5-31-2017

State v. Hernandez Appellant's Reply Brief Dckt. 43901

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 43901**
	)	
v.	)	**CANYON COUNTY NO. CR 2015-582**
	)	
JACOB JUAN HERNANDEZ, JR.,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE CHRISTOPHER S. NYE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jacob Juan Hernandez, Jr., appeals from the district court's Judgment of Commitment. Mr. Hernandez was charged with one count of second degree murder, two counts of aggravated battery, and two counts of second degree kidnapping for his alleged involvement in a gang related fight that broke out on December 24, 2014, and for hopping into a vehicle, driven by two women, to obtain a ride from the area of the altercation. Following a trial, he was convicted of voluntary manslaughter, two counts of aggravated battery, and two counts of second degree kidnapping.

Mr. Hernandez raised six issues in his Appellant's Brief. He asserted that the district court erred in denying his motion for a mistrial, that the State failed to present sufficient evidence to support his convictions for second degree kidnapping and that the district court erred in denying his Idaho Criminal Rule 29 motions for judgments of acquittal, that his statutory right to a speedy trial was violated when the district court denied his motion to dismiss the two aggravated battery and two second degree kidnapping charges, that it was an abuse of discretion for the district court to allow the admission State's Exhibit 11, a video from the body cam of Officer Robbins, that the district court abused its discretion when it denied his motion for payment of co-counsel, and that these errors amount to cumulative error, depriving him of his right to a fair trial.

This Reply Brief is necessary to address the State's erroneous assertions that the introduction of Sergeant Hoadley's testimony regarding a shooting at David Prieto's grandmother's home did not affect Mr. Hernandez' right to a fair trial because the district court's instructions to the jury were sufficient to cure the potential prejudice; that the State presented

sufficient evidence to prove that Mr. Hernandez actually seized and/or detained the alleged kidnapping victims at or before entering their vehicle; that there was no speedy trial violation because the statutory time limits ran from the later filed Superseding Indictment, not the Information, that there was good cause for any delay, and that any delay was harmless; and that any abuse of discretion in denying the payment of co-counsel was harmless.

Statement of the Facts and Course of Proceedings

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

ISSUES[1]

1. Did the district court 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?

[1] This Reply Brief will not address Mr. Hernandez' issues four and six as the State's arguments on these issues are unremarkable and, as such, do not require any further argument. In this brief, argument on issue five, will be made under issue heading four, as issue four will not be addressed in this Reply Brief.

ARGUMENT

I.

The District Court Erred In Denying Mr. Hernandez' Motion For A Mistrial

The State has asserted that Sergeant Hoadley's testimony regarding a shooting at David Prieto's grandmother's home "did not affect Hernandez's right to a fair trial" because the district court's instructions to the jury were sufficient to cure the potential prejudice. (Respondent's Brief, p.11.) Mr. Hernandez maintains that the testimony was incredibly prejudicial and likely had a continuing impact on the trial, and the district court's failure to declare a mistrial was reversible error.

A. The Testimony Was Improper

The State has first asserted that "nothing about the state's question or Sergeant Hoadley's answer was actually improper." (Respondent's Brief, p.14.) The State supports this assertion by arguing that defense counsel's questioning of Sergeant Hoadley, regarding the actual threat presented to gang members who cooperate with the police, was "an attempt to undermine the credibility of several state's witnesses." (Respondent's Brief, p.14.) This is an exaggeration of the effect of defense counsel's questioning. The State presented testimony that retaliation can and does occur. (Tr., p.1187, L.5 – p.1189, L.12.) Defense counsel asked about the frequency of retaliation versus the perceived threat of retaliation. (Tr., p.1210, L.11 – p.1211, L.15.) As such, none of the State's evidence about whether or not retaliation does occur was challenged by defense counsel's limited questioning.

Further, the purpose of defense counsel's questioning was not to elicit testimony to undermine witnesses, but was to ensure that the jury was provided with accurate information regarding retaliation. Prior to cross examination, the jury was presented testimony that there are

"very serious consequences" for snitching such as being beaten up, family members' homes being "shot up", and even death. (Tr., p.1188, L.23 – p.1189, L.7.) The State asked specifically whether the threats were "empty threats." (Tr., p.1189, L.11.) Sergeant Hoadley responded that they were not. (Tr., p.1189, L.12.) Without defense counsel's questioning, the jury would have been left with one-sided information that implied that retaliation was a foregone conclusion. It was not until defense counsel clarified, with a few questions, that there was a lot of intimidation in regards to retaliation for snitching and that "it could go either way" in terms of actual retaliation. (Tr., p.1210, L.11 – p.1211, L.15.)

