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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

LEON THOMAS CAZIER,

Defendant-Appellant.

SUPREME COURT NO. 46480-2018

TWIN FALLS COUNTY NO.
CR42-2017-7931

REPLY BRIEF OF APPELLANT LEON THOMAS 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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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

I. Table of Authoritiesii

II. Argument in Reply.....1

 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.....1

 B. The prosecutor’s misconduct in closing argument deprived 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 Constitution2

 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.....4

III. Conclusion.....6

I. TABLE OF AUTHORITIES

STATE CASES

State v. Gonzalez, 165 Idaho 95, 439 P.3d 1267 (2019).....3
State v. Polson, 92 Idaho 615, 448 P.2d 229 (1968)1-2
State v. Stevens, 146 Idaho 139, 191 P.3d 217 (2008).....5

STATE STATUTES

I.C. § 19-25215

II. ARGUMENT IN REPLY

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, Appellant Leon Cazier asked the district court to voir dire the jury after an inflammatory news article misrepresented the facts and circumstances of the case. Tr. Vol 7 p. 5, ln. 8 - p. 6, ln. 5. Despite recognizing the article's inaccuracy and its potential to taint the jury, the district court denied Mr. Cazier's motion because he could raise any taint in a new trial motion. This decision was not reached through an exercise of reason, was inconsistent with governing legal principles and therefore an abuse of discretion.

The state claims Mr. Cazier failed to show good cause to re-open voir dire because he did not have evidence that the jury heard about the article. Respondent's Brief, p. 4-5. However, Mr. Cazier could not inquire whether the jury was aware of the article without re-opening voir dire.

The state argues that the trial court is not required to "re-open voir dire every time there is a media report about the ongoing trial" and cites *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968) for the proposition that "the mere existence of media reports about a trial is 'insufficient to justify a conclusion that the jury received evidence out of court.'" Respondent's Brief, p. 5-6. However, in *Polson*, the defendant sought a new trial arguing that publicity created a prejudicial atmosphere preventing him from having a fair trial. *Polson*, 92 Idaho at 621, 448 P.2d at 235. Unlike the case at bar, the trial judge in *Polson* advised the jury that a television program had referred to the trial the previous night and "admonished the jurors that if any of them had listened

to the program, you ‘pay absolutely no attention to it whatever,’ and further, ‘what you will determine will come from this witness stand, and on place else.’” *Id.* at 621, 448 P.2d at 235. The Court held that the publicity showing was insufficient to justify a conclusion that the jury received evidence out of court. *Id.* at 621, 448 P.2d at 235.

Here, unlike *Polson*, the district court refused to admonish the jury after the inflammatory article was raised by the defense. Moreover, Mr. Cazier alleged more than mere publicity, noting that the article at issue “was absolutely hostile to the defense.” Tr. Vol 7, p. 7, ln. 6-11. The district court agreed the article did not “adequately or accurately describe what's gone on in the courtroom.” and acknowledged that taint could provide grounds for a motion for a new trial. *Id.* at p. 7, ln. 20 - p. 8, ln. 4.

The danger of the jury having seen or spoken about the inflammatory and inaccurate article outweighed any potential harm from the questioning requested by Mr. Cazier. By forgoing the simple precaution of re-opening voir dire, the district court failed to reach its decision through an exercise of reason or consistently with the constitutional jury trial protections. Accordingly, the district court abused its discretion 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 Deprived 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

The prosecutor repetitively published portions of Mr. Cazier’s interviews over repeated objections and, at times, without citations to the exhibits. The prosecutor’s cumulative

publication of the exhibits was designed to appeal to the jury's passions and prejudice and constituted misconduct.

In response, the state claims that Mr. Cazier's objections to the argument as "cumulative" and "argumentative" and "inappropriate" were substantively different than his appellate argument that the state's cumulative publication of the exhibits improperly appealed to the jury's passions and prejudice. Respondent's Brief, p. 7. Thus, according to the state, Mr. Cazier's prosecutorial misconduct claim is not properly preserved for appeal. The state errs.

