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

STATE OF IDAHO,	)	
	)	**No. 47400-2019**
Plaintiff-Respondent,	)	
	)	**Twin Falls County Case No.**
v.	)	**CR42-18-14640**
	)	
STEVEN MOSES JAY,	)	
	)	
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

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATEMENT OF THE CASE

Nature Of The Case

Steven Moses Jay appeals from the judgment of conviction entered upon the trial verdicts finding him guilty of felony domestic battery and misdemeanor obstructing of an officer.

Statement Of The Facts And Course Of The Proceedings

In December 2018, officers responded to a report of a domestic violence incident in Twin Falls County. (Trial Tr., Vol. II, p.16, L.16 – p.17, L.9.) They made contact with Keara Wilder, who had gone to a friend's house. (Trial Tr., Vol. I, p.325, L.22 – p.326, L.13; Trial Tr., Vol. II, p.17, Ls.10-15.) The officers observed that Wilder's nose and cheek were swollen. (Trial Tr., Vol. I, p.326, L.19 – p.327, L.4; Trial Tr., Vol. II, p.17, Ls.16-20.) Wilder told the officers that she had an altercation with Jay, her boyfriend. (Trial Tr., Vol. II, p.17, L.23 – p.18, L.14.) Jay pushed her down, struck her in the face twice, and then pushed her down again. (Trial Tr., p.18, Ls.14-17.) Wilder was coherent, did not slur her speech, and did not appear to be severely intoxicated. (Trial Tr., Vol. I, p.327, L.18 – p.328, L.9; Trial Tr., Vol. II, p.19, Ls.1-13.)

Officers went to Jay's and Wilder's residence where they encountered Jay, who appeared to be intoxicated. (Trial Tr., Vol. I, p.281, L.18 – p.284, L.3; State's Exhibit 19.) Officers arrested Jay, who initially resisted by trying to retreat back into the residence. (Trial Tr., Vol. I, p.284, L.24 – p.286, L.25; p.337, L.3 – p.338, L.12; State's Exhibit 19.)

Wilder went to the hospital emergency room for treatment of her injuries. (Trial Tr., Vol. I, p.306, Ls.7-12.) Wilder reported, separately to a treating nurse and doctor, that she was seeking

treatment because her boyfriend hit her multiple times with his fist. (Trial Tr. Vol. I, p.308, L.18 – p.309, L.7; Trial Tr., Vol. II, p.7, Ls.5-13.) The nurse observed that Wilder had a swollen nose and an abrasion on the bridge of her nose; bruising on her left wrist, left cheek, and above the right side of her eyebrow; and multiple scratches on her neck and wrist. (Trial Tr., Vol. I, p.309, L.8 – p.310, L.16.) The nurse also noted that Wilder was alert and oriented, and did not appear to be under the influence of any substances. (Trial Tr., Vol. I, p.310, L.17 – p.312, L.14.) In addition to the injuries observed by the nurse, the treating doctor additionally noted swelling on Wilder's lower jaw, and, after a CAT scan was completed, diagnosed her with a fracture of the nasal bone, specifically observing that the "two thin bones that make up the bridge of the nose" "had been broken into several different pieces." (Trial Tr., Vol. II, p.7, Ls.25 – p.9, L.25.) The doctor also found Wilder to be coherent and oriented. (Trial Tr., Vol. II, p.10, L.1 – p.11, L.18.)

Wilder again provided another similar account of the incident (that Jay had battered her), to an officer at the hospital, and then again to the same officer 12 hours later at Wilder's residence. (Trial Tr., Vol. II, p.20, L.8 – p.21, L.7; p.23, Ls.2-24.) There, the officer noted two spots of blood on the floor in the house, which Wilder identified as her blood. (Trial Tr., Vol. II, p.23, L.25 – p.24, L.6.) The state charged Jay with felony domestic battery and misdemeanor obstructing of an officer. (R., pp.40-42.)

By the time of the trial, Wilder changed her story about what had occurred. On direct examination, Wilder largely asserted that she could not remember what occurred that night because she was intoxicated. (Trial Tr., Vol. I, p.192, Ls.20-22; p.195, Ls.1-14; p.196, L.18 – p.197, L22; p.208, L.23 – p.209, L.1; p.214, L.11 – p.217, L.5.) However, through refreshing her recollection

from police bodycam videos, the prosecutor elicited testimony that Wilder told police that Jay pushed her down onto the ground, struck her twice in the face, and threw her on the couch, causing bruising and scratching and a broken nose.[1] (Trial Tr., Vol. I, p.208, L.23 – p.212, L.21.) Wilder provided the same account in a written statement to police, and permitted officers to take multiple photos of her injuries while she described Jay's battery of her to them. (See Trial Tr., Vol. I, p.214, L.11 – p.216, L.4; p.222, L.18 – p.235, L.6; State's Exhibits 1-18.) After refreshing her recollection of a phone call Jay made to her from jail, Wilder testified that Jay told her that he was sorry and that it was a mistake. (Trial Tr., Vol. I, p.235, L.14 – p.237, L.1.)

On cross-examination, Wilder asserted that she *was* able to remember significant events of the night of the incident. She testified definitively that Jay did not batter her, that she fell trying to get into her car when she was leaving the residence, that she then returned to the inside of the residence (where the blood was found), and then left again. (Trial Tr., Vol. I, p.241, L.14 – p.247, L.4.) Wilder testified that she had told officers a different account because she was intoxicated and not clear-headed at the time, and that she had changed her position about what happened after she stopped taking painkillers several weeks after the incident. (Trial Tr., Vol. I, p.246, Ls.14-18; p.247, L.16 – p.248, L.4; p.251, Ls.3-12.)

[1] The jury was instructed that the Wilder's prior statements to officers could only be used for the purpose of evaluating Wilder's credibility. (R., p.119.) However, the district court concluded that Jay's statements to the nurse were admissible as substantive evidence pursuant to the I.R.E. 803(4) hearsay exception for statements made for medical diagnosis or treatment. (Trial Tr., Vol. I, p.303, L.10 – p.304, L.11.) Jay subsequently did not object to the doctor's testimony about Wilder's statements made to him, and thus this testimony too could be utilized by the jury as substantive evidence. (Trial Tr., Vol. II, p.5, L.2 – p.14, L.23.)

The jury found Jay guilty of both charges. (R., p.131.) The district court imposed a unified eight-year sentence with three years fixed for felony domestic battery, and a concurrent one-year jail sentence for obstructing an officer, but retained jurisdiction for one year. (R., pp.160-166; 9/3/19 Tr., p.26, L.11 – p.28, L.24.) Jay timely appealed. (R., pp.170-175.)

ISSUES

Jay states the issues on appeal as:

I. Did the district court err by denying Mr. Jay's motion for a mistrial after the prosecutor brought up prohibited I.R.E. 404(b) evidence of prior bad acts?

II. Did the State commit prosecutor misconduct in closing arguments by disparaging and misrepresenting the defense?

III. Did the State commit prosecutor misconduct in closing argument by essentially testifying the jury as [an] expert witness on domestic violence?

IV. Did the district court abuse its discretion when it imposed a unified sentence of eight years, with three years fixed, upon Mr. Jay following his conviction for felony domestic battery?

(Appellant's brief, p.6.)

The state rephrases the issues as:

1. Did the district court properly deny Jay's motion for a mistrial after Jay opened the door to the challenged testimony?

2. Has Jay failed to show that the prosecutor committed misconduct during his rebuttal argument by speculating that the defense was attempting to encourage the jury to enter a split verdict?

3. Has Jay failed to demonstrate fundamental error with respect to his assertion that the prosecutor committed misconduct during his rebuttal argument by discussing the prevalence of recanting domestic violence victims at the courthouse?

4. Has Jay failed to show that the district court abused its sentencing discretion?

ARGUMENT

I.
The District Court Properly Denied Jay's Motion For A Mistrial After Jay Opened The Door To The Challenged Testimony

A. Introduction

Jay contends that the district court erred by denying his motion for a mistrial. (Appellant's brief, pp.7-15.) Specifically, Jay asserts that a mistrial was warranted in light of the prosecutor's attempt to elicit testimony about prior physical altercations between Jay and Wilder. (Id.) However, a review of the record reveals that Jay opened the door to the testimony by asking Wilder on cross-examination about whether she was afraid of Jay. In any event, even if the prosecutor's question was improper, the district court correctly concluded that it did not rise to the level of reversible error that necessitated a mistrial.

B. Standard Of Review

The standard of review for a denial of a motion for mistrial is well established:

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Ellington, 151 Idaho 53, 68, 253 P.3d 727, 742 (2011) (quoting State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007)).

C. The District Court Properly Denied Jay's Mistrial Motion

"A mistrial may be declared, upon the defendant's motion, if there has been an error or legal defect during the trial which is prejudicial to the defendant and deprives the defendant of a fair trial." State v. Dopp, 129 Idaho 597, 603, 930 P.2d 1039, 1045 (Ct. App. 1996) (citing I.C.R. 29.1.) A fair trial, however, is "not necessarily a perfect trial." See State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007) (citing State v. Estes, 111 Idaho 423, 427-28, 725 P.2d 128, 132-33 (1986)). Consequently, "[t]he admission of improper evidence does not automatically require the declaration of a mistrial." State v. Grantham, 146 Idaho 490, 498, 198 P.3d 128, 136 (Ct. App. 2008).

Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character in order to show that he acted in conformity therewith, but such evidence may be admitted if it is relevant for other purposes. I.R.E. 404(b).

In Hobbs v. Ada County, 93 Idaho 443, 445, 462 P.2d 742, 745 (1969) (q*uoting* Warren Livestock Co. v. Farr, 142 F. 116, 117 (10th Cir. 1905)), the Idaho Supreme Court explained the long-established concept of "opening the door" to otherwise inadmissible trial evidence as follows:

> The general rule to govern the situation where a party has opened the door for admission of irrelevant evidence at trial only to complain when his adversary takes advantage thereof was succinctly stated over sixty years ago in the federal case of *Warren Livestock Co. v. Farr*, 'one who induces a trial court to let down the bars to a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary is also allowed to avail himself of the opening.

See also United States v. Whitworth, 856 F.2d 1268, 1284-1285 (9th Cir. 1988) (otherwise inadmissible evidence may become admissible where opposing party has, by its own actions,

"opened the door" to the testimony); State v. Drennon, 126 Idaho 346, 352, 883 P.2d 704, 710 (Ct. App. 1994) (holding that defendant "opened the door" to otherwise inadmissible 404(b) evidence of prior uncharged acts by putting one of the enumerated elements of I.R.E. 404(b) at issue).

During the jury trial in this case, during Jay's cross-examination of Wilder, the following exchange occurred:

[Counsel]: Keara, do you fear Mr. Jay, as he – who's seated beside me? Do you have a fear of him?

[Wilder]: He's no threat to me. Never has been.

(Trial Tr., Vol. I, p.250, L.24 – p.251, L.2.)

Then, during the prosecutor's re-direct examination of Wilder, the following exchange occurred:

[Prosecutor: You testified the Defendant has never – your words – never been a threat to you?

[Wilder]: He's never been a threat to me.

[Prosecutor]: That's not true, is it? You're scared of him?

[Wilder]: No, I'm not.

[Prosecutor]: You told the officers you were scared of him.

[Wilder]: At the time, I thought I was.

[Prosecutor]: You told the officers – So you remember, at the time, being scared of him?

[Wilder]: I thought I was, yes.

[Prosecutor]: Yeah. So on the night in question, you were actually scared of him?

[Wilder]: Yes.

[Prosecutor]: Huh. So you remember the fear you –

[Wilder]: Because I don't remember –

[Prosecutor]: No. You had experienced – you remember the fear you experienced that night?

[Wilder]: Very little, but yes.

[Prosecutor]: Enough that you're scared of the man you love?

[Wilder]: No, I'm not scared of him.

[Prosecutor]: You said you were scared of actually him hurting his kids.

[Wilder]: I was intoxicated. I didn't know what I was saying at the time.

[Prosecutor]: You claim he has never been a threat to you twice now, and yet that night you told the officers that this wasn't the first time, was it?

[Wilder]: It's never happened. It's never happened.

[Prosecutor]: You told the officers that this was, what? The third or fourth time?

(Trial Tr., Vol. I, p.265, L.1 – p.266, L.11.)

Before Wilder could answer this final question, Jay objected, and then, outside the presence of the jury, moved for a mistrial on the basis that the prosecutor attempted to elicit inadmissible I.R.E. 404(b) evidence of Jay's prior uncharged abuse perpetrated on Wilder. (Trial Tr., Vol. I, p.266, L.12 – p.270, L.7.) Jay argued that his questioning of Wilder about whether she feared Jay at the present time did not open the door to the prosecutor's question. (Trial Tr., Vol. I, p.268, L.5 – p.269, L.4.) The prosecutor argued that Jay's questioning necessarily implicated the nature of Jay's and Wilder's relationship, predictably elicited testimony from Wilder that Jay was not a threat to her, and that this opened the door for the state to inquire about Jay and Wilder's relationship

history, and specifically, the abuse that has occurred in that relationship. (Trial Tr., Vol, I, p.270, Ls.11-24.)

Following a recess, during which the court reviewed a recording of the relevant testimony and a realtime transcription (Trial Tr., Vol. I, p.272, Ls.16-18), the court made the following ruling, in which it both denied Jay's motion for a mistrial, and ruled that Jay had opened the door to the prosecutor's question:

> And the question was, from [defense counsel] to this witness: Do you fear Mr. Jay, as he is seated besides me? Do you have a fear of him?
>
> The witness's answer was: He's no threat to me. Never has been.
>
> So the question as asked by [the prosecutor], in a vacuum, would be 404(b) evidence. However, it is this Court's ruling that the door was clearly opened by the Defendant's question and the witness's response. The response as – I understand [defense counsel's] assertion that the – what his intent of the question was, but the response given by the witness was entirely predictable, based upon the question that was asked. And the question as asked by [defense counsel] can be reasonably be interpreted to mean: Have you ever had a fear of him, as he's seated here today? And the answer was given that she has never had a fear of him.
>
> And so based on that, I don't find that it was an impermissible 404(b) question. Mistrial, as governed by Idaho Criminal Rule 29.1, and is to be granted if there is an error or legal defect in the proceeding, or if there is conduct that is prejudicial to the Defendant, and deprives the Defendant of a fair trial. Based upon the previous questions by Defendant's counsel to this witness, I don't find the conduct of [the prosecutor], in asking the question, is prejudicial. And furthermore, I certainly don't find that it deprives the Defendant of a fair trial since no answer was given.

(Trial Tr., Vol. I, p.272, L.18 – p.274, L.2.)

However, then, despite ruling that Jay had opened the door and that the prosecutor's question was not improper, the court still sustained Jay's objection to the question, precluded

Wilder from answering it, and informed the jury that the question was struck and that it was not to speculate about the question's answer. (Trial Tr., p.274, L.3 – p.275, L.12; p.276, L.18 – p.278, L.2.)

The district court's initial conclusion that Jay opened the door to the prosecutor's question about prior physical altercations between Jay and Wilder was correct. While defense counsel tried to frame the question in such a way to avoid that result, the question about Wilder's lack of fear of Jay, and Wilder's answer that she had "never" feared him, necessarily implicated the nature of their relationship. The prosecutor was not required to leave the jury with the false defense-proffered impression that Wilder and Jay had a peaceful co-existence, particularly since it was tasked with making credibility determinations in this case regarding Wilder's and Jay's denials of the facts underlying Jay's felony domestic battery. As the court initially concluded, the prosecutor's question was proper, and Wilder should have been permitted to answer it.

Even if Jay were correct, and merely asking the question interjected error, no mistrial was warranted because the district court allowed no answer, instructed the jury to ignore the question, and because the question itself did not render Jay's trial unfair. The jury is presumed to follow the district court's instructions. State v. Moses, 156 Idaho 855, 871, 332 P.3d 767, 783 (2014) (citing State v. Carson, 151 Idaho 713, 718, 264 P.3d 54, 59 (2011)). Further, unique to this case, Jay's entire defense necessitated a jury determination that Wilder's numerous detailed statements to officers and medical providers about what happened the night of the incident were all untue. It is

unlikely that *this* particular attempted elicited statement[2] would be the one that flipped the jury's credibility determination in light of all of the other allegedly false statements made by Wilder. Finally, any continuing impact from the prosecutor's question was minimal in light of the overwhelming evidence of Jay's guilt as discussed above in the state's Statement Of The Facts And Course Of The Proceedings section of this brief. Therefore, Jay has failed to show that the district court erred.

Because Jay failed to show the challenged question prevented him from getting a fair trial in light of the evidence against him and the curative instruction, he has failed to show that the district court erred in denying his motion for a mistrial.

II.
Jay Has Failed To Show That The Prosecutor Committed Misconduct During His Rebuttal Argument By Speculating That The Defense Was Attempting To Encourage The Jury To Enter A Split Verdict

A. Introduction

Jay contends that the prosecutor committed misconduct during his rebuttal argument by allegedly "misstating and disparaging the defense's theory." (Appellant's brief, pp.16-18.)

[2] As Jay correctly notes on appeal, a prosecutor's question to a witness (such as an argument that is also not evidence) can constitute reversible error by interjecting clearly improper suggestions even when the question is not answered. (Appellant's brief, p.11 n.1. (citing State v. Christiansen, 144 Idaho 463, 469, 163 P.3d 1175, 1181 (2007)). However, as the district court found, the prosecutor had a good faith basis for pursuing this line of inquiry based on the defense opening the door to past times Wilder may have feared Jay. Moreover, in this case, the lack of an answer at least reduced any potential prejudice, in light of both Wilder's assertion that most of her statements to police and medical providers about the incident were untrue, and the fact that the prosecutor was never able to attempt to elicit any details about the prior incidents that were alluded to.

Specifically, Jay takes issue with the prosecutor's argument that Jay was strategically attempting to entice the jury into entering a split verdict, with an acquittal of the felony domestic violence charge. (Id.) However, a review of the context of the prosecutor's statement reveals that it was proper, and that, even if improper, any error was harmless.

B. Standard Of Review

Where the defendant objects to alleged prosecutorial misconduct in the trial court, this Court first "determine[s] factually if there was prosecutorial misconduct" and then "determine[s] whether the error was harmless." Moses, 156 Idaho at 868, 332 P.3d at 780.

C. The Prosecutor's Argument Was Proper

Prosecutorial misconduct occurs where the prosecutor "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." State v. Sanchez, 142 Idaho 309, 318, 127 P.3d 212, 221 (Ct. App. 2005). The Idaho Supreme Court has said that "[p]rosecutorial misconduct occurs when the State attempts to secure a verdict on any factor other than the law as set forth by the jury instructions and the evidence admitted at trial, including reasonable inferences that may be drawn from that evidence." State v. Miller, 165 Idaho 115, 122, 443 P.3d 129, 136 (2019) (quoting State v. Bernal, 164 Idaho 190, 196, 427 P.3d 1, 7 (2018); State v. Abdhullah, 158 Idaho 386, 440, 348 P.3d 1, 55 (2015)). It is misconduct for a prosecutor to disparage a defense attorney in closing argument. State v. Baruth, 107 Idaho 651, 656, 691 P.2d 1266, 1271 (Ct. App. 1984).

With respect to prosecutorial misconduct in the context of closing argument, the United States Supreme Court has stated:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions [as consistent and repeated misrepresentation that may have a significant impact on a jury's deliberations]. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-647 (1974).

The Idaho Supreme Court has also reiterated the importance of reviewing closing arguments in light of their improvisational nature, noting that "in reviewing allegations of prosecutorial misconduct [the appellate court] must keep in mind the realities of trial." State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007) (quoting State v. Estes, 111 Idaho 423, 427-428, 725 P.2d 128, 132-133 (1986)). The Idaho Court of Appeals has further recognized "[t]he right to due process does not guarantee a defendant an error-free trial but a fair one," and 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).

In this case, during the state's closing argument, after discussing the misdemeanor obstructing of an officer charge (Trial Tr., Vol. II, p.103, L.24 – p.104, L.13), the prosecutor argued, "I don't think there will be much argument on this one for the defense. I wouldn't be surprised if

[defense counsel] actually stands up and concedes this crime." (Trail Tr., Vol. II, p.104, Ls.14-17). Then, in the state's rebuttal argument, after no defense argument was presented with respect to that charge, the prosecutor argued:

> I told you the defense wasn't going to stand up and argue the resisting arrest. Not one argument about it. Why? If you look at your preliminary instructions – look at this. I want to bring this up to you because it's a strategic ploy by the defense, and I want you to reject it.
>
> Instructions Number 1 and 2 state the charges and which charges I brought, and it says the defendant has pleaded not guilty to both. Interesting.
>
> The defense wants you to go sit in that room and stew over the felony domestic violence and say, "You know what? This is ugly. I don't know, dealing with domestic violence is scary and gross. Let's split the baby and give the State the resisting." That's why.

(Trial Tr., Vol. II, p.136, L.14 – p.137, L.1.)

At this point, Jay objected on the ground that the prosecutor was "speculating as to legal strategy," which Jay argued was "improper argument." (Trial Tr., Vol. II, p.137, Ls.2-4.) The district court overruled the objection. (Trial Tr., Vol. II, p.137, L.5.) The prosecutor continued:

> That's why. They want you to split the baby King Solomon style. Don't. Don't. He could have pleaded guilty to it, but he didn't.

(Trial Tr., Vol. II, p.137, Ls.7-9.)

Initially, the state notes that the ground for objection provided by Jay at trial – that the prosecutor was "speculating as to legal strategy," is not precisely the same as the challenge he raises on appeal – that the prosecutor was "misstating and disparaging the defense's theory." (Appellant's brief, pp.16-18.) An objection on one ground does not preserve for appeal a separate

and different basis for objection not raised before the trial court. State v. Higgins, 122 Idaho 590, 597, 836 P.2d 536, 543 (1992). Therefore, this Court could hold that this assertion is waived.

Even if preserved, it is this difference between commenting on defense strategy, and disparaging defense counsel or the defense, which demonstrates that the prosecutor's argument was proper. The prosecutor did not disparage defense counsel or the defense. Instead, the prosecutor drew an inference to make his own argument about Jay's defense strategy. This was proper. "Where statements are 'directed at the tactics or techniques of trial counsel rather than counsel's integrity or character[,]' the argument is permissible." State v. Reyes, 108 S.W.3d 161, 170 (Mo. App. 2003) (quoting State v. O'Haver, 33 S.W.3d 555, 563 (Mo. App. 2000)). Ultimately, and contrary to Jay's assertion on appeal (Appellant's brief, p.24), the prosecutor was not asking the jury to reach a verdict on a basis outside of the evidence – he was asking the jury to do the opposite, to reach a verdict on both of the two charges based upon the evidence presented, and to avoid any inferred invitation from the defense to "split the baby" as some kind of compromise.

Even if improper, the error was harmless. Again, overwhelming evidence supported the state's theory of the case. In addition to the facts as relayed above, the injuries suffered by Wilder were simply not consistent with her story about how she obtained them falling outside near her car, but were entirely consistent with the contemporaneous account of the incident that she gave to officers and medical providers. Further, if Wilder *did* suffer her injuries due to slipping outside, it simply makes no sense that she would then create a false account of domestic violence that she would repeat multiple times to numerous individuals over the next day, a false account which Wilder would later explain away only by referencing alcohol and pain pills. Finally, the

prosecutor's speculation about the defense attempting to encourage a split verdict did not implicate any of the factual or credibility determinations the jury was tasked with making, which were the determinations that this case turned on.

Jay has failed to demonstrate that the prosecutor's argument about the defense strategy was improper. This Court should therefore reject his assertion and affirm Jay's convictions.

III.
Jay Has Failed To Demonstrate Fundamental Error With Respect To His Assertion That The Prosecutor Committed Misconduct During His Rebuttal Argument By Discussing The Prevalence Of Recanting Domestic Violence Victims At The Courthouse

A. Introduction

For the first time on appeal, Jay contends that the prosecutor committed prosecutorial misconduct during his rebuttal argument by discussing the prevalence of recanting domestic violence victims. (Appellant's brief, pp.19-26.) A review of the record reveals that Jay has failed to demonstrate fundamental error.

B. Standard Of Review

"[T]he standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). If a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. Jay Has Failed To Demonstrate Fundamental Error

As noted above, prosecutorial misconduct occurs where the prosecutor "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." Sanchez, 142 Idaho at 318, 127 P.3d at 221.

Where a claim of error, including prosecutorial misconduct, unpreserved by a contemporaneous objection is presented on appeal, the Court applies a three step review. Perry, 150 Idaho at 228, 245 P.3d at 980. First, the appellant must show that "one or more ... unwaived constitutional rights were violated." Id. Second, "the error must be clear or obvious." Id. "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." Miller, 165 Idaho at 119, 443 P.3d at 133. "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. The Idaho Supreme Court has recently clarified that "[w]hether the error affected the trial proceedings must be clear from the appellate record." Miller, 165 Idaho at 119-120, 443 P.3d at 133-134.

Near the start of Jay's closing argument, defense counsel argued that "[w]hat's unique about this trial" was that there were only two eyewitnesses to the incident, and that both – Jay and

Wilder – testified under oath that "these events the State has alleged did not occur." (Trial Tr. Vol. II, p.105, L.20 – p.106, L.7.) Counsel then emphasized this point:

> So let me say that one more time. The only two eyewitnesses to the alleged crime both testified, both of them testified under oath that these events did not occur.
>
> So just at the beginning of our analysis of this case, it's already highly unusual, because both the alleged victim and the alleged perpetrator have both testified under oath at the trial that these things did not occur. They're the only eyewitnesses. There is no other eyewitness saying these events occurred. Both of them testified at trial yesterday and today that it simply did not occur, that Mr. Jay was not the source of the injuries. So that's somewhat unusual. And the reason why it's unusual is because both of the eyewitnesses to the alleged crime both testified that it didn't happen.

(Trial Tr., Vol. II, p.105, Ls.8-21.)

Later in his argument, defense counsel emphasized the point yet again –

> We have to recall, as I stated in the very beginning, that there are only two eyewitnesses, and both of those eyewitnesses have testified that these events did not occur, which is highly unusual.

(Trial Tr., Vol. II, p.116, Ls.13-16.)

In his rebuttal argument, the prosecutor responded to defense counsel's repeated factual assertion that both eyewitnesses denying the underlying charged criminal conduct was "highly unusual":

> [Defense counsel] says it's unusual that they both testified it did not happen. That's not unusual. Come down to the courthouse any time you want and watch domestic violence cases and see how often a domestic violence victim takes the stand and looks at the man who she has to live with and will probably live with after and stares them in the eye and says, "Yeah, that's the man who beat me." You come down and count how many of these victims you see.

> No, it is not unusual for a victim to take that stand and deny everything that happened and say that she just loves her spouse so much that she accidentally tripped and hit her face on a countertop. Every Friday, down the hall.

(Trial Tr., Vol. II, p.133, Ls.12-23.)

Jay did not object to this argument. Now, on appeal, he argues that the prosecutor committed misconduct. Jay has failed to establish fundamental error.

It was proper for the prosecutor to respond to Jay's argument that it was "highly unusual" for a battery defendant and victim to both deny that the battery occurred. Because there was no evidence on the general prevalence of victim recanting presented at the trial, the prosecutor, like Jay, could only properly appeal to the jury's own personal life experiences and understanding of domestic violence. In countering Jay's argument, the prosecutor evoked a particular context where domestic violence victims may recant – a courthouse. Because the defense specifically argued that it was highly unusual for both eyewitnesses to testify that the events charged by the state did not occur, it was proper rebuttal argument to point out that is not true, particularly in domestic violence cases where there is often a motive for the victim to recant.

Certainly, a prosecutor's introduction of information based upon his own personal knowledge or observations creates the potential for improper argument. However, like the defense argument, the prosecutor's reference to victims recanting in the courthouse was too vague, and too lacking in a precise evidentiary basis, to cross the line into improper argument. The prosecutor did not refer to scientific evidence about recanting that existed outside of the record, or attempt to present his own specific evidence or examples of recanting victims. He simply disputed defense counsel's assertion, and very broadly asserted that, to the contrary, victim recanting is not, in fact,

unusual – "[c]ome down to the courthouse…and see." This did not provide significantly different information that Jay's argument did. It would not have been surprising to a juror where either defense counsel or the prosecutor generated their competing positions on the prevalence of recanting victims – in their employment, and at the courthouse. Additionally, as discussed above, the state prevented substantial evidence that a victim recanted in this very case. In any event, for these same reasons, even to the extent that the prosecutor's reliance on the courtroom imagery context was improper, Jay has still failed to satisfy the first Perry prong because the manner of argument did not rise to the level of a constitutional violation.

Jay also cannot satisfy the second Perry prong. Jay's decision not to object was likely tactical. Shortly after this portion of the prosecutor's argument, Jay raised an objection to another portion of the argument – demonstrating his willingness and ability to do so. (Trial Tr., Vol. II, p.137, Ls.2-4.) An objection would have merely resulted in, at most, a striking of the reference to the courtroom context presented by the prosecutor – not of the argument itself, which, as noted above, was made in response to Jay's contrary argument. Moreover, asserting that an argument indistinguishable from the one defense counsel recently made was improper could put defense counsel and his own arguments in a bad light.

Finally, Jay cannot satisfy the third Perry prong because he cannot demonstrate prejudice. Regardless of how unusual victim recanting is in general, in *this* particular case, the state presented overwhelming evidence that such recanting occurred. In addition to the evidence of Jay's guilt and of Wilder's recanting discussed above, Wilder explained at the trial that she was working five jobs, living in her car, and "ready to go home" with Jay – a place she was prohibited from going

at the time of the trial. (Trial Tr., Vol. I, p.190, L.21 – p.191, L.20; p.219, L.23 – p.221, L.20.) This provided additional motive for her recanting. Finally, as noted above, any improper portion of the argument pertained only to the manner in which it was presented, rather than its substance. Any improper method of delivering the proper argument did not create prejudice in the circumstances of this case.

Jay has failed to demonstrate fundamental error with respect to his prosecutorial misconduct allegation. This Court should therefore reject this claim and affirm Jay's convictions.

IV.
Jay Has Failed To Show That The District Court Abused Its Sentencing Discretion

A. Introduction

Jay contends that the district court imposed an excessive sentence for felony domestic battery. (Appellant's brief, pp.26-29.) However, Jay cannot show he is entitled to relief because he has failed to establish that the district court's unified eight-year sentence with three years fixed for felony domestic battery, and decision to retain jurisdiction, was excessive considering the objectives of sentencing, the nature of Jay's offense, the danger Jay poses to the victim and other romantic partners, and other factors before the court.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant has the burden of demonstrating that the sentencing court abused its discretion. Id.

C. The District Court Acted Well Within Its Sentencing Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive. Id. To establish that his sentence is excessive, Jay must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Id.; see also State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982) (setting forth these sentencing objectives). "When considering whether the district court abused its sentencing discretion, [the appellate courts] review the entire sentence[.]" State v. Bailey, 161 Idaho 887, 895, 392 P.3d 1228, 1236 (2017) (citation omitted). However, the appellate court will "presume that the defendant's term of confinement will probably be the fixed portion of the sentence, because whether or not the defendant's incarceration extends beyond the fixed portion of the sentence will be within the sole discretion of the parole board." Id. (citation omitted).

In this case, prior to imposing its sentence, the district court reviewed the presentence investigation report and domestic violence assessment it had ordered, and expressly indicated its consideration of the applicable sentencing factors discussed above. (9/3/19 Tr., p.26, Ls.11-18.) The state recommended a unified eight-year sentence with three years fixed. (9/3/19 Tr., p.18, Ls.19-21.) Jay recommended that the court impose a suspended sentence and place him on probation. (9/3/19 Tr., p.25, Ls.15-22.) The district court imposed a unified eight-year sentence with three years fixed, but retained jurisdiction for one year. (9/3/19 Tr., p.28, Ls.1-9.) A review of the record supports the court's sentencing determination.

The nature of Jay's crime warranted the sentence imposed. Wilder's numerous injuries, which were documented in photos admitted into evidence at the jury trial (State's Exhibits 1-11, 18), resulted from more than a solitary act of violence from Jay, and instead were caused by a continuous attack. Wilder suffered a broken nose; multiple scratches on her neck; swelling on her lower jaw, abrasions on the bridge of her nose; and bruising on her wrist, cheek, and above her eyebrow. (Trial Tr., Vol. I, p.309, L.8 – p.310, L.16; Trial Tr., Vol. II, p.8, Ls.3 – p.9, L.25.) Jay poses a particular continuing danger to Wilder (and any other romantic partners), in light of Wilder's willingness to deny the occurrence of such violence and attempts to conceal it from authorities.

The district court also found it significant that Jay did not accept responsibility for his crime, and continued to "adhere to a false narrative as to what happened." (9/3/19 Tr., p.26, L.24 – p.27, L.4) (see also PSI,[3] pp.18, 35 (Jay's statements to domestic violence evaluator and PSI investigator that it was Wilder who attacked him)). The domestic violence evaluator concluded that Jay was a "low to moderate-risk" to re-offend (PSI, p.16), and Jay's aggregate LSI-R score placed him in the "moderate" recidivism risk category (PSI, p.46). The PSI investigator concluded that Jay was a "marginal candidate for an order of retained jurisdiction." (PSI, p.48.)

This appears to have been Jay's first felony conviction. (See PSI, pp.35-38.) However, Jay's extensive history of misdemeanor offenses (10 convictions, 2 other misdemeanor charges with no disposition listed), demonstrate Jay's inability to follow the law, and foreshadow his

[3] Cited page numbers of the PSI refer to the page numbers of the electronic file containing the PSI, domestic violence evaluation, and other confidential exhibits.

difficulty in following the rules of a supervised community probation if he had he been granted that opportunity immediately. (Id.) Further, while Jay has never been previously charged with domestic violence-related offenses, there are indications in the record (such prosecutor's question that was the subject of the mistrial motion, as discussed above), that his relationship with Wilder involved physical abuse prior to this case. Despite denying the state's version of events that was supported by evidence submitted at the trial, Jay also told the presentence investigator that "this has happened three times before, but this was the worst." (PSI, p.35.)

Despite these concerns, the district court did not follow the state's harsher sentencing recommendation, and instead retained jurisdiction, giving Jay the opportunity for probation once he completed a rider. This was an entirely appropriate sentence in this case. The district court thus acted well within it sentencing discretion, and Jay has failed to demonstrate he is entitled to relief.

CONCLUSION

The state respectfully requests that this Court affirm the judgment of conviction entered upon the trial verdicts finding Jay guilty of felony domestic battery and misdemeanor obstructing of an officer.

DATED this 29th day of September, 2020.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of September, 2020, 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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/s/ Mark W. Olson
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MWO/dd