7-15-2019

State v. Cazier Appellant's Brief Dckt. 46480

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. LEON CAZIER, Defendant-Appellant,	Supreme Court No. 46480-2018 Twin Falls County No. CR42-17-7931

OPENING BRIEF OF APPELLANT LEON CAZIER

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE THOMAS J. RYAN
District Judge

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A. Nature of the Cases

Appellant Leon Cazier appeals from his judgment of conviction and sentence for domestic violence that inflicted traumatic injury in the presence of a child under sixteen in violation of I.C. §§ 18-903, 918(2)(a), (4).

B. General Course of Proceedings

Leon's wife, Shalan, suffered from anxiety, depression and borderline personality disorder and frequently went into rages where she threatened to kill or harm herself or the couple's three children. Ex. 888; Ex. 117, 45-2:03. In the summer 2016, Health and Welfare removed Shalan from the home after she threatened her son with a knife. *Id.* However, the counselor's disbelieved Leon's accounts of Shalan's extreme conduct and she moved back in with the family. *Id.*

In summer of 2017, the couple conceived their fourth child and as Shalan's pregnancy took its toll, her threats toward Leon and the children increased. *Id.* Before 5:00 a.m. the morning of August 9, 2017, Leon woke and sat in his office reading an article about dinosaurs and eating cereal. Ex. 88, 119. Shalan confronted Leon at his computer, accusing him of being unfaithful and an argument ensued. *Id.* Shalan became extremely angry and threatened to kill their two year old daughter and the baby she was carrying. *Id.*

As Shalan stood, holding the toddler with a knife to her throat, Leon grabbed her right wrist, bear hugged Shalan, took her down to the floor, and got the knife away from her. Ex. 88, 119, 30:00 - 55:00. As Shalan squirmed and yelled obscenities, Leon turned her onto her chest,

put his hand over her mouth and put his knee in her back. *Id*. Leon picked the toddler up and stayed on Shalan, telling her to calm down. *Id*. Shalan seemed to calm, Leon released her and went to put the child in her crib. *Id*. Shalan followed, continuing to yell and threaten, and tried to take the toddler. *Id*. Leon took her to the ground again, grabbed her from behind. Shalan indicated she could not breathe and Leon released her. *Id*.

Shalan had calmed and Leon helped her back to bed, knowing rest would improve her mood. *Id*. Meanwhile, Leon went outside to pull weeds and trim rose bushes receiving various scratches. *Id*. Just before 9:00 am., Leon returned inside to clean the rabbit cage, getting scratched by the rabbit in the process. Ex. 88. Hearing a strange noise, Leon went back into the bathroom and found Shalan in the tub, slumped down in the water with her face partially submerged.

At 8:44 am, Leon called 911 as he tried to remove Shalan, who weighed more than 200 pounds, from the tub. Tr. Vol. 6 (6-18 to 24, 2018) p. 190, ln. 2 - p. 193, ln. 11. With the operator on the line, Leon struggled and eventually removed Shalan from the tub and laid her on the bathroom floor. Ex. 1. Leon — who is a registered nurse— began administering CPR. Desperately afraid of losing his wife, Leon attempted to apply cricoid pressure — an old CPR method he was taught as an RN where pressure is applied to the cricoid artery on the neck in attempt to open up an airway. Ex. 111, 16:00 - 19:00. Shalan was slippery and Leon slipped, pushing too hard on Shalan's neck. *Id.* The technique nevertheless appeared to work as Shalan began "agnonal" breathing — an irregular snoring sound. Tr. Vol. 6 (6-18 to 24, 2018) p. 209, ln. 7-24; Ex. 1, 3:52-4:44.

An EMT dispatched to Leon's residence knocked, entered the residence and shouted. Tr. Vol. 6 (6-18 to 24, 2018) p. 190, ln. 2 - p. 193, ln. 11; p. 196, ln. 16-25. Mr. Cazier motioned the EMT to follow to the bathroom, where Shalan lay unclothed on the wet bathroom floor. *Id.* at. p. 190, ln. 2 - p. 193, ln. 11. p. 196, ln. 16-25; p. 198, ln. 2 - p. 199, ln. 9; p. 203, ln.16 - p. 204, ln. 7; Ex. 7. After detecting a pulse in Shalan's wrist, the EMT grabbed her wrists and directed Leon to grab Shalan's legs as they carried her to the kitchen where there was more room. Tr. Vol. 6 (6-18 to 24, 2018) p. 204, ln. 13-21; p. 205, ln. 2 - p. 206, ln. 10.

A paramedic arrived and intubated Shalan after determining her airway was compromised. *Id.* at. p. 208, ln. 14-23; p. 222, ln. 1-25, 233, ln. 8-15; p. 223, ln. 7-14; p. 225, ln. 1 - p. 226, ln. 5. With breathing assistance, Shalan's oxygen saturations rose from low to normal. *Id.* at. p. 209, ln. 7 - p. 210, ln. 18. The paramedic called for flight ambulance to take Shalan to Boise, because Shalan required neurological care not available in the Magic Valley, who arrived at 9:20. *Id.* at. p. 243, ln. 1-4; p. 242, ln. 4-7; p. 244, ln. 10 - p. 245, ln. 1; p. 248, ln. 3-14.

An hour after encountering Shalan, the flight staff handed her off to the trauma team at the hospital. *Id.* at. 259, ln. 22 - p. 260., ln. 2. The trauma team in the emergency room thought it appeared Shlana had drowned and determined she required admission to the critical care unit, where a specialist in pulmonary medicine and critical care assumed her care. *Id.* at. p. 281, ln. 9-25; p. 283, ln. 5-16.

The critical care physician noted petechial hemorrhages on Shalan's face, which are tiny pinpoint red marks that occur when blood leaks from the tiny capillaries in the skin, which can rupture due to increased pressure on the veins. *Id.* at. p. 358, ln. 10-19; p. 471, ln. 22 -

p. 472, ln. 12. Petechiae can be caused by severe asthma, coughing episodes, vomiting, child birth, strenuous activity, or blocking an airway. *Id.* at. p. 266, ln. 8-22; p. 477, ln. 10 - p. 478, ln. 18.

Shalan remained non-responsive and a CT scan reflected brain damage. *Id.* at. p. 285, ln. 7-23. The doctor determined that Shalan suffered an anoxic brain injury, which is brain injury from low oxygen. *Id.* at. p. 284, ln. 17-20. Further, the chest x-ray was consistent with fluid having entered Shalan's mouth as she lay on her side, partially submerged in the bathtub. *Id.* at. p. 288, 7-15; p. 325, ln. 7-25. However, a mark on Shalan's neck where cricoid pressure was applied had become more pronounced. *See Id.* at. p. 252, ln. 19-25; p. 261, ln. 1-24; p. 262, ln. 7-11; p. 293, ln. 3-21; p. 332, ln. 9- p. 333, ln. 6. The bruising on Shalan's neck concerned the doctor that Shalan could have been strangled and he called law enforcement. *Id.* at. p. 294, ln. 9-16; p. 308, ln. 5-7.

That afternoon, Leon arrived at the hospital and officers interviewed him. *Id.* at. p. 653, ln. 19 - p. 654, ln. 18. Leon told the officers he was outside doing yard work when his wife began texting him about being in the bath. Ex. 111. 2:30-5:30. The officers noticed scratches on Leon's arms, face and ear, which Leon explained came from yard work. Ex. 111, 7:15-7:55; 23:00-26:00. The officers ended their questioning and Leon returned home to care for his rabbits. Tr. Vol. 6 (6-18 to 24, 2018) p. 655, ln. 13-23. Leon then explained about finding Shalan in the tub and calling 911. Ex. 111, 8:53 - 19:50. Still hoping Shalan would wake up and having been disbelieved in the past, Leon did not tell the officer about Shalan's threatening conduct. Ex. 88.

The following day, law enforcement interviewed Leon for nearly four hours. Ex. 119, 120. Leon eventually explained about his wife's past violence and the threats she made toward their toddler and unborn child the previous morning. *Id.* Officers arrested Leon for domestic battery and attempted strangulation. R. 15-20. Leon was bound over after preliminary hearing and an amended information accused him with committing felony domestic violence, in the presence of children, by covering Shalan's mouth and/or nose which obstructed her breathing; and/or by placing his hand(s) around her neck and squeezing or in another manner strangling her; and/or by sitting on her torso, and/or by causing water to enter her nose and/or mouth. R. 84. The state alleged that the battery inflicted a traumatic injury in one of four ways: anoxic brain injury; and/or respiratory failure; and/or petechiae on her face and/or head; and/or bruises and/or contusions on her face and/or torso. R. 84.

The case proceeded to trial and the state presented medical testimony that the petechia throughout the facial area was indicative of strangulation. The morning of the fifth day of trial, Mr. Cazier asked the district court to voir dire the jury whether it received outside information regarding the case after an inflammatory news article mis represented the facts and circumstances of the case. Tr. Vol 7 p. 5, ln. 8 - p. 6, ln. 5. The state objected, arguing that the jury had already been instructed to disregard and report any outside influence. *Id.* at p. 6, ln. 6 - p. 7, ln. 3. The district court agreed that the article did not "adequately or accurately describe what's gone on in the courtroom," and that any taint could be the ground for a new trial but declined Leon's request to voir dire the jury regarding the article. *Id.* at p. 7, ln. 20 - p. 8, ln. 12.

Leon presented expert testimony explaining that a CT scan performed of Shalan's neck using dyes showed there were not any injuries to her throat. *Id.* at p. 20, ln. 10 - 22, ln. 2. The expert also testified that applying force on someone's back while they are laying face down and screaming could bring about petechiae featured on Shalan's face. *Id.* at p. 23, ln. 10 - 28, ln. 20. The expert explained that CPR could not only cause petechiae but also enhance it. *Id.* at p. 29, ln. 12 - 31, ln. 24.

For the first twenty-five minutes of her closing argument, the prosecutor played a portion of Leon's video recorded interview. R 292; Tr. Vol. 7 (6.25.18) p. 73, ln. 8-13. 119 at 30:59 Mr. Cazier objected that publication of evidence was an improper use of closing argument and cumulative. *Id.* at p. 73, ln. 14-17. The prosecutor advised she had ten more minutes to publish and the district court allowed her to proceed. *Id.* at p. 74, ln. 12-15. Court recessed following the video's publication and, outside the jury's presence, Mr. Cazier objected to the state using additional video in its closing argument. *Id.* at p. 75, ln. 3-9. The district court admonished the prosecutor: "I'm going to have to agree. I was a little concerned about giving you some leeway, but you could -- closing argument is for you to help the jury understand the evidence that's been presented, not to replay the evidence." *Id.* at p. 75, ln. 10-23. The state advised the district court she had prepared "a short clip of a couple of things" that would not lengthen her argument." *Id.* at p. 76, ln. 1-4. The district court admonished "short clips of time." *Id.* at p. 76, ln. 5-7. The prosecutor then told the jury "remember this?" and played an unidentified portion of the audio recording of Leon's interview in the hospital.

The prosecutor argued that when Leon "was upset, angry, and scared," his wife ended up bruised, unconscious, and brain damaged. *Id.* at p. 78, ln. 12-20. In rebuttal, the prosecutor argued that Leon "lied in a lot ways. He said he was giving carotid pressure, and that's probably what saved her. Let's listen to how he told the officer." *Id.* at p. 125, ln. 6-9. Mr. Cazier objected, arguing "we've had over 30 minutes of audio at this point," which the jury could review, and it was cumulative to continuing playing it during closing argument. *Id.* at p. 125, ln. 10-16.

The district court instructed the prosecutor "just to make it brief." *Id.* at p. 125, ln. 17-18. The prosecutor played the audio for an additional three minutes and Mr. Cazier again objected. CR 292; Tr. Vol. 7 (6.25.18) p. 125, ln. 20-25. Mr. Cazier explained that he had renewed this objection several times and believed Court ruled in his favor, so was "surprised we're still listening to audio and video." *Id.* at p 126, ln. 1-4. Mr. Cazier further objected he did not believe the recording being published was an exhibit and thus the jury could not play the same clip. *Id.* at p. 126, ln. 4-9; p. 127, ln. 1-3. The prosecutor indicated she was playing a portion of Exhibit 111 without identifying the time stamp. *Id.* at p. 131, ln. 4-9.

The district court again reminded the prosecutor she could ask the jury to review exhibits, that the court had asked her to brief, and directed her to move on." *Id.* at p. 131, ln. 10-14. The prosecutor indicated she was finished with Exhibit 111 "but it's important that I play a small portion of the 911 call." *Id.* at p. 130, ln. 14-16. Leon again renewed his objection and the prosecutor responded "I'm playing a portion of the 911 call next. In my closing, I've never been limited." *Id.* at p. 130, ln. 16-21. The district court noted Mr. Cazier's objection and instructed the prosecutor to proceed. *Id.* at p. 130, ln. 22-23. The prosecutor reiterated her intent to "just"

play "a short portion of the 911 call" and played approximately two of the five minute recording. R. 292; Tr. Vol. 7 (6.25.18) p. 127, ln. 1-4. The prosecutor then argued "where did you guys hear him applying carotid pressure? Where did you hear him falling, slipping, face planting in that?" *Id.* at p. 128, ln. 6-9.

