. Montgomery thought that her husband had been run over and killed. (Tr., p.250, Ls.19-22.) She suffered what she thought was a panic attack and some of her memories from that night were fuzzy. (Tr., p.251, L.2 –p.252, L.10.) While it was later clear that Mr. Montgomery had not been "run over" or killed, Defense Exhibit A clearly shows that, at that point in time, Ms. Montgomery did believe her husband had been seriously injured. (Defense Exhibit A.)

[2] Mr. Newell did not remember the Jeep making contact with Mr. Montgomery. (Tr., p.135, Ls.13-24.) Ms. Haddorff testified only that the Jeep began rolling forward and as it drove off, Mr. Montgomery started shooting at the vehicle. (Tr., p.159, L.22 – p.160, L.20.) Ms. Detar stated that as the Jeep inched forward, Mr. Montgomery moved out of the way, and then began shooting at the vehicle as it drove away. (Tr., p.176, Ls.6-11.)

Both Mr. Decker and Mr. Megis qualified their testimony and merely being based on their memories of the events. Mr. Decker thought that Mr. Montgomery had his weapon holstered until the Jeep began moving forward after the driver got back inside. (Tr., p.285, L.14 – p.286, L.6.) He noted, "[f]rom what I remember, he did not [have the gun out]." (Tr., p.285, L.20-22.) Mr. Megis noted that Mr. Montgomery's gun was holstered until the driver got back into the Jeep, "but that's what I remember." (Tr., p.311, L.23 – p.312, L.3.)

Although Ms. Willis did not take the opportunity to qualify her testimony as being based solely on her memory of the events, there is no reason to believe her testimony was based on anything else. Ms. Wills testified that it was only after the Jeep lurched towards Mr. Montgomery that he "pulled" the handgun and shot at the vehicle. (Tr., p.295, L.20 – p.296, L.1.)

Mr. Montgomery also explained that his testimony was based on his memory and acknowledged that it may have been different than what the video shows. During Mr. Montgomery's cross-examination, the prosecution referenced a police interview where Mr. Montgomery had stated that he pulled out the gun after being hit, not as he initially entered the roadway. (Tr., p.335, L.4 – p.336, L.4.) He explained that at the time he was talking to officers, he was telling them everything to the best of his recollection, but he knew the incident would be on video and anything that he had remembered incorrectly would be clarified by the video. (Tr., p.347, L.15 – p.348, L.5.)

Mr. Montgomery acknowledges that there were inconsistencies between the testimony offered and the facts as shown by State's Exhibits 8 and 9. However, there is no reason to believe that any of these inconsistencies were based on lies by either

the State's or defense witnesses. Both the scientific and legal communities have recognized that eyewitness' are often inaccurate and unreliable. *See* Michael P. Seng & William K. Carroll, *Eyewitenss Teatimony: Strategies and Tactics, 2d (Trial Practice Series)* (Thomson Reuters 2015).

The prosecutor's statements, that defense witnesses who remembered any fact differently than was portrayed in the video were lying to jury, were more than the permissible arguments discussing the evidence and comments regarding inferences that could be drawn from the evidence. Mr. Montgomery asserts that the prosecution crossed the line by inserting his personal view of the evidence, including the pervasive offering of the prosecutor's opinion that defense witnesses were lying. "[Mr. Decker] lied to you. . . . [Ms. Wills] lied to you. . . . [Mr. Megis] lied to you, too. . . . Mr. Montgomery's wife took the stand and lied to you. . . . Ladies and gentleman, you heard Mr. Montgomery lie to you." (Tr., p.460, L.10 – p.461, L.11, p.467, Ls.6-7.) The comments, designed to inflame the jurors and malign the credibility of the defense witnesses, including Mr. Montgomery, constitute prosecutorial misconduct.

It is a violation of Mr. Montgomery's Fourteenth Amendment right to a fair trial to have a jury reach its decision on any factor other than the evidence admitted at trial and the law as explained in the jury instructions. In this case, misconduct related to the prosecution expressing opinions regarding defense witnesses' credibility interfered with Mr. Montgomery's Sixth Amendment right to an impartial jury. The misconduct in this case clearly violates his unwaived constitutional rights and deprived him of his right to a fair trial. As such, this Court must vacate the conviction.

