3-28-2017

State v. Johnson Appellant's Brief Dckt. 43822

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43822**
Plaintiff-Respondent,	)	
	)	**MINIDOKA COUNTY NO.**
v.	)	**CR 2005-2497**
	)	
DAVID LEON JOHNSON,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

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

_____

HONORABLE MICHAEL R. CRABTREE
District Judge

_____

ERIC D. FREDERICKSEN
State Appellate Public Defender
State of Idaho
I.S.B. #6555

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender
I.S.B. #7259
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisons

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Following the remand of his case by the Idaho Supreme Court, Mr. Johnson's case proceeded to a second trial. Unfortunately, like his first trial, this trial was tainted by errors. Prior to the start of trial, the jury pool was told, by the district court, that a prior trial had occurred in 2006 and that following an appeal, the Idaho Supreme Court had reversed the conviction and remanded the case for a new trial. This instruction did not include any statement to the jury that the prior trial should not be considered and effectively prejudiced the entire jury panel. After denying a request to draw a new panel, the case proceeded as planned. Mr. Johnson asserts that allowing the case to be heard by members of this jury pool violated his constitutional right to a fair trial.

During the trial, Mr. Johnson made two motions for mistrial. The lead detective on the case, Detective Snarr, testified that he had attempted to interview Mr. Johnson. The detective's statement prejudicially persuaded the jury to infer guilt from Mr. Johnson's previous assertions of his rights. Following defense counsel's objection and motion for a mistrial, the district court provided a curative instruction. The instruction was insufficient to cure the prejudice and increased the prejudicial nature of the testimony. Mr. Johnson asserts that the district court erred in denying his motion for mistrial based on the improperly presented inference of guilt.

Additionally, the State presented the testimony of Scott Wilson, Mr. Johnson's former employer. Mr. Wilson admitted to having no memory of the dates or times that Mr. Johnson worked on the days in question. However, he was allowed to use a report he had created to "refresh his recollection." Unfortunately, the report was not disclosed

to defense counsel prior to Mr. Wilson producing it during his testimony, despite the fact that it was created at the request of the State. Mr. Johnson asserts that the district court abused its discretion in allowing Mr. Wilson to testify when his recollection had not actually been refreshed, that the State committed a discovery violation that prejudiced Mr. Johnson's ability to prepare for examination of Mr. Wilson, and that the district court erred in denying the resulting motion for a mistrial.

Finally, Mr. Johnson asserts that the above errors amount to cumulative error.

Statement of the Facts and Course of Proceedings

On August 23, 2005, an Indictment was filed charging Mr. Johnson with three counts of lewd conduct with a minor under sixteen years of age. (33691 R., pp.1-4.)[1] The jury returned guilty verdicts for counts one and two and found Mr. Johnson not guilty of count three. (33691 R., pp.320-321.) The district court imposed a unified sentence of twenty years, with five years fixed, for each count, to be served concurrently. (33691 R., pp.343-347.) Mr. Johnson filed a Notice of Appeal timely from the Judgment of Conviction. (33691 R., pp.356-358.) The Idaho Supreme Court vacated Mr. Johnson's convictions and remanded the case for further proceedings "due to the district court's erroneous admission of evidence under I.R.E. 404(b)." *State v. Johnson*, 148 Idaho 664, 671 (2010).

Following remand, Mr. Johnson's new trial began in June of 2011. (R., pp.560-564.) Prior to the start of trial, potential jurors were called in, sworn, given preliminary jury instructions, and asked to fill out a supplemental juror questionnaire. (R., pp.555-

[1] Citations to the prior appeal, Supreme Court Docket Number 33691, will be cited as "33691 R." Citations to the record in the pending appeal will be cited as "R."

558; Tr. 6/22/11, p.4, L.4 – p.18, L.12; Tr. 6/23/11, p.18, L.4 – p.29, L.8.)[2] During these hearings, the district court read the following to the jury, ". . . There was a prior trial in this case in 2006. Following an appeal, the Idaho Supreme Court reversed and remanded the case to this court for a new trial. . . ." (R., p.550; Tr. 6/22/11, p.5, Ls.12-15, p.11, Ls.20-23; Tr. 6/23/11, p.19, Ls.14-17, p.25, Ls.14-16.)

At the start of trial, Mr. Johnson filed a motion in limine requesting an order from the district court prohibiting the State from "[m]aking any reference to a prior trial in this case" and requesting, that to the extent that witnesses need to referred to the prior trial, that it be referred to as "a previous hearing in this case." (R., p.565.) The district court immediately informed defense counsel that the jury panel had already been told that there was a prior trial and appeal during the hearings to have the potential jurors complete the supplemental questionnaire. (Tr., p.74. Ls.8-14.) Defense counsel, who was not present when the instruction had been given, expressed concern that the jurors had been informed that Mr. Johnson had been previously convicted, objected, and requested that the matter be vacated and new jury panel selected. (Tr., p.75, Ls.13-21, p.76, Ls.18-24, p.77, L.9, p.80, L.18 – p.81, L.16; R., pp.555-558.) Ultimately, the district court denied the motion to vacate and noted that if either party needed to refer to the prior trial they should "appropriately refer to it as a prior proceeding or a prior hearing." (Tr., p.82, L.20 – p.83, L.5.)

The State presented several witnesses including Dr. Barton Adrian, a doctor that preformed an examination of A.J., the alleged victim (Tr. p.534, L.1 – p.550, L.14); Peggy Jarolimek, a retired caseworker for health and welfare who set up a CARES

[2] The transcript of the jury trial and sentencing hearing, will be cited as "Tr."

interview for A.J. (Tr., p.555, L.10 – p.567, L.25); Lisa Mitton, the forensic interviewer for CARES who interviewed A.J. (Tr., p.570, L.13 – p.581, L.9); two former co-workers of Mr. Johnson, Jeremy Kiesig (Tr., p.584, L.13 – p.602, L.21) and Tammy Lynard (Tr., p.603, L.8 – p.613, L.20); Scott Wilson, Mr. Johnson's former employer (Tr., p.621, L.22 – p.701, L.18), Eric Snarr, the detective who investigated the accusations against Mr. Johnson (Tr., p.703, L.20 – p.751, L.20), A.J., the alleged victim (Tr., p.755, L.11 – p.802, L.11); Richard Smith, A.J.'s maternal grandfather (Tr., p.802, L.21 – p.860, L.7); and Michelle Johnson, A.J.'s mother (Tr., p.881, L.12 – p.1049, L.6).

During the State's case-in-chief, the defense made two motions for mistrial. The first occurred during the testimony of Scott Wilson, Mr. Johnson's former employer. The focus of Mr. Wilson's testimony was to provide information about certain dates that Mr. Johnson worked near the time that he was alleged to have inappropriately touched A.J. Mr. Wilson was asked if he remembered if Mr. Johnson was working on that particular job on March 19, 2004. (Tr., p.627, L.8 – p.628, L.6.) He requested that he be able to look at some notes that would refresh his memory. (Tr., p.628, L.10, p.631, Ls.7-9.) Defense noted counsel they had filed a discovery request and that the report had not been disclosed. (Tr., p.631, Ls.12-17.) In follow-up, Mr. Wilson admitted that he did not remember seeing Mr. Johnson at work on either March 19, 2004, or March 22, 2004. (Tr., p.632, Ls.9-17.) Defense counsel disputed the report's ability to refresh Mr. Wilson's recollection. (Tr., p.637, Ls.6-15.) The district court noted that the witness could "testify without the benefit of the document, because it's very close to his testimony being from the document itself, which is an authentication of the document, and it's impermissible. It's late disclosed discovery. [If his recollection has been

refreshed he can testify.] But any further use of the document will not be permitted." (Tr., p.637, L.19 – p.638, L.8.)

The jury returned and Mr. Wilson was asked if his memory had been refreshed as to Mr. Johnson's work on March 19th; he stated it was refreshed. (Tr., p.640, L.22 – p.641, L.1.) The State continued to ask him about Mr. Johnson's work on March 19th and then the questioning turned to March 22nd. (Tr., p.641, Ls.2-20.) Defense counsel objected again noting that Mr. Wilson's memory had not been refreshed, but that he was testifying from his memory of the report he generated earlier in the day. (Tr., p.641, L.24 – p.642, L.3.) Defense counsel was then allowed to *vior dire* in aid of objection and Mr. Wilson admitted that he had no memory of the dates in question or if Mr. Johnson was at work on those dates. (Tr., p.643, L.14 – p.644, L.9.) Defense counsel again noted his objection and requested the testimony be stricken. (Tr., p.644, Ls.10-11.) The district court overruled the objection. (Tr., p.644, Ls.17-18.) Mr. Wilson was then allowed to testify about Mr. Johnson's work on March 22nd. (Tr., p.644, L.23 – p.645, L.20.)

During a break, defense counsel reiterated that a discovery request had been made over a year ago, no records representing the data management program used by Trilogy were provided, Mr. Wilson has no current relocation of what happened on March 19th or 22nd, the defense had no opportunity to review the records related to tracking Mr. Johnson's work, that the State was using a "backdoor approach to introducing documentary evidence that was never disclosed to the defense," that the defense had "been caught in unawares," and that the district court's incorrect ruling amounted reversible error. (Tr., p.648, L.8 – p.651, L.17.) The district court

determined that it needed further information and had Mr. Wilson return to the witness stand. (Tr., p.655, L.23 – p.656, L.5.)

Eventually, after discussing the importance of Mr. Wilson's testimony, defense counsel made a motion for a mistrial. (Tr., p.668, Ls.2-4.) The district court stated that it was "difficult, if not impossible," to rein in Mr. Wilson's testimony at this point. (Tr., p.676, Ls.13-17.) The court ruled that it would affirm the prior ruling on refreshing recollection, "I think the State did just provide sufficient foundation to satisfy the requirements of Rule 612 for use of that document." (Tr., p.676, L.18 – p.677, L.1.) The district court also found that the failure to disclose the report constituted a discovery violation "in form, if not in substance" because, by the witnesses testimony, the report "was requested by either the State's attorney or Detective Snarr." (Tr., p.677, Ls.3-11.) However, the court took the motion for mistrial under advisement noting that there was no possibility of excluding the testimony at this point and that it needed to hear further testimony to determine if the evidence deprived Mr. Johnson of a fair trial. (Tr., p.677, L.18 – p.678, L.25.)