Even if the cross-examination touched on credibility, it did not open the door to all possible evidence regarding retaliation. The State has argued, as they did unpersuasively to the district court, that the testimony was necessary to rebut a presumption that retaliation "doesn't happen as often as these witnesses think it might happen, so their testimony is not as credible on that score." (Respondent's Brief, p.15; Tr., p.1222, Ls.18-20.) However, the improper testimony was not necessary to rehabilitate witnesses or to disprove testimony presented on cross-examination. While retaliation may not occur as often as a gang member might believe, it was made clear during cross-examination that the gang members "truly believe" that they will be killed for snitching. (Tr., p.1211, Ls.1-11) As such, whether retaliation will actually occur is irrelevant because, for the State's purposes, it is only what the witnesses believed that would impact their credibility.

Additionally, the State had already successfully made its point about the dangers of retaliation. As noted previously, the State had presented testimony that Sergeant Hoadley had personally "seen family's houses get shot up." (Tr., p.1189, Ls.3-7.) And, on redirect again

reiterated that retaliation is "a real concern" and that it does happen in this area. (Tr., p.1218, Ls.5-10.) The State then took it one question too far by asking:

> Q. And you are familiar with a shooting that happened Sunday night at David Prieto's grandmother's house?
>
> A. Yes.

(Tr., p.1218, Ls.11-14.) This testimony did not merely provide "a real word example," but was wholly unnecessary testimony that targeted Mr. Hernandez. It was clearly inadmissible evidence that was highly prejudicial. The trial court recognized that the danger of the evidence was more than "potentially prejudicial" when it noted that, while discussing the inference that Mr. Hernandez was involved, "the prejudice to the Defendant . . . outweighs the probative value." (Respondent's Brief, p.15; Tr., p.1223, Ls.12-15.)

B. The District Court's Instruction To Ignore The Evidence Was Insufficient To Cure The Prejudice To Mr. Hernandez

While a curative instruction can be an effective remedy, an instruction can also be an insufficient remedy. *State v. Watkins*, 152 Idaho 764, 767–68 (Ct. App. 2012). "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). Mr. Hernandez asserts that his is such a case. The evidence erroneously presented to the jury was so prejudicial that mere statement, "[f]olks, I'm going to instruct you to ignore that last comment. All right?" (Tr., p.1218, Ls.21-23), could not cure the error.

As noted in the Appellant's Brief, it was especially damning for the jury to hear information about presumably real retaliation, after hearing significant testimony about retaliation concerns. This evidence drew important testimony to a tipping point and lead to only

one conclusion: David Prieto was credible and Mr. Hernandez was guilty. After all, no reasonable juror would believe that the shooting and the case at hand were not related. Even with the instruction to ignore the evidence, the jury was likely unable to put the prejudicial thought – why retaliate if he is not guilty – out of their mind. In effect, no jury would be able to ignore the evidence.

C. The Failure To Grant A Mistrial Is Not Harmless

Mr. Hernandez asserts that the failure to grant a mistrial was not harmless. Error is harmless and not reversible if the reviewing court is convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Perry,* 150 Idaho 209 (2010).

The State has asserted that the "stricken testimony was harmless because the State presented overwhelming evidence of guilt." (Respondent's Brief, p.18.) The State has misstated the harmless error standard. The Court does not look to whether there is "overwhelming evidence of guilt," but whether the testimony contributed to the verdict. Mr. Hernandez asserts that the testimony did contribute to the verdict.

As noted above, the testimony was exceeding prejudicial. Further, evidence of Mr. Hernandez' alleged guilt was based primarily on the testimony of gang members or their associates. As was noted by the State's witness, Sergeant Hoadley, gang members cannot always be trusted to tell the truth; they lie to protect the gang, out of revenge, to personally benefit, and to protect others. (Tr., p.1212, L.12 – p.1213, L.7.) The jury could only find Mr. Hernandez guilty of the homicide or batteries by believing the testimony of gang members and their associates. Their testimony was bolstered by the testimony of a more reliable witness, Sergeant Hoadley, who testified that retaliation had in fact occurred when David Prieto's

grandmother's home was shot at the night before Mr. Hernandez' trial began. There is little doubt that this testimony had an impact on the jury's determination.