2. The Prosecutorial Misconduct Is Reviewable As Fundamental Error

It is a violation of Mr. Montgomery's Fourteenth Amendment right to a fair trial to have a jury reach its decision on any factor other than the evidence admitted at trial and the law as explained in the jury instructions. As such, prosecutorial misconduct, in general, directly violates a constitutional right. The Idaho Supreme Court stated in *Perry* that, "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. This is an implicit recognition by the Idaho Supreme Court that prosecutorial misconduct claims are connected to a constitutional provision.

In this case, the misconduct also interfered with the jury's ability to make credibility determinations. The State violated Mr. Montgomery's right to a jury trial when the prosecutor attempted to encroach upon the jury's vital and exclusive function to make credibility determinations. "The right to a jury trial contained in the Sixth Amendment . . . includes the right to have the jury be 'the sole judge of the weight of the testimony.'" *State v. Elmore,* 154 Wash. App. 885, 228 P.3d 760 (WA 2010) (quoting *State v. Lane,* 125 Wash.2d 825, 838, 889 P.2d 929 (WA 1995) (quoting *State v. Crotts,* 22 Wash. 245, 250-51, 60 P. 403 (1900)).

Additionally, the Idaho Court of Appeals, in an unpublished opinion, recently held that "unlike the elicitation of an opinion from a lay witness in regard to credibility, vouching by a prosecutor implicates a constitutional right." *State v. Anderson,* Supreme Court Docket Number 39227, Idaho Court of Appeals, 2013 Unpublished Opinion

No.805 (December 30, 2013)[3]. While this case is not binding authority, it is limitedly persuasive on the issue of whether this type of misconduct deals with a constitutional right, not merely an evidentiary issue. Conversely, if vouching implicates a constitutional right, so too must the repeated maligning of the credibility of defense witnesses. Vouching and maligning are opposite sides of the same coin and involve the same detrimental effect on the jury's credibility determinations.

The misconduct in this case not only involved Mr. Montgomery's state and federal constitutional rights to due process, but also his federal and state constitutional rights to a jury trial. As such, the errors involve an unwaived constitutional right and are reviewable for fundamental error. The error in this case plainly exists from the record and no additional information is necessary. The record in this case suggests no reason to conclude that defense counsel elected, as a matter of trial strategy, to waive any objection when the prosecution disparaged the veracity of Mr. Montgomery and several of his witnesses. Further, it cannot be a tactical decision on the part of the defense to have a jury reach a verdict, not based on the evidence and law, but based on impermissible grounds presented through misconduct. As such, the first two prongs of the *Perry* test are satisfied.

3. The Prosecutorial Misconduct Requires Vacation Of The Conviction

Neither misconduct objected to nor misconduct constituting fundamental error,

[3] Mr. Montgomery recognizes that this is an unpublished opinion and is not to be cited as authority because it is neither case law nor binding precedent. *See* Internal Rule Of The Idaho Supreme Court 15(f) ("If an opinion is not published, it may not be cited as authority or precedent in any court."). Accordingly, he is only citing to this case as an example of how the Idaho Court of Appeals has dealt with this argument in the past.

will require vacating a conviction, unless the errors were not harmless beyond a reasonable doubt. *See State v. Christiansen,* 144 Idaho 463, 471 (2007); *see also State v. Field,* 144 Idaho at 571. The prosecutorial misconduct requires vacation of the conviction because it cannot be said that it did not affect the outcome of the trial. In the case at hand, the prosecution unabashedly referred to Mr. Montgomery and his witnesses as individuals that were lying to the jury and encouraged the jury to disregard their exclusive role as the judges of credibility in favor of the prosecutor's beliefs regarding credibility.

This is a case that largely hinges on credibility. The real question was not whether Mr. Montgomery fired shots into an occupied vehicle, but whether he did so in defense of himself or others. The jury was instructed that:

> In order to find that the defendant acted in self-defense or defense of another, all of the following conditions must be found to have been in existence at the time of the assault or discharge of a firearm:
>
> 1. The defendant must have believed that he and/or another person was in imminent danger of bodily harm.
>
> 2. In addition to that belief, the defendant must have believed that the action the defendant took was necessary to save himself and/or another person from the danger presented.
>
> 3. The circumstances must have been such that a reasonable person, under similar circumstances, would have believed that the defendant and/or another person was in imminent danger bodily injury and believed that the action taken was necessary.
>
> 4. The defendant must have acted only in response to that danger and not for some other motivation.
>
> 5. When there is no longer any reasonable appearance of danger, the right of self-defense and/or defense of another ends.

