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State v. Kirk Respondent's Brief Dckt. 41236

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. JAMES D. KIRK, Defendant-Appellant.	)	No. 41236 Canyon Co. Case No. CR-2012-20480

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature of the Case

James D. Kirk appeals from a jury's guilty verdict of lewd conduct with a minor under sixteen and sexual battery of a minor sixteen or seventeen years of age. Kirk argues that the prosecutor's singing of three lines from *Dixie* during closing argument was misconduct that amounted to fundamental error requiring reversal. Kirk also asks the Court to amend the standard of review established in State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010), to shift the burden on appeal to the state to show that defendant's unobjected-to allegation of prosecutorial misconduct did not affect the outcome of trial.

Statement of Facts and Course of Proceedings

The state charged Kirk with felony lewd conduct with a minor under sixteen and felony sexual battery of a minor child sixteen or seventeen years of age. (R., pp. 11-12.) The two victims were then-17 year-old J.C. and then-13 year-old M.F.; the two had run away from Syringa House, a group home for girls in Nampa, with then-15 year old A.M. and then-15 year-old M.G. (See 4/2/13 Tr., p. 190, L. 25 – p. 191, L. 21; 4/3/13 Tr., p. 8, L. 14 – p. 9, L. 7; 4/3/13 Tr., p. 66, Ls. 6-16; 4/3/13 Tr., p. 110, Ls. 7-25.) The four girls saw Kirk outside his room at the Downtown Inn in Nampa, and J.C. approached him about a place for the four girls to stay for the night. (4/2/13 Tr., p. 194, Ls. 7-16; p. 197, Ls. 1-19.) He agreed. (4/2/13 Tr., p. 200, Ls. 7-9.)

J.C. told Kirk she was 18. (4/2/13 Tr., p. 197, L. 14; 4/3/13 Tr., p. 17, L. 9; 4/3/13 Tr., p. 72, L. 4; 4/3/13 Tr., p. 116, L. 16.) The other girls told Kirk that they

were 16 or 17 – under age, but older than their true ages, 13 to 15.[1] Kirk turned on some music, and J.C. started dancing and taking off her clothes.[2] Kirk gave J.C. a massage on the bed, then began touching and penetrating J.C.'s vagina with his fingers and penis.[3] At some point, M.G. also laid down on the bed naked and Kirk began touching and penetrating M.G.'s vagina with his penis or fingers.[4]

The next morning, A.M. and M.G. left and got a ride to Boise. (4/2/13 Tr., p. 212, L. 25 – p. 213, L. 2; 4/3/13 Tr., p. 25, L. 20 – p. 26, L. 11; 4/3/13 Tr., p. 81, Ls. 14-21.) J.C. and M.F. stayed in Kirk's room until that evening. (4/2/13 Tr., p. 213, Ls. 5-11; 4/2/13 Tr., p. 247, Ls. 3-6; 4/3/13 Tr., p. 128, Ls. 3-9.) Later that night, after leaving Kirk's room, J.C. and M.F. were picked up in a park by police. (4/2/13 Tr., p. 213, L. 22 – p. 214, L. 10; 4/3/13 Tr., p. 128, Ls. 5-24.) At first they gave police false names, then M.F. told the police their true names and what had happened in Kirk's hotel room the night before. (4/2/13 Tr., p. 214, L.

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[1] A.M. told Kirk she was 17. (4/3/13 Tr., p. 17, Ls. 9-10; p. 72, L. 5.) M.G. said she was 17. (4/3/13 Tr., p. 72, Ls. 4-5.) And M.F. said she was 16. (4/3/13 Tr., p. 116, Ls. 16-17.)

[2] This was corroborated by testimony from J.C. (4/2/13 Tr., p. 235, Ls. 16-17), A.M. (4/3/13 Tr., p. 16, L. 25 – p. 17, L. 2; 4/3/13 Tr., p. 18, Ls. 5-13), M.G. (4/3/13 Tr., p. 73, Ls. 6-23), and M.F. (4/3/13 Tr., p. 119, L. 1).

[3] Manual to genital and genital to genital contact by Kirk on J.C. was corroborated by testimony from J.C. (4/2/13 Tr., p. 204, Ls. 19-24; 4/2/13 Tr., p. 206, L. 16 – p. 207, L. 9; 4/2/13 Tr., p. 209, Ls. 1-21), A.M. (4/3/13 Tr., p. 19, Ls. 16-20; 4/3/13 Tr., p. 21, L. 12 – p. 22, L. 17), M.G. (4/3/13 Tr., p. 76, L. 20 – p. 77, L. 2), and M.F. (4/3/13 Tr., p. 119, L. 13 – p. 120, L. 14).

[4] Genital to genital contact between Kirk and M.F. is supported by testimony from J.C. (4/2/13 Tr., p. 209, L. 22 – p. 210, L. 1; 4/2/13 Tr., p. 237, L. 21 – p. 238, L. 3), M.G. (4/3/13 Tr., p. 77, Ls. 3-12), and M.F. (4/3/13 Tr., p. 123, Ls. 1-6). Manual to genital contact by Kirk on M.F. is supported by testimony from A.M. (4/3/13 Tr., p. 22, Ls. 23-24.)

17 – p. 216, L. 2; 4/3/13 Tr., p. 129, L. 10 – p. 130, L. 16.) M.F. told police she had been raped. (4/3/13 Tr., p. 253, Ls. 3-11.)

M.F. was interviewed and examined by a sexual assault nurse. (4/3/13 Tr., p. 191, Ls. 2-3; 4/3/13 Tr., p. 198, Ls. 12-25; 4/3/13 Tr., p. 203, L. 24 – p. 218, L. 15.) The nurse testified that M.F.'s perineum – the area between her vagina and rectum – was "extremely red and tender," and the lower part of her vaginal opening had suffered "tearing and abrasion." (4/3/13 Tr., p. 214, Ls. 1-22; 4/3/13 Tr., p. 217, L. 24 – p. 218, L. 9.) The nurse testified that M.F.'s injuries were consistent with M.F. having engaged in sexual intercourse. (4/3/13 Tr., p. 220, Ls. 2-9.) J.C. was not cooperative with police and was not asked to undergo a sexual assault examination. (4/4/13 Tr., p. 77, L. 6 – p. 78, L. 9.)

At the police station, Kirk agreed to speak with police after being advised of his Miranda rights. (4/4/13 Tr., p. 49, L. 6 – p. 50, L. 11.) The detective assigned to the case testified Kirk told him he "knew that they were runaways" and "thought they were under age," but that they "led him to believe that [J.C.] was 18." (4/4/13 Tr., p. 51, Ls. 6-9.) The detective further testified Kirk "kept making reference to statutory, and then he didn't want to talk himself into a case of statutory." (4/4/13 Tr., p. 53, Ls. 2-4.)

After Kirk was charged with lewd conduct and sexual battery with minors J.C. and M.F., he pleaded not guilty and the matter proceeded to trial. (R., pp. 11-12, 19-20, 37-38.) During voir dire, the trial court judge advised that prospective jurors could answer questions in writing or outside the presence of the rest of the panel if asked anything that would cause them embarrassment.

(4/2/13 Tr., p. 28, Ls. 16-20.) The trial court also informed the jury panel, "we want a jury that can decide this case fairly and impartially based only on the evidence presented here in court and the law that the court will give to you." (4/2/13 Tr., p. 36, L. 23 – p. 37, L. 1.) The trial court asked if there was any "reason . . . why any one of you do not believe that you could be a fair and impartial juror in this case?" to which no juror responded. (4/2/13 Tr., p. 44, Ls. 10-14.)

Towards the end of jury-selection, because Kirk is African-American, defense counsel brought up the topic of race, noting that "[t]here are a lot of people who believe we have moved past that, that race is no longer a factor." (4/2/13 Tr., p. 148, Ls. 9-11.) Counsel asked prospective jurors to "raise your hands if you believe that we as a society have moved past the fact that race is a factor in any kind of decision-making." (4/2/13 Tr., p. 148, Ls. 21-23.) Three of the jurors who raised their hands were ultimately seated on Kirk's jury. (4/2/13 Tr., p. 149, Ls. 5-10; 4/2/13 Tr., p. 153, Ls. 5-9.) Counsel also asked jurors to raise their hands if they believed "race still can be considered a factor in society." (4/2/13 Tr., p. 149, Ls. 14-15.) The other nine jurors who were seated on the panel were among those who raised their hands after this query. (4/2/13 Tr., p. 149, L. 21 – p. 150, L. 8; 4/2/13 Tr., p. 153, Ls. 1-10.)

The jury heard testimony from the victims J.C. and M.F., the other two girls in Kirk's room that night (A.M. and M.G.), the police officer and the detective assigned to the case, and the sexual assault nurse who examined M.F. (See generally, 4/2/13 Tr.; 4/3/13 Tr.; 4/4/13 Tr.) The state also admitted a redacted

video of the detective's interview with Kirk, which was played to the jury. (4/4/13 Tr., p. 53, L. 12 – p. 54, L. 23.)

During closing arguments, the prosecutor began her rebuttal:

> Ladies and gentlemen, when I was a kid we used to like to sings [sic] songs a lot. I always think of this one song. Some people know it. It's the Dixie song. Right? Oh, I wish I was in the land of cotton. Good times not forgotten. Look away. Look away. Look away.

(4/4/13 Tr., p. 187, L. 25 – p. 188, L. 5.) Connecting her introduction to the case, she continued,

> And isn't that really what you've kind of been asked to do? Look away from the two eyewitnesss [sic]. Look away from the two victims. Look away from the nurse in her medical opinion. Look away. Look away. Look away.

(4/4/13 Tr., p. 188, Ls. 5-9.) The prosecutor then argued that inconsistencies in the witnesses' testimonies gave them credibility by revealing different perspectives of the same event. (4/4/13 Tr., p. 188, L. 14 – p. 189, L. 5.) Although defense counsel objected to other parts of the prosecutor's closing arguments, he did not object to the prosecutor's recital[5] of *Dixie*. (4/4/13 Tr., p. 161, Ls. 6-7; 4/4/13 Tr., p. 187, L. 25 – p. 188, L. 13; 4/4/13 Tr., p. 192, Ls. 6-8.)

The jury found Kirk guilty of both counts against him, and he was sentenced to a unified term of 20 years with eight years fixed on each count, to run concurrently. (R., pp. 194-95, 211-12.) Kirk timely appealed. (R., pp. 217-22.)

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[5] Although Kirk indicates the prosecutor sang the lines from *Dixie* (Appellant's brief, p. 1), the trial transcript does not reflect whether the prosecutor sang or only spoke the lines (4/4/13 Tr., p. 188, Ls. 1-9).

ISSUES

Kirk states the issue on appeal as:

> Were Mr. Kirk's constitutional rights to due process, equal protection, and a fair trial violated by the State's unobjected-to misconduct in singing the Confederate anthem *Dixie* during closing arguments when Mr. Kirk, a black man, was on trial for alleged sex crimes against two female victims who appeared to be white?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Has Kirk failed to establish structural or fundamental error as to his unpreserved claim of prosecutorial misconduct?

2. Has Kirk failed to show that the long-standing standard of review set forth in *State v. Perry* should be altered such that the state must show the defendant's unobjected-to allegation of prosecutorial misconduct did not affect the outcome of trial?

ARGUMENT

I.
Kirk Has Failed To Establish Structural Or Fundamental Error As To His Unpreserved Claim Of Prosecutorial Misconduct

A. Introduction

Kirk argues the prosecutor committed misconduct rising to the level of structural or fundamental error when she sang three lines of phrase from the song *Dixie*. The prosecutor began her rebuttal closing, saying she enjoyed singing as a kid, and "always think[s] of this one song," then sang, "Oh, I wish I was in the land of cotton. Good times not forgotten. Look away. Look away. Look away." (4/4/13 Tr., p. 187, L. 25 – p. 188, L. 5.) Then, giving context, she argued that defense counsel was asking the jury to look away from the testimonies of the state's witnesses. (4/4/13 Tr., p. 188, Ls. 5-9.) Kirk did not object. Kirk now argues for the first time on appeal that the prosecutor's singing was prosecutorial misconduct warranting reversal.

B. Standard Of Review

Where, as here, 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 structural or fundamental error. State v. Perry, 150 Idaho 209, 222-23, 228, 245 P.3d 961, 974-75, 980 (2010).

C. The Record And Law Do Not Support That The Prosecutor's Singing In The Introduction Of Her Rebuttal Closing Was Structural Error

The Court in Perry recognized the following errors, found by the U.S. Supreme Court to constitute structural defects:

> (1) complete denial of counsel . . .; (2) biased trial judge . . .; (3) racial discrimination in the selection of a grand jury . . .; (4) denial of self-representation at trial . . .; (5) denial of a public trial . . .; (6) defective reasonable-doubt instruction . . .; and (7) erroneous deprivation of the right to counsel of choice.

Id. at 222, 245 P.3d at 974 (internal citations omitted). In each instance, the error is clear on its face. The Court continued, "[a]lthough there may be other constitutional violations that would so affect the core of the trial process that they require an automatic reversal, as a general rule, most constitutional violations will be subject to harmless error analysis." Id. at 222-23, 245 P.3d at 974-75.

The alleged error in this case is not on this list nor comparable to those identified as structural defects in Perry. Nor has Kirk even attempted to demonstrate how the alleged prosecutorial misconduct here rises to the level of the errors listed in Perry or that it "so affect[ed] the core of the trial process [as to] require an automatic reversal." Id. As discussed further herein, the record does not support fundamental error, let alone structural error in this case. Instead, the disputed conduct by the prosecutor was simply an introduction to the prosecutor's rebuttal closing, unrelated to Kirk's race, and that did not impact the outcome of Kirk's trial. Accordingly, this Court should reject Kirk's argument that the alleged misconduct amounted to structural error.

D. Kirk Has Not Demonstrated Fundamental Error Because He Has Failed To Articulate How The Prosecutor's Partial-Recitation Of *Dixie* In The Introduction Of Her Rebuttal Closing Violated His Right To A Fair Trial

An unpreserved issue 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. To establish fundamental error, a defendant has the burden of demonstrating (1) violation of one or more unwaived constitutional rights; (2) that 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) "that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Id. at 226, 245 P.3d at 978.

1. Kirk Fails To Demonstrate A Violation Of A Constitutional Right

A prosecutor has considerable latitude in closing argument. State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009); State v. Porter, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997); State v. Priest, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995). But appeals to the emotion, passion, or prejudice of the jury through the use of inflammatory tactics are impermissible. State v. Phillips, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007). Nor may a prosecutor "attempt[ ] 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," as doing so, "impacts a defendant's Fourteenth Amendment right to a fair trial." Perry, 150 Idaho at 227, 245 P.3d at 979. "[A] prosecutor is constitutionally prohibited from making racially or ethnically inflammatory remarks during its closing argument." State v. Romero-Garcia, 139 Idaho 199, 75 P.3d 1209 (Ct. App. 2003)(citing McCleskey v. Kemp, 481 U.S. 279, 309 n. 30 (1987)(other citation omitted)). "Such comments violate a criminal defendant's due process and equal protection rights." Id. (citing Bains v. Cambra, 204 F.3d 964, 974 (9th Cir. 2000)).

The record here does not support that the prosecutor quoted from *Dixie* to appeal to the jury's emotion, passion or prejudice, or to secure a verdict on a factor other than the law or evidence. Nor does **the record** support that the prosecutor's recitation from *Dixie* was a **racially inflammatory** remark. Rather, the record demonstrates that the prosecutor used a few lines from *Dixie* to introduce her summary of the defense's argument: that the jury should "look away" from the state's witnesses' testimony. (4/4/13 Tr., p. 187, L. 25 – p. 188, L. 9.)

Kirk asserts that the prosecutor's alleged misconduct "served to inject race into a case in which a black man was charged with sex crimes against two female victims, both of whom appeared to be white." (Appellant's brief, p. 6.) As shown by the extensive evidence cited in Kirk's appellate brief, *Dixie* has historical ties with the pro-Confederacy, pro-slave movement. (Appellant's brief,

pp. 2, 7-9.[6]) But the record in this case, including the lines from *Dixie* and their use in the prosecutor's closing, does not include evidence of *Dixie*'s infamous history. The record does not reveal any attempt by the prosecutor to encourage racial animus.

Kirk's argument he was denied a fair trial implies that the jury was influenced to deliver a verdict based not only on race, but on racism, rather than on the evidence. In other words, Kirk implies that the jury not only understood that quoting lines from *Dixie* was a call to consider race, but that the jury heeded that call. This argument assumes the jury was racially prejudiced. But Kirk fails to identify anything in the record supporting that the jury's verdict was influenced in this way.

Notably, defense counsel broached the topic of race in voir dire, suggesting that some people believe that the nation has moved beyond race. (4/2/13 Tr., p. 148, Ls. 9-11.) Counsel asked prospective jurors if anyone agreed "that we as a society have moved past the fact that race is a factor in any kind of decision-making." (4/2/13 Tr., p. 148, Ls. 21-23.) Three jurors who were ultimately seated on Kirk's jury raised their hands. (4/2/13 Tr., p. 149, Ls. 5-10; 4/2/13 Tr., p. 153, Ls. 5-9.) Counsel also asked if anyone believed "race still can be considered a factor in society." (4/2/13 Tr., p. 149, Ls. 14-15.) The other nine jurors on Kirk's jury raised their hands. (4/2/13 Tr., p. 149, L. 21 – p. 150, L. 8;

[6] The State's objection to this attempt to add evidence to the appellate record appears below.

4/2/13 Tr., p. 153, Ls. 1-10.) None of the prospective jurors indicated that they would be biased in rendering a verdict if selected to serve. (4/2/13 Tr., p. 44, Ls. 10-14.) The record is devoid of any indication the jury rendered its decision based on race or racism – whether because of the prosecutor's reference to *Dixie* or not. Accordingly, Kirk has failed to show he was denied a fair trial, and has failed to meet his burden of establishing the first prong of Perry, violation of an unwaived constitutional right.

2. Kirk Has Failed To Show That A Constitutional Violation Is Clear From The Record, And Instead Demonstrates The Opposite By Attempting To Introduce Extensive Evidence From Outside The Record To Support His Argument

Kirk's appellate brief highlights his inability to satisfy the second prong under Perry, that a constitutional violation is clear or obvious from the record. Kirk devotes more than three pages to discussing the historically pro-slavery significance of the song *Dixie*. (Appellant's brief, pp. 2, 7-9.) Kirk cites a 1904 writing by Charles Burleigh Galbreath, the Kentucky Post, the Washington Times, the Commercial Appeal, the Washington Post, the Oxford English Reference Dictionary, and the Pittsburgh Post-Gazette. (Appellant's brief, pp. 2, 7-9.) These materials are offered as evidence that parts of society now frown upon the song's casual use. (See Appellant's brief, pp. 7-9.) But this evidence is not part of the record in this case and must be disregarded. State v. Johnson, 148 Idaho 664, 670, 227 P.3d 918, 924 (2010); State v. Perez-Jungo, __ P.3d __, 2014 WL 2053873 at 1, n. 1 (Ct. App. 2014). Kirk's burden is to show error that is clear *on the record.* Perry, 150 Idaho at 226, 245 P.3d at 978. The record here offers no connection between *Dixie* and an issue of race or slavery.

After the prosecutor's set-up that she enjoyed singing songs as a kid, she sang the lines, "Oh, I wish I was in the land of cotton. Good times not forgotten. Look away. Look away. Look away;" she then explained, "isn't that really what you've kind of been asked to do?" (4/4/13 Tr., p. 187, L. 25 – p. 188, L. 9.) Without the evidence introduced in Kirk's appellate brief, the prosecutor's alleged misconduct was simply a personal story of singing in her youth, arriving at her argument that Kirk wanted the jurors to ignore the states' witnesses' testimony. Nothing *in the record* indicates that either the prosecutor or Kirk's jury was aware of the song's pro-slavery roots or would have interpreted the argument as injecting race into the trial. And to the extent any members of the jury were aware of the song's infamy, the record does not support that their awareness would have led them to convict Kirk upon hearing three lines from the song. As already discussed, the record from voir dire supports the opposite conclusion. Accordingly, Kirk has failed to establish either the first or second prongs from Perry.

3. Kirk Has Failed To Show Error Affecting The Outcome Of Trial

Finally, Kirk has not established the third prong from Perry, that the alleged error affected the outcome of his trial. Kirk cites a number of non-binding cases discussing the perils of virulent prejudice provoked by prosecutors' arguments appealing to "race prejudice in the context of a sexual crime." (Appellant's brief, pp. 9-14.) Already limited to their persuasive value, those cases are easily distinguishable on their facts.

In State v. Rogan, the defendant, an African-American, was convicted of four counts of sexual assault. 984 P.2d 1231 (Haw. 1999). During rebuttal argument, the prosecutor said: "This is every mother's nightmare. Leave your daughter for an hour and a half, and you walk back in, and here's some black, military guy on top of your daughter." Id. at 1238. Defense counsel interjected, "Objection, your Honor. This is an appeal to racism." Id. Despite "defense counsel's timely objection," the trial court overruled and gave no curative instruction. Id. at 1241. The Court reversed on appeal. Id. at 1250. Unlike the opening lines from *Dixie*, the prosecutor's objected-to statements in Rogan directly concerned the case before the jury, addressed the defendant's race, and appealed to the jury's emotion by suggesting the scenario was "every mother's nightmare." Given the factual and procedural dissimilarities with Kirk's case, the appellate court's decision in Rogan offers no meaningful guidance.

In State v. Guthrie, the defendant, who was Caucasian, was convicted of first-degree murder. 461 S.E.2d 163 (W.Va. 1995). The prosecutor cross-examined the defendant's father about defendant's prejudices, before a jury that included a number of women, and one African-American. Id. at 185-87. The prosecutor asked if defendant told the witness that men are better than women, and whites are better than blacks, or if he ever discussed the Ku Klux Klan. Id. The Court noted that "[t]he primary issue in this case was not one of guilt or innocence, but the degree of homicide for which the defendant would ultimately be convicted." Id. at 191. The Court determined it was error to permit the prosecution to "influence the jury's evaluation and decision" by suggesting

defendant "was a racist, a sexist, a Nazi, and a KKK sympathizer." Id. Ultimately, the Court's decision was based on its finding there were a number of errors warranting reversal, in contrast to the one assertion of error here. Id. at 192. Moreover, the prosecutor's singing did not improperly appeal to emotion, but simply suggested that Kirk's argument was to "look away" from the evidence. As with Rogan, Guthrie is not useful here.

In State v. Cabrera, the defendant was convicted of first-degree murder, second-degree intentional murder, and four counts of attempted first-degree murder. 700 N.W.2d 469 (Minn. 2005). The defendant argued the prosecution committed misconduct by stating in rebuttal closing argument that defense counsel engaged in "wild and, I submit, racist speculation" that because the state's witnesses "happen to be black . . . [and] have been in gangs in the past ... that they are people to be feared." Id. at 474. The state countered that "the defense injected the issue of gangs, and by implication race, into the trial." Id. The court on appeal disagreed. Id. Although the defense raised the possibility that gang rivalry played a role in the shooting at issue in the case, it "never mentioned the race of a witness or even implied that race was a factor." Id. Accordingly, the prosecution's rebuttal was misconduct warranting remand for a new trial. Id. at 475. The prosecution's singing in this case is more akin to the defense's arguments in Cabrera – absent mention of race or implication that race was a factor. If anything, Cabrera supports that the prosecution here did not inject race into Kirk's case.

In McFarland v. Smith, the appellant petitioned for habeas relief, arguing his constitutional rights were violated when the prosecutor argued in closing, "the fact is that Officer Dorman is black and the Defendant is black. . . . That's a fact like you consider any other fact. If she's lying she's lying against a member, a person that is black." 611 F.2d 414, 416 (2nd Cir. 1979). The prosecutor "thus urged the jury to credit Officer Dorman's testimony on the theory that the probability of truthfulness was increased by the circumstance that a Black person was testifying against another Black person." Id. The Court held "[w]hen a prosecutor's summation includes racial remarks in an effort to persuade a jury to return a guilty verdict, the resulting conviction is constitutionally unfair unless the remarks are abundantly justified." Id. 416-17. McFarland is also distinguishable. The singing of lines from *Dixie* – that do not mention race – to set up the argument that the jury should not "look away" from the evidence is not an effort to persuade the jury to return a guilty verdict based on race.

In United States v. Grey, the defendant was found guilty of bank robbery. 422 F.2d 1043 (6th Cir. 1970). While cross-examining a character witness for Grey, the prosecutor asked if the witness knew "that Grey, a Negro, and a married man, was 'running around with a white go-go dancer.'" Id. at 1046. The Court found "no nonprejudicial explanation for the 'white go-go dancer' question asked by the United States Attorney." Id. at 1045. "At best, the entire question was a magnificent irrelevance . . . At worst, the gratuitous reference to the race of the go-go dancer may be read as a deliberate attempt to employ racial prejudice to strengthen the hand of the United States government." Id. Applying

Grey here, there is a nonprejudicial explanation for the singing of *Dixie* – a set-up for the phrase "look away." Also, the prosecution did not reference race; thus, there is no evidence it was prejudicial to Kirk.

In Miller v. North Carolina, the defendant was convicted of first-degree rape and petitioned for federal habeas relief. 583 F.2d 701 (4th Cir. 1978). The defendant argued prosecutorial misconduct violating his constitutional rights when the prosecutor said in closing, "I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate within us." Id. at 704. The Fourth Circuit held, "Where the jury is exposed to highly prejudicial argument by the prosecutor's calculated resort to racial prejudice on an issue as sensitive as consent to sexual intercourse in a prosecution for rape, we think that the prejudice engendered is so great that automatic reversal is required." Id. at 708. Kirk's allegation of error here does not compare to the structural error of the prosecution's argument in Miller that no white woman would have consensual sex with a black man. The lines from *Dixie* did not mention race, were not an argument involving race, and merely introduced the theme of "looking away" from the evidence. They were not harmful to Kirk.

In addition to those non-binding cases, Kirk cited the footnote from one U.S. Supreme Court case for the general proposition that "prosecutorial discretion cannot be exercised on the basis of race." McKleskey v. Kemp, 481 U.S. 279, 310 n. 30 (1987)(cited at Appellant's brief, p. 10.) This well-established legal tenet does not apply here because the record fails to support

that the prosecutor exercised her discretion here based on race. In sum, Kirk fails to cite any binding or persuasive legal authority that, applied to this case, warrants reversal.

Moreover, the great weight of evidence presented by the state supports that the prosecutor's quoting of the song did not contribute to Kirk's guilty verdict. The jury heard from the two victims, two other eyewitnesses to the crimes, the assigned detective and police officer, and a forensic nurse who examined the younger victim. (See generally Tr.; Statement Of Facts, supra.) Although details of the night in question differed, the testimony from all witnesses was consistent as to the elements of the charged crimes: MF was under 16 years of age, and JC was 16 or 17 (4/4/13 Tr., p. 146, L. 15; 4/4/13 Tr., p. 147, L. 18; 4/4/13 Tr. ,p. 148, Ls. 5-6); the crimes happened on August 13, 2012, in Idaho (4/4/13 Tr., p. 146, Ls. 9-10; 4/4/13 Tr., p. 47, Ls. 20-21); Kirk committed "genital to genital contact and/or [an act of] oral to genital contact and/or an act of manual to genital contact on the victims" (4/4/13 Tr., p. 146, Ls. 11-14; 4/4/13 Tr., p. 147, Ls. 22-25); and Kirk did so "with the specific intent to arouse, appeal to, or gratify the lusts, passions, or sexual desires of the defendant, of such child, or of some other person" (4/4/13 Tr., p. 146, Ls. 17-20; 4/4/13 Tr., p. 148, Ls. 1-4).

Given the evidence at trial, Kirk has not demonstrated that the prosecutor's singing injected racial animus into the trial. There is nothing in the record suggesting that the prosecutor's singing or her choice of song contributed to the jury's verdict. Accordingly, Kirk has failed to meet his burden of showing the alleged error affected the outcome of his trial.

II.
Kirk Has Failed To Show The Court Should Reject The Well-Established Standard Of Review In *Perry* And Adopt A New Standard Shifting The Burden On Appeal From The Defendant To The State

Kirk suggests that his burden of demonstrating that the alleged error affected the outcome of his case – as set forth in Perry – should be shifted to the state, to show harmless error. (Appellant's brief, pp. 14-19.) The burden on appeal of showing whether the alleged error has impacted a substantial right is rooted in Rule 52. Perry, 150 Idaho at 225, 245 P.3d at 977. As explained by the U.S. Supreme Court, "When the defendant has made a timely objection to an error, . . . Rule 52(a) applies," and "precludes error correction only if the error 'does *not* affect substantial rights.'" Id. (quoting United States v. Olano, 507 U.S. 725, 734-35 (1993)). When the defendant has forfeited the error, "Rule 52(b) authorizes no remedy unless the error *does* "affect[t] substantial rights.'" Id.

There is a "strong societal interest in finality of judgments." Perry, 150 Idaho at 225, 245 P.3d at 977 (citing Puckett v. U.S., 129 S.Ct. 1423 (2009).) The courts recognize that the trial court is "best suited to deal with potential error at trial, before a verdict has been reached," thus defendants should be encouraged to properly object at trial. Id. Nonetheless, defendants may still appeal, as here, even where a timely objection was not raised, in the interest of fundamental justice. Id. In such circumstance, "It is the defendant rather than the government who bears the burden of persuasion with respect to prejudice." Id. (quoting Olano, 507 U.S. at 734-35).

Kirk urges this Court to reject the standard of review from Perry and require the state to show harmless error even where a defendant alleges, for the

first time on appeal, that the prosecution has injected race into a criminal trial. (Appellant's brief, pp. 14-19.) Kirk's proposed amended standard would discourage timely objections and result in more prosecutorial misconduct issues being addressed solely on appeal rather than at trial where the issue could be best resolved. Perry, 150 Idaho at 225, 245 P.3d at 977.

Kirk cites a 2000 survey, again outside of the record in this case and thus not properly considered, that racial minorities do not believe the criminal justice system is colorblind. (Appellant's brief, p. 15.) Even if the survey were appropriately before this Court, shifting defendant's burden on appeal to the state does not address the concern raised therein. Kirk has not articulated why or how it does so. Kirk asserts that prosecutorial misconduct "fundamentally undermines the principle of equal justice and is . . . repugnant to the concept of an impartial trial." (Appellant's brief, p. 15 (quoting State v. Monday, 257 P.3d 551, 558 (Wash. 2011)).) However, an allegation of prosecutorial misconduct is just that – an allegation. Kirk has not identified how it would be fundamentally more fair to shift the burden of showing harmless error to the state where a defendant failed to raise the issue of prosecutorial misconduct at trial. Absent a valid legal basis to overturn well-established law on the standard of review for unobjected-to prosecutorial misconduct, this Court should reject Kirk's argument to do so.

CONCLUSION

The state respectfully requests that this Court affirm Kirk's judgment of conviction.

DATED this 9th day of June, 2014.

DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of June, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

DAPHNE J. HUANG
Deputy Attorney General

DJH/pm