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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46480-2018**
Plaintiff-Respondent,	)	
	)	**Twin Falls County Case No.**
v.	)	**CR42-2017-7931**
	)	
LEON THOMAS CAZIER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATEMENT OF THE CASE

Nature Of The Case

Leon Thomas Cazier appeals from his conviction for domestic violence in the presence of a child.

Statement Of The Facts And Course Of The Proceedings

Emergency personnel responded to a home in Buhl and found Cazier's wife and the mother of his children, Shalan Cazier, unconscious and in distress, and she was transported to the emergency room with apparent brain injury caused by lack of sufficient oxygen. (Trial Tr., p. 189, L. 5 – p. 213, L. 3; p. 219, L. 21 – p. 232, L. 9; p. 237, L. 5 – p. 260, L. 13; p. 281, L. 9 – p. 321, L. 7; p. 352, L. 23 – p. 363, L. 4; p. 369, L. 23 – p. 370, L. 6; State's Exhibits 9-12, 14-25, 31-33.) After examining Shalan, the emergency room physician was concerned that she had been strangled and notified the police. (Trial Tr., p. 308, Ls. 3-16; p. 309, L. 19 – p. 310, L. 16.) The police brought in a forensic pathologist who confirmed that Shalan's brain damage was caused by "compression of the neck." (Trial Tr., p. 464, L. 24 – p. 491, L. 19; p. 539, L. 10 – p. 572, L. 9; p. 650, L. 11 – p. 653, L. 15; see also p. 621, L. 13 – p. 639, L. 11.)

The state charged Cazier with domestic violence in the presence of a child. (R., pp. 56-57, 81, 83-84, 104.) The matter proceeded to trial. (R., pp. 268-79, 282-93.)

Toward the end of the trial the defense notified the court that an article in the local paper had been published "relative to this case" and moved to question the jurors "whether or not they received any information outside of trial." (6/26/18 Tr., p. 5, L. 8 – p. 6, L. 5.) The district court agreed that the article "did not adequately or accurately describe what's gone on in the courtroom," but denied the motion because the jury had been "adequately

instructed" to avoid outside information about the case and that they were to report any attempts to provide them information outside of court. (6/26/18 Tr., p. 7, L. 19 – p. 8, L. 12.)

After the close of evidence and the instruction of the jury the prosecutor gave the state's closing argument. (6/26/18 Tr., p. 73, L. 11 – p. 86, L. 2.) Part of that argument included playing portions of the video interview of Cazier by officers. (6/26/18 Tr., p. 73, L. 12.) After several minutes of the video being played, defense counsel objected on the basis that playing the exhibit to the jury was "cumulative." (6/26/18 Tr., p. 73, Ls. 14-25; p. 75, Ls. 5-9.) The district court initially overruled the objection (6/26/18 Tr., p. 74, Ls. 8-14), but later instructed the prosecutor to use only "short clips" (6/26/18 Tr., p. 75, L. 10 – p. 76, L. 5). In rebuttal closing argument Cazier's counsel renewed the objection, calling the playing of portions of audio or video exhibits "cumulative" and "argumentative." (6/26/18 Tr., p. 125, Ls. 10-16; p. 125, Ls. 21-22; p. 125, L. 25 – p. 126, L. 9; p. 126, L. 19 – p. 127, L. 3; p. 127, Ls. 17-18; p. 129, Ls. 14-16; p. 130, Ls. 3-4.) The district court instructed the prosecutor to "make it brief," but told the prosecutor she "may proceed." (6/26/18 Tr., p. 125, Ls. 17-18; p. 127, Ls. 10-13; p. 127, Ls. 22-23.) The court stated its ruling was based on its "discretionary control over the time of closing argument." (6/26/18 Tr., p. 129, Ls. 17-21.)

The jury convicted Cazier of domestic violence in the presence of a child. (R., p. 330.) The district court entered judgment and Cazier filed a timely notice of appeal from the judgment. (R., pp. 409-11, 414-16.)

ISSUES

Cazier states the issues on appeal as:

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 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 I, 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[?]

(Appellant's brief, p. 10.)

The state rephrases the issues as:

1. Has Cazier failed to show error in the district court's ruling that the jury was adequately instructed on outside information and that it was unnecessary to re-open voir dire because of a recent newspaper article about the trial?

2. Has Cazier failed to show that the prosecutor violated his due process rights by playing parts of audio and video exhibits admitted into evidence at trial?