(R., p.202.)

Evidence regarding how Mr. Montgomery and others present perceived the situation and danger was central to the self-defense question. At trial, Mr. Montgomery testified that, "I thought he was going to try to kill me. I had to quickly move out of the way as quickly as possible. At the same time, I knew there were people behind me. I knew they were in danger, I was in danger, and I tried to disable the vehicle and fired a shot as I was moving . . ." (Tr., p.327, Ls.6-11.) Whether or not the jury believed Mr. Montgomery and his witnesses was the deciding factor in whether the shots were fired in self-defense.

As such, the jury had to make critical credibility determinations and the prosecutorial misconduct could have swayed the jury in making these determinations. This Court should find that the misconduct denied Mr. Montgomery his right to a fair trial because it cannot say beyond a reasonable doubt that misconduct did not contribute to the verdict. In reviewing the trial as a whole, the prosecutor's improper comments, constituting misconduct, likely influenced the jury.

4. Even If The Above Errors Are Harmless, The Accumulation Of The Prosecutorial Misconduct Amounts To Cumulative Error

Mr. Montgomery asserts that the prosecutorial misconduct errors which occurred throughout his closing were not individually harmless. However, assuming *arguendo* that this Court finds that they were, the accumulation of the errors and irregularities that took place negated her right to a fair trial and, thus, mandate reversal and a new trial. Mr. Montgomery asserts that if this Court finds that more than one of the asserted, unpreserved, instances of prosecutorial misconduct is found to be fundamental error that these errors can then be reviewed for cumulative error for the purposes of

determining if the prosecutor was engaging in a pattern of misbehavior. *State v. Ellington*, 151 Idaho 53, 70-71 (2011). The Idaho Supreme Court noted that when ruling on a motion for mistrial brought after an instance of alleged prosecutorial misconduct, the district court should not limit its view of the misconduct to the specific isolated incident, but should also take into consideration whether or not the prosecutor is engaging in a pattern of misbehavior. *Id.* "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. However, a necessary predicate to the application of the doctrine is a finding of more than one error." *Perry,* 150 Idaho at 230.

Mr. Montgomery asserts that given the multiple instances of prosecutorial misconduct, it is likely that even if each of the instances individually did not amount to reversible error, the accumulation of the misconduct, including disparaging Mr. Montgomery and several other defense witnesses, influenced the jury and deprived Mr. Montgomery of his right to a fair trial.

5. <u>If This Court Finds That The Error Was Harmless, It Should Nonetheless Remand The Case In Order To Discourage Further Prosecutorial Misconduct</u>

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 3 U.S. 83, 87 (1963). In *State v. Wilbanks*, 95 Idaho 346509 P.2d 331 (1973), the Idaho Supreme Court, when reviewing a claim of prosecutorial misconduct, quoted the language of the United States Supreme Court which found:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and ***whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done***. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. ***But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one***.

Id. at 353-354, 509 P.2d at 338, 339 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added)).

The prosecutor's office in question, the Kootenai County Prosecutor's Office, has exhibited a pattern of repetitious misconduct, repeatedly crossing the line between earnest prosecution, and striking foul blows. *State v. Ellington*, 151 Idaho 53 (2011) (finding numerous instances of prosecutorial misconduct, but vacating conviction on other grounds); *State v. Perry*, 150 Idaho 209 (2010) (finding misconduct in eliciting testimony intended to vouch for the credibility of a witness and in arguing during closing that the witness should be believed because that witness' credibility had been vouched for, but concluding that such misconduct did not satisfy the new standard for fundamental error); *State v. Bebee,* 145 Idaho 570 (Ct. App. 2007) (finding that the prosecutor's comments which misstated the evidence and amounted to an appeal to the jury to consider factors other than evidence of guilt amounted to prosecutorial misconduct and warranted a new trial); *State v. Phillips,* 144 Idaho 82 (Ct. App. 2007) (finding that the prosecutor's comments that the jury should be "irritated" and "upset" with the defense constituted prosecutorial misconduct and warranted a new trial); *State v. Brown*, 131 Idaho 61 (Ct. App. 1998) (finding that prosecutor's comment

suggesting the defendant was a threat for future sexual abuse was misconduct but found it was harmless); *State v. Cortez*, 135 Idaho 561 (Ct. App. 2001) (finding that the prosecutor committed misconduct during closing argument by introducing facts not in evidence and suggesting that if the defendant was not convicted, neither he nor his wife would be held responsible for their child's injury although finding it harmless); *State v. Kuhn*, 139 Idaho 710 (Ct. App. 2003) (finding that the prosecutor calling the defendant a "liar and a thief" and expressly accusing him of committing perjury during closing arguments constituted misconduct but found harmless error.) *State v. Gadberry,* Docket Nos. 26604/26605 (Ct. App. Sept. 26, 2001) (unpublished opinion) (finding misconduct in eliciting comments on the defendant's silence, but finding that error to be harmless); *State v. Lovelass*, 133 Idaho 160 (Ct. App. 1999) (finding prosecutor's question to be "improper," but not so egregious as to constitute fundamental error; finding prosecutor's closing argument to be "not completely accurate," but not so egregious as to constitute fundamental error; finding portions of prosecutor's closing argument "troubling," but holding that they "appear" to be appropriate, or at least not so egregious as to constitute fundamental error; and finding that prosecutor's closing argument "did misstate the evidence to a degree," but that the deviations were not significant enough to "have a meaningful impact on the outcome of the trial" and, thus, not so egregious as to constitute fundamental error); *State v. Strouse*, 133 Idaho 709 (1999) (vacating conviction based on prosecutorial misconduct in commenting on defendant's silence); *State v. Vandenacre*, 131 Idaho 507 (Ct. App. 1998) (finding prosecutor's question to be improper, but finding the misconduct to be harmless in light of the district court's admonishment that the jury should disregard the question); *State v. Agundis*, 127 Idaho

587 (Ct. App. 1995) (finding prosecutor's question to be misconduct, but finding the misconduct to be harmless).

In his concurring opinion in *Phillips*, Judge Schwartzman stated:

> This case represents yet another in a long line or pattern of repetitious misconduct from this prosecutorial office. A catalogue of cases in which the doctrine of "harmless error" has reared its head and saved the conviction on appeal creates a less than enviable appellate track record . . . . As our own Supreme Court has noted . . . :
>
> "Mistakes must not become the practice instead of the exception. A court on observing that a pattern of mistakes has developed, on seeing yet another "mistake," might readily decide to view such circumstance with a jaundiced eye, and rule accordingly."

Id. at 89 (internal citations omitted) (quoting *State v. Guzman,* 122 Idaho 981, 984 n. 1 (1992)).

Although this Court, when determining whether there was prejudice in this case, must focus on whether Mr. Montgomery received a fair trial and not on the culpability of the prosecutor, he requests that this Court follow the urging of Justice Blackmun in *Darden v. Wainwright*, 477 U.S. 168 (1986), and discourage prosecutorial misconduct by remanding his case for a new trial.

> Twice during the past year. . . and again today -- this Court has been faced with clearly improper prosecutorial misconduct during summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:
>
> This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. **If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of**

> **reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules**. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court -- recalling the bitter tear shed by the Walrus as he ate the oysters -- breeds a deplorably cynical attitude towards the judiciary (footnote omitted).

Darden, 477 U.S. at 205-206 (internal citations omitted) (emphasis added). In the case at hand, the prosecutor struck "foul blows" and deprived Mr. Montgomery of his right to a fair trial.

CONCLUSION

Mr. Montgomery respectfully requests that his conviction be vacated and his case remanded for a new trial.

DATED this 25th day of April, 2016.

_____/s/_____
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of April, 2016, 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:

DANIEL MONTGOMERY
1342 KALEIGH COURT
COEUR D'ALENE ID 83814

CYNTHIA K C MEYER
DISTRICT COURT JUDGE
E-MAILED BRIEF

CLAYTON G ANDERSEN
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

EAA/eas