The second motion for a mistrial occurred during Detective Snarr's testimony He was asked if he had interviewed anyone else after sitting through the CARES interview, talking to Michelle Johnson, and Joann Johnson. (Tr., p.726, Ls.17-24.) He responded that he "[t]ried to interview Mr. Johnson." (Tr., p.726, L.25.) Defense counsel immediately objected and moved for a mistrial. (Tr., p.727, Ls.13-21.) The court noted that "as it stands at this point I'm satisfied and convinced that just the way the answer's phased and the words used creates an impermissible inference of guilt." (Tr., p.731, Ls.20-23.) In discussing a possible remedy to the violation of Mr. Johnson's

constitutional rights, defense counsel argued for the declaration of a mistrial and against a limiting instruction. (Tr., p.736, Ls.15-25, p.738, Ls.20-21.) The district court determined that it would provide a limiting instruction and deferred ruling on the motion for mistrial so that it could later assess whether or not Mr. Johnson had been afforded a fair trial. (Tr., p.737, Ls.16-25.)

After the State rested, defense counsel requested that the district court rule on the motions for mistrial. (Tr., p.1070, Ls.25-25, p.1084, Ls.12-13.) The district court ruled that:

> At this point I've been examining the question of mistrial under the parameters of determining whether or not the two particular events I was focused on, which were the discovery, if you will, with the witness who went back to Twin Falls and created a computer document, and with respect to the testimony that could have been construed as commenting on the defendant's pre-arrest pre-Miranda silence, and the context was whether or not those two items operated or might operate to deprive the defendant of a fair trial.
>
> In considering the evidence as it's been presented and the examination of all the witnesses, I think those two items have been vitiated in terms of their effect on the defense, and so I will deny the motions for mistrial on those bases.

(Tr., p.1084, L.14 – p.1085, L.6.)

The defense presented the testimony of Diane Peterson, Mr. Johnson's sister (Tr., p.1086, L.1 – p.1112, L.8); recalled Detective Snarr (Tr., p.1115, L.11 – p.1136, L.16); and then Mr. Johnson testified on his own behalf (Tr., p.1138, L.22 – p.1201, L.16). Mr. Johnson specifically maintained his innocence. (Tr., p.1153, L.21 – p.1154, L.14, p.1156, Ls.15-20.)

Ultimately, the jury returned guilty verdicts for both counts of lewd conduct. (Tr., p.1299, L.15 – p.1300, L.8; R., p.608.) Mr. Johnson was sentenced to unified

sentences of fifteen years, with five years fixed, for each of his two lewd conduct convictions. (R., pp.612-614.) No Notice of Appeal was filed. However, after a successful post-conviction proceeding, a Superseding Judgment of Conviction and Order of Commitment was entered to allow Mr. Johnson to appeal. (R., pp.88-91.) A Notice of Appeal was filed timely from the Superseding Judgment of Conviction. (R., pp.101-102.)

ISSUES

1. Did the district court's instruction informing the jury pool that a prior trial had occurred, that Mr. Johnson's prior convictions were overturned, and that the Idaho Supreme Court had remanded the case for a new trial violate Mr. Johnson's constitutional right to a fair trial before an impartial jury?

2. Did the district court err in denying the motion for a mistrial made after the State improperly commented on Mr. Johnson's invocation of his right to silence?

3. Did the district court err in denying the motion for a mistrial after the court erroneously allowed Mr. Wilson to testify with the aid of a report, despite the fact that his memory was not refreshed by the contents of the report, and after finding that the State's failure to disclose the report amounted to a discovery violation?

4. Do the errors in Mr. Johnson's case amount to cumulative error?

ARGUMENT

I.

The District Court's Instruction Informing The Jury Pool That A Prior Trial Had Occurred, That Mr. Johnson's Prior Convictions Were Overturned, And That The Idaho Supreme Court Had Remanded His Case For A New Trial Violated Mr. Johnson's Constitutional Right To A Fair Trial Before An Impartial Jury

A. Introduction

When the district court called in the jury pool to complete juror questionnaires, the court provided introductory instructions. These instructions included a statement that a prior trial had occurred in 2006 and that following an appeal, the Idaho Supreme Court had reversed and remanded the case for a new trial. This instruction included no direction to the jury that the prior trial should not be considered and effectively prejudiced the entire jury panel. Later, defense counsel requested that the district court draw a new jury panel. The district court denied the motion and proceeded with the panel. Mr. Johnson's constitutional right to a fair trial before an impartial jury was violated when the jury, which had been prejudicially informed of Mr. Johnson's previous conviction for the same charges, was allowed to hear his case.

B. Standard Of Review

Constitutional claims are reviewed de novo. *State v. Easley*, 156 Idaho 214, 218 (2014). Trial errors ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v. Adams*, 147 Idaho 857, 861 (Ct. App. 2009). Because Mr. Johnson made a timely objection, he only has the duty to prove that an error occurred, "at which point the State has the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222 (2010).

C. The District Court's Instruction Informing The Jury Pool That A Prior Trial Had Occurred, That Mr. Johnson's Prior Convictions Were Overturned, And That The Idaho Supreme Court Had Remanded His Case For A New Trial Violated Mr. Johnson's Constitutional Right To A Fair Trial Before An Impartial Jury

Prior to the start of trial, potential jurors were called in, sworn, given preliminary jury instructions, and asked to fill out a supplemental juror questionnaire. (R., pp.555-558; Tr. 6/22/11, p.4, L.4 – p.18, L.12; Tr. 6/23/11, p.18, L.4 – p.29, L.8.)[3] During these hearings, the district court read the following to the jury, ". . . There was a prior trial in this case in 2006. Following an appeal, the Idaho Supreme Court reversed and remanded the case to this court for a new trial. . . ." (R., p.550; Tr. 6/22/11, p.5, Ls.12-15, p.11, Ls.20-23; Tr. 6/23/11, p.19, Ls.14-17, p.25, Ls.14-16.) The statement did not contain any limiting or curative language informing the jury that they were not to consider the prior trial, conviction, or appeal. (R., p.550-551; Tr. 6/22/11, p.4, L.19 – p.27, L.24, p.11, L.5 – p.14, L.4; Tr. 6/23/11, p.18, L.21 – p.21, L.20, p.24, L.24 – p.27, L.20.) Defense counsel was not present during the hearings where the preliminary instructions were read. (R., pp.555-558.)

At the start of trial, Mr. Johnson filed a Defendant's Motion in Limine requesting an order from the district court prohibiting the State from "[m]aking any reference to a prior trial in this case" and requesting, that to the extent that witnesses need to refer to the prior trial, that it be referred to as "a previous hearing in this case." (R., p.565.) The district court immediately informed defense counsel that the jury panel had already been told that there was a prior trial and appeal during the hearings where the potential jurors completed the supplemental questionnaires. (Tr., p.74. Ls.8-14.) Defense counsel

[3] The transcript of the jury trial and sentencing hearing will be cited as "Tr."

expressed concern that the jurors had been informed that Mr. Johnson had been previously convicted, although that word was not specifically used, stating, "I think the only reasonable inference that any but brain-dead jurors could take from that would be that he's been convicted, and then that conjures up these paradigms of technicalities and so forth. . . . I don't see how we unring that bell." (Tr., p.75, Ls.13-21, p.76, Ls.18-24, p.77, L.9.)

The district court noted that it had sent the script out to counsel, asked for objections, and received none. (Tr., p.77, Ls.10-14.) Defense counsel stated that he had not seen the script, that he could not say it had not been sent, but that had he seen it or been present when it was read, he would have objected. (Tr., p.77, Ls.15-22.) Following a discussion of options that the parties had, defense counsel again objected stating:

> I think it is objectionable. I think it has now tainted the jury to the extent that they have to understand that the case went up and, as the language says, it was reversed. There's also already been a conviction.
>
> Consequently, this is not like – I've had a lot of experience with hung juries where you're trying a case for a second time. More than once, I've tried cases for a third time. That's much easier for both counsel to work with because 12 people were not convinced beyond a reasonable doubt, but they were also not unanimous in finding the defendant not guilty.
>
> Here, the inference is that there was a jury of 12 who were convinced beyond a reasonable doubt that he was guilty. And another vexing part of that, of course, is that there's already enough notoriety surrounding this case, as I think the questionnaires disclose, so – although I know the Court is going to deny my motion, given all the time and effort that has gone into this, I would move that this matter be vacated, that we select a new panel, and that they not be informed of the reversal and remand.

(Tr., p.80, L.18 – p.81, L.16.)

After taking a short recess, the district court denied the motion to vacate and noted that should either party need to refer to the prior trial that they should "appropriately refer to it as a prior proceeding or a prior hearing." (Tr., p.82, L.20 – p.83, L.5.) The issue of referring to the prior trial was brought up again prior to the presentation of evidence and the district court reaffirmed its ruling that the parties would not use the word trial, but would refer to the prior trial as a prior hearing or proceeding.[4] (Tr., p.460, L.7 – p.463, L.4.)

The district court's instruction informing jurors that Mr. Johnson had already been convicted of the precise charges before them and had been awarded a new trial when the Idaho Supreme Court reversed and remanded the case violated his constitutional right to a fair trial before an impartial jury. The erroneous instruction set a tone of prejudice for the jury's first impression of the case. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. Further, the Fourteenth Amendment guarantees that no one may be deprived "of life, liberty, or property, without due process of the law." U.S. CONST. amend. VI. Taken together, these provisions guarantee every criminal defendant a fair trial before an impartial jury. *Strickland v. Washington,* 466 U.S. 668, 685-686 (1984); *Duncan v. Louisiana,* 391 U.S. 145, 148 (1968); *State v. Nadlman,* 63 Idaho 153, 118 P.2d 58, 61-62 (1941).

[4] Despite of the district court's ruling, twice during the trial Michelle Johnson, the alleged victim's mother, mentioned the prior trial in answering questions. (Tr., p.946, Ls.2-5; p.950, Ls.13-23.) No contemporaneous objection was made when Ms. Johnson mentioned the prior trial, presumably to avoid drawing further attention to the improper information already before the jury. However, defense counsel did mention it to the court and the State agreed to discuss the issue with her again. (Tr., p.990, L.22 – p.991, L.25.)

