IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45139**
Plaintiff-Respondent,	)	
	)	**Custer County Case No.**
v.	)	**CR-2016-277**
	)	
SABRA L. ADAMS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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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STATEMENT OF THE CASE

Nature of the Case

Sabra L. Adams appeals from the judgment of the district court entered upon the jury verdict finding her guilty of aggravated assault. On appeal Adams alleges the district court abused its discretion when it permitted evidence of statements made by Adams during the incident. She also argues that the district court erred when it denied her motion for a mistrial because, decades prior, a juror went to grade school with the victim's mother. She also alleges prosecutorial misconduct during closing argument and that the district abused its discretion by denying her motion for a new trial.

Statement of Facts and Course of Proceedings

Adams was at Bux's Bar taking shots of Fireball and drinking Mike's Hard Lemonade. (1/5/17 Tr., p. 211, L. 15 – p. 212, L. 23.) Latisha Smith arrived at Bux's Bar between 9:30 and 10:00 p.m. (1/5/17 Tr., p. 172, Ls. 2-25.) Ms. Smith was having a conversation with Candi, last name unknown, near the middle of the bar. (1/5/17 Tr., p. 173, L. 9 – p. 176, L. 1.; Ex. 2.) Candi gestured to Ms. Smith to grab her breasts. (Id.) Candi told Ms. Smith something like "[g]rab mine" or "feel these." (Id.) So Ms. Smith grabbed Candi's breasts. (Id.) Michael Skinner then joined in the conversation and said, "I've got bigger breasts than she does." (Id.) So Candi grabbed one of Mr. Skinner's breasts and Ms. Smith grabbed the other one. (Id.) Adams was in a romantic relationship with Mr. Skinner. (1/5/17 Tr., p. 228, Ls. 19-25, p. 245, L. 18 – p. 246, L. 3.)

Adams slammed her pool stick down and said something like, "I warned you bitches. You don't know who you're dealing with." (1/5/17 Tr., p 247, L. 6 – p. 249, L. 6.) Adams then

got in between Ms. Smith, Candi and Mr. Skinner. (1/5/17 Tr., p. 176, L. 2 – p. 179, L. 19.) Adams started yelling at Ms. Smith. (Id.) Adams yelled: “Don’t you [fucking] touch him or I’ll [fucking] cut your throat.” (Id.) Words were exchanged. (Id.) Adams then went to a back table and dug through her purse and grabbed a knife. (Id.) Adams then turned around and quickly walked towards Ms. Smith. (Id.)

Ms. Smith was scared. (1/5/17 Tr., p. 179, L. 20 – p. 180, L. 22.) Adams was threatening to cut Ms. Smith’s throat. (Id.) When Adams got close with the open knife, there was an altercation. (1/5/17 Tr., p. 216, L. 23 – p. 221, L. 25, p. 247, L. 6 – p. 249, L. 6.) During the altercation Mr. Skinner then grabbed Adams and “flipped her around.” (1/5/17 Tr., p. 216, L. 23 – p. 221, L. 25.) Mr. Skinner was holding Adams’ arm up above the bar. (Id.) Nicole Shippy, the bartender, then grabbed the knife and put it in the drawer. (Id.)

Adams was screaming, “Let me go. Let me cut her throat.” (1/5/17 Tr., p. 221, Ls. 5-11, p. 181, Ls. 8 – 12.) As Adams was being restrained and led out the back door, Adams told Ms. Shippy she would slit her throat and burn down the bar. (1/5/17 Tr., p. 224, L. 20 – p. 227, L. 10.)

Ms. Smith was pushed back into where Wes Sherwood was sitting. (1/5/17 Tr., p. 191, L. 19 – p. 192, L. 3.) Wes Sherwood then had his arms around Ms. Smith. (1/5/17 Tr., p. 180, Ls. 15-19.)

Adams was led out the bar’s back door, and the back door was locked. (1/5/17 Tr., p. 181, L. 13 – p. 182, L. 11.) Ms. Smith then waited five or ten minutes to make sure Adams was gone then Ms. Smith left the bar. (Id.) Ms. Smith did not immediately report the incident. (1/5/17 Tr., p. 183, Ls. 6-17.) However, she eventually decided to report Adams, because Ms. Smith was scared and did not know if Adams would come after her again. (Id.)

Deputy Talbot went to Bux's Bar to find the knife. (1/5/17 Tr., p. 155, L. 1 – p. 160, L. 16; Ex. 1.) Deputy Talbot met with a bar employee, who took the knife from the cash drawer and gave it to Deputy Talbot. (Id.) It was a folding knife. (Id.) With the blade extended it was approximately six inches long. (Id.) The state charged Adams with Aggravated Assault. (R., pp. 52-53.)

Prior to trial, Deputy Talbot spoke with Mr. Sherwood, a friend of Adams'. (R., pp. 226-227.) Mr. Sherwood told Deputy Talbot that he did not see anything. (Id.) Mr. Sherwood was hesitant to cooperate. (Id.) Deputy Talbot informed Mr. Sherwood that unless he was served with a subpoena he did not have to appear in court. (Id.)

The case proceeded to jury trial. (R., pp. 182-193.) Ms. Smith testified that Adams threatened to cut her throat and that she was scared. (1/5/17 Tr., p. 179, L. 20 – p. 180, L. 22.) She explained that when Adams got within an arm's length of her, Ms. Smith pushed her down. (Id.) Then somebody pushed Ms. Smith and held Ms. Smith back. (Id.)

After Ms. Smith testified, a juror indicated that she had twice met briefly with Ms. Smith as a part of Bible educational group. (1/5/17 Tr., p. 198, L. 14 – p. 202, L. 20.) With the consent of the parties, the court dismissed the juror from further service. (Id.)

Ms. Shippy, the bartender at Bux's Bar, testified that she heard Adams threaten to slit Ms. Smith's throat. (1/5/17 Tr., p. 216, L. 23 – p. 221, L. 25.) Adams was angry. (Id.) Ms. Shippy then saw Adams walk towards Ms. Smith with the open knife. (Id.)

Ms. Shippy testified she saw Adams grab Ms. Smith's shoulder and "had the knife at her throat." (Id.) Mr. Skinner then grabbed Adams and "flipped her around." (Id.) Mr. Skinner was holding Adams' arm up above the bar. (Id.) Ms. Shippy then grabbed the knife and put it in the

drawer. (Id.) Adams was screaming, "Let me go. Let me cut her throat." (Id.) As they were restraining Adams and trying to get her out the back door, Adams continued making threats:

> Q. (By [PROSECUTOR]) And what did she say?
>
> A. She threatened me, about giving her knife back, and that she would slit my throat, that she would burn the bar down also.

(1/5/17 Tr., p. 227, Ls. 7-10.) Ms. Shippy testified that she and some others got Adams out the back door. (1/5/17 Tr., p. 224, Ls. 1-19.) Ms. Shippy locked the front and back doors. (Id.)

Cheryl Hicks testified that Adams was "a little agitated" and "seemed a little worked up." (1/5/17 Tr., p. 244, Ls. 16-25.) She also saw that Adams then went for her purse and get a knife. (1/5/17 Tr., p. 247, L. 6 – p. 249, L. 6.) Mr. Skinner grabbed Adams. (Id.) Adams was saying "Just let me go. I just want to cut her. Let me go. Just let me go." (Id.) They then took the knife away from her. (Id.) Ms. Hicks saw the knife in Adams' hand. (1/5/17 Tr., p. 249, L. 12 – p. 252, L. 2; Ex. 1.) She also saw Ms. Shippy put the knife in the drawer. (Id.)

At the start of the second day of trial, a juror, a man in his 50s, came forward and indicated that he went to grade school with Ms. Smith's mother. (1/6/17 Tr., p. 265, L. 11 – p. 267, L. 9.) Upon being questioned by the court, he stated that knowing Ms. Smith's mother in grade school would not impact his ability to be a fair and impartial juror. (Id.) The same juror also indicated he knew Dale Bruno, a witness for the defense. (1/6/17 Tr., p. 267, L. 10 – p. 268, L. 14.) Mr. Bruno was the juror's "brother-in-law's brother." (Id.) However, the juror had never had a conversation with Mr. Bruno or gone to any social event with him. (Id.) The district court permitted both counsel to inquire. (1/6/17 Tr., p. 268, L. 15 – p. 273, L. 3.) The state inquired. (Id.) Adams did not. (Id.) Adams moved to remove the juror, understanding that doing so

would require a mistrial because there would only be 11 jurors remaining. (1/6/17 Tr., p. 270, L. 10 – p. 273, L. 3.) The district court denied the motion. (Id.)

Two of Adams's friends testified for the defense. September Moore testified that there was an escalation in voices but she did not see Adams pull a knife. (1/6/17 Tr., p. 281, L. 12 – p. 285, L. 8.) Ms. Moore could not testify as to what Adams said. (Id.) Ms. Moore admitted her back was to the incident and she did not see what started the argument or what arose between Adams and Ms. Smith. (1/6/17 Tr., p. 293, L. 11 – p. 294, L. 1, p. 303, L. 21 – p. 304, L. 23.)

Dale Bruno, another of Adams' friends, testified that Adams said, "Keep your hands off my man" and walked over to Ms. Smith. (1/6/17 Tr., p. 321, L. 25 – p. 324, L. 5, p. 325, Ls. 4-14.) Adams and Ms. Smith shoved each other. (Id.) Mr. Bruno did not see a knife. (Id.) However, he also admitted he was not really watching Adams because she was at the other end of the bar. (1/6/17 Tr., p. 331, L. 18 – p. 332, L. 2.)

During closing argument the prosecutor explained that "it is, in fact, incumbent upon me, as the prosecutor, to prove each of these elements, in the elements' instruction, beyond any reasonable doubt." (1/6/17 Tr., p. 358, Ls. 2-5.) The defense argued there was reasonable doubt because of variations between the witnesses' testimony and argued there was no knife. (1/6/17 Tr., p. 364, L. 23 – p. 375, L. 20.) The jury found Adams guilty. (R., p. 181; 1/6/17 Tr., p. 380, Ls. 12-19.)

Adams "renew[ed]" her motion for mistrial based upon the juror knowing Ms. Smith's mother in grade school. (1/6/17 Tr., p. 386, Ls. 2-12.) The district court denied the motion for a mistrial and noted that the juror appeared to be in his 50s, and knowing Ms. Smith's mother back in grade school did not constitute unfair prejudice. (1/6/17 Tr., p. 389, L. 6 – p. 390, L. 15.)

Adams then filed another renewed motion for mistrial based on the juror's prior acquaintance with Ms. Smith's mother in grade school. (R., pp. 206-208.) She also filed a motion for a new trial, alleging the state withheld exculpatory evidence. (R., pp. 209-213.) Adams submitted the affidavit of Adams' friend, Wes Sherwood. (R., pp. 216-219.) Mr. Sherwood claimed that he did not see Adams with a knife. (Id.) He also claimed he told Deputy Talbot this and Deputy Talbot told him he did not need to testify at trial. (Id.) In response the state submitted an affidavit from Deputy Talbot. (R., pp. 226-227.) Deputy Talbot averred that when he spoke to Mr. Sherwood, Mr. Sherwood said he did not see anything. (Id.) Mr. Sherwood was hesitant to cooperate and did not tell Deputy Talbot whether he saw a knife or not. (Id.)

The district court held a hearing on Adams' motion for new trial and her renewed motion for mistrial. (3/15/17 Tr., p. 391, L. 5 – p. 412, L. 14.) The district court denied the motion for a mistrial. (3/15/17 Tr., p. 400, Ls. 9-18.) The district court discussed the motion for a new trial, but eventually took the matter under advisement. (3/15/17 Tr., p. 412, Ls. 4-14.) The district court entered a short written order denying the motion for a new trial. (R., pp. 229-231.) The district court held the state never suppressed any evidence because the witness, Mr. Sherwood, was disclosed as a witness during the preliminary hearing. (Id.)

At sentencing, the district court entered a withheld judgment and placed Adams on probation for three years. (R., pp. 234-236.) Adams timely appealed. (R., pp. 269-272.)

ISSUES

Adams states the issues on appeal as:

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?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Adams failed to show the district court abused its discretion when it permitted Ms. Shippy to testify as to what Adams said during the incident?

2. Has Adams failed to show the district court erred when it denied her motion to declare a mistrial because a juror knew Ms. Smith's mother when the juror and Ms. Smith's mother were in grade school?

3. Has Adams failed to show prosecutorial misconduct and fundamental error during closing arguments?

4. Has Adams failed to show the district court abused its discretion when it denied her motion for a new trial on the grounds she knew that Mr. Sherwood, her friend, was a potential witness to the incident?

ARGUMENT

I.
The District Court Did Not Err In Admitting Relevant Evidence

A. Introduction

Ms. Shippy, the bartender, testified that she helped disarm Adams, and as Adams was being led out the back door, Adams threatened Ms. Shippy about "giving her knife back, and that she would slit my throat, that she would burn the bar down also." (1/5/17 Tr., p. 227, Ls. 7-10.) Adams objected on relevance and Idaho Rule of Evidence 404(b) grounds. (1/5/17 Tr., p. 226, L. 7 – p. 227, L. 10.) The district court overruled the objection. (Id.) Adams argues on appeal that the district court's ruling was an abuse of discretion. (See Appellant's brief, pp. 6-15.) Adams' arguments on appeal fail.

Adams' threats immediately after she was disarmed and being restrained from attacking Ms. Smith are relevant because her threats make it more probable that she had a knife when she assaulted Ms. Smith, and also provide evidence of Adams' seriousness and intent. See I.R.E. 401. Adams' threats during the incident also are not propensity or character evidence, because, in part, these threats were inextricably intertwined with the criminal episode. See I.R.E. 404(b). Adams also failed to show that evidence of her threats was unfairly prejudicial. The district court did not abuse its discretion when it permitted Ms. Shippy to testify regarding the statements Adams made to her while being escorted from the bar.

B. Standard Of Review

When the appellate court reviews the trial court's evidentiary rulings, the appellate court applies an abuse of discretion standard. State v. Jones, 160 Idaho 449, 375 P.3d 279 (2016) (citing Dulaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160, 163-64, 45 P.3d 816, 819-20

(2002)). To determine whether a trial court abused its discretion, the appellate court considers whether the trial court "correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason." Id. (quoting Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 51, 995 P.2d 816, 821 (2000)).

Whether evidence is relevant is reviewed de novo. State v. Raudebaugh, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993).

C. The District Court Did Not Err In Admitting Ms. Shippy's Testimony Regarding Adams' Words And Actions That Occurred As Part Of The Circumstances Of The Crime

Ms. Shippy testified that she heard Adams threaten to slit Ms. Smith's throat. (1/5/17 Tr., p. 216, L. 23 – p. 221, L. 25.) Ms. Shippy testified she saw that Adams "had the knife at [Ms. Smith's] throat." (Id.) Mr. Skinner then grabbed Adams and Ms. Shippy was able to get the knife and put it in the drawer. (Id.) Adams was screaming, "Let me go. Let me cut her throat." (Id.) As they were restraining Adams and trying to get her out the back door, Adams continued making threats:

> Q. (By [PROSECUTOR]) And what did she say?
>
> A. She threatened me, about giving her knife back, and that she would slit my throat, that she would burn the bar down also.

