4-28-2017

State v. Johnson Respondent's Brief Dckt. 43822

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43822**
Plaintiff-Respondent,	)	
	)	**Minidoka County Case No.**
v.	)	**CR-2005-2497**
	)	
DAVID LEON JOHNSON,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

David Leon Johnson appeals from his judgment of conviction for two counts of lewd and lascivious conduct with a child.

Statement Of The Facts And Course Of The Proceedings

A jury convicted Johnson of two counts of lewd conduct with a child, but the Idaho Supreme Court found error in the admission of prior bad act evidence, vacated his convictions, and remanded for further proceedings. State v. Johnson, 148 Idaho 664, 227 P.3d 918 (2010). On remand Johnson was tried and convicted again for two counts of lewd conduct with a child, and did not appeal. State v. Johnson, Docket No. 39762, 2013 Unpublished Opinion No. 635, p. 2 (Idaho App., Aug. 20, 2013) (affirming the denial of Johnson's I.C.R. 35 and I.R.C.P. 60(b) motions). His appeal rights were later reinstated in post-conviction proceedings. (R., p. 88; see also 11/16/15 Tr.) He timely appealed from the re-entered judgment. (R., pp. 88, 101.)

ISSUES

Johnson states the issues on appeal as:

> 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. Jonson's case amount to cumulative error?

(Appellant's brief, p. 9.)

The state rephrases the issues as:

1. The district court did inform the jury panel that this case was being re-tried after an appeal, but did not, contrary to Johnson's claim, inform the jury of any conviction. Has Johnson failed to show error in the denial of his motion to strike the panel for bias?

2. Detective Snarr testified about the general course of his investigation, including who he interviewed. When asked if he had interviewed anyone else he stated he "tried" to interview Johnson. Has Johnson failed to show error in the denial of his motion for mistrial based upon this testimony?

3. During trial a state's witness, Scott Wilson, was allowed to testify about Johnson's work schedule on two days in March 2014, based on refreshed recollection. The document he used to refresh his memory was a report from time records kept by the business, generated the day before he testified. Has Johnson failed to show error in the district court's rulings on the admissibility of refreshed testimony or the potential prejudicial effect of late-disclosed evidence?

4. Has Johnson failed to show errors that cumulatively deprived him of a fair trial?

ARGUMENT

I.
Johnson Has Failed To Show Error In The Denial Of His Motion To Strike The Jury Panel For Bias

A. Introduction

At the June 6, 2011, pre-trial conference Johnson expressed a desire to change venue or, alternatively, to have a questionnaire submitted to the potential jurors. (Supp. R., p. 163.[1]) The district court instructed Johnson's counsel to submit a proposed questionnaire and scheduled a hearing on all remaining pre-trial motions for June 24, 2011. (Supp. R., pp. 163-64.) As instructed, Johnson's counsel submitted the proposed questionnaire the next day. (Supp. R., pp. 165-68.) On June 17, 2011, the district court entered an order that stated the following:

> On June 22nd and 23rd, 2011, the court will conduct preliminary jury selection proceedings in this case. Before the potential jurors complete the Supplemental Juror Questionnaire, the court will give verbal preliminary instructions and information about the charges in this case. A written copy of the court's intended comments is attached hereto as Exhibit A.
>
> Any objection to Exhibit A must be made in writing and filed with the clerk …, before 5:00 p.m. on June 21, 2011.

(Supp. R., p. 169.) The "intended comments" in "Exhibit A" included, "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." (Supp. R., p. 171.) Neither party filed an objection to this proposed language. (See, generally,

[1] Page citations to the supplemental record are to the pages in the electronic file rather than the page numbers stamped on the documents, which appear to be continued from the record provided in the first appeal.

Supp. R.) Having received no objection, the district court used the intended comments in relation to having the jury panel fill out the questionnaire on June 22 and 23, 2011. (Compare Supp. R., pp. 171-72 with 6/22 & 23/11 Tr., p. 5, L. 8 – p. 7, L. 10; p. 11, L. 16 – p. 14, L. 4; p. 19, L. 5 – p. 21, L. 8; p. 25, L. 8 – p. 27, L. 10.)

On June 24, 2011, the district court vacated the hearing on outstanding motions because Johnson's counsel was in a jury trial in another court. (6/24/11 Tr., p. 48, Ls. 8-13.) On June 27, 2011, Johnson filed a motion *in limine* seeking a ruling to prevent "any reference to a prior trial in this case." (Supp. R., pp. 186-87.)

When the motion *in limine* was addressed on June 27, 2011, the district court pointed out that it had already informed the jury panel of the prior trial and that the Idaho Supreme Court on appeal had reversed and remanded for a new trial. (Trial Tr., p. 74, L. 3 – p. 75, L. 12.) Johnson's trial counsel was "very concerned" about the district court having provided that information because the jury panel was "in effect" informed that Johnson had "previously been convicted." (Trial Tr., p. 75, Ls. 13-15.) The district court pointed out that the jury panel had been informed of the prior trial and remand, but "[t]he word 'convicted' was never used." (Trial Tr., p. 75, Ls. 16-18.) Counsel clarified that he believed the fact of conviction was the only "reasonable inference" the jury could draw from the information provided. (Trial Tr., p. 75, Ls. 19-21; see also p. 76, Ls. 18-24.) When asked why an objection to the proposed script was not timely filed, counsel

responded, “Well, perhaps it was because I’ve been in trial.” (Trial Tr., p. 77, Ls. 10-22.)