Further, the State has argued that the testimony was brief and buried in a seven-day trial. (Respondent's Brief, p.16.) Presumably, the State is implying that because the erroneous testimony involved only a few words, during one witness's testimony, there is little concern that it could implicate Mr. Hernandez' right to a fair trial. To make such a suggestion is absurd. The right to fair trial is a right to a fair trial from start to finish. Whether the erroneous testimony is limited in words used or actual time presented has no bearing on whether the evidence is so egregious that it interferes with a constitutional right. This Court looks to the continuing impact of the incident that triggered the motion, not the mere amount of time it took to present the erroneous testimony. *State v. Field*, 144 Idaho 559, 571 (2007).

Based upon the highly prejudicial nature of the testimony and its likely impact on the verdict, Mr. Hernandez asserts that the failure to grant a mistrial was not harmless and amounted to a denial of his right to a fair trial.

II.

This Court Should Vacate Mr. Hernandez' Convictions For Second Degree Kidnapping Because There Was Insufficient Evidence To Support The Convictions

The State has asserted that "[b]y stopping Amanda and Michelle as they were driving away, Hernandez necessarily 'seized' them or, at the very least, temporarily 'detained' them from departing" and that "the evidence clearly shows Hernandez actually seized and/or detained the women at or before the time he entered their vehicle." (Respondent's Brief, pp.26-27.) The State's argument that Mr. Hernandez had seized the women, even prior to entering their vehicle, is unpersuasive and its application leads to absurd results.

Contrary to the State's assertion, every momentary interference with a person going about their business is not a seizure or temporary detention. If all that was required to prove a seizure or detention was that a person's attention was diverted from their planned course of activity, nearly every interaction with another human would satisfy this burden. For a kidnapping conviction, under the theories charged by the State in this case, the State has to prove that an individual "seized and/or detained" another individual with the intent to "to cause [him or her], without authority of law, to be in any way held to service and/or kept and/or detained against [his or her] will." (R., pp.383, 386.) As such, following the State's logic, every time a person stops an individual on the street to ask the time, they have satisfied the elements of kidnapping: they would have seized or temporarily detained the person to ask a question, diverting them from their previously planned course of action, with the intention of holding them to service (i.e. serving them by providing information). Of course, one would have to assume that the individual was not happy to provide that person with the time, an assumption similar to the one that the State has made in regards to the facts of this case. Simply, the State's asserted standard for what constitutes a seizure or detention is impractical, illogical, and not supported by law.

For law enforcement purposes, the typical standard for a seizure or detention has been identified by the Supreme Court:

> When police attempt to question a person who is walking down the street . . . , it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.
>
> . . . In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.

Florida v. Bostick, 501 U.S. 429, 435–36 (1991). Mr. Hernandez acknowledges that this standard has not been applied specifically to the seizure requirement of kidnapping, but he asserts that it is helpful in determining what conduct is necessary for a seizure. Surely, a seizure requires more than a mere limited interference with an individual's planed course of activities, as the State suggests.

In the case at hand, Mr. Hernandez and another individual were clearly seeking a ride. This was evidenced by the undisputed fact that Mr. Hernandez asked for a ride. (Tr., p.637, L.25 – p.638, L.1.) The act of asking must play a significant role in determining Mr. Hernandez' intent. Under any normal kidnapping fact pattern, the accused would not ask the individual if they were willing participate in an activity which might be construed as being held to service, kept, or detained against their will, but would insist on participation or acquiescence. Making a request is strong evidence that Mr. Hernandez did not intent to hold the women to service against their will. Further, while he did not wait for an answer before hoping into the van (Tr., p.614, Ls.7-9), that action alone does not prove that the women were not free to decline the ride or to ask Mr. Hernandez to get out of the van. In fact, the evidence shows that they did feel free to do just that when, after a few minutes, the women asked the young men to get out. (Tr., p.626, Ls.11-17.) Both men exited when asked and thanked the women for the ride. (Tr., p.626, L.18 – p.627, L.1, p.651, Ls.1-8, p.651, Ls.7-24.)

As such, the logical conclusion is that providing a ride was either a consensual act or that, at a minimum, it was consensual from Mr. Hernandez' point of view. Either view would prove that he did not have the requisite intent for kidnapping. Obviously, jumping into a vehicle and demanding that a person drive to a specific location is far different than jumping into a vehicle

while asking for a ride and saying thank you when asked to leave prior to reaching the desired location. One may amount to kidnapping, and the other cannot.

