6-4-2018

State v. Andersen Respondent's Brief Dckt. 45173

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45173**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2016-23896**
	)	
KYLE DAVID ANDERSEN,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature Of The Case

Kyle David Andersen appeals from the judgment of conviction entered by the district court after a jury found Andersen guilty on one count of possession of a controlled substance and one count felony concealment of evidence. Andersen argues on appeal that the district court erroneously denied his motion for a mistrial based on a statement made by a prospective juror during voir dire and that his two convictions put him in jeopardy twice for the same offense in violation of the U.S. and Idaho Constitutions.

Statement Of The Facts And Course Of The Proceedings

On December 26, 2016, at approximately 11:00 p.m., two officers on patrol noticed a car stopped in an alleyway with its headlights off. (Trial Tr., p.105, L.25 – p.106, L.12; p.107, Ls.10-18.) Thinking that the car "looked out of place," the officers pulled into the adjacent parking lot to investigate. (Trial Tr., p.107, L.10 – p.108, L.17.) The car pulled out of the alleyway and parked alongside an island in the parking lot "in a hasty manner." (Trial Tr., p.144, L.25 – p.145, L.9.) A man, later identified as Kyle David Andersen, "exited the vehicle, came around the back of the vehicle at a quick pace, and went to the front passenger door, opened it and was leaning in." (Trial Tr., p.145, Ls.12-18.) One of the officers saw Andersen "discretely throw something in the vicinity of the island" like he was "just trying to get something away." (Trial Tr., p.145, L.22 – p.146, L.8.) A search of the island produced "a small black box" that contained "[a] little baggie with white crystalline substance in it." (Trial Tr., p.116, Ls.11-25; p.119, Ls.14-25.) The white crystalline substance tested positive for methamphetamine. (Trial Tr., p.178, Ls.2-6.) As relevant to this appeal, the state charged Andersen with possession of a controlled

substance, methamphetamine, and felony concealment of evidence. (R., pp.57-58.) The case went to trial. (R., pp.152-63.)

Toward the beginning of voir dire, the district court informed the prospective jurors that the district court and the attorneys would be asking questions and stated, "[i]f you have a response, please raise your hand." (Trial Tr., p.30, L.10 – p.31, L.17.) During voir dire, the following exchange took place:

> THE COURT: . . . Have any of you ever formed or expressed an unqualified opinion that the defendant, Kyle David Andersen, is guilty or not guilty of the offense charged? In other words, just without having heard any evidence at all have you already made your mind up one way or the other? Okay. Juror Number 1.
>
> JUROR NO. 1: Yes.
>
> THE COURT: And help me understand just what would be the nature of that or the reason for that.
>
> JUROR NO. 1: I'm a recovering methamphetamine addict of twenty years ago, and in my opinion by the looks of him, looks like he did meth.
>
> THE COURT: Okay. And you would not be able to – would you be able to set aside that opinion and listen to the evidence objectively?
>
> JUROR NO. 1: Be a rough one.

(Trial Tr., p.41, L.20 – p.42, L.23.) Based on these answers, the district court excused the juror. (Trial Tr., p.43, Ls.1-9.)

The defense moved to strike the jury panel, adding "I'm not sure if the Court wants to take that up outside the presence of the jury or not or if you want to take it up later." (Trial Tr., p.43, Ls.10-14.) The district court responded "[w]e'll take it up later." (Trial Tr., p.43, L.15.) The district court then invited Juror 35 to move forward and take the excused juror's seat. (Trial Tr., p.43, Ls.15-22.)

Immediately after inviting Juror 35 forward, the district court asked if there were "[a]ny other hands up in response to the prior question?" (Trial Tr., p.43, Ls.23-24.) No prospective juror raised their hand. A few questions later, the district court asked: "Do any of you have any bias or prejudice either for or against Kyle David Andersen?" (Trial Tr., p.44, Ls.13-15.) No prospective juror raised their hand. A few questions after that, the district court asked: "And do any of you have any other reason why you cannot give this case your undivided attention and render a fair and impartial verdict?" (Trial Tr., p.46, Ls.20-22.) No prospective juror raised their hand.

At the conclusion of voir dire, the district court read the actual jury the introductory instructions. As part of these instructions, the district court instructed the jury as follows: "The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations." (Trial Tr. p.86, Ls.12-15.) The district court explained that "[i]n determining the facts, you may consider only the evidence admitted in this trial" and that "[t]his evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts." (Trial Tr., p.86, Ls.17-21.) The district court also instructed the jury that "if I tell you not to consider a particular statement or exhibit, you should put it out of your mind and not refer to it or rely on it in your later deliberations." (Trial Tr., p.87, Ls.9-12.)

After the district court finished reading the instructions and dismissed the jury for a break, the defense again raised the issue of Juror 1's comment—this time in the form of a motion for a mistrial. (Trial Tr., p.93, Ls.8-23.) The district court denied the motion but offered to give further instruction on the issue. (Trial Tr., p.94, L.16 – p.95, L.9.) Both Andersen's counsel and the state initially declined the offer. but after the district court read

the instruction it was "contemplating giving," the state asked the district court to give the instruction. (Trial Tr., p.95, L.14 – p.96, L.7.) After the state requested the instruction, the district court asked whether the "defense have any concerns about my giving that instruction?" (Trial Tr., p.96, Ls.8-9.) Defense counsel responded "I don't believe so." (Trial Tr., p.96, L.10.) Upon the jury's return, the district court gave the instruction: "You are instructed that anything said by any person during voir dire is not evidence. Anything said by any person during jury selection must not enter into your decision-making process in any way." (Trial Tr., p.96, L.25 – p.97, L.7.)

