10-16-2017

# State v. Ibarra Appellant's Brief Dckt. 44945

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| **STATE OF IDAHO,** | ) | |
| | ) | **NOS. 44945, 44946 & 44947** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **CANYON COUNTY** |
| | ) | **NOS. CR 2016-11195, CR 2016-11241 &** |
| | ) | **CR 2016-12526** |
| **v.** | ) | |
| | ) | |
| **JESSICA JEAN IBARRA,** | ) | **APPELLANT'S BRIEF** |
| **aka DELEON,** | ) | |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

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**HONORABLE JUNEAL C. KERRICK**
**District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Jessica Ibarra contends that the prosecutor committed misconduct amounting to fundamental error by twice asking one of the officers to give his opinion about her guilt even though the district court had already sustained an objection to a third such question. Ms. Ibarra also contends that the district court erred by admitting propensity evidence because the State did not provide the requisite written notice of its intent to introduce that evidence. Finally, she asserts that the district court abused its discretion by entering a restitution award which was solely based on the prosecutor's unsworn statement, not on substantial evidence.

Accordingly, this Court should vacate her judgments of conviction and remand these cases for a new trial. Alternatively, it should vacate the portions of the restitution order which are not supported by substantial evidence.

### Statement of the Facts and Course of Proceedings

Given the number and diversity of the errors in this case, to promote clarity, the facts relevant to the specific issues will be set forth in the respective sections of the brief. Generally though, Ms. Ibarra was a passenger in a car with her then-boyfriend, and they were pulled over when an officer saw him fail to completely stop at a stop sign. (R., p.225.) Subsequent searches of the car and its occupants revealed drugs, paraphernalia, and a gun. (R., pp.225-28.)

A jury ultimately convicted Ms. Ibarra of possession of cocaine (enhanced based on a prior conviction for possession of a controlled substance), unlawful possession of a firearm, misdemeanor possession of marijuana, and misdemeanor possession of paraphernalia.[1]

[1] Hereinafter, the charges will be referred to as the "cocaine charge," the "firearm charge," the "marijuana charge," and the "paraphernalia charge," respectively.

(R., pp.324-27.) The district court imposed an aggregate sentence of nineteen years, with six and one-half years fixed, which consisted of: a fourteen-year sentence, with six and one-half years fixed, for the cocaine charge; a consecutive five-year sentence, with zero years fixed, for the firearm charge; and concurrent 180-day sentences for the two misdemeanor charges. (Tr., Vol.1, p.120, L.8 - p.121, L.23.)[2] Ms. Ibarra filed notices of appeal timely from the resulting judgments of conviction. (R., pp.75, 83-84, 89-92, 339-44.)

[2] The transcripts in this case are provided in three independently bound and paginated volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcripts of the motion to suppress hearing and sentencing hearing. "Vol.2" will refer to the volume containing the transcript of the first day of the jury trial, and "Vol.3" will refer to the volume containing the transcript of the second day of trial.

## ISSUES

I. Whether the prosecutor committed misconduct by eliciting opinion testimony about Ms. Ibarra's guilt in regard to the firearm charge.

II. Whether the district court erred by admitting propensity evidence when the State failed to provide the written notice required under I.R.E. 404(b).

III. Whether the district court abused its discretion by ordering restitution which was solely based on the prosecutor's unsworn statement, not on sufficient evidence.

## ARGUMENT

## I.

## The Prosecutor Committed Misconduct By Eliciting Opinion Testimony About Ms. Ibarra's Guilt In Regard To The Firearm Charge

### A. Relevant Facts

During her direct examination of Officer Duke, the prosecutor asked him: "Based on your training and experience, you believed they were both guilty of this [possessing the gun in the car]?" (Tr., Vol.2, p.183, Ls.21-22.) The district court sustained defense counsel's objection to that question. (Tr., Vol.2, p.183, Ls.23-24.) Nevertheless, during her redirect examination, the prosecutor again asked Officer Duke: "If you believed that someone was innocent, would you arrest them?" and "[I]f you believed Jessica did not know about the gun and did not have access to it, would you have arrested her?" (Tr., Vol.2, p.214, Ls.14-15, p.215, Ls.16-18.) The officer answered "No" to both questions without further objection. (*See* Tr., Vol.2, p.214, Ls.14-16, p.215, Ls.16-19.)