Finally, the State has asserted that there was additional evidence that supported the inference that Mr. Hernandez intended to detain the women or hold them to his service. (Respondent's Brief, p.28.) None of the referenced evidence (that Mr. Hernandez allegedly participated in the earlier stabbings, that he wanted to leave the area quickly, and that he initially claimed to have left the area in a taxi[2]) lend any actual support to an inference of nefarious intent in regards to kidnapping. It merely shows alleged involvement in earlier criminal activities and that he had a desire to leave the area. He clearly intended to try to obtain a ride, but the evidence does not infer that his intent was to do so in any way possible, including resorting to kidnapping. Again, the actual evidence in this case, Mr. Hernandez' actions, exiting as soon as requested and saying thank you, show that he was not a desperate individual who would do anything to get to his intended location. This is especially true because Mr. Hernandez did not even reach his intended location. (Tr., p.616, L.2 – p.617, L.15.)

Mr. Hernandez maintains that the State failed to prove that any actual seizure or detention of the women occurred or that Mr. Hernandez had the intent to commit second degree kidnapping. Because the State failed to present substantial and competent evidence that proved,

[2] The State has implied that Mr. Hernandez' response to police, admitting that the women did not invite him into the vehicle, carries weight to prove intent. (Respondent's Brief, p.28 (citing State's Exhibit 77: DVD10_Redacted.mpg).) However, a lack of invitation does not show that Mr. Hernandez was intending to force the women to provide him with a ride. It would be very unusual for women and children to drive around calling out to individuals in the night offering rides. The fact that the events of that evening did not include such odd behavior does not have any bearing on Mr. Hernandez' intent. Further, Mr. Hernandez asserts that the video of his conversation with police shows how upset he was at the suggestion that he had kidnapped anyone and he can be heard reiterating over and again that he asked for a ride and believed that he had received permission. (State's Exhibit 77: DVD10_Redacted.mpg.)

beyond a reasonable doubt, that Mr. Hernandez committed two counts of second degree kidnapping, this Court must vacate his convictions.

III.

The District Court Erred When It Denied Mr. Hernandez' Motion To Dismiss Due To A Violation Of His Right To A Speedy Trial

A. The District Court Violated Mr. Hernandez' Right To A Speedy Trial As Guaranteed By Idaho Statute

I.C. § 19-3501(2) required the State to bring Mr. Hernandez to trial on the two aggravated battery charges and the two second degree kidnapping charges within in six months of the filing of the Information. The Information was never dismissed and, as a result, the speedy trial requirement was not altered. The State violated I.C. § 19-3501(2) when it failed to bring Mr. Hernandez to trial within six months.

1. Under Idaho Code § 19-3501 Mr. Hernandez' Speedy Trial Time Limitations Ran From The Filing Of The Information, Not The Superseding Indictment

The State has asserted that "[b]ecuase Hernandez' 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." (Respondent's Brief, p.31.) This argument fails to recognize the significance of the previously filed Information. The State appears to argue that because an indictment was filed, the Information and the statutory speedy trial rights attached thereto, vanish for all purposes of legal significance. The State provides no authority to support this assertion. *State v. Zichko*, 129 Idaho 259, 263 (1996). Mr. Hernandez maintains that the Information cannot merely be disregarded.

The State then asserted that Mr. Hernandez "asks this Court to ignore the plain language of I.C. § 19-3501(3)" when evaluating the statutory speedy trial limits. (Respondent's Brief, p.31.) Contrary to the State's assertion, Mr. Hernandez did not ask this Court to ignore I.C. § 19-3501(3). Instead, he requested this Court find that the time limits involved ran from the filing of the Information and that it apply I.C. § 19-3501(2); a request consistent with Idaho Supreme Court and Court of Appeals precedent, stating that the six month speedy trial time limit is not renewed unless the original charges are dismissed and re-filed. [*State v. McKeeth*, 136 Idaho 619, 627 (Ct. App. 2001)]; *State v. Horsley*, 117 Idaho 920, 926 (1990); *State v. Goodmiller*, 86 Idaho 233, 235 (1963).

2. The State Failed To Show Good Cause For The Delay

The State has asserted that the evolution of the case caused by the addition of a murder charge and the need to further investigate, including obtaining DNA test results amounted to good cause. (Respondent's Brief, pp.36-38.) This argument fails for several reasons.

First, the district court did not find good cause to delay past the speedy trial deadline. The district court's findings that there was good cause to delay the trial was based upon the idea that the trial would be held within the statutory speedy trial limits. (Tr., 4/30/15, p.17, Ls.11-22.) While the district court assumed that the speedy trial requirement ran from the filing of the Superseding Indictment for purposes of the current hearing, the district court had not yet definitively determined whether the statutory speedy trial requirements ran from the filing of the information or superseding indictment and specifically requested briefing on that issue "as soon as possible." (Tr. 4/30/15, p.8, Ls.18-23, p.26, Ls.1-18.) Therefore, the district court did not rule that the State's motion presented good cause to delay the trial outside of the speedy trial limit.

Further, the evolution of the case did not provide for good cause to delay the trial. The State asserted that "nothing required the state . . . 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 re-file all of the charges, thus resetting the statutory speedy trial clock." (Respondent's Brief, p.37.) The State seems to forget that a defendant's right to a speedy trial could require that the State conduct two separate trials. The argument that the State could have dismissed the charges to reset speedy trial limits is equally unpersuasive as it highlights how easily the State could have conducted a trial within speedy trial limits by merely seeking dismissal of the Information. However, the State did not seek to dismiss the Information and, as a result, it was bound to the speedy trial limitations it placed upon itself for the battery and kidnapping charges. Further, when the State sought an additional continuance, for the same DNA evidence, it did not dismiss and re-file. Instead, the case proceeded to trial as scheduled.

Additionally, the State's request for a continuance was not based upon the evolution of the case or need to investigate other than the specific request for time to collect additional evidence related to the DNA testing and other blood evidence. Although the motion notes that the "investigation is ongoing" it also specifically refers to the DNA testing. (R., p.101.) When the district court began discussion of the motion it noted "[a]nd the basis for the motion, as I understand it, is that the evidence is not back from the lab." (Tr. 4/30/15, p.14, Ls.17-19.) The State's response was "[y]es" and only noted that they were also looking as some blood smears found on some other items. (Tr. 4/30/15, p.14, Ls.21-24.) As such, the only evidence mentioned as grounds for the continuance was already in the State's possession or control at that time. Because the State failed to assert that the collection of any other evidence provided grounds for the motion, such an assumption cannot be made for the first time several years later. If a

continuance was necessary for additional reasons, the State should have presented those reasons to the district court.

Finally, the State did not disclose the complete information about the DNA testing to Judge Huskey at the hearing on the motion for continuance. The State only revealed the information about its own negligence in submitting the evidence for DNA testing at the September 23, 2015, motion for continuance hearing. At this hearing, the State admitted that although the knife was collected nearly four months earlier, it was not received by the state lab until April 14, 2015, and that it was not sent off sooner because everyone incorrectly assumed that the police department had already sent it to the lab. (Tr. 9/23/16, p.7, L.16 – p.8, L.5, p.11, Ls.14-23.) Although the prosecution had already discovered that the knife had been sitting for nearly four months and had only been sent to the lab two weeks prior, it chose to not disclose this information to Judge Huskey when she was tasked with determining whether or not there was good cause to delay the trial at the April 30, 2015, hearing. It is notable that once this information was revealed and a district court had the opportunity to specifically address the issue, the district court denied the motion for a further continuance, finding that there was not good cause. (Tr. 9/23/15, p.13, L.6.)

3. The Violation Of Mr. Hernandez' Statutory Speedy Trial Right Was Not Harmless

The State has asserted that "any error in the court's decision to continue the trial was harmless." (Respondent's Brief, p.39.) Mr. Hernandez asserts the violation cannot be harmless because a harmless error standard in not applied to speedy trial violations. In *State v. Stuart*, 113 Idaho 494, 497 (Ct. App. 1987), the Court of Appeals found that because there was no waiver of the right to a speedy trial and there was not good cause shown for the delay, the judgment of

conviction must be reversed. The Court did not engage in any harmless error analysis. *Id.* Likewise, no harmless error analysis is conducted for constitutional speedy trial violations. After balancing the *Barker* factors, if there is a speedy trial violation, the remedy is dismissal:

> The amorphous quality of the right [to a speedy trial] also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

Barker v. Wingo, 407 U.S. 514, 522 (1972). As such, no harmless error test should be used by this Court in evaluating the speedy trial violation.

Should this Court decide to apply a harmless error standard, the speedy trial violation cannot be found to be harmless. The State has asserted that if the district court had dismissed the case, it would have simply re-filed the charges and that "his trial on the subsequently filed Indictment rendered the alleged error harmless." (Respondent's Brief, p.39.) This argument is erroneous.