This Court has long recognized that an accused's right to a fair trial before an impartial jury can be compromised when a jury is made aware of an accused's prior convictions. For example, in cases where the State alleges the defendant is subject to punishment as a persistent violator due to prior convictions, or is subject to substantially greater punishment due to prior convictions for similar conduct, this Court has held jurors cannot be told of or presented with evidence of the prior convictions unless the defendant is first found guilty of the substantive offense. *State v. Wiggins,* 96 Idaho 766, 768 (1975) (felony DUI based on defendant's prior DUIs); *State v. Johnson,* 86 Idaho 51, 61 (1963) (persistent violator based on prior convictions). In such cases, the trial is bifurcated with the substantive offense tried first, and then if a defendant is found guilty, the State can then present evidence of the prior convictions. *Wiggins,* 96 Idaho at 768; *Johnson,* 86 Idaho at 61. This bifurcated procedure recognizes a defendant's right to a fair and impartial trial may be compromised if evidence of a defendant's prior convictions is allowed during the trial of the substantive offense. *Id.* This procedure also recognizes jurors' exposure to evidence of a defendant's prior convictions is so prejudicial and damning, that it cannot be erased or cured by a limiting instruction. *Wiggins,* 96 Idaho at 768; *Johnson,* 86 Idaho at 61-62.

Even more prejudicial than jurors' knowledge of a defendant's prior convictions for *unrelated* crimes is jurors' knowledge that a defendant has previously been found guilty of the *same crime* which is the subject of the trial. The Fifth Circuit Court of Appeals concluded "we are hard pressed to think of anything more damning to an accused than information a jury had previously convicted him for the crime charged." *United States v. Williams,* 568 F.2d 464, 470-71 (5th Cir. 1978) (two jurors' exposure to

information about defendants' convictions at first trial resulted in an unfair second trial, even though the two jurors said they could disregard the information and decide the case solely on evidence adduced in court).

In fact, a number of courts have recognized that jurors' knowledge that the defendant was previously found guilty of the same offense for which he is now on trial is so prejudicial that it constitutes a denial of the Constitutional right to a fair trial. *See, e.g., Hughes v. State*, 490 A.2d 1034, 1044-46 (Del. 1985) (holding jurors' knowledge of defendant's prior trial and conviction for same offense, which was discussed among jurors prior to deliberations, raised a presumption of jury bias that violated the defendant's right to a fair and impartial jury); *State v. Lee*, 346 So. 2d 682, 683-85 (La. 1977) (finding a violation of the defendant's constitutional right to a fair trial where the prosecutor, during closing arguments, highlighted the fact that the defendant had previously been found guilty).[5] *See also, e.g., Fullwood v. Lee*, 290 F3d 663, 682-83 (4th Cir. 2002) (recognizing, in dicta, that a violation of the defendant's Sixth Amendment right to an impartial jury trial may occur if the jury learned the defendant had previously been found guilty of murder and sentenced to death).

Other courts that have dealt with this issue, although not necessarily asked to rule on Constitutional grounds, have nearly universally found that, although a reference to a prior trial is a relatively minor error that can be corrected with a curative instruction, a reference to the outcome of a previous trial is so extraordinarily prejudicial that it will

[5] *Compare State v. Williams*, 445 So.2d 1171, 1177 (La. 1984) (finding no error in the trial court's denial of the defendant's motion for a mistrial when a witness referenced the defendant's prior trial, in part, because the witness did not reveal the outcome of that trial).

typically require a new trial. *United States v. Attell*, 655 F.2d 703, 704-05 (5th Cir. 1981) (reversing the defendant's conviction where mid-trial publicity revealed that the defendant had previously been convicted, but had won a new trial on appeal, and where the trial judge had refused to poll the jurors to determine if any had been witness to the publicity in question); *Frazier v. State*, 632 So.2d 1002, 1007 (Ala. Ct. App. 1993) ("The appellant asserts that the prosecutor committed reversible error when he referred to the appellant's previous conviction for the offense for which he was being tried. We must agree.")[6], *Williams v. State*, 629 P.2d 54, 58-60 (Alaska 1981) (holding trial court erred in denying the defense's motion for a mistrial following prosecutor's statement that defendant's prior jury trial for the same offense was hung 11 to 1); *State v. Lawrence*, 599 P.2d 754, 758 (Ariz. 1979) (finding no error in a witness's reference to an earlier trial because that reference did not reveal the outcome of that trial); *Bailey v. State*, 521 A.2d 1069, 1076-77 (Del. 1987) ("The jury not only learned that the defendant had been previously tried for the same charge, but that the 1980 trial had ended in a conviction. That information, regardless of how it is received, is inherently prejudicial and even more so when a jury is exposed to those facts during trial."); *Duque v. State*, 498 So.2d 1334, 1337 (Fla. Dist. Ct. App. 1986) (holding where newspaper article published during the defendant's trial reported the defendant had been convicted at her first trial, the trial court's refusal to grant defense counsel's motion to question jurors about the article was reversible error and finding error in the prosecutor's comment on a witness's testimony

[6] *Compare Sneed v. State*, 1 So.3d 104, 114-15 (Ala. Ct. App. 2007) ("In this case, none of the references to a first trial or to prior proceedings specifically informed the jury that the appellant had previously been convicted of capital murder and sentenced to death. Accordingly, we do not find that there was any plain error in this regard.").

that defendant was sentenced to jail following first trial)[7]; *Hood v. State*, 537 S.E.2d 788, 790 (Ga. Ct. App. 2000) ("Where there is no mention of the result of a prior judicial proceeding, the bare reference to an earlier trial does not necessarily imply a conviction and reversal on appeal. . . . Since the record contains no reference to the earlier verdict of guilt, the trial court's curative instructions were adequate to remove the subject from the jury's consideration."); *People v. Jones*, 528 N.E.2d 648, 658 (Ill. 1988) (finding no error in the decision to deny the defendant's motion for a mistrial where a prosecution witness alluded to the defendant's first trial but did not reveal the outcome of that trial)[8]; *Major v. Commonwealth*, 275 S.W.3d 706, 716-17 (Ky. 2009) (finding no error in the decision to deny the defendant's motion for a mistrial where a witness mentioned the defendant's first trial but "did not indicate any favorable or unfavorable outcome"); *Coffey v. State*, 642 A.2d 276, 281-85 (Md. Ct. App. 1994) (holding experienced police officers' repeated testimony that the defendant had previously been tried and convicted of the same charges, where curative instruction served to emphasize the inadmissible testimony, required mistrial because it deprived the defendant of a fair trial). The rationale for this standard was well-put by the Delaware Supreme Court:

> "[W]e are hard-pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime

---

[7] *See also Weber v. State*, 501 So.2d 1379, 1381-85 (Fla. Dist. Ct. App. 1987) (finding error in the trial court's failure to declare a mistrial where the jury learned (from outside information) that the defendant had previously been found guilty and had received a 99-year sentence, and that the defendant had won a new trial based on a "technicality"). *Compare Brooks v. State*, 918 So.2d 181, 208 (Fla. 2005) (affirming the trial court's denial of the defendant's motion for a mistrial where the government repeatedly referenced the defendant's previous trial but did not reveal that the defendant had been convicted at that trial).

[8] *Cf. McDonnell v. McPartlin*, 736 N.E.2d 1074, 1091 (Ill. 2000) (holding, in the civil context, that the trial court did not err in denying a motion for a mistrial where a witness referenced the first trial of the matter, but did not disclose the result of that trial).

> charged." *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978). It seems unreasonable to expect a juror to divorce from his deliberative process, knowledge that a defendant has been previously tried and convicted, and following a reversal has been once again subjected to prosecution. The mere expenditure of so much time and expense on the part of the State might lead the average lay person to assume that such a defendant must, in fact, be guilty.

Hughes, 490 A.2d at 1044 (quoted with approval in *Bailey*, 521 A.2d at 1076, and *Coffey*, 642 A.2d at 282). *See also Bordenkircher*, 715 F.2d at 119 (quoting, with approval, the quoted language from *Williams*); *Attell*, 655 F.2d at 705 (same).

In recent years, Idaho appellate courts have addressed similar issues in *State v. Watkins,* 152 Idaho 764 (Ct. App. 2012) and *State v. Lankford*, Docket No. 35617 (July 25, 2016) (2016 Opinion No. 82) (petition for rehearing granted).[9] Both cases are easily distinguishable from the facts of Mr. Johnson's case.

In *Watkins,* the jury was informed that a prior trial and appeal had occurred through answers provided by a police officer on cross-examination: "In my transcript from the – well, can I say that because I was told I can't talk about the prior trial. . . . I read the transcript of the prior trial after the appeals court-so it that's what you're asking." *Watkins*, 152 Idaho at 765. After defense counsel's motion for a mistrial, the district court determined that a mistrial would not be granted and provided a curative instruction. The district court instructed the jury: "You have heard testimony that there was a previous trial in this matter. You are not to speculate as to the result of that previous trial." *Id.* The Court of Appeals noted that it did not need to "decide whether the disclosure of a prior *conviction* for the same offense would be cause for an

[9] For ease of reference *State v. Lankford* will be cited as "*Lankford*" and the page numbers from the Idaho Supreme Court opinion, as found on the Idaho Supreme Court website, will be used.

automatic declaration of a mistrial because the police officer mentioned only a 'prior trial' and 'the appeals court,' without revealing the result of Watkins' first trial or saying which party appealed." *Id.* at 766. The Court found that these statements were not "equivalent to the disclosure that a previous jury had found him guilty." *Id*. While noting that the disclosure "was a serious error," the Court held that it did not warrant a mistrial *ipso facto*. *Id.* at 767. The Court of Appeals concluded that, due to the overwhelming evidence of guilt and the curative instruction, the police officer's "improper disclosures" were harmless. *Id.* at 769.