The prosecutor argued that Mr. Cazier lied in "so many different ways" because his wife looked like crap and he was scared." *Id.* at p. 129, ln. 3-6. The prosecutor told the jury "let's look at what he said about another way that he faked the scene" and then played an unidentified audio recording. *Id.* at p. 29, ln. 3-9. The prosecutor argued: "Is that when the shaving cream and the razor appeared in that full bathtub, when he tried to make it look like it slipped -- like she had slipped? What really happened in that tub?" *Id.* at p. 129, ln. 10-13. Mr. Cazier renewed his objection and indicated he would do so "every time there's an audio or video clip played. *Id.* at p. 129, ln. 14-16.

The district court admonished the prosecutor "let's get this summed up?" *Id.* at p. 129, ln. 17-20. The prosecutor told the jury: "You ready? What happened in that tub?" and played about a minute from an unidentified portion of an exhibit, at which point Mr. Cazier renewed his objection. *Id.* at p. 129, ln. 25 - p. 130, ln . 4. The prosecutor continued: "Did you just hear that? Did he just say he had to get her shoved in the tub? . . . This man battered his wife, with his baby nearby. . .You saw [the photo exhibits] of Shalan today being fed through a tube and sitting in a wheelchair. Find him guilty." *Id.* at p. 131, ln. 3-14.

The state alleged Leon committed domestic battery: (1) by covering Shalan's mouth and/ or nose, which obstructed her breathing; (2) placing his hands around her neck and squeezing, or

in any other manner, strangling her; (3) by sitting on her torso; (4) or by causing water to enter her nose and mouth. Tr. Vol. 7 (6.25.18) p. 82, ln. 1-12; R. 312. Likewise, the state accused Leon of inflicting four distinct traumatic injuries on Shalan: (1) anoxic brain injury; (2) by respiratory failure; (3) by petechiae on her face or her head; or (4) by bruises and/or contusions on her face and her torso. Tr. Vol. 7 (6.25.18) p. 82, ln. 18 - p. 83, ln. 9; R. 312. The jury was required to agree that the same underlying criminal act and traumatic injury has been proved beyond a reasonable doubt. Tr. Vol. 7 (6.25.18) p. 83, ln. 10 - p. 84, ln. 2; R. 318. The prosecutor argued that the jury should find Leon guilty if it believed his statement that he sat on his wife's body and saw petechiae appear, "you've unanimously found him guilty of this entire charge. That's it. That's enough. One act. One traumatic injury is enough." Tr. Vol. 7 (6.25.18) p. 85, ln. 11-25.

The jury found Leon guilty but the verdict did not identify which battery and which traumatic injury the jury agreed that Leon committed and caused. R. 330. In sentencing Leon, the district court found that the jury had convicted Leon of rendering his wife an invalid. Tr. Vol. 8 (6-26-18) p. 139, ln. 8-13. The district court concluded Shalan's was the "worst injury from a domestic violence situation that I've ever seen in my career" and there was not not "much room for leniency in the circumstances given the nature of the injuries that have been suffered." *Id*. at. p. 139, ln. 8-23. The district court sentenced Leon for a minimum period of custody of 15 years followed by an indeterminate period of custody of up to 5 years for a unified sentence of 20 years. R. 409. This appeal follows.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court violate Mr. Cazier's right to an impartial jury as protected by the Sixth Amendment to the United States Constitution and Article 1, Section 7 of the Idaho Constitution by denying counsel's counsel's request to voir dire the jury in light of the inflammatory and misleading article?

2. Did the prosecutor's misconduct in closing argument deprive Mr. Cazier of his right to due process as protected by the Fourteenth Amendment to the United States Constitution and Article 1, Section 13 of the Idaho Constitution?

3. Did the district court violate Mr. Cazier's right under the Sixth and Fourteenth Amendments to the United States Constitution to have a jury determine each element of the offense by failing to require the jury to identify the acts it unanimously found constituted the battery and sentencing Mr. Cazier for causing the anoxic brain injury

IV. ARGUMENT

A. The District Court Violated Mr. Cazier's Right To An Impartial Jury As Protected By The Sixth Amendment To The United States Constitution And Article 1, Section 7 Of The Idaho Constitution By Denying Counsel's Counsel's Request To Voir Dire The Jury In Light Of The Inflammatory And Misleading Article

The morning of the fifth day of trial, Mr. Cazier asked the district court to voir dire the jury whether it received outside information regarding the case after an inflammatory news article misrepresented the facts and circumstances of the case. Tr. Vol 7 p. 5, ln. 8 - p. 6, ln. 5. The state objected, arguing that the jury had already been instructed to disregard and report any outside influence. *Id.* at p. 6, ln. 6 - p. 7, ln. 3. Mr. Cazier argued that confirming the jury has

followed the district court's instruction would be harmless and confirmation was necessary because the article "was absolutely hostile to the defense, to put it conservatively." *Id.* at p. 7, ln. 6-11. The danger of the jury having seen or spoken about the article outweighed any potential harm from the questioning, and Mr. Cazier asked the district court to verify whether the jury had been tainted. *Id.* at p. 7, ln. 10-18.

The district court agreed that the article did not "adequately or accurately describe what's gone on in the courtroom." *Id.* at p. 7, ln. 20-23. The district court further acknowledged that "it may very well be that if the Court does not voir dire the jury and there is a verdict for the State, and [Mr. Cazier] later find out that they have been tainted by an article in the newspaper, there may be grounds for a motion for a new trial." *Id.* at p. 7, ln. 24 - p. 8, ln. 4. The district court nevertheless ruled it was not inclined to question the jury since it was already instructed to report outside influence. *Id.* at p. 8, ln. 4-12.

Article 1, § 7 of the Idaho Constitution guarantees that the right to trial by jury remain inviolate and the Sixth Amendment to the United States Constitution, applicable through the Fourteenth Amendment, guarantees that a jury be "impartial." Due process protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law. *Peters v. Kiff*, 407 U.S. 493, 501 (1972); *State v. Moses*, 156 Idaho 855, 862, 332 P. 3d 767, 774 (2014). Moreover, the right to know whether a juror is qualified and competent is a substantial right that cannot that cannot be lawfully denied. *Moses*, 156 Idaho at 862, 332 P.3d at 774.

Nor does the requirement of an impartial jury end once the jury is empaneled. *Moses*, 156 Idaho at 862, 332 P.3d at 774. The court may reopen voir dire for good cause and discharge any juror found unable to perform jury duty. *Id.* The right given to challenge for cause necessarily carries with it the right to examine for cause, or have the court do so. *Id.*

The decision to reopen voir dire and allow a for-cause hearing is discretionary. *Moses*, 156 Idaho at 863, 332 P.3d at 775. Further, the decision to excuse potential jurors is within the trial court's discretion. *Dunlap v. State*, 159 Idaho 280, 305, 360 P.3d 289, 314 (2015); *Moses*, 156 Idaho at 863, 332 P.3d at 775. A court properly exercises its discretion when it (1) correctly perceives the issue to be one of discretion, (2) acts within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and (3) reaches its decision by an exercise of reason. *State v. Cobler*, 148 Idaho 769, 771, 229 P.3d 374, 376 (2010).

Here, the district court recognized the article was inaccurate and could taint the jury. However, rather than taking the simple precautionary measure Mr. Cazier requested, the district court determine any taint could be raised in a new trial motion. By neglecting to discover if any juror was effected by the inflammatory article and then removing that one juror, the district court allowed potentially tainted jurors to remain, undermining the entire deliberation process.

The district court's decision was inconsistent with the constitutional jury trial protections and was not reached through an exercise of reason. Accordingly, the district court erred in denying Mr. Cazier's request to re-open voir dire and this Court must vacate the judgment of conviction.

B. The Prosecutor's Misconduct In Closing Argument Deprive Mr. Cazier Of His Right To Due Process As Protected By The Fourteenth Amendment To The United States Constitution And Article 1, Section 13 Of The Idaho Constitution

1. Facts in Support of Argument

For the first twenty-five minutes of her closing argument, the prosecutor played a portion of Mr. Cazier's video recorded interview. R 292; Tr. Vol. 7 (6.25.18) p. 73, ln. 8-13. 119 at 30:59 Mr. Cazier objected that publication of evidence was an improper use of closing argument and cumulative. *Id.* at p. 73, ln. 14-17. The prosecutor responded: "It's my argument. I want to play the video as evidence before the jury . . I'm not going to make stuff up about what he said when I've got it actually on a video that they get to watch." *Id.* at p. 74, ln. 2-7. The district court noted the jury could review the exhibit at any time during its deliberations and inquired whether the prosecutor intended to play the remaining hour of the exhibit. *Id.* at p. 74, ln. 8-11. The prosecutor advised she had ten more minutes to publish and the district court allowed her to proceed. *Id.* at p. 74, ln. 12-15.

Court recessed following the video's publication and, outside the jury's presence, Mr. Cazier objected to the state using additional video in its closing argument. *Id.* at p. 75, ln. 3-9. The district court admonished the prosecutor:

> I'm going to have to agree. I was a little concerned about giving you some leeway, but you could -- closing argument is for you to help the jury understand the evidence that's been presented, not to replay the evidence.
>
> And so I've given you considerable leeway up to now, but I think at this rate, we will be going well into the lunch hour with closing arguments. I think it's time for your summary of the evidence to be presented to the jury, not recordings. You can remind them of recordings, you can remind them of the exhibit numbers, and what you believe he said at that time, but it's time for closing remarks.

Id. at p. 75, ln. 10-23.

The state advised the district court she intended to refer to evidence and had prepared "a short clip of a couple of things I intend to show, and its certainly not going to lengthen my argument." *Id*. at p. 76, ln. 1-4. The district court admonished "short clips of time." *Id*. at p. 76, ln. 5-7.

The prosecutor resumed her argument: "remember this?" and published an unknown portion of the exhibit. Similarly, in rebuttal, the prosecutor argued that Leon "lied in a lot ways. He said he was giving carotid pressure, and that's probably what saved her. Let's listen to how he told the officer." *Id*. at p. 125, ln. 6-9. Mr. Cazier objected, arguing "we've had over 30 minutes of audio at this point," which the jury could review and it was cumulative to continuing publishing recording during closing argument. *Id*. at p. 125, ln. 10-16. The district court instructed the prosecutor "just to make it brief." *Id*. at p. 125, ln. 17-18.

The prosecutor published the audio for an additional three minutes and Mr. Cazier again objected. CR 292; Tr. Vol. 7 (6.25.18) p. 125, ln. 20-25. Mr. Cazier explained he had renewed the objection several times and believed Court ruled in his favor, so was "surprised we're still listening to audio and video." Tr. Vol. 7 (6.25.18) p. 126, ln. 1-4. Mr. Cazier further objected that the recording being published was not an exhibit. *Id*. at p. 126, ln. 4-9.

The district court inquired regarding the exhibit being published to the jury and the prosecutor eventually indicated it was a portion of Exhibit 111, the recording of Mr. Cazier's interview at the hospital, without identifying a time-stamp. *Id*. at p. 126, ln. 10-18; p. 131, ln.

4-9. Mr. Cazier objected that the jury could not play the same four minute clip. *Id.* at p. 127, ln. 1-3. The district court reminded the prosecutor she could ask the jury to review the exhibit in argument, that he had asked her to brief, she had "done about five minutes with this, so let's move on." *Id.* at p. 127, 10-14. The prosecutor indicated she intended to "move off of this exhibit, but it's important that I play a small portion of the 911 call. *Id.* at p. 127, p. 130, ln. 14-16.

Mr. Cazier again renewed his objection and the prosecutor responded "I'm playing a portion of the 911 call next. In my closing, I've never been limited." Tr. Vol. 7 (6.25.18) p. 130, ln. 16-21. The district court noted Mr. Cazier's objection and instructed the prosecutor to proceed. *Id.* at p. 130, ln. 22-23. The prosecutor reiterated her intent to "just" play "a short portion of the 911 call" and played approximately two of the five minute recording. R. 292; Tr. Vol. 7 (6.25.18) p. 127, ln. 1-4. The prosecutor then argued "where did you guys hear him applying carotid pressure? Where did you hear him falling, slipping, face planting in that?" *Id.* at p. 128, ln. 6-9.

The prosecutor argued that Mr. Cazier lied in "so many different ways" because his wife looked like crap and he was scared." *Id.* at p. 129, ln. 3-6. The prosecutor told the jury "let's look at what he said about another way that he faked the scene" and then played an unidentified audio recording. *Id.* at p. 129, ln. 3-9. The prosecutor argued: "Is that when the shaving cream and the razor appeared in that full bathtub, when he tried to make it look like it slipped -- like she had slipped? What really happened in that tub?" *Id.* at p. 129, ln. 10-13. Mr. Cazier renewed his objection and indicated he would do so "every time there's an audio or video clip played. *Id.* at p.

129, 14-16. The district court indicated: "You may do that. And, Counsel, I guess I will remind you that the Court does have discretionary control over the time of closing argument, so let's get this summed up?" *Id.* at p. 129, 17-20.

The prosecutor advised: "Absolutely, Your Honor. I would be done by now" and told the jury: "You ready? What happened in that tub?" *Id.* at p. 129, ln. 21 - p. 130, ln. 2. After the audio played for a minute or so, Mr. Cazier renewed his objection *Id.* at p. 130, ln. 3-4.

The prosecutor continued:

> Did you just hear that? Did he just say he had to get her shoved in the tub? Listen to that evidence really closely. Listen to State's Exhibit 119. This man battered his wife, with his baby nearby, and his other kids sleeping upstairs. You get to look at those exhibits. You saw [the photo exhibits] of Shalan today being fed through a tube and sitting in a wheelchair. Find him guilty.

Id. at p. 131, ln. 3-14.

2. Why relief should be granted

Closing argument serves to sharpen and clarify the issues for the jurors and to help them remember and interpret the evidence. It gives each party an opportunity to present its view of what the evidence proves or fails to prove. *Herring v. New York*, 422 U.S. 853, 862 (1975); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007); *State v. Adams*, 147 Idaho 857, 863, 216 P.3d 146, 152 (Ct. App. 2009). A prosecutor exceeds his or her considerable latitude in closing argument by attempting to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence. *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). Counsel are traditionally afforded considerable latitude to discuss fully, from their respective

standpoints, the evidence, inferences and deductions arising from the evidence. *State v. Payne*, 146 Idaho 548, 566, 199 P.3d 123, 141 (2008); *State v. Severson*, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

A prosecutor commits misconduct by appealing to emotion, passion or prejudice of the jury through use of inflammatory tactics. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Adams*, 147 Idaho at 863, 216 P.3d at 152; *Phillips*, 144 Idaho at 86–87, 156 P.3d at 587–88. Inflammatory comments are those calculated to inflame the jurors' minds and arouse passion or prejudice against the defendant such that the jurors may be influenced to determine guilt on factors outside the evidence. *State v. Miller*, No. 46517, 2019 WL 1217673, at *6 (Idaho Mar. 15, 2019), *reh'g denied* (June 12, 2019); *Sheahan,* 139 Idaho at 280, 77 P.3d at 969.

Where, as here, the defendant objected to the misconduct, the State must prove that the the prosecutor's tactics were harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 21 (1967); *Perry*, 150 Idaho at 227, 245 P.3d at 979; *State v. Marmentini*, 152 Idaho 269, 271, 270 P.3d 1054, 1056 (Ct. App. 2011). Generally, where a defendant's objection to alleged misconduct is sustained, there is no unfavorable ruling for this Court to review or reverse. *Marmentini*, 152 Idaho at 271, 270 P.3d at 1056; *State v. Sanchez*, 142 Idaho 309, 317, 127 P.3d 212, 220 (Ct. App. 2005). Nevertheless, prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process even when objections are sustained. *Greer v. Miller*, 483 U.S. 756, 765–66 (1987); *Marmentini*, 152 Idaho at 271, 270 P.3d at 1056. To constitute a due process violation, the prosecutorial misconduct must be of sufficient

significance to result in the denial of the defendant's right to a fair trial. *Greer*, 483 U.S. at 765; *Marmentini*, 152 Idaho at 271-72, 270 P.3d at 1056-57

Thus, when prosecutorial misconduct may have resulted in a violation of due process, the trial court's decision to sustain or overrule a contemporaneous defense objection to the prosecutor's comment is not determinative of whether this Court will review the issue. *Greer*, 483 U.S. at 764–65. Instead, whether the trial court sustains or overrules an objection to impermissible closing arguments are questions that are relevant to the harmless-error inquiry, or to deciding whether the error made the trial fundamentally unfair. *Greer,* 483 U.S. at 767 (Stevens, J., concurring); *Marmentini*, 152 Idaho at 2772, 270 P.3d at 1057.

Despite repeated objections and admonishments, the prosecutor continued to re-publish evidence in closing argument. In so doing, the prosecutor repeatedly emphasized portions of interviews, out of context, and without identifying the portion of the exhibit she was publishing, and at times, did not even identify the exhibit. These clips were not presented to help the jury understand the evidence but to inflame its passions.

Indeed, the prosecutor followed the videos' publication with the repetitive use of a phrase taken from the video, asking the jury what happened "when the defendant was upset, angry, and scared?" Tr. Vol. 7 (6-25-18) p. 78, ln. 12-24. The prosecutor presented photos of Shalan in the hospital, telling the jury that when Leon was upset and angry, his wife "was unconscious, breathing with help from an apparatus attached to her mouth, strapped to her face" and "staring into space, with her head being cradled by healthcare workers." and "her hands were posturing due to a brain injury. You see that clenched hand in this image." *Id.* at p. 78, ln. 12-24.

The prosecutor repetitively published portions of Leon's interviews, without citations to the exhibits, and despite repeated objections and admonishments. The prosecutor's publication of the same exhibits did not help the jury understand the evidence but was designed to appeal to their passions and prejudice. The jury heard conflicting evidence regarding the events leading to Shalan's injuries, including expert testimony that the injuries could have resulted from CPR and the incorrectly applied cricoid pressure. The prosecutor's conduct permeated the trial with unfairness, was not harmless and deprived of Mr. Cazier right to a fair trial under the Fourteenth Amendment.

C. By Failing To Require The Jury To Identify The Acts It Unanimously Found Constituted The Battery And Sentencing Mr. Cazier For Causing The Anoxic Brain Injury, The District Court Violated Mr. Cazier's Right Under The Sixth And Fourteenth Amendments To The United States Constitution To Have A Jury Determine Each Element Of The Offense

The Sixth Amendment right to a trial by jury, in conjunction with the Due Process Clause, requires the state to prove each element of a crime be proved to a jury beyond a reasonable doubt. *Hurst v. Fla.*, 136 S. Ct. 616, 621 (2016); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). The touchstone to determine whether the jury must find a fact beyond a reasonable doubt is whether the fact constitutes an "element" of the charged offense. *Apprendi*, 530 U.S. at 477; *State v. Stover,* 140 Idaho 927, 930, 104 P.3d 969, 972 (2005)

Judicial fact-finding under indeterminate sentencing regimes are permissible because the facts do not pertain to whether the defendant has a legal right to a lesser sentence, which makes all the difference insofar as judicial impingement upon the traditional role of the jury is

concerned. *Blakely v. Washington*, 542 U.S. 296, 308 (2004); *Stover*, 140 Idaho at 930–31, 104 P. 3d at 972–73.

Here, however, the state alleged Leon committed domestic battery in different ways causing one of four traumatic injuries, ranging from bruises to the anoxic brain injury. When the evidence indicates that several distinct criminal acts have been committed but the defendant is charged with only one count of criminal conduct, jury unanimity must be protected by prosecutorial election of a single act upon which it will rely for conviction or by a clarifying instruction requiring the jurors to agree that the same underlying criminal act has been proven beyond a reasonable doubt. *Miller v. State*, 135 Idaho 261, 268, 16 P.3d 937, 944 (Ct. App. 2000).

Thus, the jury was required to agree whether Leon committed domestic battery: (1) by covering Shalan's mouth and/or nose, which obstructed her breathing; (2) placing his hands around her neck and squeezing, or in any other manner, strangling her; (3) by sitting on her torso; or (4) by causing water to enter her nose and mouth. Tr. Vol. 7 (6-25-18) p. 82, ln. 1-12. Similarly, the jury was required to agree on a traumatic injury (1) anoxic brain injury; (2) by respiratory failure; (3) by petechiae on her face or her head; or by bruises and/or contusions on her face and her torso. *Id.* at p. 82, ln. 18 - p. 85, ln. 11.

Moreover, the prosecutor encouraged not to think long and hard on the more difficult questions, since it should find Leon guilty if it believed his statement that he sat on his wife's body and that he saw petechiae appear. *Id.* at p. 85, ln. 11-25. The prosecutor explained if the

jury all agreed on a bruise: "you've unanimously found him guilty of this entire charge. That's it. That's enough. One act. One traumatic injury is enough." *Id.* at p. 85, ln. 11-25.

However, the verdict form did not reveal which act or injury the jury agreed on. Further, in sentencing Leon, the district court noted that he had been convicted by an unanimous jury of causing a traumatic injury and that "couldn't be worse" and that his wife an invalid. who could not speak, care for herself, or care for her children." Tr. Vol. 9 (9.21.18) p. 139, ln. 8-13. The district court emphasized "it's the worst injury from a domestic violence situation that I've ever seen in my career and there was not "much room for leniency in the circumstances given the nature of the injuries that have been suffered." *Id*. at p. 139, ln. 8-23. The district court thus imposed a unified term of twenty years with a minimum period of confinement of fifteen years. *Id*. at p. 139, ln. 15-24.

Unlike a circumstance where a court imposes a harsh sentence based on the crime's surrounding circumstances, Leon was accused of distinct offenses. The district court sentenced Leon for the most aggravated injury — the most aggravated offense — without knowing whether the jury found him guilty of causing the brain injury or only unanimously concluded that he unjustifiably bruised Shalan during their struggle for the knife.

The district court's sentence violated Leon's due process right to have a jury determine each element of a criminal offense beyond a reasonable doubt. Accordingly, this Court must vacate the sentence and remand.

IV. CONCLUSION

For all the reasons set forth above, this Court should vacate Mr. Cazier's judgment of conviction and sentence.

Respectfully submitted this 15th day of July 2019.

FYFFE LAW, LLC

/s/ Robyn Fyffe
ROBYN FYFFE
Attorney for Leon Cazier

CERTIFICATE OF SERVICE

I CERTIFY that on July 15, 2019, I served the foregoing document via the File and Serve system to the email that was identified as the service contact for the Criminal Appellate Unit of the Office of the Attorney General.

/s/ Robyn Fyffe
ROBYN FYFFE