(1/5/17 Tr., p. 227, Ls. 7-10.) Adams objected to the admission of this evidence on relevance and I.R.E. 404(b) grounds. (1/5/17 Tr., p. 226, L. 7 – p. 227, L. 10.) At defense counsel's request, the parties and the court held an unreported sidebar. (Id.) Adams' objection was overruled. (Id.) On appeal, Adams claims the district court abused its discretion because, she claims, the continued threats made by Adams were not relevant and were impermissible

propensity evidence under Rule 404(b). Adams has failed to show the district court abused its discretion.

1. Adams' Threats Made To The People Disarming Her And Keeping Her From Assaulting Ms. Smith Are Relevant

Adams threatened one of the people who helped disarm her and prevented her from attacking Ms. Smith. (1/5/17 Tr., p. 227, Ls. 7-10.) Adams argues the evidence of her threats is not relevant because this "testimony does not make any material fact to the charged offenses 'more or less probable.'" (Appellant's brief, p. 9 (citing I.R.E. 401).) Adams' argument is without merit. The definition of what constitutes relevant evidence is broad:

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

I.R.E. 401. The appellate court reviews questions of relevance de novo. Raudebaugh, 124 Idaho at 764, 864 P.2d at 602. Here, the threats made by Adams to Ms. Shippy, one of the people who helped keep her from Ms. Smith, are relevant because they have a tendency to show that Adams had a knife, what her state of mind was at the time of the attack, and the seriousness of her intent to do violence to Ms. Smith.

The state was required to prove among other things that Adams "committed an assault" upon Ms. Smith by intentionally and unlawfully "threatening by word or act to do violence" to Ms. Smith "which created a well-founded fear in Ms. Smith that such violence was imminent[.]"

(Augment, p. 13[1].) The state was also required to prove that Adams "committed the assault with deadly weapon or instrument." (Id.)

Whether Ms. Smith had a knife and whether she intended to do violence were both at issue. Both of Adams' friends testified they did not see a knife. (See 1/6/17 Tr., p. 281, L. 12 – p. 285, L. 8, p. 321, L. 25 – p. 324, L. 5, p. 325, Ls. 4-14.) Adams' friends also testified it was only yelling and a pushing match. (See 1/6/17 Tr., p. 293, L. 11 – p. 294, L. 1, p. 303, L. 21 – p. 304, L. 23, p. 321, L. 25 – p. 324, L. 5, p. 325, Ls. 4-14.) Ms. Shippy testified that Adams' threat included "giving her knife back." (1/5/17 Tr., p. 227, Ls. 7-10.) This testimony makes it more likely that Adams had a knife when she assaulted Ms. Smith, because she was threatening to get her knife "back." Further the state's theory of the case was that Ms. Shippy was the one who took Adams' knife. Therefore Adams' threats to Ms. Shippy to get her knife "back" supports the state's theory. At the same time, Adams threatened to cut Ms. Shippy's throat and burn down her bar. These threats to one of the people disarming her and keeping her away from Ms. Smith have a tendency to show that Adams had the intent to assault Ms. Smith. Adams was threatening one of the people who was thwarting her from assaulting Ms. Smith. They also are evidence of Adams' state of mind and behavior at the time of the crime, all of which is very relevant to the crime. Ms. Shippy's testimony regarding the statements made to her while she was preventing Adams from harming Ms. Smith is clearly relevant.

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[1] See The Second Motion To Augment The Record And Statement in Support Thereof, dated April 3, 2018; see also Order Granting Appellant's Amended Second Motion To Augment The Record dated April 4, 2018.

2. Ms. Shippy's Testimony That Adams Threatened Her While She Was Disarming Her And Keeping Her From Assaulting Ms. Smith Is Not Impermissible Propensity Evidence

Adams argues that the only purpose of Ms. Shippy's testimony that Adams threatened her was "to demonstrate that Ms. Adams had a propensity to threaten harm." (See Appellant's brief, pp. 9-10.) Adams' argument is not supported by the record. The evidence that Adams threatened one of the people who disarmed her and prevented her from attacking Ms. Smith is not propensity evidence, and Idaho Rule of Evidence 404(b) is inapplicable.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." I.R.E. 404(b). Evidence that Adams threatened Ms. Shippy, who had helped disarm her during the charged conduct, is not "[e]vidence of other crimes, wrongs, or acts" admitted to prove Adams' "character." It is evidence of the crime for which Adams was on trial. Adams' threat to Ms. Shippy included Adams admitting she had just possessed a knife and threatening a person who had interfered with her assault on Ms. Smith. (See 1/5/17 Tr., p. 227, Ls. 7-10.) This evidence is intrinsic to the crime charged.

"Evidence of an act is intrinsic when it and evidence of the crime charged are inextricably intertwined, or both acts are part of a single criminal episode, or it was a necessary preliminary to the crime charged." State v. Whitaker, 152 Idaho 945, 949, 277 P.3d 392, 396 (Ct. App. 2012) (citing State v. Sheldon, 145 Idaho 225, 228, 178 P.3d 28, 31 (2007); United States v. Sumlin, 489 F.3d 683, 689 (5th Cir. 2007)). "Evidence is inextricably intertwined when it is 'so interconnected with the charged offense that a complete account of the charged offense could not be given to the jury without disclosure of the uncharged misconduct.'" Id. (citing State v. Avila, 137 Idaho 410, 413, 49 P.3d 1260, 1263 (Ct. App. 2002); State v. Izatt, 96 Idaho 667, 670, 534

P.2d 1107, 1110 (1975); State v. Blackstead, 126 Idaho 14, 17-18, 878 P.2d 188, 191-92 (Ct. App. 1994)). "The state is entitled to present a full and accurate account of the circumstances of the commission of the crime, and if such an account also implicates the defendant or defendants in the commission of other crimes for which they have not been charged, the evidence is nevertheless admissible." State v. Izatt, 96 Idaho 667, 670, 534 P.2d 1107, 1110 (1975). Evidence is admissible if it complies with the Idaho Rules of Evidence. State v. Kralovec, 161 Idaho 569, 574, 388 P.3d 583, 588 (2017) (concluding that evidence previously considered admissible as *res gestae* is only admissible if it meets the criteria established by the Idaho Rules of Evidence). As addressed above, Adams' threats meet the relevancy requirements of Idaho Rule of Evidence 401 because they showed Adams was so intent on harming Ms. Smith that she threated to harm the person who was helping prevent her from doing so and that she had a knife during the charged conduct. Adams' threats are relevant, intertwined with the crime, and are not propensity or character evidence.

Testimony regarding what Adams did and said when she was disarmed and restrained from attacking Ms. Smith is inextricably intertwined with the crime. See e.g. Avila, 137 Idaho at 413, 49 P.3d at 1263 (defendant's "story about a strip club experience occurred simultaneously with the charged offense, and introduction of evidence about it was necessary to present the jury with the entire context in which the alleged touching of A.A.'s back and breast occurred."); compare Whitaker, 152 Idaho at 949, 277 P.3d at 396 (evidence that the defendant viewed "pornography on some occasion entirely separate from the charged offenses was not part of the charged criminal episode, nor was it necessary in order to provide a complete account of the charged crimes"); State v. Naranjo, 152 Idaho 134, 141, 267 P.3d 721, 728 (Ct. App. 2011)

(statements regarding past drug dealings were not inseparably connected to the charged conduct or necessary for a complete account of the charged offense).

Here, evidence of Adams threats was not a prior or distant crime. It was inextricably intertwined with the criminal episode. This evidence was not character evidence that Adams "acted in conformity therewith." Making threats at the same time as the charged conduct is not evidence of "character" it is evidence of the crime.

For the foregoing reasons, Ms. Shippy's testimony does not implicate the Rule 404(b) analysis. Since it is not 404(b) evidence the state was not required to provide advance notice of its use. Therefore Adams argument regarding lack of 404(b) notice is inapplicable.[2] (See Appellant's brief, pp. 11-12.)

3. Adams Fails To Provide Support In The Record That The District Court Abused Its Discretion When It Allowed Ms. Shippy To Testify As To Adams' Threats

Adams argues that the district court did not provide a sufficient enough record to support the admission of Ms. Shippy's testimony, nor did the district court properly weigh the prejudicial effect of this testimony. (See Appellant's brief, pp. 12-15.) Both of these arguments fail because it was Adams' burden, both below and on appeal to provide any record of the district court's decision or analysis during the sidebar she requested:

> Q. [By 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 COUNSEL]: Objection, Your Honor; relevance. We don't believe it's permissible, 404. And we would like a sidebar.

---

[2] Further, it does not appear that Adams' 404(b) notice argument is not preserved for appeal. Adams' objection did not include a reference to a lack of notice. (See 1/5/17 Tr., p. 226, L. 7 – p. 227, L. 10.) Arguments not raised before the district court are not preserved for appeal. See State v. Garcia-Rodriguez, 162 Idaho 271, 275-276, 396 P.3d 700, 704-705 (2017).

> THE COURT: Okay. Let's have a sidebar. Both counsel step up here a minute. Stay where you are.
>
> (Pause.)
>
> THE COURT: We had some lawyer talk. Okay. [Prosecutor], go ahead.
>
> [PROSECUTOR]: Thank you, Your Honor.
>
> Q (By [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 COUNSEL]: And we would renew our objection for the record, Your Honor.
>
> THE COURT: Objection's noted. You can answer the question.
>
> A. Yes.
>
> Q. (By [PROSECUTOR]) And what did she say?
>
> A. She threatened me, about giving her knife back, and that she would slit my throat, that she would burn the bar down also.

(1/5/17 Tr., p. 226, L. 7 – p. 227, L. 10.)

Adams argues, without citation to authority, that because the district court did not give its reasons why it overruled Adams' objection or conduct its probative versus prejudice analysis on the record, the court "failed to reach its decision through an exercise of reason" and, therefore, abused its discretion. (See Appellant's brief, pp. 12-13.) Adams' argument is waived. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority or argument, they will not be considered.") It also fails on the merits. It was incumbent upon Adams, as the party objecting, to make a record. E.g. State v. Willoughby, 147 Idaho 482, 488, 211 P.3d 91, 97 (2009) (Supreme Court will not presume error). Also Adams' burden, as appellant, to provide record supporting claim on appeal.

Where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court. See State v. Beck, 128 Idaho 416, 422, 913 P.2d 1186, 1192 (Ct. App. 1996).

Here, Adams requested a sidebar, during which the district court apparently made its rulings and provided its reasons for allowing the testimony, because immediately after the sidebar the district court instructed the prosecutor to continue with his line of questions. (See 1/5/17 Tr., p. 226, L. 7 – p. 227, L. 10.) Adams then "renewed" her objection, and the district court overruled the "renewed" objection. (Id.) Thus, it appears the district court's reasons for overruling Adams' objection occurred during the unreported sidebar. The district court's reasons for ruling are therefore not in the record. As a result, this missing portion of the record must be presumed to support the actions of the trial court.

4. The Probative Value Of Adams' Threats Were Not Substantially Outweighed By The Danger Of Unfair Prejudice

Adams argues that testimony of her threats was unfairly prejudicial because it "depicted Ms. Adams as a person with a propensity to commit the charged offense in the minds of the jury." (Appellant's brief, pp. 13-15.) Adams has failed to show the district court abused its discretion when it admitted Ms. Shippy's testimony.

Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice – which is the tendency to suggest a decision on an improper basis – substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 907 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993). "Under the rule, the evidence is only excluded if the probative value is substantially outweighed

by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

In criminal cases, relevant evidence is often prejudicial in the sense that it is unpleasant, but such does not mandate its exclusion from evidence. See, e.g., State v. Winn, 121 Idaho 850, 853, 828 P.2d 879, 882 (1992) (fact that photographs depict the body of a victim and the wounds inflicted on the victim and may tend to excite the emotions of the jury does not mandate their exclusion from evidence). Rather, the trial court must exercise its discretion by balancing the probative value of possibly inflammatory evidence against the risk of unfair prejudice. Winn, 121 Idaho at 853, 828 P.2d at 882; State v. Beason, 95 Idaho 267, 278, 506 P.2d 1340, 1351 (1973) (acknowledging the trial court is in a "far better position to determine whether the probative value was sufficient to overcome any possible inflammatory effect on the jury"). Here, the court exercised discretion in favor of admitting Ms. Shippy's testimony. The court did not abuse its discretion.

Ms. Shippy's testimony did not create a danger of unfair prejudice that substantially outweighed the probative value of the evidence. As an initial matter the probative value of Ms. Shippy's testimony was great. A central point of Adams' defense was that she did not possess a knife during the altercation with Ms. Smith. Adams argued, in part:

> They had a pushing match. It was over a guy. It was over a guy that she cared about a lot at the time. Could she have reacted differently? Probably.
>
> But there wasn't a knife.

(1/6/17 Tr., p. 375, Ls. 8-12.) Part of Ms. Shippy's testimony was that Adams was yelling about getting her knife "back." (See 1/5/17 Tr., p. 227, Ls. 7-10.) Ms. Shippy's testimony directly addresses one of the central issues in the case.

In addition, as explained above, Adams' threats to one of the people disarming her and keeping her away from Ms. Smith is relevant to the charge of aggravated assault against Ms. Smith. Adams' threats to Ms. Shippy show that Adams was serious about harming Ms. Smith and is relevant to Adams' intent. They also are illustrative of Adams' state of mind and behavior at the time of the crime, all of which is relevant to the crime.

Further, the danger of unfair prejudicial was minimal, if it existed at all. The testimony was not that Adams had actually slit Ms. Shippy's throat or had actually attempted to burn down her bar. At the time Adams made these threats she did not have a means to accomplish either threat. Ms. Shippy had taken her knife and there is no indication that she was in the process of setting a fire in the bar. Nor was there any evidence that Adams came back and attempted to follow through with either of these threats. There was no danger of unfair prejudice. And even if there was, it did not substantially outweigh the probative value of this testimony. Adams has failed to show the district court abused its discretion.

Even if the district court did err, that error was harmless beyond a reasonable doubt. "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." State v. Perry, 150 Idaho 209, 222, 245 P.3d 961, 974 (2010). "In other words, the error is harmless if the Court finds that the result would be the same without the error." State v. Montgomery, 163 Idaho 40, 44, 408 P.3d 38, 44 (2017) (citing State v. Almaraz, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013)).

Here, the result would have been the same. As cited above, there were multiple witnesses who testified that they saw Adams with an open knife and saw her threaten Ms. Smith. Further, despite Adams' arguments to the contrary, there was in fact a knife. This knife was recovered and was introduced into evidence at trial. (See Ex. 1.) Even if Ms. Shippy's testimony regarding Adams' statements had not been admitted into evidence, the jury would still have returned a guilty verdict.

II.
The District Court Did Not Err By Denying Adams' Motion To Declare A Mistrial Because A Juror Went To Elementary School With Ms. Smith's Mother

A. Introduction

Adams argues the district court erred when it denied her motion for a mistrial. (Appellant's brief, pp. 15-19.) Adams has failed to show error. The fact that a juror, who was in his 50s, went to grade school with the victim's mother does not create unfair prejudice and was not a legitimate basis for a mistrial.

B. Standard Of Review

The standard of review applicable to the refusal of a trial court to grant a mistrial upon a motion in a criminal case is well established:

> [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. [The appellate court's] 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. Grantham, 146 Idaho 490, 498, 198 P.3d 128, 136 (Ct. App. 2008) (quoting State v. Urquhart, 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct. App. 1983)). Because the right to due process guarantees only a fair trial, not an error-free one, "error is not reversible unless it is shown to be prejudicial." Grantham, 146 Idaho at 498, 198 P.3d at 136 (citing State v. Shepherd, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct. App. 1993)). "Error will be deemed harmless if the appellate court is able to declare, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of contributed to the conviction." Shepherd, 124 Idaho at 58, 855 P.2d at 895 (citations omitted).

C. Adams Has Failed To Show The District Court Erred When It Denied Her Motion For A Mistrial

Adams argues that the juror's "relationship" with the victim's mother "would have affected his analysis of whether Ms. Smith was telling the truth." (Appellant's brief, pp. 17-20.) Adams' argument is without support in the record. The district court questioned the juror:

> THE JUROR: I didn't know that it was pertinent to the case, but I felt that it should be known. So it was back when I was a younger kid that I did know her mother.
>
> THE COURT: Okay. So she's not a relative?
>
> THE JUROR: No.
>
> THE COURT: She just went to grade school with you for --
>
> THE JUROR: Yes, sir.
>
> THE COURT: -- a couple years?
> Okay. Have you had any relationship with Latisha Smith at all?
>
> THE JUROR: No.

> THE COURT: Okay. And based on that information you've given us, about your prior knowledge of her mother, would that cause you to give greater or lesser weight to any testimony that Latisha Smith gives in this trial?
>
> THE JUROR: No.
>
> THE COURT: And based on that information you've given us so far, can you be a fair and impartial juror in this case?
>
> THE JUROR: Yes, sir.

(1/6/17 Tr., p. 266, L. 11 – p. 267, L. 9.)

The juror explained it did not occur to him when he was chosen as a juror because it "was way back when [he] was younger." (1/6/17 Tr., p, 268, L. 15 – p. 269, L. 7.) After Adams renewed her motion for a mistrial, the district court further explained:

> THE COURT: Yeah, the next -- I can tell you right now. The first motion, I'm going to deny. I don't believe that it's appropriate to declare a mistrial based on the juror knowing the mother of one of the complaining witnesses back when he was in elementary school. This guy was in his 50s or so. And he didn't feel like there would be any reason that he couldn't be fair and impartial, and the court was convinced of that. So I'm going to deny that motion.

(3/15/17 Tr., p. 400, Ls. 9-18.) The district court did not err. The juror testified that he could be a fair and impartial juror. There is no reason to believe that a juror, in his 50s, who, decades earlier, went to grade school with Ms. Smith's mother could not be a fair and impartial juror. Nor has Adams even attempted to show from the record that the juror's presence on the jury had any prejudicial impact on the trial.

Further, even if there was error, that error was harmless. In the context of the full record, even if the juror attached improper weight to Ms. Smith's testimony (there is no evidence or reason to do believe he did), it would not have changed the outcome of the trial. As outlined above, the state presented the testimony of eye witnesses, other than Ms. Smith, who were nonbiased and were able to testify regarding the aggravated assault. Further, despite the

defense's argument that there was no knife, the state also produced the knife. (See Ex. 1.) Regardless, Adams has failed to show error. The district court properly denied her motion for a mistrial.

III.
Adams' Prosecutorial Misconduct Claims Fails All Three Prongs Of The Fundamental Error Analysis

A. Introduction

For the first time on appeal, Adams argues that the "prosecutor committed misconduct during closing arguments by disparaging defense counsel and by misstating the State's burden of proof." (Appellant's brief, p. 20.) Adams' arguments are not supported by the record or the law and fail all three prongs of the fundamental error analysis.

B. Standard Of Review

"On appeal, the standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). If a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where 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." Perry, 150 Idaho at 224, 245 P.3d at 976. Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated"; (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision"; and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Id. at 226, 245 P.3d at 978.

C. Adams Has Failed To Show The Prosecutor Committed Misconduct During Closing Argument That Amounted To Fundamental Error

Adams argues the prosecutor committed misconduct, amounting fundamental error, during closing arguments by disparaging defense counsel and lowering the burden of proof. (See Appellant's brief, pp. 24-31.) Both of Adams' claims are without merit.

1. The Prosecutor Did Not Disparage Defense Counsel And Adams' Claim Fails All Three Prongs Of The Fundamental Error Analysis

a. Adams Has Failed To Show The Prosecutor's Closing Argument Constituted Prosecutorial Misconduct And Violated Her Right To A Fair Trial

During closing argument, the prosecutor explained that his job was to prove the elements of a crime beyond a reasonable doubt. (See 1/6/17 Tr., p. 357, L. 25 – p. 364, L. 19.) The prosecutor argued:

> Now, the next thing I'd like you to consider are the elements of the crime. And that's kind of the road map to your deliberations. And it is, in fact, incumbent upon me, as the prosecutor, to prove each of these elements, in the elements' instruction, beyond any reasonable doubt.

(1/6/17 Tr., p. 357, L. 25 – p. 358, L. 5.) After going through the elements and testimony presented at trial, the prosecutor explained reasonable doubt and the role of the defense:

> 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 face.
>
> There is no such thing -- I repeat it -- as a case without doubt. That's why your reasonable doubt instruction says that proof beyond a reasonable doubt does not require proof beyond mere possible doubt. Your instructions says [sic] 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. And I thank you for your attention.

(1/6/17 Tr., p. 363, L. 25 – p. 364, L. 19.) Adams did not object. (See id.)

For the first time on appeal Adams argues that this argument constitutes a disparagement or personal attack on defense counsel to such an extent that her right to a fair trial was violated. (See Appellant's brief, pp. 24-27.) Adams' argument fails because the prosecutor's argument in no way disparaged or attacked defense counsel and did not impact Adams' right to a fair trial.

"A defendant's right to a fair trial is impacted '[w]here 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.'" State v. Parker, 157 Idaho 132, 145, 334 P.3d 806, 819 (2014). "It is improper to misrepresent or mischaracterize the evidence in closing argument." State v. Moses, 156 Idaho 855, 871, 332 P.3d 767, 783 (2014) (quoting State v. Rothwell, 154 Idaho 125, 133, 294 P.3d 1137, 1145 (Ct. App. 2013)). "Indeed, the prosecutor 'has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics.'" Id. (citing State v. Griffiths, 101 Idaho 163, 166, 610 P.2d 522, 525 (1980) (overruled on other grounds by State v. LePage, 102 Idaho 387, 630 P.2d 674

(1981))). The prosecutor's closing argument should not include disparaging comments about opposing counsel. See State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007); State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); State v. Brown, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998) (prosecutor's statements about defense counsel that, "He should have been an actor, don't you think?" were improper but were not so egregious as to be the basis for reversal); State v. Baruth, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1984) (holding that prosecutor's comments, regarding defense attorney selling doubt as a "huckster" was improper but not the basis for reversal); State v. Norton, 151 Idaho 176, 188-89, 254 P.3d 77, 89-90 (Ct. App. 2011) (not prosecutorial misconduct for the state to refer to the defense arguments as red herrings and smoke and mirrors). Generally the parties are given wide latitude in making closing arguments to the jury and discussing the evidence and inferences that can be made therefrom. State v. Montgomery, 163 Idaho 40, ___, 408 P.3d 38, 45 (2017) (citing Severson, 147 Idaho at 720, 215 P.3d at 440).

Here, at no time did the prosecutor say defense counsel was lying or concealing the truth. Nor did the prosecutor say the defense attorney was doing anything untoward or outside the bounds of the law. In fact it is the opposite – the prosecutor was arguing the defense is doing exactly what the law says the defense should be doing – trying to raise reasonable doubt.

Adams' failure to establish prosecutorial misconduct is highlighted when cases are examined and compared with the present case. Adams relies on a Ninth Circuit case. (Appellant's brief, pp. 24-27 (citing Bruno v. Rushen, 721 F.2d 1193, 1194-1195 (9th Cir. 1983)). The Ninth Circuit has explained that Bruno stands "for the proposition that under the Sixth Amendment right to counsel, prosecutors may not imply that the fact that a defendant hired a lawyer is a sign of guilt, or that all defense counsel are programmed to conceal and distort the

truth." United States v. Santiago, 46 F.3d 885, 892 (9th Cir. 1995) (citing Bruno, 721 F.2d at 1194-95; United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980)). In Santiago, the prosecutor criticized the tactics of the defense counsel. See id. The Ninth Circuit held that this was not prosecutorial misconduct. Id.

Idaho also holds that the prosecutor cannot disparage counsel by calling counsel a liar. In Sheahan, supra, the prosecutor argued that "defense counsel 'tried to hide the facts and to mislead' the jury, as well as a statement that defense counsel 'tried to establish something that is not in evidence by his argument. Apparently acceding to that other maxim that if you tell a lie enough times and often enough, people are going to believe it.'" Sheahan, 139 Idaho at 280, 77 P.3d at 969. The Idaho Supreme Court held that these comments "that defense counsel had misled and lied to the jury were improper." Id., at 281, 77 P.3d at 970.

Here, the prosecutor did not even criticize the tactics of the defense counsel, nor did the prosecutor say that all defense counsel are programmed to conceal and distort the truth. Nor did the prosecutor argue that the defense attorney lied or even tried to hide facts. Nor did the prosecutor imply that hiring a defense attorney is indicative of guilt. Here, the prosecutor argued that the defense's job is to raise doubt and good defense attorneys can raise doubt even when it seems like there should be no doubt – but all cases will have some doubt. (See 1/6/17 Tr., p. 363, L. 25 – p. 364, L. 19.) This is not a disparagement of defense counsel. The prosecutor explained that it was his job to prove the case beyond a reasonable doubt, and then explained that the defense attorney's job is to raise doubt, and that all cases will have some doubt. Adams has failed to show the prosecutor was disparaging defense counsel. Adams has failed to show these comments by the prosecutor violated her right to a fair trial.

b. Adams Has Failed To Show Any Error Was Clear From The Record

Adams has also failed to show any constitutional error is clear or obvious on the record, and has failed to show whether the failure to object was a tactical decision See Perry, 150 Idaho at 224, 245 P.3d at 976. The prosecutor's comments did not clearly disparage defense counsel, and it was likely a tactical decision not to object to the prosecutor's statements.

In determining whether a prosecutor's comment violated due process, the Idaho appellate courts do "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Severson, 147 Idaho at 719, 215 P.3d at 439 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974)). The prosecutor's statements that good defense attorneys can raise doubt, even where jurors may not think there is doubt, does not clearly disparage defense counsel. (See 1/6/17 Tr., p. 363, L. 25 – p. 364, L. 19.) There were no pejorative terms used nor were there any clear statements suggesting that defense counsel was doing anything outside of the law.

Further, it is likely that defense counsel's decision not to object was a tactical decision because the prosecutor's general point was that all cases have doubt. (See 1/6/17 Tr. p. 363, L. 25 – p. 364, L. 19 ("There is no such thing -- I repeat it -- as a case without doubt.").) The state conceded that even cases with video evidence and multiple witnesses can contain some doubt. (See id.) This argument played into Adams' closing argument. (See 1/6/17 Tr. p. 364, L. 23 – p. 375, L. 20.) Adams argued that there was reasonable doubt because of variations between the multiple witnesses' testimony. (See id.) Thus, as a result of the prosecutor's argument, that all cases have doubt, Adams only had to argue the amount, or level, of doubt, and did not have to

first establish that doubt can exist where there are multiple eye witnesses. Adams has failed the second prong of the fundamental error analysis.

c. Even If There Were Error, Adams Has Failed To Show That The Error Was Not Harmless

Adams has failed to demonstrate any error; however even if there was error, Adams has failed to show there was a reasonable probability that the prosecutor's comments affected the outcome of the trial court proceedings. Perry, 150 Idaho at 224, 245 P.3d at 976. Adams argues that the prosecutor's statements were not harmless because the "evidence was far from overwhelming." (See Appellant's brief, pp. 30-31.) This argument is not supported by the record. As cited above, the state presented multiple non-biased witnesses who testified that Adams threatened Ms. Smith with a knife. Both the defense witnesses admitted their testimony and observations of the event were limited.

Further, the defense theory was there was no knife. (See, e.g., 1/6/17 Tr., p. 375, Ls. 8-12.) However, Ms. Shippy testified that Adams wanted her knife "back" and also the Deputy Talbot testified that he recovered the knife from drawer where both Ms. Shippy and Ms. Hicks said it was placed. (See 1/5/17 Tr., p. 155, L. 1 – p. 160, L. 16, p. 227, Ls. 7-10, p. 249, L. 12 – p. 252, L. 2; Ex. 1.) The prosecutor's argument that a good defense attorney can raise doubt, did not affect the outcome of the trial proceedings.

2. Adams Has Failed To Show The Prosecutor Mispresented The Burden Of Proof And Has Failed To Establish All Three Prongs Of The Fundamental Error Analysis

a. Adams Has Failed To Show The Prosecutor Violated An Unwavied Constitutional Right And Failed To Show The Prosecutor Mispresented The Burden Of Proof

During closing argument, the state explained that it had to prove all of the elements of the crime beyond a reasonable doubt. (See 1/6/17 Tr., p. 357, L. 25 – p. 358, L. 5.) After going through the elements and testimony presented at trial, the prosecutor explained reasonable doubt and the role of the defense:

> There is no such thing -- I repeat it -- as a case without doubt. That's why your reasonable doubt instruction says that proof beyond a reasonable doubt does not require proof beyond mere possible doubt. Your instructions says [sic] 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. And I thank you for your attention.

(1/6/17 Tr. p. 364, Ls. 10-19.) Adams did not object. (See id.) On appeal Adams claims the prosecutor violated her unwaived right to a fair trial because she claims the prosecutor was misrepresenting the burden of proof. (See Appellant's brief, pp. 28-30.) Adams argues, "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 a reasonable doubt standard was error." (Appellant's brief, p. 29.) The state's argument did not mispresent the burden of proof.

The prosecutor's closing argument was based upon the jury instruction. "A defendant's right to a fair trial is impacted '[w]here 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.'" Parker, 157 Idaho 132, 145, 334 P.3d 806, 819 (2014) (quoting Perry, 150 Idaho at 227, 245 P.3d at 979). The district

court instructed the jury that reasonable doubt is a doubt "based upon reason and common sense." (Augment, p. 1.)

> 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.

(Id.)

The jury was instructed to use its reason and common sense, and if its doubt was based upon reason and common sense then it must find the defendant not guilty. (See id.) Thus, based upon a plain reading of the jury instruction, if reason and common sense tell the jury that a defendant is not guilty, then it also reason and common sense that tells the jury that the defendant is guilty. This is precisely what the state argued, "Your instructions says [sic] 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." (1/6/17 Tr., p. 364, Ls. 10-18.) The prosecutor did not lower the burden of proof. The prosecutor's arguments accurately reflected the jury instructions. Adams has failed to show the first prong of the fundamental error analysis.

b. Adams Has Failed To Show Clear Error Or That Failure To Object Was Not A Tactical Decision

Adams has also failed to show the prosecutor's comments clearly misstated the burden of proof. (See Appellant's brief, p. 30.) As cited above, Jury Instruction No. 1 required the jury to use its reason and common sense when determining whether the defendant was guilty. (See

Augment, p. 1.) It is not clear from the face of the record that the prosecutor was asking the jury to do anything else. (See 1/6/17 Tr. p. 364, Ls. 10-18.)

Further, Adams has failed to show that the her failure to object was not a tactical decision. (See Appellant's brief, p. 30.) Her closing argument was based upon the jurors using their common sense and reason to find that there were variations between the witnesses' testimony, such that they should find Adams not guilty. (See 1/6/17 Tr., p. 364, L. 23 – p. 375, L. 20.) Adams argued, in part:

> In your packet, Instruction 1 is reasonable doubt. The State made reference to it. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. And here's the common sense: The common sense is those stories cannot rectify themselves with each other sufficient to find that Sabra [Adams] did this.

(1/6/17 Tr., p. 371, L. 22 – p. 372, L. 4.) Adams' closing argument also relied upon the jury using its common sense and reason, and it would have been a tactical decision not to object to the prosecutor's invocation of the same.

c. Adams Has Failed To Show The Prosecutor's Comments Affected The Outcome Of The Trial

As above, Adams argues that the prosecutor's statements regarding "reason" and "common sense" were not harmless because the state's case was "far from overwhelming." (See Appellant's brief, pp. 30-31.) As cited and explained above, this assertion is not supported by the record.

Further, it is difficult to see how it can be harmful for the jury to use its "reason" and "common sense" when determining whether to find the defendant guilty, especially since this is what they were instructed to do. Adams has failed all three prongs of the fundamental error analysis.

IV.
Adams Has Failed To Show The District Court Abused Its Discretion When It Determined That The Proposed Testimony Of Adams' Friend Was Not Newly Discovered Evidence Or Suppressed By The State

A. Introduction

Adams moved for a new trial on the grounds that the state did not disclose contact between Mr. Sherwood, a potential witness, and Deputy Talbot. (See R., pp. 209-212.) The district court denied the motion for a new trial because Adams knew about Mr. Sherwood as a potential witness prior to trial. (See R., pp. 229-230.) On appeal Adams argues the district court abused its discretion and that she is entitled to a new trial under Brady v. Maryland, 373 U.S. 83 (1963). (See Appellant's brief, pp. 35-43.) Adams' argument on appeal fails.

Adams' Brady claim was not preserved. Before the district court she argued she was entitled to a new trial under State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976). (See R., pp. 209-212.) A Brady claim is a separate and unique claim from a newly discovered evidence claim under Drapeau. Thus Adams' Brady claim was not preserved for appeal.

Even if it was preserved for appeal, she has failed to show the state suppressed any favorable evidence. (See R., p. 226.) Mr. Sherwood did not tell Deputy Talbot any exculpatory or impeaching information. (See id.) Further, Adams was aware of Mr. Sherwood as a potential witness. (See R., pp. 229-230.) Finally, even if Mr. Sherwood's affidavit is believed and he had testified at trial in accordance with his affidavit, it would not have changed the outcome of the trial. Adams' has failed to show an abuse of discretion in the denial of her motion for a new trial.

B. Standard Of Review

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

C. Adams Has Failed To Show The District Court Abused Its Discretion When It Denied Her Motion For A New Trial

Adams moved for a new trial based on a claim of newly discovered evdience pursuant to Idaho Code § 19-2406(7). (See R., pp. 209-212; see also 3/15/17 Tr., p. 394, Ls. 2-3.) ("With respect to our motion for new trial -- motion for new trial is based on 19-2406."). Adams argued that state did not disclose before that Deputy Talbot spoke with Mr. Sherwood. (See id.) The district court entered a written decision finding that the state did not suppress evidence and that Adams was aware of Mr. Sherwood. (See R., pp. 229-230.) On appeal, Adams argues the state suppressed evidence and thus a new trial should be granted pursuant to Brady v. Maryland, 373 U.S. 83 (1963). (Appellant's brief, pp. 35-43.) Adams' Brady claim was not preserved below. Even it was preserved below, it is without merit because Mr. Sherwood did not tell Deputy Talbot anything favorable to Adams, nor did the state suppress Mr. Sherwood as a witness.

1. Adams' *Brady* Argument Was Not Preserved Because Adams Moved For A New Trial Under I.C. § 19-2406(7) And The Four Part *Drapeau* Test

As an initial matter, Adams argues on appeal that this is a claim pursuant to Brady v. Maryland, 373 U.S. 83 (1963). (See Appellant's brief, pp. 35-43.) This is an incorrect reading of the record. Before the district court, Adams moved for a new trial pursuant to Idaho Code § 19-2406(7) because of newly discovered evidence. (See R., pp. 209-212; see also 3/15/17 Tr., p.

394, Ls. 2-3.) While Adams did reference the state's obligation to produce evidence, Adams' motion was framed around the four part Drapeau test. (See R., pp. 210-211.)

In State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976), the Idaho Supreme Court articulated the four-part test a defendant must satisfy in order to be entitled to a new trial based upon newly discovered evidence. That test requires a defendant to show that the evidence offered in support of his motion for a new trial (1) is newly discovered and was unknown to the defendant at the time of trial; (2) is material, not merely cumulative or impeaching; (3) will probably produce an acquittal; and (4) failure to learn of the evidence was due to no lack of diligence on the part of the defendant. Id. at 691, 551 P.2d at 978.

A motion for new trial based upon newly discovered evidence established under the Drapeau standard is "quite distinct" from a Brady claim. State v. Lankford, 162 Idaho 477, 502-03, 399 P.3d 804, 829-30 (2017) (citing Grube v. State, 134 Idaho 24, 30-31, 995 P.2d 794, 800-01 (2000) (noting that the Drapeau standard is a different and "higher standard" than what is required under Brady); State v. Branigh, 155 Idaho 404, 421-22, 313 P.3d 732, 749-50 (Ct. App. 2013)).

Adams moved for a new trial under the Drapeau standard. Her motion cited to Idaho Code § 19-2406(7) and cited to the four-part Drapeau standard. (See R., p. 210.) Paragraphs 6-9 of her motion argued the four-part Drapeau standards. (See R., pp. 210-212.) Adams made a motion under Drapeau, not Brady, and thus, Adams' Brady argument on appeal not preserved. See Garcia-Rodriguez, 162 Idaho at 275-276, 396 P.3d at 704-705 (constitutionality of arrest was not preserved for appeal because the parties argued a statutory basis for arrest before the district court).

Adams argues her Brady claim is preserved because "[t]he district court acknowledged that *Brady* was applicable in this instance[.]" (Appellant's brief, p. 39 (citing R., pp. 229-230).) The district court, when denying Adams' motion, cited to Brady for the proposition that the state cannot suppress material evidence favorable to the defendant. (See R., p. 229 (citing Brady, 373 U.S. at 87.) That is it. The district court did not conduct a Brady analysis, nor did the district court appear to consider Adams' claim a Brady claim. This is especially true when the transcript of the hearing on Adams' motion for new trial is considered. (See 3/15/17 T., p. 391, L. 9 – p. 412, L. 16.) The parties were clearly arguing the Drapeau standard. (Id.)

At the hearing, the central question appeared to be whether Mr. Sherwood could be considered to be newly discovered evidence when he was a friend of Adams' and the defense was aware of his potential as a witness. (See id.) After Adams made her argument the first thing the court asked was whether Mr. Sherwood was a friend of the defendant's. (3/15/17 Tr., p. Ls. 17-20.) The district court explained it was concerned about whether Adams had known about Mr. Sherwood:

> THE COURT: ...
>
> [W]hat I'm really concerned about, [defense counsel], is -- it appears that the defendant had notice that Mr. Sherwood had knowledge at the time of the preliminary hearing. And just because the State doesn't identify him as their witness or somebody with knowledge, she -- she was there. I mean, she was at the bar. And she was -- she knew at the time of the preliminary hearing that he had knowledge. Why -- why is this something that she couldn't have -- somebody that she couldn't have subpoenaed? What did the State do that prevented that?

(3/15/17 Tr., p. 409, Ls. 9-20.) Eventually, after some additional back and forth, Adams clarified that what it "c[ame] down to" is that the defense did not know how to contact Mr. Sherwood. (3/15/17 Tr., p. 411, Ls. 5-10.) The argument before the district court was clearly an argument whether Mr. Sherwood was a "newly discovered" witness under the Drapeau standard. The

district court's citation to Brady for a general standard that the state cannot suppress evidence does not transform Adams' Drapeau claim into a distinct Brady claim. Adams has failed to preserve her Brady claim for appeal.

2. Even If Adams Had Preserved Her *Brady* Claim The Claim Fails Because The State Did Not Suppress Any Evidence Favorable To The Defense

Prior to trial, Mr. Sherwood, a friend of Adams', spoke to Deputy Talbot. (See R., pp. 226-227.) Mr. Sherwood told Deputy Talbot that he had not seen anything, and he was hesitant to cooperate. (Id.) "To the best of [Deputy Talbot's] knowledge," Mr. Sherwood did not tell Deputy Talbot that Adams did have or did not have a knife. (Id.) Deputy Talbot told Mr. Sherwood that "unless he was served with a subpoena that he did not have to appear" in court. (Id.) Adams was aware of Mr. Sherwood as a potential witness. (See R., pp. 229-230.) After the trial was over, Mr. Sherwood submitted an affidavit on behalf of Adams. (See R., pp. 216-219.) In his affidavit Mr. Sherwood claimed that he never saw Adams with a knife and that he told Deputy Talbot the same thing. (Id.) On appeal, Adams argues the state suppressed Mr. Sherwood as a potential witness and thus violated Brady. (See R., pp. 35-43.) If Adams' Brady claim is preserved, she has failed to meet the elements of a Brady claim on appeal. (Id.)

"Under Brady, the defendant must demonstrate that the government's suppression of evidence "'undermines confidence in the outcome of the trial.'" Lankford, 162 Idaho at 503, 399 P.3d at 830 (citing Kyles v. Whitley, 514 U.S. 419, 433 (1995)). The defendant's burden of proof under Brady is lower than that under Drapeau because Brady claims derive from prosecutorial misconduct, whereas Drapeau claims deal with evidence that was unknown to the defendant not due to prosecutorial misconduct. See id. (citations omitted). "The State has a duty to disclose exculpatory evidence to a defendant." Id. (citing Brady, 373 U.S. at 87). "In order to

establish a Brady violation, there must be evidence that (1) is favorable to the accused because it is either exculpatory or impeaching; (2) was willfully or inadvertently suppressed by the State; and (3) was prejudicial or material in that there is a reasonable probability that its disclosure to the accused would have led to a different result." Id. (citing State v. Shackelford, 150 Idaho 355, 380, 247 P.3d 582, 607 (2010); Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Kyles, 514 U.S. at 433). "Reasonable probability" of a different result is shown when the suppression "undermines confidence in the outcome of the trial." Id. (citations omitted).

Here, the state did not suppress any evidence favorable to Adams. Mr. Sherwood's statement to police is neither exculpatory nor impeaching. Deputy Talbot averred under oath that Mr. Sherwood said he "didn't see anything." (R., p. 226.) And he did not say one way or another whether he saw a knife. (See id.) This is neither impeaching nor exculpatory.

The deputy's recollection of his conversation with Mr. Sherwood is also supported by evidence at trial. The evidence at trial was, after Adams threatened Ms. Smith with the knife, Ms. Smith was pushed away from Adams and back into where Mr. Sherwood was sitting. (1/5/17 Tr., p. 191, L. 19 – p. 192, L. 3.) Mr. Sherwood then held on to Ms. Smith. (1/5/17 Tr., p. 180, Ls. 15-19.) Thus, it is very reasonable that Mr. Sherwood would not have seen the assault because he was not involved until after Ms. Smith and Adams had been separated.

Even if Mr. Sherwood's statement to police was somehow exculpatory or impeaching, there is no evidence that the state suppressed it. Telling a witness, who said he did not see anything, that he does not have to come to court unless he was subpoenaed is not suppression. It is the correct response when someone asks if they have to come to court. The witness only has to come to court if he has been subpoenaed.

Further, even though Adams did not make a Brady claim before the district court, Adams' central complaint was not that the state suppressed any statements made to Deputy Talbot, but rather that the state did not provide Mr. Sherwood's address to Adams.

> [DEFENSE COUNSEL]: Well, Your Honor, I guess it comes down to us not knowing anything about where he was at and how to locate him and those sorts of things. And we have a defendant that doesn't live in the area. We have an attorney that doesn't live in the area. That's where I'm at.

(3/15/17 Tr., p. 411, Ls. 5-10.) The state did not suppress any evidence favorable to Adams. Adams and Mr. Sherwood "have been friends for a significant period of time." (R., p. 226.) Adams was aware that Mr. Sherwood was at the bar and was a potential witness. (R., pp. 229-230.)

Mr. Sherwood was not willfully or inadvertently suppressed by the State. (See R., pp. 229-230.) The district court found that Mr. Sherwood was not suppressed by the state. (Id.) Adams was aware of Mr. Sherwood as a witness. (Id.) Adams argues the district court abused its discretion in finding the state does not have a duty to investigate exculpatory leads or subpoena known witnesses for the defense. (See Appellant's brief, pp. 41-43.) As an initial matter, the district court's finding that the state did not have an obligation to subpoena defense witnesses is a finding respondsive to the Drapeau claim. Since Mr. Sherwood was not a newly discovered witness and known to the defense, then the state did not have an obligation to bring him to court. This appellate argument highlights the issue created by Adams pursuing a Drapeau claim in the district court and a Brady claim on appeal.

Finally, the evidence was not so was prejudicial or material that there is a reasonable probability that its disclosure to the accused would have led to a different result. Here, even if Mr. Sherwood's affidavit is believed over Deputy Talbot's affidavit, there is not a reasonable

probability his testimony would have led to a different outcome. The central point of Mr. Sherwood's affidavit was that he did not see a knife. (See R., pp. 216-219.) However, there was substantial and overwhelming evidence that there was, in fact, a knife.

Ms. Smith testified that Adams had an open knife. (1/5/17 Tr., p. 178, L. 8 – p. 180, L. 22.) Ms. Shippy, the bartender, testified that she saw Adams with an open knife. (1/5/17 Tr., p. 216, L. 23 – p. 221, L. 25.) She also testified that she grabbed the knife and put it in the cash drawer. (Id.)

Ms. Hicks testified that Adams had a knife in her hand. (1/5/17 Tr., p. 249, L. 12 – p. 252, L. 2; Ex. 1.) She testified that she saw Ms. Shippy put the knife in the drawer and that Exhibit 1 looked like the same knife. (Id.) The knife was retrieved from the cash drawer. (1/5/17 Tr., p. 155, L. 1 – p. 160, L. 16; Ex. 1.) The knife was admitted into evidence. (1/5/17 Tr., p. 262, Ls. 2-13; Ex. 1.) Thus even if Mr. Sherwood had testified that he did not see a knife, it would not have led to a different result at trial. Adams has failed to show the district court abused its discretion when it denied her motion for a new trial.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 21st day of June, 2018.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of June, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd