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State v. Daniels Respondent's Brief Dckt. 47481

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

STATE OF IDAHO,	)	
	)	**No. 47481-2019**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-19-10123**
	)	
JOHN HUEY DANIELS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE THOMAS J. RYAN
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

COLLEEN D. ZAHN
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

BEN P. McGREEVY
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.state.id.us

ATTORNEY FOR DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

John Huey Daniels appeals from his conviction for aggravated battery. He challenges the district court's denial of his mistrial motion.

Statement Of The Facts And Course Of The Proceedings

The state charged Daniels with aggravated battery with a deadly weapon enhancement for shooting Christopher Anderson. (R., pp. 26-27.)

At trial, Detective O'Gorman testified that in an interview Daniels admitted entering Anderson's house with a gun to help an associate collect a debt from Anderson. (Tr., p. 274, L. 10 – p. 276, L. 19.) Daniels admitted shooting Anderson, but claimed he did so on accident when "he was hit" by Anderson and Anderson's cousin and the gun "went off." (Tr., p. 276, L. 20 – p. 280, L. 1; State's Exhibit 23.)

When cross-examining Detective O'Gorman about his interview of Daniels, defense counsel asked, "[Y]ou wrote down in your police report about what [Daniels] characterized [Anderson] to be a member of something?" (Tr., p. 313, Ls. 19-21.) Detective O'Gorman responded, "Yes," and, in further response to questioning, acknowledged he was "familiar" with what Daniels had been talking about. (Tr., p. 313, Ls. 23-25.) Defense counsel asked "what was that?" and O'Gorman answered, "He classified [Anderson] as being a member of the SVC, which is a gang" and "Daniels also identified himself as an Aryan Knight dropout." (Tr., p. 314, Ls. 1-6.) Defense counsel then asked, "Okay. So you are familiar with those two gangs and the animosity between the two?" (Tr., p. 314, Ls. 7-8.) O'Gorman testified that he was. (Tr., p. 314, L. 9.)

Defense counsel continued: "Okay. So as more—based on what you understood from Daniels, this bad blood was between taking something from SVC rather than just the individual [Anderson]; is that right?" (Tr., p. 314, Ls. 10-13.) Detective O'Gorman "[couldn't] say what Mr. Daniels thought" but Daniels expressed "concern that [Daniels] was at [Anderson's] house" and that the matter "wasn't a gang issue." (Tr., p. 314, Ls. 14-19.) Defense counsel then clarified that he was "talking about the first time he met with [Anderson]" and if that involved a discussion of "taking something from SVC." (Tr., p. 314, Ls. 20-23.) Detective O'Gorman answered, "I think it was something—and I believe he actually made a statement that he was taking money from his family." (Tr., p. 314, L. 24 – p. 315, L. 1.) Defense counsel then used the police report to ask further questions about Daniels's statement that Anderson had previously confronted him "in reference to stuff being stolen" from SVC. (Tr., p. 315, L. 2 – p. 316, L. 15.)

In redirect examination, the prosecutor clarified that Daniels was referring to himself when he talked about being an "Aryan Knight dropout." (Tr., p. 331, Ls. 14-22.[1]) Defense counsel then conducted re-cross examination and Detective O'Gorman was excused. (Tr., p. 332, L. 6 – p. 333, L. 11.)

During the following lunch break for the jury, defense counsel moved for a mistrial. (Tr., p. 336, L. 6 – p. 337, L. 2.) The district court applied I.C.R. 29.1 and denied the motion. (Tr., p. 339, L. 11 – p. 341, L. 14; p. 341, L. 23 – p. 342, L. 11.) The district court left open the issue of a curative instruction. (Tr., p. 341, Ls. 15-22.) The record does not reflect that a curative instruction was requested or given. (See, e.g., R., pp. 92-119.)

[1] The prosecutor later explained that he was seeking only to clarify that Daniels had not claimed that Anderson was the Aryan Knights dropout. (Tr., p. 337, Ls. 4-11.)

The jury returned a guilty verdict. (R., p. 120.) Daniels filed an appeal timely from entry of judgment. (R., pp. 123, 130.)

ISSUE

Daniels states the issue on appeal as:

> Did the district court commit reversible error when it denied Mr. Daniels' motion for a mistrial?

(Appellant's brief, p. 11.)

The state rephrases the issue as:

Has Daniels failed to demonstrate error in the district court's denial of his motion for a mistrial?

ARGUMENT

Daniels Has Shown No Error In The Denial Of His Motion For A Mistrial

A. Introduction

During the trial, defense counsel inquired specifically about gang affiliation and elicited testimony that Daniels's had stated that he was an "Aryan Knights dropout." (Tr., p. 313, L. 19 – p. 316, L. 15.) After the witness had been excused, Daniels moved for a mistrial, expressing "concern" that two sitting jurors who either currently or in the past worked for the Idaho Department of Correction might "know that [Daniels has] either been to prison or is in prison." (Tr., p. 336, L. 6 – p. 337, L. 2.) Defense counsel asserted the claim that "this jury is prejudiced and they cannot be fair in determining [Daniels's] guilt or innocence because of the knowledge of these gangs in the prison." (Tr., p. 338, Ls. 1-14.)

The district court first addressed the concern about the two jurors with IDOC experience, noting there had been no voir dire about what those witnesses did or did not know about the Aryan Knights. (Tr., p. 339, L. 18 – p. 340, L. 12.) The district court invited defense counsel to correct it if it was wrong in believing that the concern underlying the motion was that the jurors who had experience with IDOC might "bring up to the other jurors" information about the prison gangs that would "create a prejudice." (Tr., p. 340, Ls. 13-21.) The district court then concluded that without knowledge of what the jurors had stated or would state to one another, it could not determine if such an error occurred or would occur. (Tr., p. 340, Ls. 22-25.) Furthermore, the jury had been instructed not to share specialized knowledge, so any such sharing would be contrary to the instructions. (Tr., p. 341, Ls. 1-7.) The "final grounds for denying the motion" was that "the subject of

a gang conflict was brought up by the defense." (Tr., p. 341, L. 23 – p. 342, L. 2.) The district court concluded that Daniels had failed to show error, and that for error to occur it would require the two jurors to violate their instructions. (Tr., p. 342, Ls. 7-11.)

On appeal Daniels argues the district court erred because (1) the invited error doctrine did not apply to the witness's statement about the Aryan Knights (Appellant's brief, pp. 13-20) and (2) the statement constituted reversible error (Appellant's brief, pp. 20-25). Daniels's claims of error fail because the record shows that the district court correctly concluded that the argument the two jurors would infer that Daniels had been in prison was speculative; that the instruction to not share specialized knowledge addressed the concern of juror misconduct raised by defense counsel in the motion; and that defense counsel did in fact introduce the subject of gang conflict when he specifically asked about gang animosity in a follow-up question.

B. Standard Of Review

"The decision to declare a mistrial is within the discretion of the district court, and such a determination will only be reversed when that discretion has been abused." State v. Manley, 142 Idaho 338, 342, 127 P.3d 954, 958 (2005). "The power to declare a mistrial is the power to avert the consequences of an event at trial that might otherwise deprive the defendant of a fair trial and lead to reversal of a conviction." State v. Urquhart, 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct. App. 1983). Thus, a "trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error." Id.

C. Daniels Has Failed To Show Error By The District Court Because The Record Supports All Three Of Its Bases For Denying The Motion For Mistrial

"The threshold inquiry" in review of the denial of a mistrial motion "is whether *the state* introduced error." State v. Shepherd, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct. App. 1993) (emphasis added). "[W]hen an officer of the State gives any unsolicited testimony that is gratuitous and prejudicial to the defendant, that testimony will be imputed to the State for the purposes of determining prosecutorial misconduct." State v. Johnson, 163 Idaho 412, 423, 414 P.3d 234, 245 (2018). The Court reviews for reversible error only where the state-introduced error allegedly necessitating the mistrial is "supported by a contemporaneous objection to the underlying procedural or evidentiary error." State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). "When there is no contemporaneous objection a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error." Id.

Daniels did not object to the testimony that prompted his motion for a mistrial, nor did he move to strike it. Rather, his motion was based exclusively on the theory that two jurors who had worked or did work for the Department of Correction would infer from the testimony that Daniels had served time in prison and would so inform the other jurors. (Tr., p. 336, L. 6 – p. 337, L. 2; p. 338, Ls. 1-14.) The district court properly rejected this theory.

1. The District Court Properly Rejected Daniels's Mistrial Theory For Three Reasons

First, the district court concluded that Daniels had not shown that the jurors in question were familiar with the Aryan Knights or would infer a prison record based on a past association with them. (Tr., p. 339, L. 18 – p. 340, L. 12.) Daniels's failure to support his claim with evidence is borne out by the record.

Prospective Juror No. 3 worked for IDOC for ten years, but at the time of trial worked for the Department of Agriculture. (Tr., p. 32, Ls. 1-18.) He started as a "food service officer," became a "correctional corporal," and finished as a "correctional shift commander." (Tr., p. 91, L. 19 – p. 92, L. 11.) He stated that he had not formed a bias against persons who were "sent to the state penitentiary." (Tr., p. 32, Ls. 19-23.) Prospective Juror No. 10 worked for IDOC as a computer lab instructor. (Tr., p. 33, Ls. 9-22.) Neither juror was asked anything about their knowledge of gangs. (Tr., p. 17, L. 7 – p. 134, L. 13.) The district court correctly concluded that Daniels had not supported his claim that these two jurors would have concluded that Daniels had been in prison based on the reference to being an Aryan Knights dropout.

Second, the district court concluded that Daniels had not shown that the two jurors who worked at IDOC had or would transmit any specialized knowledge about the Aryan Knights to the other jurors. (Tr., p. 340, L. 13 – p. 341, L. 7.) Nothing in the record shows that, even if the two jurors were familiar with the significance of having a prior association with the Aryan Knights, they did or would have conveyed such information to the other jurors. As found by the district court, the jurors were instructed to not share any specialized knowledge about the facts of the case with the other jurors. (R., p. 103.) The district court correctly concluded there was no showing of error, and that it could rely on the jury instructions. To overcome the presumption that jurors followed given instructions, "a defendant claiming error in the denial of a mistrial motion must show there is an overwhelming probability that the jury was unable to follow the court's instructions and a strong likelihood that the effect of the evidence was devastating to the defendant." State

v. Maldonado, 164 Idaho 702, 706, 435 P.3d 14, 18 (Ct. App. 2018). The record supports no such showing.

Third, the district court found that "the subject of a gang conflict was brought up by the defense." (Tr., p. 341, L. 23 – p. 342, L. 2.) "A misstep on dangerous ground, where counsel has voluntarily ventured but is unsure of possible responses, may result in invited error, and if so, cannot then be grounds for a mistrial." State v. Atkinson, 124 Idaho 816, 821, 864 P.2d 654, 659 (Ct. App. 1993). Here the record shows that defense counsel did introduce "the subject of gang conflict."

After Detective O'Gorman testified that Daniels had identified Anderson as a member of the SVC and stated that he was an "Aryan Knights dropout" (Tr., p. 313, L. 19 – p. 314, L. 6), defense counsel did not object or move to strike the answer. Instead, he asked the question, "So you are familiar with those two gangs and the animosity between the two?" and received the answer, "Yes." (Tr., p. 314, Ls. 7-9.) Defense counsel then went on to explore the potential role of gangs in the prior confrontation between Daniels and Anderson. (Tr., p. 314, L. 10 – p. 316, L. 15.) This record shows that defense counsel pursued a line of inquiry about gang conflict and its potential role in the events surrounding the shooting. That he later regretted having pursued that line of inquiry (Tr., p. 338, Ls. 7-9) does not negate the fact the error was invited.

The district court properly rejected the mistrial motion as it was presented. Daniels claimed, but failed to show, prejudice from two jurors inferring that Daniels had been in prison because of specialized knowledge of the nature of the Aryan Knights gang. Daniels also claimed, but failed to show, that the two jurors would have shared this specialized knowledge despite instructions not to. Finally, defense counsel's actions of inquiring about

animosity between the two gangs and the role of gang activity in the events surrounding the shooting, instead of objecting and moving to strike the testimony about the Aryan Knights, supports the district court's conclusion that any error was invited.

2. Daniels Has Failed To Show Error In The District Court's Determination That Daniels Had Not Shown The Jurors Who Worked For IDOC Would Have Drawn The Inference That Daniels Had Been In Prison

On appeal, Daniels has failed to show error in any of the three bases for denying the mistrial motion articulated by the district court. First, he has failed to show error in the district court's determination that Daniels had failed to show that the two IDOC employees in fact were familiar with the Aryan Knights and would conclude that Daniels's prior association with them meant he had spent time in prison.

Daniels argues that the statement was inadmissible under I.R.E. 404(b) and that evidence of gang affiliation is generally highly prejudicial. (Appellant's brief, p. 19.) However, the transcripts contains no I.R.E. 404(b) objection to the testimony, nor any motion to strike it. This argument is not preserved. "To properly preserve an issue for appellate review, both the issue and the party's position on the issue must be raised before the trial court." State v. Hoskins, 165 Idaho 217, 222, 443 P.3d 231, 236 (2019) (quotation marks omitted). Because Daniels made no I.R.E. 404(b) objection (and indeed, at no point at trial even claimed the evidence was inadmissible), this issue is not preserved for appellate review. The issues on appeal must be limited to the issues below: whether two jurors with a work history at IDOC would have inferred from the Aryan Knight evidence that Daniels had been a prison inmate, would have shared that inference with the rest of the jury, and that the jury thus would be unfairly prejudiced. (Tr., p. 336, L. 6 – p. 337, L. 2; p. 338, Ls. 1-14.)

Daniels also argues "it was likely" the jurors who had worked for IDOC "knew of the nature of the Aryan Knights," especially the one who had worked as a shift commander and investigator. (Appellant's brief, p. 23.) Daniels makes no specific argument that the computer lab instructor knew about the Aryan Knights. Neither the district court nor this Court needs accept Daniels's speculation, however. See, e.g., State v. Watkins, 152 Idaho 764, 766, 274 P.3d 1279, 1281 (Ct. App. 2012) (speculative prejudice did not necessitate mistrial). Daniels has failed to show that the specific prejudice he argued below—knowledge that he had been in prison—was improperly rejected by the district court for lack of support.[2]

3. Daniels Has Failed To Show Error In The District Court's Determination That Daniels Had Not Shown The Jurors Who Worked For IDOC Would Share Specialized Knowledge With The Other Jurors

Daniels has also failed to show error in the district court's determination that, even if the two jurors had specialized knowledge of the Aryan Knights, there was no grounds to assume they would share that knowledge with the other jurors. The district court so found both because there was no evidence of it happening, and because the jurors had been instructed not to share specialized knowledge. On appeal Daniels argues that the jurors would not have so construed the instruction, because they were also given an instruction that they could rely on their own experience in making credibility determinations. (Appellant's brief, pp. 23-24.) Again, however, this claim is unpreserved because it was not raised below. Hoskins, 165 Idaho at 222, 443 P.3d at 236. Moreover, any claim the

[2] In addition, Daniels did not move to excuse the one juror he, on appeal, claims "likely" knew that association with the Aryan Knights indicated having spent time in prison, and to proceed with the alternate juror.

instruction was inadequate is waived by Daniels's failure to request a curative instruction. See State v. Pearce, 146 Idaho 241, 248, 192 P.3d 1065, 1072 (2008) ("This Court will not allow a defendant to appeal an instruction which was never offered at the trial level, unless that instruction constitutes a necessary matter of law whose omission would constitute fundamental error."); State v. Setzer, 136 Idaho 477, 478, 36 P.3d 829, 830 (Ct. App. 2001) (failure to request instruction waives claim of error in not giving instruction). Finally, Daniels makes no claim of error in the court's determination that it had no evidence that the two jurors had or would in fact share suspicions that Daniels had been in prison at some point.

4. Daniels Has Failed To Show Error In The District Court's Determination That The Defense Brought Up The Subject Of Gang Conflict

Daniels has finally failed to show that the district court erred when it concluded that defense counsel invited the error by bringing up the subject of a gang conflict. Daniels first argues that Detective O'Gorman's testimony about Daniels stating he was an "Aryan Knights dropout" was nonresponsive and therefore not invited. (Appellant's brief, pp. 14-24.) This argument is based on an unreasonably narrow view of the record, an overly generous reading of the law, and a misunderstanding of the district court's finding.

First, Daniels's argument presents an unreasonably narrow view of the record. A complete review shows that defense counsel did not limit his inquiry to what gang Anderson belonged to, but instead asked more broadly about Daniels's statements, and thus elicited the statement about Daniels's own prior gang affiliation.

Using O'Gorman's police report, defense counsel elicited testimony in cross examination about Daniels's statements about Anderson's affiliation with SVC. (Tr., p.

313, Ls. 19-21.) The police report at issue stated that Daniels said that when he entered Anderson's trailer, Anderson reacted angrily because he believed Daniels had stolen drugs from SVC. (PSI, p. 1015.) Anderson had previously confronted Daniels about the theft, and Daniels had denied it. (Id.) In the middle of describing the events surround the shooting, Daniels "said he was an AK dropout (Former Arian Knights gang member). [Daniels] said if he ever goes back to prison 'I'm done'." (Id. (punctuation and spelling original).)

After confirming that the detective "wrote down" in his police report Daniels's "characteriz[ation]" of Anderson as "a member of something," defense counsel confirmed the detective was "familiar with what *he [Daniels] was talking about*." (Tr., p. 313, L. 19-25 (emphasis added).) Counsel then asked, "And *what was that*?" (Tr., p. 314, L. 1.) Thus, the question before Detective O'Gorman was *what Daniels was talking about.* The detective answered that Daniels had claimed Anderson was a member of SVC and identified himself as being a former member of the Aryan Knights. (Tr., p. 314, Ls. 1-6.)

Counsel then followed up on this answer by asking, "So you are familiar with those two gangs and the animosity between the two?" (Tr., p. 314, Ls. 7-8.) Counsel then explored in detail Daniels's statement, as set forth in the police report, about Anderson having previously confronted him about a theft from SVC. (Tr., p. 314, L. 10 – p. 316, L. 15.) This testimony ultimately supported Daniels's testimony that when he entered the trailer with a gun in his pocket, Anderson and another person attacked him and he shot Anderson by accident while trying to scare him with the gun. (Tr., p. 402, L. 24 – p. 423, L. 20.)

The record shows that Daniels's counsel did not limit his inquiry to only Anderson's gang affiliation. Rather, his questions were in regards to Daniels's statement about his history with Anderson. Included in Daniels's statement was his own prior gang affiliation. Moreover, the fact defense counsel asked a follow-up question about whether the detective was aware of animosity between the gangs instead of objecting to the answer as beyond the scope of the question and moving to strike it shows counsel at that time did not believe the testimony to have been improperly volunteered.

Trial counsel's questions were not limited to Anderson's gang affiliation. Because it was cross-examination, counsel could simply have asked, "Did Mr. Daniels state that Anderson was a member of SVC?" He did not. Instead, he asked much broader questions about *Daniels's statement*. He also asked at least one question directly about gang animosity between the two gangs, and additional questions about whether a prior confrontation between Daniels and Anderson was gang related. The record does not support Daniels's argument that trial counsel's questioning was narrow and did not include Daniels's gang affiliation.

Second, Daniels's argument fails because it is based on an overly generous reading of the law. A defendant "cannot complain of any error in [inadmissible testimony] he elicited." State v. Abdullah, 158 Idaho 386, 435, 348 P.3d 1, 50 (2015). See also State v. Gleason, 123 Idaho 62, 66, 844 P.2d 691, 695 (1992) ("Appellant cannot now be heard to denounce testimony that he roused. This constitutes invited error.").

These standards were employed in State v. Parker, 157 Idaho 132, 148 n.2, 334 P.3d 806, 822 n.2 (2014). In that case defense counsel asked a detective if the defendant "'was being cooperative with you the entire time' of the interview" and the detective

responded, "'Well, he was being cooperative, but he was lying to me about certain things.'" The Court declined to consider Parker's argument that the part of the response about lying was error, because it was invited error. Id. "Parker cannot now be heard to denounce the testimony that he roused." Id. (quotation marks omitted). Like counsel in Parker, trial counsel in this case may have believed he limited his question to the information favorable only to the defense. However, his question was ultimately about Daniels's statement, not Anderson's gang affiliation specifically, so his inartful question elicited more information than he may have intended. In addition, his response to the answer, asking a follow-up question instead of objecting to the answer as non-responsive, suggests that counsel knew the answer was not unresponsive to the question.

Likewise, defense counsel cannot tread "dangerous ground" where counsel is "unsure of possible responses" and assume a mistrial motion will save him if it does not go as well as hoped. Atkinson, 124 Idaho at 821, 864 P.2d at 659. That is what happened here. Counsel deliberately asked about Daniels's statements about gang affiliation. The law does not let him parse his claim that some of the evidence he elicited was uninvited where he asked about Daniels's statements and the answer addressed Daniels's statements.

Finally, Daniels's argument is based on a misunderstanding of the district court's finding. Daniels argues that "[c]ontrary to the district court's determination, Detective O'Gorman's volunteered statement that Mr. Daniels identified himself as a former member of the Aryan Knights was not invited error, because the statement was nonresponsive to defense counsel's question on Mr. Anderson's affiliations." (Appellant's brief, p. 12.) The district court, however, found that "the *subject of a gang conflict* was brought up by the defense." (Tr., p. 341, L. 23 – p. 342, L. 2 (emphasis added).) Defense counsel, after

eliciting the testimony that Daniels said Anderson was a member of SVC and that he was a former member of the Aryan Knights, asked, "So you are familiar with those two gangs and the animosity between the two?" (Tr., p. 314, Ls. 1-8.) The district court's finding that "the subject of a gang conflict was brought up by the defense" (Tr., p. 341, L. 23 – p. 342, L. 2) is established by the record. Daniels's claim otherwise is without merit.

The district court rejected the mistrial motion on three grounds. Rather than show that all three grounds were erroneous, as is his appellate burden, Daniels has presented an appellate argument that is not preserved or that fails to show error.

5. Even If Daniels's Assumptions Of Prejudice Were Supported By The Record, He Was Still Given A Fair Trial

The touchstone of the mistrial analysis is whether the alleged error, defect, or conduct deprived the defendant of a fair trial. I.C.R. 29.1 ("A mistrial may be declared on motion of the defendant when there occurs during the trial, either inside or outside the courtroom, an error or legal defect in the proceedings, or conduct that is prejudicial to the defendant and deprives the defendant of a fair trial."). Review of the record shows that Daniels received a fair trial even accepting his underlying claims that the two jurors who worked for IDOC speculated that Daniels had been in prison before and shared that speculation with the other jurors.

Daniels admitted he shot Anderson. (Tr., p. 435, L. 25 – p. 436, L. 11.) Daniels had gone to Anderson's house to help his friend Jeff (telling the detective he was there to "back him up"). (Tr., p. 403, L. 1 – p. 405, L. 24; p. 439, L. 24 – p. 440, L. 9; State's Exhibit 23 (file named "30.wmv").) Daniels brought a gun with him, in his pocket. (Tr., p. 412, Ls. 18-19; p. 414, Ls. 9-12; p. 415, Ls. 12-14.) Daniels took the gun into the house

with him. (Tr., p. 415, Ls. 1-22.) When Anderson and another person present "aggressed towards" him he pulled the gun to "scare them." (Tr., p. 420, L. 15 – p. 422, L. 10.) Then he was hit and "the gun went off." (Tr., 422, Ls. 14-21; State's Exhibit 23 ("32.wmv").) Intent was the only element of the crime left for the jury to decide.

When proving aggravated battery, "direct evidence of intent is not required." State v. Mitchell, 146 Idaho 378, 384, 195 P.3d 737, 743 (Ct. App. 2008). The requisite intent "may be shown by circumstantial evidence, or proven by the defendant's acts and conduct." Id. Here the evidence of Daniels's intent is plentiful: Daniels and Anderson had a history of confrontation with at least one violent encounter. Daniels took a gun with him to confront Anderson and provide backup for a friend. After shooting Anderson, Daniels hid the gun in a door panel in his car. (Tr., p. 223, L. 6 – p. 226, L. 9; p. 243, Ls. 4-19; p. 284, L. 19 – p. 285, L. 1.) He then lied to police about the incident for hours. (Tr., p. 428, L. 25 – p. 430, L. 23.) The one comment about former gang membership, which did not merit an objection, a motion to strike, or a curative instruction, did not deprive Daniels of a fair trial.

On appeal Daniels argues the evidence of his guilt is weak because he testified he did not intend for the gun to go off and did not intentionally point it at anyone, and no other witness directly contradicted his testimony. (Appellant's brief, p. 24.) However, the applicable legal standard assumes that direct evidence of intent will be rare. A jury may infer "intent from the acts and conduct of the accused, the nature of the weapon used by the defendant and the manner in which it was used, taken together with all other circumstances in the case." State v. Herrera-Brito, 131 Idaho 383, 386, 957 P.2d 1099, 1102 (Ct. App. 1998) (quotation marks omitted). Daniels's acts, conduct, choice of

weapon, manner in which it was used, and all the circumstances of the case show Daniels's willful intent. There is no reason to believe the testimony about his statement of former gang membership changed the verdict in this case.

Daniels had a fair trial even if the district court had erred in concluding (1) that there was no showing that the two jurors inferred that Daniels had been in prison, (2) that there was no evidence that the two jurors shared such an inference with the other jurors in contravention of an instruction, and (3) that defense counsel introduced the subject of gang animosity.

CONCLUSION

The state respectfully requests this Court to affirm Daniels's conviction for aggravated battery.

DATED this 30th day of December, 2020.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of December, 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:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

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

KKJ/dd