8-22-2017

State v. Alwin Respondent's Brief Dckt. 44553

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44553**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2015-15784**
	)	
JEFFREY LYNN ALWIN,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature of the Case

Jeffrey Lynn Alwin appeals from the judgment of conviction entered upon the trial verdict finding him guilty of felony eluding of a peace officer, and from the district court's order denying his motion for a new trial.

Statement of Facts and Course of Proceedings

In August 2015, Coeur d'Alene Police Officer Cody Cohen was concluding a traffic stop. (Trial Tr., Vol. I, p.127, L.23 – p.128, L.6; p.130, Ls.3-12.) As he was walking back to his patrol vehicle, Officer Cohen observed a vehicle with no front license plate accelerating past him. (Trial Tr. Vol. I, p.130, L.24 – p.131, L.17.) Officer Cohen began to follow the vehicle in his patrol car and observed it traveling 65 mph in a 35 mph zone. (Trial Tr., Vol. I, p.133, L.3 – p.135, L.13; p.144, Ls.5-7.) Officer Cohen then effectuated a traffic stop and called the suspect vehicle's Montana plate number into dispatch. (Trial Tr., Vol. I, p.135, Ls.14-20; p.139, Ls.11-25.)

Upon his approach to the vehicle, Officer Cohen noted the odor of alcohol coming from the driver's seat area. (Trial Tr., Vol. I, p.138, Ls.3-11.) Officer Cohen asked the driver for his license, registration, and proof of insurance, had the opportunity to look at the driver for approximately 20 seconds, and observed a "tribal" tattoo on the driver's left arm. (Trial Tr., Vol. I, p.138, L.21 – p.139, L.10; p.142, Ls.12-21.) While Officer Cohen was still conducting the traffic stop, the driver of the vehicle fled the scene. (State's Exhibit 1; Trial Tr., Vol. I, p.133, L.14 – p.134, L.19.)

Officer Cohen then returned to his patrol car and identified the registered owner of the fleeing vehicle (through the vehicle's plate number) as Jeffrey Alwin. (Trial Tr.,

Vol. I, p.140, Ls.1-4.) Using his in-vehicle computer, Officer Cohen was also able to pull up a photo of Alwin. (State's Exhibit 2; Trial Tr., Vol. I, p.140, Ls.8-24.) Based upon this photograph, Officer Cohen identified Alwin as the driver of the vehicle that fled the traffic stop. (Trial Tr., Vol. I, p.152, Ls.18-20.)

Several other officers in the area observed Alwin's vehicle after it fled the traffic stop. (Trial Tr., Vol. I, p.157, L.17 – p.159, L.3; p.164, L.21 – p.165, L.12; Trial Tr., Vol. II, p.179, L.15 – p.180, L.25.) One of the officers attempted to pursue the vehicle on I-90. (Trial Tr., Vol. I, p.166, L.11 – p.168, L.10.) However, that officer was unable to gain ground on the vehicle, which the officer estimated to be traveling at approximately 120 to 130 mph. (Id.) Another officer ended his pursuit after being instructed to do so by a Sergeant. (Trial Tr., Vol. II, p.182, L.16 – p.184, L.16.)

The state charged Alwin with felony eluding of a peace officer, I.C. § 49-1404(2). (R., pp.40-42.) Officer Cohen testified at the jury trial and identified Alwin as the driver of the vehicle that fled his traffic stop. (Trial Tr., Vol. I, p.137, L.16 – p.138, L.2; p.139, Ls.4-6.) The state submitted into evidence the photo that Officer Cohen viewed on his in-vehicle computer after the traffic stop. (Trial Tr., Vol. I, p.140, L.8 – p.141, L.18; State's Exhibit 2.) The district court overruled Alwin's I.R.E. 404(b) objection to the admission of this photo.[1] (Trial Tr., Vol. I, p.141, Ls.4-15.) The state also submitted into evidence the booking sheet associated with Alwin's arrest in the present case. (State's Exhibit 3; Trial Tr., Vol. I, p.142, L.22 – p.143, L.5.) This booking sheet indicated Alwin had a

[1] While Alwin would later, in his motion for a new trial, identify this photo as an old booking photo (R., pp.176-180), the photo was not identified as such to the jury, and no reference was made at the trial to any prior arrest or other police activity involving Alwin. (See generally Trial Tr., Vols. I-II.)

"tribal" tattoo consistent with the tattoo observed by Officer Cohen on the left arm of the driver who fled the traffic stop. (Trial Tr. Vol. I, p.143, Ls.6-16.)

Alwin testified in his own defense and asserted that while it was his car that was pulled over by Officer Cohen, he was in Montana at the time, and his car was still in Idaho. (Trial Tr., Vol. II, p.187, L.22 – p.189, L.6; p.193, L.13 – p.194, L.15.) Alwin claimed that two other individuals, including the person from whom he purchased the car, had access to the car via a key lock box that was concealed on the surface of the car. (Trial Tr., Vol. II, p.190, L.13 – p.191, L.5.) Alwin's half-brother testified that, prior to the date of Officer Cohen's traffic stop, he drove from Montana to Idaho, picked up Alwin, and then drove back to Montana, where Alwin stayed for almost two weeks. (Trial Tr., Vol. II, p.204, Ls.17-21; p.206, L.1.) At trial, Alwin also called an expert witness who testified about how certain factors, including stress, can reduce the reliability of eyewitness identifications. (Trial Tr., Vol. II, p.214, L.16 – p.273, L.11.)

The jury found Alwin guilty as charged for felony eluding of a peace officer. (R., p.174.) In a subsequent motion for a new trial, Alwin challenged the district court's ruling on his I.R.E. 404(b) objection. (R., pp.176-180.) After a hearing (8/5/16 Tr.), the district court denied the motion (R., pp.188-189; 8/5/16 Tr., p.13, L.25 – p.20, L.12).

The court imposed a unified two-year sentence with one year fixed, but suspended the sentenced and placed Alwin on probation for three years. (R., pp.203-210.) The court also imposed 30 days jail to serve and 300 hours of community service. (Id.) Alwin timely appealed. (R., pp.211-215.)

ISSUES

Alwin states the issues on appeal as:

1. Did the district court err in admitting un-noticed evidence of prior bad acts?

2. Did the State commit prosecutorial misconduct in its closing argument?

3. Did the district court err in denying Mr. Alwin's motion for a new trial?

(Appellant's brief, p.6)

The state rephrases the issues on appeal as:

1. Has Alwin failed to show that the district court erred by overruling his I.R.E. 404(b) objection?

2. Has Alwin failed to show that the prosecutor committed misconduct during closing argument, let alone that any such misconduct rises to the level of fundamental error that necessitates a vacating of the conviction?

3. Has Alwin failed to show that the district court abused its discretion in denying his motion for a new trial?

ARGUMENT

I.
Alwin Has Failed To Show That The District Court Erred By Overruling His I.R.E. 404(b) Objection

A. Introduction

Alwin contends that the district court erred by overruling his I.R.E. 404(b) objection to the admission, into evidence at the jury trial, of a photograph utilized by Officer Cohen to identify him after Alwin fled a traffic stop. (Appellant's brief, pp.7-17.) Alwin has failed to show that the district court erred. At the trial, the booking photo was not presented to the jury as a "booking photo," and thus did not constitute evidence of "prior acts" implicating I.R.E. 404(b). In any event, even if the district court erred by not recognizing the nature of the photo, any such error was harmless.

B. Standard Of Review

Rulings under I.R.E. 404(b) are reviewed under a bifurcated standard: Whether the evidence is admissible for a purpose other than propensity is given free review while the determination of whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice is reviewed for an abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009).

C. The District Court Properly Overruled Alwin's I.R.E. 404(b) Objection

"Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. However, such evidence may be admissible for a purpose other than that prohibited by I.R.E. 404(b)." State v. Truman, 150 Idaho 714, 249 P.3d 1169 (Ct. App. 2011) (citations omitted). Under I.R.E. 404(b), evidence of prior

wrongs or acts may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993). In Grist, *supra*, the Idaho Supreme Court set forth a two-tiered analysis to determine the admissibility of evidence under I.R.E. 404(b). State v. Naranjo, 152 Idaho 134, 138, 267 P.3d 721, 725 (Ct. App. 2011). "The first tier involves a two-part inquiry: (1) whether there is sufficient evidence to establish the prior bad acts as fact; and (2) whether the prior bad acts are relevant to a material disputed issue concerning the crime charged, other than propensity." Id. (citing Grist, 147 Idaho at 52, 205 P.3d at 1188).

The second step in a 404(b) analysis involves a determination of whether the evidence, although relevant, should be excluded because the danger of unfair prejudice substantially outweighs its probative value. State v. Sheahan, 139 Idaho 267, 275-276, 77 P.3d 956, 964-965 (2003). Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice – which is the tendency to suggest a decision on an improper basis – substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 908 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993). As previously explained by the Idaho Supreme Court: "Under the rule, the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

A party intending to utilize I.R.E. 404(b) "other acts" evidence for a permissible I.R.E. 404(b) purpose at trial must "file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." I.R.E. 404(b). Lack of required notice renders I.R.E. 404(b) evidence inadmissible. State v. Sheldon, 145 Idaho 225, 230, 178 P.3d 28, 33 (2007).

Approximately 15 minutes after Alwin fled the traffic stop, Officer Cohen pulled up a photo of Alwin on his in-vehicle computer. (Trial Tr., Vol. I, p.140, Ls.8-23.) During Officer Cohen's trial testimony, the state moved for the admission of this photo into evidence. (Trial. Tr., Vol. I, p.140, L.25 – p.141, L.5.) Alwin objected to the admission of the photo on the ground that it violated I.R.E. 404(b). (Trial Tr., Vol. I, p.141, Ls.7-8.) Alwin did not provide any other context for his objection or request that the matter be taken up outside the presence of the jury. (See id.) The court overruled the objection, after stating its agreement with the state's contention that I.R.E. 404(b) was not applicable because there was "no conduct being alleged." (Trial Tr., Vol. I, p.141, Ls.10-15.)

After the jury found him guilty, Alwin filed a motion for a new trial on the ground that the district court erred by overruling his I.R.E. 404(b) motion. (R., pp.176-180.) In this motion, Alwin identified the photo that was admitted at trial as a booking photo associated with a prior arrest. (Id.) At a subsequent hearing on the motion, the district court explained that at the trial, it did not realize that the photo submitted into evidence was a booking photo. (8/5/16 Tr., p.15, Ls.17-19.) Instead, at the time of the trial, the court assumed that the photo was a driver's license photo or passport photo, and that the

"jail garb" worn by Alwin in the photo was actually "scrubs." (8/5/16 Tr., p.15, L.17 – p.16, L.7.) The court further noted that the photo did not contain identifying numbers or a corresponding side portrait view that clearly identified it as a booking photo. (8/5/16 Tr., p.16, L.22 – p.17, L.4.) As a result, the court concluded that it would not be "readily apparent" to lay jurors that the photo was a booking photo associated with a prior arrest. (8/5/16 Tr., p.17, Ls.5-8; p.18, Ls.12-18.) The court also concluded, presumably in the alternative, that the booking photo was admitted for a permissible I.R.E. 404(b) purpose — identity. (8/5/16 Tr., p.17, L.21 – p.18, L.7.)

Alwin has failed to demonstrate that the district court erred in overruling his I.R.E. 404(b) objection to the photo. As the court correctly recognized, the photo was not specifically identified as a "booking photo" to the jury during the trial. The photo lacked many of the identifiable characteristics associated with booking photos, such as a separate side portrait view, law enforcement agency markings, a booking number, etc. (See State's Exhibit 2.) Further, neither party, nor the court, referenced any prior arrest or police activity involving Alwin in the course of the trial. (See Trial Tr., Vols. I-II.)

Because the admitted photo was not presented to the court or to the jury as a booking photo, and because the photo was not readily identifiable as such, it did not implicate any prior acts or require an I.R.E. 404(b) analysis. Therefore, the state was not required to provide I.R.E. 404(b) notice, and the district court did not err in overruling Alwin's I.R.E. 404(b) objection.

D. Even If The District Court Erred, Any Such Error Was Harmless

Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." I.C.R. 52. The proper

inquiry is whether "'the guilty verdict actually rendered in this trial was surely unattributable to the error.'" State v. Joy, 155 Idaho 1, 12, 304 P.3d 276, 286 (2013) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (emphasis omitted)). In Sheldon, after concluding that the district court erred by failing to recognize that certain admitted evidence was "prior act" evidence subject to I.R.E. 404(b), the Idaho Supreme Court, in conducting its harmless error analysis, considered the probative value and degree of unfair prejudice of the evidence, as well as the prejudice to Sheldon caused by the lack of notice. Sheldon, 145 Idaho at 230-231, 178 P.3d at 33-34.

In the present case, the state first submits that *if* the photo, as presented at trial, constituted "prior acts" evidence subject to I.R.E 404(b), the evidence was offered for the permissible I.R.E. 404(b) purpose of identity. The identity of the driver who fled the traffic stop with Officer Cohen was the primary disputed issue at trial. The photo admitted by the state was the very photo utilized by Officer Cohen to identify Alwin after he fled the traffic stop. Alwin's own defense expert acknowledged, in his trial testimony, that Officer Cohen's ability to view a photo of Alwin shortly after the traffic stop "favor[ed] reliability" of the officer's identification of Alwin. (Trial Tr., Vol. II, p.255, Ls.14-21.) The photo therefore contained probative evidentiary value.[2]

[2] It is somewhat unclear how the probative value of un-noticed I.R.E. 404(b) evidence should be weighed in a harmless error analysis where, as the state asserts is the case here, the evidence was relevant for a permissible I.R.E. 404(b) purpose. In Sheldon, in such a circumstance, the Idaho Supreme Court rejected the Idaho Court of Appeals' focus on "whether there was prejudice from the absence of notice rather than prejudice from the content of the evidence." Sheldon, 145 Idaho at 230, 178 P.3d at 33. However, prior to concluding that the error in that case was not harmless, the Idaho Supreme Court noted that the probative value of the evidence in question was "low." Id. Therefore, it appears that when the probative value of I.R.E. 404(b) evidence substantially outweighs the danger of unfair prejudice from the evidence, this supports a conclusion that a district court's I.R.E. 404(b) error was harmless.

The potential for unfair prejudice resulting from the admission of the photo was relatively low. As discussed above, the booking photo lacked many of the identifiable characteristics associated with booking photos, was never specifically identified as a "booking photo" in the course of the trial, and no prior arrest or police activity involving Alwin was referenced by either party. Notably, while Alwin objected to the admission into evidence of the photo itself, he did not object to Officer Cohen's testimony that he observed the photo on his in-vehicle computer shortly after the traffic stop. (See Trial Tr., Vol. I, p.140, Ls.8-24.) Any limited potential for unfair prejudice arising from the photo itself was at least somewhat cumulative with the limited potential for unfair prejudice arising from Officer Cohen's unchallenged testimony that he was able to access a photo of Alwin in his vehicle.

Finally, on appeal, Alwin has not attributed any specific prejudice to his lack of notice of the state's introduction of the photo into evidence, except to state that this lack of notice "effectively defeat[ed] his ability to investigate and prepare a defense against the implication that he had engaged in criminal conduct in the past." (Appellant's brief, p.17.) Unlike the appellant in Sheldon, Alwin has not "listed a number of things that the defense would have done differently, had it been known that the [photo was] to be offered in evidence." See Sheldon, 145 Idaho at 230-231, 178 P.3d at 33-34.

Even assuming that photo admitted into evidence at the trial constituted evidence of "prior acts" subject to I.R.E. 404(b) analysis, and even assuming that the district court erred by not recognizing the nature of this evidence, any such error was harmless because the jury's guilty verdict actually rendered "was surely unattributable to the error."

II.
Alwin Has Failed To Show That The Prosecutor Committed Misconduct During Closing Argument, Let Alone That Any Such Misconduct Rises To The Level Of Fundamental Error That Necessitates A Vacating Of The Conviction

A. Introduction

For the first time on appeal, Alwin contends that the prosecutor committed misconduct in three instances during his closing and rebuttal argument. (Appellant's brief, pp.17-28.) Alwin's contention fails because he has failed to demonstrate misconduct, let alone misconduct that satisfies the fundamental error standard set forth in State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2010).

B. Standard Of Review

"[T]he standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho at 694, 715, 215 P.3d 414, 435 (2008). If a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. Perry, 150 Idaho at 228, 245 P.3d at 980.

C. The Challenged Portions Of The Prosecutor's Closing Argument Did Not Constitute Misconduct, Let Alone Fundamental Constitutional Error

Prosecutorial misconduct occurs where the prosecutor "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." State v. Sanchez, 142 Idaho 309, 318, 127 P.3d 212, 221 (Ct. App. 2005).

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

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions [as consistent and repeated misrepresentation that may have a significant impact on a jury's deliberations]. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-647 (1974).

The Idaho Supreme Court has reiterated the importance of reviewing closing arguments in light of their improvisational nature, noting that "in reviewing allegations of prosecutorial misconduct [the appellate court] must keep in mind the realities of trial." State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007) (quoting State v. Estes, 111 Idaho 423, 427-428, 725 P.2d 128, 132-133 (1986)). The Idaho Court of Appeals has further recognized "[t]he right to due process does not guarantee a defendant an error-free trial but a fair one," and the function of appellate review is "not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial." State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991).

"Idaho has limited appellate review of unobjected-to error to cases wherein the defendant has alleged the violation of a constitutionally protected right." Perry, 150 Idaho at 226, 245 P.3d at 978. To obtain appellate review and reversal on an issue not preserved through timely objection at trial an appellant must demonstrate:

(1) violation of an unwaived constitutional right; (2) that the error is clear and obvious without the need to further develop the evidence regarding the error or whether the lack of objection was a tactical decision; and (3) that the error affected the outcome of the proceedings. Id.

On appeal in this case, Alwin has identified three portions of the prosecutor's closing and rebuttal argument, which, Alwin asserts, satisfies the Perry fundamental error standard. However, a review of the entire context of the challenged statements reveals that Alwin has failed to demonstrate misconduct, let alone fundamental constitutional error.

1. The Prosecutor's Statement Regarding Officer Cohen's Credibility

In the first challenged portion of the state's closing argument, Alwin contends that the prosecutor vouched for Officer Cohen's credibility and "asked the jury to make a decision after telling them that the prosecution's witness was a credible witness." (Appellant's brief, p.21.)

The prosecutor stated:

> There's one person in here who has the motive to not tell the truth, and he's sitting right there. Not Officer Cohen, a police officer. He is not going to sit up here under oath and not tell the truth. He is credible. His testimony is credible, *and it was consistent and he documented everything that night that turned out to be true later on once he was arrested.*

(Trial Tr., Vol. II, p.288, Ls.19-25 (emphasis added).)

The prosecutor's statement regarding Officer Cohen's credibility does not constitute prosecutorial misconduct, let alone fundamental constitutional error, because the prosecutor tied the statement to evidence presented at trial. Specifically, the prosecutor argued that Officer Cohen's testimony was internally consistent, and that his

identification of Alwin and other observations made during the traffic stop were corroborated by information obtained upon Alwin's arrest – such as the presence of Alwin's "tribal" tattoo. Further, it appears that the prosecutor's reference to Officer Cohen's documentation of the events of the traffic stop was made in response to defense counsel's cross-examination of Officer Cohen regarding alleged omissions and discrepancies between Officer Cohen's testimony and his police report. (See Trial Tr., Vol. I, p.146, L.18 – p.147, L.2; p.151, L.9 – p.152, L.22.) This Court should not assume the more damaging interpretation of the statement proposed by Alwin – that the prosecutor was improperly vouching for Officer Cohen's credibility – without more specific indications of such vouching in the prosecutor's statement itself. This is especially true considering that at trial, it was not Alwin's defense theory of the case that Officer Cohen lied about his identification of Alwin – only that Officer Cohen was mistaken. (Trial Tr., Vol. II, p.290, L.11 – p.297, L.11.)

2. The Prosecutor's Statement Regarding Officer Cohen's Identification Of Alwin

In the second challenged portion of the state's closing argument, Alwin contends that the prosecutor committed misconduct by "guarantee[ing] to the jury that Officer Cohen's ability to identify who [was] driving the car was correct." (Appellant's brief, pp.21-22.)

The prosecutor stated:

> And you can watch Cohen in that video. He was up and down, when he was up there, he said, you know, what I got a view of is everything from the waist up, absolutely everything from the waist up. So he's in there and he's looking. And he's a unique-looking guy. I guarantee if I walked him in here at the beginning of this case, had him stand here and look at you and then look away for 20 seconds, starting

> now, when you saw a picture of him 15 minutes later and said, That's the guy, you're all going to pick him out, because it's him.
>
> Again, you don't check your common sense at the door. The State's not hiding anything. Officer Cohen wasn't making anything up.

(Trial Tr., Vol. II, p.298, L.22 – p.299, L.7.)

The prosecutor's statement regarding Officer Cohen's identification of Alwin did not constitute prosecutorial misconduct, let alone fundamental constitutional error. At trial, the state bolstered Officer Cohen's in-court identification of Alwin with evidence of Officer Cohen's review of Alwin's photo in his patrol vehicle shortly after the traffic stop. In the challenged portion of the prosecutor's argument, the prosecutor was not literally providing a personal, unsupported "guarantee" of the accuracy of Officer Cohen's identification. Instead, the prosecutor utilized the term "guarantee" simply to place the identification into a different, real-world, relatable context. The prosecutor appealed to the jury's own "common sense" in arguing that an individual in Officer Cohen's position, who had the opportunity to observe a suspect's face for 15 to 20 seconds, and who then, shortly thereafter, viewed a photograph of an individual, would be able to accurately compare the personal observation of the suspect with the individual depicted in the photo. This did not constitute improper vouching or other prosecutorial misconduct.

3. The Prosecutor's Statement Regarding The Defense Expert Testimony

In the third challenged portion of the state's closing argument, Alwin contends that the prosecutor committed misconduct by "substitut[ing] his own opinions for those of the expert." (Appellant's brief, pp.22-23.)

The prosecutor stated:

> This right here goes right here. It's the motive. Right? [Defense counsel] gets up and he talked mostly just about Cohen and how stressed

> out he was and everything, but you've seen the video now multiple times. Watch the video. Not stressed out. Super calm. Trained to identify people. His job as a police officer is to look at things and then go write a report on it.
>
> And I completely disagree with the expert. I know that, you know, he's got some fancy titles and stuff, that when you're under stress, you focus less. I completely disagree. I think that a lot of people get hyperfocused when they stress. *You hear people in car accidents, everything slowed down; right? So we're talking about stress. Use your own experiences with it.*

(Trial Tr., Vol. II, p.297, L.16 – p.298, L.6 (emphasis added).)

A prosecutor does not commit misconduct by asking jurors to apply their own common sense to their evaluation of expert witness testimony. See e.g., State v. Kirby, 113 A.3d 138, 151-152 (Conn. App. Ct. 2015) (holding that "it is entirely proper for counsel to appeal to a jury's common sense in closing remarks," and that it was not misconduct for the prosecutor to ask jurors to utilize their common sense and own observations in evaluating the expert testimony"); State v. Morgan, 14 N.E.3d 452, 464 (Ohio Ct. App. 2014) (rejecting Appellant's argument that the prosecutor committed misconduct by "asking the jury to use its common sense when the case focused primarily on expert testimony"); People v. Rich, 755 P.2d 960, 994-995 (Cal. 1988) (no misconduct where prosecutor encouraged the jury to use its own common sense in evaluating psychiatric expert's testimony).

While the prosecutor in this case initially, and perhaps inadvisably, stated his own "disagreement" with the defense expert's conclusions, he did not expand upon this wording to specifically argue that this disagreement was based upon some personal expert knowledge or other evidence outside of the trial evidence. Instead, the prosecutor

ultimately utilized this terminology to request that the jurors utilize their own common sense to evaluate the defense expert testimony.

The defense expert did not testify that, as a universal rule, a witness' stress level at the time of an identification reduces his ability to accurately identify an individual in all circumstances. (Trial Tr., Vol. II, p.214, L.16 – p.273, L.11.) Further, the defense expert's testimony that Officer Cohen was stressed during the traffic stop was speculative, non-definitive, and not based upon any particular established expert qualifications regarding degree or signs of stress. (See Trial Tr., Vol. II, p.244, L.8 – p.245, L.2.) Therefore, while the defense expert's testimony was relevant to the jury's determination regarding the accuracy of Officer Cohen's identification, the testimony left room for the jury to properly apply its own common sense and life experiences to its evaluation of the testimony.

For the foregoing reasons, Alwin has failed to satisfy the first prong of the Perry fundamental error standard – that his constitutional rights were violated with respect to any of the challenged portions of the state's closing argument. Alwin has also failed to satisfy the other two prongs of the Perry standard.

With respect to the second Perry prong, Alwin has failed to demonstrate that defense counsel's decision not to object to the prosecutor's closing argument was not tactical. Counsel may have reasonably chosen not to bring possible damaging interpretations of the prosecutor's closing argument to the attention of the jury, particularly where these interpretations were not readily apparent.

Alwin has also failed to meet his burden under the third prong of the Perry fundamental error test. Under this prong, Alwin must "demonstrate that the error affected

his substantial rights" by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Perry, 150 Idaho at 226, 245 P.3d at 978. In this case, even assuming that the prosecutor committed misconduct, the errors were not so egregious as to overcome the evidence supporting the state's theory of the case, as set forth above in Sec. I and in the state's Statement of Facts and Course of Proceedings. This case ultimately turned on the jury's evaluation of Officer Cohen's identification of Alwin in light of the circumstances of the stop and escape from police, and whether there was a possibility that someone other than Alwin was driving the vehicle at the time of the stop.

Alwin has failed to demonstrate prosecutorial misconduct, let alone misconduct that satisfies the Perry fundamental error standard, with respect to any of the three challenged portions of the prosecutor's closing argument. This Court must therefore affirm Alwin's conviction.

III.
Alwin Has Failed To Show That The District Court Erred In Denying His Motion For A New Trial

A. Introduction

Alwin contends that the district court erred by denying his motion for a new trial. (Appellant's brief, pp.28-32.) For the same reasons as discussed above in Sec. I with respect to the district court's admission of the photo into evidence at the jury trial, Alwin has failed to show error.

B. Standard Of Review

Granting or denying a motion for a new trial is within the district court's discretion and will not be disturbed on appeal absent a showing that the court abused that discretion. State v. Jones, 127 Idaho 478, 481, 903 P.2d 67, 70 (1995); State v. Pugsley, 119 Idaho 62, 63, 803 P.2d 563, 564 (Ct. App. 1991).

C. The District Court Acted Well Within Its Discretion To Deny Alwin's Motion For A New Trial

Idaho law permits a district court to order a new trial if the court has "erred in the decision of any question of law arising during the course of the trial." I.C. § 19-2406(5). Idaho Criminal Rule 34 outlines the standard that the trial court applies when considering a motion for a new trial, directing that "[t]he court ... may grant a new trial to the defendant if required in the interest of justice."

This Court's conclusion with respect to Sec. I, above, regarding whether the district court erred by overruling Alwin's I.R.E. 404(b) objection, is dispositive of Alwin's challenge to the district court's denial of his motion for a new trial. If this Court concludes that the district court did not err in overruling the I.R.E. 404(b) objection, or if it concludes that any such error was harmless, it must also conclude that the district court acted well within its discretion to deny the motion for a new trial on the same basis.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of conviction entered upon the jury's verdict finding Alwin guilty of felony eluding of a peace officer, and the district court's order denying Alwin's motion for a new trial.

DATED this 22nd day of August, 2017.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of August, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Mark w. Olson
MARK W. OLSON
Deputy Attorney General

MWO/dd