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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44675
Plaintiff-Respondent,)	
)	ADA COUNTY
v.)	NO. CR-FE-2015-15435
)	
PATRICK ANTHONY ZAVALA,)	
)	
Defendant-Appellant.)	
<hr/>		

BRIEF OF APPELLANT

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

**HONORABLE LYNN G. NORTON
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

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. Mr. Zavala was convicted of unlawful possession of a firearm, assault on a law enforcement officer with a use of a deadly weapon enhancement, and two counts of resisting or obstructing an officer. He was found to be a persistent violator, and was sentenced to an aggregate unified term of 30 years, with 20 years fixed. He appeals from his judgment of conviction, arguing the prosecutor committed 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 him prior to trial.

Statement of Facts and Course of Proceedings

On October 25, 2015, Officer Jordan McCarthy pulled a vehicle over for failing to come to a complete stop and failing to signal after leaving a parking lot. (Tr., p.290, L.14 – p.291, L.23.) As he was exiting his patrol car, Officer McCarthy saw a man later determined to be Mr. Zavala open the driver’s side door of the stopped vehicle, and run away. (Tr., p.293, L.4 – p.294, L.11.) Officer McCarthy did not run after Mr. Zavala. (Tr., p.294, Ls.21-22.) He testified Mr. Zavala did not threaten him, but seemed motivated “[t]o get away.” (Tr., p.310, Ls.10-21.)

The next night, Officer McCarthy and two other officers stopped a vehicle in the same general area for driving without illuminated headlights. (Tr., p.295, L.13 – p.296, L.14, p.316, Ls.13-19.) Mr. Zavala was the passenger in that vehicle and ran away before the officers approached. (Tr., p.298, Ls.4-21, p.317, Ls.18-21.) The officers observed Mr. Zavala carrying a pistol in his right hand, and a soda bottle in his left hand. (Tr., p.298, L.23 – p.299, L.2, p.319,

Ls.9-11.) Two officers ran after Mr. Zavala, yelling at him multiple times to “[d]rop the gun.” (Tr., p.302, Ls.6-19, p.319, Ls.2-8.) Officer McCarthy testified Mr. Zavala continued to run away and “never even turned around.” (Tr., p.303, Ls.3-7.) At one point, Mr. Zavala fell down, but he “immediately got back up and continued [to run]” (Tr., p.323, Ls.4-9.)

The officers saw Mr. Zavala run down an alley, but did not follow him until they heard shots fired. (Tr., p.304, L.17 – p.305, L.5, p.323, L.22 – p.324, L.9.) Officer McCarthy testified he “didn’t know who was shooting or what was being shot.” (Tr., p.306, Ls.2-5.) Unbeknownst to anyone, Officer Adam Crist had responded to the area of the traffic stop, and observed multiple patrol cars. (Tr., p.417, Ls.4-11, p.418, Ls.6-10.) He did not communicate with dispatch or any of the officers on scene, but began pursuing Mr. Zavala on his own. (Tr., p.445, L.23 – p.446, L.3.) Officer Crist followed Mr. Zavala in his patrol car, then parked his car in a parking lot near the end of an alley, and exited with his gun drawn. (Tr., p.421, Ls.4-18.) Officer Crist stood near a six-foot wooden fence. (State’s Exs. 4c, 5; Tr., p.423, Ls.9-14, p.424, Ls.14-17, p.427, Ls.14-17.) He testified he expected Mr. Zavala to come over the fence based on the sounds he heard. (Tr., p.425, L.24 – p.426, L.10.) He turned on his flashlight and “put it against my chest, so if the subject did jump over the fence, or before he jumped over the fence, he wouldn’t see where my flashlight was, so that I would have the element of surprise as well as to be able to not be seen before I wanted to be seen.” (Tr., p.425, Ls. 18-23.)

Officer Crist heard Mr. Zavala hit the fence, and then saw Mr. Zavala’s hands on top of the fence. He testified:

A. So when he hits the fence, he puts his hands up on top of the fence, and as he does this, I can see both hands clearly, and his left hand is clear. There’s nothing inside his hand. In the right hand, he’s holding a semiautomatic pistol with a chrome or silver slide.

Q. Okay. What did he do next?

- A. He then jumped up onto the fence and rested his belly at his waist on top of the fence and began to – he was looking straight ahead as if the next place he was going to run to. He began to bend over at the waist and his butt started to come up, but he’s still looking straight ahead.