3. Has Cazier failed to argue, much less show, fundamental error in not giving a special verdict form?

ARGUMENT

I.
Cazier Has Failed To Show Error In The District Court's Denial Of His Request To Re-Open Voir Dire

A. Introduction

During trial Cazier moved to re-open voir dire to determine if jurors had been exposed to a report in the local newspaper regarding the trial. (6/26/18 Tr., p. 5, L. 8 – p. 6, L. 5.) The district court concluded the jurors had been instructed to not expose themselves to outside information and there was no need to inquire of them whether they had followed those instructions. (6/26/18 Tr., p. 7, L. 19 – p. 8, L. 12.) On appeal Cazier acknowledges that he had the burden of showing good cause to voir dire the jury, but argues only that the district court abused its discretion when it "neglect[ed] to discover" whether jurors had read the article and been influenced thereby. (Appellant's brief, pp. 11-12.) Cazier has failed to show that he demonstrated good cause to re-open voir dire or that the district court abused its discretion when it concluded that its repeated instructions to avoid out-of-court information were sufficient grounds to deny the motion.

B. Standard Of Review

"Although voir dire is generally completed at the beginning of a trial, it may later be reopened at the trial court's discretion." State v. Moses, 156 Idaho 855, 862, 332 P.3d 767, 774 (2014).

C. Cazier Has Shown No Abuse Of Discretion

Challenges for cause must be made at the conclusion of voir dire except "as permitted by the court on a showing of good cause." I.C.R. 24(c)(3). See also Moses, 156

Idaho at 863, 332 P.3d at 775. The mere existence of media reports about a trial is "insufficient to justify a conclusion that the jury received evidence out of court." State v. Polson, 92 Idaho 615, 621, 448 P.2d 229, 235 (1968). "Juries are presumed to follow the instructions given by the court." State v. Hall, 163 Idaho 744, 807, 419 P.3d 1042, 1105 (2018).

The district court repeatedly instructed the jury that it was not to receive information about the case outside the courtroom. (Trial Tr., p. 77, Ls. 19-23; p. 162, Ls. 7-18; p. 171, L. 2 – p. 173, L. 14; p. 185, Ls. 10-14; p. 495, Ls. 14-17; p. 750, Ls. 21-25; p. 761, Ls. 19-23; p. 809, L. 25 – p. 810, L. 8.) Cazier presented no evidence that the jurors disregarded those instructions, claiming only that an article about the trial had been published in the local paper. (6/26/18 Tr., p. 5, L. 8 – p. 6, L. 5.) The mere existence of a newspaper article was not alone good cause to re-open voir dire. Moreover, there was no showing to rebut the presumption that the jurors followed their instructions to avoid extraneous information about the case.

On appeal Cazier argues the district court abused its discretion because it "neglect[ed] to discover if any juror was effected [sic] by the inflammatory article and then removing that one juror" thus "allow[ing] potentially tainted jurors to remain" and deliberate. (Appellant's brief, p. 12.) Despite acknowledging that he had the burden of showing good cause to re-open voir dire, Cazier makes no argument as to why the existence of the article was alone enough to show good cause. (Appellant's brief, pp. 11-12.) It was not. See Polson, 92 Idaho at 621, 448 P.2d at 235. Furthermore, the jury must be presumed to have followed its instructions and not read the article. See Hall, 163 Idaho at 807, 419

P.3d at 1105. Cazier's argument effectively reverses the presumption, and requires this Court to assume that jurors ignored or disobeyed their instructions.

Cazier has cited no case holding or suggesting that a court must re-open voir dire every time there is a media report about the ongoing trial. His motion below and his argument on appeal is premised on the belief the jurors did not follow their instructions, but without any evidence or reason to believe that in fact happened. On this record Cazier failed to show good cause, and the jury must be presumed to have followed its instructions. Cazier has thus failed to show that the district court abused its discretion.

II.
Cazier Has Not Established That Playing Portions Of Admitted Audio Or Video Exhibits During Closing Argument Was Misconduct

A. Introduction

Cazier objected to the prosecutor playing portions of audio or video exhibits during closing arguments as "cumulative" and "argumentative." (6/26/18 Tr., p. 73, Ls. 14-25; p. 75, Ls. 5-9; p. 125, Ls. 10-16; p. 125, Ls. 21-22; p. 125, L. 25 – p. 126, L. 9; p. 126, L. 19 – p. 127, L. 3; p. 127, Ls. 17-18; p. 129, Ls. 14-16; p. 130, Ls. 3-4.) The district court allowed the playing of portions of the video and audio exhibits, but exercised its "discretionary control over the time of closing argument" and instructed the prosecutor to limit the scope of those excerpts. (6/26/18 Tr., p. 74, Ls. 8-14; p. 75, L. 10 – p. 76, L. 5; p. 125, Ls. 17-18; p. 127, Ls. 10-13; p. 127, Ls. 22-23; p. 129, Ls. 17-21.) On appeal Cazier argues that the prosecutor sought to "inflame [the] passions" of the jury during closing argument by playing excerpts of audio and video exhibits. (Appellant's brief, pp. 13-19.) Cazier's argument is not preserved and, even if preserved, is without merit.

B. Standard Of Review

Where a trial court has overruled an objection to a closing argument in a criminal trial, the appellate court engages in a two-step analysis—first asking whether misconduct occurred and, if so, whether the misconduct was harmless. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

C. Cazier's Appellate Argument Is Unpreserved And Without Merit

"[B]oth the issue and the party's position on the issue must be raised before the trial court for it to be properly preserved for appeal." State v. Gonzalez, 165 Idaho 95, 439 P.3d 1267, 1271 (2019). Here the objection to playing portions of audio and video exhibits admitted at trial was that doing so was "cumulative" and "argumentative." (See, e.g., 6/26/18 Tr., p. 130, Ls. 3-4.) On appeal, however, Crazier argues that playing the exhibit excerpts was "an appeal to [the jury's] passions and prejudice." (Appellant's brief, p. 19.) This argument is not preserved and Cazier has not claimed fundamental error. Thus, Cazier has failed to present a cognizable issue for appellate review.

Even if the issue were preserved it is without merit. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." State v. Herrera, 164 Idaho 261, 273, 429 P.3d 149, 161 (2018) (internal quotes omitted). "There is considerable latitude in closing argument, and both sides are entitled to discuss fully, from their respective standpoints, the evidence and the inferences that should be drawn from it." State v. Alwin, 164 Idaho 160, 169, 426 P.3d 1260, 1269 (2018) (internal quotes and ellipses omitted). "A party may utilize admitted evidence in its closing argument." State v. Baker, 161 Idaho 289, 300, 385 P.3d 467, 478 (Ct. App. 2016). Cazier's argument that it was improper for the prosecutor to utilize the admitted exhibits is without merit.

Finally, even if playing portions of the audio or video exhibits during closing argument could be considered improper, any possible error was harmless. Prosecutorial misconduct "does not automatically require reversal." State v. Christiansen, 144 Idaho 463, 471, 163 P.3d 1175, 1183 (2007). A court need not reverse a conviction for prosecutorial misconduct "if the Court can conclude, based upon the evidence and argument presented during the trial, that the jury would have reached the same result absent the error." Id. Playing portions of admitted audio and video exhibits during closing argument was not unfairly prejudicial. The jury heard the exhibits when they were published at trial and was free to listen to them again during deliberations. Hearing the actual admitted evidence during argument, as opposed to the prosecutor's characterization of that evidence, almost by definition did not unfairly prejudice Cazier. Any error was necessarily harmless.

III.
Cazier Has Failed To Argue, Much Less Show, Fundamental Error In Not Giving A Special Verdict Form

A. Introduction

The prosecution requested a special unanimity instruction, which was given at trial. (R., pp. 238, 318.) The instruction informed the jury that "unanimity as to a single agreed upon act or incident is required" to convict. (R., p. 318.) Specifically, to find Cazier guilty the jury was required to find proved beyond a reasonable doubt "the same underlying criminal act or incident" and "the same underlying traumatic injury." (R., p. 318.) The verdict form provided to the jury provided for a verdict of guilty or not guilty without further elucidation. (R., p. 329.) Cazier did not object to the unanimity instruction and his

objection to the verdict form was limited to requesting a separate verdict on self-defense. (6/26/18 Tr., p. 57, L. 22 – p. 58, L. 8; p. 60, Ls. 5-23.)

The case proceeded to sentencing, and the district court imposed a sentence of 20 years with 15 years determinate. (R., pp. 409-11.) It did so, in part, based upon its finding that this was "the worst injury from a domestic violence situation that I've ever seen in my career." (Sent. Tr., p. 139, Ls. 8-13.) Cazier did not object to the court considering evidence of Shalan's condition or to any argument based on the severity of her brain injury. (See, generally, Sent. Tr.[1]) Nor did Cazier file a Rule 35 motion claiming the sentence had been imposed in an illegal manner. (See, generally, R.)

For the first time on appeal, Cazier contends that the "district court's sentence violated [his] due process right to have a jury determine each element of a criminal offense beyond a reasonable doubt." (Appellant's brief, p. 21.) This, Cazier reasons, is because "the verdict form did not reveal which act or injury the jury agreed on." (Id.) He requests this Court to "vacate the sentence and remand." (Id.)

Cazier has failed to argue, much less show, fundamental error. He has shown no constitutional violation, no clear error, and no prejudice.

B. Standard Of Review

Where a claim of error unpreserved by a contemporaneous objection is presented on appeal, the Court applies a three step review. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). First, the appellant must show that "one or more … unwaived constitutional rights were violated." Id. Second, "the error must be clear or obvious." Id.

[1] Cazier objected to evidence regarding pornography. (Sent. Tr., p. 12, Ls. 21-24.)

"This means the record must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object." State v. Miller, 165 Idaho 115, ___, 443 P.3d 129, 133 (2019). "If the record does not contain evidence regarding whether counsel's decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief." Id. Finally, the appellant "must demonstrate that the error affected [his or her] substantial rights." Perry, 150 Idaho at 226, 245 P.3d at 978. Where, as here, there was a trial, the appellant must show that the clear error "must have affected the outcome of the trial proceedings." Id. "Whether the error affected the trial proceedings must be clear from the appellate record." Miller, 165 Idaho at ___, 443 P.3d at 134.

C. Cazier Has Not Claimed Fundamental Error

Cazier has not claimed fundamental error. (Appellant's brief, pp. 19-21.) He has therefore necessarily failed to carry his burden of demonstrating fundamental error.

Even if this Court were to review for fundamental error despite Cazier's failure to invoke it, such review would show no fundamental error. First, there is no clear constitutional violation. Cazier claims he had a constitutional right to certain jury findings prior to sentencing, invoking Blakely v. Washington, 542 U.S. 296 (2004). (Appellant's brief, pp. 19-20.) This argument lacks merit.

The right to have a jury finding applies to "any fact that increases the penalty for a crime *beyond the prescribed statutory maximum.*" Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added). "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Blakely, 542 U.S. at 303-04 (emphasis original).

Thus, if a defendant "has a legal *right* to a lesser sentence" in the absence of a particular finding, that finding must be made by a jury. Id. (emphasis original). However, because "Idaho has an indeterminate sentencing system," the "Idaho system is unaffected by the holding in *Blakely*." State v. Stover, 140 Idaho 927, 931, 104 P.3d 969, 973 (2005). In other words, the constitution requires a jury finding of every fact that determines the legally applicable sentencing range, but not every fact that might guide the sentencing court's exercise of discretion within that range. Id. at 930-32, 104 P.3d at 972-74. Cazier's claim that he was given a sentence in excess of the statutory maximum allowed by the verdict does not establish a violation of a constitutional right, much less a clear violation.

Even if there were potential merit to Cazier's claim that he received a sentence in excess of the statutory maximum allowed by the verdict, he has failed to show any error was clear. The record shows that the jury did in fact unanimously find what act constituted the battery he committed and what traumatic injury he inflicted on Shalan. (R., p. 318.) Cazier's only claim is that the jury was not instructed to memorialize that finding in the verdict form. He has failed to show any clear constitutional requirements for the verdict form.

In addition, Cazier has failed to show a lack of tactical decision. It may very well have been that Cazier's counsel hoped to avoid a specific finding of how he committed the battery and what injury he inflicted, because such would be advantageous at sentencing.

Finally, Cazier has failed to articulate a theory of prejudice. As noted, the jury was instructed that they had to be unanimous as to the mechanism of the battery and what traumatic injury Cazier inflicted. On this record there is no reason to believe that it did not find that he caused Shalan's brain injury. Indeed, no alternate theory for how Shalan's

brain came to be oxygen-deprived appears in the record. Cazier's trial theories were accident and self-defense, theories obviously rejected by the jury. Even if Cazier attempted to demonstrate prejudice arising from the alleged error on the submitted verdict form, it would lack support in the record.

CONCLUSION

The state respectfully requests this Court to affirm the judgment and sentence.

DATED this 12th day of August, 2019.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 12th day of August, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KKJ/dd