Unlike *Watkins,* the jury in Mr. Johnson's case was essentially informed that Mr. Johnson had been previously convicted: ". . . There was a prior trial in this case in 2006. Following an appeal, the Idaho Supreme Court reversed and remanded the case to this court for a new trial. . . ." (R., p.550; Tr. 6/22/11, p.5, Ls.12-15, p.11, Ls.20-23; Tr. 6/23/11, p.19, Ls.14-17, p.25, Ls.14-16.) No viable inference, other than that Mr. Johnson had been previously convicted, can be drawn from the terms used by the district court - prior trial and reversed. Additionally, in Mr. Johnson's case, the jury was not provided with a curative or limiting instruction. *See generally* Tr. As such, the jury was not immediately, or ever, told that the erroneous information regarding a prior trial, conviction, and reversal by the appellate court could not be considered as evidence of guilt or be allowed to influence the jurors, thereby increasing the harm of the erroneous instruction. (R., p.550-551; Tr. 6/22/11, p.4, L.19 – p.27, L.24, p.11, L.5 – p.14, L.4; Tr. 6/23/11, p.18, L.21 – p.21, L.20, p.24, L.24 – p.27, L.20; *See generally* Tr.)

In a scenario closer to Mr. Johnson's, during *voir dire* the district court in *Lankford* instructed the jury: "There was a prior trial in Idaho County in 1984 for the

offenses for which he is now charged. And an Appeals Court held that Mr. Lankford was not effectively represented and that his trial was therefore unfair." *Lankford*, pp.2, 5. The Idaho Supreme Court held that it would not address the question of whether the disclosure of a prior conviction for the same offense would result in implied basis, as the instruction did not mention that Lankford had been previously convicted or found guilty. *Lankford*, p.5. It determined that the actual issue was whether the district court's mentioning a prior *trial and appeal* was so extremely and inherently prejudicial that the jury could not be rehabilitated though further questioning and then held that it was not. *Lankford*, p.5.

The Idaho Supreme Court noted three specific reasons that relief was not justified. First, the district court had not revealed the outcome of the prior trial and that this information "simply does not carry the same weight" as information that a defendant had been previously convicted. *Lankford*, pp.6-7. Second, defense counsel did not object to the district court's statement, nor request that the prior trial not be mentioned, and expressly questioned the jurors "about the fact that they'll be referring at times to the prior hearings and prior trial." *Lankford*, p.5. Third, following the instruction, the district court "properly questioned the jurors whether their knowledge of the previous trial would cause them to have actual bias against Lankford and properly instructed the jurors that the must presume Lankford innocent regardless of his prior trial." *Lankford*, p.8. The district court specifically instructed the jury that: "As jurors you are not to consider the earlier trial and deliberate on whether or not Mr. Lankford is guilty. In other words, you must presume him to be innocent and judge the charges against him solely

on the evidence that is presented during this trial without considering in any manner his earlier trial." *Lankford*, p.8.

As noted above, the district court's erroneous preliminary instruction in Mr. Johnson's case is more egregious than the one given in *Lankford* because it uses the word "reversed," clearly indicating that it was Mr. Johnson's prior conviction that had been reversed. As defense counsel noted when objecting, although the word conviction was not specifically used, "the only reasonable inference that any but brain-dead jurors could take from that would be that he's been convicted . . ." (Tr., p.76, Ls.20-23.) To find that reversal, as used in this context, meant anything other than the reversal of a conviction, would be an endorsement of informing a jury about a prior trial and conviction in any way possible, as long as the exact word "conviction" was not used. Simply, the plain language of reversed and remanded means only one thing – Mr. Johnson's *convictions* were reversed and the case remanded.

Further, unlike counsel in *Lankford,* counsel for Mr. Johnson did object to the mentioning of the prior trial, conviction, and appeal at the earliest opportunity. Defense counsel was not at any of the hearings when the preliminary instructions were read so he did not have an opportunity to object at that time. (R., pp.555-558.) When the district court noted that it had sent the script out to counsel, asked for objections, and received none, defense counsel noted that he had not seen the script, that he could not say it had not been sent, but that had he seen it or been present when it was read, he would have objected. (Tr., p.77, Ls.10-22.) Furthermore, prior to the start of trial, counsel filed a filed a motion in limine attempting to prevent any such prejudicial error from occurring. The motion requested an order from the district court prohibiting the

State from "[m]aking any reference to a prior trial in this case" and requesting, that to the extent that witnesses need to referred to the prior trial, that it be referred to as "a previous hearing in this case." (R., p.565.)

Additionally, unlike the jury in *Lankford*, Mr. Johnson's jury was not provided any potential rehabilitation through additional questioning related to the inappropriate information presented by the district court or in the form of a limiting instruction. Defense counsel's position was that the only appropriate remedy was to select a new jury panel. (Tr., p.81, Ls.13-16.) However, the State suggested that the jury not be subject to questioning about the prior trial or appeal: "You Honor, I think that jury – and I don't know how you question them from this point on. I think the best thing to do is to stay away from it, because if you do question them, it could taint them further. If there is any tainting. . . " (Tr., p.77, L.25 – p.78, L.5.) As a result, no follow-up questions were presented to the jury.

Moreover, as was also noted above, the jury was not provided with a curative or limiting instruction informing the jury that the prior trial, conviction, and reversal by the appellate court could not be considered as evidence of guilt. (*See generally* Tr.) This was in stark contrast to other portions of the instructions. For example, after the district court summarized the charges contained in the information, the district court noted that the jurors "must not consider [the information] as evidence of guilt and you must not be influenced by the fact that charges have been filed." (R, p.550; Tr. 6/22/11, p.5, Ls.19-21, p.12, Ls.2-4; Tr. 6/23/11, p.19, Ls.21-23, p.25, Ls.20-22.)

Because the district court's erroneous instruction implied that Mr. Johnson had been previously convicted of the same crimes, defense counsel objected to the jury

receiving the improper information, there was no follow-up questioning of jurors to see if the information created an actual bias, and there was no limiting instruction provided, Mr. Johnson's case is clearly distinguishable from both *Watkins* and *Lankford.* Based on the distinctive factual scenario presented in his case, Mr. Johnson asserts that his case requires a different result.

The jurors' knowledge of Mr. Johnson's prior trial and conviction for the same offenses was inherently prejudicial, depriving him of his presumption of innocence and his constitutional right to fair trial before an impartial jury. The error in advising jurors of Mr. Johnson's prior trial, conviction, and appeal for the same offenses affected his substantial rights and likely affected the outcome of his trial. As such, Mr. Johnson's convictions must be vacated and his case remanded for a new trial before a fair and impartial jury.

D. The State Will Be Unable To Prove That The District Court's Erroneous Instruction Is Harmless Beyond A Reasonable Doubt

The harmless error doctrine has been defined by this Court: "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman v. California,* 386 U.S. 18, 24 (1967)). Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman*. *See State v. Perry*, 150 Idaho 209, 227 (2010). The State will simply be unable to prove that the district court's

instruction error depriving Mr. Johnson of his right to a fair trial by an impartial jury was harmless.

As discussed above, this issue has been addressed by numerous other courts which have nearly universally held that jurors' knowledge that another jury has found the defendant guilty of the precise offense at issue is uniquely prejudicial, such that it requires that the defendant be granted a new trial. *See, e.g., Bordenkircher*, 715 F.2d at 118-20; *Fullwood*, 290 F3d at 682-83; *Attell*, 655 F.2d at 704-05; *Frazier*, 632 So.2d at 1007; *Williams*, 629 P.2d at 58-60; *Bailey*, 521 A.2d at 1076-77; *Hughes*, 490 A.2d at 1044-46; *Duque*, 498 So.2d at 1337; *Lee*, 346 So. 2d at 683-85; *Coffey*, 642 A.2d at 281-85. As noted, a number of these courts have concluded that there is nothing "more damning to an accused than information that a jury had previously convicted him for the crime charged." *Williams*, 568 F.2d at 471. *Accord Bordenkircher*, 715 F.2d at 119 (quoting *Williams*); *Attell*, 655 F.2d at 705 (same); *Hughes*, 490 A.2d at 1044 (same); *Bailey*, 521 A.2d at 1076 (quoting *Hughes* quoting *Williams*); *Coffey*, 642 A.2d at 282 (same). In addition, knowledge that a different group of twelve disinterested jurors found Mr. Johnson guilty would likely have a subconscious effect on the jurors, making it easier for them to convict Mr. Johnson. Jurors would not only feel a certain amount of subtle pressure to conform by voting for guilt as others had, but they would also feel a diminished sense of responsibility for the ultimate verdict.

Given the tremendously prejudicial effect of informing the jury that Mr. Johnson was previously found guilty by a different jury, it simply cannot be said that "there was no reasonable possibility" that the district court's instruction regarding the prior trial did not contribute to the jury's verdicts. The Fourth Circuit explicitly noted that such an error

could not be harmless when it deemed a court's instruction advising jurors of the defendant's prior conviction in the same case to be prejudicial error requiring a new trial:

> We find the error in this case of allowing the jury to receive as its first impression in the case the admitted fact that the defendant had already been convicted of the same crime and that the present jury was to retry the defendant only because the prior conviction was reversed on procedural grounds cannot be considered harmless error beyond a reasonable doubt as required by *Chapman* [*v. California,* 386 U.S. 18, 23-24 (1967)], even though the evidence of guilt was great and the defense of insanity tenuous. When the jury heard the judge's instruction, approved by defense counsel, [the defendant's] chances for a fair trial by an impartial jury were seriously and irreparably prejudiced.

Arthur v. Bordenkircher, 715 F.2d 118, 120 (4th Cir. 1983).

II.

The District Court Erred In Denying The Motion For A Mistrial Made After The State Improperly Commented On Mr. Johnson's Invocation Of His Right To Silence

A. Introduction

The State presented the testimony of Detective Snarr. In response to a question from the State, Detective Snarr testified that he had attempted to interview Mr. Johnson. The detective's response to the State's question prejudicially persuaded the jury to infer guilt from Mr. Johnson's previous assertions of his rights. Defense counsel immediately objected and made a motion for a mistrial. The district court found that the testimony was prejudicial, but denied the motion for a mistrial. The district court then provided a curative instruction that increased the prejudicial nature of the testimony and further highlighted the prejudicial information. The instruction provided by the district court was insufficient to cure the prejudice. As such, Mr. Johnson asserts that the motion for a mistrial was erroneously denied.