The court then (1) noted that it would be instructing the jury on the presumption of innocence; (2) explained that a specific curative instruction might only serve to highlight the fact of a prior trial; and (3) stated that it would be willing to excuse any potential juror who indicated in voir dire that the fact of a prior trial would weigh on his or her decision. (Trial Tr., p. 78, L. 16 – p. 79, L. 15.) The district court then asked the parties if that was an adequate response. (Trial Tr., p. 79, Ls. 15-17.) The prosecutor expressed agreement with that procedure. (Trial Tr., p. 79, Ls. 18-19.) The defense stated it was “not going to object to that” (Trial Tr., p. 79, Ls. 20-22), but moved “that this matter be vacated, that we select a new panel, and that they not be informed of the reversal and remand” (Trial Tr., p. 80, L. 11 – p. 81, L. 16). The district court took the motion to strike the panel under advisement and took a recess. (Trial Tr., p. 82, Ls. 1-16.)

Upon reconvening the district court denied the motion to strike the panel. (Trial Tr., p. 82, Ls. 17-21.) The court ruled there were to be no references to the prior trial in the current trial and that the court intended to emphasize the presumption of innocence. (Trial Tr., p. 82, L. 17 – p. 83, L. 13.) Prior to the start of voir dire the court did instruct the jury on the presumption of innocence. (Trial Tr., p. 97, L. 16 – p. 98, L. 5; p. 234, L. 25 – p. 235, L. 14.) The district court again instructed the jury on the presumption of innocence after it was sworn and before presentation of evidence. (Trial Tr., p. 496, L. 9 – p. 497, L. 2.) The

district court and counsel also questioned the jury panel regarding whether any potential juror had formed or expressed an unqualified opinion or belief that Johnson was or was not guilty (Trial Tr., p. 110, Ls. 1-6; p. 256, Ls. 20-24) and whether the potential jurors could follow the reasonable doubt and presumption of innocence instructions (Trial Tr., p. 369, L. 20 – p. 371, L. 8; p. 403, L. 24 – p. 405, L. 19).

On appeal Johnson argues that 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." (Appellant's brief, p. 13.[2]) Johnson's claim of jury bias fails for three reasons. First, Johnson waived it by later, after voir dire, passing the remaining panel for cause. (Trial Tr., p. 432, Ls. 19-21.) Second, even if not waived, Johnson's argument is factually without merit because the jury was not informed he "had already been convicted of the precise charges before them." Rather, the jury was informed, "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." (Supp. R., p. 171.) Third, the argument is also legally without merit because the mention of a prior trial and appeal was not so extremely and inherently prejudicial that the jury was not susceptible to rehabilitation through further questioning.

[2] Johnson also argues that the state will not be able to demonstrate the error he claims to be harmless. (Appellant's brief, pp. 23-25.) However, this argument is legally irrelevant because jury bias is not subject to harmless error analysis. Dunlap v. State, 159 Idaho 280, 304, 360 P.3d 289, 313 (2015).

B. Standard Of Review

"'The decision whether a juror can render a fair and impartial verdict is directed to the sound discretion of the trial court and will not be reversed absent an abuse of discretion.'" State v. Abdullah, 158 Idaho 386, 421, 348 P.3d 1, 36 (2015) (quoting State v. Yager, 139 Idaho 680, 688, 85 P.3d 656, 664 (2004)).

> To determine whether an abuse of discretion occurred this Court uses a three-part test: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.

State v. Johnson, 145 Idaho 970, 979, 188 P.3d 912, 921 (2008).

C. Johnson Waived Any Claim That The Jury That Ultimately Tried Him Was Biased

After the initial motion to strike the panel was rejected and after conducting voir dire, Johnson's trial counsel passed the panel for cause. (Trial Tr., p. 432, Ls. 19-21.) "'Passing a jury for cause at the conclusion of voir dire "indicates [ ] satisfaction with the jury as finally constituted."'" State v. Pratt, 160 Idaho 248, 251, 371 P.3d 302, 305 (2016) (brackets and internal quotes original, quoting Mulford v. Union Pacific Railroad, 156 Idaho 134, 139, 321 P.3d 684, 689 (2014)). Passing for cause therefore "waived any claim that the jury panel was biased." Id. at 250, 371 P.3d at 304. Because Johnson expressed satisfaction with the jury as finally constituted, after having had the opportunity to explore potential bias through voir dire, his claim that the jury that tried him was actually or impliedly biased was waived.

D. Even If The Issue Were Not Waived, Johnson Has Shown No Abuse Of Discretion In The Denial Of His Motion To Strike The Panel

The Sixth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...." U.S. Const. amend VI. Further, the Idaho Constitution establishes "the right of trial by jury shall remain inviolate." Idaho Const. art. I, § 7. Therefore, a defendant's constitutional rights are implicated where the defendant is denied impartial jurors. State v. Moses, 156 Idaho 855, 862, 332 P.3d 767, 774 (2014). "Actual bias deals with the specific state of mind of an individual juror and is proved by questioning the juror about his actual biases. Implied bias, however, conclusively presumes bias as a matter of law based on the existence of a specific fact." State v. Lankford, No. 35617, 2016 WL 4010851 at *2 (Idaho July 25, 2016) (rehearing granted).

Courts generally "have held that the fact that a jury knew that the defendant has been found guilty or convicted by a previous jury for the same crime creates an implied bias" in the jury. Id. at *3. However, the Idaho Supreme Court has not decided "whether the disclosure of a prior conviction for the same offense would be cause for a finding of implied bias." Id. See also State v. Watkins, 152 Idaho 764, 766, 274 P.3d 1279, 1281 (Ct. App. 2012) (Court of Appeals also deferring to decide if knowledge of a prior conviction creates implied bias). The Court did not decide this issue in Lankford because the district court in that case "did not mention a prior conviction or that Lankford

was previously found guilty." Lankford, 2016 WL 4010851 at *3. Rather, during voir dire, the district court stated: "'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.'" Id.

"Idaho law has clearly distinguished between the mention of a previous trial and the mention of a previous conviction." Id. (citing Watkins, 152 Idaho at 766, 274 P.3d at 1281). Because the district court did not mention a conviction, the proper issue was "whether the mention of a prior *trial and appeal* is so extremely and inherently prejudicial that the jury is not susceptible to rehabilitation through further questioning." Id. (emphasis original, internal quotations omitted).

The Court addressed that issue, and held that mention of a prior trial and appeal was not "extremely and inherently prejudicial" under the facts of that case. Id. at *3-4. See also Watkins, 152 Idaho at 766-67, 274 P.3d at 1281-82 (mention of a "prior trial" and "the appeals court" was not disclosure of a conviction requiring reversal). The Court held that, where the jury had been informed of a prior trial and appeal, the defendant asserting jury bias must demonstrate actual bias or an "extreme case" or "extreme circumstances" rising to the level of implied bias. Lankford, 2016 WL 4010851 at *3-4.

As in Lankford and Watkins, the jury panel in the present case was made aware that there had been a prior trial and an appeal, but was not told there had been a conviction or finding of guilt. (6/22 & 23/11 Tr., p. 5, L. 8 – p. 7, L. 10;

p. 11, L. 16 – p. 14, L. 4; p. 19, L. 5 – p. 21, L. 8; p. 25, L. 8 – p. 27, L. 10.) The question addressed by the district court below was therefore "whether the mention of a prior *trial and appeal* [was] so extremely and inherently prejudicial that the jury [was] not susceptible to rehabilitation through further questioning." Lankford, 2016 WL 4010851 at *3 (emphasis original). The applicable legal standard was whether the defense had demonstrated actual bias or "extreme circumstances" rising to the level of showing implied bias. Id. The district court answered this in the negative, concluding that any potential unfair prejudice could be cured. (Trial Tr., p. 78, L. 16 – p. 79, L. 15; p. 82, L. 17 – p. 83, L. 13.) The district court did not err in that determination. The record shows neither actual bias nor an "extreme case" demonstrating implied bias.

Johnson claims the district court did err, and attempts to distinguish Lankford and Watkins by claiming that in this case the jury "was essentially informed that Mr. Johnson had been previously convicted" because the district court used the word "'reversed,' clearly indicating that it was Mr. Johnson's prior conviction that had been reversed." (Appellant's brief, pp. 19-21.) This argument does not withstand analysis. As stated above, the district court in Lankford, 2016 WL 4010851 at *3, stated, "'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.'" This statement is indistinguishable from what the district court told the jury panel in this case. Likewise, in Watkins, 152 Idaho at 766, 274 P.3d at 1281, the Idaho Court of Appeals rejected the argument "that the disclosure of a prior

trial and appeal is tantamount to telling the jury that [the defendant] had been found guilty by a previous jury."

There was no magical significance in the use of the word, "reversed." This case is indistinguishable from Lankford and Watkins in that in all three cases the jurors were made aware there had been a prior trial and the necessity of a new trial as a result of an appeal. The district court in this case properly answered the question of whether "the mention of a prior *trial and appeal* [was] so extremely and inherently prejudicial that the jury [was] not susceptible to rehabilitation through further questioning," Lankford, 2016 WL 4010851 at *3-5, in the negative.

Johnson also argues that the district court erred by not finding bias because the three factors deemed determinative in Lankford are allegedly not present here. (Appellant's brief, pp. 21-23.) This argument fails on the applicable legal standard. "In determining whether an 'extreme situation' exists each case must turn on its own facts." Lankford, 2016 WL 4010851 at *4. Even if the facts of this case differ from those in Lankford, such does not meet Johnson's burden of showing an extreme case meriting a finding of implied bias.

