3-22-2017

State v. Hernandez Respondent's Brief Dckt. 43901

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43901**
Plaintiff-Respondent,	)	
	)	**Canyon County Case No.**
v.	)	**CR-2015-582**
	)	
JACOB JUAN HERNANDEZ, JR.,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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Nature Of The Case

Jacob Juan Hernandez, Jr., appeals from the judgment entered upon the jury's verdicts finding him guilty of voluntary manslaughter (with a gang enhancement), two counts of aggravated battery (with gang enhancements), and two counts of second-degree kidnapping. On appeal, Hernandez challenges the denial of his motion for a mistrial, the sufficiency of the evidence supporting his kidnapping convictions, the denial of his motion to dismiss based on a claimed speedy trial violation, the admission of certain evidence at trial, and the denial of his motion for payment of co-counsel.

Statement Of The Facts And Course Of The Proceedings

Hernandez is a member of the Sureno (a.k.a. "Southside") gang in Canyon County. (10/1/15 Tr., p.1018, Ls.10-18, p.1074, L.24 – p.1075, L.23.) On December 24, 2014, he and four other Southsiders attacked Ricardo ("Ricky") Sedano, Jose Marones, Christian Barner, and several other individuals outside of Jose's apartment. (9/30/15 Tr., p.719, L.18 – p.735, L.21, p.794, L.16 – p.815, L.17, p.872, L.20 – p.893, L.13, p.957, L.22 – p.970, L.20; 10/2/15 Tr., p.1289, L.16 – p.1305, L.25.) Ricky and Jose were members of a rival gang, the Norteno (a.k.a. "Northside"), and Jose and Hernandez lived across from one another in the same apartment complex. (9/29/15 Tr., p.487, Ls.14-24; 9/30/15 Tr., p.759, L.20 – p.760, L.5, p.766, Ls.12-20, p.868, L.23 – p.869, L.24, p.873, Ls.4-18; 10/1/15 Tr., p.1019, Ls.22-24, p.1072, Ls.8-13.) Ricky, Jose, and Christian were all stabbed during the attack, and Ricky ultimately died as a result of his injuries. (9/29/15 Tr., p.664, Ls.18-23, p.667, L.17 – p.672, L.22; 9/30/15 Tr., p.735, Ls.16-21, p.892, L.25 – p.895, L.8; 10/1/15 Tr., p.995, L.14 – p.997, L.1,

p.1000, L.2 – p.1003, L.13.) Although no one who was the subject of the altercation was certain who stabbed Ricky, Jose, and Christian, Jose's girlfriend saw Hernandez and two of his fellow gang members with knives in their hands during the attack (9/30/15 Tr., p.803, L.4 – p.806, L.25); and Hernandez subsequently told several other people that he was responsible for having stabbed at least two of the victims (10/1/15 Tr., p.1022, L.9 – p.1027, L.21, p.1073, L.24 – p.1080, L.13, p.1132, L.3 – p.1135, L.8; 10/2/15 Tr., p.1314, L.3 – p.1315, L.4).

After the stabbings, Hernandez and a fellow gang member got into a minivan occupied by two women and several children whom they did not know without first getting permission to do so, then asked for a ride and directed the woman who was driving the van where to go. (9/29/15 Tr., p.603, L.19 – p.616, L.14, p.631, L.21 – p.639, L.25.) The women complied and drove Hernandez and his associate to another part of town. (Id., p.615, L.21 – p.619, L.23, p.642, L.15 – p.643, L.4.) Later that evening, after learning from a news broadcast that Hernandez was a "person of interest" in an incident in which there had been "multiple stabbings," the women reported their encounter with Hernandez to the police. (Id., p.627, L.14 – p.629, L.6, p.652, L.21 – p.654, L.14.)

On January 9, 2015, the state filed a Criminal Complaint charging Hernandez with two counts of aggravated battery, both with deadly weapon and gang enhancements, and with two counts of second-degree kidnapping. (R., pp.16-19.) Hernandez waived a preliminary hearing and, on February 9, 2015, the state filed a three-part Information charging Hernandez with two counts of aggravated battery and two counts of second-degree kidnapping, and with deadly weapon and gang

enhancements in relation to the aggravated batteries. (R., pp.31-38.) Hernandez pled not guilty, and a trial was set for June 9, 2015. (R., p.42.)

On April 9, 2015, a grand jury returned a Superseding Indictment charging Hernandez with second-degree murder (as either a principal or an aider and abettor), two counts of aggravated battery (as either a principal or an aider and abettor), and two counts of second-degree kidnapping. (R., pp.75-78.) Parts II, III and IV of the Superseding Indictment charged, respectively, a deadly weapon enhancement in relation to the murder charge (Count I); gang enhancements in relation to the murder, aggravated battery and kidnapping charges (Counts I-V); and great bodily injury enhancements in relation to the aggravated battery charges (Counts II and III). (R., pp.79-84.) Hernandez pled not guilty to the charges and enhancements, and his trial remained set for June 9, 2015. (R., pp.99-100.)

On April 28, 2015, the state filed a "Motion to Continue Jury Trial and Motion to Extend the Discovery Deadline," citing as the reasons for its request that "the investigation is still ongoing and waiting for the lab results for the DNA testing." (R., p.101 (verbatim).) The district court granted the motion over Hernandez's objection and continued the trial until September 28, 2015. (R., pp.105-08; 4/30/15 Tr., p.14, L.12 – p.22, L.12.)

On August 11, 2015, Hernandez filed a motion to dismiss the aggravated battery and kidnapping charges (Counts II-V) on the basis of an alleged speedy trial violation. (R., pp.143-63.) Hernandez argued that, because there were "no material differences" between the aggravated battery and kidnapping charges alleged in the Information filed on February 9, 2015, and those alleged in the Superseding Indictment filed on April 9,

2015, "the time for calculating the six (6) month time frame within which to have a speedy trial under I.C. § 19-3501 for those charges" began from the date of the filing of the Information, and he should have been brought to trial by August 10, 2015. (R., p.145.) He also argued the delay between the date of his arrest (January 7, 2015) and the date his trial was scheduled to commence (September 28, 2015) violated his state and federal constitutional rights to a speedy trial. (R., pp.144, 149-56.) At a hearing on Hernandez's motion, the district court recognized the question before it – at least as to the statutory speedy trial issue – was whether "the Superseding Indictment reset the time for all counts." (9/17/15 Tr., p.11, Ls.16-19.) The court did not address that question, however, and instead adopted the finding, made by the trial judge who had previously granted the state's motion for a continuance, that the state's need to conduct further investigation and obtain DNA evidence constituted good cause to delay the trial. (9/17/15 Tr., p.11, L.22 – p.12, L.6.) Having concluded that any delay was justified by good cause, the court denied Hernandez's motion to dismiss and ordered the trial to proceed on all five counts. (9/17/15 Tr., p.12, Ls.6-7.)

On August 27, 2015, approximately three weeks before trial, Hernandez filed an "Ex-Parte Motion for Payment of Co-Counsel." (R., pp.168-69.[1]) The motion was "based on Rule 12.2 of the Idaho Criminal Rules" and sought an "[o]rder authorizing the defense to engage a second attorney as co-counsel in this matter and for the payment of the cost of a [sic] this matter from the District Court Fund." (Id.) Following a hearing, the district court denied the motion on the bases that (1) the attorney whose services

[1] Only the first and last page of the motion appear in the record. Contemporaneously with the filing of this brief, the state is filing a motion to augment the record with a complete copy of the motion.

Hernandez's trial counsel sought to engage had a conflict of interest because he had previously represented one of Hernandez's co-defendants, and (2) even if there were no conflict, whether to allocate funds so that Hernandez's attorney could hire co-counsel was a decision within the discretion of the Canyon County Public Defender and one the court believed it was not free to override. (9/1/15 Tr., p.4, L.2 – p.7, L.24.)

Following a seven-day trial, a jury found Hernandez guilty of voluntary manslaughter (as a lesser included offense of second-degree murder), two counts of aggravated battery, and two counts of second-degree kidnapping. (R., pp.242-283, 296-317, 334-44, 404-07.) The jury also found Hernandez guilty of the gang enhancements in relation to the manslaughter and aggravated battery counts, but not guilty of the gang enhancements in relation to the two counts of kidnapping.[2] (R., pp.408-09.) Hernandez filed a motion for a judgment of acquittal and a motion for a new trial, both of which the district court denied. (R., pp.415-21, 431-32.) The court entered judgment on the jury's verdicts and imposed an aggregate unified sentence of 25 years, with 13 years fixed. (R., pp.454-56.) Hernandez timely appealed. (R., pp.471-76, 490-95.)

[2] Before the case was submitted to the jury, the state withdrew the deadly weapon and great bodily injury enhancements alleged in Parts II and IV of the Superseding Indictment. (10/6/15 Tr., p.150, L.22 – p.152, L.14.)

ISSUES

Hernandez states the issues on appeal as:

1. Did the district court err in denying Mr. Hernandez' motion for a mistrial?

2. Should this Court vacate Mr. Hernandez' convictions for second-degree kidnapping because there was insufficient evidence to support the convictions?

3. Did the district court err when it denied Mr. Hernandez' Motion to Dismiss due to a violation of his right to a speedy trial?

4. Did the district court abuse its discretion when it admitted State's Exhibit 11, the body cam video from Officer Erica Robbins, because the video's limited probative value is substantially outweighed by its prejudicial effect?

5. Did the district court abuse its discretion when it denied Mr. Hernandez' motion for payment of co-counsel?

6. Even if the above errors are individually harmless, was Mr. Hernandez' Fourteenth Amendment right to due process of law violated because the accumulation of errors deprived him of his right to a fair trial?

(Appellant's brief, p.7.)

The state rephrases the issues as:

1. Has Hernandez failed to show the district court committed reversible error in denying his motion for a mistrial?

2. Was the evidence sufficient to support Hernandez's kidnapping convictions?

3. Has Hernandez failed to show the trial court erred by denying his motion to dismiss Counts II through V of the Superseding Indictment for an alleged speedy trial violation?

4. Has Hernandez failed to show error in the trial court's evidentiary ruling?

5. Was the district court's failure to rule on the merits of Hernandez's motion for the payment of co-counsel harmless?

6. Has Hernandez failed to show cumulative error?

ARGUMENT

I.
Hernandez Has Failed To Show Error In The Denial Of His Motion For A Mistrial

A. Introduction

During its case-in-chief, the state presented the testimony of several witnesses who were members of or associated with gangs. (See 9/30/15 Tr., p.867, L.10 – p.869, L.21 (Jose Morones member of Northside Gang); 10/1/15 Tr., p.1015, L.3 – p.1018, L.23, p.1036, L.3 – p.1037, L.2 (David Prieto "r[a]n around with" South Side Gang), p.1068, L.11 – p.1069, L.13 (Kenneth Melody was member of East Side Locos Gang).) All of the witnesses testified that gang members are not supposed to "snitch" on other gang members and, if they do, retaliation is a near certainty. (9/30/15 Tr., p.907, Ls.8-24, p.911, Ls.1-24; 10/1/15 Tr., p.1022, Ls.1-18, p.1033, L.17 – p.1034, L.3, p.1038, Ls.7-9, p.1081, L.15 – p.1083, L.22, p.1085, Ls.17-25, p.1099, L.1 – p.1100, L.1.) David Prieto, who "used to run around with" the Southside Gang but who turned state's witness against Hernandez, testified that he had actually received "threats or intimidation because of [his] cooperation" and, as a result, he feared for his and his family's safety. (10/1/15 Tr., p.1034, L.4 – p.1035, L.19, p.1036, L.3 – p.1037, L.2, p.1058, Ls.13-18.) That David Prieto had reason to be fearful was corroborated by another witness who testified that, while incarcerated in relation to this case, Hernandez wrote a note instructing a fellow gang member that David Prieto was "a rat and to get him, to make him be quiet" and to "take care of him." (Id., p.1135, L.15 – p.1139, L.18.)

Sergeant Joey Hoadley, who worked for seven years as a gang detective for the Caldwell City Police Department, testified as an expert about gang culture, including the consequences of being a "snitch." (Id., p.1167, L.1 – p.1170, L.1, p.1186, L.11 –

p.1189, L.12.) He testified that a gang member who cooperates with law enforcement or the prosecution "get[s] labeled as a snitch" and "become[s] a target of potential violence" by his or her own gang members, with the consequences ranging from being "checked or reprimanded or beat up" "[a]ll the way up to being killed." (Id., p.1187, L.5 – p.1189, L.2.)

In an apparent attempt to downplay the danger of retaliation associated with snitching, defense counsel asked Sergeant Hoadley on cross-examination whether the consequences of snitching are really that serious, stating:

> Because it seems to me on one hand, if there's such serious consequences for snitching that no one in their right mind would snitch, but then on the other hand they do snitch. So the – I can only assume – correct me if I'm wrong. But so the consequences to snitching aren't nearly as bad as, perhaps, we perceive them to be?

(Id., p.1210, L.21 – p.1211, L.2.) In response, Sergeant Hoadley testified that, "as a police officer," he viewed the threat of retaliation "as a lot of intimidation factor," but that "young kids [who] are living in that world" "truly believe it" when gang members threaten to kill them if they snitch. (Id., p.1211, Ls.3-11.) Defense counsel then asked, "So a lot of intimidation, but it's a question as to whether there's going to be some follow-through?" and Sergeant Hoadley responded, "Yeah, it could go either way." (Id., p.1211, Ls.12-15.)

In an attempt to rebut the inference, suggested by defense counsel's line of questioning on cross-examination, that retaliation for snitching "doesn't happen as often as [the state's] witnesses think it might happen, so their testimony's not as credible on that score" (Id., p.1222, L.12 – p.1223, L.2), the prosecutor asked Sergeant Hoadley on redirect-examination whether he was aware of a specific example of retaliation having

occurred with respect to David Prieto (Id., p.1218, Ls.5-14). The prosecutor's questions and Sergeant Hoadley's answers were as follows:

> Q. Okay. And I talked to you a little bit before about retaliation. And that's a real concern?
>
> A. Yes.
>
> Q. And that has happened in this area?
>
> A. Yes.
>
> Q. And you are familiar with a shooting that happened Sunday night at David Prieto's grandmother's house?
>
> A. Yes.

(Id., p.1218, Ls.5-14.) Immediately following the above exchange, defense counsel requested a bench conference and, after an off-the-record discussion, the trial court instructed the jury "to ignore that last comment." (Id., p.1218, Ls.17-23.) Sergeant Hoadley was then excused as a witness and the trial was adjourned for the day. (Id., p.1219, L.1 – p.1221, L.9.)

When the trial resumed the next morning, the prosecutor made the following record, outside the presence of the jury, regarding the state's reasons for having asked Sergeant Hoadley whether he was aware of the shooting at David Prieto's grandmother's house:

> Your Honor, I raised the issue in chambers of the testimony regarding the drive-by at David Prieto's house. I believe that was perfectly proper on redirect. [Defense counsel] made the obvious inference or asked the jury to draw the obvious inference on cross examination that this sort of thing doesn't happen as often as theses witnesses think it might happen, so their testimony's not as credible on that score.
>
> Well, my point in having [co-counsel for the state] ask that question – and it was me, not her – was to point out that we have a real-world example of this with a witness in this case that just happened this week.

> So it was not to inflame the passions of the jury. It was to point out that this retaliation actually occurs in the real world.
>
> And of course it corroborates the note that was sent to Aaron Fehrs. And that's why I believe that testimony was directly relevant on redirect.

(10/2/15 Tr., p.1222, L.12 – p.1223, L.6.) The prosecutor then asked the court "to not only admit" the testimony it had instructed the jury to ignore, but also to allow the state to call another witness "to talk about the shooting" and the fact of its location. (Id., p.1223, Ls.6-10.) The district court denied both requests, reasoning "the prejudice to [Hernandez], the inference that [Hernandez] had something to do with it [the shooting] outweighs the probative value." (Id., p.1223, Ls.11-18.)

Three days later, upon reconvening after a weekend recess and after the state had rested its case, defense counsel moved for a mistrial based on the state's question and Sergeant Hoadley's answer regarding the "shooting at the house of the mother [sic] of David Prieto." (10/5/15 Tr., p.5, L.14 – p.6, L.17.) Defense counsel acknowledged the court had instructed the jury to ignore the testimony but argued the instruction was not sufficient to cure the prejudice, asserting:

> I think it's very easy for a jury to assume, one, that the retaliation has already begun; two, that my client is somehow attached to that retaliation and, three, that this retaliation or alleged retaliation somehow bolsters the credibility and truthfulness of not only Mr. Prieto but other witnesses who testify that they were in fear of retaliation.

(Id., p.5, L.14 – p.6, L.7.) In response, the prosecutor reiterated the state's reasons for having asked Sergeant Hoadley about the shooting – *i.e.*, to rebut the inference that "retaliation is not real" and to provide the jury with "a real world example" of retaliation experienced by a witness in this case. He also noted the state "did not attempt to tie" Hernandez to the shooting. (Id., p.6, L.19 – p.7, L.22.) The district court denied

Hernandez's motion for a mistrial but gave the jury an additional curative instruction at the end of the trial. (Id., p.7, Ls.23-25; see also R., p.359 (Instruction No. 12 (instructing jury that "[c]ertain things you have heard or seen are not evidence, including … testimony that has been excluded or stricken, or which you have been instructed to disregard or ignore").)

Hernandez now challenges the denial of his motion for a mistrial, arguing as he did below that the testimony regarding a shooting at David Prieto's grandmother's home was "extremely prejudicial" and that the court's curative instructions directing the jury to disregard the testimony "provided an insufficient remedy." (Appellant's brief, pp.8-13.) Hernandez, however, has failed to show from the record that the stricken testimony was so damaging that the court's instructions to disregard it were insufficient to cure its potentially prejudicial effect or that it otherwise deprived him of a fair trial. Because the stricken testimony did not affect Hernandez's right to a fair trial, Hernandez has failed to show the trial court erred in denying his motion for a mistrial.

B. Standard Of Review

The standard of review applicable to the denial of a motion for mistrial is well established. State v. Ruiz, 159 Idaho 722, 724, 366 P.3d 644, 646 (Ct. App. 2015).

> [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. (citing State v. Urquhart, 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct. App. 1983)). "An error is harmless, not necessitating reversal, if the reviewing court is able to declare beyond a reasonable doubt that the error did not contribute to the verdict." Id. (citing State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010); State v. Watkins, 152 Idaho 764, 766, 274 P.3d 1279, 1281 (Ct. App. 2012)).

C. Hernandez Has Failed To Show The Trial Court Committed Reversible Error In Denying His Motion For A Mistrial

"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); accord, e.g., Ruiz, 159 Idaho at 724, 366 P.3d at 646. "The admission of improper evidence does not automatically require the declaration of a mistrial." Ruiz, 159 Idaho at 724, 366 P.3d at 646 (citing State v. Hill, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004)). Rather, "[t]he 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).

In conducting this inquiry, the appellate court "normally presume[s] that a jury will follow an instruction to disregard inadmissible evidence." Watkins, 152 Idaho at 768, 274 P.3d at 1283; accord Ruiz, 159 Idaho at 724, 366 P.3d at 646. To overcome the presumption, a defendant claiming error in the denial of a mistrial motion must show

"there is an overwhelming probability that the jury [was] unable to follow the court's instructions and a strong likelihood that the effect of the evidence [was] devastating to the defendant." Ruiz, 159 Idaho at 724-25, 366 P.3d at 646-47 (citing Hill, 140 Idaho at 631, 97 P.3d at 1020). Where, as here, a defendant claims a curative instruction was insufficient to remedy the prejudicial effect of inadmissible evidence, the appellate court's analysis focuses not only on the curative instruction, but also on the "strength of the evidence" and "the significance of the improperly disclosed information." Watkins, 152 Idaho at 768, 274 P.3d at 1283; Ruiz, 159 Idaho at 725, 366 P.3d at 647.

Contrary to Hernandez's assertions on appeal, application of the above principles to the facts of this case shows Sergeant Hoadley's testimony about a shooting at David Prieto's grandmother's house, even if inadmissible, was harmless and did not necessitate a mistrial. Immediately following the challenged testimony, the court held an off-the-record bench conference at defense counsel's request and then instructed the jury "to ignore that last comment." (10/1/15 Tr., p.1218, Ls.11-23.) The court later gave a written instruction directing the jury that it was to "decide the facts from all the evidence presented in the case" and reminding it that "[c]ertain things you have heard or seen are not evidence, including … testimony that has been excluded or stricken, or which you have been instructed to disregard or ignore." (R., p.359.) "Absent compelling circumstances dictating the opposite conclusion," the court's curative instructions must be deemed to have been "an effective remedy" for any potential prejudice occasioned by Sergeant Hoadley's testimony. State v. Frauenberger, 154 Idaho 294, 302, 297 P.3d 257, 265 (Ct. App. 2013) (citing Watkins, 152 Idaho at 767-69, 274 P.3d at 1282-84).