Error is harmless and not reversible if the reviewing court is convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Perry*, 150 Idaho 209 (2010). If this Court finds the district court should have granted Mr. Hernandez' motion to dismiss the error would not be harmless, because this Court would have to find the district court should have dismissed the case. Inevitably, the harm is the trial. Therefore, a trial held in violation of a defendant's right to a speedy trial is unavoidably not harmless.

B. The District Court Violated Mr. Hernandez' Right To A Speedy Trial As Guaranteed By The United States And Idaho Constitutions

The majority of the State's arguments regarding the constitutional speedy trial violation are unremarkable and, as such, do not require any further argument. However, the State has asserted that there was a valid reason presented for the delay in the trial and adopts its earlier arguments regarding a showing of good cause under the statutory speedy trial analysis. (Respondent's Brief, p.42.) Mr. Hernandez specifically disputes this assertion and adopts the arguments articulated in Section I(A)(2), supra, in support of his response.

IV.

The District Court Abused Its Discretion In Denying Mr. Hernandez' Motion For Payment Of Co-Counsel

The State has conceded that the district court abused its discretion by failing to recognize that it had authority under I.C.R 12.2 to grant Mr. Hernandez' request for payment of co-counsel; yet, the State asserts that the abuse of discretion was harmless. (Respondent's Brief, pp.52-53.) Mr. Hernandez asserts that the district court's abuse of discretion was not harmless.

The State claims, "Any abuse of discretion was harmless, however, because the denial of the motion did not affect Hernandez's substantial rights." (Respondent's Brief, p.52 (citing I.C.R. 52, *State v. Shackelford*, 150 Idaho 355, 363 (2010).) The State continues, arguing that "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 [his Sixth Amendment right to effective assistance of counsel and] absent such evidence, it must be presumed that Hernandez's trial counsel preformed within the wide range of reasonable profession [sic] assistance the Sixth Amendment requires." (Respondent's Brief, p.53.) The State's assertion is that Mr. Hernandez had a duty to prove his Sixth Amendment right was

violated. This is a misrepresentation of the harmless error standard and is patently incorrect.

As the Idaho Supreme Court recognized, in Idaho the harmless error test articulated in *Chapman v. California,* 386 U.S. 18 (1967) is used for all objected-to error, "A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry,* 150 Idaho 209, 222 (2010). As such, the State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 221 (quoting *Chapman,* 386 U.S. at 24).

In order for the State to prove that the district court's abuse of discretion was harmless, it must show either that the district court would not have granted the motion had the court recognized its discretion under I.C.R. 12.2 or the result of the trial would have been the same had the district court allowed for the payment of co-counsel. The State did not argue nor prove either of these theories.

Furthermore, Mr. Hernandez asserts that the State could not prove harmlessness. There is no evidence that the district court would have denied the motion for payment of co-counsel. Due the district court's failure to recognize its authority, there was no discussion as to the merits of the motion. (Tr. 9/1/15, p.4, L.2 – p.8, L.3.) Additionally, Mr. Hernandez' case is more complex than an average case. As was noted in the Ex-Parte Motion for Payment of Co-Counsel and Notice of Hearing, counsel noted that Mr. Hernandez was proceeding to trial on five felony counts, including first degree murder; that the State was intending to call 35 to 40 witnesses; at least three witness would be experts; between 60 and 100 exhibits were planned for introduction; the discovery included numerous audio and video recordings. (Augmentation: Ex-Parte Motion for Payment of Co-Counsel and Notice of Hearing.) It is undeniable that co-counsel would have

been of great assistance in preparing for and during trial. It is impossible to ascertain whether this additional assistance may have had an effect on the outcome of the trial.

Therefore, the State failed to meet its burden to prove that the error was harmless. And, because the State has conceded that the district court abused its discretion, this Court must vacate Mr. Hernandez' convictions and remand the case for a new trial.

CONCLUSION

Mr. Hernandez respectfully requests that this Court vacate his two kidnapping convictions because the State failed to provide sufficient evidence to support these convictions. Additionally, he respectfully requests that this Court vacate his convictions and remand this case for a new trial.

DATED this 31st day of May, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of May, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JACOB JUAN HERNANDEZ JR
INMATE #117485
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

CHRISTOPHER S NYE
DISTRICT COURT JUDGE
E-MAILED BRIEF

LARY G SISSON
ATTORNEY AT LAW
E-MAILED BRIEF

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CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

EAA/eas