(Tr., p.427, L.21 – p.428, L.8.) Officer Crist testified he shined his flashlight at Mr. Zavala and said, “You drop the gun.” (Tr., p.429, Ls.1-11.) He testified Mr. Zavala “immediately looked at me and immediately pointed the gun directly at me.” (Tr., p.430, Ls.14-17.) He testified he felt threatened and thought Mr. Zavala “was going to shoot me.” (Tr., p.431, Ls.15-20.)

Officer Crist shot at Mr. Zavala eleven times, from a distance of approximately 25 feet, striking him once in the leg. (Tr., p.432, Ls.19-24, p.444, Ls.9-10.) Mr. Zavala, on the other side of the fence, shot himself accidentally in the hand, and Officer Crist fired at Mr. Zavala again, through the fence. (Tr., p.383, Ls.2-6, p.433, L.20 – p.431, L.6.) The two recordings of the incident reflect that Officer Crist began shooting at Mr. Zavala before he finished saying, “Put the gun down.” (State’s Ex. 10, at 1:05-1:14; Defendant’s Ex. A at 1:10-1:19.) Officer Crist acknowledged on cross-examination that he did not believe Mr. Zavala knew he was there before he shined his flashlight at him. (Tr., p.442, Ls.12-18.) He also acknowledged that, per department policy, a police officer is only permitted to use deadly force “if you are in fear of yourself, of imminent danger for life of yourself or others.” (Tr., p.447, Ls.14-17.)

After the shots were fired, Officers McCarthy and Green found Mr. Zavala bleeding from his hand and “pretty profusely” from his right leg. (Tr., p.307, Ls.7-24, p.308, Ls.23-24, p.325, Ls.9-13.) Officer McCarthy testified Mr. Zavala “did what we asked him to do,” and was taken into custody. (Tr., p.308, Ls.5-11.) Officer McCarthy acknowledged on cross-examination that he was never threatened by Mr. Zavala, and believed Mr. Zavala’s intention was to get away. (Tr., p.312, Ls.9-13.)

Mr. Zavala was charged by Information, and subsequently Amended Information, with unlawful possession of a firearm, aggravated assault on a law enforcement officer with a use of a deadly weapon enhancement, and two counts of resisting or obstructing an officer. (R., pp.74-75, 221-23.) The State filed an Information Part II alleging Mr. Zavala was a persistent violator within the meaning of Idaho Code § 19-2514. (R., pp.95-97.) Prior to trial, the district court granted Mr. Zavala's request to represent himself, appointing the public defender as standby counsel. (R., p.105.) The district court re-appointed the public defender to represent Mr. Zavala, and then again allowed Mr. Zavala to represent himself. (R., pp.126, 156.) The case proceeded to trial, with Mr. Zavala representing himself. (R., pp.242-79.)

The jury found Mr. Zavala guilty of assault on a law enforcement officer with a use of a deadly weapon enhancement and two counts of resisting or obstructing an officer. (Tr., p.613, Ls.7-24.) Mr. Zavala then proceeded to trial on the charge of unlawful possession of a firearm, this time represented by counsel, and was found guilty. (Tr., p.648, Ls.3-14.) The jury then found Mr. Zavala guilty of being a persistent violator. (Tr., p.659, L.12 – p.660, L.15.) The district court sentenced Mr. Zavala to an aggregate unified term of 30 years, with 20 years fixed. (Tr., p.720, L.23 – p.721, L.18.) The judgment of conviction was entered on November 21, 2016, and Mr. Zavala filed a timely notice of appeal on December 6, 2016. (R., pp.340-45, 346-49.) On January 27, 2017, Mr. Zavala filed a motion pursuant to Idaho Criminal Rule 35(a) to correct an illegal sentence. (R., pp.369-99.) The district court denied Mr. Zavala's Rule 35 motion. (R., pp.519-24.)

ISSUE

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?

ARGUMENT

The Prosecutor Committed 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 Prior To Trial

A. Introduction

Mr. Zavala’s unwaived constitutional right to a fair trial was violated when the prosecutor stated, in his rebuttal closing argument, that it was “untrue” that the State offered to “dismiss charges” against him prior to trial. The prosecutor’s statement constituted misconduct because, in addition to being false, the district court had granted the State’s motion *in limine* to prohibit any reference to pretrial settlement offers, and, at the prosecutor’s request, had struck Mr. Zavala’s statements referring to a pretrial offer. The prosecutorial misconduct is plain from the record, and Mr. Zavala’s failure to object could not have been a tactical decision. The error was not harmless, as this was a close case, and the only count Mr. Zavala contested was the aggravated assault charge, which is the very charge the State offered to dismiss prior to trial. This Court must vacate Mr. Zavala’s conviction and remand for a new trial.

B. Standard Of Review

“When there is no contemporaneous objection a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error.” *State v. Field*, 144 Idaho 559, 571 (2007). An error constitutes fundamental error where it: “(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.” *State v. Perry*, 150 Idaho 209, 228 (2010).

C. The Prosecutor's Statement Plainly Constituted Misconduct And Violated Mr. Zavala's Constitutional Right To A Fair Trial

The Due Process Clause of the United States Constitution guarantees the right to a fair trial in criminal proceedings. U.S. CONST. amends. V & XIV, § 1. “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. The Idaho Supreme Court has recognized that “[w]hile our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he is nevertheless expected and required to be fair.” *Field*, 144 Idaho at 571 (quoting *State v. Estes*, 111 Idaho 423, 427-28 (1986)). Here, the prosecutor’s rebuttal closing argument was not fair, and was in no way a permissible commentary on the law and the evidence.

At a pretrial conference, the prosecutor stated on the record that he made a settlement offer to Mr. Zavala, offering to drop the charge of aggravated assault against a law enforcement officer. The prosecutor said:

I did make a settlement offer that I passed to Mr. Zavala through his standby counsel. That offer was to allow Mr. Zavala to plead guilty to the possession of the firearm charge, a persistent violator enhancement, and the state would dismiss the remaining charges. My understanding is that Mr. Zavala has rejected that plea offer. That plea offer expires today, and so my understanding is that he has heard that plea offer and rejected it.

(Tr., p.97, Ls.9-18) Mr. Zavala signed a document acknowledging, and rejecting, the State’s settlement offer. (R., p.202.)

Prior to trial, the prosecutor made an oral motion *in limine* “to prohibit any talk of plea agreements, any plea offers that have been made or rejected at any time in this case whether in writing, whether by exhibit or verbally.” (Tr., p.132, L.25 – p.133, L.4.) The district court

granted the prosecutor's motion, explaining to Mr. Zavala that the rejection of any plea offer is "not admissible as to whether you are guilty or not guilty in this particular case, and those are the matters that are before the jury for trial." (Tr., p.137, L.22 – p.138, L.1.)

In his closing argument, Mr. Zavala said he would accept full responsibility for what he did, but "[a]s God is my witness, I never threatened him." (Tr., p.568, Ls.19-20.) He said, "My only offense was running from the cops and having that gun" (Tr., p.568, Ls.20-21.) At the end of his closing argument, Mr. Zavala said, "And I'm not supposed to tell you, but they offered to dismiss the charges." (Tr., p.570, Ls.3-4.) The prosecutor objected, stating, "That is irrelevant and untrue." (Tr., p.570, Ls.5-6.) Mr. Zavala continued, "But I chose to come here and confront them." (Tr., p.570, Ls.7-8.) The prosecutor again objected, and the district court sustained the objection and, at the request of the prosecutor, struck Mr. Zavala's last two sentences. (Tr., p.570, Ls.9-12.) The court explained, "Mr. Zavala's last two sentences . . . 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.12-18.) At that point, the prosecutor began his rebuttal argument. He said, "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 of him to say those things in court today, and I ask you not to consider those things." (Tr., p.570, Ls.18-23.)

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. The prosecutor's misconduct was two-fold. First, the prosecutor knowingly violated the district court's ruling on the State's motion *in limine* and addressed statements made by Mr. Zavala which had already

been struck at the prosecutor's request. Second, the prosecutor misrepresented the actual procedural history of this case. The prosecutor said it was "untrue" that the State was willing to "dismiss charges" prior to trial. This was plainly false, as the prosecutor *did* offer to dismiss the aggravated assault charge prior to trial. (Tr., p.97, Ls.9-18) By falsely denying that the State offered to dismiss any charges against Mr. Zavala, the prosecutor wanted the jury to believe Mr. Zavala was lying about the pretrial offer, and lying about what occurred between him and Officer Crist. The prosecutorial misconduct is plain from the record, and Mr. Zavala could not possibly have made a tactical decision not to object.

Though neither the Idaho Supreme Court nor the Idaho Court of Appeals has squarely addressed the issue, other courts have made clear that a prosecutor cannot refer in closing argument to a matter that has been excluded from evidence. *See, e.g., Com. v. Carroll*, 789 N.E.2d 1062, 1068 (Mass. 2003) (stating "[a] prosecutor is barred from referring in closing argument to a matter that has been excluded from evidence . . . and a prosecutor should also refrain from inviting an inference from the jury about the same excluded subject matter"). The Idaho Court of Appeals has recognized that "[i]t is impermissible for a party to ask the jury to rely on evidence admitted for a limited purpose as though it had been admitted for all substantive purposes" *State v. Rothwell*, 154 Idaho 125, 135 (Ct. App. 2013). Surely it is even more impermissible for a party to ask the jury to consider a matter that has been excluded from evidence altogether. Here, the prosecutor chose to comment on a matter that had been excluded from evidence on the State's motion. Mr. Zavala violated the district court's order in referring to the State's pretrial offer, but his statements were struck by the district court. For the prosecutor to refer to the matter in his rebuttal closing argument was improper.

Moreover, the prosecutor's comment on the excluded matter was knowingly false. It is clear from the record that the State *did* offer to dismiss the aggravated assault charge against Mr. Zavala prior to trial. The prosecutor mischaracterized the procedural history of the case when he stated Mr. Zavala's reference to an offer to dismiss charges "was untrue." The Idaho Supreme Court has recognized "[i]t is improper to misrepresent or mischaracterize the evidence in closing argument." *State v. Moses*, 156 Idaho 855, 871 (2014) (quoting *Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)). It must also be improper to misrepresent or mischaracterize the procedural history of a case.

In *Moses*, the Supreme Court held the prosecutor fell short of his duty by misleading the jury as to the terms of a witness' immunity agreement. 156 Idaho at 871; *see also State v. Lankford*, 162 Idaho 477, 399 P.3d 804, 829 (2017) (discussing *Moses*). The prosecutor committed a similar error here by referencing the pretrial settlement offer, but his statement was even more egregious than the statement at issue in *Moses* because the matter was supposed to be excluded altogether. Moreover, the error here was not harmless when viewed in the context of the evidence as a whole. Mr. Zavala did not object to the prosecutor's statement at trial, but surely his failure to object resulted not from a tactical decision, but from his lack of legal knowledge.

D. The Prosecutorial Misconduct Was Not Harmless

This Court must vacate Mr. Zavala's conviction and remand this case to the district court for a new trial because the prosecutorial misconduct in this case was egregious and inflammatory, and the prejudice resulting from that misconduct could not have been remedied by a limiting instruction. *See State v. Abdullah*, 158 Idaho 386, 444 (2015) ("[P]rosecutorial misconduct during closing arguments will constitute fundamental error only if the comments

were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded.”)

The prosecutor concluded his rebuttal closing argument as follows:

And he told you about those responsibilities, and he told you under oath, and, ladies and gentlemen, if you believe Officer Crist, if you believe he was telling the truth up there, then you have nothing else to do, then you have all of the evidence you need to convict the defendant of aggravated assault on law enforcement. Despite his riotous indignation here in court today, despite his yelling about admitting the mistakes he’s made and then admitting none of them, if you believe Officer Crist, then the defendant is guilty beyond a reasonable doubt, and I’d ask you to find him so.

(Tr., p.574, L.16 – p.575, L.2.) The prosecutor was setting up a credibility contest—either the jury believed Officer Crist, and found Mr. Zavala guilty of aggravated assault, or the jury believed Mr. Zavala, and found him not guilty of aggravated assault. The prosecutor set up this credibility contest after telling the jury Mr. Zavala was lying—that his statement about a pretrial offer to dismiss charges was “untrue.” This was surely helpful to the State in obtaining a guilty verdict, but wrongfully undermined Mr. Zavala’s defense.

In his opening argument, Mr. Zavala admitted he “was at fault for certain things” but denied ever threatening Officer Crist. (Tr., p.286, Ls.12-13.) He told the jury, “My main objective was to run away. I was scared. I’m not going to lie I was scared, and the gun belonged to somebody I know, and I didn’t want it to get [taken] away, so I ran with it, but it was never my intention to [assault] anybody. It was never my intention to be aggressive with anybody.” (Tr., p.286, Ls.14-19.) Mr. Zavala told this story to the district court and the jury over and over again. The jury may well have believed him, and found him not guilty of aggravated assault, if they had not been told by the prosecutor, in his rebuttal closing argument, that Mr. Zavala was lying. The prosecutor’s comments were egregious and inflammatory, could not have been remedied by a limiting instruction, and violated Mr. Zavala’s constitutional right to a fair trial.

CONCLUSION

Mr. Zavala respectfully requests that this Court vacate his judgment of conviction and remand this case to the district court for further proceedings.

DATED this 24th day of October, 2017.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of October, 2017, 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:

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_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas