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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 44675
 Plaintiff-Respondent,)
) Ada County Case No.
 v.) CR-FE-2015-15435
)
 PATRICK ANTHONY ZAVALA,)
)
 Defendant-Appellant.)
)
 _____)

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Patrick Anthony Zavala appeals from his judgment of conviction for unlawful possession of a firearm; aggravated assault on a law enforcement officer, enhanced for the use of a deadly weapon; and two counts of resisting or obstructing an officer; all enhanced for being a persistent violator of the law. He claims, for the first time on appeal, that the prosecutor committed misconduct during his closing arguments.

Misstatements Of The Facts By Zavala

Zavala opens his brief stating: “Patrick Anthony Zavala *was shot eleven times* by a police officer after he fled from a vehicle that was stopped for driving without illuminated headlights.” (Appellant’s brief, p.1 (emphasis added).) Not only is this irrelevant to the case, it is a gross misstatement of the record. As Zavala later recognizes, while he was shot *at* eleven times, he was only actually *shot* once by Officer Crist. (Appellant’s brief, p.3; see also Tr., p.368, Ls.1-16; p.309, Ls.3-7; p.381, Ls.4-12 and p.383, Ls.2-6; p.432, Ls.19-24.) Worse, Zavala claims that recordings of the incident demonstrate that Officer Crist opened fire “before he finished saying, ‘Put the gun down.’” (Appellant’s brief, p.3.) This is flatly false and never corrected by Zavala in his brief. First, Officer Crist did not say “put the gun down”; while the other officers who pursued Zavala did issue that command, numerous times—a command which Zavala refused to obey—Officer Crist’s command was, “You drop that gun!” (See State’s Ex. 10 and Defense Ex. A.) And, as is clear on both recordings, he *finished* that command *before* opening fire with 10 rounds. (Id.) After the first volley, Officer Crist again commanded Zavala, “Drop that gun!” before Zavala fired his gun, and then Officer Crist returned fire once. (Id.)

Statement Of The Facts And Course Of The Proceedings

The facts of the case are straightforward: Just before midnight on October 25, 2015, Officer McCarthy attempted to detain Zavala after he failed to bring his vehicle to a stop when exiting a parking lot. (Tr., p.291, L.6 – p.292, L.16.) As the officer activated his overhead lights, the vehicle veered off into oncoming traffic and pulled over on the opposite side of the road. (Tr., p.292, Ls.18-25.) As soon as the vehicle came to a stop, Zavala, who was the driver, darted out of the vehicle and ran from the scene into a residential area. (Tr., p.293, L.4 – p.294, L.11.) Zavala was able to successfully evade police that night. (Tr., p.294, Ls.19-22.) Looking in at the open door of Zavala’s car, officers noticed an empty holster. (Tr., p.315, Ls.2-17.)

The following night, on October 26, again just before midnight, officers from the Boise Police Department pulled over a car for driving at night without illuminated headlights. (Tr., p.295, L.13 – p.296, L.14.) Zavala was a passenger in the car, and he again burst out of the vehicle and fled on foot. (Tr., p.297, L.25 – p.298, L.22; p.317, L.18 – p.318, L.5.) In his left hand, Zavala held a bottle of Coke. (Tr., p.319, Ls.9-11.) In his right, he had a small caliber semiautomatic pistol. (Tr., p.298, L.24 – p.299, L.2.) Officer Green chased Zavala on foot, repeatedly yelling, “Drop the gun!” (Tr., p.302, Ls.11-12; p.319, Ls.2-15.) Officer McCarthy also joined the pursuit and the officers commanded Zavala to stop. (Tr., p.299, Ls.3-13; p.320, Ls.10-11.) But Zavala refused to surrender and continued to flee, still armed, shuffling down an alleyway and crossing through a residential backyard. (Tr., p.301, L.22 – p.303, L.17; p.319, L.20 – p.320, L.9; see also Tr., p.324, L.23 – p.325, L.13.)

Meanwhile, Officer Crist got ahead of Zavala and positioned himself at a location where he expected Zavala might attempt to negotiate a six foot cedar fence. (Tr., p.424, L.3 – p.426, L.10.) Zavala reached the fence and, gun still in hand, began to swing his body over the fence.

