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State v. Lumpkin Appellant's Reply Brief Dckt. 46703

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

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 46703-2019**
	)	
v.	)	**BONNER COUNTY NO. CR09-18-4532**
	)	
ZANE EUGENE LUMPKIN,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

HONORABLE BARBARA BUCHANAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

After being charged with felony possession of a controlled substance, methamphetamine, and the persistent violator sentencing enhancement, Zane Lumpkin exercised his constitutional right to a jury trial. He was found guilty as charged, and received a sentence of five years, with two years fixed.

On appeal, he asserts that in its closing arguments, the prosecution committed misconduct and diminished the State's burden of proof when it argued that a jury instruction not to open an evidence bag during deliberations proved that the substance inside contained methamphetamine. Although that misconduct was not objected to, it rises to the level of fundamental error. Mr. Lumpkin respectfully requests that this Court vacate his judgment of conviction and remand his case for new trial.

Mr. Lumpkin also asserts that the district court infringed upon his constitutional right to a jury trial when it punished him for making the "strange decision" to go to trial.

This Reply Brief is necessary to address the State's erroneous contentions that any prosecutorial error was cured by other jury instructions, and that Mr. Lumpkin failed to establish fundamental error because "overwhelming evidence [ ] supported the jury verdict." (Resp. Br., pp.5-14.)

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Lumpkin's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

I. Did the State commit prosecutorial misconduct in closing arguments by telling the jury that the district court's instruction not to open an evidence bag proved that Mr. Lumpkin possessed methamphetamine?

II. Did the district court impermissibly punish Mr. Lumpkin for exercising his constitutional right to trial?[1]

[1] Mr. Lumpkin fully set forth his arguments pertaining to sentencing in his Appellant's Brief and does not reiterate these arguments herein.

ARGUMENT

I.

The State Committed Prosecutorial Misconduct In Closing Arguments By Telling The Jury That The District Court's Instructions Not To Open An Evidence Bag Proved That Mr. Lumpkin Possessed Methamphetamine

Unobjected to prosecutorial misconduct is subject to the fundamental error test, "[w]hether such comments constitute fundamental error, however, must be considered in the context of the entire trial." *State v. Severson*, 147 Idaho 694, 720 (2009).

> [W]hen an objection to alleged prosecutorial misconduct is raised at trial, we use a two-part test to determine whether the misconduct requires reversal. First, we ask whether the prosecutor's challenged action was improper. If it was not, then there was no prosecutorial misconduct. If the conduct was improper, we then consider whether the misconduct "prejudiced the defendant's right to a fair trial or whether it was harmless."

Id. 147 Idaho at 716 (internal citations omitted).) "Unobjected-to prosecutorial misconduct that arises in closing argument must be so egregious that the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Garcia*, No. 46253, 2020 WL 2029266, at *10 (Idaho Apr. 28, 2020) (quoting *State v. Lankford*, 162 Idaho 477, 497 (2017).)

As the Idaho Supreme Court held in *State v. Perry*:

> [I]n cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, 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) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

150 Idaho 209, 226 (2010) (footnote omitted).

In Mr. Lumpkin's case, the jury heard that there would not have been a jury instruction advising them about the dangerous nature of the items in the bag had there not actually been

methamphetamine in there, essentially telling the jury that the jury instruction itself *proved* the pipe contained a controlled substance.

During his rebuttal closing remarks, the prosecutor told the jury,

> Counsel also talked about the residue, how it's not a weighable amount and it's smoke. And I'll reference another jury instruction for you, number 18. This is interesting. So it tells you, certain items that have been admitted into evidence may contain substance residue. To preclude contamination of the evidence and to preclude such residue from coming into contact with you, the evidence has been placed in sealed plastic bags.
>
> You are not to unseal the plastic bags when dealing with the evidence during deliberation. What do you think that means? If there's nothing in those ziplock bags, why would you have a jury instruction telling you don't open the bag because you might come in contact with it, right? So if you want to talk about, well, it's not a weighable amount, it's nothing, I think the defendant testified that it's nothing, it's garbage. It's nothing, it's blow-off.
>
> If it was nothing, if it's nothing, literally, why would you have an instruction specifically telling you don't open the bag, because it might contaminate you. There's obviously something in there, right; and Ms. Rayner is able to test it.

(Trial Tr., p.163, L.17 - p.164, L.15.) Jury Instruction No. 18 states:

> Certain items that have been admitted into evidence may contain controlled substance residue. To preclude contamination of the evidence and to preclude such residue form coming into contact with you, the evidence has been placed in sealed plastic bags. You are not to unseal the plastic bags when viewing the evidence during deliberations.

(R., p.112.) The prosecutor asked the jury to interpret a jury instruction as proof of one element of the crime. He was telling the jury that the jury instruction itself proved the substance was methamphetamine.

The State claims Mr. Lumpkin failed to meet his burden to show fundamental error. (Resp. Br., pp.6-7.) However, in his initial Appellant's Brief, Mr. Lumpkin established the prosecutorial misconduct as fundamental error, as set forth by the Idaho Supreme Court in *State v. Miller*, 165 Idaho 115, 119-20 (2019). Recently, in *State v. Saenz*, the Idaho Court of

Appeals explained the fundamental error analysis in instances of prosecutorial misconduct. ___ P.3d ___ No. 46262, 2020 WL 1148807 (Idaho Ct. App. Mar. 10, 2020).[2] The Court addressed the change to fundamental error review wrought by *Miller*, recognizing that under the second prong of the fundamental error standard, a defendant must show the appellate record contains: (1) clear and obvious evidence of the error; and (2) evidence as to whether or not trial counsel made a tactical decision not to object. *Saenz*, at *4 (citing *Miller*, 165 Idaho at 119).

The *Saenz* Court then analyzed the third prong of *Miller*—the effect of a remedial jury instruction in determining "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Saenz*, at *7 (quoting *State v. Lankford*, 162 Idaho 477, 497 (2017). The Court concluded that "[m]eeting this standard demonstrates the misconduct actually impacted the trial because 'even a timely objection to such inflammatory statements would not have cured the inherent prejudice.'" *Saenz*, at *7 (quoting *State v. Gross*, 146 Idaho 15, 18 (Ct. App. 2008). The Court also noted that the timing of an inappropriate remark requires consideration. Although not determinative in every case, the Idaho Court of Appeals "has acknowledged the potential increased impact prosecutorial misconduct in a rebuttal closing argument may have." *Saenz*, at *7 (citing *State v. Troutman*, 148 Idaho 904, 909-10 (Ct. App. 2010)).

The State concedes that the prosecutor's remarks were improper, but claims that the district court's instruction telling the jury that it "must not conclude from the fact that an instruction has been given that the court is expressing any opinion as to the facts" cured the error. (Resp. Br., pp.6, 11.) However, the particular misconduct complained of in Mr. Lumpkin's case—the prosecutor's assertion during his rebuttal closing remarks that one of the jury

[2] The Idaho Court of Appeals' Opinion in *Saenz* was issued on March 10, 2020, and is not yet final.

instructions served to inform the jury that the substance in the pipe was methamphetamine—did not have a curative instruction. While the jury was told that the jury instructions did not constitute the district court's opinion (R., p.110), the jury was also repeatedly told that the jury instructions set forth the applicable law and it must follow them (R., pp.91, .93, 103). In fact, the prosecutor did not tell the jury that the district court believed the substance in the pipe was methamphetamine; instead, the prosecutor told the jury that, for its safety, it must not open the bags:

> You are not to unseal the plastic bags when dealing with the evidence during deliberation. What do you think that means? If there's nothing in those ziplock bags, why would you have a jury instruction telling you don't open the bag because you might come in contact with it, right?
> . . .
> If it was nothing, if it's nothing, literally, why would you have an instruction specifically telling you don't open the bag, because it might contaminate you. There's obviously something in there, right; and Ms. Rayner is able to test it.

(Trial Tr., p.163, L.17 - p.164, L.15.) The prosecutor told the jury it could infer guilt from a jury instruction, which affected Mr. Lumpkin's substantial rights and actually affected the verdict. As the United States Supreme Court has explained, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 16-19 (1985); *Accord State v. Garcia*, 100 Idaho 108, 110-111 (1979); *State v. Rosencrantz*, 110 Idaho 124, 131 (Ct. App. 1986).

The State claims the prosecutor's remarks served to refocus the jury on the expert's opinion. (Resp. Br., p.14.) However, the prosecutor's statement to the jury buttressed the expert's testimony by attesting to the truth of the jury instruction; the statement implied that the prosecutor was privy to certain facts and he knew that the jury would not have been so instructed if there was no danger in the jury opening the bag. The prosecutor told the jury that the

instruction would not have been given if the substance inside the pipe was not methamphetamine, and that they had been so instructed for their own safety. Thus, it was not the district court's opinion that was put to the jury, it was the prosecutor's assertion that, but-for the presence of methamphetamine, the jury would not have been so instructed.

Although the jury was instructed that the jury instructions did not indicate the district court's opinion (R., p.110), the prosecutor's comments took the instruction outside the realm of opinion and essentially told the jury that the presence of the instruction meant the substance was methamphetamine. *C.f. People v. Visciotti*, 825 P.2d 388, 436 (Cal. 1992) (holding it was not misconduct for the prosecutor to argue that the lesser included instructions given by the court were required by law and did not indicate that the court necessarily believed that the instructions applied). Here, the prosecutor did not claim that the district court's opinion reflected that the substance was methamphetamine; instead, the prosecutor said that the jury would not be so instructed unless there was meth in the pipe-given to prevent the jury from being harmed by biohazard, essentially a scare tactic. The prosecutor told the jury that jury instruction No. 18 proved that the substance was methamphetamine, appealing to the jury's fears of being exposed to a dangerous substance.

In this case, the prosecutor's improper argument allowed the jury to find Mr. Lumpkin guilty absent proof beyond a reasonable doubt that the residue in the pipe actually contained methamphetamine. In fact, Mr. Lumpkin consistently and vociferously maintained that the substance was *not* methamphetamine. (Trial Tr., p.138, L.21 – p.139, L.8; p.139, Ls.15-22; p.140, L.1 – p.141, L.6; p.143, L.13 – p.144, L.24; p.146, Ls.12-17.) Mr. Lumpkin's defense consistently focused on his insistence that it was not methamphetamine in the pipe, but that the pipe contained simply a white film that was "garbage" byproduct. (Trial Tr., p.137, L.1 – p.146,

L.22.) At the conclusion of the trial, in her closing remarks defense counsel talked again about Mr. Lumpkin's testimony that there was no methamphetamine in the pipe. (*See* Trial Tr., p.161, L.1 – p.162, L.15.) Given that Mr. Lumpkin's defense rested on the argument that there was no methamphetamine present, counsel's failure to object was clearly not strategic or tactical. There could be no reason for defense counsel to allow the prosecutor to eliminate the State's burden of proving this element. Counsel did not object to any portion of the prosecutor's closing or rebuttal closing, thus negating any supposition of strategy or tactical decision whereby counsel chose not to object to the erroneous statements at issue. (Trial Tr., p.151, L.23 – p.166, L.11); *c.f., Saenz*, at *6 ("Because Saenz's counsel demonstrated a willingness to object to some statements during closing arguments that spoke to Saenz's innocence, we cannot say the record clearly establishes that trial counsel's silence in other instances was not strategic"). Under *Miller*, Mr. Lumpkin has met his burden to show the error plainly exists.

The *Saenz* Court concluded that the defendant did not meet his burden to show the prosecutor's references to facts not in evidence actually impacted the trial. *Saenz*, at *8. This was because the jury in *Saenz* was twice instructed that the lawyers' statements were not evidence. *Saenz*, at *8. However, in Mr. Lumpkin's case the prosecutor told the jurors that the jury instruction was evidence proving the substance in the pipe was methamphetamine.

The State claims that it "had a strong case against Lumpkin." (Resp. Br., p.7.) However, this case came down to a determination of the identity of the substance—did the jury believe the State's witnesses, or did the jury believe Mr. Lumpkin's testimony that the substance inside the pipe was not methamphetamine, and/or that he did not know there was methamphetamine in the pipe? As such, it is clearly improper that at closing arguments, the prosecutor eliminated one of

the elements of the offense of possession of a controlled substance by telling the jury that the district court's instruction proved the substance was methamphetamine.

Further, contrary to the State's claim (Resp. Br., pp.9-10), Mr. Lumpkin's defense that he did not know it was methamphetamine was a viable defense based on the knowledge element of possession of methamphetamine. That is, Mr. Lumpkin could not be found guilty of the charged offense unless he *knew* there was *methamphetamine* (or believed it was a controlled substance) in the pipe. (*See* R., p.107.) In fact, the analyst testified that there was a film on the pipe she described as residue, and the amount was so minimal that she was unable to even weigh the substance. (Tr., p.123, L.24 – p.124, L.3; p.125, Ls.5-18.) As such, it is clearly improper that at closing arguments, the prosecutor eliminated one of the elements of the offense of possession of a controlled substance by telling the jury that a jury instruction proved the substance was methamphetamine. In light of the weak evidence in this case, and the egregious prosecutorial misconduct, Mr. Lumpkin has shown the prosecutorial misconduct actually affected the outcome of the trial. *See Miller*, 165 Idaho at 120. He respectfully requests that this Court vacate his judgment of conviction and remand his case for a new trial.

CONCLUSION

Mr. Lumpkin respectfully requests that this Court vacate his conviction and remand this matter for a new trial. In the alternative, Mr. Lumpkin requests that his case be remanded for resentencing by a different district court judge.

DATED this 30th day of April, 2020.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2020, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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Administrative Assistant

SJC/eas