2-20-2014

State v. Rocha Appellant's Brief Dckt. 41535

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**No. 41535**
	)	
v.	)	
	)	
ALFREDO ROCHA,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL MCLAUGHLIN
District Judge

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Nature of the Case and Course of Proceedings

This case proceeded to a Jury Trial on January 11, 2013; at which time he was convicted by a jury of Driving Under the Influence. (1/11/2013 Tr., p.127, Ls.13-16). Mr. Rocha filed his Notice of Appeal on February 27, 2013; the District Court heard argument and took the matter under advisement. The District Court issued its Memorandum Decision and Order affirming the conviction on October 2, 2013 and Mr. Rocha now timely appeals.

On appeal, Mr. Rocha asserts the following: 1) that the trial court erred in admitting irrelevant evidence over Defendant's objection; 2) that the prosecutor committed misconduct when: it placed before the jury facts not in evidence, and it improperly shifted the burden of proof; and 3) that there was insufficient evidence to prove beyond a reasonable doubt that Alfredo Rocha was driving or in actual physical control while under the influence of an intoxicating substance.

Statement of the Facts

Alfredo Rocha was sleeping in his disable vehicle, with the hood open and resting against the windshield, when Officer Shannon Taylor of the Boise City Police Department approached his vehicle on September 1, 2012 at approximately 4:45 a.m. (1/11/13 Tr. p.22, Ls.16-23)(1/11/13 Tr. p.56, Ls.8-10). The officer observed the vehicle for ten to fifteen minutes before approaching the vehicle. (1/11/13 Tr. p.53, Ls.4-7). There were two individuals in the vehicle, both of them we're laying back with their heads against the headrest. (1/11/13 Tr. p.23, Ls.16-23). The officer called for an assist and waited another 10 minutes for the assist to arrive. (1/11/13 Tr. p.23, L.22 – p.24, L.1). The officer then approached the vehicle and proceeded to wake up the sleeping driver. (1/11/13 Tr. p.24, Ls.6-11). The officer is unaware as to how long Mr. Rocha had been sleeping on the side of the road. (1/11/13 Tr. p.55, Ls.17-22).The officer

observed Mr. Rocha's hands in his lap, palms up with a cell phone in his right hand. (1/11/13 Tr. p.53, Ls.12-15).

The officer observed an odor of an alcoholic beverage, slow and deliberate speech, and bloodshot and glassy eyes. (1/11/13 Tr. p.24, Ls.21-25). Mr. Rocha admitted to the officer that he had been drinking at around 7:30 p.m., which was not recorded by the officer in her report. (1/11/13 Tr. p.54, Ls.2-13). Mr. Rocha further advised the officer that another vehicle had come by to help at around 2:45 or 3:45 but was not sure as to the exact time. (1/11/13 Tr. p.55, Ls.22 – p.56, Ls.7). The officer admitted that there is potentially two (2) hours that Mr. Rocha could potentially have been parked on the side of the road. (1/11/13 Tr. p.56, Ls.1-14). The officer was concerned because she believed he had been driving, but the vehicle was not running. (1/11/13 Tr. p.25, Ls.7-13). Based on the officer's observations she asked the defendant to perform Field Sobriety Tests; Mr. Rocha did not pass any of the administered tests. (1/11/13 Tr. p.39, Ls.18-21). Mr. Rocha was then placed under arrest for DUI. (1/11/13 Tr. p.40, Ls.1-2).

The officer advised Mr. Rocha of the Administrative License Suspension waited the required 15 minute period at which time Mr. Rocha refused to provide a breath sample. (1/11/13 Tr. p.47, Ls.18–25). Mr. Rocha advised the officer that he understood the consequences of not providing a breath sample. (1/11/13 Tr. p.48, Ls.3-6). The officer admitted that she is familiar with Idaho Code § 18-8002 and that she is required by law to take one or more evidentiary test to determine the concentration of alcohol or the presence of drugs or other intoxicating substances. (1/11/13 Tr. p.79, Ls.6-19). The officer testified that it is not the policy of the Meridian Police Department to force a blood draw or take a urine sample. (1/11/13 Tr. p.48, Ls.16-20). However the officer admitted that based on the statute and current case law she is aware that she could use force to obtain an evidentiary sample. (1/11/13 Tr. p.79, Ls.21 – p.80, Ls.6).

ISSUES

I. Did the trial court err in admitting irrelevant evidence over defendant's objections?

II. Did the prosecutor commit misconduct when it placed before the jury facts not in evidence; and improperly shifted the burden of proof?