It is "proper and necessary" for "the specific legal arguments" a party uses to support its position to evolve on appeal as the parties "ruminate on issues and case law . . . [that] may need to be applied to the specific facts of the case." *State v. Gonzalez*, 165 Idaho 95, 98, 439 P.3d 1267, 1270 (2019). However, such pragmatic evolutions do not extend to new substantive issues or a new position on an issue that the trial court had no opportunity to rule on. *Id.* In other words, a "groomed horse is expected on appeal, but a different horse is forbidden." *Id.* at 99, 439 P.3d at 1271.

Here, Mr. Cazier's argument is groomed and reshod on appeal but he arrives in this Court on the same horse he rode at trial. In the district court, Mr. Cazier repeatedly objected to the prosecutor's use of video and audio recordings in closing argument as cumulative, noted that the jury could not replay the clips the prosecutor excerpted from the exhibits and argued their continued use was inappropriate. Tr. Vol. 7 (6.25.18) p. 73, ln. 8-13; p. 75, ln. 3-9; p. 125, ln. 10-16; p. 126, ln. 1-18; p. 127, ln. 1-3; p. 129, ln. 14-16; p. 130, ln. 3-21; p. 131, ln. 4-9. On appeal, Mr. Cazier argues that the prosecutor's cumulative publication of those exhibits and

excerpts was misconduct because it was an inflammatory tactic calculated to appeal to emotion, passion or prejudice of the jury. The issue (the prosecutor's repetitive publication of parts of exhibits during closing argument) and Mr. Cazier's position on the issue (that the prosecutor's conduct was improper) are the same.

Mr. Cazier's multiple objections to the prosecutor's cumulative publication of exhibits and unidentified clips from exhibits during closing argument preserved his argument that the argument constituted prosecutorial misconduct. The prosecutor's misconduct permeated the trial with unfairness, was not harmless and deprived of Mr. Cazier right to a fair trial under the Fourteenth Amendment. This Court should therefore vacate his judgment of conviction.

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 jury was required to agree whether Mr. Cazier 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.

Although the verdict form did not reveal which act or injury the jury agreed on, the district court found that the jury convicted Mr. Cazier of causing the anoxic brain injury. Tr. Vol.

9 (9.21.18) p. 139, ln. 8-23. The district court then relied on that finding to impose a unified term of twenty years with a minimum period of confinement of fifteen years. *Id.* at p. 139, ln. 15-24. In so doing, the district court sentenced Mr. Cazier for a specific offense (causing anoxic brain injury) when the jury could have convicted him of an entirely different offense (causing bruises and/or contusions on her face and her torso).

The state argues the issue is not preserved because Mr. Cazier did not request a special verdict form. Respondent's Brief, p. 10. However, the issue on appeal is not whether the district court's failure to sua sponte require a special verdict constituted fundamental error.

Instead, the issue is the district court's error in sentencing Mr. Cazier as if the jury found him guilty of causing the anoxic brain injury when no special verdict form revealed the actual offense of conviction. This issue arose during the district court's pronouncement of sentence and, as a challenge to the constitutionality of the sentence, is appropriately raised on appeal.

The state also notes that the maximum punishment was the same whether Mr. Cazier committed domestic battery by causing anoxic brain injury or whether by causing a bruise. Respondent's Brief, p. 10-11. Nonetheless, Idaho law requires the sentencing court to consider the nature of the offense in fashioning sentence. *See* I.C. § 19-2521(1). Unlike a situation where the court imposes a harsh sentence based on the crime's surrounding circumstances, the district court sentenced Mr. Cazier for a crime for which he may have been acquitted. *cf State v. Stevens*, 146 Idaho 139, 150, 191 P.3d 217, 228 (2008), disapproved in later proceedings by *Stevens v. Carlin*, 286 F. Supp. 3d 1092, 1131 (D. Idaho 2018) (court's discussion of intent was discussion

of crime's circumstances and was not a finding that defendant committed a crime distinct from the of which he had been found guilty).

Mr. Cazier was charged with distinct offenses and the constitution and statute require that Mr. Cazier be sentenced for the crime of conviction. The district court's sentence violated Mr. Cazier's due process right to have a jury determine each element of a criminal offense beyond a reasonable doubt and this Court must vacate the sentence and remand.

III. CONCLUSION

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

Respectfully submitted this 15th day of October 2019.

FYFFE LAW, LLC

/s/ Robyn Fyffe
ROBYN FYFFE
Attorney for Leon Cazier

CERTIFICATE OF SERVICE

I CERTIFY that on October 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