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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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

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District Judge

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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. 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. 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.

This Reply Brief is necessary to address the State assertions to the contrary.

Statement of the Facts and Course of Proceedings

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

ISSUES[1]

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?

[1] This Reply Brief will not address issue four as the State's arguments on the issue are unremarkable and, as such, no response is necessary.

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

Mr. Johnson maintains that his 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.

A. The Issue Was Not Waived

The State has asserted that when Mr. Johnson passed the jury panel for cause he waived any claims of actual or implied jury bias. (Respondent's Brief, p.7.) This assertion is incorrect for numerous reasons.

First, the case relied upon by the State, *State v. Pratt*, is not applicable to the present case. In *Pratt,* the Idaho Supreme Court found that after a juror made some comments of concern during voir dire, counsel was able to question the jury panel about any potential related bias and appeared to be satisfied that no bias existed, as evidenced by his "tactical decision to pass the jury for cause." *State v. Pratt*, 160 Idaho 248, 250 (2016). Mr. Johnson's case presents a very different situation.

In the case at hand, there was no ability for counsel to question the jurors regarding any potential bias from the district court's statement. While counsel in *Pratt* was able to ask questions that would uncover bias, the jury panel in Mr. Johnson's case could not be asked about

potential bias without emphasizing the very information that the jurors should not have been exposed to, that there had been a prior trial, conviction, and appeal.[2]

All of the parties agreed that it would be impossible to question jurors about the implied bias without increasing the possible prejudice. Once defense counsel's concerns were brought to the district court's attention, the district court agreed that any further mentioning of the previous trial would be prejudicial and ordered that from that point forward the prior trial would be referred to as prior proceeding or hearing. (Tr., p.82, L.20 – p.83, L.5.) The district court noted that "if, in fact, there is prejudice – and I am not presuming that there is, although I understand defense counsel's concerns, any further comment of it as a topic would only, I think, serve to highlight it." (Tr., p.79, Ls.1-4.) The State also 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.) Defense counsel's position was that the only appropriate remedy was to select a new jury panel, implying that he also thought it would be inappropriate to question the jurors further about the issue. (Tr., p.81, Ls.13-16.)

Additionally, not only were no questions asked to alleviate counsel's concerns about bias, there was no reason to believe that counsel made a tactical decision to pass the jury for cause based on an assumption that concerns about bias had been alleviated. Instead, it was obvious that Mr. Johnson remained very concerned that mentioning the prior trial would only serve to further bias the jury. After the jury had been selected, the topic was discussed again and

[2] Mr. Johnson asserts that the error is similar to a structural error because it could not be cured. Any attempt to cure the error through questioning or instruction could only serve to increase the prejudicial effect by further emphasizing the improper information.

Mr. Johnson noted that he was still requesting that the prior trial not be mentioned. (Tr., p.460, Ls.11-21.) 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. (Tr., p.461, L.23 – p.463, L.4.) It was clear that Mr. Johnson had continuing concerns about the bias created by the district court's statement and the jury receiving additional, similar information, and that he did not abandon the earlier objection.

The facts of Mr. Johnson's case do not support a conclusion that counsel made a tactical decision to waive the claim of implied bias because counsel was never able to dispel fears of bias by questioning potential jurors on the subject or by implying, through later actions, that Mr. Johnson was abandoning the claim. As such, *Pratt* is not instructive on the issue.

Further, in *Lankford* the Idaho Supreme Court did not refuse to address a similar issue although counsel also, presumably, passed the jury for case. *State v. Lankford*, No. 35617, 2016 WL 4010851, at 1-5 (Idaho July 25, 2016) (rehearing granted). Instead, the Court addressed the merits of the issue and found that because the district court did not reveal the outcome of the prior trial, counsel did not object to the statement, and because the district court properly questioned the jurors about any possible bias and instructed on the presumption of innocence, there was not an extreme situation requiring a finding of implied bias. *Id.* Just as in *Lankford*, Mr. Johnson asserts that a review of the merits of his claim is also required.

Finally, Mr. Johnson's objection was sufficient to preserve the issue and objecting again at the end of voir dire was unnecessary as the district court had already made a final ruling on the issue. As soon as the jury pool entered the courtroom, the district court's decision regarding the motion to select a new panel was final. There was nothing more that Mr. Johnson could do to have a new panel selected.

Mr. Johnson asserts that this issue is similar to a ruling on a motion in limine. The issue was first brought to the district court's attention through a motion in limine. It has been a long standing rule that once a motion in limine has been ruled upon, there is no need to object again at trial to preserve the issue. *Davidson v. Beco Corp.,* 112 Idaho 560, 563–64, (Ct. App. 1986) (overruled on other grounds). As was noted in *Davidson*, "All the purposes of an objection have already been fulfilled by the proceedings on the motion in limine. The trial court has been apprised of the possible error in admitting the evidence and has made its ruling, and the record has been perfected for appeal purposes." *Id.* at 563 *(quoting Harley-Davidson Motor Co., Inc. v. Daniel,* 244 Ga. 284, 260 S.E.2d 20 (1979)). Requiring Mr. Johnson to reiterate his objection to the entire jury panel at the end of voir dire would not have made his position more clear and would have served only to remind the jury that they had been exposed to prejudicial information.

Therefore, Mr. Johnson has not waived the issue.

B. 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

The State asserts that "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." (Respondent's Brief, p.9.) The State's assertion is erroneous. The jury was told ". . . 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.) This is not a mere statement that there had been a trial and appeal, but a clear statement that "the Idaho Supreme Court reversed and remanded the case." This statement is, for all intents and purposes, the same as saying that

Mr. Johnson had been convicted and had his conviction overturned on appeal. The statement was so specific that a juror could not merely assume that there had been a previous hung jury or a prior mistrial. The jury pool must have understood that Mr. Johnson had been previously convicted of the charges as there is simply no other conclusion that can be drawn from this statement. Any other interpretation of the words used would be a logical fallacy.

Next, Mr. Johnson agrees with the State that each case must turn on its own facts in determining whether an "extreme situation" exists to justify a finding of implied bias. *State v. Lankford*, No. 35617, 2016 WL 4010851, at *4 (Idaho July 25, 2016) (rehearing granted); Respondent's Brief, p.11.) He asserts that the facts of his case present such an extreme situation. In support of this assertion, Mr. Johnson presented argument illustrating how the facts of his case were different than the crucial facts used to find the opposite in *Lankford*. (*See* Appellant's Brief, pp.19-23.)

Further, the State appears to believe that it was argued on appeal that a curative instruction should have been given. (Respondent's Brief, p.12.) However, Mr. Johnson made no such argument. It was merely pointed out that unlike the jury in *Lankford*, whether prudent or not, the jury in Mr. Johnson's case was not provided a curative instruction. (Appellant's Brief, p.22.)

Additionally, the State asserts that Mr. Johnson argued that the prosecutor's comments regarding the best course of action somehow prevented voir dire of the jury. (Respondent's Brief, p.12.) This was never argued by Mr. Johnson. Instead, Mr. Johnson, again in an effort to illustrate the differences between *Lankford* and the case at hand, noted that follow-up questions about an implied bias were not asked because both parties did not think that such questioning could cure the taint. (Tr., p.81, Ls.13-16, p.77, L.25 – p.78, L.5; s*ee* Appellant's Brief, p.22.)

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 noted in the Appellant's Brief, 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. As such, Mr. Johnson's convictions must be vacated and his case remanded for a new trial before a fair and impartial jury.

C. Harmless Error

The State has asserted that "jury bias is not subject to harmless error analysis." (Respondent's Brief, p.6, n.2.) *Dunlap* states that "Accordingly, '[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.'" *Dunlap v. State*, 159 Idaho 280, 304 (2015) (quoting *United States v. Olsen,* 704 F.3d 1172, 1189 (9th Cir. 2013) (quoting *United States v. Gonzalez,* 214 F.3d 1109, 1111 (9th Cir. 2000)). However, *Lankford* noted, in articulating the standard of review, that as part of the defendant's burden to prove fundamental error, he would be required to prove harmlessness. *Lankford*, 2016 WL 4010851 at *2. As such, there is a discrepancy in the Idaho Supreme Court's standards of review for the issue. Mr. Johnson maintains that the error cannot be harmless, whether that is because a showing of prejudice is not required or because the State has failed to prove the error is harmless. Regardless, the State's has conceded the issue either by directly conceding that the harmless error standard is not applicable or by failing to present evidence proving that the error was harmless.

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

In response to a question from the State, Detective Snarr testified that he had attempted to interview Mr. Johnson. The response prejudicially persuaded the jury to infer guilt from Mr. Johnson's previous assertions of his rights. This testimony formed the basis for a motion for a mistrial. The district court found that the testimony was prejudicial, but denied the motion for a mistrial. Instead, the district court provided a flawed curative instruction that was insufficient to cure the prejudice. Mr. Johnson maintains that the motion for a mistrial was erroneously denied.

The State failed to address several of Mr. Johnson's arguments presented within this issue. Presumably, the lack of argument on these issues is a concession by the State that Detective Snarr's testimony was a violation of Mr. Johnson's constitutional rights.

Specifically, the State did not address Mr. Johnson's argument that the limiting instruction compounded the error by insuring that the jury first considered the testimony as an inference of guilt before instructing them to draw no inferences. Instead, the State has only argued that the instruction had three objectives and that the instruction, combined with voir dire opportunities, "was [not shown to be] insufficient to eliminate any probability of bias." (Respondent's Brief, p.17.)

Further, while acknowledging that a prosecutorial misconduct is a due process violation, the State did not separately address the prosecutorial misconduct issue, noting only that the State did not "encourage or invite the jury to draw an inference from the evidence . . ." (Respondent's Brief, p.17.) It appears that the State is implying that because the prosecution did not enhance the misconduct by committing further misconduct there is no error. Yet, "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." *State v. Ellington*, 151 Idaho 53, 61 (2011). The conduct in question, a comment that Detective Snarr had "[t]ried to interview Mr. Johnson" (Tr., p.726, L.25), was clearly misconduct attributable the State.

Additionally, the State has asserted that "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." (Respondent's Brief, p.17.) The State's assertion is puzzling as clearly neither party preventatively discussed this issue in voir dire. This issue at hand involves the testimony of Detective Snarr, which arose well after voir dire. (Tr., p.726, Ls.17-25.) As such, questioning during voir dire has no bearing on this issue and certainly does not support the district court's decision regarding the motion for mistrial.

Finally, contrary to the State's assertion otherwise, Mr. Johnson has met his burden to show that the district court's failure to grant a mistrial and to provide only a flawed curative instruction was not harmless error. *State v. Perry,* 150 Idaho 209 (2010). The jury 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, as discussed in section I. The limiting instruction 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 the same way as a jury that had not been exposed to the prejudicial

information. 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.

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

Mr. Johnson has asserted that the district court abused its discretion in allowing Scott Wilson, Mr. Johnson's former employer, to testify 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. Mr. Wilson admitted to having no memories of the information, yet 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 even though the report did not actually refresh his recollection. The State committed a discovery violation that prejudiced Mr. Johnson's ability to prepare for examination of Mr. Wilson when it failed to disclose the report to defense counsel prior to Mr. Wilson producing it during his testimony. Mr. Johnson maintains that the district court erred in denying the resulting motion for a mistrial.

A. The Report Was Improperly Used During Mr. Wilson's Testimony Because It Did Not Refresh His Recollection And The Resulting Motion For A Mistrial Should Have Been Granted

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. 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)).

Contrary to the State's assertion that Mr. Wilson's report refreshed Mr. Wilson's recollection, it is clear that it did not. It is important to note that there is a difference between knowing something at one point, being reminded of the information, and then presently being able to recall the information versus knowing something at one point, seeing information related to that information, and still not being able to actually recall the information from a refreshed previous knowledge. For example, an individual may not be able to recall eating at a restaurant until someone reminds them of the odd colored walls and distinctive soup they tasted there. After being reminded of these details, the person may now recall dining at the restaurant. This is in contrast to an individual not recalling that they ate a restaurant, being presented with a receipt they signed, acknowledging they must have eaten there, but still having no actual memory of dining at the restaurant. This case presents a situation like the latter.

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 commenting 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 attempted to prove that Mr. Wilson's recollection had been refreshed through a series of questions:

> 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.)

It was clear, when the district court ruled on the objection, that Mr. Wilson was never able to remember the information contained in the report, regardless of whether he knew it at one

point or not. As such, the district court did not reach its decision through an exercise of reason because the report did not refresh Mr. Wilson's recollection and Mr. Wilson merely provided testimony from his memory of the contents of the report.

The State also asserts that Mr. Johnson incorrectly cited to "post-ruling testimony" in support of the argument that Mr. Wilson's memory was not refreshed because it was not "presented to the district court in support of the objection . . ." (Respondent's Brief, p.24, n.5.) The testimony referenced includes the following:

> 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.695, Ls.6-21.) Had Mr. Johnson raised only the issue regarding the district court's abuse of discretion in allowing Mr. Wilson to testify concerning his alleged refreshed recollection, this may be a valid point. However, Mr. Johnson presented this issue as a part of a larger issue, the denial of his motion for mistrial. As this Court is well aware: "[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." *State v. Field*, 144 Idaho 559, 571 (2007) (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))). As such, this evidence can and must be considered in relation to this claim of error.

Additionally, the State has argued that any possible error is harmless because this evidence was "ultimately a very minor part of the trial." (Respondent's Brief, pp.24-25.) Mr. Johnson asserts that this evidence was not minor, and opportunity to commit the crime was a critical issue that was fervently contested by the defense. The issue of timing and opportunity to commit the alleged offenses was a portion of more than half of the witnesses' testimony including Scott Wilson (Tr., p.623, L.1 – p.662, L.11, p.686, L.2 – p.701, L.16); Jeremy Kiesig, a former co-worker of Mr. Johnson (Tr., p.587, L.12 – p.602, L.19); Tammy Lynard, a former co-worker of Mr. Johnson (Tr., p.604, L.15 – p.613, L.5); Michelle Johnson, the alleged victim's mother (Tr., p.905, L.17 – p.1048, L.19); Detective Snarr (Tr., p.746, L.25 – p.751, L.19, p.1122, L.2 – p.1138, L.13), Richard Smith, the alleged victim's grandfather (Tr., p.807, L.4 – p.814, L.13, p.821, L.12 – p.841, L.15, p.849, L.5 – p.856, L.23); Diane Peterson, the defendant's sister (Tr., p.1092, L.4 – p.1112, L.6); and Mr. Johnson himself (Tr., p.1143, L.13 – p.1149, L.4, p.1172, L.9 – p.1201, L.13.) As such, opportunity to commit the charged crimes was the crucial question in this case and Mr. Wilson's testimony, providing exact dates, times, and client information, was critically important. The erroneous admission of the testimony had a continuing impact on the trial and the jurors' ultimate decision in the case and, as a result, deprived Mr. Johnson of a fair trial.

B. The State Committed A Discovery Violation When It Failed To Provide Defense Counsel A Copy Of Mr. Wilson's Time Entry Report And The Resulting Motion For A Mistrial Should Have Been Granted

The State has asserted that there was no discovery violation. (Respondent's Brief, p.26, n.6.) However, as argued in the Appellant's Brief, the facts support the district court's conclusion that there was a discovery violation. 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.) The district court 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.)

Additionally, the State has asserted that Mr. Johnson has "not expressed any non-speculative basis for concluding that he was prejudiced by the amount of time he has to respond to the report generated by Wilson." (Respondent's Brief, p.27.) In support of the argument, the State claims that because Mr. Wilson had already done all the work to generate the report, there was nothing else that defense counsel would have needed to do. (Respondent's Brief, p.27.) However, Mr. Johnson was not required to accept the report, a summary of other records, as submitted and should have been given the opportunity to examine the records from which the report was created. The report was generated from a time tracking system called Bridge Track, a system that Mr. Wilson was no longer using, and to create the report he had run a SQL query to pull information regarding the dates in question. (Tr., p.629, L.12 – p.631, L.6.) As such, in

order to examine the records to determine if the report was correct, Mr. Johnson would have had to examine the computer records and the Bridge Track system.

In light of this information and the related objection regarding Mr. Wilson's recollection, defense counsel made a motion for mistrial. (Tr., p.668, Ls.2-4.) In support of the motion, counsel noted that "we have no practical way of examining the primary records from which this document was generated in a meaningful way." (Tr., p.662, Ls.23-25.) 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 then 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.)

Therefore, it is clear that Mr. Johnson's ability to conduct research and fully prepare to rebut the evidence offered was devastated by the late disclosure. The district court was unwilling to provide a break in the proceedings to complete the necessary investigation, offering only to continue the trial and re-call Mr. Wilson later. In light of the inability of counsel to properly cross-examine Mr. Wilson, investigate either the report's accuracy or the records the report was created from, and the significance of the testimony, the discovery violation and improper presentation of Mr. Wilson's testimony amounted to a depravation of Mr. Johnson's right to a fair trial. As such, the district court erred in denying the motion for mistrial.

CONCLUSION

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

DATED this 16th day of June, 2017.

/s/

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of June, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, as follows:

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