3-27-2018

State v. Adams Appellant's Brief Dckt. 45139

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45139**
Plaintiff-Respondent,	)	
	)	**CUSTER COUNTY NO. CR 2016-277**
v.	)	
	)	
SABRA L. ADAMS,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Sabra Adams was convicted of aggravated assault after a jury trial. On appeal, she asserts the district court erred when it denied her motion for a mistrial after one juror admitted, midway through the trial, that he knew the complaining witness's mother. Ms. Adams asserts district court erred in admitting irrelevant evidence which was also prohibited 404(b) propensity evidence. Ms. Adams also asserts that that the State committed prosecutorial misconduct when the prosecutor disparaged the defense and misstated the reasonable doubt jury instruction, thereby lessening the State's burden of proof. Finally, Ms. Adams contends that the district court erred by denying her motion for a new trial.

Statement of the Facts and Course of Proceedings

On April 30, 2016, Sabra Adams attended a memorial service at Bux's Place. (Trial Tr.,[1] p.210, Ls.4-12; p.242, Ls.7-24.) Ms. Adams used to bartend there. (Trial Tr., p.317, Ls.13-17.) Ms. Adams' boyfriend, Mike Skinner, was also at the bar that evening. (Trial Tr., p.245, L.23 – p.246, L.3.) While Mr. Skinner was speaking to another bar patron, Latisha Smith, they conversed about breast implants and Ms. Smith grabbed one of Mr. Skinner's breasts. (Trial Tr., p.174, L.17 – p.175, L.21.) Ms. Adams was conversing with Dale Bruno at the time, but when she saw this exchange, she commented to Ms. Smith, "Keep your hands off my man," and walked towards Ms. Smith. (Trial Tr., p.322, Ls.3-7.) Ms. Adams confronted Ms. Smith, and the two began arguing and shoving each other. (Trial Tr., p.322, Ls.7-16; p.323, L.7 – p.324,

[1] Because there are multiple volumes of transcripts of proceedings in this case, for ease of reference, citations made herein to the primary volume of transcripts for the trial and sentencing proceedings in this case are referred to herein as "Trial Tr." All other citations to the transcripts are made in accordance with the date of the proceeding transcribed.

L.5.) The other bar patrons broke up the altercation, and Ms. Adams left the bar out the back door. (Trial Tr., p.322, Ls.8-17.)

Ms. Smith did not report the conduct or arrange to file a complaint until several days later, on May 3, 2016. (R., p.14; Trial Tr., p.164, Ls.5-16.) Ms. Smith claimed that Ms. Adams walked toward her holding a knife, saying she was going to cut her throat. (Trial Tr., p.177, Ls.5-7; p.177, Ls.13-23; p.179, L.8 - p.180, L.14.) Officer Talbot, who took Ms. Smith's statement, went to the bar to inquire "if there was a knife anywhere," and was handed a small knife from the cash register. (Trial Tr., p.150, Ls.10-16; p.156, Ls.1-17.) A Complaint was filed nearly three months later, on July 18, 2016, charging Ms. Adams with aggravated assault. (R., p.12.)

Based on the accusations of these witnesses, Ms. Adams was charged by Information with one count of aggravated assault. (R., pp.52-53.)

Ms. Adams exercised her constitutional right to a jury trial. After the jury was empaneled and had heard the testimony of the complaining witness, a juror came forward and told the district court that he knew the complaining witness's mother. (Trial Tr., p.265, L.13 – p.266, L.8.) Defense counsel moved to strike the juror for cause, but the alternate had already been removed for cause, and the district court did not want to declare a mistrial if Ms. Adams ended up being acquitted anyway. (Trial Tr. p.272, Ls.12-18.)

Three of the State's witnesses testified that they saw Ms. Adams with a knife. The three witnesses' testimony as to what Ms. Adams said, who was present during the altercation, and how Ms. Adams approached Ms. Smith, were drastically different. Ms. Smith testified that after she grabbed Mike Skinner's breast, Ms. Adams came over to her and Mr. Skinner. (Trial Tr., p.175, L.17 – p.176, L.16.) Ms. Adams yelled for Ms. Smith not to touch Mr. Skinner or she

would cut her throat. (Trial Tr., p.177, Ls.5-7.) Ms. Smith told her, "I'd like to see you try," and then Ms. Adams went to her purse and extracted a knife. (Trial Tr., p.177, Ls.13-23.) She came back toward Ms. Smith, holding the knife, and, once she got to arm's length away, Ms. Smith pushed Ms. Adams down. (Trial Tr., p.179, L.8 - p.180, L.14.) Mr. Sherwood then held Ms. Smith back. (Trial Tr., p.180, Ls.15-19.) Ms. Smith testified that Ms. Adams was yelling "Just let me go so I can cut her throat." (Trial Tr., p.181, Ls.8-12.)

Nicole Shippy was bartending that night. (Trial Tr., p.210, Ls.4-8.) Ms. Shippy testified that she saw Ms. Smith and Mr. Skinner talking, then saw Ms. Adams go straight to her purse, walk up to Ms. Smith, grab Ms. Smith's shoulder and hold the knife to her. (Trial Tr. p.217, Ls.6-8; p.231, L.4 – p.232, L.20.) Ms. Shippy testified that Mr. Skinner then grabbed Ms. Adams. (Trial Tr., p.232, Ls.17-24.) After Janette Perkins escorted Ms. Adams out of the back door of the bar, Ms. Shippy locked both the front and back doors. (Trial Tr., p.233, Ls.10-17; p.235, L.15 – p.236, L.2.) Over defense counsel's objections, Ms. Shippy also testified that, as Ms. Adams was leaving the bar, she threatened Ms. Shippy "about giving her knife back, and that she would slit my throat, that she would burn the bar down also." (Trial Tr., p.226, L.7 – p.227, L.10.)

Cheryl Hicks also worked as a bartender; however, she was cooking steaks that night and not working the bar. (Trial Tr., p.236, L.21 – p.237, L.5; p.243, Ls.22-25.) Ms. Hicks testified that she saw Ms. Adams slam her pool stick down and go to her purse. (Trial Tr., p.248, Ls.3-6.) She saw Ms. Adams with a knife in her hand, walking between the bar and the pool table and then Mr. Skinner grabbed her. (Trial Tr., p.248, Ls.18-24.) Ms. Adams told them to let her go, and then the people surrounding her took the knife away. (Trial Tr., p.248, L.24 – p.249, L.2.) She saw Ms. Shippy escort Ms. Adams out the back door. (Trial Tr., p.252, Ls.3-6.) She also

testified that Ms. Shippy grabbed one of Ms. Adams' arms during the altercation. (Trial Tr., p.255, Ls.8-11.)

The defense called two witnesses, Dale Bruno and September Moore. (Trial Tr., p.274, L.12 – p.336, L.15.) Both of these witnesses testified that they only saw/heard one altercation, and saw Ms. Adams leave the bar immediately afterward. (Trial Tr., p.280, L.24 – p.282, L.7; p.283, Ls.11-20; p.285, Ls.1-4; p.321, L.5 – p.323, L.19.) They both testified that they never saw Ms. Adams with a knife. (Trial Tr., p.285, Ls.1-4; p.323, Ls.20-23.) Ms. Adams did not testify at her trial. (Trial Tr., p.337, Ls.17-22.)

The jury found Ms. Adams guilty as charged. (Trial Tr., p.380, Ls.12-19; R., p.181.)

Post-trial, Ms. Adams renewed her motion for a mistrial, which the district court denied. (Trial Tr., p.390, Ls.12-13; R., pp.206-208.) Ms. Adams also filed a motion for a new trial on the basis of newly discovered evidence pursuant to I.C. § 19-2406 and I.C.R. 16, in which she asserted that the prosecution failed to disclose the investigating officer's interview the day before trial of Wes Sherwood, a witness to the altercation. (R., pp.209-213, 216-219.) In support of her motion, Ms. Adams submitted the affidavit of Mr. Sherwood, who told Officer Talbot that he never saw a knife. (R., pp.216-219.) The district court denied the motion, finding that Mr. Sherwood was a witness who was known to the defense where his name was mentioned at the preliminary hearing. (Trial Tr., p.394, L.2 – p.412, L.24; R., pp.229-230.) Ms. Adams filed a Notice of Appeal timely from the Judgment of Conviction. (R., pp.269-272, 278-282.)

ISSUES

I. Did the district court err in admitting irrelevant propensity evidence?

II. Was Ms. Adams' constitutional right to a fair trial with an impartial jury violated when the district court failed to give a curative instruction and denied her motion for mistrial following a seated juror's disclosure that he knew the complaining witness's mother?

III. Did the prosecutor commit misconduct by disparaging the defense and by misstating the State's burden of proof?

IV. Did the district court abuse its discretion by denying Ms. Adams' motion for a new trial as the court's finding that Ms. Adams' newly discovered evidence was evidence the defense should have located had it exercised due diligence is not supported by substantial evidence and misapplies the applicable law?

ARGUMENT

I.

The District Court Erred In Admitting Irrelevant Propensity Evidence

A. Introduction

At trial, the jury heard from a State's witness that Ms. Adams threatened her and said she was going to "burn down the bar" as she was being escorted out of the bar. This testimony was admitted over defense counsel's objection that such conduct is irrelevant to whether Ms. Adams committed aggravated assault against Latisha Smith, and further, was propensity evidence improperly admitted absent I.R.E. 404(b) considerations. Ms. Adams asserts that district court erroneously admitted the irrelevant testimony without analyzing the prejudicial nature of the testimony, and it failed to address the State's I.R.E. 404(b) notice violation.

Although the district court overruled the objections after an off-record sidebar, (Trial Tr., p.226, Ls.13-20), the testimony of Ms. Adams' purported threat(s) to Ms. Shippy was clearly irrelevant evidence used to demonstrate Ms. Adams' propensity to commit crimes. The district court further erred when it admitted the State's evidence in absence of any showing of good cause that would excuse the State's failure to timely provide and serve notice of its intent to introduce prior bad acts evidence at trial, and by failing to consider the prejudicial effect of such information versus any probative value pursuant to I.R.E. 403.

B. Standard Of Review

This Court generally reviews the district court's decision whether to admit prior bad acts evidence under I.R.E. 404(b) for an abuse of discretion. *See, e.g., State v. Grist*, 147 Idaho 49, 51 (2009). Under I.R.E. 404(b), this Court reviews both whether the evidence admitted was

relevant to a material and disputed issue regarding the crime charged, other than propensity, and whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant. *State v. Field*, 144 Idaho 559, 569 (2007). The district court's determination as to whether to admit or to exclude evidence based upon the potential for prejudice of that evidence under I.R.E. 403 is likewise reviewed by this Court for an abuse of discretion. *State v. Johnson*, 148 Idaho 664, 667 (2010). Three pertinent considerations are attendant upon review for an abuse of discretion: (1) whether the district court correctly perceived the issue as an issue of discretion; (2) whether the district court acted in accordance with applicable legal standards and within the proper bounds of its discretion; and (3) whether the district court reached its decision through an exercise of reason. *Id.*

However, the relevance of evidence is a question of law and therefore this Court reviews the district court's determination that evidence is relevant *de novo*. *State v. Raudebaugh*, 124 Idaho 758, 764 (1993).

C. The District Court Erred When It Admitted Evidence Of Ms. Adams' Statements As She Was Leaving The Bar Because They Were Irrelevant And Inadmissible Evidence Of Propensity, And The State Failed To Provide Timely Notice Of Its Intent To Introduce This Evidence, And The Evidence Was More Prejudicial Than Probative

Ms. Adams asserts that the district court failed to act in accordance with applicable legal standards when it admitted the testimony by Ms. Shippy that, as Ms. Adams was leaving the bar, she threatened Ms. Shippy and threatened to burn down the bar, as this evidence should have been excluded as irrelevant and as purely propensity evidence under I.R.E. 404(b).

Relevant evidence means evidence having the tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be

without the evidence. Idaho Rule of Evidence 401. All relevant evidence is admissible except as otherwise provided by the rules of evidence or other applicable rules. I.R.E. 402.

"Under I.R.E. 404(b), evidence of other crimes, wrongs, or acts is not admissible to show a defendant's criminal propensity." *Johnson*, 148 Idaho at 667. Such evidence may, however, be admissible for a non-propensity or character purpose so long as the prosecution provides timely notice of its intent to use such evidence. *Id*.

To determine the admissibility of evidence of prior bad acts, the Idaho Supreme Court had adopted a two-tiered test. The first tier involves a two-part inquiry as to whether: (1) there is sufficient evidence to establish the prior bad act as fact; and (2) the prior bad act is relevant to a material disputed issue concerning the crime charged, excepting propensity. *Grist*, 147 Idaho at 52; *State v. Johnson*, 148 Idaho 664, 667 (2010). The second tier of the I.R.E. 404(b) analysis is a determination under I.R.E. 403 regarding whether the probative value of the evidence is substantially outweighed by unfair prejudice. *Johnson*, 148 Idaho at 667; *Grist*, 147 Idaho at 52.

In reviewing a trial court's decision regarding the admissibility of "bad act" evidence under Rule 404(b), Idaho's appellate courts apply differing standards of review to the different steps of the analysis. The questions of whether there is sufficient evidence to establish the "bad act" as fact, and whether the "bad act" evidence is relevant to an issue other than character or propensity, are questions of law which are reviewed *de novo*. *See State v. Joy*, 155 Idaho 1, 8 (2013); *see also Grist*, 147 Idaho at 52 (making it clear that the question of whether there was sufficient evidence of the "bad act" is judged under an objective standard and is actually part of the relevance analysis). On the other hand, the question of whether the probative value of the evidence was substantially outweighed by the risk of unfair prejudice is reviewed for an abuse of discretion. *Joy*, 155 Idaho at 8.

1. Ms. Adams' Statements As She Was Leaving The Bar Are Irrelevant To The Issue Of Whether Ms. Adams Threatened Ms. Smith With A Weapon

Ms. Adams asserts Ms. Shippy's testimony about what Ms. Adams said while exiting the bar was not relevant. "Generally, character evidence is not permissible to prove a person acted in conformity therewith." *State v. Almaraz*, 154 Idaho 584, 591 (2013) (citing I.R.E. 404(a)). Ms. Shippy's testimony of Ms. Adams' remarks while leaving the bar was nothing more than impermissible character evidence to show the jury Ms. Adams made threats to others that night, which asked the jury to impermissibly conclude that it was more likely that Ms. Adams threatened Ms. Smith, too. Her testimony does not make any material fact to the charged offenses "more or less probable." I.R.E. 401.

Thus, it follows that only purpose for offering Ms. Shippy's statements was to show Ms. Adams' bad character or her propensity to commit acts similar to the one with which she was charged. This was impermissible. Ms. Adams contends the district court erred by admitting the testimony of Ms. Shippy as to threats Ms. Adams made when exiting the bar.

2. Testimony As To Threats Ms. Adams Made To Another Person As She Was Leaving The Bar Is I.R.E. 404(b) Evidence

Evidence of uncharged misconduct must be relevant to a material and disputed issue concerning the crime charged, other than propensity. The State not only had to show that an I.R.E 404(b) exception applied, but it also had to show that the evidence is relevant under I.R.E. 401, and that its probative value is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence, consistent with I.R.E. 403. This it did not do.

During Ms. Adams' trial, as part of the State's case-in-chief, the prosecutor introduced into evidence testimony by Nicole Shippy that Ms. Adams threatened her and said she was going

to "burn the bar down," as she was leaving on the night of the altercation. (Trial Tr., p.227, Ls.7-10.) Ms. Adams timely objected when the prosecutor sought to elicit this testimony:

> PROSECUTOR: And so my question was: Do you recall her, being the defendant, making any threats against anyone other than Latisha Smith before she was escorted out the back door of the bar?
>
> DEFENSE: Objection, Your Honor; relevance. We don't believe it's permissible, 404. And we would like a sidebar.

(Trial Tr., p.226, Ls.7-13.) After an untranscribed sidebar, the prosecutor asked the question again:

> PROSECUTOR: So my question again was whether you – whether the defendant made any threats to others before she was escorted out the back door of the bar. Now that you've had the opportunity to review your written statement, can you answer my question?
>
> DEFENSE: And we would renew our objection for the record, Your Honor.
>
> THE COURT: Objection's noted. You can answer the question.
>
> WITNESS: Yes.
>
> PROSECUTOR: And what did she say?
>
> WITNESS: She threatened me, about giving her knife back, and that she would slit my throat, that she would burn the bar down also.

(Trial Tr., p.226, L.21 – p.227, L.10.)

However, the testimony of Ms. Shippy did not give any insight as to whether Ms. Adams committed the aggravated assault against Ms. Smith that night, the only purpose in having the evidence admitted would be to demonstrate that Ms. Adams had a propensity to threaten harm. In overruling Ms. Adams's objection, the district court never provided any basis for its decision, and never addressed the fact that the State failed to give notice pursuant to I.R.E. 404(b) that it

intended to seek admission of testimony that Ms. Adams threatened Ms. Shippy and to "burn the bar down." (Trial Tr., p.226, Ls.14-20.) Further, the district court did not conduct any I.R.E. 403 analysis on the record of whether the evidence was more prejudicial than probative.

In this case, the evidence proffered by the State of subsequent bad conduct lacked relevance, timely notice of its intended use by the State, and was more prejudicial than probative.

3. The State Failed To Provide Timely Notice Of Its Intent To Use I.R.E. 404(b) Propensity Evidence

Under I.R.E. 404(b), the State may be able to introduce other-acts evidence against a defendant if, *inter alia*, the State files and serves notice of its intent to introduce such evidence reasonably in advance of trial, or during trial if the district court excuses the lack of such notice upon a showing of good cause for the failure to provide such notice. I.R.E. 404(b).

The Idaho Supreme Court in *State v. Sheldon* has addressed the practical consequences for the State's failure to provide timely notice of its intent to introduce prior bad acts evidence at trial. *See State v. Sheldon*, 145 Idaho 225 (2008). In *Sheldon*, the State elicited evidence at trial regarding allegations that the defendant had made statements admitting that he had previously engaged in drug sales. *Id*. at 227. In reviewing whether the admission of the prior bad acts evidence was error in light of the State's failure to file timely notice of this evidence, the *Sheldon* Court held that compliance with the notice requirement of I.R.E. 404(b) is mandatory. *Id*. at 230-231. The *Sheldon* Court further concluded that, because the State failed to comply with the notice provisions contained in I.R.E. 404(b), the State's prior bad acts evidence was inadmissible. *Id*. As the introduction of this evidence was highly prejudicial to the defendant, and because such evidence also likely caught defense counsel off-guard when the district court

permitted its introduction, the *Sheldon* Court vacated the defendant's conviction for trafficking in methamphetamine. *Id*.

This Court should do the same. The State in this case failed to provide notice of its intent to admit evidence of uncharged acts "reasonably in advance of trial." In fact, the State did not provide *any* notice of its intent to admit this evidence prior to trial.

The district court did not make any findings on the record, including whether there was good cause that would excuse the untimeliness. The lack of notice deprived Ms. Adams of any ability to defend against these allegations. In light of this, the district court erred when it admitted evidence that Ms. Adams threatened Ms. Shippy and threatened to "burn the bar down."

4. The Record Was Insufficient To Support Admission Of The Testimony

Although Ms. Shippy initially did not recall writing a report in which she indicated that, as Ms. Adams was being escorted out of the bar, she threatened to slit Ms. Shippy's throat and "burn the bar down," once her recollection was refreshed at trial, she recalled writing her previous statement. (Trial Tr., p.224, L.20 – p.227, L.10.)

However, after defense counsel objected to the admission of these statements on relevancy and as prohibited I.R.E 404(b) evidence, the district court overruled defense counsel's objections in a sidebar, and allowed the prosecutor to elicit the testimony. (Trial Tr., p.226, L.11 – p.227, L.10.) The district court did not explain on the record why it admitted the testimony, and did not make any findings as to whether it was relevance, whether it was evidence of prior bad acts, or whether the State had noticed its intent to introduce the information at trial. Nor did the court weigh the probative value versus the prejudicial effect.

The lack of explanation or reasoning of the district court demonstrates that the district court failed to act consistently with applicable legal standards and within the proper bounds of its discretion when ruling on the relevance and 404(b) objection. The district court failed to reach its decision through an exercise of reason, and the admittance of the testimony was erroneous and an abuse of its discretion.

5. The District Court Erred In Admitting Testimony Of Comments Made By Ms. Adams After The Incident With Ms. Smith Because The Potential Prejudice Of This Evidence Substantially Outweighed Any Probative Value That The Evidence May Have Had

Ms. Adams asserts that the district court's admission at trial of testimony that she threatened a witness and threatened to "burn the bar down" was error because the prejudice of this evidence substantially outweighed any probative value.

"As with the admissibility of any piece of evidence, where the probative value of the statement[s] is substantially outweighed by the danger of unfair prejudice . . . this evidence should be excluded." *State v. Goodrich*, 97 Idaho 472, 477 (1976). This requires an analysis of whether the testimony should have been excluded under Idaho Rule of Evidence 403, which allows for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." *See* I.R.E. 403. Under I.R.E. 403, relevant evidence can be excluded by the district court if, *inter alia*, the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, danger of misleading the jury, or if the evidence would involve needless presentation of cumulative evidence. *State v. Tapia*, 127 Idaho 249, 254 (1995). "The trial judge, in determining probative worth, focuses upon the degree of relevance and materiality of the evidence and the need for it on the issue on which it is to be introduced." *Davidson v. Beco Corp.*, 114 Idaho 107, 110 (1987). To some

extent, all probative evidence is prejudicial. *State v. Gauna*, 117 Idaho 83, 88 (Ct. App. 1989). The question is whether that prejudice is unfair; whether it harms the defendant because it is so inflammatory that it would lead the jury to convict regardless of other facts presented. *Id*. This inquiry does not center on "whether the evidence is harmful to the strategy of the party opposing its introduction," but on whether the evidence "invites inordinate appeal to lines of reasoning outside the evidence or emotion which are irrelevant to the decision making process." *State v. Rhoades*, 119 Idaho 594, 604 (1991).

The district court erred in admitting the testimony. The testimony was not relevant to whether Ms. Adams threatened Ms. Smith while holding a knife, further, if this Court finds it was relevant, any minimally probative value was substantially outweighed by the risk of unfair prejudice. *See* I.R.E. 401, 402 & 403. Whether evidence is relevant is reviewed *de novo*, while trial court "conclusions of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice is reviewed under an abuse of discretion standard." *State v. Page*, 135 Idaho 214, 219 (2000).

The statements had no probative value as to whether Ms. Adams threatened Ms. Smith while holding a knife. As such, the testimony allowed the prosecution to better portray Ms. Adams as a violent person or a criminal. Accordingly, the testimony was exceptionally and unfairly prejudicial (as well as irrelevant to whether Ms. Adams committed the charged act), it is clear that the district court abused its discretion by failing to apply the correct legal standards in determining whether the testimony was admissible and by failing to reach its decision by an exercise in reason.

The district court also should have excluded the testimony on the basis that the potential for prejudice of the allegations that Ms. Adams had threatened another person at the bar and

made a statement that she was going to commit arson substantially outweighed any probative value of this evidence. *See* I.R.E. 403. The testimony placed Ms. Adams' propensity to commit crimes in front of the jury. Thus, admission of this evidence tended to work great prejudice on Ms. Adams' case, as this evidence necessarily would tend to imply that Ms. Adams had a propensity to commit offenses like the ones charged in this case. This prejudice was amplified by the lack of notice that the State would be eliciting testimony of this nature against Ms. Adams, effectively defeating her ability to investigate and prepare a defense against the implication that she had made threats to others in the bar that night.

In sum, the testimony depicted Ms. Adams as a person with a propensity to commit the charged offense in the minds of the jury. The total lack of disclosure by the State coupled with the extremely prejudicial nature of the allegation precluded Ms. Adams from being able to provide a defense against the assertion. The evidence was irrelevant, and the admission of this evidence was improper. Furthermore, it was not harmless given that the case turned on the witnesses' credibility, and where the prosecutor even referenced the testimony in his closing argument, asking the jury to conclude that Ms. Adams "is a very, very angry woman." (Trial Tr., p.357, Ls.19-23.).

II.

Ms. Adams' Constitutional Right To A Fair Trial With An Impartial Jury Was Violated When The District Court Denied Her Motion For Mistrial Following A Seated Juror's Disclosure That He Knew The Complaining Witness's Mother

A. Introduction

Ms. Adams asserts that district court committed reversible error when it denied her motion for a mistrial. After the jury was empaneled and had heard the testimony of the complaining witness, a juror stepped forward and told the district court that he knew the

complaining witness's mother. (Trial Tr., p.265, Ls.13-24.) While he did not immediately recognize the alleged victim's last name as being the same as his friend from elementary school, when Ms. Smith testified, he realized that he had gone to school for many years with her mother. (Trial Tr., p.266, Ls.4-8.) Defense counsel moved to strike the juror for cause, but district court denied the motion where the alternate juror had already been struck for cause, and the court did not want to declare a mistrial "if Ms. Adams ended up being acquitted anyway." (Trial Tr., p.270, Ls.10-11; p.271, L.16 – p.272, L.18.)

The State will not be able to meet its burden of showing beyond a reasonable doubt that this error is harmless. The guilty verdict from the jury on which the contested juror sat and deliberated demonstrates that the district court committed reversible error when it denied Ms. Adams' motion for a mistrial.

B. Standard Of Review

Under Idaho Criminal Rule 29.1(a), "[a] mistrial may be declared," *inter alia*, "upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant. . . ." I.C.R. 29.1(a). "The decision whether to grant a mistrial rests within the sound discretion of the district court . . . On appellate review [the] inquiry is whether the event which brought about the motion for a mistrial constitutes reversible error when viewed in the context of the entire record." *State v. Wachholtz*, 131 Idaho 74, 77 (Ct. App. 1998) (citations omitted). In considering whether the denial of a motion for mistrial resulted in reversible error, an appellate court may consider the strength of the State's case. *See State v. Keyes*, 150 Idaho 543, 546 (Ct. App. 2011) (finding no error in the denial of a motion for mistrial "[i]n light of the overwhelming evidence" presented by the State).

The following standards are utilized when the denial of a motion for mistrial is reviewed on appeal:

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Urquhart, 105 Idaho 92, 95 (Ct. App. 1983). "Error is not reversible if this Court can conclude beyond a reasonable doubt that the verdict would have been the same if the error had not occurred." *State v. Pickens*, 148 Idaho 554, 558 (Ct. App. 2010); *see also State v. Perry*, 150 Idaho 209, 222 (2010) ("A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt.")

C. Ms. Adams' Constitutional Right To A Fair Trial With An Impartial Jury Was Violated When The District Court Denied Her Motion For Mistrial Following A Seated Juror's Disclosure That He Knew The Complaining Witness's Mother

When viewed in the context of the full record, the district court's refusal to excuse a juror for cause constituted reversible error. After the State was nearly finished presenting its case, one juror came forward because he realized that he knew the alleged victim's mother, as well as one of the witnesses that was scheduled to testify later that day. (Trial Tr., p.265, Ls.13-24.) The juror said he did not realize he knew the mother until the witness mentioned that her mother lived in Darby, Montana. (Trial Tr., p.266, Ls.4-6.) Then it "kind of clicked" and the juror remembered that they went through grade school together for a couple years. (Trial Tr., p.266,

Ls.6-8.) As for his relationship with Dale Bruno, a witness who was slated to testify for the defense later that day, the juror said that he was related by marriage to Mr. Bruno. (Trial Tr., p.267, Ls.10-16.) Mr. Bruno was the juror's brother-in-law's brother. (Trial Tr., p.267, Ls.14-16.) After both parties were given an opportunity to question the juror further, defense counsel asked that the juror be removed. (Trial Tr., p.270, Ls.10-11.) After asking if defense counsel would be willing to stipulate to try the case to only 11 jurors, which defense counsel would not agree, the district court denied the motion. (Trial Tr., p.271, L.11 – p.272, L.14.) The district court rationalized, "Well, the ramifications could be that we would either all have to agree to try the case to 11 jurors or if I excuse him and we can't agree on that, then I'd have to declare a mistrial." (Trial Tr., p.271, Ls.3-9.)

In denying the motion, the court said, "Okay. So here's how I'm -- I'm going to deny the motion. The State's already put on its evidence. There's no guarantee that there's going to be a guilty verdict. I mean, we could proceed, and it could be a defense verdict, and then your objection is moot. If there is a guilty verdict, then the court can consider whether or not it should set aside the verdict." (Trial Tr., p.271, Ls.16-23.) The district court reasoned, "And I think, as the judge, the prudent thing for me to do is to go forward. If there is an acquittal, your motion doesn't mean anything. If there's a guilty verdict, then I still have the option of setting aside the jury verdict, declaring a mistrial at that time, so . . ." (Trial Tr., p.272, Ls.12-18.) The district court made no finding as to whether the juror would have been disqualified for cause had the parties been aware of this information during *voir dire*.

However, the juror had been present during Ms. Adams' challenge to him remaining as a juror as defense counsel noted, and asked the district court to also consider this as an additional factor in the defense's motion for a mistrial:

> "[T]he additional concern is: Does he feel slighted in any way that I'm asking him to be removed, and is that going to be a factor that will weigh on his mind going forward? That would be an additional reason to excuse him as a juror at this point.

(Trial Tr., p.273, Ls.8-15.) The district court expressed its understanding of the argument, but did not reconsider its decision. (Trial Tr., p.273, L.16.)

After the guilty verdict, relying on the district court's statements in denying the initial motion for mistrial, Ms. Adams renewed her motion for mistrial, but the district court denied it. (Trial Tr., p.386, L.2 – p.390, L.13; p.392, Ls.6-12.) The court said it was "not convinced that there was anything about him that would have made him a juror that would have likely been excluded by either side in peremptories." (Trial Tr., p.389, Ls.15-18.) In denying the motion, the court ruled that there was no unfair prejudice and that this was a fair trial. (Trial Tr., p.390, Ls.10-11.)

Two months after trial, Ms. Adams made another renewed motion for a mistrial, and the district court again denied the motion. (Trial Tr., p.391, Ls.23-24; p.400, Ls.17-18; R., pp.206-208.) The motion was denied despite defense counsel's argument that had counsel been aware that the juror knew the complaining witness's mother during voir dire, they would not have selected him and would have asked that he be excused. (Trial Tr., p.392, Ls.13-21.)

The Idaho Supreme Court has explained that, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 7 and 13 of the Idaho Constitution, "A criminal defendant has a constitutional right to trial by an impartial jury." *State v. Ellington*, 151 Idaho 53, 69 (2011). "The requirement of an impartial jury does not end once the jury is empaneled." *State v. Moses*, 156 Idaho 855, 862 (2014). A juror's relationship with the complaining witness's family has been a basis for excusing that juror. *See Pena v. State*, 102 S.W.3d 450, 455 (Tx. Ct. App. 2003) (holding trial court did not err in refusing to

excuse juror and in refusing to allow defense counsel to question juror in more detail, because juror who admitted to knowing the family of the victim was excused before deliberations began). *Jowers v. State*, 538 S.E.2d 853, 856 (Ga. Ct. App. 2000) (holding trial court did not err in denying motion for mistrial where juror realized her daughter was friends with the victim after victim testified—juror called error to court's attention and was then examined and excused outside presence of other jurors and there was no opportunity for juror to communicate her knowledge to other jurors).

In a case in which the evidence was hotly contested—it was solely a credibility battle with three witnesses testifying for the State that Ms. Adams was holding a knife (Trial Tr., p.178, Ls.11-14; p.217, Ls.6-8; p.248, L.23) and two witnesses testifying for the defense that there was no knife (Trial Tr., p.285, Ls.1-4; p.323, Ls.20-23)—the juror's relationship with Ms. Smith's mother would have affected his analysis of whether Ms. Smith was telling the truth; it is difficult not to conclude that the prospective juror's history with Ms. Smith's mother had a continuing impact on the verdict. As such, this Court should conclude that the district court's denial of Ms. Adams's motion for a mistrial constitutes reversible error.

III.

The Prosecutor Committed Misconduct By Disparaging Defense Counsel And By Lowering The State's Burden Of Proof By Misstating The Reasonable Doubt Standard During Closing Arguments

A. Introduction

The prosecutor committed misconduct during closing arguments by disparaging defense counsel and by misstating the State's burden of proof. Although Ms. Adams did not object to the prosecutor's arguments, she asserts that the misconduct violated her right to due process and a fair trial, was plain on the face of the record, and the misconduct constituted fundamental error.

B. Standard Of Review

"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." *State v. Perry*, 150 Idaho 209, 227 (2010). "Where prosecutorial misconduct was not objected to at trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error[.]" *Id.* "Such review includes a three-prong inquiry wherein 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.

C. The Prosecutor Committed Misconduct In Closing Arguments

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall … deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be … deprived of life, liberty or property without due process of law." Idaho Const. art. I, § 13. Due process requires criminal trials to be

fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

Prosecutors too often forget that they are a part of the machinery of the court, and that they 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 give to counsel for the accused. *State v. Irwin*, 9 Idaho 35, ___, 71 P. 608, 611 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.*, 71 P. at 611. The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*, 71 P. at 611. "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. This can occur where the prosecutor employs inflammatory language regarding the defendant or defense counsel, particularly where that language is "seemingly calculated to arouse negative emotions" on the

part of the jury towards the defendant. *See Phillips*, 144 Idaho at 87; *see also State v. Gross*, 146 Idaho 15, 19 (Ct. App. 2008); *State v. Baruth*, 107 Idaho 651, 657 (Ct. App. 1985).

"Indeed, the prosecutor has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics." *State v. Moses*, 156 Idaho 855, 871 (2014) (internal punctuation marks omitted). "Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible." *State v. Gross*, 146 Idaho 15, 20 (Ct. App. 2008). Misrepresentations or diminishments of the State's burden to prove the defendant's guilt beyond a reasonable doubt are impermissible. *State v. Raudebaugh*, 124 Idaho 758, 769 (1993); *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). "It is improper to misrepresent or mischaracterize the evidence in closing argument." *Moses*, 156 Idaho at 871 (quoting *State v. Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)). Nor should closing argument include counsel's personal opinion about the credibility of a witness or the guilt or innocence of the accused. *State v. Garcia*, 100 Idaho 108, 110-11 (1979). Likewise, it impacts upon a defendant's right to a fair trial if a prosecutor misstates or misrepresents the evidence, or seeks to distort the defense presented at trial. *See State v. Troutman*, 148 Idaho 904, 909-910 (2010); *State v. Beebe*, 145 Idaho 570, 575-576 (Ct. App. 2007).

Although a prosecutor has considerable latitude in conducting closing arguments and can argue all reasonable inferences from the evidence, a prosecutor should avoid expressing a personal belief as to the credibility of the witnesses unless the comment is based solely on the evidence. *State v. Kuhn*, 139 Idaho 710, 715 (Ct. App. 2003). The prosecutor may not express a personal belief as to the credibility of witnesses, unless the comment is based solely on inferences from evidence presented at trial. *State v. Sheahan*, 139 Idaho 267, 280 (2003).

1. The Prosecutor Committed Misconduct By Disparaging Defense Counsel

During closing arguments, the prosecutor told the jurors:

> Reasonable doubt. We have an instruction on the definition of reasonable doubt. And I will say that defense attorneys are good at raising doubt. That's what they're trained to do. That's what they are experienced in doing. Good ones can even avoid convictions, with multiple witnesses, like we have here, testifying to the crime. Sometimes can avoid a conviction, even with spectator video, which seems indisputable on its fact.

(Trial Tr., p.363, L.25 – p.364, L.9.)

It is misconduct for the prosecution to make personal attacks on defense counsel in closing argument. *Sheahan*, 139 Idaho at 280; *United States v. Young*, 470 U.S. 1, 9-10 & n. 7 (1985). In fact, it is improper for a prosecutor to disparage defense counsel or the defense function. *See, e.g., Young*, 470 U.S. at 9 & n. 6 (observing that neither counsel in a criminal case is "permitted to make unfounded and inflammatory attacks on the opposing advocate," and noting that although defense counsel's tactics may be unreviewable, "[t]he prosecutor's conduct and utterances . . . are always reviewable on appeal, for he is 'both an administrator of justice and an advocate'"); *Sheahan*, 139 Idaho at 280-82 ("The prosecutor's comments during closing argument that the defense counsel had misled and lied to the jury were improper. It would appear that the comments were intended to inflame the minds of jurors and arouse passion or prejudice against the defendant based upon asserted misconduct of defense counsel"); *State v. Contreras-Gonzales*, 146 Idaho 41, 49 (Ct. App. 2008) (finding misconduct in the prosecutor's argument that defense counsel had attempted to "deflect [the jury's] attention from the important things," "muddy the waters," and "distract [the jury] from your job"); *State v. Brown*, 131 Idaho 61, 69 (Ct. App. 1998) (noting that, generally, "it is misconduct for the prosecutor to mock or disparage the defense attorney," and going on to find such misconduct where the prosecutor said, "He should have been an actor, don't you think?"); *State v. Baruth*, 107 Idaho 651, 657 (Ct. App.

1984) (finding misconduct in the prosecutor's argument where it "had the effect—if not the intent—to disparage Baruth's attorney," as the challenged statements "unfairly cast the role of a defendant's counsel").

In *State v. Givens*, the Idaho Supreme Court stated:

> It is the duty of the prosecutor to see that a defendant has a fair trial, and [the prosecutor] should never seek by innuendo or inference to pervert the testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce [the prosecutor] to obtain a verdict by argument based upon anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same.

State v. Givens, 28 Idaho 253, 268 (1915). A prosecutor must not impugn the role of or integrity of defense counsel. *Bruno v. Rushen*, 721 F.2d 1193, 1194-95 (9th Cir. 1983) (holding prosecutor's insidious attacks on Bruno's exercise of his constitutional right to counsel and his attacks on the integrity of defense counsel were error) *see also United States v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980) ("Comments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error. The right to counsel is so basic to all other rights that it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error.").

The *Bruno* Court held that, "the obvious import of the prosecutor's comments was that *all* defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth." 721 F.2d at 1194 n. 2. In *Bruno*, the Ninth Circuit reasoned:

> "[A]bsent specific evidence in the record, no particular defense counsel can be maligned. Even though such prosecutorial expressions of belief are only intended ultimately to impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice. Furthermore,

> such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and we readily presume because the principle is so fundamental that all attorneys are cognizant of it. Any abridgment of its sanctity therefore seems particularly unacceptable.

Bruno v. Rushen, 721 F.2d at 1194–95 (internal citation omitted).

The Idaho Court of Appeals has distinguished between comments that disparage defense counsel personally and comments regarding defense theories or arguments. For example, in *State v. Norton*, 151 Idaho 176, 188-89 (Ct. App. 2011), the Court held that while prosecutors should not make disparaging comments about defense counsel during closing argument, it was not prosecutorial misconduct to refer to the defense arguments as "red herrings" and "smoke and mirrors."

In *Sheahan*, the Idaho Supreme Court held that the prosecutor's comments during closing argument that defense counsel had misled and lied to the jury were improper. 139 Idaho at 280. The Court held that the comments appeared to have been made with the goal of inflaming the minds of the jurors and arousing passion or prejudice against the defendant based upon the asserted misconduct of defense counsel. *Id*. at 281. Although the comments were improper, the Court ultimately held that they did not rise to the level of fundamental error because they could have been an attempt to analyze and refute defense counsel's arguments. *Id*.

One jurisdiction held that the prosecution, in saying, "Don't underestimate [defense counsel], he's good, he got a killer off," breached its duty to conduct trials in a fair and impartial manner. *See State v. Wade*, 581 N.W.2d 906, 912, 914 (Neb. Ct. App. 1998) (holding that it was error for the court to deny the defense's motion for a mistrial, "it is obvious that the language was extremely improper and prejudicial. The clear effect of the comment was to suggest that defense counsel was able to obtain acquittals for guilty defendants. Not only is such a statement

prejudicial to the defendant, but it also strikes against the underpinnings of our system of criminal jurisprudence.")

The prosecutor's comments in this case were similar to the facts of *Bruno* and *Wade* and were disparaging comments about defense counsel, not counsel's specific arguments or theories. Here, as in *Bruno*, "the obvious import of the prosecutor's comments was that *all* defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth." *See Bruno*, 721 F.2d at 1194 n. 2. As in *Bruno* and *Wade*, the comments here were intended to scare the jury into convicting Ms. Adams. The necessary implication of these comments is that the jurors should not trust defense counsel—he was someone who was persuasive and could even get a defendant off when there was clear evidence that the defendant was guilty.

Unlike the facts of *Sheahan*, here the prosecutor was not saying that defense counsel's theory was not supported by the evidence, instead, the prosecutor was saying that defense counsel cannot be trusted, that defense counsel would use his powers of persuasion to trick the jury and convince them that something obviously true was perhaps not true after all. Such passion and prejudice encourages the jurors to render a decision based on matters outside the evidence admitted at trial. *See State v. Babb*, 125 Idaho 934, 942 (1994). When a prosecutor seeks "to secure a verdict on any factor other than the law as set forth in the jury instruction 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.

2. The Prosecutor Committed Misconduct By Effectively Misstating The Reasonable Doubt Standard And Lowering The State's Burden Of Proof, Which Deprived Ms. Adams Of Her Right To A Fair Trial

The prosecutor, in telling the jurors during closing argument that, "*Your instructions says that if reason and common sense support a guilty verdict, the State has met its burden of proof*," committed misconduct which lowered the State's burden of proof.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *State v. Rhoades*, 121 Idaho 63, 82 (1991) (citing *In re Winship*, 397 U.S. 358, 364 (1970). The Supreme Court has held that an instruction defining "reasonable doubt" may not use language that has the effect of reducing the State's burden of proof. *Cage v. Louisiana*, 498 U.S. 39 (1990). A deficient reasonable doubt instruction is considered a structural defect requiring automatic reversal because a verdict based on an improper reasonable doubt instruction vitiates all of the jury's factual findings. *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *c.f., State v. Herrera*, 152 Idaho 24, 31-32 (2011) (finding constitutional error under *Perry* for prosecution's misstatement of reasonable doubt standard, but holding such error harmless in light of subsequent corrections to this misstatement by both parties at trial).

A prosecutor commits misconduct during closing arguments by misstating the law and lowering the State's burden of proof. *State v. Phillips*, 144 Idaho 82, 86-88 (Ct, App. 2007) (citing *State v. Raudebaugh*, 124 Idaho 758, 769 (1992); *State v. Lovelass*, 133 Idaho 160, 168 (Ct. App. 1999); *State v. Missamore*, 114 Idaho 879, 882 (Ct. App. 1988).) A prosecutor who misstates the burden of proof deprives the defendant of a right essential to their defense and goes to the foundation of the case. *State v. Erickson*, 148 Idaho 679, 686 (Ct. App. 2010).

During the State's closing argument, the prosecutor stated the following:

> There is no such thing -- I repeat it -- as a case without a doubt. That's why your reasonable doubt instruction says that proof beyond a reasonable doubt does not require proof beyond mere possible doubt.[2] *Your instructions says that if reason and common sense support a guilty verdict, the State has met its burden of proof*. And I'll submit to you, ladies and gentlemen, that reason and common sense here support that verdict of guilty.

(Trial Tr., p.364, Ls.10-18.) (emphasis added). However, the prosecutor's argument was a misstatement of the reasonable doubt standard and effectively lowered the State's burden of proof.

Telling the jurors that if their reason and common sense told them that Ms. Adams threatened Ms. Smith with a knife that satisfied the beyond reasonable doubt standard was error. On the contrary, the jurors merely needed to have a reasonable doubt as to whether Ms. Smith's allegations were true. *See* Augmentation, p.1. Even if the jurors used their reason and common sense to conclude that Ms. Adams was guilty, the State had not necessarily met its burden of proof. It is only when the jurors are all *convinced, beyond a reasonable doubt,* of Ms. Adams' guilt, that the State had met its burden of proof. Thus, the prosecutor's argument was misconduct where it misstated the law which lowered the State's burden of proof.

"It follows that a misstatement to a jury of the State's burden rises to the level of fundamental error because it goes to the foundation of the case and would take away from a defendant a right essential to his or her defense." *State v. Erickson*, 148 Idaho 679, 685

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[2] I.C.J.I. 103, the pattern jury instruction on reasonable doubt, provides, in relevant part:

> Second, the state must prove the alleged crime beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after considering all the evidence you have a reasonable doubt about the defendant's guilt, you must find the defendant not guilty.

I.C.J.I. 103.

(Ct. App. 2010) (holding the prosecutor's distortion of the State's burden of proof in closing argument was fundamental error and highly prejudicial).

The prosecutor's misconduct violated Ms. Adams' due process right to a fair trial.

3. The Prosecutorial Misconduct Is Plain On Its Face

The prosecutorial misconduct in this case is plain on its face, and there is no reason to believe that Ms. Adams' counsel was "sandbagging" the district court by failing to object to the prosecutor lowering the State's burden of proof by falsely telling the jurors that they had been instructed that "if reason and common sense support a guilty verdict, the State has met its burden of proof." There is simply no strategic advantage that can possibly be gained by failing to object to, and to ask the court to correct, the prosecutor's misstatement of the law which radically lowered the State's burden of proof. Further, no strategic advantage could be gained by allowing the prosecutor to impliedly tell the jurors that defense counsel could not be trusted—that he could persuade juries even in the face of blatant evidence of guilt. Therefore, the prosecutorial misconduct is plain on its face.

4. The Prosecutorial Misconduct Is Not Harmless

Because Ms. Adams did not object to the prosecutorial misconduct during trial, she bears "the burden of proving there is a reasonable possibility that the error affected the outcome of the trial." *Perry*, 150 Idaho at 226. Ms. Adams asserts that there is a reasonable possibility that the prosecutorial misconduct affected the outcome of her trial.

The prosecutor's evidence was far from overwhelming. All three of the State's witnesses told conflicting stories about who was present, what was said, and what happened that night. (*See* Trial Tr., p.177, Ls.5-23; p.179, L.8 – p.180, L.14; p.233, Ls.10-17; p.235, L.15 – p.236,

L.2; p.248, Ls.3-24; p.369, L.2 – p.371, L.9.) The only thing the three stories from the State's witnesses had in common was that there was a knife. (Trial Tr., p.178, Ls.11-14; p.217, Ls.6-8; p.248, L.23.) Further, Ms. Adams had two witnesses who told similar versions of the events, but testified that there was no knife—that Ms. Adams did not re-engage with Ms. Smith but simply left the bar. (Trial Tr., p.284, Ls.2-8; p.285, Ls.1-8; p.321, L.5 – p.323, L.23.) It should be noted that Ms. Adams has maintained her innocence throughout the process, including sentencing. (Trial Tr., p.422, Ls.16-22; PSI, p.4.)

The prosecutor's misconduct was a targeted attempt at mitigating the shortcomings in the State's case. By telling the jurors that they had been instructed to find that if their "reason and common sense support[ed] a guilty verdict, the State has met its burden of proof," the prosecutor gave the jurors permission to find Ms. Adams guilty even if they actually had a reasonable doubt about whether the State's witnesses were telling the truth.

Ms. Adams asserts that there is a reasonable possibility that the prosecutor's misconduct affected the outcome of the trial, and the error is not harmless. *See Perry*, 150 Idaho at 226.

IV.

The District Court Abused Its Discretion In Denying Ms. Adams' Motion For A New Trial As The Court's Finding That Ms. Adams' Newly Discovered Evidence Was Evidence The Defense Should Have Located Had It Exercised Due Diligence Is Not Supported By Substantial Evidence And Misapplies The Applicable Law

A. Introduction

Ms. Adams' motion for new trial was based upon newly discovered evidence that Wes Sherwood, an eyewitness to the incident, had spoken to the investigating deputy the night before trial and told him that Ms. Adams did not have a knife during the altercation. (R., pp.216-217.) In his sworn statement, Mr. Sherwood said Deputy Talbot told him that he did not need to show

up at court to testify. (R., p.217.) The district court found that the proffered evidence was newly discovered and found the failure to discover the evidence was due to a lack of diligence by the defense, but never analyzed whether the proffered evidence was material.

By suppressing this exculpatory evidence, the State violated Ms. Adams' due process rights. Despite conducting an interview with Mr. Sherwood the night before trial, the State withheld evidence of this interview and the results of which—that Mr. Sherwood was present during the altercation and did not see either party with a knife—evidence that could have been used to undermine the credibility of the State's witnesses and cast doubt on their testimony.

Ms. Adams asserts that the district court abused its discretion in denying her motion for a new trial. Although the State attempted to minimize the importance of the new information by submitting an affidavit from the officer (apparently in lieu of interview notes or a recording) in which the officer contradicts the substance of Mr. Sherwood's testimony, and claims that the witness did not want to cooperate, and "To the best of my knowledge, Wes Sherwood never told me that he did or did not see a knife." (R., pp.226-227.) However, this type of information goes to whether the government intended to call the witness, not whether the witness had exculpatory information that the defense could have further investigated. Further, Mr. Sherwood was described as a friend of Ms. Smith's, thus, it would be reasonable for the defense to assume that his testimony would not be exculpatory but would instead favor his friend, Ms. Smith. (Trial Tr., p.170, L.22 – p.171, L.8.) Ms. Smith testified that Mr. Sherwood was there, holding her back during the encounter thus, because he played a role in the encounter, his testimony may have been the testimony that tipped the balance in favor of Ms. Adams. (*See* Trial Tr., p.180, Ls.18-19; p.395, Ls.14-20; p.411, Ls.18-22.) A third witness for the defense, one like Mr. Sherwood who was friends with the complaining witness and who was involved in breaking

up the scuffle, would likely have very persuasive testimony which would likely have resulted in a not guilty verdict.

B Standard Of Review

"'The denial of a motion for new trial is reviewed for an abuse of discretion.'" *State v. Ellington*, 157 Idaho 480, 485 (2014) (quoting *State v. Stevens*, 146 Idaho 139, 144 (2008). "Abuse of discretion review involves three questions: '(1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.'" *Id.* (quoting *Cantwell v. City of Boise*, 146 Idaho 127, 133–34 (2008)). "Because a motion for a new trial based upon newly discovered evidence involves both factual and legal questions, '[a]n abuse of discretion will be found if the trial court's findings of fact are not supported by substantial evidence or if the trial court does not correctly apply the law.'" *Id.* (quoting *Stevens*, 146 Idaho at 144.)

Idaho Criminal Rule 34 grants the district court discretion to order a new trial if doing so is "in the interest of justice." I.C.R. 34. However, Idaho Code § 19-2406 sets forth the only grounds upon which a district court may grant a motion for a new trial. *Ellington*, at 485 (quoting *State v. Cantu*, 129 Idaho 673, 675 (1997)). A court may grant a motion for a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at trial." I.C. § 19-2406(7). Generally, a defendant seeking a new trial on the basis of newly discovered evidence has the burden of showing:

> (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or

> impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant.

Ellington at 485 (quoting *State v. Drapeau*, 97 Idaho 685, 691 (1976)). However, when the State fails to disclose exculpatory evidence, the *Brady* standard applies.

The Fourteenth Amendment Due Process Clause guarantees a criminal defendant the right to the production of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* requires prosecutors to turn over exculpatory evidence when they have actual or imputed knowledge of, and access to, such evidence. *United States v. Santiago*, 46 F.3d 885, 893 (9th Cir.1995). *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

In *Brady*, the United States Supreme Court held that a State violates a defendant's due process rights when it suppresses evidence favorable to a defendant, where such evidence is material either to a defendant's guilt or punishment. *Id.* at 87. There are three components to a *Brady* violation: (1) the evidence must be favorable to the accused, which includes impeachment evidence relating to state witnesses; (2) the evidence must have been suppressed by the state, either intentionally or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

C. The District Court Abused Its Discretion In Denying Ms. Adams' Motion For A New Trial As The Court's Finding That Mr. Sherwood's Interview Was Not Suppressed Is Not Supported By Substantial Evidence And Misapplies The Applicable Law

Ms. Adams supported her motion for a new trial with an affidavit. (R., pp.209-213, 216-217.) In the affidavit, Wes Sherwood swore that the day before trial, he had several conversations with Deputy Talbot about the incident and told the deputy that he was present

during the altercation and had heard rumors that there was a knife; however, Mr. Sherwood verified that there was no knife present during the altercation—neither Ms. Smith nor Ms. Adams had a knife. (R., pp.216-217.) During his final conversation with Deputy Talbot, Mr. Sherwood was told not to show up at court because his testimony was not needed. (R., p.217.)

The court held a hearing on Ms. Adams' motion where the parties provided no further evidence. (Trial Tr., p.400, L.19 – p.412, L.24.) After hearing each party's arguments, the court issued a written ruling. (Trial Tr., p.400, L.19 – p.412, L.24; R., pp.229-231.) The court held that the proffered evidence was not suppressed because the witness was disclosed to Ms. Adams at the preliminary hearing. (R., p.229.)

Ms. Adams asserts that the district court, in concluding that the evidence was not suppressed, and that "[t]he prosecution does not have the duty to investigate exculpatory leads or to subpoena witnesses for the Defendant," misapplied the law governing a motion for new trial. (R., pp.229-230.) Ms. Adams further asserts that the district court's conclusion that the evidence was not suppressed is not supported by substantial evidence. Therefore, Ms. Adams asserts that the district court abused its discretion in denying her motion for a new trial based upon newly discovered evidence.

D. The Court Erred When It Denied Ms. Adams' Motion For A New Trial In Light Of The *Brady* Claim Regarding The State's Interview Of A Potential Witness

The prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Idaho has recognized the duty of disclosure extends not only to all the government agents investigating and prosecuting the offense, but also "any others who have participated in

the investigation or evaluation of the case who either regularly report, or with reference to the particular case have reported, to the office of the prosecuting attorney." *State v. Gardner*, 126 Idaho 428, 433 (Ct. App. 1994); *see also* I.C.R. 16 (a)); *State v. Roles*, 122 Idaho 138, 149 n.6 (Ct. App. 1992) (prosecutor's duty under the Due Process Clause is coextensive with ICR 16 duty).

Idaho Criminal Rule 16(a) and 16(b)(6) deal with exculpatory "*Brady*" evidence and statements by witness. The State has a duty to provide discovery on any statement, whether oral, written, or recorded that is relevant to the case. Under I.C.R. 16(b)(6), the State has a duty of responsibility to disclose such evidence, including statements made by a witness to the incident, that would negate the guilt of the Defendant. The State has a continual duty to provide such evidence. I.C.R. 16(j).

The "materiality" standard for establishing prejudice is the same as the prejudice standard under *Strickland*. *United States v. Bagley*, 473 U.S. 667, 682 (1985). The question is whether the defense, relying on evidence unavailable at the first trial, had a "reasonable probability" (less than a preponderance) of shifting even one juror's vote. *Cone v. Bell*, 556 U.S. 449, 452, 470 (2009); *see Kyles*, 514 U.S. at 434. It is important to remember a "reasonable probability" or "reasonable likelihood" is a burden less strenuous than a preponderance of the evidence, requiring a showing only that the suppressed evidence *undermines confidence* in the outcome, not that the outcome *would have* been different. *Bagley*, 473 U.S. at 682; *Kyles*, 514 U.S. at 433-35. Even if a defendant cannot show the undisclosed evidence may have affected the jury's verdict, relief must be granted. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016); *Kyles*, 514 U.S. at 434-35. As the United States Supreme Court has repeatedly acknowledged, the materiality of evidence cannot be evaluated in isolation, but must be considered cumulatively. *Wearry*, 136 S.

Ct. at 1007 (citations omitted). Even if the jury *could* have still convicted the defendant, despite the new evidence, the lack of confidence they *would* have done so entitles the defendant to relief. *Id*. (citation omitted).

A defendant is entitled to a new trial only if she "establis[hes] the prejudice necessary to satisfy the 'materiality' inquiry." *Turner v. United States*, 137 S. Ct. 1865 (2017) (quoting *Strickler*, at 282). As the *Turner* Court analyzed:

> Consequently, the issue before us here is legally simple but factually complex. We must examine the trial record, "evaluat[e]" the withheld evidence "in the context of the entire record," *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392 (1976), and determine in light of that examination whether "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, *supra*, at 470, 129 S.Ct. 1769 (citing *Bagley*, *supra*, at 682, 105 S.Ct. 3375).

Turner v. United States, ___ U.S. ___, ___, 137 S. Ct. 1885, 1893 (2017) (holding there was no such reasonable probability because the withheld evidence, when viewed "in the context of the entire record" was "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards"). The *Turner* Court "conclude[d] only that in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to 'undermine confidence' in the jury's verdict", but noted that it was not "suggest[ing] that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence." *Turner*, ___ U.S. at ___, 137 S. Ct. at 1895 (quoting *Kyles*, 514 U.S., at 434).

Here, less than one month after the complaint was filed, defense counsel requested "Any statements made by prosecution witnesses or prospective prosecution witnesses to the prosecuting attorney or his agents or to any official involved in the investigative process of the case." (R., p.22.) The duty to supplement was ongoing. (R., p.22.) Two weeks before trial, the

State filed a supplemental discovery response in which it asserted, when asked for evidence and material subject to automatic disclosure under I.C.R. 16(a) for material or information that tends to negate the defendant's guilt or would reduce her punishment: "The State has no exculpatory or mitigatory material or information." (R., p.111.)

In support of her motion for a new trial, Ms. Adams submitted a notarized statement from Wes Sherwood. (R., pp.216-219.) Wes Sherwood swore that the day before trial, he had several conversations with Deputy Talbot about the incident and told the deputy that he was present during the altercation and had heard rumors that there was a knife. (R., pp.216-217.) Mr. Sherwood verified that he told Deputy Talbot there was no knife present during the altercation—neither Ms. Smith nor Ms. Adams had a knife. (R., pp.216-217.)

In response, the State submitted an affidavit by the investigating officer who interviewed Mr. Sherwood the night before trial. (R., pp.226-227.) In the affidavit, the officer stated that Mr. Sherwood "indicated he would not cooperate and indicated that he didn't see anything." (R., p.226.) The officer believed Mr. Sherwood was hesitant to cooperate, and told Mr. Sherwood he didn't have to appear in court unless he was served with a subpoena. (R., p.226.) The officer recalled "[t]o the best of my knowledge,[3] Wes Sherwood never told me he did or did not see a knife." (R., p.226.)

At the hearing on Ms. Adams' motion for a new trial, the prosecutor primarily argued due diligence—that Ms. Adams should have been on notice that Mr. Sherwood was there at the bar and actively participated in the altercation. (3/15/17 Tr., p.401, L.20 – p.408, L.5.) The prosecutor asserted that the additional exculpatory evidence was not known to the State as being

[3] Apparently, the officer is relying entirely on his memory to recall the witness interview as no notes or recordings of the officer's interview with Mr. Sherwood were submitted in support of his affidavit.

exculpatory.[4] (Trial Tr., p.406, Ls.11-20.) The district court noted that the two affidavits were "somewhat contradictory," but did not make factual findings regarding either affidavit, instead believing the important question to be: "What duty, if any, does the defendant have to come up with -- I mean, she was there. . . what duty did she have to subpoena him to be there at trial? Or did she have -- not have a duty? Is that all the State's responsibility?" (Trial Tr., p.404, Ls.1-18.)

After the hearing, the district court issued a written decision and order on Ms. Adams' motion for a new trial. (R., pp.229-230.) The district court acknowledged that *Brady* was applicable in this instance, but denied the motion, holding:

> The suppression, by the prosecution, of evidence that is material either to guilt or punishment and is favorable to a Defendant, whether in good faith or bad, is a violation of due process. *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963). The Defendant argues that evidence was suppressed by the prosecution regarding a known witness who claims not to have seen a knife during the altercation. However, the Defendant admits in the Motion that the witness was disclosed to the Plaintiff at the preliminary hearing. Since it is admitted that the Defendant was made aware of the existence of the additional witness, his existence was not suppressed.
>
> The prosecution does not have the duty to investigate exculpatory leads or to subpoena witnesses for the Defendant. In this case, the identity of the witness in question was disclosed to the Defendant at the preliminary hearing and his existence was not suppressed. Therefore, the Motion for New Trial is HEREBY DENIED.

(R., pp.229-230.)

However, there is a difference between defense counsel simply knowing a witness was

[4] Knowledge of exculpatory information is imputed to prosecutors, even if evidence is not personally known by the particular prosecutor, so long as it is known by prosecutorial staff or government agents investigating a particular case. *See, e.g., Kyles*, 514 U.S. at 438 (police investigator); *Giglio v. Untied States*, 405 U.S. 150, 154 (1972) (fellow prosecutor); *United States v. Thornton*, 1 F.3d 149 (3rd Cir. 1993) (Drug Enforcement Administration agents); *United States v. Morrell*, 524 F.2d 550, 555 (2nd Cir. 1975) (government agent supervising confidential informant).

present at the scene, and defense counsel knowing that the witness was interviewed by an investigating officer the day before trial, told the officer exculpatory information, and was then told his testimony would not be needed at trial. Here, the prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police." *See Kyles*, 514 U.S. at 437.

Moreover, the district court's implicit conclusion that defense counsel's failure to *independently* learn of exculpatory evidence regarding the substance of Mr. Sherwood's testimony somehow excuses the State from complying with its constitutional obligations under *Brady* is erroneous. The Supreme Court has explicitly rejected the argument that a prosecutor's constitutional duties are excused by a defendant's (or his counsels') lack of diligence. *Banks v. Dretke*, 540 U.S. 668 (2004). In. *Banks,* the Supreme Court rejected a due diligence requirement, concluding:

> We rejected a similar argument in *Strickler*. There, the State contended that examination of a witness' trial testimony, alongside a letter the witness published in a local newspaper, should have alerted the petitioner to the existence of undisclosed interviews of the witness by the police. We found this contention insubstantial. In light of the State's open file policy, we noted, "it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." The "cause" inquiry, we have also observed, turns on events or circumstances "external to the defense."
>
> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. *A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.*

Id. at 695-98. (internal citations omitted) (emphasis added). In addition, the Ninth Circuit Court of Appeals recently reiterated the parameters of the prosecution's obligations with respect to

exculpatory evidence in *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014), and rejected the State's plea to impose a due diligence requirement upon the defense:

> Interpreting *Kyles*, our circuit has observed that "[b]ecause the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned." *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (en banc).
>
> . . .
>
> The Court of Appeal's requirement of due diligence would flip that obligation, and enable a prosecutor to excuse his failure by arguing that defense counsel could have found the information himself. The proposition is contrary to federal law as clearly established by the Supreme Court, *see Early*, 537 U.S. at 8. . . , and unsound public policy. Especially in a period of strained public budgets, a prosecutor should not be excused from producing that which the law requires him to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigations. No *Brady* case discusses such a requirement, and none should be imposed. *See Banks*, 540 U.S. at 691 . . . (setting forth the essential elements of a *Brady* claim).

Amado, 758 F.3d at 1134, 1136-37.

Here, the district court ruled that there had been no *Brady* violation because, "The prosecution does not have the duty to investigate exculpatory leads or to subpoena witnesses for the Defendant. In this case, the identity of the witness in question was disclosed to the Defendant at the preliminary hearing and his existence was not suppressed." (R., p.229.) However, because there is no due diligence requirement, the district court's implicit reliance on an inapplicable due diligence standard to excuse the State's failure to comply with its *Brady* obligations was error.

Further, even though *Banks* negated a due diligence requirement, the Idaho Supreme Court's pre-*Banks* holding in *Grube v. State*, is instructive in Ms. Adams' case. 134 Idaho 24 (2000). In *Grube*, the State claimed that, with due diligence, the defense could have obtained the testimony of Lynn Gifford, a witness with information that contradicted the testimony of the

State's primary witness, put into question the other suspect's alibi, and supported the defense's alternate perpetrator theory, because Mr. Grube had mentioned Gifford in an interview with the police. *Id*. at 27, 30. The Idaho Supreme Court found the State's excuse for not providing the defense with the Gifford interview was without merit:

> Although the state is not required to furnish a defendant with exculpatory evidence that is fully available through the exercise of due diligence by the defendant, *United States v. McMahon*, 715 F.2d 498, 501 (11th Cir.1983), *there is no evidence in the record to suggest that Grube had any knowledge that Gifford had been questioned and the interview recorded by the state investigator.*

Grube, 134 Idaho at 30 (emphasis added).

Here, the district court essentially made the same mistake as the district court in *Grube*—the court analyzed whether, with due diligence, the defense could have obtained the witness's testimony. However, the United States Supreme Court's decision in *Banks* overruled any "due diligence" requirement, thus the correct analysis under *Brady* is whether the defense had any knowledge that Mr. Sherwood had been questioned by the investigator the night before trial. This Court must examine the withheld evidence in Ms. Adams' case to determine whether Deputy Talbot's undisclosed interview with Mr. Sherwood substantially undermined confidence in the outcome of the jury's verdict, thus entitling Ms. Adams to a reversal of her conviction and a new trial. *See Grube*, 134 Idaho at 30.

The State had a duty to disclose favorable evidence to Ms. Adams regarding its witness interviews, even those that occurred the day before Ms. Adams' trial. Regardless of whether counsel could have uncovered this evidence with reasonable diligence, the State had an independent obligation to provide the evidence to Ms. Adams prior to trial. *See Banks v. Dretke*, 540 U.S. 668, 695-98 (2004) (rejecting State's argument that defendant was barred from obtaining relief on his *Brady* claims because of his failure to diligently pursue and investigate his

Brady claims). Evidence that Deputy Talbot had interviewed Mr. Sherwood the day before trial and that Mr. Sherwood told the deputy that he was there during the altercation, but did not see either party with a knife, was suppressed, it was material to the question of Ms. Adams' guilt, and it was evidence that could have been used by the defense to impeach or discredit the State's witnesses' testimony.

CONCLUSION

Ms. Adams respectfully requests that this Court vacate her conviction and remand her case to the district court for further proceedings.

DATED this 27th day of March, 2018.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of March, 2018, 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/_____
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SJC/eas