### B. Standard Of Review

When raising claims of unobjected-to error, the appellant must demonstrate that the error affected one of her unwaived constitutional rights, that the error was clear from the face of the record, and that there is a reasonable possibility that the error affected the outcome of the trial. *State v. Perry*, 150 Idaho 209, 226 (2010).

### C. The Prosecutor's Improper Eliciting Of The Officer's Opinion About The Ms. Ibarra's Guilt Was Misconduct, And That Misconduct Amounted To Fundamental Error

A witness's opinion which serves to evaluate the circumstances of the case, or in other words, to weigh the evidence, and thus, "render the same conclusion the jury was asked to render

by its verdict," is inadmissible. *State v. Hester*, 114 Idaho 688, 696 (1988). This is because such opinions do not speak to a matter that is beyond the common sense, experience, and education of the average juror, and so, such opinions do not "assist" the jury in fulfilling its duties. *See State v. Ellington*, 151 Idaho 53, 66 (2011). Therefore, when the prosecutor attempts to elicit this sort of improper, inflammable, or irrelevant testimony, she commits misconduct. *Id.* at 62.

The questions the prosecutor asked during her redirect examination of Officer Duke do precisely that. She expressly asked Officer Duke to weigh the evidence in regard to the elements of constructive possession of the firearm – whether he "believed Jessica did not know about the gun and did not have access to it." (Tr., Vol.2, p.215, Ls.16-18.) Furthermore, by asking him if he would have still arrested her if he did not believe either of those two facts existed – whether he would have arrested a person if he "believed that someone was innocent" (Tr., Vol.2, p.214, Ls.14-15) – the prosecutor was asking Officer Duke to opine on precisely the same question the jury would be asked to answer in its verdict. (*Compare* R., p.308 (the elements instruction for the firearm charge).) Essentially, the prosecutor was asking Officer Duke the same question she had pointedly asked on direct examination – whether he believed is Ms. Ibarra (along with the driver of the car) was "guilty of this." (Tr., Vol.2, p.183, Ls.21-22.) Such questions about the ultimate issue, as the district court indicated by sustaining the objection to the first such question, are wholly improper. *See, e.g.*, *Ellington*, 151 Idaho at 66; *Hester*, 114 Idaho at 696.

As such, the prosecutor's questions on redirect constitute misconduct. That misconduct is properly challenged in this appeal under the doctrine of fundamental error.

1. The Prosecutor's Misconduct Violated Ms. Ibarra's Unwaived Constitutional Due Process Right To A Fair Trial In A Fair Tribunal

In regard to the first prong of the *Perry* test, Ms. Ibarra recognizes that not all instances of prosecutorial misconduct involving eliciting improper evidence will rise to the level of constitutional error, but they are not categorically excluded from consideration as fundamental error either. *See State v. Lankford*, 162 Idaho 477, ___, 399 P.3d 804, 823-24 (2017) ("evidentiary errors do not implicate constitutional considerations unless the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal") (internal quotation and alterations omitted); *Perry*, 150 Idaho at 227 (indicating that prosecutorial misconduct could "impact[] a defendant's Fourteenth Amendment right to a fair trial); *accord Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974) (in reviewing a claim of prosecutorial misconduct, the United States Supreme Court explained that "the process of constitutional line drawing in this regard is necessarily imprecise," but it ultimately held that "this incident [of misconduct] made respondent's trial so fundamentally unfair as to deny him due process").

Therefore, it is possible for a situation to arise in which prosecutorial misconduct resulting in the improper admission of evidence reaches such a prejudicial level that it will deprive the defendant of due process and a fair trial, thereby amounting to fundamental error. *See, e.g.*, *Ellington*, 151 Idaho at 65-67 (explaining that, even though no objection was made when the officer gratuitously offered an improper opinion on direct examination,[3] "had Mr. Ellington raised this issue as another instance of prosecutorial misconduct on appeal, we would have found, once again, that the State's conduct was improper"); *United States v. Vera*,

[3] The defense attorney in *Ellington* did object when the officer made similar statements during redirect examination. *See Ellington*, 151 Idaho at 66.

770 F.3d 1232, 1243 (9th Cir. 2014) (vacating a conviction under the federal plain error doctrine because, even though it had not been objected-to, the prosecutor had elicited improper opinion testimony from an officer).[4]

Ms. Ibarra's is one such case. Here, the prosecutor asked the officer to opine on Ms. Ibarra's guilt on three different occasions, and was successful in the latter two efforts. The reason eliciting this sort of opinion testimony is problematic, as numerous courts have recognized, is that jurors may defer to the witness's opinion rather than weighing the evidence themselves. *See, e.g., State v. Johnson*, 119 Idaho 852, 857 (Ct. App. 1991) ("In view of the deference that the jury may have held for the doctor's testimony," his improper opinion testimony about another witness's credibility should have been excluded); *United States v. Freeman*, 730 F.3d 590, 599 (6th Cir. 2013) ("An agent presented to a jury with an aura of expertise and authority increased the risk that the jury will be swayed improperly by the agent's testimony, rather than rely on its own interpretation of the evidence.")[5]

[4] Granting relief under the federal plain error doctrine is appropriate when the error "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *See United States v. Olano*, 507 U.S. 725, 736 (1993). Thus, the decision in *Vera* suggests the misconduct in that case violated the defendant's constitutional right to a fair trial.

[5] *See also Vera*, 770 F.3d at 1243, 1252-53 (vacating portions of a verdict based on the improperly-admitted expert testimony of a federal agent because of the risk the jury deferred to that opinion); *United States v. Hampton*, 718 F.3d 978, 981-82, 984 (D.C. Cir. 2013) (holding the reasonable possibility that the jurors had deferred to an officer's improper opinion testimony meant the error in admitting that testimony was not harmless); *United States v. Grinage*, 390 F.3d 746, 751 (2nd Cir. 2004) (same); *cf. State v. Phillips*, 144 Idaho 82, 87 (Ct. App. 2007) (explaining that prosecutorial misconduct in closing argument is problematic because prosecutors (like the officer in Ms. Ibarra's case) "'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 counsel for the accused.'") (quoting *State v. Irwin*, 9 Idaho 35, 43-44 (1903)); *Reynolds v. State*, 126 Idaho 24, 30 (Ct. App. 1994) ("Experts often possess special knowledge or training, giving their opinions of credibility great weight in the minds of the jury.")

This concern is particularly present when the witness in question is a police officer, as jurors are even more likely to defer to an officer's conclusions than to those of other witnesses. *See, e.g., Grinage*, 390 F.3d at 751 (explaining that, since the federal agent's testimony "went to the crux of the Government's case[,] the jury may well have afforded *unusual* authority to the agent, who was presented as having expertise, as well as knowledge beyond that available to the jury") (emphasis added); *Hampton*, 718 F.3d at 981-82 ("Judicial scrutiny of a law-enforcement witness's purported basis for lay opinion *is especially important* because of the risk that the jury will defer to the officer's superior knowledge of the case and past experiences with similar cases") (emphasis added). In essence, as courts have repeatedly recognized, this sort of misconduct drives at the heart of the due process right to a fair trial before a fair tribunal because it effectively causes the jury to cease functioning as a neutral arbiter.

As problematic as that is, the error in this case is actually even more insidious because the prosecutor repeatedly engaged in this misconduct after the district court had sustained an objection to that line of questioning, meaning the misconduct here was even more likely to deprive Ms. Ibarra of her constitutional right to a fair trial. As the Idaho Supreme Court noted in *Ellington*, where the prosecutor also continued to ask improper questions after the district court had sustained an objection to that line of questioning, "[t]he court should not have to lecture the prosecutor in front of the jury in order to get its point across that the current line of questioning is inappropriate and the prosecutor should move on to the next one." *Ellington*, 151 Idaho at 63. Therefore, given the nature of this particular type of misconduct and the repeated efforts to engage in it, the facts of this case present the situation where the prosecutorial misconduct rises to a constitutional violation, depriving Ms. Ibarra of her constitutional due process right to a fair trial in a fair tribunal.

2. The Prosecutor's Misconduct Is Clear From The Face Of The Record

Under the second prong of the *Perry* test, the transcript is eminently clear as to what questions the prosecutor asked of Officer Duke. (Tr., Vol.2, p.183, Ls.21-22, p.214, Ls.14-15, p.215, Ls.16-18.) Those questions are just as clearly improper. *See, e.g.*, *Ellington*, 151 Idaho at 66; *Hester*, 114 Idaho at 696. Therefore, the error is clear from the record.

3. There Is A Reasonable Possibility The Prosecutor's Misconduct Affected The Outcome On The Firearm Charge

In regard to the third prong of *Perry*, the major problem with this sort of misconduct is that the jurors may disregard otherwise-reasonable doubts and simply adopt the improper opinion in their evaluation of the case instead. (*See* Section I(A)(1), *supra*.) As a result, several courts have indicated there is a reasonable possibility such an error would affect the outcome of the trial. *See, e.g.*, *Vera*, 770 F.3d at 1243 (vacating a conviction under the federal plain error doctrine, which requires the same sort of showing of harm by the appellant); *Freeman*, 730 F.3d at 599-600 (holding that such misconduct was not harmless); *Hampton*, 718 F.3d at 984 (same); *Grinage*, 390 F.3d at 751-52 (same); *Johnson*, 119 Idaho at 859 (same).

This reasonable possibility is evident in Ms. Ibarra's case because there are several aspects of the firearm charge about which the jurors may have harbored reasonable doubts, particularly in regard to the elements of her knowledge of, and ability to control, the gun. For example, Officer Duke himself made numerous statements during the course of his encounter with Ms. Ibarra in which he expressed doubt as to her assertion that the gun was hers, and thus, of her knowledge of, and ability to control, the gun. (*See, e.g.*, Exhibit 20.) Rather, as he told her, he felt she was lying in order to try and protect the driver of the car. (*See* Exhibit 20.) Furthermore, the recording of Ms. Ibarra's testimony during the preliminary hearing in the

driver's case reveals the prosecutor there thoroughly impeaching her assertion that she knew about the gun, demonstrating, for example, that she had no knowledge about the specifics of the gun, such as its maker, model, or magazine size. (*See* Exhibit 42.) The jurors could have easily harbored those same doubts about Ms. Ibarra's knowledge of, and ability to control, the gun, and based on those doubts, acquitted her of the firearm charge. There is, thus, a reasonable possibility that they abandoned those reasonable doubts and cleaved to the opinion the prosecutor expressly and improperly elicited from Officer Duke about the existence of those elements despite those reasonable doubts. Therefore, there is a reasonable possibility the prosecutor's repeated misconduct affected the outcome of the trial on the firearms charge.

As such, this Court should vacate Ms. Ibarra's conviction because the prosecutor's repeated misconduct constitutes fundamental error.

## II.

## The District Court Erred By Admitting Propensity Evidence When The State Failed To Provide The Written Notice Required Under I.R.E. 404(b)

### A. Relevant Facts

On the morning of the first day of trial, the prosecutor gave verbal notice to defense counsel of her intention to ask one of her witnesses about lab tests conducted on a pipe found in the car, which confirmed the presence of methamphetamine. (Tr., Vol.2, p.19, Ls.8-15, p.20, Ls.18-19.) The prosecutor argued that evidence was relevant to whether Ms. Ibarra knew the pipe was actually drug paraphernalia, but the prosecutor also noted that video from Officer Duke's body camera had recorded him asking Ms. Ibarra who owned "the meth pipe," and that she had responded that she did. (Tr., Vol.2, p.21, Ls.11-16; *see* Exhibit 20.)

Defense counsel objected to the State introducing evidence about those test results, arguing that such evidence spoke to an act with which Ms. Ibarra had not been charged (possession of methamphetamine), and therefore, that evidence was subject to the requirements of I.R.E. 404(b). (Tr., Vol.2, p.19, L.25 - p.20, L.5; *see generally* R., pp.7-10, 38-39 (the complaint and information identifying the charges in this case).) He argued that evidence was not admissible because the prosecutor had not provided written notice of her intent to admit that evidence as required by that rule. (Tr., Vol.2, p.20, Ls.8-22.) He also noted that "it's important for the Court to distinguish between my client admitting the pipe is a methamphetamine pipe and then now saying all right, we've tested it, and there's actually methamphetamine in it." (Tr., Vol.2, p.22, Ls.12-18.)

The district court did not discuss the notice requirements of I.R.E. 404(b) in ruling on that objection. (*See generally* Tr., Vol.2, p.22, L.19 - p.23, L.6.) Instead, it allowed the State to present testimony that the pipe had tested positive for "a controlled substance," but forbade it from identifying the substance as methamphetamine. (Tr., Vol.2, p.22, L.20 - p.23, L.5.)

B. Standard Of Review

In reviewing the admission of propensity evidence, the Court conducts a two-prong analysis: "The first step was for the district court to determine whether the evidence met the requirements for admissibility under Rule 404(b), and the second step was for the court to decide under Rule 403 if the probative value of the evidence was substantially outweighed by the danger of unfair prejudice." *State v. Rawlings*, 159 Idaho 498, 505 (2015). The notice requirement is reviewed as part of the first prong since "[t]he evidence would not meet the admissibility requirements of Rule 404(b) unless the Prosecutor filed and served the Rule 404(b)

notice reasonably in advance of trial." *Id*. The first prong is subject to free review. *State v. Sheldon*, 145 Idaho 225, 229 (2007).

C. Since The State Did Not Provide The Required Written Notice, The Evidence Relating To The Tests On The Pipe Is Inadmissible In Any Form

The evidence of what the tests on the pipe revealed is properly subject to the requirements of I.R.E. 404(b) because uncharged possession of a controlled substance is an "other act" as contemplated by that rule. *See State v. Kralovec*, 161 Idaho 569, 574 (2017) (holding, while evaluating the application of I.R.E. 404(b), that other uncharged conduct occurring at the same time as the charged conduct "is only admissible if it meets the criteria established by the Idaho Rules of Evidence"). As a result, the prosecutor was required to provide written notice before any evidence relating to those test results would be admissible. *See, e.g.*, *State v. Whitaker*, 152 Idaho 945, 950 (Ct. App. 2012) ("The notice requirement is mandatory and the failure to comply creates a bar to admission."). Since the prosecutor did not ever provide any written notice (*see generally* R.), no evidence about those tests should have been admitted.

This includes the generic reference to "a controlled substance" which the district court allowed. That generic reference still presents evidence of other uncharged conduct, namely, possession of a controlled substance. Therefore, that generic reference still has to be analyzed under I.R.E. 404(b). *See Kralovec*, 161 Idaho at 574. Under that rule, the generic reference is still inadmissible because the prosecutor did not provide the required written notice of her intent to present testimony about that other, uncharged act. *See Rawlings*, 159 Idaho at 505; *Whitaker*, 152 Idaho at 950. Thus, the district court's decision to allow that generic testimony in absence of the proper notice was error. Because the district court allowed the State to present improper propensity evidence, this Court should vacate Ms. Ibarra's convictions.

III.

The District Court Abused Its Discretion By Ordering Restitution Which Was Solely Based On The Prosecutor's Unsworn Statement, Not On Sufficient Evidence

A. Relevant Facts

At the sentencing hearing, the State made an initial request for restitution pursuant to I.C. § 37-2732(k). (Tr., Vol.1, p.101, Ls.14-21.) The district court deferred its ruling on that issue because "the State needs to submit an affidavit in support of the lab [costs] and also an affidavit in support of the -- the requested costs of prosecution" for its consideration. (Tr., Vol.1, p.120, Ls.15-21.) The district court also informed Ms. Ibarra of her right to object to the State's restitution request. (Tr., Vol.1, p.125, Ls.16-18.)

Thereafter, the State filed a motion for restitution. (R., p.79.) In regard to its claim for $3,697.50 as costs of prosecution, it attached a fill-in-the-blank-style form prepared by the prosecutor claiming restitution for 25.5 hours of work at a pay rate of $145 per hour. (R., p.82.) That statement was not certified as accurate, nor was it notarized. (*See generally* R., p.82.) Nevertheless, the district court granted that restitution request without a hearing. (R., pp.85-87.)

B. Standard Of Review

The awarding of restitution under I.C. § 37-2732(k) is discretionary. *State v. Nelson*, 161 Idaho 692, 695 (2017); *State v. Cunningham*, 161 Idaho 698, 700 (2017). As such, the appellate courts evaluate whether the district court properly perceived the issue as one of discretion; whether it acted within the outer bounds of that discretion and consistent with the relevant legal standards; and whether it reached its discretion in an exercise of reason. *Id.*

C. The Prosecutor's Unsworn Statement Does Not Constitute Sufficient Evidence Upon Which The Restitution Award Could Be Based

In order for a restitution award under I.C. § 37-2732(k) to be a proper exercise of discretion under the second and third prongs of the applicable test, the award must be based upon the preponderance of the evidence, and the prosecutor bears the burden of proof. *See Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700. In both *Nelson* and *Cunningham*, the Idaho Supreme Court held that unsworn representations made by the prosecutor do not constitute substantial evidence upon which such restitution awards can be based. *Nelson*, 161 Idaho at 696-97; *Cunningham*, 161 Idaho at 701-02.[6] Just like the restitution awards in *Nelson* and *Cunningham*, the restitution award for the prosecutor's time in this case is based solely on an unsworn, "boilerplate, fill-in-the-blank-style form" filled out by the prosecutor. (*See* R., p.82; *see generally* R., pp.79-82.) Therefore, just as in *Nelson* and *Cunningham*, the restitution order is not supported by sufficient evidence.

For example, there is no evidence supporting the claim for 25.5 hours worked on this case. There is no itemization or description of the tasks performed, nor is there any indication of when they were undertaken. *See, e.g., Cunningham*, 161 Idaho at 701 (noting the lack of such facts); *compare State v. Weaver*, 158 Idaho 167, 170-71 (Ct. App. 2014) (affirming an award of restitution where evidence of such facts was presented). The lack of that sort of evidence is particularly troubling here since the drug charges were consolidated with the firearm charge, and the applicable statute does not authorize the district court to award restitution for the time spent on the firearm charge. *See* I.C. § 37-2732(k). Therefore, if some of the claimed time was

[6] The sentencing hearing, at which the prosecutor made her initial request for restitution, was held on February 28, 2017, the day after the opinions in *Nelson* and *Cunningham* were issued. (*See* Tr., Vol.1, p.73, L.2.)

actually focused on prosecuting the firearm charge, restitution for that time would be improper. *See Nelson*, 161 Idaho at 695 (noting a similar problem existed in that case, where the restitution award could have included restitution for time spent in a mistrial, on charges resulting in an acquittal, or on efforts solely directed at a co-defendant).

Similarly, there is no evidence supporting the rate of pay being $145 per hour. As the Idaho Supreme Court explained in *Nelson* and *Cunningham*, I.C. § 37-2732(k) only allows restitution for expenses "actually incurred"; it "does not permit restitution awards for what is 'reasonable.'" *Nelson*, 161 Idaho at 697; *Cunningham*, 161 Idaho at 702. There is no evidence indicating that the State actually pays this prosecutor $145 per hour, and so, that figure would not represent its actual loss. In fact, it is highly unlikely that the $145-per-hour figure is accurate in that regard, as that would result in this prosecutor having an annual salary of approximately $301,600, which is more than double that of the governor or any judge or justice in the State of Idaho. *See* Transparent Idaho, Idaho State Controller, http://transparent.idaho.gov/Pages/transhome.aspx (last accessed October 4, 2017). Thus, the restitution award in this case actually appears to be for [un]reasonable, rather than actual, losses.

Therefore, for the same reasons the restitution awards in *Nelson* and *Cunningham* were not supported by substantial evidence, the restitution award in this case was not supported by sufficient evidence. As such, the district court abused its discretion by awarding that restitution and this Court should vacate those portions of the restitution order.

Since the district court expressly told the State it needed to present evidence to support its restitution request and the State still failed to meet its burden in that regard, remanding this case to give the State a second bite at the proverbial apple would be improper. *See Nelson*, 161 Idaho at 697 (refusing to remand the case because there, the State had been afforded two opportunities

to provide sufficient evidence and failed to carry its burden); *but see Cunningham*, 161 Idaho 702 (remanding the case after finding the restitution award was not supported by sufficient evidence). Rather, this Court should simply vacate those portions of the restitution award which are not supported by sufficient evidence. *State v. McNeil*, 158 Idaho 280, 286 (Ct. App. 2014).

## CONCLUSION

Ms. Ibarra respectfully requests this Court vacate her judgments of conviction and remand these cases for a new trial. Alternatively, she respectfully requests this Court vacate the portions of the restitution award which are not supported by sufficient evidence.

DATED this 16th day of October, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th 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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INMATE #83175
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SHERIFF'S OFFICE
200 COURTHOUSE WAY
RIGBY ID 83442

JUNEAL C KERRICK
DISTRICT COURT JUDGE
E-MAILED BRIEF

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E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BRD/eas