(Tr., p.426, L.11 – p.428, L.8.) Officer Crist shouted, “You drop that gun!” and shined his flashlight on Zavala. (State’s Ex. 10 and Defense Ex. A; Tr., p.429, L.23 – p.430, L.11.) Zavala immediately looked up and pointed his gun at Officer Crist. (Tr., p.430, L.12 – p.431, L.10.) Officer Crist opened fire, shooting at Zavala 10 times and striking him once in the leg. (State’s Ex. 10 and Defense Ex. A; Tr., p.381, Ls.8-12; p.432, Ls.19-24.) Zavala then fired his gun and, unbeknownst to Officer Crist, struck his own left hand. (State’s Ex. 10 and Defense Ex. A; Tr., p.381, L.8 – p.383, L.6; p.433, Ls.20-24.) Officer Crist returned fire once and then retreated to cover. (Tr., p.433, L.25 – p.436, L.2.) Officers Green and McCarthy then arrived and were able to take Zavala into custody. (Tr., p.307, L.7 – p.308, L.11; p.325, Ls.9-25; p.329, L.24 – p.330, L.1.) Officers later located Zavala’s .38 pistol, which he had tossed aside, and a .38 shell casing from the bullet he fired. (Tr., p.340, Ls.2-8; p.347, L.11 – p.348, L.3.)

The state charged Zavala with unlawful possession of a firearm by a convicted felon; aggravated assault on a police officer; an enhancement for use of a deadly weapon; and two counts of resisting and obstructing an officer. (R., pp.221-23.) In a Part II of the information, the state also charged that Zavala was a persistent violator of the law. (R., pp.95-97.) Zavala pleaded not guilty and went to trial. (See R., pp.242-79; Tr., pp.163-665.) At the close of the trial, the jury returned guilty verdicts on all counts and both of the enhancements. (R., pp.323-27.) Later, the trial judge received an amended abstract of an out-of-state judgment, and amended the Part II verdict form on its own motion to find Zavala not guilty of one of the underlying convictions. (R., p.336.)

The district court entered a judgment of conviction against Zavala and sentenced him to concurrent sentences of 30 years with five years fixed on the conviction for unlawful possession of the firearm; 30 years with 20 years fixed on the enhanced conviction for aggravated assault on

the police officer; and one year each on the convictions for resisting and obstructing officers. (R., pp.340-43.) Zavala filed a timely notice of appeal. (R., pp.346-48.) After filing his notice of appeal, Zavala filed several *pro se* motions (see, e.g., R., pp.369-400, 450-62, 508-17), all of which were denied (R., pp.433-36, 506, 519-28).

ISSUE

Zavala states the issue on appeal as:

Did the prosecutor commit misconduct, rising to the level of fundamental error, when, in his rebuttal closing argument, he falsely stated it was “untrue” that the State offered to dismiss charges against Mr. Zavala prior to trial?

(Appellant’s brief, p.5.)

The state rephrases the issue as:

Has Zavala failed to show error in the prosecutor’s closing statement, much less fundamental error entitling him to review of his unpreserved claim of prosecutorial misconduct?

ARGUMENT

Zavala Has Failed To Show Fundamental Error Entitling Him To Review Of His Unpreserved Claim Of Prosecutorial Misconduct

A. Introduction

As Zavala, who was representing himself at trial, wrapped up his closing argument, the following exchange occurred:

[THE DEFENDANT:] And I'm not supposed to tell you, but they offered to dismiss the charges.

MR. NAUGLE: Objection. That is irrelevant and untrue.

THE DEFENDANT: But I chose to come here and confront them.

MR. NAUGLE: Objection.

THE COURT: Sustain.

MR. NAUGLE: Move to strike.

THE COURT: Mr. Zavala's last two sentences—

THE DEFENDANT: The truth.

THE COURT: —are improper argument and are not to be considered by the jury. I'm going to strike his last two sentences and advise the jury they are not to consider those last two sentences of Mr. Zavala's statements.

(Tr., p.570, Ls.3-18.) The district court then invited the prosecutor to make his rebuttal argument, during which the prosecutor stated:

Mr. Zavala says lots of things, that we're going to send him to prison for life. There is an instruction in your instructions that you heard that says that penalty and punishment is something you're not to consider. That is not part of your job today. You guys have a hard enough job, to listen to all of this evidence, to make a decision about what's been proven beyond a reasonable doubt and what hasn't. That's your job to do all that and to listen to the evidence, to carefully weigh it and determine what's been proven beyond a reasonable doubt. It is not your job to determine what is a proper sentence. It is the judge's job to determine what is a proper sentence and only she can do that. It's not up to me. When he says that I'm going to dismiss charges or that I want to put him in prison for life, any of that stuff, that has nothing to do with the case today. It's untrue, and it's unfair for him to say those things in court today, and I ask you not to consider those things.

(Tr., p.572, Ls.5-23.)

For the first time on appeal, Zavala claims that the prosecutor's unobjected-to statements referenced above constitute misconduct. (Appellant's brief, pp.6-12.) Application of the correct legal standards to the record, however, shows that Zavala has failed to show error, much less fundamental error entitling him to review of this unpreserved issue.

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 (2009). 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. State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

C. The Challenged Portion Of The Prosecutor's Closing Argument Does Not Constitute Misconduct, Much Less Fundamental Error

Because Zavala failed to preserve his claim of prosecutorial misconduct by timely objection below, he is required to show fundamental error on appeal. Perry, 150 Idaho at 226, 245 P.3d at 978. To establish fundamental error,

the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980. Because review of the record shows that the prosecutor's argument was not improper, Zavala has failed to show error, much less fundamental error entitling him to review of his unpreserved claim of error.

"Generally, both parties are given wide latitude in making their arguments to the jury and discussing the evidence and inferences to be made therefrom." Severson, 147 Idaho at 720, 215 P.3d at 440 (citations omitted). Prosecutorial misconduct only 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 alleged prosecutorial misconduct specifically 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, 646-47 (1974).

The Idaho Supreme Court has reiterated the importance of reviewing closing arguments in light of their improvisational nature, noting that "in reviewing allegations of prosecutorial misconduct [the appellate court] must keep in mind the realities of trial." State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007) (quoting State v. Estes, 111 Idaho 423, 427-428, 725 P.2d 128, 132-133 (1986)). Moreover, a prosecutor's comments "must be evaluated in light of defense conduct and in the context of the entire trial." Severson, 147 Idaho at 720, 215 P.3d at

440 (citations and quotations omitted); see also Darden v. Wainwright, 477 U.S. 168, 179 (1986) (“[t]he prosecutors’ comments must be evaluated in light of the defense argument that preceded it”); United States v. Young, 470 U.S. 1, 11 (1985) (“only by [viewing the prosecutor’s comments in context] can it be determined whether the prosecutor’s conduct affected the fairness of the trial”). Finally, the Idaho Court of Appeals has recognized “[t]he right to due process does not guarantee a defendant an error-free trial but a fair one,” and the function of appellate review is “not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant’s right to a fair trial.” State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991).

Application of these foregoing standards to the prosecutor’s contested statements shows that those statements, taken in context and recognizing the improvisational and imprecise nature of closing argument, do not constitute misconduct, much less fundamental error.

On appeal, Zavala asserts (inaccurately, as will be shown below) that the “prosecutor attempted to secure a verdict in the State’s favor by falsely denying that the State offered to dismiss any of the charges against Mr. Zavala prior to trial.” (Appellant’s brief, pp.8-10.) Zavala identifies two alleged errors in this (again, inaccurate) claim of misconduct: First, he claims that the prosecutor violated the district court’s ruling *in limine* when he addressed Zavala’s (false) statements, which had been struck at the prosecutor’s request. (Appellant’s brief, pp.8-9.) Second, he claims that the prosecutor lied when he stated that Zavala’s claim, that the state “offered to dismiss the charges,” was “untrue.” (Appellant’s brief, pp.9-10.) Reversing these arguments, the state will address each in turn.

Zavala’s argument that the prosecutor committed misconduct by, allegedly, falsely denying Zavala’s falsehoods during his rebuttal argument fails. First, examining the prosecutor’s

statement in context (as reproduced in full above), it appears that the focus of the prosecutor's statement was on Zavala's accusation that the state was trying to send him to prison for life, and how the jury's proper function was not to determine Zavala's sentence, only his guilt or innocence. (See Tr., p.572, Ls.5-23.) Second, even taking the comment out of context and making it solely a rejoinder to Zavala's claim that the state had offered to dismiss the charges, the record shows that, in fact, Zavala's statement was false.

Zavala claimed that the state "offered to dismiss *the* charges." (Tr., p.570, Ls.3-4 (emphasis added).) That was untrue. While the state had offered to dismiss *some* charges in exchange for guilty pleas to others, an offer Zavala rejected (see Tr., p.97, Ls.7-18; R., p.202), it never offered a total dismissal of *the* charges, which is what Zavala claimed. Had Zavala told the jury that the state had "offered to dismiss *some* of the charges if he pleaded guilty to others," though still irrelevant and improper argument, that would have at least been honest. But Zavala's actual unqualified statement, that the state had offered to dismiss *the* charges, was not true. The prosecutor did not misstate anything by correctly pointing out, "When [Zavala] says that I'm going to dismiss charges or that I want to put him in prison for life, any of that stuff, that has nothing to do with the case today. It's untrue...." (Tr., p.572, Ls.18-21.) Whether in context or not, Zavala has failed to show error, much less fundamental error, in the prosecutor's rebuttal argument.

Zavala's argument that the prosecutor committed fundamental error by touching on an excluded issue during his rebuttal argument equally fails under the fundamental error standard. First, for a constitutional error to plainly exist, it must be clear in the law. State v. Hadden, 152 Idaho 371, 375, 271 P.3d 1227, 1231 (Ct. App. 2012). As Zavala acknowledges on appeal, there appears to be no Idaho case law on this issue. Second, the prosecutor may respond to the defense

argument during his rebuttal statement. See Darden, 477 U.S. at 182. Zavala's false statements to the jury, offered for the first time during his closing argument without opportunity of cross-examination, opened the door to this line of argument, and the prosecutor did not render Zavala's trial unfair by finally putting it to rest. Zavala has failed to show error, much less fundamental error, in the prosecutor's closing argument.

Zavala also addresses the prejudice prong of the fundamental error test. (Appellant's brief, pp.10-11.) Contrary to Zavala's assertions, this was not a close case. Zavala did not dispute that, on consecutive days, he twice ran away from police and did not submit to their lawful orders. These acts constitute violations of Idaho Code § 18-705. Zavala did not dispute that he was a convicted felon in possession of a firearm, in violation of Idaho Code § 18-3316. The only charge that he remotely disputed was whether he committed an aggravated assault against Officer Crist.

The evidence against Zavala on that contested issue was overwhelming. Zavala was fleeing the police, not with a holstered gun on his person, but while carrying a gun openly in his right hand. (Tr., p.298, L.23 – p.299, L.2; p.319, Ls.2-8; p.427, L.21 – p.428, L.1.) Though Zavala did not take aim at Officers McCarthy and Green, their testimony reveals that, in the moment, they felt sufficiently threatened by Zavala to hesitate to follow him when he ran down an alley, and then to actually fall back from pursuit when Zavala ran headlong into an air-conditioning unit. (Tr., p.303, L.12 – p.304, L.13; p.323, L.4 – p.324, L.5.) When Zavala pointed his gun at Officer Crist, Officer Crist did feel threatened and was concerned for his life. (Tr., p.431, Ls.15-20.) Zavala actually fired his gun (Tr., p.347, L.7 – p.348, L.3; p.366, L.20 – p.367, L.1; p.433, Ls.20-24; see also State's Ex. 10 and Defense Ex. A), which does not occur without Zavala pulling the trigger. Clearly Zavala did not accidentally pull the trigger, jostled

when he fell back from the fence; there was sufficient time between Officer Crist's initial volley and Zavala's return fire for Officer Crist to issue a second command, "Drop that gun!" (State's Ex. 10 and Defense Ex. A.) This evidence suggests that Zavala's trigger pull was deliberate. Finally, evidence showed that Zavala's gun, specifically the slide action, was not in proper working order, and that the slide had locked back. (Tr., p.355, L.24 – p.357, L.9.) This coupled with the fact that Zavala had a contact-type wound to his pinky and ring fingers on his left hand (Tr., p.382, Ls.15-24) could lead to the inference that he shot those fingers while attempting to manipulate the jammed slide.

On appeal, Zavala claims that the prosecutor was attempting to set up a credibility contest. (Appellant's brief, p.11.) For there to be a credibility contest, there must be at least two sets of testimony that conflict. Officers McCarthy, Green, Clark, White, Hopkins, Martinez, Miller, and Crist testified during the state's case-in-chief. (See generally Tr., pp.290-454.) Officers Gooch, Stace, and Chase testified during the defense's case-in-chief. (See generally Tr., pp.496-514.) None of the testimonies presented by any of these witnesses conflicted. Zavala only really challenged Officer Crist's testimony. But Zavala did not testify. He only presented argument and, while argument can be helpful in understanding or interpreting the evidence, it is not evidence. See I.C.J.I. 202; DeChristoforo, 416 U.S. at 640-41, 644; Severson, 147 Idaho at 720, 215 P.3d at 440. Because Zavala did not testify, there is no testimony to weigh against Officer Crist's testimony, and there is no credibility contest. The jury either believed Officer Crist, or it did not.

Zavala has failed to show that the prosecutor committed misconduct in the rebuttal portion of his closing argument, much less misconduct rising to the level of fundamental error. Zavala is not entitled to appellate review of this unpreserved claim of error.

CONCLUSION

The state respectfully requests that this Court affirm Zavala's convictions and sentence.

DATED this 16th day of January, 2018.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of January, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd