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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 43795
)	
v.)	KOOTENAI COUNTY
)	NO. CR 2014-18207
)	
DANIEL MONTGOMERY,)	REPLY BRIEF
)	
Defendant-Appellant.)	
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REPLY 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disclose rebuttal witnesses, these cases are based solely upon the now amended statute, I.C. § 19-1302, and are either not binding precedent, as they are not based upon an analysis of the Idaho Criminal Rules, or must be overturned.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.

This Reply Brief is necessary to address the State's assertions that the district court could not have applied law that had not yet been enacted in determining whether to allow the State's non-disclosed rebuttal witnesses to testify; that the plain language of I.C.R. 16(b)(6) does not require the disclosure of the State's rebuttal witnesses; and that

statements made by the prosecuting attorney, during closing arguments, that defense witnesses had lied, were merely proper inferences based upon the evidence presented at trial. Mr. Montgomery does not offer reply to the State's remaining arguments as they are unremarkable and no further argument is necessary.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Montgomery's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

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

The State has asserted that the district court followed relevant law in making the decision to allow the non-disclosed witnesses to testify, arguing that the district court could not follow law that had not been enacted. (Respondent's Brief, p.8.) While the district court was aware of prior case law holding that the State was not required to disclose rebuttal witnesses, presumably, the district court was also aware of the plain language of I.C.R. 16(b)(6) and case law that holds that the Rule must be applied as it was written. Further, defense counsel provided the district court with the language contained in a footnote in *State v. Wilson*, 158 Idaho 585, 589 n. 2 (Ct. App. 2015), which directly called into question prior case law supporting the proposition that the State was not required to disclose rebuttal witnesses. (Tr., p.391, L.13 – p.395, L.24.) As such, the law regarding the required disclosure of the State's witnesses had both been enacted and highlighted by the appellate court's expressed concerns with the precise issue before the district court.

Further, after conceding that the appellate court must evaluate I.C.R. 16 using the plain language of the rule¹, the State asserted that "the plain language of I.C.R. 16(b)(6) and logic support the conclusion that the rule does not require disclosure."

¹ "Where the language of a rule is plain and unambiguous, the appellate court must give effect to the rule as written, without engaging in construction. State v. Locke, 149 Idaho 641, 642, 239 P.3d 34, 35 (Ct. App. 2010) (citing State v. Rhode, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); State v. Burnight, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); State v. Escobar, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000))." (Respondent's Brief, p.16.)

(Respondent's Brief, pp.16-17.) 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 . . ." Mr. Montgomery maintains that the plain language does not provide for any exception for the disclosure of rebuttal witnesses.

The State premised its argument that the plain language did not require disclosure of witnesses on the phrase "who may be called by the state." (Respondent's Brief, p.16.) The Respondent asserts that, "the state must only disclose the names of witnesses it will probably or possibly call in order to meet its burden of proof." (Respondent's Brief, p.16.) This argument flies in the face of Rule 16(b). The State has blatantly skipped over the requirement that they "shall" furnish the list of witnesses, instead focusing on the word "may" found later in the rule. I.C.R. 16(b)(6). Rule 16(b)(6) does not stand for the proposition that they State "may" disclose witnesses that it "may" call. Instead, it requires the State to disclose "all" witnesses that may testify at trial. I.C.R. 16(b)(6). The "may" in the Rule allows the State the opportunity to later choose to not present a witness's testimony at trial. The "may" is in no way a method for the State to avoid its disclosure responsibilities. Further, contrary to the State's assertion otherwise, there is also no limit to the Rule that only witnesses offered to "meet [the State's] burden of proof" must be disclosed.

While there may be an argument that requiring the State to disclose all rebuttal witnesses is impractical, those arguments would be more properly presented in support of an effort to change the Rule. Under the current version of I.C.R. 16(b)(6), those

arguments carry no weight. The plain language of I.C.R. 16(b)(6) is clear, and under the plain language, the State is required to disclose “all” witnesses. As such, Mr. Montgomery asserts that the district court abused its discretion in allowing the State to present the testimony of two non-disclosed rebuttal witnesses.

II.

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

The State has asserted that the prosecutor’s statements that Mr. Montgomery and several of his witnesses had lied were fair assertions based upon the evidence. (Respondent’s Brief, pp.23-27.) Mr. Montgomery maintains that the comments were more than assertions based upon the evidence and constituted prosecutorial misconduct.

The State has asserted that because defense witnesses’ testimony of the events of the night in question were not 100% accurate, it was merely a comment on the evidence when the prosecutor pointed out the discrepancy between their testimony and the video recording and then continued by calling them liars. While it would have been proper to comment that the video accurately portrayed the series of events that evening and that most witnesses that night were incorrect in their memory of the events, it was not a proper comment on the evidence to accuse only defense witnesses of lying. As noted in the Appellant’s Brief, if a person’s memory of an event is not exactly the same as a video recording of the events, this does not mean that the logical conclusion is that a person lied while they were testifying.

Mr. Montgomery and his witnesses, like the witnesses from the State, testified regarding their memory of events that had transpired nearly a year prior. No witnesses for the State testified to the events of the altercation exactly as they occurred. 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.) As such, none of the State's eyewitnesses recalled that the Jeep had struck Mr. Montgomery. Despite their testimony, the video clearly showed Mr. Montgomery being struck by the vehicle. (State's Exhibits 8 and 9.) However, the State failed to comment on this evidence or characterize its own witnesses as liars, as one might have expected, if the prosecution was merely making assertions based upon the video evidence from the trial.

Instead, the prosecution chose to paint only defense witnesses as liars. It ignored that both Mr. Decker and Mr. Megis qualified their testimony as being based on their memories of the events. (Tr., p.285, L.20-22; p.311, L.23 – p.312, L.3.) The prosecution failed to mention that, while Ms. Montgomery testified that she thought that her husband had been run over and killed (Tr., p.250, Ls.19-22), something that clearly did not occur; defense Exhibit A shows that, when the events transpired, Ms. Montgomery did believe her husband had been seriously injured (Defense Exhibit A). And, only a nefarious interpretation was provided when Mr. Montgomery explained that he knew his statements would be later clarified by the video and he was making his

initial statements to police from his recollection of events. (Tr., p.347, L.15 – p.348, L.5.) The State characterized each of these witnesses, not just as proven incorrect by the videos, but as liars: “[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 were not made as fair inferences based upon the evidence. If that was the case, comments that the video showed what actually occurred were all that were necessary or proper. Instead, the prosecution’s comments were designed to inflame the jurors and malign the credibility of the defense witnesses (the only witnesses singled out for their partially inaccurate memories of the events that evening). Calling the witnesses liars was more than a proper comment on the evidence or inferences to be drawn therefrom. The prosecutor’s statements crossed the line and constitute prosecutorial misconduct. This prosecutorial misconduct deprived Mr. Montgomery 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 11th day of August, 2016.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of August, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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1342 KALEIGH COURT
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CYNTHIA K C MEYER
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E-MAILED BRIEF

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_____/s/
EVAN A. SMITH
Administrative Assistant

EAA/eas