B. Standard Of Review

Idaho's appellate courts effectively review denials of motions for mistrial *de novo*. *State v. Field*, 144 Idaho 559, 571 (2007).

> [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.

Id. (quoting *State v. Sandoval-Tena,* 138 Idaho 908, 912 (2003) (quoting *State v. Shepherd,* 124 Idaho 54, 57 (Ct. App. 1993) (quoting *State v. Urquhart,* 105 Idaho 92, 95 (Ct. App. 1983))). Error is harmless and not reversible if the reviewing court is convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Perry,* 150 Idaho 209 (2010).

C. The District Court Erred In Denying The Motion For A Mistrial Made After The State Improperly Commented On Mr. Johnson's Invocation Of His Right To Silence

A motion for a mistrial is controlled by I.C.R. 29.1, which provides that "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a); *State v. Canelo,* 129 Idaho 386, 389 (Ct. App. 1996). Mr. Johnson asserts that the district court erred in failing to grant a mistrial.

Detective Snarr was asked if he had interviewed anyone else after sitting through the CARES interview, talking to Michelle Johnson, and Joann Johnson. (Tr., p.726, Ls.17-24.) He responded that he "[t]ried to interview Mr. Johnson." (Tr., p.726, L.25.) Defense counsel immediately objected, asked that the jury be excused, and then moved for a mistrial, stating, "Detective Snarr has just said that he tried to interview Mr. Johnson. He has deliberately implied to this jury that he was unable to do so. Mr. Johnson stood on his constitutional rights to have an attorney present, to not make a statement." (Tr., p.727, Ls.13-21.)

After a break to review case law, the district court asked the State if it had "any purpose for this answer in terms of developing additional testimony or any other direction that the State was going to go with this information." (Tr., p.729, Ls.1-5.) The State responded that it did not, that it was merely collecting a list of the individuals that Detective Snarr had interviewed. (Tr., p.729, Ls.6-7.) The Court noted that "the clear upshot and import of this testimony is an inference of evasiveness or perhaps even of guilt at least as the answer now stands as it pertains to the defendant and that's an impermissible inference or implication . . ." (Tr., p.729, Ls.16-21.) After further follow-up questions, the State then noted that it was not planning on using Mr. Johnson's pre-arrest silence for impeachment purposes if he later testified. (Tr., p.731, Ls.7-8.) The court then noted that "as it stands at this point I'm satisfied and convinced that just the way the answer's phased and the words used creates an impermissible inference of guilt." (Tr., p.731, Ls.20-23.) However, the court again provided the State an opportunity to point out any legitimate probative value of the statement. (Tr., p.734, Ls.15-19.) The prosecution stated, "I'm struggling to come up with what's there, but

[sic] other than providing you with what the alternative inferences could be other than to explain with Detective Snarr was doing in his investigation . . ." (Tr., p.734, Ls.21-25.) The district court rejected the other possible inferences and again noted, "[w]ell, the only way to read this statement then in conjunction with the additional information that you presented is a direct comment on the defendant's position that he wasn't going to interview with the detective, that he was going to have to talk to his attorney." (Tr., p.735, Ls.6-11.)

In discussing a possible remedy to the violation of Mr. Johnson's constitutional rights, defense counsel argued for the declaration of a mistrial and against a limiting instruction:

> This is the functional equivalent of a prosecutor's comment on the defendant's exercise of his Fifth Amendment right not to testify, and if that happened during closing argument, this Court would not entertain any argument that it could be cured with a curative instruction. That's the problem. I don't think that the genie can't be put back in the bottle. That was a violation of a constitutional right, not a procedural right. It's not an evidentiary issue. It is a constitutional issue.
>
> . . .
>
> [And], I'm not going to a [sic] join the Court in that instruction. . . . It's certainly not the instruction that I would request. The problem in these situations, as I think the Court has well anticipated, is that one never knows whether the wound is being treated or the wound is simply being made more severe.

(Tr., p.736, Ls.15-25, p.738, L.20 – p.739, L.3.) Defense counsel then requested that the jury be informed that the significant delay in the case was not attributed to the objection because "[w]e've been in trial since 9:00 this morning, and the jury has not yet heard an hour of testimony and I've been forced twice, under circumstances I have no control over, to make objections and ask for these proceedings out of the presence of

the jury in a way that can easily be interpreted by the jury as being my efforts to try to obscure the case . . ." (Tr., p.739, Ls.5-15.) The district court determined that it would provide a limiting instruction and deferred ruling on the motion for mistrial so that it could later assess whether or not Mr. Johnson had been afforded a fair trial. (Tr., p.737, Ls.16-25.)

Despite the defense's objection to the limiting instruction and other requests, the district court told the jury:

> Now, we're at the situation where just before we recessed there was [an] objection to an answer given by Detective Snarr, and do I will now make a formal ruling on that objection and that ruling is this: The objection is sustained. The last answer given by Detective Snarr is stricken. A defendant has a constitutional right to remain silent. The decision whether to exercise this right is left to the defendant. You, the members of the jury, are instructed to disregard the last answer given and to not consider that answer during your deliberations. You are further instructed that you are not to draw any inferences at all from the testimony that has been stricken.

(Tr., p.745, L.24 – p.746, L.12.)

After the State rested, defense counsel requested that the district court rule on the motions for mistrial. (Tr., p.1070, Ls.25-25, p.1084, Ls.12-13.) The district court denied the motion for mistrial. (Tr., p.1084, L.14 – p.1085, L.6.)

The Fifth Amendment guarantees "[n]o person ... shall be compelled in any criminal case to be a witness against himself...." U.S. CONST. amend. V. A defendant who testifies in his own behalf waives his privilege against self-incrimination with respect to the relevant matters covered by his direct testimony and subjects himself to cross-examination by the government. *Brown v. United States*, 356 U.S. 148, 154-55, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958); *Whiteley v. State*, 131 Idaho 323, 328, 955 P.2d 1102, 1107 (1998). However, parties are not entitled to draw any inference from a

witness's invocation of the Fifth Amendment. KENNETH S. BROUN, ET AL., MCCORMICK ON EVIDENCE § 137 at 512 (John William Strong, ed., 4th ed.1992). Further, in a criminal case, a prosecutor may not directly or indirectly comment on a defendant's invocation of his constitutional right to remain silent, either at trial or before trial, for the purposes of inferring guilt. *Griffin v. California,* 380 U.S. 609 (1965); *see also State v. Stefani,* 142 Idaho 698, 701 (Ct. App. 2005) ("A defendant's decision to exercise his or her right to remain silent, whether before or after arrest and *Miranda* warnings, cannot be used for the purpose of inferring guilt."); *State v. Molen,* 148 Idaho 950, 959 (Ct. App. 2010) ("A defendant's exercise of his right to remain silent concerning an alleged offense may not be used by the State at trial in order to raise an inference of guilt.") In cases of pre-*Miranda*,[10] pre-arrest silence, the prosecutor may not use that evidence "solely for the purpose of implying guilt;" however, the prosecutor may use pre-*Miranda* silence, either pre- or post-arrest, for impeachment of the defendant. *State v. Parton,* 154 Idaho 558, 566 (2013) (quoting *State v. Moore,* 131 Idaho 814, 821 (1998)); *State v. Ellington,* 151 Idaho 53, 60 (2011).

It is clear that the State presented testimony, whether elicited or not, that implicated an inference of guilt from Mr. Johnson's silence. Mr. Johnson asserts, in accordance with the district court's findings, that the testimony of Detective Snarr created an inference of guilt and that the State had failed to assert any legitimate reasons for presenting the testimony. (Tr., p.731, Ls.20-23, p.734, Ls.21-25, p.735, Ls.6-11.) As such, the presentation of the testimony was clear error and a violation of Mr. Johnson's Fifth Amendment rights.

[10] *Miranda v. Arizona,* 384 U.S. 436 (1966).

In addition, Mr. Johnson asserts that the error amounts to reversible error. This is due, in part, to the district court's limiting instruction, to which defense counsel objected. (Tr., p.738, L.20 – p.739, L.3.) If there was any chance that the jury would not have recognized the inference of guilt, that chance was destroyed by the district court's instruction, which compounded the error. The district court did not merely instruct the jury to disregard the testimony, but highlighted the inference of guilt, making sure it was in the forefront of the juror's minds before then telling them to "not draw any inferences." (Tr., p.746, Ls.10-12.) Unfortunately, the district court's instruction created a how-to guide for drawing an impermissible inference and heightened the prejudicial impact of the already prejudicial information.

While a curative instruction can be an effective remedy, an instruction can also be an insufficient remedy. *State v. Watkins*, 152 Idaho 764, 767–68 (Ct. App. 2012). "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States,* 391 U.S. 123, 135 (1968). Mr. Johnson asserts that his case is a case where the jury instruction presented an insufficient remedy. This is especially true because the instruction precipitated the jury's inability to put aside the negative inference of guilt.

Not only is the inference of guilt particularly damming and prejudicial, but in this case it deprived Mr. Johnson of a fair trial. When viewed in the context of the full record, the improper inference of guilt likely had a continuing impact on the trial. In this case, the jury was told that Mr. Johnson had been previously convicted of the charges.

(R., p.550; Tr. 6/22/11, p.5, Ls.12-15, p.11, Ls.20-23; Tr. 6/23/11, p.19, Ls.14-17, p.25, Ls.14-16.) This improper information was inherently prejudicial and the trial started with an atmosphere in which Mr. Johnson was not presumed innocent, but essentially presumed guilty. The jury later learning that Mr. Johnson had invoked his constitutional right to remain silent likely had a stronger effect on the jury than it would have in a case where the jurors had not already learned that the defendant had been previously found guilty. Even with the instruction to ignore the evidence, the jury was likely unable to put the prejudicial thought – only a guilty person would not talk to the police – out of their mind. In effect, the limiting instruction, as given, did not cure the prejudicial inference of guilt. The jury had to weigh the credibility of Mr. Johnson, who asserted his innocence, against other witnesses in his case. It is probable that a jury hearing that Mr. Johnson had been previously convicted and had invoked his right to remain silent would not evaluate his testimony in same way as a jury that had not been exposed to the prejudicial information.