III. Was there sufficient evidence to prove beyond a reasonable doubt that Alfredo Rocha was driving or in actual physical control of a motor vehicle while under the influence of an intoxicating substance?

ARGUMENT

I.

The Trial Court Erred In Admitting the Administrative License Suspension Advisory Form Over the Defendant's Objection Because It Was Not Relevant To Any Element Of The Crime.

A. Introduction

Mr. Rocha asserts that the trial court erred by failing to sustain objections to irrelevant evidence specifically admitting the Administrative License Suspension Advisory Form which was admitted as State's Exhibit 3.

B. Standard of Review

When reviewing a trial court's evidentiary rulings, including those made over objections, the Court applies an abuse of discretion standard. *State v. Field*, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). When determining whether the trial court abused its discretion, this Court must ascertain: (1) "whether the trial court correctly perceived the issue as one of discretion;" (2) "whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it;" and (3) "whether the court reached its conclusion by an exercise of reason." *State v. Johnson*, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010).

C. The Trial Court Erred When It Admitted The Administrative License Suspension Form As State's Exhibit 3.

If evidence is not relevant, it should not be admitted. If irrelevant evidence is admitted, then the focus on appeal should be whether or not such error prejudiced the objecting party." *State v. Cannady,* 137 Idaho 67, 70, 44 P.3d 1122 (2002). A judgment may not be disturbed on appeal due to error in an evidentiary ruling unless the error affected the substantial rights of a party. White v. Mock, 140 Idaho 882, 891, 104 P.3d 356, 365 (2004).

Evidence is relevant if it has "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; *State v. Byington,* 132 Idaho 597, 603, 977 P.2d 211, 217 (Ct.App.1998). Whether evidence is relevant is an issue of law.

Evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. I.R.E. 403. The trial court's conclusions of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice is reviewed under an abuse of discretion standard. State v. Page, 135 Idaho 214, 219, 16 P.3d 890, 895 (2000).

Mr. Rocha contends that the trial court erred when it failed to sustain objections to the admission of State's Exhibit 3 the Administrative License Suspension Advisory From. While it is proper for the State to utilize the arrestee's refusal of the BAC test as evidence at trial it was improper for the trial court to admit the Administrative License Suspension Advisory Form as State's Exhibit 3 because it improperly references penalty or punishment. *State v. Green*, 149 Idaho 706, 711, 239 P.3d 811, 816 (Ct.App.2010)

Prior to the presentation of evidence, the Court instructed the jurors as follows:

> "your duties are to determine the facts and to apply the law set forth in my instructions to those facts and in this way decide the case. ... You must consider the instructions as a whole, not picking out some and disregarding others."

(1/11/11 Tr., p.4, Ls.1-9). The Court further instructed the jury to:

> "not concern yourself with the subject of penalty or punishment. That subject must not in any way affect your deliberation or your verdict in this case. If you find the defendant guilty, it will be my duty to determine what the appropriate penalty or punishment should be."

(1/11/13 Tr., p.8, Ls.2-8).

The admission of this evidence is harmful and was used during closing argument by the prosecutor to appeal to the passions and prejudices of the jury. During closing argument the prosecutor used State's Exhibit 3 as follows:

> "why didn't he blow? When you go back into chambers to deliberate, you will be given State's Exhibit *-003. This is the notification of suspension. This is the administrative license suspension. The ALS. This document is given to the suspect, to the defendant, for them to read. It is also played out loud through an audio speaker so they can also hear if they choose not to read.
>
> The reason it's given to them twice like that is because it is serious. What this form tells a suspect is that if they refuse to participate in a breath test or blood test or whatever happens to be, in this case it is the breath test. If they refuse that breath test, there are penalties and those penalties are significant. The person is fined.
>
> The second, real problem, one year absolute driver's license suspension. That means no driving to work. That means no driving to school. That means no driving for a year. When you are put in that position of giving a breath sample, do I give this sample and let them know what my breath alcohol is, or do I refuse and accept these consequences. That's what the defendant did. He did not want to reveal his breath alcohol.
>
> ...
>
> The defendant shows [chose] to take those penalties rather than let you know what his alcohol concentration was. Why not blow and let us know? What's going on up there that he didn't want to let us know?
>
> ...he is not under the influence he should be clear enough to recognize I should just take this test and maybe I will walk out of here. That's the logical logic. Take the test. You are under. You get out of here. The reason you don't blow is because you know you are going to be over. Because you know you had too much to drink because you passed out in your car on the side of the road. That's why you don't blow."

(1/11/13 Tr. p.94, L.1 – p.96, L.3)

Even if the evidence admitted is relevant, the value of the challenged evidence is substantially outweighed by the probative effect of the evidence. Furthermore, the admission of this evidence cannot be seen as harmless error. In order for the evidence to be relevant it "must be sufficiently established as fact and relevant as a matter of law to a material element of the charged offense. *State v. Pepcorn*, 152 Idaho 678, 688, 273 P.3d 1271, 1281 (2012). The state argued that the Administrative License Suspension Advisory Form was "relevant to make sure

that the fact that the defendant was fully advised of what the ALS is and the consequences of the breath test are – he was made aware of that." (1/11/13 Tr., p.45, Ls.4-8). Mr. Rocha contends that his knowledge of an Administrative procedure has no relevance to whether he was driving under the influence. The State cannot and did not point to an element for which that piece of evidence was being used to prove. The State further improperly used that evidence to suggest or imply consciousness of guilt.

Because the evidence is not relevant to a permitted purpose, it is next necessary to determine whether its admission was harmless. In applying the harmless error test articulated by the Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). *See also State v. Perry*, 150 Idaho 209, 222, 245 P.3d 961, 974 (2010). "To hold the errors are harmless, the Court "must find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence." *State v. Robinett,* 141 Idaho 110, 113, 106 P.3d 436, 439 (2005).

The District Court made a blanket statement that it is not error for the jury to be informed of the circumstances of the defendant's refusal to submit to evidentiary testing. (R., p.166.) Mr. Rocha agrees with that statement; however that was not the issue on appeal. The issue is whether the admission of the Administrative License Suspension Advisory Form was error and whether that admission was harmless. The circumstances of the refusal would be relevant, but not any other information with regard to an administrative penalty or punishment. The District Court in part seemed to rely on the fact that the Administrative License Suspension form does not reference "penalties or punishment" for driving under the influence but rather the available sanctions for refusing to submit to evidentiary testing. (R., p.162.) This seems like an absurd distinction, specifically because of the instructions the jury is given with regard to penalty or

punishment. Although we have considerable faith in juries, we cannot expect them to discern the difference between an administrative vs. criminal penalty especially when those administrative penalties are being admitted in a criminal trial to prove guilt. Further it is a likely inference that the jury could have thought the defendant was guilty, but also believed that the State didn't prove it beyond a reasonable doubt, but then considered the penalties the defendant had been subjected to and decided that maybe it wasn't enough and they wanted the defendant to be punished further.

The defendant must establish an error; the burden then lies with the State to demonstrate that the error was harmless beyond a reasonable doubt. In this case the error cannot be said to be "surely unattributable to the error." While there is some evidence on which the jury could have based its verdict, including odor of alcohol, slow and deliberate speech, glassy and blood shot eyes, and the failure of evidentiary testing; there is no specific evidence that Mr. Rocha was driving or in actual physical control of a motor vehicle while his breath alcohol was above a .08 or while he was under the influence of an intoxicating substance. This evidence was used to improperly argue to the jury consciousness of guilt and the State cannot show beyond a reasonable doubt that this evidence did not contribute to the verdict obtained. Therefore, because the error affected Mr. Rocha's right to a fair trial the judgment of conviction must be vacated and remanded to the magistrate court for a new trail.

ARGUMENT

II.

The Prosecutor Committed Misconduct When He 1) Placed Before The Jury Facts Not In Evidence; and 2) Improperly Shifted The Burden Of Proof.

A. Introduction

Mr. Rocha asserts that the prosecutor violated his right to a fair trial and denial of his due process rights when the prosecutor placed before the jury facts not in evidence and improperly shifted the burden of proof.

1. The prosecutor committed misconduct when he placed before the jury facts not in evidence.

a. Standard of Review

In *State v Field* the Supreme Court of Idaho held that the standard of review for claims of prosecutorial misconduct when there has been a contemporaneous objection is as follows: 1) the Court must determine factually if there was prosecutorial misconduct, 2) then the court must determine whether the error was harmless. 144 Idaho 559, 571 (2007). The burden rests on the State to prove that the error was not harmless. *Id.*

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Gross*, 146 Idaho 15, 18, 189 P.3d 477, 480 (Ct.App.2008). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.* It is plainly improper for a party to present closing argument that misrepresents or mischaracterizes the evidence. *State v. Felder,* 150 Idaho 269, 274, 245 P.3d 1021, 1026 (Ct.App. 2010). In addition, it constitutes misconduct for a prosecutor to place before the jury facts not in evidence. *Id.* Furthermore, appeals to emotion, passion or prejudice of the jury

through use of inflammatory tactics are improper. *State v. Smith*, 117 Idaho 89, 898, 792 P.2d 916, 923 (1990).

The role of the prosecutor is to present the government's case earnestly and vigorously, using every legitimate means to bring about a conviction, but also to see that justice is done and that every criminal defendant is afforded a fair trial. *State v. Babb*, 125 Idaho 934, 942, 877 P.2d 905, 913 (1994). Although the Court has recognized the imposition of certain well-accepted restrictions beyond which the prosecutor's argument may not go without running afoul of its function, the propriety of a given argument will depend largely on the facts of each case. *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The function of appellate review is not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial. *State v. Reynolds,* 120 Idaho 445, 451, 816 P.2d 1002, 1008(Ct.App.1991); *see also State v. Ruth,* 102 Idaho 638, 640–41, 637 P.2d 415, 417–18 (1981).

During the State's rebuttal the following colloquy took place:

> "Defense counsel suggests that the state – or sorry, that the Meridian Police Department should forcibly subject you to a test because State code allows that. I can tell you in my experience as a prosecutor I am aware that other jurisdictions do in fact force you to do a blood draw if you refuse a breath test.
>
> Now the simple fact that Meridian and their City Council and their police department has chosen not to go that route, has chosen not to force people to do a blood draw, well, I think that says something about City Council Meridian police department. The fact that they are legally allowed to do that is one thing. The fact that they choose not to force someone into that shouldn't be held against them.
>
> There is any number of reasons why the City of Meridian has chosen not to go that route. Obviously cause some kind of liability. So some jurisdictions are –"
>
> Defense Counsel: Objection, Judge. Facts not in evidence.
>
> The Court: I will overrule the objection.

> "Some jurisdictions don't want to take that risk. They don't want to go down that road."

(1/11/13 Tr., p.122, L.25 – p.123, L.24). Furthermore during deliberations the jury sent a question to the judge which read as follows "when did Meridian City start the change on blood draws after refusal to take breathalyzer and since the change have they requested any blood draws."

In *State v. McClain*, 154 Idaho 742, 302 P.3d 367 (Ct.App.2012) the Court of Appeals was asked to look at the issue of the persistent violator enhancement. In that case:

> "during deliberations, the jury sent three separate notes to the court pertaining to the lack of evidence identifying third degree assault as a felony under Oregon law. The court directed the jury to continue deliberations, and the jury ultimately found that McClain had been convicted of felony assault in Oregon. When McClain later filed a motion for judgment of acquittal on the persistent violator enhancement, the district court denied the motion.
>
> McClain asserts that on this record it is apparent that there was insufficient evidence to establish that the Oregon conviction was for a felony. We agree."

Id. at 748. The Court held that the record plainly did not indicate whether a third degree assault was a felony, and no other evidence in the record answered that question. The Court further indicated that the State did not introduce copies of the applicable Oregon statutes that could have identified the offense as a misdemeanor or as a felony.

The District Court held that the "prosecutor's remark ... is not a statement of fact. Instead, it is merely the prosecutor's inference or opinion. (R., p.169.) However this assertion is error. Had the prosecutor argued in his closing that "there are numerous reasons a city might not want to force blood draws any one of which could be policy, financial, training, all of these things." we would not be arguing this issue. That is not the case, the prosecutor, did not make an inference, the prosecutor made a statement. It wasn't made as a suggestion or as inference; it was stated as a fact.

Mr. Rocha asserts that the trial courts failure to sustain the objection to facts not in evidence and to strike the argument by the prosecutor, or in the least to instruct the jury that the prosecutor's statements are not evidence is not harmless. Mr. Rocha has made a showing that the state improperly placed facts before the jury and it is the state's burden to show that the error was harmless. As is similar to *McClain,* based on the questions from the jury regarding the Meridian city policy regarding blood draws it cannot be said beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged argument therefore the state cannot meet its burden.

2. The prosecutor committed misconduct when he improperly shifted the burden of proof.

a. Standard of Review

Where prosecutorial misconduct was not objected to at trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error. *State v. Perry* 150 Idaho at 227, 245 P.3d at 979. The fundamental error analysis includes a three prong test wherein the defendant bears the burden of persuading the appellate court that the:

> "alleged error (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand."

Id.

While our system of justice is adversarial in nature and the prosecutor is expected to be diligent and leave no stone unturned, he is never the less expected and required to be fair. *Field,* 144 Idaho at 571. In *Field,* the Supreme Court also identified the standard of review for claims

of prosecutorial misconduct when there is no contemporaneous objection. *Id.* A conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error. *Id.* "Misconduct will be regarded as fundamental error when it "goes to the foundation or basis of a defendant's rights or ... to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or out to permit him to waive." *State v. Severson*, 147 Idaho 694, 716, 215 P.3d 414, 436 (2009). "However, even when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless. *Field*, 144 Idaho at 571. Under the harmless error doctrine, a conviction will stand if the appellate court is convinced beyond a reasonable doubt that the same result would have been reached by the jury had the prosecutorial misconduct not occurred. *Id.*

Misconduct may occur by the prosecutor diminishing or distorting the State's burden to prove the defendant's guilt beyond a reasonable doubt. *State v. Felder*, 150 Idaho at 274. The requirement that the State prove every element of a crime beyond a reasonable doubt is grounded in the constitutional guarantee of due process. *Id.* The Court in Felder further held that "this standard of proof plays a vital role in the American scheme of criminal procedure because it provides concrete substance for the presumption of innocence—the bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. *Id. citing In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, (1970).

The prosecutor has the right to identify how, from the prosecutor's perspective, the evidence confirms or calls into doubt the credibility of a particular witness. However in this case the prosecutor's remarks were as follows:

"When you are put in that position of giving a breath sample, do I give this sample and let them know what my breath alcohol is, or do I refuse and accept these consequences. That's what the defendant did. He did not want to reveal is breath alcohol.

We as citizens through our legislature and everything that we vote, requires every one that drives on our roads to consent to a breath test. Implied consent. Maybe you have heard that phrase before. When you get a driver's license it is implied consent that you will submit to one of these tests. The penalty for not doing that is you lose your license for a year absolutely and pay a significant fine.

The defendant [chose] to take those penalties rather than let you know what his alcohol concentration was. Why not blow and let us know? What's going on up there that he didn't want to let us know?"

...

"The reason you don't blow is because you know you are going to be over. Because you know you had too much to drink because you passed out in your car on the side of the road. That's why you don't blow."

"Now, in this particular case the defendant refused to give a breath sample. Why did he refuse? If he wasn't under the influence he should have blown. If he didn't feel impaired he should have blown. Consciousness of guilt. That's why you don't blow.

Defense counsel suggests that the state – or sorry, that the Meridian Police Department should forcibly subject you to a test because State code allows that. I can tell you in my experience as a prosecutor I am aware that other jurisdictions do in fact force you to do a blood draw if you refuse the breath test.

...

The breath test is the most or the least invasive of all the tests you can do. You don't have to stick out your arm. You don't have to have a needle. You don't have to pee in a cup. You just simply blow in a tube. It doesn't take very long at all. Why not just give that breath test. Didn't want to give up that number.

(1/11/13 Tr., p.94, Ls.22-25 – p.95, Ls.1-17) (1/11/13 Tr., p.96, Ls.1-3) (1/11/13 Tr., p.122, Ls.18-25 – p.123, Ls.1-5). (1/11/13 Tr., p.124, Ls.1-7)

In the instant case, the prosecutor did not simply call into question the credibility of a particular witness, because in fact Mr. Rocha did not testify. The prosecutor did not simply identify how, from his perspective the evidence confirms or calls into doubt the credibility of a witness. The prosecutor's statements were all directed at Mr. Rocha's refusal to take an evidentiary test, and how that refusal infers consciousness of guilt. As stated in *Darden,* the propriety of any given argument will depend largely on the facts of each case, when looking at

the specific facts of this case, it cannot be said that these statements were not fundamental error and it cannot be found beyond a reasonable doubt that the same result would have been reached by the jury had the prosecutorial misconduct not occurred.

b. Mr. Rocha's fundamental right to the presumption of innocence was violated when the Prosecutor shifted the burden, arguing that Mr. Rocha should have proven his innocence by blowing in a breathlyzer maching.

In *Morisette*, the jury was instructed that it only had to find that the defendant intentionally exercised dominion over certain property, and ignored the "knowingly" element of the charge. The United States Supreme Court held that "[T]his presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit." Morisette v. US, 342 U.S. 246 (1952). This is exactly what the State did in this case, and even more specifically made remarks about "consciousness of guilt" and "that's why you don't blow." Consciousness of guilt allows or instructs the jury to infer that because he refused a breath test he is guilty.

c. Mr. Rocha's Fifth Amendment Right against self-incrimination was violated when the State commented on his refusal to participate in an evidentiary testy because any implied consent authorizing evidentiary testing for a motorist suspected of DUI is revocable.

According to *State v. Diaz*, 144 Idaho 300 (2007) by obtaining a driver's license, Idaho motorists have impliedly consented to involuntary blood draws if law enforcement has reasonable suspicion that the motorist is under the influence of an intoxicating substance.[1] Mr.

[1] The *McNeely* plurality noted that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* 133 S.Ct. 1552 at 1566. The Court observed that all 50 states have implied consent statutes which "impose significant consequences when a motorist withdraws consent." *Id.* Implicit is this portion of the opinion is that a motorist does have the ability to withdraw his/her consent and the implied consent statutes do not act as a *per se* exception to the warrant requirement.

Rocha does not dispute that pursuant to I.C. § 18-8002 and *Diaz*, "In Idaho 'any person who drives or is in actual physical control' of a vehicle impliedly consents to evidentiary testing for alcohol at the request of a peace officer with reasonable grounds for suspicion of DUI." *Diaz*, 144 Idaho at 302. However, even if Mr. Rocha impliedly consented to evidentiary testing, pursuant to the Fourth Amendment, Mr. Rocha retained the right to revoke his consent. It is without question that a State cannot condition the granting of a privilege upon the renunciation of a constitutional right. *See Slochower v. Bd. Of Higher Educ.,* 350 U.S. 551, 555 (1956) (striking down statute which made the assertion of the privilege against self-incrimination by a city employee or agent relating to his or official duties the functional equivalent of a resignation, where statute resulted in conclusive presumption of guilt of one who claimed his or her constitutional privilege, such discharge violated due process even though employee had no constitutional right to be a City employee).

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost v. R.R. Comm'n of California, 271 U.S. 583, 593-594 (1926).

Moreover, federal courts, including the United States Supreme Court, have repeatedly held that although a suspect can consent to a search of his person or property, that suspect retains the right to revoke, withdraw, or delimit his consent at anytime. *See Florida v. Jimeno*, 500 U.S. 348 (1991) (holding that a suspect may "delimit as he chooses the scope of the search to which he consents," in the context of a vehicle search); *United States v. McWeeney*, 454 F.3d 1030 (9th Cir. 2006) (holding that, "a suspect is free ... after initially giving consent, to delimit or

withdraw his or her consent *at any time*," in the context of a stop and risk); *United States v. Sanders*, 424 F.3d 768 (8th Cir. 2005) ("Once given, consent to search may be withdrawn."); *United States v. Lockett*, 406 F.3d 907 (3rd Cir. 2005) (recognizing that a suspect retains the right to revoke his consent, in the context of a luggage search); *United States v. Marshall*, 348 F.3d 281 (1st Cir. 2003) (same, in the context of a home search); *United States v. Bustillos-Munoz*, 235 F.3d 505 (10th Cir. 2000) (same, in the context of a vehicle search); *United States v. McFarley*, 991 F.2d 1188 (4th Cir. 1993) (same, in the context of a luggage search).

Accordingly, to the extent Mr. Rocha impliedly consented to evidentiary testing by operating a motor vehicle on Idaho roads, Mr. Rocha validly and unequivocally revoked his consent, when he refused to participate. Thus, if the State wished to prove that Mr. Rocha was under the influence of an intoxicating substance, it had the means to do so. The officer could have obtained a warrant and had Mr. Rocha's blood drawn. Mr. Rocha had the right to refuse, and it would seem that if such a right exists, which is why the Administrative License Suspension Advisory is in effect, that when the defendant exercises that right not to submit to the test, that right is rendered valueless because the jury can draw an inference of guilt.

d. Mr. Rocha has met his burden and established that the arguments made by the prosecutor in closing arguments are fundamental error.

Mr. Rocha never waived any aspect of his constitutional rights; including his Fifth Amendment right against self-incrimination, his right to due process of law and his fundamental right to the presumption of innocence. In Idaho, a defendant may waive a right of constitutional magnitude provided it is shown that he did so knowingly, voluntarily, and intelligently. *State v. Kirkwood,* 111 Idaho 623, 626, 726 P.2d 735, 738 (1986). The record is devoid of any pleading, testimony or statement of Mr. Rocha which can be read as a knowing, voluntary and intelligent waiver of his constitutional rights.

The error is plainly visible in the record without the need for additional information, including information as to whether the failure to object was tactical. This is not a situation in which Mr. Rocha needs the benefit of additional evidence in order to state and support his constitutional challenges to a prosecution, given the record in this case, for a violation of Idaho Code § 18-8004.

This error is clearly not harmless. Mr. Rocha has an absolute constitutional right against self-incrimination as provided by the Fifth Amendment to the United States Constitution and applicable to the states through the Fourteenth Amendment. This right against self-incrimination goes directly to the foundation or basis of Mr. Rocha's rights and cannot be taken away. When the prosecutor argued consciousness of guilt it impermissibly shifted the burden to the Defendant to prove that he was not under the influence when he has an absolute right to refuse and accept the penalty outlined in the Administrative License Suspension Advisory Form. Furthermore because State's Exhibit 3 (ALS Form) was admitted and allowed in with the jury during deliberations, there is no way this Court can be sure that the same result would have been reached had the misconduct and argument about consciousness of guilt not occurred.

ARGUMENT

III.

There Was Insufficient Evidence To Prove Beyond A Reasonable Doubt That Alfredo Rocha Was: 1) Driving or In Actual Physical Control Of A Motor Vehicle; 2) While Under The Influence Of An Intoxicating Substance.

A. Introduction

Mr. Rocha asserts that there was insufficient evidence to convict him of driving under the influence. Specifically, there was no or limited evidence regarding whether he was actually driving or in actual physical control of a motor vehicle while under the influence of an intoxicating substance.

B. There Was Insufficient Evidence To Prove Beyond A Reasonable Doubt That Alfredo Rocha Was Driving Or In Actual Physical Control Of A Motor Vehicle While Under The Influence Of An Intoxicating Substance.

The evidence presented by the State is insufficient to sustain a conviction and there was not substantial evidence presented at trial upon which rational triers of fact could find guilt beyond a reasonable doubt. *St. v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct.App.1987). Evidence is sufficient to sustain a conviction if there is substantial evidence upon which a rational trier of fact could conclude that the defendant's guilt as to each material element was proved beyond a reasonable doubt. *St. v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct.App.1993).

A person is "under the influence" for purposes of section 18-8004, if the person's ability to drive is impaired in some identifiable way by alcohol, drugs, intoxicating substances, or some combination thereof. The state must prove more than a driving impairment, the state must also present evidence, besides the impairment itself, to prove that the impairment was caused by alcohol, drugs, or intoxicating substances. The term intoxicated therefore has two components: (1) impairment; (2) caused by alcohol or drugs.

Lay testimony regarding observations of a person's behavior and actions, including FST's can be used to show impairment, one of the necessary elements. However, it is not enough for the State to prove that Mr. Rocha was impaired. To establish the elements of a DUI offense, the State must prove beyond a reasonable doubt that Mr. Rocha drove or was in actual physical control of a motor vehicle while under the influence of alcohol. *See* I.C. § 18–8004(1)(a). (emphasis added)

An accused's right to demand proof of the State's case beyond a reasonable doubt is of "surpassing importance." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). The right to demand proof beyond all reasonable doubt is a bedrock constitutional principle. *See In re Winship*, 397 U.S. 358 (1970) ("Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it is as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). "Simply stated, the fact that defendant is 'probably' guilty does not equate with guilt beyond a reasonable doubt." *People v. Ehlert*, 811 N.E.2d 620, 631 (Ill. 2004).

In *State v. Crawford*, 130 Idaho 592, 944 P.2d 727 (Ct. App. 1997), it was stated that:

> [a]ppellate review of the sufficiency of the evidence is limited in scope. A judgment of conviction, entered upon a jury verdict, will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt . . . [w]e will not substitute our view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence . . . [m]oreover, we will consider the evidence in the light most favorable to the prosecution.

Id. at 594-595, 944 P.2d at 729-730 (citations omitted).

In *State v. Mitchell*, 130 Idaho 134, 937 P.2d 960 (Ct. App. 1997), it was noted that, "[e]vidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proved." *Id.* at 135, 937 P.2d at 961. "The challenge to the sufficiency of the evidence is not based on a technical or subtle defect. The defense simply says that there was not enough admissible evidence to convict the defendant." *State v. Faught*, 127 Idaho 873, 877, 908 P.2d 566, 570 (Ct. App. 1995).