Moreover, a review of the facts in this case shows no "extreme case" requiring a finding of implied bias. Most importantly, contrary to Johnson's argument, the record shows the jury was not informed that Johnson had been convicted of the "precise charges" he faced (Appellant's brief, p. 13), but rather had been informed only of a prior trial and appeal (6/22 & 23/11 Tr., p. 5, L. 8 – p. 7, L. 10; p. 11, L. 16 – p. 14, L. 4; p. 19, L. 5 – p. 21, L. 8; p. 25, L. 8 – p. 27,

L. 10). Also contrary to Johnson's argument (Appellant's brief, p. 21 (trial counsel objected "at the earliest opportunity")), the district court gave Johnson's counsel the opportunity to object prior to the statement associated with the jury questionnaire (Supp. R., pp. 169-71), but counsel did not because he was busy with a different trial (Trial Tr., p. 77, Ls. 10-22). The district court concluded the instructions addressing the presumption of innocence and burden of proof would suffice to address prejudice, while a curative instruction specifically addressing the comment about the former trial and appeal would likely call attention to the statement and therefore be less effective. (Trial Tr., p. 78, L. 16 – p. 79, L. 15.) Importantly, although Johnson on appeal believes that a curative instruction should have been given (Appellant's brief, p. 22), Johnson's trial counsel specifically concurred with the district court's reasoning regarding the lack of a curative instruction (Trial Tr., p. 79, Ls. 20-22). Finally, Johnson's appellate argument that the prosecutor's comments (that he believed "the best thing to do is to stay away" from any mention of the prior trial or appeal) prevented his trial counsel from inquiring in voir dire about actual or implied bias (Appellant's brief, p. 22) is specious. On the contrary, the potential jurors were subjected to a full voir dire by the district court, the prosecutor, and defense counsel. (Trial Tr., p. 91, L. 7 – p. 432, L. 18.) In fact, after conducting voir dire Johnson's trial counsel was sufficiently satisfied that he passed the remaining jury panel for cause (Trial Tr., p. 432, Ls. 19-21), indicating that prior concerns about bias had been allayed by voir dire. See Pratt, 160 Idaho at 250, 371 P.3d at 304. Johnson's claim of implied bias is unsupported by the record. He has failed to

demonstrate actual or implied bias, and has therefore failed to show error in the denial of his motion to strike the jury panel.

II.
Johnson Has Failed To Show Error In The Denial Of His Motion For Mistrial

A. Introduction

Detective Snarr testified generally about his investigation in this case, including arranging for a forensic interview of the victim and interviewing two family members. (Trial Tr., p. 712, L. 8 – p. 714, L. 15; p. 724, L. 4 – p. 726, L. 23.) When asked the yes or no question of whether he had interviewed "[a]nyone else," he responded, "Tried to interview Mr. Johnson." (Trial Tr., p. 726, Ls. 24-25.)

Johnson objected and, outside the presence of the jury, requested a mistrial, asserting a violation of his right to silence. (Trial Tr., p. 727, Ls. 1-21.) The district court concluded that the detective's statement was inadmissible because it created an "impermissible inference of guilt." (Trial Tr., p. 729, Ls. 16-23; p. 731, Ls. 20-23; p. 735, Ls. 6-11; see also p. 734, Ls. 4-9 (prosecutor representing that detective called Johnson, but Johnson invoked right to contact attorney).) The district court sustained the objection, decided to give a curative instruction at that time, but deferred a decision on the motion for mistrial. (Trial Tr., p. 737, L. 10 – p. 738, L. 1.) The district court provided the language of the proposed curative instruction to the parties and asked for input. (Trial Tr., p. 738, Ls. 4-19.) The defense did not "join the Court in that instruction," but did not offer any specific objection other than to express concern that the delay in the

arguments and ruling would be ascribed to the defense. (Trial Tr., p. 738, L. 20 – p. 739, L. 15.) After addressing a few more issues, the jury was brought back in and the district court instructed them that the objection had been sustained; the answer stricken; and that they were to draw no inferences from the testimony, including any inference of guilt from Johnson's invocation of the right to silence. (Trial Tr., p. 745, L. 3 – p. 746, L. 12.) After the close of the state's case, the district court denied the mistrial motion, finding any prejudice had been "vitiated." (Trial Tr., p. 1084, L. 16 – p. 1085, L. 6.)

Johnson contends the district court erred by not granting a mistrial because his due process rights were infringed when Detective Snarr testified he tried to interview Johnson. (Appellant's brief, pp. 25-36.[3]) He has failed to demonstrate, however, that the district court's determination that, although the statement did implicate due process, the curative action of sustaining the defense objection, striking the statement, and instructing the jury to draw no

[3] Johnson asserts his argument as both a due process violation and prosecutorial misconduct. (Appellant's brief, pp. 26-36.) However, a claim of prosecutorial misconduct is a due process claim. Greer v. Miller, 483 U.S. 756, 765 (1987) ("This Court has recognized that prosecutorial misconduct may 'so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.'") (brackets original, quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). See also State v. Severson, 147 Idaho 694, 716, 215 P.3d 414, 436 (2009) (objectionable conduct by prosecutor reversible only if it "prejudiced the defendant's right to a fair trial"); State v. Sanchez, 142 Idaho 309, 318, 127 P.3d 212, 221 (Ct. App. 2005) ("The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. 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.") (footnote omitted, citing Smith v. Phillips, 455 U.S. 209, 219 (1982)).

inferences from the statement, were sufficient to protect Johnson's due process rights.

B. Standard Of Review

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). The standard for reviewing a district court's denial of a motion for mistrial is well established:

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

State v. Passons, 158 Idaho 286, 292–93, 346 P.3d 303, 309–10 (Ct. App. 2015) (internal brackets omitted) *(*quoting State v. Urquhart*,* 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct. App. 1983)). The appellant "has the burden of showing that the trial court's refusal to declare a mistrial constituted reversible error." State v. Hedger, 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989). See also State v. Fluery, 123 Idaho 9, 11, 843 P.2d 159, 161 (Ct. App. 1992) (mistrial standard "is more accurately described as one of prejudicial error where the appellant has the

burden to show prejudicial error, and absent such a showing, error will be deemed harmless" (internal quotation omitted)).

C. Johnson Has Shown No Error In The District Court's Determination That Curative Action Short Of A Mistrial Could Render The Trial Compliant With Due Process

"A mistrial may be declared, upon the defendant's motion, if there has been an error or legal defect during the trial which is prejudicial to the defendant and deprives the defendant of a fair trial." State v. Dopp, 129 Idaho 597, 603, 930 P.2d 1039, 1045 (Ct. App. 1996) (citing I.C.R. 29.1). "The core inquiry" when denial of a mistrial is challenged on appeal is "whether it appears from the record that the event triggering the mistrial motion contributed to the verdict, leaving the appellate court with a reasonable doubt that the jury would have reached the same result had the event not occurred." State v. Palin, 106 Idaho 70, 75, 675 P.2d 49, 54 (Ct. App. 1983).

The Idaho appellate courts have repeatedly held that where "improper testimony inadvertently arises and the trial court promptly instructs the jury to disregard the evidence, it must be presumed that the jury obeyed the trial court's direction entirely." State v. Hedger, 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989) (citing State v. Rolfe, 92 Idaho 467, 444 P.2d 428 (1968); State v. Boothe, 103 Idaho 187, 646 P.2d 429 (Ct. App. 1982)). To show a due process violation despite a curative instruction a claimant must show an "overwhelming probability" that the instruction was ignored. State v. Hill, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004) (in context of instruction to disregard prejudicial evidence inadvertently admitted). As stated in Lankford:

> We presume that the jury followed the jury instructions given by the trial court in reaching its verdict and that, although not always dispositive, the court is entitled to rely on assurances from venire persons concerning partiality or bias. Consequently, any inappropriate effect the advisement might have had on the jury was properly addressed by the district court's questioning and instruction.

2016 WL 4010851 at *5 (internal quotes, citations and brackets omitted). See also Watkins, 152 Idaho at 767-68, 274 P.3d at 1282-83 (applying rebuttable presumption where curative instruction given after mention of prior trial during course of presentation of evidence). Johnson has failed to show an overwhelming probability that the district court's curative instruction, combined with the opportunity to voir dire the potential jurors regarding potential bias, was insufficient to eliminate any reasonable probability of bias.

The district court's curative instruction did three things: (1) it sustained the objection and struck the statement; (2) it informed the jury of the right to silence and that a defendant was entitled to invoke that right; and (3) it told the jury to "disregard" the statement and, further, "to draw no inferences at all" from the stricken statement. (Trial Tr., p. 746, Ls. 3-12.) The entirety of the stricken statement was that the detective "[t]ried to interview Mr. Johnson." (Trial Tr., p. 726, Ls. 24-25.) At no point did the prosecution encourage or invite the jury to draw any inference from this evidence, much less an improper one. (See generally Trial Tr.) There is no reason on this record to believe that the jury drew an impermissible inference of guilt from the stricken statement, much less grounds for finding an overwhelming probability that it did so.

III.
Johnson Has Failed To Show Error In The District Court's Rulings On The Admissibility Of Refreshed Testimony Or The Potential Prejudicial Effect Of Late-Disclosed Evidence

A. Introduction

In order to address Johnson's activities in the general time-frame of the charge,[4] the state presented the testimony of Scott Wilson, the former owner of Trilogy Network Systems, Johnson's employer at that time. (Trial Tr., p. 622, L. 6 – p. 628, L. 3.) Wilson testified that Johnson had worked on March 19, 2004. (Trial Tr., p. 628, Ls. 4-8.) When asked how much time Johnson had worked, Wilson asked if he could "refer to some notes." (Trial Tr., p. 628, Ls. 9-10.) The "notes" were a "report" Wilson "generated from a time tracking system" used in his business. (Trial Tr., p. 630, L. 18 – p. 631, L. 6.) The report was extracted from "time sheets" submitted by Johnson for billing clients of the company, and reflected "work done by Mr. Johnson" from March 19 and March 22, 2004. (Trial Tr., p. 634, Ls. 2-14.) Wilson had generated the report "yesterday" and had not provided a copy of the report to the state. (Trial Tr., p. 630, Ls. 24-25; p. 632, Ls. 2-8.) He had generated the report only to "refresh [his] own memory." (Trial Tr., p. 635, L. 22 – p. 636, L. 11.)

The defense objected that it had not seen the report prior to its mention in court. (Trial Tr., p. 633, Ls. 1-4; p. 637, Ls. 2-15.) The district court concluded that the report, having been reviewed by the witness to refresh his recollection, could not be used "further." (Trial Tr., p. 637, L. 24 – p. 638, L. 8; see also

[4] The parties and the trial judge engaged in a thorough, and lengthy, discussion of the relevance and probative nature of the evidence. (Trial Tr., p. 663, L. 1 – p. 668, L. 1.)

p. 638, L. 20 – p. 639, L. 18.) Defense counsel stated he was "satisfied with that." (Trial Tr., p. 638, Ls. 9-10.) The district court, at Johnson's request, instructed the bailiff to take custody of the report. (Trial Tr., p. 640, Ls. 5-8.)

Shortly after the state resumed direct examination of Wilson, Johnson objected that Wilson was not testifying from refreshed recollection, but only his recollection of the report, which was "a backdoor approach to introducing the documentary evidence that was never disclosed to the defense." (Trial Tr., p. 640, L. 22 – p. 651, L. 17.) The district court and the parties further inquired of Wilson regarding the generation of the report, and Wilson testified that, the previous afternoon when he had arrived to testify, he "was asked" by one of the prosecutors "to try to verify what Mr. Johnson was doing on March 22nd" so he produced the document "on his own" in order to "refresh [his] memory on what [Johnson] was doing that day." (Trial Tr., p. 655, L. 23 – p. 662, L. 13.)

Johnson moved for a mistrial because the defense "had no opportunity to examine the primary documentation from which [the report] came." (Trial Tr., p. 667, L. 20 – p. 668, L. 4.) After some initial comments, the district court took the motion under advisement. (Trial Tr., p. 668, L. 5 – p. 669, L. 7.)

After the recess, the district court took up both issues regarding the use of the report, first re-affirming its ruling on allowing Wilson to testify based on refreshed recollection under I.R.E. 612, concluding the state "did just provide sufficient foundation to satisfy the requirements of Rule 612 for the use of that document." (Trial Tr., p. 675, L. 4 – p. 677, L. 2.) The district court then addressed the mistrial motion, initially concluding there had been a discovery

violation "in form, if not in substance" because of the timing of the generation and disclosure of the report. (Trial Tr., p. 677, Ls. 3-11.) The district court took the motion under advisement because "the appropriate sanction" was "difficult to assess" at that time. (Trial Tr., p. 677, Ls. 18-25.) The district court stated that it would assess "whether or not the disputed matter has so prejudiced the defense in the preparation of its defense that it's been deprived of a fair trial," and the factors it was considering were the "weight of the particular disputed evidence," whether the defense was allowed access to the underlying data, and whether cross-examination "may address the weight of this evidence." (Trial Tr., p. 677, L. 24 – p. 679, L. 21.) The district court later denied the motion for mistrial. (Trial Tr., p. 1084, L. 12 – p. 1085, L. 6.)

On appeal Johnson asserts the district court erred in both its rulings concerning the use of the report. First, Johnson claims the district court erred by admitting Wilson's testimony, claiming it was not in fact based on memory refreshed by the report. (Appellant's brief, pp. 48-50.) Second, Johnson argues that the district court erred by denying his motion for a mistrial based on the timing of the disclosure of the report. (Appellant's brief, pp. 50-53.) Johnson has failed to show error in relation to either claim.

B. Johnson Has Shown No Abuse Of Discretion In Admitting Wilson's Refreshed Testimony

Idaho Rule of Evidence 612 states, in its entirety:

> (a) If while testifying, a witness uses a writing or object to refresh the memory of the witness, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

> (b) Before testifying. If, before testifying, a witness uses a writing or object, not privileged under these rules or not protected from disclosure under Rule 26 of the Idaho Rules of Civil Procedure or Rule 16 of the Idaho Criminal Rules, to refresh the memory of the witness for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.
>
> (c) Terms and conditions of production and use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. 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.

The plain language of this rule does not address any foundational requirements regarding testimony refreshed by review of documents or tangible items. Rather, those are contained in I.R.E. 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness."

The Idaho Supreme Court has adopted the following "excellent analysis of the permissible use of documents for purposes of refreshing the recollection of a witness" articulated by the Idaho Court of Appeals:

> First, the witness must exhibit the need to refresh his or her memory and, second, the witness must confirm that the notes will assist in refreshing his or her memory. The witness may not testify directly from the notes, but can use them to assist in recollection. The purpose of Fed.R.Evid. 612 is "to promote the search of credibility and memory." Fed.R.Evid. 612, advisory committee's notes (1972). 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. Two safeguards have been devised for this purpose. First, the district court has broad discretion in determining whether the witness is truly using the writing to refresh his or her memory, or whether he or she is effectively offering the writing for its truth. Second, Fed.R.Evid. 612 gives opposing counsel the right to inspect at trial whatever is used to refresh recollection, to cross-examine the witness on it and to introduce relevant portions into evidence.

Thomson v. Olsen, 147 Idaho 99, 105, 205 P.3d 1235, 1241 (2009) (citations omitted) (quoting Baker v. Boren, 129 Idaho 885, 892, 934 P.2d 951, 958 (Ct. App. 1997)). Review of the record shows the district court did not abuse its "broad discretion" when it determined that Wilson was using the report to refresh his recollection, rather than merely reciting information contained in the report.

First, the testimony of the witness provided foundation for concluding that the report did in fact refresh his memory. Wilson repeatedly testified that the report refreshed his memory. (Trial Tr., p. 629, Ls. 17-21; p. 631, Ls. 7-9; p. 632, Ls. 6-8; p. 636, Ls. 4-11; p. 642, Ls. 22-25.) Wilson also testified that he did in fact "know at one point in time whether or not Mr. Johnson worked for [him] on March 22nd, 2004." (Trial Tr., p. 642, Ls. 18-21.) The defense's voir dire in aid of objection merely established that Wilson had no current memory independent of the refreshment of whether Johnson worked the 22nd. (Trial Tr., p. 643, L. 4 – p. 644, L. 9.) This evidence was sufficient to support the district court's conclusion that sufficient foundation had been laid that Wilson was testifying from

refreshed recollection regarding when and where Johnson worked on the relevant dates.

Second, the district court's ruling shows it was aware of its discretion, applied the correct legal standard, and reached its decision by exercise of reason. The district court initially ruled that sufficient foundation had not been laid. (Trial Tr., p. 629, Ls. 7-10.) It explained the procedure that should be employed to lay foundation. (Trial Tr., p. 630, Ls. 5-14.) It articulated the proper legal standard and allowed testimony from refreshed memory only, including ruling that the report, having refreshed the witness's memory, not be further used in the trial. (Trial Tr., p. 637, L. 24 – p. 638, L. 10.) The district court explained, as part of its reasoning for its ruling that the report, having refreshed the witness's memory, not be used further in court, that it did not want the jury to think the document, as opposed to the refreshed testimony, was the evidence. (Trial Tr., p. 638, L. 20 – p. 639, L. 18.) The district court overruled a renewed objection (Trial Tr., p. 644, Ls. 10-18), and reaffirmed its ruling on admissibility under Rule 612, stating the state "did just provide sufficient foundation" (Trial Tr., p. 676, L. 18 – p. 677, L. 2). In light of the evidence set forth above, the record clearly and amply demonstrates that the district court employed the correct legal standard, recognized its discretion, and reached its conclusion by an exercise of reason.

Johnson argues that "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 he worked on those dates, as he had no

specific memory of that information." (Appellants brief, p. 49 (citing Trial Tr., p. 643, L. 14 – p. 644, L. 9.[5]) This argument is factually and legally without merit. Wilson testified he had "no recollection of his own" regarding specific events on the dates in question. (Trial Tr., p. 643, L. 14 – p. 644, L. 9.) The first prong of the relevant test, however, is "the witness must exhibit the need to refresh his or her memory." Olsen, 147 Idaho at 105, 205 P.3d at 1241. The witness did not say he had no personal knowledge of the subjects to which he testified, only that he had no unrefreshed memory of them.

The district court applied the correct legal analysis, reached reasonable conclusions regarding the foundation, and exercised its discretion to overrule the objection to allowing witness Wilson to provide refreshed testimony. Johnson has failed to demonstrate error.

In addition, any possible error was harmless. State v. Perry, 150 Idaho 209, 222, 245 P.3d 961, 974 (2010) (error will be declared harmless if state demonstrates harmlessness beyond a reasonable doubt). The state's theory of the case was that on Friday, March 19, 2004, Michelle Johnson, then Johnson's wife, went to Utah to visit her parents, and returned on Monday, March 22, 2004. (Trial Tr., p. 1240, L. 24 – p. 1243, L. 13.) The state asserted that Johnson met Michelle at the school where she was picking up the older children on March 19,

[5] Johnson also cites post-ruling testimony by Wilson in support of this argument, asserting Wilson "may have actually never had knowledge of the specific times that Mr. Johnson worked." (Appellant's brief, p. 49 (citing Trial Tr., p. 693, L. 2 – p. 696, L. 18).) Because this evidence was not presented to the district court in support of the objection, and thus never considered by the district court for this purpose, it cannot be properly considered in relation to this claim of error. Moreover, the claim the witness "may have" had no personal knowledge falls far short of showing an abuse of discretion by the trial court.