Hernandez argues the trial court's curative instructions "provided an insufficient remedy" because, he believes, Sergeant Hoadley's "testimony regarding the shooting at [David] Prieto's family's home" was "incredibly prejudicial and likely had a continuing impact on the trial." (Appellant's brief, p.12.) Specifically, Hernandez argues the testimony was "extremely prejudicial" both because it "implied that [he] was involved in the shooting for retaliation purposes" and because it "bolstered the credibility of David Prieto and compelled the jury to find Mr. Hernandez guilty." (Id., pp.12-13.) Hernandez's claims of incurable prejudice do not withstand analysis. Although the court ultimately deemed the testimony inadmissible, nothing about the state's question or Sergeant Hoadley's answer was actually improper; nor was the testimony so prejudicial that the jury would have been unable to disregard it and render its verdict based solely on the admissible evidence that overwhelmingly established Hernandez's guilt.

In analyzing the potentially prejudicial effect of the stricken testimony, it is important to consider the context in which the testimony was elicited. Watkins, 152 Idaho at 768, 274 P.3d at 1283 (significance of improperly disclosed information is factor in harmless error analysis); Ruiz, 159 Idaho at 725, 366 P.3d at 647 (same). While cross-examining Sergeant Hoadley, defense counsel attempted to undermine the credibility of several state's witnesses, including David Prieto, who had testified they were at risk of retaliation for having cooperated with law enforcement in this case. Defense counsel suggested during his questioning that "the consequences to snitching aren't nearly as bad as, perhaps, we perceive them to be" and, ultimately, he got Sergeant Hoadley to agree that threats of retaliation are often an "intimidation" tactic,

"but it's a question as to whether there's going to be some follow-through." (10/1/15 Tr., p.1210, L.11 – p.1211, L.15.) Although Hernandez fails on appeal to even mention defense counsel's exchange with Sergeant Hoadley, it is clear from the record that the only reason the prosecutor asked Sergeant Hoadley whether he was familiar with a shooting at David Prieto's grandmother's house was to rebut the "obvious inference," suggested by defense counsel, that retaliation for snitching "doesn't happen as often as [the state's] witnesses think it might happen, so their testimony's not as credible on that score." (10/2/15 Tr., p.1222, Ls.12-20.) There can be no question that the challenged testimony – which was elicited by the state for the express purpose of providing the jury with a "real-world example" of retaliation having occurred with respect to one of the witnesses in this case (Id., p.1222, L.21 – p.1223, L.2) – was relevant for that purpose. See I.R.E. 401 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be within the evidence"); State v. Moses, 156 Idaho 855, 867, 332 P.3d 767, 779 (2014) ("Rebuttal evidence is evidence which explains, repels, counteracts, or disproves evidence which has been introduced by or on behalf of the adverse party." (Internal quotations and citations omitted)). That the trial court ultimately exercised it discretion to exclude the testimony based on its potentially prejudicial effect does not show the testimony was improperly offered or that the risk of prejudice was so significant as to result in the denial of Hernandez's right to a fair trial.

Hernandez argues the stricken testimony was "extremely prejudicial" because it bolstered David Prieto's credibility and implied both that Hernandez was "involved in the shooting for retaliation purposes" and "that he is the type of person who would

participate in trying to harm particularly vulnerable individuals" (because the shooting occurred "at a defenseless grandmother's home"). (Appellant's brief, p.13.) For the reasons explained above, the state readily acknowledges the entire purpose of the stricken testimony was to rehabilitate the credibility of several state's witnesses, including David Prieto, by rebutting the inference created in cross-examination that "retaliation is not real." That being said, the state submits Hernandez cannot demonstrate an "overwhelming probability" that the jury disregarded the court's instructions to ignore the testimony merely by showing that the testimony, *if considered*, would have had the desired effect. Nor does a review of the record support his assertions that the stricken testimony was otherwise indelibly prejudicial and devastating to his case.

Sergeant Hoadley was one of 28 witnesses who testified during the course of Hernandez's seven-day jury trial. (See R., pp.242-83, 296-317, 334-44.) The prosecutor's question and Sergeant Hoadley's one-word answer establishing that he was "familiar with a shooting that happened Sunday night at David Prieto's grandmother's house" occurred on day four of the trial and, after the court instructed the jury to ignore it, the subject was never mentioned in front of the jury again.[3] Although Hernandez argues the jury could only have concluded from the testimony that he "had

[3] The prosecutor did remind the jury during closing arguments that David Prieto was at risk of being retaliated against as a result of his cooperation in this case and she specifically argued, "[Y]ou know that retaliation is a concern and it's real." (10/6/15 Tr., p.40, Ls.19-25, p.60, L.17 – p.61, L.1.) As Hernandez acknowledges on appeal, however, the prosecutor's arguments to this effect were supported by evidence admitted without objection at trial. (Appellant's brief, p.12.) The arguments were proper and in no way invited the jury to consider the testimony the trial court had instructed it to ignore.

something to do with the shooting," neither the question nor Sergeant Hoadley's answer expressly tied Hernandez to the shooting, nor does the record support Hernandez's assertion that such was the only possible inference the jury could draw. (See, e.g., 10/1/15 Tr., p.1187, L.15 – p.1188, L.4 (Sergeant Hoadley's testimony that snitches can be subject to retaliation by their own gang members).) Even assuming it was, there is no reason to believe the jury was unable to ignore the inference, much less that it "compelled the jury to find Mr. Hernandez guilty." (Appellant's brief, p.13.)

When the prosecutor elicited Sergeant Hoadley's testimony regarding the shooting, the jury was already aware that David Prieto had received "threats or intimidation because of [his] cooperation" in this case and that he had "concerns for [his] personal safety" and for "the safety of [his] family." (10/1/15 Tr., p.1033, L.17 – p.1034, L.20.) The jury was also aware that Hernandez had authored a note directing a fellow gang member "take care of" David Prieto and "to make him be quiet" because he was "a rat." (Id., p.1135, L.15 – p.1139, L.18.) The additional information that "a shooting" actually "happened at David Prieto's grandmother's house on Sunday night" – provided without any detail as to the identity of the shooter(s), whether anyone was shot, the nature of the shooting (e.g., shots fired at persons inside the home vs. a "drive-by" shooting at an unoccupied dwelling), etc. – was not any more prejudicial than the evidence the jury had already received. Although Hernandez argues the stricken testimony would have left the jury wondering "why [Hernandez] retaliate[d] if he is not guilty" (Appellant's brief, p.13), the jury could have much more easily inferred Hernandez's consciousness of guilt from the admissible evidence that expressly showed he personally directed retaliation against David Prieto than from the stricken

testimony that, at best, only implied he was somehow involved in "a shooting" at David Prieto's grandmother's house, the details of which were never disclosed. And, contrary to Hernandez's assertions, there simply was no danger the jury would have concluded from the stricken testimony that Hernandez "is the type of person who would participate in trying to harm particularly vulnerable individuals" – *i.e.*, David Prieto's "defenseless" grandmother (Appellant's brief, p.13) – because neither Sergeant Hoadley nor any other witness provided testimony from which the jury could infer that David Prieto's grandmother was either "particularly vulnerable" or an intended target of the "shooting."

Because a review of the record shows the prejudice Hernandez identifies as having arisen from the stricken testimony is either minimal or non-existent, Hernandez has failed to overcome the presumption that the jury followed the court's instructions to ignore the testimony and render its verdict based solely on the admissible evidence. Even if the curative instruction is not itself determinative, this Court can nevertheless easily conclude the stricken testimony was harmless because the state presented overwhelming evidence of Hernandez's guilt. Watkins, 152 Idaho at 768, 274 P.3d at 1283; Ruiz, 159 Idaho at 725, 366 P.3d at 647.

Multiple witnesses testified that Hernandez was one of several Southside gang members who instigated the altercation in which Ricky Sedano, Jose Marones, and Christian Barner were stabbed. (9/30/15 Tr., p.719, L.17 – p.735, L.21, p.791, L.1 – p.815, L.17, p.867, L.1 – p.893, L.13, p.956, L.18 – p.970, L.20.) Before the attack, Hernandez and a fellow Southsider had been "beefing" with and trying to intimidate rival gang member Jose Marones and other individuals who lived at or were staying in Jose's apartment. (Id., p.797, Ls.9-23, p.872, L.19 – p.875, L.14, p.960, L.17 – p.963,

L.19.) Eventually, numerous other Southside gang members arrived at Hernandez's apartment. (Id., p.724, L.20 – p.729, L.4, p.798, L.11 – p.800, L.13, p.878, L.23 – p.879, L.17, p.963, L.2 – p.964, L.17; 10/2/15 Tr., p.1289, L.16 – p.1298, L.16.) Almost immediately after their arrival, all of the Southsiders, including Hernandez, ran toward Jose's apartment and started attacking the individuals who were standing outside. (9/30/15 Tr., p.728, L.19 – p.732, L.19, p.800, L.14 – p.807, L.23, p.879, L.10 – p.883, L.6.) Jose, Christian and Ricky all sustained stab wounds during the fight, and Ricky eventually died as a result of his injuries. (9/29/15 Tr., p.664, L.17 – p.672, L.22; 9/30/15 Tr., p.735, Ls.16-21, p.892, L.25 – p.985, L.8; 10/1/15 Tr., p.995, L.14 – p.997, L.1, p.1000, L.2 – p.1003, L.13.) Although no witness was able to say definitively who stabbed whom, Jose's girlfriend, Crystal Gomez, testified that Hernandez was one of three Southsiders who had a knife in his hand during the fight. (9/30/15 Tr., p.803, L.4 – p.806, L.25.)

In addition to the eye-witness testimony establishing that Hernandez participated in the altercation and had a knife in his hand while doing so, the state also presented evidence showing that Hernandez engaged in behavior and made statements, after the stabbings, that both directly and circumstantially showed his guilt. For example, the state's evidence showed that, immediately following the altercation, Hernandez returned to his apartment and retrieved a backpack. (Id., p.769, L.11 – p.773, L.12; State's Exhibit 77: DVD09_redacted.mpg at 38:20-39:20.) He and another Southsider then fled the apartment complex by getting into a mini-van occupied by two women and several children whom they did not know without permission to do so, then asking for a ride and directing the woman who was driving the van where to go. (9/29/15 Tr., p.603,

L.19 – p.616, L.14, p.631, L.21 – p.639, L.25.) The driver complied and drove Hernandez and his companion to another part of town. (Id., p.627, L.14 – p.629, L.6, p.652, L.21 – p.654, L.14.)

Later that same evening, Hernandez and two other Southsiders showed up at David Prieto's grandmother's home. (10/1/15 Tr., p.1018, Ls.8-18, p.1022, L.22 – p.1024, L.5.) There, Hernandez confided in David Prieto that he and the other Southsiders had "got[ten] into it with some people," that he had "stabbed a couple of them," and that another Southsider, Edgar Covarrubius (a.k.a. "Pollo"), had "stabbed Ricky."[4] (Id., p.1024, L.14 – p.1026, L.24, p.1186, Ls.2-10.) Hernandez showed David Prieto the knife he used in the stabbings as well as a fresh cut on his finger that he claimed to have sustained during the altercation. (Id., p.1027, L.1 – p.1028, L.16.)

David Prieto was not the only person to whom Hernandez made admissions. The state presented evidence that, at various points in time following the altercation, Hernandez told three other people that he was responsible, either in whole or in part, for the stabbings. (Id., p.1073, L.24 – p.1080, L.13, p.1132, L.3 – p.1135, L.8, p.1314, L.3. – p.1315, L.4.) The state also presented a video recording of Hernandez's January 8, 2015 police interview during which Hernandez admitted to having participated in the fight that resulted in the stabbings (see generally State's Exhibit 77: DVD09_redacted.mpg) and that the people in whose vehicle he left the scene were strangers and did not invite him into their vehicle (see State's Exhibit 77: DVD10_redacted.mpg at 0:00 – 11:30)). During the same interview, Hernandez said he

[4] Edgar later confessed to having stabbed Ricky and pled guilty to voluntary manslaughter. (Defendant's Exhibits B and D.)

had been cut during the altercation, and he showed the officers a scar on his finger. (State's Exhibit 77: DVD10-redacted.mpg at 37:20-37:40; see also State's Exhibits 70 and 71 (photographs of Hernandez's hands).)

The state tried Hernandez for the voluntary manslaughter and aggravated battery charges on the alternative theories that Hernandez was either directly responsible for the stabbings of Ricky Sedano, Jose Marones and Christian Barner, or that he aided and abetted those stabbings. (See R., pp.75-77 (Superseding Indictment), 367-380 (jury instructions).) As demonstrated above, the state's evidence showing that Hernandez was at least an aider and abettor in the crimes was not just compelling, it was overwhelming. For the reasons set forth in Section II, infra, the state's evidence also convincingly showed that Hernandez was guilty of the kidnapping charges for having detained the occupants of the mini-van. Considering the strength of the evidence and the trial court's curative instructions, there is no reasonable possibility that the stricken testimony regarding a shooting a David Prieto's grandmother's house contributed to the jury's verdicts. Hernandez has failed to show the trial court erred in denying his motion for a mistrial.

II.
The Jury's Verdicts Finding Hernandez Guilty Of Two Counts Of Second-Degree Kidnapping Are Supported By Substantial, Competent Evidence

A. Introduction

Hernandez challenges the sufficiency of the evidence supporting his convictions for two counts of second-degree kidnapping. (Appellant's brief, pp.14-22.) Specifically, he argues the state failed to present sufficient evidence to prove that he seized and/or detained either victim, and that he did so with the intent to hold the victims to service or

to keep or detain them against their will. (Id.) He also challenges the denial of his motions for a judgment of acquittal on the same bases. (Id., pp.22-25.) Hernandez's arguments fail. A review of the record shows the state presented substantial, competent evidence that proved beyond a reasonable doubt all of the elements of the second-degree kidnapping charges alleged in Counts IV and V of the Superseding Indictment.

B. Standard Of Review

On appeal from the denial of an I.C.R. 29 motion for a judgment of acquittal, the issue presented is whether there was substantial and competent evidence to support a guilty verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997). Whether reviewing a challenge to the denial of a Rule 29 motion for judgment of acquittal, specifically, or a challenge to the sufficiency of the evidence, generally, an appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Sheahan, 139 Idaho 267, 285-86, 77 P.3d 956, 974-75 (2003); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992). The appellate court will not substitute its view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. State v. Hoyle, 140 Idaho 679, 683-84, 99 P.3d 1069, 1073-74 (2004) (plurality); State v. Knutson, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991); State v. Decker, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985).

In determining if the evidence is substantial and competent, it will be considered in the light most favorable to the prosecution. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); Knutson, 121 Idaho at 104, 822 P.2d at 1001. Substantial evidence is present when a "reasonable mind" could conclude that guilt was proved beyond a reasonable doubt. Hoyle, 140 Idaho at 683-684, 99 P.3d at 1073-1074.

C. The State Presented Substantial, Competent Evidence To Prove Beyond A Reasonable Doubt That Hernandez Seized The Victims With The Intent To Cause Them To Be Held To Service Or Kept Or Detained Against Their Will

Minutes after the fight he and his fellow gang members had instigated broke up, Hernandez and one of his associates got into a minivan occupied by two women and several children and directed the women to drive them to a different part of town. (9/29/15 Tr., p.603, L.19 – p.616, L.14, p.631, L.21 – p.639, L.25.) The grand jury indicted Hernandez on two counts of second-degree kidnapping, in violation of Idaho Code §§ 18-4501 and 18-4502. Specifically, Counts IV and V of the Superseding Indictment alleged:

> That the defendant, Jacob Juan Hernandez Jr., on or about the 24th day of December, 2014, in the County of Canyon, State of Idaho, did willfully seize and/or detain [the named victim] to be held to service and/or to be kept/detained against her will within Idaho.

(R., p.77 (Counts IV and V identical except as to names of respective victims).)

Consistent with the charging language, and with the language of Idaho Code § 18-4501(1), the trial court instructed the jury that, to find Hernandez guilty of the kidnapping charges, the state must have proved beyond a reasonable doubt that Hernandez "seized and/or detained" each named victim "with the intent to cause her,

without authority of law, to be in any way held to service and/or kept and/or detained against her will." (R., pp.383 (elements instruction as to Count IV), 386 (elements instruction as to Count V).) Compare I.C. § 18-4501(1) ("Every person who willfully … [s]eizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be … in any way held to service or kept or detained against his will" is guilty of kidnapping.). Contrary to Hernandez's assertions, a review of the trial record shows the state presented substantial, competent evidence to prove each of these elements beyond a reasonable doubt.

Amanda Beascochea and her sister-in-law, Michelle Beascochea, were the named victims of the kidnapping charges, and both of them testified at trial. (See R., p.77; 9/29/15 Tr., pp.603-31 (Amanda's testimony), 631-55 (Michelle's testimony).) Together, their testimony established the following: On Christmas Eve of 2014, Amanda and Michelle and their four small children had driven in Amanda's minivan to Michelle's apartment to pick up some Christmas gifts. (9/29/15 Tr., p.604, L.3 – p.605, L.20, p.632, L.3 – p.634, L.25.) Once they arrived at the apartment complex, Amanda parked on the street and waited in the van with the children while Michelle retrieved the gifts from her residence. (Id., p.606, L.12 – p.608, L.6.) While they were there, Amanda and Michelle both heard some commotion coming from the apartments across the street, and Amanda realized a fight was occurring. (Id., p.608, L.7 – p.609, L.10, p.620, Ls.5-20, p.635, L.9 – p.636, L.11.) Before Michelle finished loading the gifts into Amanda's vehicle, both of them heard someone screaming, "take her to the hospital," followed by the sound of glass breaking. (Id., p.609, L.18 – p.610, L.16, p.620, L.21 – p.621, L.3, p.645, L.14 – p.646, L.15.) After that, the individuals who had been involved

in the fight "loaded" into two separate vehicles and sped away from the apartment complex. (Id., p.609, L.18 – p.611, L.2, p.636, L.21 – p.637, L.13.) All of the windows on one of the vehicles were broken out. (Id., p.610, Ls.13-14.)

Approximately three minutes later, Michelle finished loading Amanda's vehicle with gifts, and she and Amanda and their children began to drive away from the apartment complex. (Id., p.611, L.3 – p.612, L.2, p.637, Ls.20-22.) Amanda was driving away very slowly (approximately five to eight miles per hour) when Hernandez and "another young boy" approached her minivan, one on each side, and opened her passenger doors. (Id., p.611, L.20 – p.613, L.17, p.637, Ls.20-25.) Hernandez asked Amanda if she could give him a ride and, without waiting for an answer, he and his companion got into the vehicle. (Id., p.613, L.25 – p.614, L.17, p.615, Ls.17-20, p.637, L.24 – p.639, L.25.) Neither Amanda nor Michelle knew Hernandez or his companion, and neither one of them had invited the men into the vehicle or otherwise gave them permission to be there. (Id., p.613, Ls.18-24, p.615, Ls.12-16, p.619, Ls.14-16, p.639, Ls.10-25.) Once the men were in the vehicle, however, Amanda and Michelle both felt they had no choice but to take them wherever it was they wanted to go. (Id., p.619, Ls.17-23, p.639, L.10 – p.640, L.19.) Although neither man displayed any weapons, they both appeared nervous and both were carrying full backpacks. (Id., p.623, L.8 – p.625, L.13, p.641, Ls.8-20, p.647, L.22 – p.648, L.9.) Believing the men were involved in the altercation that had happened just minutes earlier, Amanda and Michelle feared for their safety and the safety of their children and so acquiesced to Hernandez's request for a ride. (Id., p.615, L.21 – p.616, L.3, p.623, Ls.10-14, p.640, L.1 – p.641, L.7.)

Amanda asked Hernandez "where [they] were driving to," and Hernandez directed Amanda where to go. (Id., p.616, Ls.3-14.) Amanda complied with Hernandez's directions and drove for several minutes towards the men's destination before finally mustering the nerve to say, "[Y]ou guys need to get off of the van. We need to get home to our family." (Id., p.616, L.24 – p.617, L.15, p.618, Ls.2-8, p.625, L.25 – p.626, L.17, p.642, L.23 – p.643, L.4, p.649, Ls.18-22, p.651, Ls.1-6.) Hernandez's companion indicated they were "close to his home, and so [he and Hernandez] got off there" and Hernandez thanked the women for the ride. (Id., p.619, Ls.2-10, p.651, Ls.1-24.) Amanda and Michelle then went home to spend Christmas eve with their family. (Id., p.627, Ls.7-13.)

Amanda's and Michelle's testimony, summarized above, was clearly sufficient evidence from which the jury could conclude that Hernandez was guilty of two counts of second-degree kidnapping. Amanda's vehicle was in motion when Hernandez and his companion approached it, opened the passenger doors, and got into the vehicle without Amanda's or Michelle's permission. By stopping Amanda and Michelle as they were driving away, Hernandez necessarily "seized" them or, at the very least, temporarily "detained" them from departing. There also can be no question that, when he stopped them, Hernandez intended to hold Amanda and Michelle to service or to otherwise keep or detain them against their will. The evidence showed the entire reason Hernandez hindered the victims' departure from the apartment complex was to secure a ride. However, after "asking" for a ride, neither Hernandez nor his companion waited for an answer but instead immediately got into the vehicle without Amanda's or Michelle's permission. From this evidence the jury could, and apparently did, reasonably infer that

Hernandez intended to hold Amanda and Michelle to service by requiring them to give him and his companion a ride whether they consented or not.

Hernandez argues the state failed to prove that he seized or detained Amanda and Michelle because the evidence showed he "[a]t no time" "display[ed] a weapon" or "threaten[ed] violence"; because Amanda eventually "felt free to ask [Hernandez and his companion] to leave the vehicle" and they complied with her request; and because, he contends, Amanda's and Michelle's "actions following [Hernandez's] entrance" into the vehicle "amounted to implied consent." (Appellant's brief, pp.19-21.) Hernandez's arguments are meritless. The fact that Hernandez did not display a weapon or directly threaten violence in no way negates the evidence showing that he in fact seized and/or detained Amanda by approaching their moving vehicle, opening the passenger door, asking for a ride, and getting in without permission. Nor does the fact that Hernandez and his companion complied with Amanda's later request to get out of the vehicle show that Amanda and Michelle were not seized or detained, either initially when the men stopped them, or for the several minutes they spent driving the men where they wanted to go. Finally, while the state disputes Hernandez's claim that the women's "actions *following* [Hernandez's] entrance" into the vehicle "amounted to implied consent," such claim, even if true, is ultimately irrelevant. For the reasons already stated, the evidence clearly shows Hernandez actually seized and/or detained the women at or before the time he entered their vehicle.

Hernandez's claim that "no evidence was presented to show that [he] intended to hold to service, keep, or detain the women against their will" (Appellant's brief, p.21) is equally without merit. To support his argument, Hernandez cites portions of Amanda's

and Michelle's testimony that he contends can only reasonably lead to an inference that he "believed he was obtaining a consensual ride from kind strangers." (Id., pp.21-22.) In doing so, however, Hernandez utterly ignores other evidence that supports the jury's finding that, at the time he seized or detained Amanda and Michelle, he did so with the intent to cause them to be held to service or kept or detained against their will. As argued above, such evidence included the victims' testimony that, after asking for a ride, Hernandez got into the victims' vehicle without their permission, thus implying he intended to detain the victims and/or hold them to service whether they consented or not. That inference is also supported by other evidence presented by the state, including evidence that, minutes before getting in the minivan, Hernandez had participated either directly or as an aider and abettor in the stabbings of three people (see summary of evidence proving voluntary manslaughter and aggravated battery charges, set forth at pages 16-21 of Section I.C., supra,); immediately after the stabbings, Hernandez retrieved a backpack and wanted to get away from the apartment complex as fast as he could (State's Exhibit 77: DVD09_redacted.mpg at 38:20 – p.39:50); and, when interviewed by police, Hernandez initially claimed to have fled the scene of the stabbings in a taxi but later admitted to having gotten a ride with strangers who never invited him into their vehicle (State's Exhibit 77: DVD09_redacted.mpg at 39:00 – 40:20 and DVD10_redacted.mpg at 0:00 – 11:30).

Construing the facts and the reasonable inferences to be drawn from the facts in light of upholding the jury's verdict, it is clear that the state presented substantial, competent evidence from which the jury concluded that Hernandez seized and/or detained both victims with the intent to cause them to be held to service or kept or

detained against their will. Hernandez's kidnapping convictions, and the denial of his motion for judgment of acquittal, must be affirmed.

III.
Hernandez Has Failed To Show The District Court Erred By Denying His Motion To Dismiss Counts II Through V Of The Superseding Indictment For An Alleged Speedy Trial Violation

A. Introduction

Hernandez argues the trial court erred in denying his motion to dismiss counts II through V of the Superseding Indictment on speedy trial grounds. (Appellant's brief, pp.25-46.) As he did below, Hernandez contends the six-month statutory period for bringing him to trial on the aggravated battery and kidnapping charges alleged in counts II through V of the Superseding Indictment commenced upon the filing of the Information, rather than upon the filing of the Superseding Indictment on which he actually stood trial. Because he was tried more than six months after the filing of the Information, Hernandez claims his statutory right to a speedy trial was violated. (Id., pp.31-34.) He also claims his constitutional speedy trial rights were violated because his trial occurred approximately eight-and-a-half months after his arrest. (Id., pp.38-46.)

Hernandez's arguments fail. Pursuant to the plain language of Idaho Code § 19-3501, the six-month statutory period for bringing Hernandez to trial on the aggravated battery and kidnapping charges commenced upon the filing of the Superseding Indictment on which Hernandez stood trial. Even if the statutory period began to run from the earlier filed Information, the statute was not violated because the state presented good cause for the delay. Moreover, application of the law to the facts of this case shows the less than nine-month delay between the date of Hernandez's arrest

and the date of his trial was reasonable and did not violate Hernandez's constitutional rights to a speedy trial. Hernandez has failed to show the trial court erred in denying his motion to dismiss.

B. Standard Of Review

Whether there was an infringement of a defendant's rights to a speedy trial presents a mixed question of law and fact. State v. Clark, 135 Idaho 255, 257, 16 P.3d 931, 933 (2000); State v. Avila, 143 Idaho 849, 852, 153 P.3d 1195, 1198 (Ct. App. 2006). The appellate court defers to the trial court's findings of fact that are supported by substantial and competent evidence, but freely reviews the trial court's application of the law to the facts found. Avila, 143 Idaho at 852, 153 P.3d at 1198, State v. Davis, 141 Idaho 828, 835, 118 P.3d 160, 167 (Ct. App. 2005).

C. Hernandez Has Failed To Show A Statutory Speedy Trial Violation

1. The Six-Month Statutory Period For Bringing Hernandez To Trial Commenced Upon The Filing Of The Superseding Indictment

Idaho Code § 19-3501 sets forth specific time limits within which a criminal defendant must be brought to trial. Relevant to this appeal, the statute provides:

> The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases:
> . . .
>
> (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the information is filed with the court.
>
> (3) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the defendant was arraigned before the court in which the indictment is found.
> . . .

I.C. § 19-3501. Pursuant to the plain language of this statute, the six-month period for bringing a defendant to trial on an indictment commences upon "the date that the defendant was arraigned before the court in which the indictment is found." I.C. § 19-3501(3). The record shows Hernandez was arraigned on the Superseding Indictment on which he stood trial on April 17, 2015, and that he was "brought to trial" less than six months later, on September 28, 2015. (R., pp.75-84, 99-100, 242.) Because Hernandez's trial commenced within six months of his arraignment on the charges in the Superseding Indictment, Hernandez has failed to show any violation of his statutory speedy trial rights.

Hernandez asks this Court to ignore the plain language of I.C. § 19-3501(3) that required the state to bring him to trial within six months of his arraignment on the indictment and to hold, instead, that the time for bringing him to trial on the aggravated battery and kidnapping charges "was initiated by the filing of the Information" in February 2015, even though that is not the charging document on which he ultimately stood trial. (Appellant's brief, pp.31-34.) Hernandez argues that, because there were no material differences between the aggravated battery and kidnapping charges alleged in the Information and those found by the grand jury in the Superseding Indictment, the Superseding Indictment was merely "an amendment to the information" and did not start the limitation period of I.C. § 19-3501(2) – requiring a trial within six months of the filing of the information – anew. (Id.) Hernandez's argument fails. Regardless of the similarities between the charges contained in the originally filed Information and those contained in the Superseding Indictment, the Superseding Indictment was in no way "equivalent to" an amended information; rather, it was an entirely different charging

document, and one to which the speedy trial provisions of I.C. § 19-3501(3) specifically applied.

State v. McKeeth, 136 Idaho 619, 38 P.3d 1274 (Ct. App. 2001), relied upon by Hernandez, in no way mandates, or even suggests, a contrary result. McKeeth was charged with three misdemeanors, to which he entered not guilty pleas on August 25, 1999. Id. at 621, 38 P.3d at 1277. In September 1999, the state amended the complaint to add three additional misdemeanor charges. Id. McKeeth pled not guilty to the amended charges in October 1999. Id. at 626, 38 P.3d at 1282. On February 25, 2000, McKeeth moved to dismiss Counts I through III of the amended complaint pursuant to what is now I.C. § 19-3501(4), which requires dismissal of a misdemeanor offense if the defendant is not brought to trial within six months of the date of the entry of a not guilty plea. Id. The district court denied the motion to dismiss, concluding "the six-month period began to run from the plea of not guilty to the charges contained in the amended complaint." Id. at 627, 38 P.3d 1283. The Court of Appeals reversed, however, holding "[t]he mere amendment of a misdemeanor complaint does not restart the time limitation in I.C. § 19-3501[(4)] as to the original charges." Id.

The holding of McKeeth has no application, either directly or by extension, to the facts of the case. The statutory speedy trial provision that was at issue in McKeeth requires a defendant charged with a misdemeanor offense to be brought to trial within six months of the date he enters a not guilty plea to the misdemeanor offense, regardless of the type or timing of the charging document in which the offense is alleged. I.C. § 19-3501(4). Unlike that provision, the statutory speedy trial provisions applicable to criminal defendants charged with felonies are not offense specific; instead

the legislature has very clearly mandated that the time for bringing a felony defendant to trial depends entirely upon whether the defendant is being tried by information or by indictment. Compare I.C. §§ 19-3501(2) (requiring defendant being tried on information to be brought to trial within six months of date information was filed) with 19-3501(3) (requiring defendant being tried on indictment to be brought to trial within six months of arraignment on indictment). Because the operative limitation period in felony cases depends on the type of charging document on which the defendant is standing trial, not upon the offenses contained in the charging document, the fact that the aggravated battery and kidnapping offenses charged in the Superseding Indictment on which Hernandez stood trial were also charged in the originally filed Information is irrelevant. Hernandez was tried on the Superseding Indictment, not the Information, and, as such, the six-month limitation period of I.C. § 19-3501(3) applied.

The plain language of I.C. § 19-3501(3) required the state to bring Hernandez to trial within six months of his arraignment on the Superseding Indictment. Because the state did so, Hernandez has failed to show any violation of his statutory right to a speedy trial.

2. Even If The Statutory Speedy Trial Clock Started With The Filing Of The Information, The Record Supports The Trial Court's Finding Of Good Cause To Continue The Trial Beyond The Six-Month Deadline Of I.C. § 19-3501(2)

Pursuant to I.C. § 19-3501, the failure to bring a criminal defendant to trial within the applicable timeframe requires dismissal "unless good cause to the contrary is shown." For purposes of this statute, "good cause means that there is a substantial reason that rises to the level of a legal excuse for the delay." Clark, 135 Idaho at 260,

16 P.3d at 936 (citing State v. Johnson, 119 Idaho 56, 58, 803 P.2d 557, 559 (Ct. App. 1990); State v. Stuart, 113 Idaho 494, 496, 745 P.2d 1115, 1117 (Ct. App. 1987)); accord State v. Young, 136 Idaho 113, 116, 29 P.3d 949, 952 (2001). There is no fixed rule for determining whether good cause exists to delay a trial and, as such, the matter is initially left to the discretion of the trial court. Young, 136 Idaho at 116, 29 P.3d at 952 (citing Clark, 135 Idaho at 260, 16 P.3d at 936). The trial court's discretion is not unbridled, however, and its decision is subject to independent review on appeal. Id. Ultimately, "whether legal excuse has been shown is a matter for judicial determination upon the facts and circumstances of each case." Clark, 135 Idaho at 260, 16 P.3d at 936 (citing Johnson, 119 Idaho at 58, 803 P.2d at 559; Stuart, 113 Idaho at 496, 745 P.2d at 1117).

For the reasons set forth in Section III.C.1, supra, Hernandez's statutory right to a speedy trial on the aggravated battery and kidnapping charges that were the subject of his motion to dismiss attached when he was arraigned on the Superseding Indictment, not upon the filing of the Information. If this Court concludes otherwise, Hernandez has still failed to show a statutory speedy trial violation because the delay in bringing him to trial on those charges was justified by good cause.

Hernandez's trial was originally set for June 9, 2015 – four months after the filing of the Information that charged Hernandez with two counts of aggravated battery and two counts of second-degree kidnapping, but only two months after the filing of the Superseding Indictment that added a second-degree murder charge. (R., pp.16, 42, 75, 99-100.) In its motion to continue the jury trial, filed after the grand jury had returned the Superseding Indictment, the state requested that the June 9, 2015 trial

setting be vacated "for the reason that the investigation is still ongoing and waiting for lab results for the DNA testing." (R., p.101 (verbatim).) At the hearing on the motion, the prosecutor confirmed it was requesting a continuance because "all of the evidence [was] not back from the lab." (4/30/15 Tr., p.14, Ls.14-24.) The prosecutor also explained, however, that the case had a "convoluted procedural history" and that, since the time the trial date was originally set, the state had filed the Superseding Indictment charging Hernandez with homicide. (Id., p.14, L.24 – p.15, L.15.)

Defense counsel objected to the state's request for a continuance, arguing the state "obviously knew on December 24th that they had a murder on their hands," and questioning why "whatever lab testing need[ed] to be done" on evidence "they had right from the beginning" could not be accomplished within six months. (Id., p.15, L.24 – p.16., L.9.) Counsel acknowledged that the murder charge "doesn't have to be tried until October 6th," and that the "murder charge plus the aggravated battery charge and the other charge, are all interrelated." (Id., p.16, Ls.10-17.) He argued, however, that the state failed to show good cause why his trial on the aggravated battery and kidnapping charges should be continued beyond the June 9, 2015 trial setting. (Id., p.16, L.17 – p.17, L.10.)

In response to defense counsel's argument, the prosecutor noted that the case was complex and had taken a while to build. (Id., p.19, L.20 – p.20, L.7.) Although the state was aware when it filed the Information charging Hernandez with two aggravated batteries that one of the stabbing victims had been killed, the state did not know at the time which of the four suspects in the case had killed him. (Id., p.14, L.24 – p.15, L.1, p.19, L.20 – p.20, L.7.) After Hernandez was charged with the aggravated batteries he

made statements implicating himself in the homicide, and the subsequently filed murder charge was based at least partially on that evidence. (Id., p.19, L.22 – p.20, L.6.)

After considering the parties' arguments, the district court granted the state's motion for a continuance and reset Hernandez's trial for September 28, 2015 – a date outside the statutory limitation period for the Information but within the limitation for the Superseding Indictment (which everyone agreed was applicable to the murder charge). (Id., p.18, L.24 – p.19, L.16, p.21, L.22 – p.22, L.12.) In doing so, the court indicated that it was proceeding on the assumption that the statutory speedy trial clock "runs from the date of the superseding indictment." (Id., p.18, L.24 – p.19, L.2.) However, it also specifically found: (1) the state's "need[] to get all of the evidence from the lab [was] good cause" to continue the trial (Id., p.19, Ls.9-11); and (2) the continuance was warranted because "the nature of [the] case [had] evolved" from an aggravated battery "into a much more significant charge" and the court "want[ed] to make sure that both parties [had] sufficient time to prepare (Id., p.21, L.24 – p.22, L.5.) The district court's good cause findings were correct.

Even if Hernandez's statutory right to a speedy trial on the aggravated battery and second-degree kidnapping charges related back to the filing of the Information, the subsequent filing of the Superseding Indictment charging Hernandez with second-degree murder arising out of the same incident, and the state's continuing investigation of the case, constituted good cause to continue the trial to a date within the limitation period applicable to the murder charge. As defense counsel acknowledged, all of the charges were "interrelated," but the murder charge was based at least partially on evidence that was unavailable to the state when the Information was filed. Clearly, the

state had an absolute right to continue to build its case as to the murder charge, including by gathering DNA evidence, up to the date the statutory speedy trial limitation ran for that charge. Nothing required the state either to proceed to trial against Hernandez on all three counts without less than all of the evidence that may become available to it within the limitation period applicable to the murder charge or, as defense counsel seemed to suggest, to conduct two separate trials. In fact, had the court denied the state's request for a continuance, the state would have been well within its right to dismiss and refile all of the charges, thus resetting the statutory speedy clock. I.C. § 19-3506 (dismissal not a bar to refiling felony); State v. Averett, 142 Idaho 879, 885, 136 P.3d 350, 356 (Ct. App. 2006) (newly discovered evidence "constitute[d] a sufficient basis to dismiss and re-file charges").

In arguing that the state failed to demonstrate good cause for the delay of his trial on the aggravated battery and kidnapping charges, Hernandez fails to address either the prosecutor's argument or the district court's finding that the filing of the Superseding Indictment changed the nature of the case and was itself good cause for the continuance of the trial to a date within the limitation period applicable to the murder charge. Instead, Hernandez focuses on the district court's ruling, later adopted by the judge who denied Hernandez's motion to dismiss, that a continuance of the trial was justified by the state's need to get all of the evidence from the lab. (Appellant's brief, pp.35-38.) Hernandez contends this good cause finding was based on incomplete information because the state acknowledged at a later hearing that, due to a misunderstanding between itself and law enforcement, there was a four-month delay in sending a knife that had been found at the scene to the lab. (Id., p.37 (citing 9/23/15

Tr., p.7, L.16 – p.8, L.5, p.11, Ls.14-23.) Hernandez then argues, "[t]he State's failure, through its own negligence, to process the evidence for DNA in a timely manner, cannot be good cause." (Id.)

Hernandez's argument is without merit. Even assuming the state was negligent in its processing of the DNA evidence, Hernandez has failed to show how any such negligence negates the district court's finding that the evolution of the case, and the state's continuing need to investigate it, constituted good cause to delay the trial. Regardless of the reasons the DNA testing had not yet been performed, the state was entitled to gather evidence relevant to the murder charge within the speedy trial limitations applicable to that charge. Because the aggravated battery and kidnapping charges arose out of the same factual circumstances as the murder charge, the state's desire to continue of the trial to a date within the limitation period for the murder charge so that it could obtain relevant (and potentially even exculpatory) evidence justified the continuance ultimately granted.

Under the facts and circumstances of this case, the filing of the Superseding Indictment charging Hernandez with murder and the state's desire to obtain relevant evidence constituted good cause to delay Hernandez's trial on the aggravated battery and kidnapping charges to a date within the limitation period applicable to the murder charge. Hernandez has failed to establish a violation of his statutory speedy trial rights.

3. If There Was A Statutory Speedy Trial Violation, It Was Harmless

Even if the filling of the Superseding Indictment did not constitute good cause sufficient to justify delay of the trial of the aggravated battery and kidnapping charges beyond the six-month statutory period of I.C. § 19-3501, any error in the court's

decision to continue the trial was harmless. Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Where, as here, a defendant is facing felony charges, the remedy for a statutory speedy trial violation is dismissal without prejudice. See I.C. §§ 19-3501, 19-3506. Thus, even had the trial court dismissed the case on the basis of a statutory speedy trial violation, the state could have simply re-filed the charges and proceeded to trial against Hernandez in a new criminal action. In addition, because Hernandez's remedy was dismissal of the Information without prejudice, his trial on the subsequently filed Indictment rendered the alleged error harmless. But see State v. Stuart, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987) (reversing felony judgment of conviction on basis of statutory speedy trial violation, albeit without engaging in harmless error analysis).

D. Hernandez Has Failed To Show A Constitutional Speedy Trial Violation

"Both the Sixth Amendment to the United States Constitution and Article 1, § 13 of the Idaho Constitution guarantee to criminal defendants the right to a speedy trial." State v. Lopez, 144 Idaho 349, 352, 160 P.3d 1284, 1287 (Ct. App. 2007). When analyzing claims of speedy trial violations under the state and federal constitutions, the Idaho appellate courts utilize the four-part balancing test set forth by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). State v. Young, 136 Idaho 113, 117, 29 P.3d 949, 953 (2001); Lopez, 144 Idaho at 352, 160 P.3d at 1287; State v. Avila, 143 Idaho 849, 853, 153 P.3d 1195, 1199 (Ct. App. 2006). The factors to be considered are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice occasioned by the delay. Barker, 407 U.S. at 530.

Contrary to Hernandez's arguments on appeal, balancing of these factors in this case supports the district court's determination that Hernandez failed to establish a violation of his constitutional rights to a speedy trial.

1. The Length Of The Delay Does Not Weigh In Hernandez's Favor

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530. For purposes of the Sixth Amendment, "the period of delay is measured from the date there is 'a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge.'" Lopez, 144 Idaho at 352, 160 P.3d at 1287 (citing United States v. Marion, 404 U.S. 307, 320 (1971); Young, 136 Idaho at 117, 29 P.3d at 953.) "Similarly, under the Idaho Constitution, the period of delay is measured from the date formal charges are filed or the defendant is arrested, whichever occurs first." Lopez, 144 Idaho at 352, 160 P.3d at 1287 (citations omitted). Once the balancing test is triggered, the length of delay also becomes a factor in and of itself. Avila, 143 Idaho at 853, 153 P.3d at 1199.

Hernandez was arrested on January 9, 2015, and the state brought him to trial on September 28, 2014. (R., pp.24, 242.) The state submits the delay of less than nine months is not sufficient to trigger the Barker balancing test. See Doggett v. United States, 505 U.S. 647, 652 n. 1 (1992) (delay is generally not presumptively prejudicial until it approaches one year); but see State v. Talmage, 104 Idaho 249, 252, 658 P.2d 920, 923 (1983) (delay of seven-and-a-half moths was sufficient to trigger Barker analysis). Even assuming it is, the reasonableness of the length of the delay must be

evaluated in light of the nature of the offense for which the defendant is standing trial: "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Barker, 407 U.S. at 531. Considering the nature of the charges on which Hernandez was standing trial – second-degree murder and two counts each of aggravated battery and kidnapping, arising out of a gang-related incident in which there were multiple suspects – the length of the delay was not substantial and does not weigh in Hernandez's favor.

Moreover, the length of the delay is not dispositive. None of the four Barker factors is by itself "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533. Because there were valid reasons for the delay, and because Hernandez was not unfairly prejudiced by the delay, the length of the delay, even if sufficient to trigger the Barker factors, should be excused. See Talmage, 104 Idaho at 252, 658 P.2d at 923 (finding seven-and-a-half-month delay was "not in itself so excessive as to outweigh the other balancing factors").

2. The State Presented A Valid Reason For The Delay

Implicit in the standards applicable to claims of constitutional speedy trial violations is the recognition that "pretrial delay is often both inevitable and wholly justifiable." Avila, 143 Idaho at 853, 153 P.3d at 1199 (citing Doggett v. United States, 505 U.S. 647, 656 (1992)); State v. Davis, 141 Idaho 828, 837, 118 P.3d 160, 169 (Ct. App. 2005) (same). For that reason, different weights are assigned to different reasons for the delay. Barker, 407 U.S. at 531. As explained by the Supreme Court:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate

> responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. at 531 (footnote omitted).

Hernandez concedes on appeal that the state is not responsible for 24 days of the eight-and-a-half-month delay in bringing him to trial. (Appellant's brief, p.43.) He argues, however, that the remaining delay must be weighed against the state, contending that the state failed to present any valid reason to justify the delay in bringing him to trial. (Id.) Hernandez's argument is without merit. For the reasons set forth in Section III.C.2., supra, the filing of the Superseding Indictment charging Hernandez with murder and the state's need for continuing investigation due to the complexities of the case constituted valid reasons to justify an appropriate delay.

3. Hernandez Timely Asserted His Constitutional Speedy Trial Rights

The third factor in the Barker analysis is whether and how the defendant asserted his constitutional right to a speedy trial. A defendant's assertion of his right is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker, 407 U.S. at 531-32; Davis, 141 Idaho at 839, 118 P.3d at 171. "[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Id.

The state concedes that Hernandez timely asserted his speedy trial rights and, as such, this factor weighs in Hernandez's favor.

4. Hernandez Failed To Establish That He Was Unfairly Prejudiced By The Delay

The final and most important factor in the Barker analysis is the nature and extent of any prejudice suffered by the defendant as a result of the delay. Barker, 407 U.S. at 532; Lopez, 144 Idaho at 354, 160 P.3d at 1289; Davis, 141 Idaho at 840, 118 P.3d at 172. As explained by the Idaho Supreme Court:

> Prejudice is to be assessed in light of the interests of defendants which the right to a speedy trial is designed to protect. Those interests are (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired.

Young, 136 Idaho at 118, 29 P.3d at 954 (citing Barker, 407 U.S. at 532). Accord Lopez, 144 Idaho at 354-55, 160 P.3d at 1289-90; Avila, 143 Idaho at 854, 153 P.3d at 1200; Davis, 141 Idaho at 840, 118 P.3d at 172. "The third of these is the most significant because a hindrance to adequate preparation of the defense 'skews the fairness of the entire system.'" Lopez, 144 Idaho at 355, 160 P.3d at 1290 (citing Barker, 407 U.S. at 532; State v. Hernandez, 133 Idaho 576, 583, 990 P.2d 742, 749 (Ct. App. 1999)).

There is no question that Hernandez was continuously incarcerated in jail for eight-and-a-half months while awaiting trial, and during that time he undoubtedly felt the anxiety and concern that any incarcerated individual would suffer. However, Hernandez has not even claimed his defense was actually impaired by the delay. Nor is there any evidence in the record that would support such a claim. Because Hernandez has not even attempted to make a showing of a reasonable possibility that his defense was prejudiced, "this factor should be given a very light weight, if any," for Hernandez. Avila, 143 Idaho at 854, 153 P.3d at 1200 (citation omitted).

5. A Balancing Of The *Barker* Factors Weighs Against A Finding Of A Speedy Trial Violation

The four Barker factors, together with any other relevant circumstances, must be balanced and weighed to determine whether an individual's right to a speedy trial was violated. Barker, 407 U.S. at 533. In this case, even if the length of the delay is sufficient to trigger a constitutional analysis, the remaining factors, on balance, weigh against a finding of a speedy trial violation. The state sought the delay for a valid reason and, although Hernandez timely asserted his speedy trial rights, he failed to demonstrate that he was unfairly prejudiced by the delay. Hernandez has therefore failed to show error in the denial of his motion to dismiss.

IV.
Hernandez Has Failed To Show Error In The Trial Court's Evidentiary Ruling

A. Introduction

During its case-in-chief, the state sought to admit a video recording taken from the body camera of one of the officers who responded to the scene where the stabbing victims were located. (9/29/15 Tr., p.438, L.15 – p.439, L.9.) The video showed the scene and the events that were taking place there, including the unsuccessful efforts being undertaken to resuscitate Ricky Sedano. (See generally State's Exhibit 11A.) Defense counsel conceded the video had "some probative value" but argued it was cumulative, inflammatory and otherwise unfairly prejudicial. (9/29/15 Tr., p.439, L.13 – p.440, L.13.) The district court admitted the video over counsel's objections. (Id., p.440, L.14 – p.444, L.12, p.450, L.23 – p.451, L.6.)

Hernandez challenges the court's evidentiary ruling, arguing as he did below that the "video is highly prejudicial and that the probative value is outweighed by its

prejudicial effect." (Appellant's brief, p.46.) More specifically, Hernandez complains about the portion of the video that shows an officer performing chest compressions on Ricky. (Id., p.49.) Application of the correct legal standards to the complained of video footage shows Hernandez has failed to meet his burden of showing the district court abused its discretion in admitting the video. Even if this Court finds error in the district court's discretionary decision, any error in the admission of the video was harmless.

B. Standard Of Review

"[W]hen reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice," the Court "use[s] an abuse of discretion standard." State v. Canelo, 129 Idaho 386, 393, 924 P.2d 1230, 1237 (Ct. App. 1996) (citations omitted).

C. The Video Was Not Unfairly Prejudicial

Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice – which is the tendency to suggest a decision on an improper basis – substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 907 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993). "Under the rule, the evidence is only excluded if the probative value is substantially outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

In criminal cases, relevant evidence is often prejudicial in the sense that it is unpleasant, but such does not mandate its exclusion from evidence. See, e.g., State v. Winn, 121 Idaho 850, 853, 828 P.2d 879, 882 (1992) (fact that photographs depict the body of a victim and the wounds inflicted on the victim and may tend to excite the emotions of the jury does not mandate their exclusion from evidence); State v. Hawkins, 131 Idaho 396, 402, 958 P.2d 22, 28 (Ct. App. 1998) (same); State v. Beason, 95 Idaho 267, 278, 506 P.2d 1340, 1351 (1973) (quoting Napier v. Kentucky, 426 S.W.2d 121, 122 (Ky. Ct. App. 1968)) ("The time has come when it should be presumed that a person capable of serving as a juror in a murder case can, without losing his head, bear the sight of a photograph showing a body of the decedent in the condition of place in which found.'"). Rather, the trial court must exercise its discretion by balancing the probative value of possibly inflammatory evidence against the risk of unfair prejudice. Winn, 121 Idaho at 853, 828 P.2d at 882; Beason, 95 Idaho at 278, 506 P.2d at 1351 (acknowledging the trial court is in a "far better position to determine whether the probative value was sufficient to overcome any possible inflammatory effect on the jury"). Here, the court exercised discretion in favor of admitting the video and, doing so, necessarily rejected Hernandez's arguments that it was overly prejudicial and inflammatory. The court was correct.

Officer Erica Robbins was one of the officers who responded to the location where Ricky and Christian were found stabbed. (9/29/15 Tr., p.446, L.19 – p.448, L.23.) Officer Robbins was wearing a body camera, which recorded some aspects of the scene as she performed various functions. (Id., p.449, L.25 – p.450, L.22.) Approximately 11 minutes of Officer Robbins' body camera footage was admitted at

trial as State's Exhibit 11A. During the 11 minutes of footage, the victims are intermittently depicted. (See generally State's Exhibit 11A.) Indeed, the victims can only be seen for a total of approximately three minutes, and in much of those three minutes, the victims are only partially depicted or are seen in the background. For example, approximately 30 seconds of the two minutes, shows only an individual covered in a blanket being placed on a stretcher, and moved into an ambulance by other emergency personnel. (State's Exhibit 11A at 9:30-9:36, 10:11-0:14, 10:32-10:50, 10:58-11:01.) Approximately 22 seconds of the two minutes involves Officer Robbins taking pictures, but the subject of those pictures either cannot be seen at all, or the viewer can only see blurry images on the screen of the digital camera. (State's Exhibit 11A at 6:37-6:58, 7:32.) The most direct footage of Ricky and Christian, consists of approximately 19 seconds showing Ricky, lying on the ground where he was pronounced dead, and approximately one minute of Christian during the time Officer Robbins was talking to Christian about what happened while paramedics were tending to him and preparing him to be transported to the hospital. The bulk of the footage on Exhibit 11A shows the area in general (although it is dark and snowing), and the actions of other individuals on scene, including snippets of one officer as he performs chest compressions on Ricky.

Hernandez objected to admission of the video footage[5] "for three things" – "cumulative," "inflammatory," and "its prejudicial effect substantially outweighs the

[5] When Hernandez objected to the video footage, it was marked as State's Exhibit 11. (9/29/15 Tr., p.438, L.15 – p.441, L.2.) The exhibit was, however, "redacted" by excluding the footage that was recorded after 11 minutes. (Id., p.441, L.22 – p.442, L.2.) The redacted version was admitted as State's Exhibit 11A. (See Id., p.443, L.25 – p.445, L.2, p.451, Ls.4-6, p.499, Ls.15-24.)

probative value" because the state had "plenty of photos," "plenty of exhibits," and "plenty of witnesses to all explain that Mr. Sedano passed away that night." (9/29/15 Tr., p.439, L.13 – p.440, L.13.) Hernandez further argued:

> . . . [W]e've already established that he's dying. And he didn't die in the middle of being -- CPR. He died before the CPR was done. And all this does is just inflames the jury. I mean, seeing a man laying in the cold and snow and somebody working on him trying to revive him doesn't add to this case. All it does is inflame the jury. That's really the primary purpose in submitting all of this.

(Id., p.443, Ls.1-9.)

The district court admitted State's Exhibit 11A. (See Id., p.443, L.25 – p.445, L.2.) Hernandez asserts the district court abused its discretion in doing so because, he argues, the "video is highly prejudicial" because it "shows individuals attempting to revive the already diseased [sic], Ricardo Sedano while his body lies in the cold and snow." (Appellant's brief, p.46.) Hernandez elaborates on this argument as follows:

> . . . [A]ny probative value was outweighed by the video's prejudicial effect because it was incredibly disturbing. Watching individuals attempt to revive a lifeless body, as it lies nearly in the gutter of a roadway, on a very cold and snowy evening, necessitates an extreme emotional effect. [Ricky] Sedano had already passed away prior the [sic] CPR shown in the video. Allowing the jury to see individuals working on a lifeless body does not assist the jury in determining if Mr. Hernandez was guilty of any of the charged crimes. Instead, its only purpose was to inflame the jury and it undoubtedly succeeded.

(Id., p.49.)

Hernandez's overstated claims of prejudice about what Exhibit 11A depicts vis-à-vis Ricky fail to show an abuse of discretion by the district court.[6] At no time does the

[6] Given the scope of Hernandez's argument, it appears Hernandez does not claim error in the admission of the entirety of Exhibit 11A, but only in the portion of the video showing "individuals attempt[ing] to revive" Ricky, which occurs in the first two minutes.

video clearly depict Ricky while an officer is performing chest compressions on him. The part of the video showing the officer performing compressions is dark, and the actual images of the officer are intermittent because Officer Robbins's body camera is moving around as she moves around. The only time the body camera is focused on the officer who is performing the compressions is when Officer Robbins is talking to him, at which time the viewer can only see the officer's head moving in conjunction with the compressions. It is unclear how seeing dark footage of someone performing chest compressions is unfairly prejudicial, particularly when such footage merely depicts the testimony at trial. Compare State v. Reid, 151 Idaho 80, 88, 253 P.3d 754, 762 (Ct. App. 2011) (rejecting prejudice argument in relation to photographs of the victim that were "undoubtedly gruesome" and noting "[p]hotographs of dead victims are inherently prejudicial," but their admission is only precluded if they are "unfairly prejudicial"). It is even less clear how it is unfairly prejudicial that the video shows that the CPR occurred on a "snowy evening," or that the CPR occurred after Ricky died (a fact that is not even readily apparent from the video itself). Finally, Hernandez's complaint that the video is prejudicial because it shows Ricky lying "nearly in the gutter of a roadway" is not well-founded. What the video shows is Ricky on a snowy surface. While other evidence at trial may have indicated Ricky was "nearly in the gutter," the video does not depict that. Hernandez cannot claim prejudice based on imagery that does not actually exist.

While Hernandez would like this Court to believe that the video "undoubtedly succeeded" in "inflam[ing] the jury," he has failed to offer any cogent explanation as to why the Court should reach this conclusion. Nothing about the video supports a finding that a dark video showing intermittent chest compressions on Ricky led the jury to

convict Hernandez on an improper basis. To the contrary, it is highly unlikely the jury's verdicts were in any way influenced by the fact that the jurors saw dark video footage of what they otherwise heard through testimony, *i.e.*, that an officer attempted CPR on Ricky in the snow. In short, nothing about Exhibit 11A was so prejudicial as to suggest a decision on an improper basis. Hernandez's arguments to the contrary are without merit and fail to show an abuse of discretion in the admission of the video.

D. Any Error Was Harmless

Even if Hernandez has met his burden of showing error in the admission of State's Exhibit 11A, any such error is harmless. "Where a defendant alleges error at trial that he contemporaneously objected to, this Court reviews the error on appeal under the harmless error test." State v. Almaraz, 154 Idaho at 584, 600-01, 301 P.3d 242, 258-259 (2013) (citation omitted). "[T]he error is harmless if the Court finds that the result would be the same without the error." Id. at 598, 301 P.3d at 256 (citation omitted). Because the state presented overwhelming evidence of Hernandez's guilt, see Section I.C., supra, there is no reasonable possibility that Exhibit 11A contributed to the jury's verdicts. If there was error, it was harmless.

V.
The Denial Of Hernandez's Motion For Payment Of Co-Counsel Did Not Affect Hernandez's Substantial Rights And Was Therefore Harmless

A. Introduction

Hernandez argues the trial court abused its discretion when it denied his motion for payment of co-counsel. (Appellant's brief, pp.50-53.) Specifically, Hernandez contends that the court "failed to recognize that it had the authority to authorize the

payment for co-counsel under Idaho Criminal Rule 12.2," regardless of whether the county public defender was herself willing to allocate the funds necessary for payment of second counsel. (Id.) The state acknowledges the district court failed to perceive that it had the authority to grant a request for payment of co-counsel pursuant to Hernandez's Rule 12.2 motion. Any abuse of discretion was harmless, however, because Hernandez had no statutory or constitutional right to have a second attorney appointed at public expense, and the record is devoid of any evidence that his substantial rights were prejudiced as a result of being required to proceed to trial with a single attorney.

B. Standard Of Review

In reviewing a discretionary decision, the appellate court "examine[s] whether: (1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer bounds of its discretion and with applicable legal standards; and (3) the trial court reached its decision through an exercise of reason." State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009) (citations omitted); accord State v. Shackelford, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010). Even when the trial court abused its discretion, such "abuse of discretion may be deemed harmless if a substantial right is not affected." Shackelford, 150 Idaho at 363, 247 P.3d at 590 (citation omitted).

C. Any Abuse Of Discretion In The Denial Of Hernandez's Rule 12.2 Motion For Payment Of Co-Counsel Was Harmless

Idaho Criminal Rule 12.2 provides that a "defendant may submit a motion seeking public funds to pay for investigative, expert, or other services that he believes to be necessary for his defense." I.C.R. 12.2(a). The motion must be made in advance

of trial and must include specific information about the nature of the request, the reasons for it, the proposed provider(s) of the requested services, and the total cost. I.C.R. 12.2(a), (b). If the court finds the defendant is indigent, the court may, upon whatever conditions it deems appropriate, grant the request and authorize the payment of additional defense services, including services that "are to be provided through funds budgeted to the public defender." I.C.R. 12.2(c)-(g).

The district court denied Hernandez's Rule 12.2 motion for payment of co-counsel for two reasons. First, it found that the attorney whose services Hernandez's trial counsel sought to engage had a conflict of interest (9/1/15 Tr., p.7, Ls.15-18) – a finding Hernandez does not challenge on appeal (see Appellant's brief, p.52 n.15). Second, it found that, even if there were no conflict, whether to allocate funds for the services of an additional attorney was a decision within the discretion of the county public defender, and one the court believed it was not free to override. (9/1/15 Tr., p.7, Ls.18-20; see also id., p.5, Ls.15-23.) Following this ruling, defense counsel asked the court if it would entertain another motion if counsel were to "present another attorney," and the court responded, "I'm not going to grant it." (Id., p.7, Ls.21-24.)

On appeal, Hernandez argues the trial court abused its discretion by "fail[ing] to recognize that it had authority to address the merits of the motion under I.C.R. 12.2" and finding, instead, "that this was an issue for the Canyon County Public Defender." (Appellant's brief, p.53.) The state acknowledges that, so long as Hernandez was indigent, the court had authority to grant Hernandez's request for payment of co-counsel pursuant to Rule 12.2. Any abuse of discretion was harmless, however, because the denial of the motion did not affect Hernandez's substantial rights. See

I.C.R. 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); Shackelford, 150 Idaho at 363, 247 P.3d at 590 (citation omitted) ("[A]n abuse of discretion may be deemed harmless if s substantial right is not affected.").

Hernandez was charged with a non-capital offense and, as such, had no constitutional or statutory right to the representation of more than one attorney at public expense. See U.S. Const. amend. VI (constitutional right to "assistance of counsel"); I.C. § 19-852 (indigent criminal defendant entitled "to be represented by *an attorney* to the same extent a person having his own counsel" (emphasis added)); I.C.R. 44.3(2) (requiring appointment of "two qualified trial attorneys" to represent indigent defendant in a capital case). Hernandez did have a Sixth Amendment right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). However, Hernandez does not claim, and there is no evidence in the record to suggest, that the trial court's failure to "address the merits" of Hernandez's motion for payment of co-counsel in any way adversely affected that right. Absent such evidence, it must be presumed that Hernandez's trial counsel performed within the wide range of reasonable profession assistance the Sixth Amendment requires.[7] Id.; Shackelford, 150 Idaho at 383, 247 P.3d at 610; Workman v. State, 144 Idaho 518, 525, 164 P.3d 798, 805 (2007). In light of that unrebutted presumption, any error in the denial of Hernandez's Rule 2.2 motion for payment of co-counsel was necessarily harmless.

[7] The state notes that, if there is evidence outside the record demonstrating trial counsel's assistance was ineffective, Hernandez may seek relief in a post-conviction action.

VI.
No Cumulative Error

Under the doctrine of cumulative error, a series of errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998).

Hernandez has failed to show that two or more errors occurred in his trial, and therefore the doctrine is inapplicable to this case. See, e.g., LaBelle v. State, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997). Even if errors in the trial had been shown, they would not amount to a denial of due process that would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997); State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000) (accumulation of errors deemed harmless).

CONCLUSION

The state respectfully requests that this Court affirm the judgment.

DATED this 22nd day of March, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of March, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

_/s/ Lori A. Fleming_____
LORI A. FLEMING
Deputy Attorney General

LAF/dd