Without any evidence regarding whether Mr. Rocha was under the influence of alcohol or an intoxicating substance at the time he was driving or in physical control of a motor vehicle there is not substantial and competent evidence to support a verdict of guilty. Mr. Rocha contends that there was no evidence from which the jury in his case could draw reasonable and justifiable inferences of guilt. *State v. Ojeda,* 119 Idaho 862, 810 P.2d 1148 (Ct.App.1991).

On appeal, it is clear the Court is precluded from substituting its judgment for that of the jury as to the credibility of the witnesses, the weight of the testimony and the reasonable inferences to be drawn from the evidence. *State v. Campbell*, 104 Idaho 705, 718-19, 662 P.2d 1149, 1162-63 (Ct.App.1983). The Court must review the evidence, and permissible inferences that can be drawn reasonably from the evidence, in the light most favorable to the respondent. *State v. Slawson*, 124 Idaho 753, 757, 864 P.2d 199, 203 (Ct.App.1993). Where there was substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we will not set aside a judgment of conviction entered upon a jury verdict. *Id.*

In this case the evidence which was admitted at trial was that the officer observed a red passenger car parked on the east side of the road at Locust Grove and Victory. (1/11/13 Tr. p.22, Ls.16-23). The hood of the vehicle was up, and leaning against the front windshield of the car.

(1/11/13 Tr. p.22, Ls.16-23). When the officer stopped her vehicle and approached the suspect car she was able to see two men in the vehicle, both had their heads resting against the headrest. (1/11/13 Tr. p.23, Ls.13-23). The officer called for an assist and waited about ten minutes for that assist to arrive. (1/11/13 Tr. p.23, L.21 – p.24 L.1). The officer had to wake up the driver who was sleeping in the vehicle, the key was in the ignition but the vehicle was not turned on or running. (1/11/13 Tr. p.24, L.5 – p.25 L.13).

The District Court appears to have relied on the above factual evidence which was admitted at trial. However, the District Court completely overlooked the requirement that the defendant drove or was in actual physical control of a motor vehicle ***while*** under the influence of alcohol. It's not in dispute that Mr. Rocha may have been impaired at the time he was given field sobriety testing but **no** evidence was admitted with regard to the time at which Mr. Rocha was driving, nor was any evidence admitted that he was under the influence of alcohol an intoxicating substance at the time he was driving. There were no witnesses to his driving, no 911 calls, no testimony other than his own admission that he had driven to this point at some time in the evening, but no evidence as to when. Further, the car was not running and Mr. Rocha was not in the driver's position as he was laid back and asleep when approached by law enforcement.

When the Officer approached the car it was parked. She watched the car for arguably twenty-five (25) minutes before making contact with the occupants. She never saw Mr. Rocha drive. No one ever saw Mr. Rocha drive and there was no evidence of any driving pattern. The vehicle was inoperable, on the side of the road with the hood up leaning against the windshield. There was no evidence presented by the State as to how long Mr. Rocha was on the side of the road. In fact evidence was admitted that he could possibly have been there for up to 2 hours. No rational trier of fact can make a reasonable inference that Mr. Rocha was under the influence at

the time he was driving because it would be pure speculation. The State laid a factual basis that he may have been impaired at the time the officer made contact, but no leap can be made to any time prior to that.

Consequently, there may be competent and substantial evidence that he was impaired at 4:30 in the morning, but there was not substantial and competent evidence which would lead a reasonable trier of fact to infer that Mr. Rocha was impaired at the time he was driving or in actual physical control of a vehicle because no evidence was admitted as to when the Mr. Rocha was actually driving.

CONCLUSION

For the reasons set forth above, Mr. Rocha respectfully requests that this court vacate his judgment of conviction and enter a judgment of acquittal.

DATED this 20th day of February 2014.

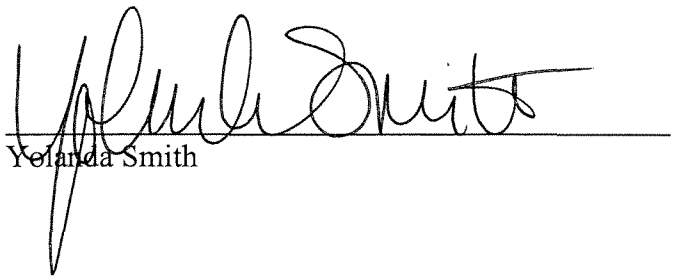
HEIDI TOLMAN
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 24th day of February 2014, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter to:

MICHAEL MCLAUGHLIN
DISTRICT COURT JUDGE

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



Yolanda Smith