As such, there is a great danger that the jury did not disregard the stricken testimony, but that it considered it to Mr. Johnson's detriment, that it had a continuing impact on the trial, may have contributed to the verdict, and, ultimately, deprived Mr. Johnson of his right to a fair trial. As such, it was error for the district court to not declare a mistrial.

D. Additionally, The State Committed Prosecutorial Misconduct When It Improperly Commented On Mr. Johnson's Invocation Of His Right To Silence

Prosecutorial misconduct claims that are grounded in constitutional principles involve questions of law over which this Court exercises free review. *City of Boise v.*

Frazier, 143 Idaho 1, 2 (2006). Trial error ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v. Adams*, 147 Idaho 857, 861 (Ct. App. 2009). For alleged errors for which there was a timely objection, Mr. Johnson only has the duty to prove that an error occurred, "at which point the State has the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222 (2010).

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon,* 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall…deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be…deprived of life, liberty or property without due process of law." ID. CONST. art. I, §13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters,* 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *State v. Sanchez,* 142 Idaho 309, 318 (Ct. App. 2005); *Greer v. Miller,* 483 U.S. 756, 765 (1987). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. *Id.* The hallmark of due process analysis in cases of alleged

prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips,* 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

In the case at hand, as in *State v Parker* and *State v. Ellington,* the prosecution committed misconduct when it elicited the response from Detective Snarr that he had "[t]ried to interview Mr. Johnson." (Tr., p.726, L.25.) In *Parker*, the Idaho Supreme Court noted that it was an improper line of questioning when the prosecutor elicited information about Mr. Parker ending his interview with police. *State v. Parker*, 157 Idaho 132, 147 (2014). The Court noted that the testimony was used for the sole purpose of informing the jury that Mr. Parker had invoked his right to silence, the State was unable to provide a reason why the testimony was necessary or relevant, and "even if Detective Smith offered an unsolicited comment on Parker's invocation of his rights, Detective Smith's actions are imputed to the State." *Id.* The Court concluded that the line of questioning caused an improper comment on Parker's silence for the purpose of implying guilt and amounted to prosecutorial misconduct. *Id.* Ultimately, the Court found the error was not fundamental because although the jury may have inferred guilt from Parker's silence, the jury was also "introduced to ample evidence of guilt with Parker's own incriminating statements made during that same interview. This is not a case where the defendant did not answer any questions posited by law enforcement and the prosecutor sought to imply guilt from the defendant's complete silence or lack of cooperation." *Id.* at 148.

Similarly, in *State v. Ellington*, 151 Idaho 53, 59-61 (2011), the Idaho Supreme Court again found that it was prosecutorial misconduct for the prosecutor or an officer of the State to comment on a defendant's silence. The prosecution asked, "so you did not interview him?" *Id.* at 59. The officer responded, "I attempted to." *Id*. The Court mentioned that "the jury was likely to infer that the reason Sergeant Maskell only 'attempted' to interview Mr. Ellington rather than actually interviewing him was because he chose to invoke his right to remain silent once he was put under arrest." *Id.* at 61. Again, the State was unable to prove the evidence was relevant or that it was offered for any purpose other than to draw attention to Mr. Ellington's assertion of his right to remain silent. *Id*. The Court noted that "when 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." *Id.*

Just as in the above case, the State drew prejudicial attention to Mr. Johnson's assertion of his right to remain silent through the presentation of Detective Snarr's testimony. The State was unable to provide any reason to justify the testimony, specifying it was offered to show how the investigation progressed, not for impeachment purpsoes and stated "I'm struggling to come up with what's there, but [sic] other than providing you with what the alternative inferences could be other than to explain with Detective Snarr was doing in his investigation . . ." (Tr., p.734, Ls.21-25, p.729, Ls.6-7, p.731, Ls.7-8.) The district court found, ". . . the only way to read this statement . . . is a direct comment on the defendant's position that he wasn't going to interview with the detective, that he was going to have to talk to his attorney." (Tr., p.735, Ls.6-11.)

Therefore, it is clear that the prosecution, whether the testimony was solicited or not, offered evidence for the sole purpose of drawing an inference of guilt from Mr. Johnson's assertion of his constitutional right to remain silent.

As in *Parker* and *Ellington,* the misconduct in this case clearly violated Mr. Johnson's unwaived constitutional rights and deprived him of his right to a fair trial. The State will be unable to prove that the inference of guilt derived from Mr. Johnson's silence did not contribute to the conviction. As such, this Court must vacate the conviction.

III.

The District Court Erred In Denying The Motion For A Mistrial After The Court Erroneously Allowed Mr. Wilson To Testify With The Aid Of The Report, Despite The Fact That His Memory Was Not Refreshed By The Contents Of A Report, And After Finding That The State's Failure To Disclose The Report Amounted To A Discovery Violation

A. Introduction

The State presented the testimony of Scott Wilson, Mr. Johnson's former employer. Mr. Wilson was asked specific questions about the hours Mr. Johnson worked and the locations at which he was working on the days surrounding the weekend that Mr. Johnson was alleged to have committed the charged offenses. Although Mr. Wilson admitted to having no memories of the information, the district court allowed Mr. Wilson to testify using a time entry report he had generated at the request of the State to refresh his recollection. The report was not disclosed to defense counsel prior to Mr. Wilson producing it during his testimony. Mr. Johnson asserts that the district court abused its discretion in allowing Mr. Wilson to testify when his recollection had not actually been refreshed, that the State committed a discovery

violation that prejudiced Mr. Johnson's ability to prepare for examination of Mr. Wilson, and that the district court erred in denying the resulting motion for a mistrial.

B. Standard Of Review

Idaho's appellate courts effectively review denials of motions for mistrial *de novo*. *State v. Field*, 144 Idaho 559, 571 (2007). Error is harmless and not reversible if the reviewing court is convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Perry,* 150 Idaho 209 (2010).

C. The District Court Erred In Denying The Motion For A Mistrial After The Court Erroneously Allowed Mr. Wilson To Testify With The Aid Of A Report, Despite The Fact That His Memory Was Not Refreshed By The Contents Of The Report, And After Finding That The State's Failure To Disclose The Report Amounted To A Discovery Violation

1. Relevant Factual Information

Scott Wilson, Mr. Johnson's former employer, employed Mr. Johnson for about five years at Trilogy Network Systems. (Tr., p.263, L.1 – p.624, L.14.) The focus of Mr. Wilson's testimony was to provide information about certain dates that Mr. Johnson worked near the time that he was alleged to have inappropriately touched A.J. However, issues regarding Mr. Wilson's ability to remember and testify to this information became an issue early on in his testimony.

After discussing that work for a specific client, Pickett Equipment, required some work to be completed in the office, Mr. Wilson was asked if he remembered if Mr. Johnson was working on that particular job on March 19, 2004. (Tr., p.627, L.8 – p.628, L.6.) Mr. Wilson requested that he be able to look at some notes. (Tr., p.628, L.10.) After some discussion, it became clear that Mr. Wilson wanted to use a report he

generated from a time tracking system called Bridge Track and that, because he was no longer using that system, he had run a SQL query to pull information regarding the dates in question. (Tr., p.629, L.12 – p.631, L.6.) Mr. Wilson stated that the report would refresh his memory. (Tr., p.631, Ls.7-9.) Defense noted counsel they had filed a discovery request and that the report had not been disclosed. (Tr., p.631, Ls.12-17.) In follow-up, Mr. Wilson admitted that he did not remember seeing Mr. Johnson at work on either March 19, 2004, or March 22, 2004. (Tr., p.632, Ls.9-17.) The district court remarked that if "the witness' memory is refreshed, then you can proceed, but no testimony from the document itself." (Tr., p.632, Ls.22-24.) Defense counsel then requested that the jury be excused while the report was discussed. (Tr., p.633, Ls.1-4.)

Mr. Wilson then discussed the time tracking program in more detail, admitted that the raw invoices from which the tracking data was compiled had been destroyed, and discussed how the report had been created. (Tr., p.634, L.5 – p.636, L.18.) Defense counsel then brought up the discovery request; noted that if a summary is used, the originals must be made available; and noted that this was "not recollection being refreshed," but "an attempt to put . . . data into evidence . . ." which had never been disclosed in the seven years the case had been pending. (Tr., p.637, Ls.2-13.) After a comment from the State that they were not putting on documentary evidence, the district court noted that the witness could "testify without the benefit of the document, because it's very close to his testimony being from the document itself, which is an authentication of the document, and it's impermissible. It's late disclosed discovery. [If his recollection has been refreshed he can testify.] But any further use of the document will not be permitted." (Tr., p.637, L.19 – p.638, L.8.) The district court continued:

> And his recollection was that he didn't know, and then he produced – he did a computer search. He has indicated he still has not present recollection. You then asked him about this document, whether that assisted him with refreshment of his recollection. He can answer that question, . . . but he cannot testify from the document . . . itself.
>
> . . . [T]he purpose of the document would simply be, if it does, to refresh his recollection, and that's the foundation that has to be explored and can be explored on cross-examination as well, but further use of the document is very problematic due to its nondisclosure and due to the fact that it has now been sufficiently referenced to the jury that there's some possible hint in the jury's mind that it is itself evidence.

(Tr., p.638, L.20 – p.639, L.18.)

The jury returned and Mr. Wilson was asked if his memory had been refreshed as to Mr. Johnson's work on March 19th; he stated it was refreshed. (Tr., p.640, L.22 – p.641, L.1.) The State continued to ask him about Mr. Johnson's work on March 19th and then questioning turned to March 22nd. (Tr., p.641, Ls.2-20.) When asked how he remembered that Mr. Johnson worked for him on March 22nd, Mr. Wilson responded that he had "the hours that he turned in for that day." (Tr., p.641, Ls.21-23.) Defense counsel objected again noting that Mr. Wilson's memory had not been refreshed, but that he was testifying from his memory of the report he generated earlier in the day. (Tr., p.641, L.24 – p.642, L.3.) The State again attempted to prove that Mr. Wilson's recollection had been refreshed through a series of questions:

> Q. . . . Has your memory been refreshed on whether or not Mr. Johnson worked for you on March 22nd, 2004?
>
> A. What do you mean my refreshed?
>
> Q. Have you – Do you, in fact, know at one point in time whether or not Mr. Johnson worked for you on March 22nd, 2004?
>
> A. Yes.

Q. Has your memory been refreshed since that time whether or not you have knowledge of whether or not he worked for you on March 22nd, 2004?

A. Yes.

Q. Do you recall if Mr. Johnson worked for you on March 22nd, 2004?

A. Yes.

(Tr., p.642, L.14 – p.643, L.3.)

Defense counsel was then allowed to *voir dire* in aid of objection:

Q. Mr. Wilson, if I can make a distinction here. I know that you have records or you had records for your business, that you can go back and verify certain kinds of things. You can see whether or not there is what we sometimes call a paper trail; correct?

A. That's correct.

Q. There's also such a thing as a recollection. Can you remember the 19th day of March 2004?

A. No.

Q. Can you remember whether you were in the office that day?

A. No.

Q. So you can't remember whether Mr. Johnson was present in the office that day?

A. Not from recollection.

Q. And as far as the 22nd of March is concerned, you have no recollection of your own as to whether he was there on that day; correct?

A. That's correct.

(Tr., p.643, L.14 – p.644, L.9.) Defense counsel then noted his objection and requested the testimony be stricken. (Tr., p.644, Ls.10-11.) The district court overruled the

objection. (Tr., p.644, Ls.17-18.) Mr. Wilson was then allowed to testify about Mr. Johnson's work on March 22nd. (Tr., p.644, L.23 – p.645, L.20.)

During his testimony, the prosecution requested a short break to retrieve a document. (Tr., p.647, Ls.5-20.) Before the jury returned, defense counsel asked to be allowed to make a record. (Tr., p.648, Ls.5-6.) He reiterated that a discovery request had been made over a year ago, no records representing the data management program used by Trilogy were provided, Mr. Wilson has no current relocation of what happened on March 19th or 22nd, the defense has had no opportunity to review the records related to tracking Mr. Johnson's work, that the State was using a "backdoor approach to introducing documentary evidence that was never disclosed to the defense," that the defense had "been caught in unawares," and that the district court's incorrect ruling amounted reversible error. (Tr., p.648, L.8 – p.651, L.17.)

The district court determined that it needed further information and had Mr. Wilson return to the witness stand. (Tr., p.655, L.23 – p.656, L.5.) The court questioned Mr. Wilson:

> As I recall yesterday, tentatively you were scheduled to testify in the afternoon. I believe it was represented to me that you did come to court that date – or at that time but that you had a need to return to Twin Falls, and, thus, we adjourned early yesterday to permit you to do that.
>
> So my question to you is twofold. Was the purpose of returning to Twin Falls to obtain this inquiry document that you've used to refresh recollection with, and, if it was, was the production of that document something that you initiated on your own or was this at the request or suggestion or encouragement of anybody involved in this case?
>
> The Witness: The production of the document was on my own. I was asked to try to verify what Mr. Johnson was doing on March 22nd.

The Court: All right. And the question to try to you [sic] verify what Mr. Johnson was doing was propounded to you by someone from the State's side of this case?

The Witness: Yes. More just to refresh my memory on what he was doing that day.

The Court: And approximately when was that inquiry or request made?

The Witness: It was sometime yesterday afternoon. Probably sometime around 3:00 to 3:30.

The Court: And at that point as you thought about that, you came upon the idea that you could conduct this search through your computer records to obtain that information; is that correct?

The Witness: That's correct.

The Court: And then you did do that?

The Witness: Yes.

(Tr., p.656, L.9 – p.657, L.18.) The court then allowed counsel to do further inquiry. Defense counsel asked:

Q. Mr. Wilson, who was this conversation with, the conversation yesterday afternoon?

A. It was with either Lance or Eric. I don't recall which one.

. . .

Q. I understand. But you were asked if there was some way you could go back to the office or go back to Twin Falls and verify whether he worked on those days or did not?

A. That's correct.

Q. And to verify, in fact, whether he was working on this Pickett contract as well; correct?

A. I don't know that we discussed the Pickett one specifically, just what – whether he was in Twin Falls on that day was more what the question was.

Q. And you told them that you thought there was such a way or such a thing you could do?

A. I don't remember if I said that or not.

Q. And, in fact, you produced such document; correct?

A. Yeah.

Q. And when did you tell the State that you had produced that document?

A. I mentioned it when I came to court this morning that I had information on what Mr. Johnsons was doing on March 22nd.

Q. So you came here yesterday prepared to testify?

A. Yes.

Q. And had you testified yesterday, you could not of your own recollection have testified anything about whether or not Mr. Johnson worked on the 19th of March 2004?

A. That's not correct. I did know what he was doing on March 19th yesterday. I did not know what he was doing on March 22nd.

Q. So you would not have been able to testify about March 22nd from present recollection at all?

A. That's correct.

Q. And how did you know what he was doing on the 19th?

A. Because I looked in those records earlier and determined that.

Q. When?

A. It was probably a week ago.

Q. After you, again, had talked to the prosecutors about your –

A. Yes.

(Tr., p.658, L.14 – p.660, L.20.) The prosecution then confirmed that it had asked Mr. Wilson if he knew what Mr. Johnson was doing on the dates in question and had

confirmed that he could obtain that information. (Tr., p.661, Ls.2-19.) After the State was done questioning him, Mr. Wilson volunteered, "In fact, if I can add to that, I specifically asked you yesterday if you wanted me to print off a report, and you said, 'No. Just look at it and see what you can determine.'" (Tr., p.661, Ls.21-24.)

The district court then asked defense counsel what remedy it was seeking. (Tr. p.662, Ls.15-18.) Defense counsel then noted, "I don't think there is now a remedy. I think what we would be asking the jury to do is to unremember testimony that they have heard, and that's my problem. And we have no practical way of examining the primary records from which this document was generated in a meaningful way." (Tr., p.662, Ls.19-25.) Eventually, after discussing the importance of Mr. Wilson's testimony, defense counsel made a motion for a mistrial. (Tr., p.668, Ls.2-4.) The district court noted that, "The more difficult question and the more troubling question for me is that this information was generated just in the last few days, not disclosed to the defense. If it has the relevancy and the power that the State says that it does, that actually increases the concern that I've got about this particular information." (Tr., p.668, Ls.15-21.)

Following a recess and still outside the presence of jury, the State presented the testimony of Kim Bourn, a legal secretary for the prosecutor's office. (Tr., p.671, L.14 – p.672, L.5.) Ms. Bourn had been a participant in the conversation regarding the printing of the Trilogy records and noted that Mr. Wilson had been told, '"Well, if you can't print it off, don't worry about it."' (Tr., p.672, Ls.6-20.)

The district court then ruled on the pending motions. The court noted that it was making its rulings based on the idea that Mr. Wilson's testimony about March 19th and

22nd was either corroborative of Michelle Johnson's testimony or direct evidence in support of the State's theory that the charged conduct occurred on or around those dates. (Tr., p.676, Ls.1-12.) The district court stated that it was "difficult, if not impossible," to rein in Mr. Wilson's testimony at this point. (Tr., p.676, Ls.13-17.) The court ruled that it would affirm the prior ruling on refreshing recollection, "I think the State did just provide sufficient foundation to satisfy the requirements of Rule 612 for use of that document." (Tr., p.676, L.18 – p.677, L.1.) The district court also found that the failure to disclose the report constituted a discovery violation "in form, if not in substance" because, by the witnesses testimony, the report "was requested by either the State's attorney or Detective Snarr." (Tr., p.677, Ls.3-11.) However, the court took the motion for mistrial under advisement noting that there was no possibility of excluding the testimony at this point and that it needed to hear further testimony to determine if the evidence deprived Mr. Johnson of a fair trial. (Tr., p.677, L.18 – p.678, L.25.) The court then offered defense counsel an opportunity to examine Mr. Wilson's records, continue with the trial and re-call him at a later time, but noted that it was "reluctant to have this trial go on forever" and "reluctant to have the jury continue to be out for long periods of time." (Tr., p.679, Ls.7-14, p.680 Ls.8-17.)

Defense counsel told the district court that allowing them to look at the records and report would not be feasible at this point in time. He noted that he was staying in a hotel, was not a computer expert, that there was no time to conduct further examination of the time reporting system, and that there would not be enough time to sift through the information especially while continuing with trial. (Tr., p.680, L.18 – p.681, L.24.) Counsel reminded the district court that:

> And, again, I have a document that I now have to deal with because I believe that the document, in effect, is in evidence. The jury has heard not just that Mr. Johnson was present at work on those days. They've heard how many hours he was there on those days. So I them am forced to cross examine a witness based upon a document that I did not see until the witness himself was actually testifying and the primary source of which I have had no opportunity to investigate. I'm going to have to do that, but I think that has put me at a very large disadvantage. I think it flies in the face of what Rule 16 is supposed to do.

(Tr., p.681, L.25 – p.682, L.12.)

The district court then again offered to stop Mr. Wilson's testimony and have him come back at a later date. (Tr., p.683, Ls.4-25.) Defense counsel again turned down the offer noting that, "I am simply not able to conduct investigation and further discovery inquiry during the course of a trial. And what the Court is suggesting – I mean, if we had just learned about this even last week, I think what the Court is suggesting would have been viable. It's not now. So I appreciate the opportunity, but I don't view it as being of comfort or assistance to the defense." (Tr., p.684, Ls.6-15.)

Mr. Wilson's testimony continued and on cross-examination it again highlighted that the report did not actually refresh his recollection:

> Q. Again, good morning, Mr. Wilson. I don't want to make too fine of a point of this because sometime lawyers start talking in a language that is absurd. Mr. Wilson, but what I'm trying to do here just simply as I can is distinguish between those things that you remember without having to look at any other document or photograph and those things that you could only remember if you had the aid of some other refreshing object like a photograph. Does that make sense to you, sir?
>
> A. Yes.
>
> . . .
>
> Q. You don't remember whether you personally saw Mr. Johnson at the offices of Trilogy on that day, do you?
>
> A. No, I don't.

Q. And you don't know whether or not you saw any other employee on that particular day; correct?

A. That's correct.

Q. And for that matter, you could not say with certainty that you even came to the office on the 19th of March 2004?

A. No.

Q. Okay. But you were able to go back to a database that tracked, as I understand it, the billings that you would send out to various clients?

A. Yes.

Q. And this would be in the nature of a time and billing program?

A. Yes, it is.

. . .

Q. And that, in fact, is the program that you consulted, you say, to refresh your recollection?

A. Yes.

Q. But consulting that program and the data that was contained in the program didn't give you a present recollection of seeing David Johnson in the office on the 19th of March, did it?

A. No.

Q. Nor did it give you a recollection – a present recollection of seeing him in the office on the 22nd of March; correct?

A. That's correct.

Q. You are assuming that the data entry is accurate. And that's what you're relying upon, the data entry, not any memory that you have personally.

A. Yes, that's correct.

(Tr., p.693, L.2 – p.695, L.21.) Mr. Wilson also noted that he did not enter the time entries, but that they were completed by either the secretary or chief financial officer. (Tr., p.695, L.22 – p.696, L.18.)

After the State rested, defense counsel requested that the district court rule on the motions for mistrial. (Tr., p.1070, Ls.25-25, p.1084, Ls.12-13.) The district court denied the motion for mistrial. (Tr., p.1084, L.14 – p.1085, L.6.)

2. The Report Was Improperly Used During Mr. Wilson's Testimony Because It Did Not Refresh His Recollection

Idaho appellate courts apply an abuse of discretion standard when reviewing a lower court's decision to either admit or exclude evidence. *State v. Almaraz*, 154 Idaho 584, 590 (2013) (quoting *White v. Mock,* 140 Idaho 882, 888 (2004).) Furthermore, "'A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason.'" *Id.* (quoting *Fazzio v. Mason,* 150 Idaho 591, 594 (2011).)

Idaho Rule of Evidence 612 provides that a witness may use a writing or object to refresh his or her memory. *Baker v. Boren*, 129 Idaho 885, 892 (Ct. App. 1997); I.R.E. 612. However, "[i]t is error to allow a witness to testify at trial from prepared notes under the guise of refreshing recollection." *Baker,* 129 Idaho at 885; *Hall v. American Bakeries Co.,* 873 F.2d 1133 (8th Cir.1989). Two articles of foundation must be laid before a witness may refer materials to refresh his or her memory. *Id.* First, the witness must demonstrate the need to refresh his or her memory and, second, the witness must confirm that the materials will assist in refreshing his or her recollection. *Id.* A witness

may not testify directly from the notes, but may use them to assist in recollection. *Id.* "The court must ensure that the witness actually has a present recollection and is not to allow inadmissible evidence to inadvertently slip in for its truth." *Id.* (citing *20th Century Wear, Inc., v. Sanmark–Stardust, Inc.,* 747 F.2d 81, 93 n. 17 (2d Cir.1984)).

In the case at hand, the district court abused its discretion when it failed to reach its decision through an exercise of reason. Contrary to the district court's decision otherwise, Mr. Wilson's memory was not refreshed by the report he used and his testimony, on this topic, was inadmissible. Mr. Wilson was able to recall that Mr. Johnson had worked for him during the month of March, including the dates in question. (Tr., p.642, L.14 – p.643, L.3.) However, Mr. Wilson admitted that he relied completely on his notes to determine whether Mr. Johnson was at work on the dates in question, what he was working on, and the hours that he worked on those dates, as he had no specific memory of that information. (Tr., p.643, L.14 – p.644, L.9.) Mr. Wilson again admitted that he had no memory of the relevant information on cross-examination. (Tr., p.693, L.2 – p.695, L.21.) Further, Mr. Wilson's testimony showed that he may have actually never had knowledge of the specific times that Mr. Johnson worked because he did not make time entries into the timekeeping program, but that they were completed by either the secretary or chief financial officer. (Tr., p.695, L.22 – p.696, L.18.)

As such, the State failed to meet the foundational requirements for Mr. Wilson to use of the report because the materials did not assist in refreshing his memory. Regardless of Mr. Wilson's actual memories, the jury was allowed to hear specific testimony about dates, times, and the locations that Mr. Johnson worked during the

dates in question. The district court abused its discretion in allowing the testimony, which was not admissible recollection refreshed, but inadmissible evidence presented "under the guise of refreshing recollection." Mr. Wilson's testimony regarding the dates of March 19th and March 22nd was improperly admitted and constitutes grounds for reversal.

The State will be unable to prove that the improperly presented evidence did not contribute to the conviction. As such, this Court must vacate the conviction.

3. The State Committed A Discovery Violation When It Failed To Provide Defense Counsel A Copy Of Mr. Wilson's Time Entry Report

Further, the evidence and the materials used to "refresh the recollection" of Mr. Wilson were intertwined with the State's discovery violation. As noted above, Mr. Wilson testified that the prosecution had specifically told him to look up the time entry information. (Tr., p.661, Ls.21-24.) The district court noted that, "[t]he . . . more troubling question for me is that this information was generated just in the last few days, not disclosed to the defense. If it has the relevancy and the power that the State says that it does, that actually increases the concern that I've got about this particular information." (Tr., p.668, Ls.15-21.) Later the court found that the failure to disclose the report constituted a discovery violation. (Tr., p.677, Ls.3-11.)

The prejudicial nature of Mr. Wilson's improperly admitted testimony was amplified by the State's discovery violation which deprived defense counsel of the

opportunity to properly prepare for Mr. Wilson's testimony.[11] The district court offered to continue with the trial, but delay Mr. Wilson's testimony to give defense counsel time to examine Mr. Wilson's records. (Tr., p.679, Ls.7-14, p.680 Ls.8-17.) The district court did not offer a continuance. (Tr., p.679, Ls.7-14.) Defense counsel noted that his remedy for the discovery violation was insufficient because it was not realistically possible for counsel to conduct an examination of the time reporting system and sift through the information while continuing with trial. (Tr., p.680, L.18 – p.681, L.24, p.684, Ls.6-15.) Counsel expressed concern that he was now "forced to cross examine a witness based upon a document that I did not see until the witness himself was actually testifying and the primary source of which I have had no opportunity to investigate. I'm going to have to do that, but I think that has put me at a very large disadvantage." (Tr., p.682, Ls.5-11.)

As defense counsel suggested, the only appropriate remedy was a mistrial. (Tr., p.668, Ls.2-4.)

4. The District Court Erred In Denying The Motion For Mistrial

Mr. Johnson asserts that the district court erred in denying the motion for mistrial

[11] Mr. Johnson asserts that I.R.E. 612 also supports defense counsel's request that the relevant testimony of Mr. Wilson be struck or a mistrial granted. Idaho Rule of Evidence 612 notes that if a witness uses a writing to refresh their memory for the purposes of testifying an adverse party may be entitled to have the writing prior to the witness testifying. I.R.E. 612(b). Further, if "a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial." I.R.E. 612(c). However, no request for this particular I.R.E. 612 relief was made during the trial and, as such, it is not specifically addressed as a ground for relief in this appeal.

because the erroneously admitted testimony of Mr. Wilson and defense counsel's inability to properly prepare for Mr. Wilson's testimony due to the discovery violation deprived him of a fair trial. A motion for a mistrial is controlled by I.C.R. 29.1, which provides that "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a); *State v. Canelo,* 129 Idaho 386, 389 (Ct. App. 1996).

The primary purpose of Mr. Wilson's testimony was to show that Mr. Johnson had an opportunity to commit the crimes charged. According to Michelle Johnson, Mr. Johnson was alone with A.J. and the only time he had the opportunity to commit the instant offenses was between the afternoon of March 19, 2004, and March 22, 2004. (Tr., p.907, L.21 – p.918, L.5.) Thus, detailed information regarding Mr. Johnson's work schedule which corroborated Ms. Johnson's testimony was critically important and extremely prejudicial. This evidence bolstered the credibility of Ms. Johnson, one of the State's most crucial witnesses. Mr. Johnson acknowledges that State's Exhibit U, Mr. Johnson's personal work calendar, provides some general information regarding his work schedule; however, it did not provide the same detailed information and does not alleviate the harm caused by allowing Mr. Wilson's erroneous testimony.

Further, the prejudicial nature of the improperly admitted testimony was intensified by the State's related discovery violation which limited Mr. Johnson's ability to be fully prepared for and to confront Mr. Wilson as a witness. *See supra*.

There is a great danger that the improper testimony and related discovery violation had a continuing impact on the trial and the jurors' ultimate decision in the

case. As such, these errors deprived Mr. Johnson of a fair trial and it was error for the district court to not declare a mistrial.

IV.

Even If The Above Errors Are Individually Harmless, Mr. Johnson's Fourteenth Amendment Right To Due Process Of Law Was Violated Because The Accumulation Of Errors Deprived Him Of His Right To A Fair Trial

Mr. Johnson asserts that if the Court finds that the above errors were harmless, the district court's errors combined amount to cumulative error. The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process. *State v. Paciorek,* 137 Idaho 629, 635 (Ct. App. 2002). In order to find cumulative error, this Court must first conclude that there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial. *State v. Lovelass,* 133 Idaho 160, 171 (Ct. App. 1999). Under that doctrine, even when individual errors are deemed harmless, an accumulation of such errors may deprive a defendant of a fair trial. *State v. Martinez,* 125 Idaho 445, 453 (1994). However, a finding of cumulative error must be predicated upon an accumulation of actual errors. *State v. Medina,* 128 Idaho 19, 29 (Ct. App. 1996).

Mr. Johnson asserts that the district court's errors amounted to actual errors depriving him of a fair trial. His arguments in support of this assertion are found in sections I – III above, and need not be repeated, but are incorporated herein by reference.

CONCLUSION

Mr. Johnson respectfully requests that his judgments of conviction be vacated and his case remanded for further proceedings.

DATED this 28th day of March, 2017.

_____/s/_____
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of March, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DAVID LEON JOHNSON
PO BOX 65262
SALT LAKE CITY UT 84165

MICHAEL R CRABTREE
DISTRICT COURT JUDGE
E-MAILED BRIEF

STEVEN MCRAE
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

EAA/eas