After the trial, Andersen filed a Motion For Judgment Of Acquittal arguing, in part, that his convictions for possession of a controlled substance and concealment of evidence violated the Double Jeopardy Clause of both the U.S. and Idaho Constitutions. (R., pp.200-05.) The district court denied the motion. (5/30/2016 Tr., p.265, L.19 – p.266, L.12.) The district court found that an I.C.R. 29 motion for judgment of acquittal is not "the mechanism for a Constitutional challenge" but also stated on the record that, "[e]ven if it were the right vehicle, I don't find that concealment and possession have the same facts, the same elements." (Id.)

Andersen timely appealed. (R., pp.223-27.)

ISSUES

Andersen states the issues on appeal as:

I. Was Mr. Andersen's constitutional right to a fair trial by an impartial jury violated when the district court denied his motion for a mistrial after a prospective juror told the entire jury panel that Mr. Andersen looked like he used methamphetamine?

II. Did Mr. Andersen's convictions and punishments for possession of a controlled substance and concealment of evidence violate his right to be free from double jeopardy?

(Appellant's brief, p.5.)

The state rephrases the issues as:

I. Has Andersen failed to show that the prospective juror's comment had a lasting prejudicial impact on his trial such that the district court should have granted a mistrial?

II. Has Andersen failed to show that his convictions for possession of a controlled substance and concealment of evidence constituted fundamental error because they put Andersen in jeopardy twice for the same offense in violation of the U.S. and Idaho Constitutions?

ARGUMENT

I.
The District Court Did Not Err When It Denied Andersen's Motion For A Mistrial Based On The Prospective Juror's Statement

A. Introduction

The district court properly denied Andersen's motion for a mistrial because the prospective juror's statement did not cause bias in an actual member of the jury. The prospective juror who made the allegedly prejudicial statement was excused and did not sit on the jury. And the remaining members of the jury pool repeatedly confirmed that they had no bias toward the defendant, which means the allegedly prejudicial statement had no effect on their decision-making.

Even if the allegedly prejudicial statement had an impact on the remaining jurors, and Andersen has provided no evidence that it did, the district court's instructions to the jury cured any prejudice. The district court expressly instructed the jury that anything said during voir dire was not evidence, that anything said during voir dire could not be considered by the jury in making their decisions, and that the jury's decision must be based only upon the evidence presented at trial. Nothing in the record suggests the jury did not follow the district court's instructions. This Court must therefore presume that the jury followed the district court's instructions, made their decision based only on the evidence, and did not allow the prospective juror's comment to influence their decision.

B. Standard Of Review

"The standard of review of a denial of a motion for mistrial is well-settled: . . . 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. Ellington, 151 Idaho 53, 68, 253 P.3d 727, 742 (2011).

C. The Prospective Juror's Statement Did Not Constitute Reversible Error Because It Did Not Cause Bias In An Actual Member Of The Jury

The prospective juror's statement did not violate Andersen's right to a fair trial. "'[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial.'" Ross v. Oklahoma, 487 U.S. 81, 86 (1988) (quoting Lockhart v. McCree, 476 U.S. 162, 184 (1986)); see Ellington, 151 Idaho at 69, 253 P.3d at 743. To overcome that presumption, a defendant contesting the impartiality of his jury based on the statement of a prospective juror must show that the statement had more than "a passing, inconsequential effect on the remaining pool members," State v. Laymon, 140 Idaho 768, 771, 101 P.3d 712, 715 (Ct. App. 2004), and caused bias in "an actual member of the jury," Ellington, 151 Idaho at 70, 253 P.3d at 744.

For example, in Ellington, three prospective jurors expressed opinions about the defendant's guilt during voir dire. 151 Idaho at 68-69, 253 P.3d at 742-43. Two of the prospective jurors said they had heard about the case in the news and had already formed opinions of the defendant's guilt. Id. The third prospective juror stated she had spoken with a member of the victim's family about the incident and was "on her side of him being guilty." Id. The Idaho Supreme Court held that the defendant "has not shown that the expressions of three prospective jurors . . . overcome the presumption that the impaneled jurors were impartial." Ellington, 151 Idaho at 70, 253 P.3d at 744. The court reached that conclusion because (1) the defendant "has not shown in any way that the[] actual jury members had been influenced by the three prospective jurors' statements during voir dire";

(2) "[a]t worst, the jurors who actually deliberated received a second-hand opinion from those three prospective jurors"; and (3) "[t]he impaneled jurors were instructed at the end of voir dire that they were to decide the case only based on the evidence" and "were again instructed of this duty before their deliberations." Ellington, 151 Idaho at 69-70, 253 P.3d at 743-44; see also Laymon, 140 Idaho at 770-71, 101 P.3d at 714-15 (holding prospective juror's statement that defendant had been in trial the week before did not cause bias in actual jury because "[t]he potential juror who uttered the statements at issue was removed," the district court gave a curative instruction, and "there is no evidence that her statements had but a passing, inconsequential effect on the remaining pool members").

Like the defendants in Ellington and Laymon, Andersen has failed to overcome the presumption of impartiality. Andersen has cited nothing in the record showing bias in "an actual member of the jury." Ellington, 151 Idaho at 70, 253 P.3d at 744. The juror who made the allegedly prejudicial comment did not sit on Andersen's jury because the district court immediately excused him for cause (Trial Tr., p.43, Ls.1-6), which means, "[a]t worst, the jurors who actually deliberated received a second-hand opinion . . . that [Andersen] was guilty." Ellington, 151 Idaho at 69, 253 P.3d at 743. That is insufficient to overcome the presumption of impartiality. Id.

Not only has Andersen failed to show that the allegedly prejudicial comment had a "continuing impact on the trial," the record here actually shows that it had, *at most*, "a passing, inconsequential effect on the remaining pool members." Laymon, 140 Idaho at 771, 101 P.3d at 715. Immediately after the district court dealt with excusing the prospective juror who made the allegedly prejudicial comment, the district court asked if there were "[a]ny other hands up in response to the prior question" (i.e., if any other juror

had already "made your mind up one way or the other"). (Trial Tr., p.42, L.8 – p.43, L.24.) Even though the remaining pool of jurors had already heard the allegedly prejudicial comment, no prospective juror raised their hand. Shortly thereafter, the district court asked at least two additional questions that required any juror who had been affected by the allegedly prejudicial comment to raise their hand: "Do any of you have any bias or prejudice either for or against Kyle David Andersen?" (Trial Tr., p.44, Ls.13-15.) "And do any of you have any other reason why you cannot give this case your undivided attention and render a fair and impartial verdict?" (Trial Tr., p.46, Ls.19-22.) No prospective juror raised their hand on either occasion. The remaining pool members' repeated confirmation that the allegedly prejudicial comment had no effect on their evaluation of the case is fatal to Andersen's claim of partiality. See Laymon, 140 Idaho at 771, 101 P.3d at 715.

Citing Ellington, Andersen argues that the prospective juror's statement had a prejudicial effect *per se* because it provided "specific facts as to why the juror formed the opinion." (Appellant's brief, pp.8-9.) His argument finds no support in the record or the law.

The only fact that the prospective juror stated had nothing to do with Andersen's guilt. The prospective juror simply stated that "twenty years ago" he had a problem with methamphetamine. (Trial Tr., p.42, Ls.17-19.) He then stated what he expressly qualified as "my opinion": "by the looks of him, looks like he does meth." (Id.) The conclusory opinion "looks like he does meth" is not a fact, and "by the looks of him" is certainly not specific. (Id.)

Andersen's attempt to bolster the prospective juror's opinion by repeatedly referring to him as an "expert" is not supported by the record. (Appellant's brief, p.8

(stating juror "was essentially an expert on the matter"); Appellant's brief, p.8 (characterizing juror as having "unique expertise"); Appellant's brief, p.9 (describing juror as "someone with unique, expert knowledge").) The prospective juror gave no basis for his opinion other than his own drug problem from "twenty years ago" and did not explain in any way what about Andersen's appearance supposedly made the juror believe Andersen did methamphetamine. (Trial Tr., p.42, Ls.17-19.) Neither the record nor common sense supports the notion that an addiction to methamphetamine gifts the addict with the extraordinary ability to instantly recognize a methamphetamine user on sight.

Even setting aside Andersen's factual problems, Ellington does not support Andersen's bright-line rule that " a statement that does provide specific facts as to why the juror formed the opinion does have a prejudicial effect." (Appellant's brief, p.9.) As the Idaho Supreme Court made clear in Ellington, the statements at issue in that case *did* reveal specific facts as to why the prospective jurors thought the defendant was guilty: the jury pool "did not receive any specific facts as to why, *other than* that the prospective jurors read about it in the paper and in one instance interacted with a member of the [victim's] family." Ellington, 151 Idaho at 69, 253 P.3d at 743 (emphasis added). Nevertheless, the defendant in Ellington did not overcome the presumption of impartiality. Id.

Furthermore, Andersen's proposed bright-line rule cannot be reconciled with Idaho appellate courts repeatedly holding that the erroneous admission of actual evidence can be harmless. See, e.g., State v. Jones, 154 Idaho 412, 425, 299 P.3d 219, 232 (2013) (holding erroneous admission of statement made by defendant charged with rape suggesting he "had sex with [his former girlfriend] while she was sleeping" was harmless); State v. Alsanea, 138 Idaho 733, 739-41, 69 P.3d 153, 159-61 (Ct. App. 2003) (holding erroneous admission

of officer's testimony in trial for aggravated assault that the defendant committed "prior bad acts of stalking and harassing his girlfriend" was harmless). Adoption of Andersen's bright-line rule would lead to the nonsensical result that the revelation of a specific fact by a prospective juror expressing an opinion of guilt would always be prejudicial, even where the erroneous admission of testimony of the exact same fact during the evidentiary portion of the trial would be harmless.

Andersen also argues that the statement at issue here was more prejudicial than the statements made in Ellington because "[n]one of those statements spoke directly to the crime that Mr. Ellington was charged with." (Appellant's brief, p.9.) That is not true. One of the prospective jurors in Ellington "stated that when she was at the gym the day the incident happened 'one of the aunts related [to] the [victim's] family told about this incident and gave her informative opinion and we had a discussion about it." 151 Idaho at 69 n.13, 253 P.3d at 743 n.13. The strong implication of the potential juror's statement was that she had learned specific facts from a member of the victim's family on the day of and about the very incident the jury would be considering at trial and, based upon those facts, came to the conclusion the defendant was guilty. Id. That speaks *more* directly to the crime the defendant was charged with than the conclusory statement here that, based on his own personal experience unrelated to the specific facts of the case at hand, the prospective juror thought Andersen looked like he did methamphetamine.

Andersen also erroneously argues that the allegedly prejudicial comment "concerned Mr. Andersen's appearance" and thus had a continuing impact on the trial because "Mr. Andersen was present throughout the trial." (Appellant's brief, p.9.) He cites no authority to support the premise that comments about appearance are inherently

more prejudicial than other kinds of comments. Nor does he cite anything in the record to support his suggestion that every time the jurors looked at Andersen they were somehow reminded of the prospective juror's comment. (Appellant's brief, pp.9-10.) As explained above, the record actually shows that within minutes of the prospective juror making the allegedly prejudicial comment, the remaining jury pool confirmed that they had no "bias or prejudice either for or against Kyle David Andersen." (Trial Tr., p.44, Ls.10-15.) Andersen's speculation to the contrary is not sufficient to overcome the presumption of impartiality. See Ellington, 151 Idaho at 70, 253 P.3d at 744 (rejecting claim of juror partiality where defendant "has not *shown* that the expression of the three prospective jurors that Mr. Ellington was guilty overcome [sic] the presumption that the impaneled jurors were impartial" (emphasis added)).

Even if the prospective juror's comment caused bias in the remaining jurors, which it did not, the instructions given by the district court cured any prejudice. See Ellington, 151 Idaho at 69-70, 253 P.3d at 743-44; Laymon, 140 Idaho at 771, 101 P.3d at 715. Just like in Ellington, 151 Idaho at 69-70, 253 P.3d at 743-44, the district court here properly instructed the jury that it had to make its decision based solely on the evidence. At the conclusion of voir dire, the district court gave the instruction twice:

> *The law requires that your decision be made solely upon the evidence before you.* Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.
>
> *In determining the facts, you may consider only the evidence admitted in this trial.* This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts.

(Trial Tr., p.86, Ls.12-21 (emphases added).) And, just like in Laymon, 140 Idaho at 771, 101 P.3d at 715, the district court also instructed the jury that it could not consider the

allegedly prejudicial statement: "You are instructed that anything said by any person during voir dire is not evidence. Anything said by any person during jury selection must not enter into your decision-making process in any way . . . ." (Trial Tr., p.97, Ls.2-7.).

At the conclusion of the presentation of evidence, the district court provided the jurors with copies of the instructions that included all of the instructions previously given. (Trial Tr., p.205, L.23 – p.206, L.4.) The district court also instructed the jury, yet again, that it could only consider the evidence presented at trial: "You are to decide the facts from all the evidence presented in the case. The evidence you are to consider consists of: One, sworn testimony of witnesses; two, exhibits which have been admitted into evidence; and three, any facts to which the parties have stipulated." (Trial Tr., p.206, L.23 – p.207, L.3.) Therefore, even if the allegedly prejudicial statement initially caused bias in the jurors, these instructions defeat Andersen's claim of partiality because "there is no evidence that the jury here did not follow the trial court's instructions." Laymon, 140 Idaho at 771, 101 P.3d at 715; see State v. Kilby, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997) (holding defendant received fair trial despite prospective juror's comment that defendant was a pedophile where the district court instructed the jury to disregard the comment because "we will presume that the jury followed the instructions given by the district court").

Andersen relies on Ellington to argue that the instructions given in this case could not have cured any prejudice because the district court did not give the instruction immediately after the prospective juror made the allegedly prejudicial comment. (Appellant's brief, p.10.) His reliance on Ellington is misplaced. In laying out the factual context in Ellington, the court noted that, after each prospective juror's allegedly

prejudicial comment, the district court reiterated the importance of deciding the case on the evidence presented. 151 Idaho at 68-69, 253 P.3d at 742-43. But the Ellington court made no mention of those reminders in its analysis of whether the defendant had overcome the presumption of impartiality. Instead, the court expressly recognized as part of its analysis that "[t]he impaneled jurors were instructed at the end of voir dire that they were to decide the case only based on the evidence presented in the courtroom" and that "[t]hey were again instructed of this duty before their deliberations." Ellington, 151 Idaho at 69, 253 P.3d at 743. The impaneled jurors here were given those same instructions at the same times. (Trial Tr., p.86, Ls.12-21; p.205, L.23 – p.206, L.4; p.206, L.21 – p.207, L.3.) Furthermore, after voir dire had ended, the district court gave an additional instruction expressly informing the jury that "anything said by any person during voire dire is not evidence" and "[a]nything said by any person during jury selection must not enter into your decision-making process in any way . . . ." (Trial Tr., p.97, Ls.2-6.) These instructions, which were even more extensive than the instructions the court relied on in Ellington, were sufficient to cure any prejudice. 151 Idaho at 69-70, 253 P.3d at 743-44.

Moreover, Andersen has failed to provide any logical explanation why the curative instruction delivered at the conclusion of voir dire was less effective than a curative instruction given immediately following the allegedly prejudicial comment. He first claims that "the instruction came so long after the statement was made that the prejudice was already established." (Appellant's brief, p.11.) It is unclear what Andersen means by "the prejudice was already established" or when exactly Andersen believed that happened, but any prejudice from the prospective juror's comment "was already established" the second he finished the statement. This means that any curative instruction, even one given

immediately after the statement, would have been given after the prejudice "was already established." This makes sense given that the entire purpose of a *curative* instruction is "to bring about recovery from" potential prejudice. Cure, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/cure (last visited May 4, 2018). Put differently, a curative instruction always, by definition, occurs after prejudice has—at least potentially—been introduced into the trial.

Andersen also claims that "the jury almost certainly did not know that the court was referring to the statement when it read its instruction." (Appellant's brief, p.11.) But there is nothing in the record to suggest, and no other reason to believe, that the jury understood the district court's instruction not to apply to the allegedly prejudicial statement. The instruction clearly communicated to the jury that they should not consider *anything* that they had heard up to that point as evidence or use *anything* they had heard up to that point in making their decision: "You are instructed that *anything* said by *any person* during voir dire is not evidence. *Anything* said by *any person* during jury selection must not enter into your decision-making process in any way." (Trial Tr., p.97, Ls.2-6 (emphases added).) It strains credulity to suggest that the jurors understood from that broad directive that the instruction applied to everything said in voir dire *other than* the prospective juror's comment. A more specific instruction was not only unnecessary but would have risked re-introducing any prejudice caused by the prospective juror's statement.

In any event, having initially told the district court that he did not want a curative instruction *at all* and then confirming he did not "have any concerns" with the substance of the curative instruction ultimately given (Trial Tr., p.94, L.16 – p.96, L.10), Andersen does not get to argue on appeal that the curative instruction should have been more specific.

See Greer v. Miller, 483 U.S. 756, 766 (1987) ("Miller argues that the curative instructions should have been more specific. But Miller's trial counsel bore primary responsibility for ensuring that the error was cured in the manner most advantageous to his client. Once it became apparent that the judge was not going to grant a mistrial, it was the duty of counsel to determine what strategy was in his client's best interest."). Because Andersen did not argue the jury instruction should have been more specific before the district court, "it is not properly before this Court on appeal." State v. Garcia-Rodriguez, 162 Idaho 271, 276, 396 P.3d 700, 705 (2017).

II.
Andersen's Two Convictions Did Not Violate The Double Jeopardy Clause Of The U.S. Or Idaho Constitution

A. Introduction

Andersen cannot show his convictions for possession of a controlled substance and felony concealment of evidence constituted fundamental error because, as the district court found, he was not put in jeopardy twice for the same offense. The Double Jeopardy Clauses of the U.S. and Idaho Constitutions only protect a defendant when the state seeks to punish him multiple times for the same act or transaction. Here, the state sought to punish Andersen for two separate, distinct acts: first for possessing methamphetamine and second for concealing methamphetamine through abandonment by throwing it into the snow and bushes. Because the act of possessing the methamphetamine was necessarily complete by the time the concealment-by-abandonment occurred, the acts were separate and distinct for purposes of double jeopardy.

Even if the two acts were the same for purposes of double jeopardy, the state did not subject Andersen to jeopardy twice for the same offense because possession of a

controlled substance is not a lesser included offense of felony concealment of evidence. Under the statutory theory, possession of a controlled substance cannot be a lesser included offense of felony concealment of evidence because the two crimes do not have even a single overlapping element. Under the pleading theory, the state did not allege in the charging document possession of a controlled substance as a means or element of felony concealment of evidence. Specifically, the state did not allege, in charging felony concealment of evidence, that Andersen knew that the object he concealed was methamphetamine or believed it to be a controlled substance. That noticeably absent knowledge requirement is an element of possession of a controlled substance. Accordingly, the state could prove felony concealment of evidence as charged without proving possession of a controlled substance, which means Andersen was not put in jeopardy twice for the same offense under the pleading theory.

B. Standard Of Review

Andersen's claim of double jeopardy must be reviewed only for fundamental error because "no *proper* objection was made below." State v. Cannady, 137 Idaho 67, 72, 44 P.3d 1122, 1127 (2002) (emphasis added). Andersen improperly raised his double jeopardy claim in a Rule 29 motion for judgment of acquittal. (R., pp.200-07.) As the district court correctly recognized, Rule 29 is not "the mechanism for a constitutional challenge" like double jeopardy. (5/30/2017 Tr., p.265, Ls.19-23.) Rule 29 only allows a district court to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." I.C.R. 29(a). Here, even if Andersen's two convictions subjected him to jeopardy twice for the same offense, that does not entitle him to an acquittal (i.e., a legal determination that he is not guilty), which is the only relief a

district court can grant under Rule 29—it would simply mean the state cannot punish him for both crimes.

On appeal, Andersen does not even contend that Rule 29 was the proper vehicle to assert a claim of double jeopardy. (Appellant's brief, p.13.) Instead, he claims that the district court should have treated Andersen's motion as a motion alleging an illegal sentence under Idaho Criminal Rule 35(a). (Appellant's brief, p.13.) But the rule upon which Andersen relies—that "a mislabeled pleading will be treated according to its substance"—applies in the context of "pleadings *filed by convicted defendants*" (i.e., convicted defendants proceeding pro se). Schwartz v. State, 145 Idaho 186, 190, 177 P.3d 400, 404 (Ct. App. 2008) (emphasis added).[1] Andersen's motion, on the other hand, was filed by his counsel, titled "MOTION FOR JUDGEMENT OF ACQUITTAL," and expressly made "pursuant to I.C.R. 29" (R., p.200). Nothing in the cases Andersen cites implies that this Court will save defendants from their own counsel's legal decisions.

Moreover, to the extent Andersen is suggesting that his counsel intended to cite Rule 35 but mistakenly cited Rule 29 (Appellant's brief, p.13), that suggestion is belied by the record. Andersen's counsel filed the motion just eight days after the jury returned its verdict and prior to the district court imposing a sentence, which would have been entirely premature for a motion to correct a sentence under Rule 35. (R., pp.200-01.) Moreover,

[1] See, e.g., Schwartz, 145 Idaho at 190, 177 P.3d at 403 (citing rule, but ultimately refusing to apply it, where defendant argued letter she personally wrote to judge should be construed as an application for post-conviction relief); Palmer v. Dermitt, 102 Idaho 591, 597, 635 P.2d 955, 961 (1981) (applying rule to pro se petition), overruled on other grounds by Murphy v. State, 156 Idaho 389, 395, 327 P.3d 365, 371 (2014); Martin v. Spalding, 133 Idaho 469, 472, 988 P.2d 695, 698 (Ct. App. 1998) (applying rule to pro se petition); Freeman v. Dep't of Corrections, 115 Idaho 78, 78-79, 764 P.2d 445, 445-46 (Ct. App. 1998) (applying rule to pro se petition).

at Andersen's sentencing, Andersen's counsel expressly recognized that he could make a double jeopardy claim in a Rule 35 motion once the district court imposed Andersen's sentence. (5/11/2017 Tr., p.250, Ls.1-14.) But Andersen's counsel has chosen not to do so—even though he can still file a Rule 35 motion in the district court. See I.C.R. 35(a) ("The court may correct a sentence that is illegal from the face of the record at any time."); I.A.R. 13(c)(11).

Because Andersen has chosen to raise his double jeopardy claim on appeal after improperly raising it before the district court, rather than raise it properly before the district court in the first instance, this Court must apply fundamental error review. See State v. Perry, 150 Idaho 209, 225-28, 245 P.3d 961, 977-80 (2010). Reversible error under Idaho's fundamental error doctrine requires Andersen to show the alleged error (1) violated an unwaived constitutional right, (2) plainly exists, and (3) was not harmless. See Perry, 150 Idaho at 228, 245 P.3d at 980.

"'The requirements of the Idaho and U.S. Constitutions are questions of law, over which this Court has free review.'" State v. Sepulveda, 161 Idaho 79, 82, 383 P.3d 1249, 1252 (2016) (quoting State v. Draper, 151 Idaho 576, 598, 261 P.3d 853, 875 (2011)).

C. Andersen Has Failed To Show Fundamental Error Because He Was Not Subjected To Double Jeopardy Under The U.S. Or Idaho Constitutions

Andersen cannot show fundamental error because the state did not put him in jeopardy twice for the same offense in violation of the U.S. or Idaho Constitution. Both the U.S. and Idaho Constitutions prohibit a person being "twice put in jeopardy for the same offense." Idaho Const. art. I, § 13; see U.S. Const. amend. V. Andersen's two convictions are not punishments for the same offense for two separate, independent

reasons: (1) his convictions were not based on the same act or transaction and (2) possession of a controlled substance is not a lesser included offense of felony concealment of evidence.

1. Andersen's Convictions Were Not Based On The Same Act Or Transaction

Andersen overlooks the fact that his double jeopardy claim fails because each of his convictions is based on a discrete act. He jumps straight to an analysis of whether possession of a controlled substance is a lesser included offense of felony concealment of evidence under Blockburger v. United States, 284 U.S. 299 (1932), and similar cases. (Appellant's brief, pp.11-19.) But "[t]he double jeopardy issue is more complex than simply applying the *Blockburger* test." State v. Stewart, 149 Idaho 383, 389, 234 P.3d 707, 713 (2010). Double jeopardy can only be triggered where multiple convictions arise from "the same act or transaction." Stewart, 149 Idaho 389-90, 234 P.3d at 713-14; see State v. Moad, 156 Idaho 654, 659, 330 P.3d 400, 405 (Ct. App. 2014) ("[T]he double jeopardy prohibition is not violated if the charges are for distinct crimes rather than inseparable parts of a single criminal episode.").

Determining "whether or not the conduct constituted separate, distinct and independent crimes . . . requires an inquiry into the circumstances of the conduct." Moad, 156 Idaho at 660, 330 P.3d at 406. For example, in Moad, the Idaho Court of Appeals observed that, "[a]fter orally raping L.T., Moad beat him and moved him away from the cell door and onto a cot, where he continued the batter." 156 Idaho at 661, 330 P.3d at 407. Based on those circumstances, the court held "[t]he battery was an additional brutalization of the victim that occurred after the rape was completed" and found the defendant had not been subjected to double jeopardy. Id.; see Stewart, 149 Idaho at 392,

234 P.3d at 716 (finding defendant not subjected to double jeopardy where "acts necessary to prove a violation of section 18-7906 as an element of felony stalking must necessarily be different from the acts upon which Defendant's prior conviction for misdemeanor stalking was based"); Almada v. State, 108 Idaho 221, 224, 697 P.2d 1235, 1238 (Ct. App. 1985) (finding defendant not subjected to double jeopardy where "the attempted robbery and assault convictions grew out of separate acts involving different victims").

Just like the crimes in Moad, Stewart, and Almada, the crimes here "grew out of separate acts" and thus could not have subjected Andersen to double jeopardy. 108 Idaho at 224, 697 P.2d at 1238. The record makes clear that the state proved possession of a controlled substance the only way that it could—by proving that Andersen had "physical control" of the methamphetamine, or at least "the power and intention to control it." (R., p.180.) The record makes equally clear that the state proved felony concealment of evidence by proving that Andersen "willfully conceal[ed]" the methamphetamine by abandoning it. (R., p.183.) Specifically, Officer Guthrie testified that he saw Andersen, while standing next to his car, "throw" an object—later identified as methamphetamine—toward "the vicinity of the island" in the parking lot like he was "trying to get something away." (Trial Tr., p.145, L.12 – p.146, L.8.) And Officer Schneider testified that he found the methamphetamine in "an area with some low bushes" where it was in the snow on a bush. (Trial Tr., p.160, L.18 – p.161, L.9.) Because Andersen concealed the methamphetamine by abandoning it (i.e., by *not* possessing it), the concealment of the evidence necessarily took place after the possession of the methamphetamine was complete. Thus, Andersen's convictions were based on separate—in fact, mutually exclusive—acts and could not have subjected him to double jeopardy. See Stewart, 149

Idaho at 392, 234 P.3d at 716; Moad, 156 Idaho at 661, 330 P.3d at 407; Almada, 108 Idaho at 224, 697 P.2d at 1238; see also State v. McCormick, 100 Idaho 111, 115, 594 P.2d 149, 153 (1979) (finding defendant not subject to double jeopardy because "[t]he burglary was complete when McCormick entered the victim's residence with the intent to commit rape, whereas the rape was not committed until there was an act of sexual intercourse").

2. Possession Of A Controlled Substance Is Not A Lesser Included Offense Of Felony Concealment Of Evidence

Andersen's double jeopardy claim also fails because possession of a controlled substance is not a lesser included offense of felony concealment of evidence. "Under both the federal and Idaho double jeopardy clauses, 'a defendant may not be convicted of both a greater and lesser included offense.'" State v. McKinney, 153 Idaho 837, 841, 291 P.3d 1036, 1040 (2013) (quoting State v. Pizzuto, 119 Idaho 742, 756, 810 P.2d 680, 694 (1991)). "In Idaho, '[t]here are two theories under which a particular offense may be determined to be a lesser included offense of a charged offense.'" Sepulveda, 161 Idaho at 87, 383 P.3d at 1257 (quoting State v. McIntosh, 160 Idaho 1, 4, 368 P.3d 621, 624 (2016)). The first is the "statutory theory" and the second is the "pleading theory." Id. Possession of a controlled substance is not a lesser included offense of felony concealment of evidence under either theory.

a. Statutory Theory

Possession of a controlled substance is not a lesser included offense of concealment of evidence under the statutory theory. "'Under this theory, one offense is not considered a lesser included of another unless it is necessarily so under the statutory definition of the crime.'" Id. (quoting State v. Sanchez-Castro, 157 Idaho 647, 648, 339 P.3d 372, 373 (2014)); Blockburger v. United States, 284 U.S. 299, 303-04 (1932). Both the Idaho

Supreme Court and federal courts determine whether one offense is a lesser included offense of another under the statutory theory by applying the Blockburger test: "whether each provision requires proof of a fact which the other does not." 284 U.S. at 304; see Stewart, 149 Idaho at 389, 234 P.3d at 713 ("[U]nder the *Blockburger* test, *each* offense must contain an element not included in the other.").

Application of the Blockburger test shows that possession of a controlled substance is not a lesser included offense of concealment of evidence. Under I.C. § 37-2732(c), possession of methamphetamine requires proof that: (1) the defendant possessed any amount of methamphetamine and (2) the defendant either knew it was methamphetamine or believed it was a controlled substance. See State v. Thompson, 143 Idaho 155, 157 & n.1, 139 P.3d 757, 759 & n.1 (Ct. App. 2006). Under I.C. § 18-2603, felony concealment of evidence requires proof that: (1) the defendant willfully destroyed, altered, or concealed evidence; (2) the defendant knew the evidence was about to be produced, used, or discovered in a trial, proceeding, inquiry, or investigation authorized by law; (3) the defendant acted with the intent to prevent the evidence from being produced, used or discovered; and (4) the investigation was criminal in nature and involved a felony offense. See State v. Yermola, 159 Idaho 785, ___, 367 P.3d 180, 182 (2016).

Andersen's convictions for these two crimes "pass" the Blockburger test because "each provision requires proof of a fact which the other does not." 284 U.S. at 304. For example, possession of methamphetamine requires proof that the defendant possessed methamphetamine; felony concealment of evidence does not. Felony concealment of evidence requires proof that the defendant willfully destroyed, altered, or concealed evidence; possession of methamphetamine does not.

Andersen argues that possession of a controlled substance is an included offense of felony concealment of evidence under the Blockburger test because "both statutes require that the defendant possess methamphetamine." (Appellant's brief, pp.16-17.) But the statute prohibiting the concealment of evidence says nothing about "possess" or "methamphetamine." See I.C. § 18-2603. Andersen's error is rooted in his misapplication of the Blockburger test; he defines the elements of the crime through the lens of "this case." (Appellant's brief, p.16.) The Blockburger test, however, is applied in the abstract to the two statutes at issue, without reference to the facts of the specific case at hand. See McKinney, 153 Idaho at 841, 291 P.3d at 1040 ("Under the federal strict elements theory, whether one crime is a lesser included offense of another crime can be determined merely by examining the respective statutes defining those crimes.").

Andersen makes a second mistake in his application of the Blockburger test that is equally devastating to his claim. Even if both offenses had possession of methamphetamine as an element, Andersen errs in concluding the overlap of a single element shows one is a lesser included offense of the other. That flips the Blockburger test on its head. In reality, the Blockburger test merely requires that each offense have *one element* that the other *does not*. See Stewart, 149 Idaho at 389, 234 P.3d at 713.

Here, not only does "each offense . . . contain an element not included in the other," which is all the Blockburger test requires, Stewart, 149 Idaho at 389, 234 P.3d at 713 (emphasis omitted), but there is zero overlap between the statutory elements of the two crimes. An individual could be convicted of possession of methamphetamine without the state proving a single element of felony concealment of evidence—and vice versa. Under the Blockburger test, these two crimes could not possibly be more distinct.

b. Pleading Theory

Possession of a controlled substance is not a lesser included offense of felony concealment of evidence under the pleading theory. "Under this theory, an offense is included within another if the charging document alleges facts that, if proven, also necessarily prove the elements of the lesser-included offense." State v. McIntosh, 160 Idaho 1, 5, 368 P.3d 621, 625 (2016). "The pleading theory does not look at evidence adduced at trial, only the language of the charging document." State v. Weatherly, 160 Idaho 302, 305, 371 P.3d 815, 818 (Ct. App. 2016); see McKinney, 153 Idaho at 841, 291 P.3d at 1040.

The state charged Andersen with felony concealment of evidence as follows:

> COUNT II:
>
> That the defendant, KYLE DAVID ANDERSEN, on or about the 26th day of December, 2016 in the County of Kootenai, State of Idaho, knowing that an object or thing, to wit; methamphetamine, was about to be used or discovered in a felony proceeding or investigation, did conceal said methamphetamine with the intent thereby to prevent it from being so used or discovered.

(R., p.150.) As charged in this case, possession of a controlled substance is not a lesser included offense of felony concealment of evidence because the state did not allege facts in charging felony concealment of evidence that, if proven, also necessarily prove the elements of possession of a controlled substance. See McIntosh, 160 Idaho at 5, 368 P.3d at 625. Specifically, in charging felony concealment of evidence, the state did not allege that Andersen *knew* the object or thing he concealed was methamphetamine or *believed* it was a controlled substance, which is a required element of possession of a controlled substance. See Thompson, 143 Idaho at 157 & n.1, 139 P.3d at 759 & n.1; ICJI 403

(requiring state to prove "the defendant either knew it was [name of substance] or believed it was a controlled substance").

Although Count II alleges that the "object or thing" that Andersen concealed was, in fact, methamphetamine, it says nothing regarding Andersen's knowledge or belief as to the nature or character of the item he concealed. All that the state alleged with respect to Andersen's knowledge was that Andersen knew the item he concealed "was about to be used or discovered in a felony proceeding or investigation," (R., p.150), which tracks the language of the knowledge requirement in the felony concealment of evidence statute, see I.C. § 18-2603 ("Every person who, knowing that any . . . thing, is about to be produced, used or discovered . . ."). Consistent with the charging document, the state could demonstrate Andersen's guilt of felony concealment of evidence by proving all of the facts alleged in Count II without ever presenting any evidence that Andersen knew or believed the item he concealed was a controlled substance. Accordingly, because it is not "clear from the face of the information" that possession of a controlled substance was the means or element of the commission of felony concealment of evidence, the former is not a lesser included offense of the latter. Weatherly, 160 Idaho at 306, 371 P.3d at 819.

Andersen erroneously claims he was subjected to jeopardy twice on the basis that he "could not conceal methamphetamine without possessing it." (Appellant's brief, p.18.) While it may be true that Andersen could not have concealed the methamphetamine

without having first physically possessed it at some point in time,[2] the pleading theory requires that the facts alleged, if proven, satisfy *every* element of the purported lesser included offense. See McIntosh, 160 Idaho at 5, 368 P.3d at 625. And mere physical possession of methamphetamine, which is, at most, what the state alleged in charging felony concealment of evidence, is not sufficient to prove every element of possession of a controlled substance because it does not prove the knowledge or belief element of the crime. See Thompson, 143 Idaho at 157 & n.1, 139 P.3d at 759 & n.1; ICJI 403. Because the state could prove Andersen committed felony concealment of evidence as charged without "necessarily" proving he committed possession of a controlled substance, Andersen was not subjected to jeopardy twice under the pleading theory. Weatherly, 160 Idaho at 306, 371 P.3d at 819.

[2] Although it may be difficult to conceal something without ever having possessed it, as explained above, that does not make the alleged possession and concealment in this case the same act for purposes of double jeopardy. The methamphetamine was not concealed in violation of I.C. § 18-2603 until it was outside of Andersen's possession, which makes the acts on which the charges are based separate and distinct. Accord Bookbinder v. United States, 287 F. 790, 795 (3d Cir.) ("Both language and law distinguish between the words 'possess' and 'conceal.' One may possess a thing without concealing it or he may conceal it without possessing it, having parted with the possession in the act of concealing it.").

CONCLUSION

The state respectfully requests this Court affirm the judgment of conviction entered upon a jury's guilty verdict against Andersen for, *inter alia*, possession of a controlled substance and felony concealment of evidence and affirm the district court's order denying Andersen's motion for judgment of acquittal.

DATED this 4th day of June, 2018.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of June, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

___/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

JN/dd