2004, at about 1:00, and asked that the victim, their eldest daughter, remain behind with him. (Trial Tr., p. 1241, L. 20 – p. 1242, L. 10.) The crimes occurred while Johnson and the victim were home alone together and Michelle was with the other children in Utah. (Trial Tr., p. 1280, L. 21 – p. 1282, L. 9.) Wilson's testimony regarding Johnson's work on the 19th and 22nd was to help corroborate evidence that Johnson met Michelle at the school at 1:00 on March 19 and that the victim was with him at work on the 22nd, in order to corroborate this chronology and rebut any work-related alibi for those two dates. (Trial Tr., p. 666, Ls. 5-22.) Wilson's testimony was, in turn, corroborated by the work schedule Johnson himself kept. (State's Exhibit U; Trial Tr., p. 1183, L. 12 – p. 1187, L. 23.) Ultimately Johnson generally denied the crime and asserted the evidence showed that Michelle did not visit her parents that weekend, but did not contend that work was an alibi. (Trial Tr., p. 1138, L. 22 – p. 1156, L. 22; p. 1252, L. 22 – p. 1280, L. 13.) Whether Johnson's work schedule on March 19 and 22 corroborated the state's evidence and theory of opportunity was ultimately a very minor part of the trial, and introduction of Wilson's testimony about Johnson's work on those dates was harmless error even if erroneous.

C. The Timing Of The Disclosure Of The Work Records Did Not Violate Johnson's Due Process Rights[6]

"Where the late disclosure of evidence forms the basis of an alleged due process violation, the defendant must show the late disclosure to have been so prejudicial to the defendant's preparation of his or her case that a fair trial was denied." State v. Iverson, 155 Idaho 766, 777, 316 P.3d 682, 693 (Ct. App. 2014) (citing State v. Tapia, 127 Idaho 249, 255, 899 P.2d 959, 965 (1995)). This same standard applies when the alleged late disclosure is also a discovery violation. State v. Barcella, 135 Idaho 191, 199, 16 P.3d 288, 296 (Ct. App. 2000). "To prove prejudice, a defendant must show there is a reasonable probability that, but for the late disclosure, the result of the proceedings would have been different." Id. To prevail on his claim, Johnson must make a "showing of specific prejudice." State v. Gerdau, 96 Idaho 516, 518, 531 P.2d 1161, 1163 (1975).

As noted above, the evidence in question went to Johnson's work on March 19 and 22, 2004, and whether that was consistent with him picking up the victim from school at 1:00 on March 19, 2004, and having her at his workplace on March 22, 2004. Johnson contends the *evidence* was "critically important and extremely prejudicial" (Appellant's brief, p. 52), but this argument is irrelevant

[6] The state asserts there was no discovery violation, as the prosecution learned of the report, at best, a day before it was used at trial to refresh Wilson's memory. Therefore, Johnson is asserting a due process claim based on the timing of the disclosure to both parties. Regardless of whether there was a violation of I.C.R. 16, the legal standard requiring that Johnson show prejudice from the timing of the disclosure of the report is the same. State v. Barcella, 135 Idaho 191, 199, 16 P.3d 288, 296 (Ct. App. 2000).

(and incorrect, because the evidence was not *unfairly* prejudicial in the slightest) because the issue is unfair prejudice arising from the timing of the disclosure.

The only arguably relevant argument presented by Johnson is his trial counsel was unable to "properly prepare for Mr. Wilson's testimony due to the discovery violation." (Appellant's brief, p. 52.) He fails to back this conclusory statement with any plausible scenario of what impeachment more time to prepare would have yielded. Johnson does cite trial counsel's argument that 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." (Appellant's brief, p. 51.) However, Wilson testified how he had already sifted through the information (by use of a computer database search) to find the relevant data, and the relevant data was contained in the report. (Trial Tr., p. 630, L. 18 – p. 631, L. 6; p. 634, L. 2 – p. 636, L. 18.) Johnson has not expressed any non-speculative basis for concluding that he was prejudiced by the amount of time he had to respond to the report generated by Wilson.

IV.
Johnson Has Failed To Show Errors To Cumulate

"The cumulative error doctrine requires reversal of a conviction when there is 'an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show the absence of a fair trial, in contravention of the defendant's constitutional right to due process." State v. Draper, 151 Idaho 576, 594, 261 P.3d 853, 871 (2011) (citations, quotations and alteration omitted). A necessary predicate to application of the cumulative error

doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). In addition, cumulative error analysis does not include errors neither objected to nor found fundamental. State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2010). Johnson has failed to show multiple errors that are harmless individually but prejudicial cumulatively.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction.

DATED this 28th day of April, 2017.

__/s/ Kenneth K. Jorgensen_____
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of April, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ELIZABETH A. ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

__/s/ Kenneth K. Jorgensen_____
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd