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State v. Cruse Appellant's Brief Dckt. 47801

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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 47801-2020**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-19-23411**
v.	)	
	)	
DAVID RAY CRUSE,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

After being charged with one count of attempted strangulation and one count of felony domestic battery, David Cruse exercised his constitutional right to a jury trial. He was found guilty of misdemeanor domestic battery and felony domestic battery. He received a unified sentence of twenty years, with ten years fixed.

On appeal, Mr. Cruse contends that the district court erred by refusing to give his requested necessity jury instruction. Mr. Cruse also asserts that the prosecutor committed misconduct during closing arguments by misrepresenting the evidence. The accumulation of the errors deprived him of his right to a fair trial. Mr. Cruse respectfully requests that this Court vacate his judgments of conviction and remand his case for a new trial.

Mr. Cruse also contends that his sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts. He further contends that the district court abused its discretion in failing to reduce his sentence in light of the additional information submitted in conjunction with his Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion.

Statement of the Facts and Course of Proceedings

On the evening of June 9, 2019, Mr. Cruse and his fiancée, Danyelle Hume, had a fight after drinking alcohol together all day long. (Tr., p.205, L.2 – p.208, L.1; p.703, Ls.15-20; p.705, Ls.4-19.) Ms. Hume claimed that Mr. Cruse had his hands on her neck, and the pressure made it difficult for her to breathe. (Tr., p.205, Ls.19-24; p.394, Ls.9-24.) She also claimed that he grabbed her outside the apartment and carried her back into the apartment against her will. (Tr., p.201, Ls.7-14.)

Based on these facts, the State filed an Information charging Mr. Cruse with one count of attempted strangulation, one count of felony domestic battery—a misdemeanor domestic battery enhanced by a prior felony domestic violence conviction—and the persistent violator sentencing enhancement. (R., pp.29-30, 39-40, 42-43.)

Mr. Cruse exercised his constitutional right to a jury trial. At trial, Ms. Hume told the jury that she and Mr. Cruse drank alcohol all morning with one of Mr. Cruse's friends at several restaurants in downtown Boise. (Tr., p.189, L.3 – p.191, L.15.) That afternoon, on the way home, they stopped twice to buy more alcohol. (Tr., p.191, Ls.16-25; p.425, L.20 – p.428, L.4.)

After arriving at Ms. Hume's apartment, the three continued to drink alcohol. (Tr., p.428, L.20 – p.433, L.4.) Ms. Hume drove to a grocery store—to purchase more alcohol as well as food for dinner. (Tr., p.431, L.24 – p.433, L.6.)

After dinner at home in the apartment, the friends continued to drink more alcohol. (Tr., p.258 Ls.14-25.) It was during this time that Ms. Hume took offense at a conversation between Mr. Cruse and his friend—she thought Mr. Cruse's comments were hurting his friend's feelings. (Tr. p.192, L.18 – p.196, L.24.) Ms. Hume angrily confronted Mr. Cruse about the way he was speaking to his friend. (Tr., p.197, Ls.1-3.) A short time later, Mr. Cruse and Ms. Hume argued over the remote control for the music, and Mr. Cruse put his hands against her throat. (Tr., p.199, L.22 – p.200, L.13; p.219, Ls.7-16.) She said Mr. Cruse picked her up by her neck and pushed her five feet back into a wall, causing her to hit her head on the wall and to break a mirror leaning up against the wall. (Tr., p.204, L.19 – p.206, L.6; p.248, Ls.12-19; p.249, Ls.1-9.) Ms. Hume testified that her throat was sore, internally, though she did not have external bruising. (Tr., p.226, Ls.19-25.) Ms. Hume claimed she ran out the back patio and across the lawn of the common area, but Mr. Cruse followed her, picked her up, and carried her

back into the apartment. (Tr., p.201, Ls.7-14.) Once back at the apartment, Ms. Hume smashed a beer glass into Mr. Cruse's head, which shattered. (Tr., p.203, Ls.13-24; p.439, Ls.6-12.) She then pinned Mr. Cruse underneath her and screamed and cursed at him. (Tr., p.207, Ls.9-15; p.250, Ls.3-17.) She hit Mr. Cruse in the face. (Tr., p.207, Ls.16-20.)

When officers arrived, Ms. Hume was on top of Mr. Cruse while he laid motionless on the floor. (Tr., p.208, Ls.5-10.) She was screaming and cursing and did not stop when law enforcement showed up to the apartment. (Tr., p.233, Ls.5-8; p.250, Ls.9-17; State's Exhibit 9.) The officers ordered Ms. Hume to get off Mr. Cruse and proceeded to handcuff her while she yelled obscenities at the officers. (Tr., p.208, Ls.5-15; p.233, L.5 – p.234, L.15.) Ms. Hume refused medical treatment. (Tr., p.209, L.16 – p.210, L.3.) Mr. Cruse had dried blood on the sides of his face and two red and swollen "goose eggs" on top of his head. (State's Exhibits 9, 14-16.) Ms. Hume admitted she was intoxicated at the time the incident took place. (Tr., p.235, Ls.8-10; p.250, Ls.3-8.)

Mr. Cruse testified in his own defense. While he corroborated much of Ms. Hume's account of their day of drinking, he provided some critical details that she had omitted. Mr. Cruse testified that he, Ms. Hume, and a male friend of his had been drinking all day. (Tr., p.417, Ls.9-17; p.420, L.23 – p.433, L.4.) Several times he tried to order an Uber so Ms. Hume did not drive after drinking, but Ms. Hume insisted on driving. (Tr., p.426, L.21 – p.432, L.6.) Because Ms. Hume had been driving a car Mr. Cruse had borrowed from the car dealership where he worked, he was concerned that he would be terminated if Ms. Hume wrecked the car or was arrested for DUI in the car. (Tr., p.427, Ls.5-22.)

After the three of them ate dinner at the apartment that night, Ms. Hume became upset at the nature of the conversation Mr. Cruse was having with his friend, and she slapped him.

(Tr., p.436, Ls.11-21.) At this time, Ms. Hume was very drunk and furious at Mr. Cruse. (Tr., p.437, Ls.10-16.) She grabbed the borrowed car's key fob and stormed out of the apartment, telling Mr. Cruse, "Fuck you and your stupid job." (Tr., p. 437, L.8 – p.438, L.8.) When Ms. Hume did not stop, he ran after her to stop her from driving drunk. (Tr., p.438, Ls.9-13; p.451, Ls.3-10.) He picked Ms. Hume up and carried her back into the apartment. (Tr., p.438, Ls.23-25.) After this, Ms. Hume became enraged, and she started attacking Mr. Cruse in earnest. (Tr., p.439, Ls.3-12.) She broke a glass jar against his head and screamed at him. (Tr., p.441, Ls.3-19.) She reached around Mr. Cruse's neck, and dug her fingernails into the side of his face. (Tr., p.442, Ls.5-13; State's Exhibit 16.) When Mr. Cruse tried to get her to let go, he stumbled into the mirror—his foot broke the mirror and he swung around and hit the wall with his head, causing the bump on his head. (Tr., p.442, L.20 – p.443, L.8; State's Exhibit 14.) Mr. Cruse tried to walk away from Ms. Hume, but she wrapped around him again and they fell to the floor. (Tr., p.446, Ls.10-24.) After kicking Mr. Cruse several times, Ms. Hume sat on Mr. Cruse while he laid on the floor. (Tr., p.447, Ls.5-20.) She hit Mr. Cruse in the face while he lay prone beneath her. (Tr., p.207, Ls.9-20.) The police arrived to see Ms. Hume sitting on top of Mr. Cruse, screaming obscenities at him. (Tr., p.305, L.8 – p.306, L.18; p.390, L.23 – p.391, L.15; State's Exhibit 9.)

Mr. Cruse requested, *inter alia*, a jury instruction regarding the necessity defense and one on the victim's reputation for being quarrelsome. (Tr., p.477, L.6 – p.483, L.1; R., pp.49-50.) The district court declined to give these two requested jury instructions. (Tr., p.486, Ls.1-7; p.500, Ls.16-22.) The court agreed to give the prosecution's lesser-included instruction, whereby the jury would be instructed that if it did not find Mr. Cruse guilty of attempted

strangulation (Count I), it must consider the lesser included offense of misdemeanor domestic battery. (Tr., p.501, Ls.8-20.)

During her closing remarks, the prosecutor misrepresented the facts of the case by telling the jury that Mr. Cruse admitted to Count II, the no-injury domestic battery where Mr. Cruse allegedly grabbed Ms. Hume outside, in the common area. (Tr., p.534, Ls.21-23.)

The jury acquitted Mr. Cruse on the charge of attempted strangulation, but convicted him of the lesser-included offense of misdemeanor domestic battery. (R., p.219.) As for Count II, the jury convicted Mr. Cruse of the domestic battery that occurred in the outside common area, and Mr. Cruse admitted his prior felony domestic battery conviction (thereby enhancing the charge in Count II to a felony domestic battery) and to the persistent violator enhancement. (Tr., p.580, L.13 – p.582, L.1; p.588, L.2 – p.592, L.14; R., pp.186-89.)

At Mr. Cruse's sentencing hearing, the State recommended a sentence of twenty-five years, with ten years fixed, for the felony domestic violence conviction, and time served on the misdemeanor domestic battery conviction. (Tr., p.613, Ls.5-18.) Mr. Cruse's counsel asked the court to sentence Mr. Cruse to concurrent sentences, with no fixed time, and to consider placing Mr. Cruse on probation. (Tr., p.637, L.12 – p.638, L.13.)

Mr. Cruse was sentenced to time served on the misdemeanor conviction in Count I. (Tr., p.649, Ls.20-24.) The district court sentenced Mr. Cruse to twenty years, with ten years fixed, on the felony domestic battery, as enhanced by the prior conviction and persistent violator sentencing enhancement. (Tr., p.649, L.20 – p.650, L.15.) Mr. Cruse filed a Rule 35 motion for leniency. (R., pp.315-23.) The district court denied the motion without a hearing. (R., pp.355-57.)

Mr. Cruse filed a notice of appeal from the judgment of conviction. (R., pp.298-302, 309-14.)

ISSUES

I. Did the district court erred by rejecting Mr. Cruse's proposed necessity defense jury instruction?

II. Did the State commit prosecutorial misconduct?

III. Was Mr. Cruse's Fourteenth Amendment right to due process of law violated because the accumulation of errors deprived him of his right to a fair trial?

IV. Did the district court abuse its discretion when it imposed a unified sentence of twenty years, with ten years fixed, upon Mr. Cruse for a no-injury domestic battery conviction?

V. Did the district court abuse its discretion when it denied Mr. Cruse's Idaho Criminal Rule 35 Motion?

ARGUMENT

I.

The District Court Erred By Rejecting Mr. Cruse's Proposed Necessity Defense Instruction

A. Introduction

The district court erred when it found that a necessity instruction was not warranted. The instruction was requested by the defense, and a reasonable view of the evidence supported a necessity instruction. Despite describing Mr. Cruse's conduct as him "acting out of necessity," the district court refused to give the defense's requested instruction, and explained that other jury instructions "cover that issue." (Tr., p.482, Ls.18-24.) This Court should hold that the facts before the jury warranted a necessity instruction, vacate Mr. Cruse's felony domestic battery conviction, and remand this case to the district court for a new trial.

B. Standard Of Review

"Whether a jury has been properly instructed is a question of law over which this Court exercises free review." *State v. Pearce*, 146 Idaho 241, 247 (2008). To determine whether a defendant's requested instruction should have been given, the appellate court "must examine the instructions that were given and the evidence that was adduced at trial." *State v. Johns*, 112 Idaho 873, 881 (1987).

C. The District Court Erred By Rejecting Mr. Cruse's Necessity Instruction

The district court is required to give requested instructions if a reasonable view of the evidence supports the requested instruction. *See, e.g., State v. Howley*, 128 Idaho 874, 878 (1996); *State v. Tadlock*, 136 Idaho 413, 414 (Ct. App. 2001) ("A defendant in a criminal action is entitled to have his legal theory of defense submitted to the jury through an instruction if there

is a reasonable view of the evidence which would support the theory."). The district court may properly refuse to give a requested instruction on the necessity defense when there is no evidence presented in support of one of the elements of that defense. *See, e.g., State v. Korn*, 148 Idaho 413, 417-18 (2009) (holding that the necessity instruction had been properly withheld because defendant had not presented evidence that he was acting to avoid a reasonably perceived specific threat of immediate harm). However, where there is conflicting evidence as to the elements of the necessity defense, resolution of that conflict is a question for the jury, and so, the jury should be instructed on the defense in such cases. *State v. Hastings*, 118 Idaho 854, 856 (1990).

The defense has the burden of production when it seeks to raise the necessity defense; however, the State ultimately bears the burden of proof. *See State v. Meyer*, 161 Idaho 631, 635 (2017). The elements of the necessity defense are: (1) a specific threat of immediate harm; (2) the circumstances which necessitate the illegal act must not have been brought about by the defendant; (3) the same objective could not have been accomplished by a less offensive alternative available to the actor; and (4) the harm caused was not disproportionate to the harm avoided. *State v. Hastings*, 118 Idaho 854, 855 (1990); *see also* Idaho Criminal Jury Instruction ("ICJI") 1512. The pattern jury instruction for the necessity defense provides that "the state must prove beyond a reasonable doubt that the defendant did not act because of necessity." ICJI 1512. Erroneous instructions amount to reversible error if "the instructions as a whole misled the jury or prejudiced a party." *State v. Draper*, 151 Idaho 576, 588 (2011).

In this case, the State accused Mr. Cruse of committing a domestic battery (Count II) by unlawfully pushing and/or grabbing Ms. Hume outside, in the common area of the apartment complex. (Tr., p.519, Ls.18-23; R., p.30.) The State alleged that Mr. Cruse pursued Ms. Hume when she ran out of the apartment and into the common area, and picked her up and carried her

back into the apartment against her will. (Tr., p.530, Ls.5-21.) In support of its theory, the State elicited testimony from Ms. Hume that she was trying to get away from Mr. Cruse, and that she kicked and screamed and yelled for help once Mr. Cruse started carrying her. (Tr., p.201, Ls.7-23.)

Mr. Cruse's necessity defense was in response to the conduct alleged in Count II. (Tr., p.482, Ls.7-12.) Mr. Cruse testified that he did touch and carry Ms. Hume, and she yelled for him to stop; however, Mr. Cruse believed his actions were necessary. (Tr., p.438, Ls.2-25.) As defense counsel explained to the jury in his closing remarks, "His intent at that time was to get her from screaming and yelling out in the common area, to make sure she didn't drive with the key fob that she had in her hand, and to make sure she didn't wreck the car that he was responsible for." (Tr., p.562, Ls.4-9.) Mr. Cruse testified that he touched Ms. Hume, because he thought "she's going to wreck that car, and she is going to get in trouble and get a DUI." (Tr., p.438, Ls.9-13.)

Mr. Cruse requested a necessity jury instruction from the Idaho Criminal Pattern Jury Instructions. (Tr., p.482, L.25 – p.483, L.1; R., p.49.) The prosecutor objected to the defense's requested jury instruction for necessity. (Tr., p.477, L.6 – p.478, L.6.) Although defense counsel agreed that the necessity defense was inapplicable to the attempted strangulation charge, counsel argued regarding the conduct outdoors, that the "necessity defense is vital to our defense as it is written here." (Tr., p.481, Ls.11-13.) The district court agreed that the necessity defense related to the conduct that occurred outside, however, it denied the requested jury instruction for necessity. (Tr., p.480, L.20 – p.483, L.1.) The district court concluded, "I think those other three instructions cover that issue and give the defense plenty of room to argue about the defendant's argument that he was acting out of necessity or need with respect to the activity that was

occurring outside as to the contact – the contact he admits occurred." (Tr., p.482, Ls.18-25.)[1] The court refused to give Mr. Cruse's instruction because it concluded that the other jury instructions (self-defense, defense of property, and misfortune or accident) gave the defense sufficient room to argue that Mr. Cruse was acting out of necessity. (Tr., p.482, Ls.18-24.) Specifically, the court rejected Mr. Cruse's proposed instruction because it believed the evidence did not support such an instruction as to the attempted strangulation charge, and it believed the other jury instructions covered the necessity arguments Mr. Cruse intended to make as to the domestic battery for the conduct in the outdoor common area. (Tr., p.481, L.14 – p.483, L.1.) Although the district court did not squarely address the issue, evidently the court found that there was a factual basis for Mr. Cruse's necessity instruction. (Tr., p.482, Ls.19-23 (concluding defense had "plenty of room to argue . . . that he was acting out of necessity or need").)

However, evidence was presented by Mr. Cruse which satisfied each element of the necessity defense, and thus, a reasonable view of the evidence supported the requested instruction on that defense. Mr. Cruse's theory of the case regarding the felony domestic battery charge was that, to the extent that he committed a domestic battery, he acted out of necessity. The trial evidence supported that theory.

First, there was evidence of a specific threat of imminent harm. When Ms. Hume left the apartment seriously intoxicated (Tr., p.437, Ls.10-13), and with the keys to the borrowed car in her hand (Tr., p.438, Ls.2-8), she told Mr. Cruse that she did not care about him or his "stupid job." (Tr., p.438, Ls.6-8.) At that point, Mr. Cruse thought she was going to drive drunk and potentially wreck the car and get charged with a DUI. (Tr., p.438, Ls.9-13.) The prosecutor

[1] The jury was instructed on three affirmative defenses: (1) self-defense, (2) defense of property, and (3) misfortune or accident. (R., pp.201-05; Tr., p.476, Ls.7-25.)

argued that Ms. Hume was not running in the direction of the garage, thus, Mr. Cruse must not have been trying to stop her from driving (Tr., p.455, Ls.14-23; p.574, Ls.11-16); however, the fact that there may have been conflicting evidence as to that element of the necessity defense does not justify not instructing the jury as to that defense. *See Hastings*, 118 Idaho at 856 ("It is for the trier of fact to determine whether or not [the defendant] has met the elements of that defense."). Resolving the conflicting evidence in this regard requires a determination regarding the credibility of the witnesses and the evidence presented, and it is the jury, not the district court, that is tasked with making that determination. *See, e.g., State v. Almaraz*, 154 Idaho 584, 599 (2013); *State v. Allen*, 129 Idaho 556, 558 (1996).

Second, there was evidence that Mr. Cruse did not bring about the actions leading to the necessity, since, as defense counsel pointed out, Mr. Cruse told Ms. Hume multiple times he would arrange for her to take an Uber, instead of driving drunk. (Tr., p.426, L.21 – p.432, L.6.) Further, he tried to use words to calm Ms. Hume down, hoping to change her mind about driving drunk. (Tr., p.438, Ls.15-17.)

Third, there was evidence that Mr. Cruse could not have escaped the situation by some less offensive means, as he saw Ms. Hume leaving the apartment with the key fob in her hand. (Tr., p.438, Ls.2-8.) As such, the only option available to Mr. Cruse was to try and persuade Ms. Hume not to go. After she cursed at Mr. Cruse and told him she did not care about his "stupid job," Mr. Cruse testified that he went outside to catch her; he put his hands on her waist and told her to "chill out." (Tr., p.438, Ls.15-17.) In response, Ms. Hume started screaming and told Mr. Cruse to leave her alone and to get away from her. (Tr., p.438, Ls.15-19.) He put his hands around her waist, and "picked her up and [ ] carried her about ten feet back to the house." (Tr., p.438, Ls.23-25.) After four previous attempts to call Ms. Hume an Uber, and where all

verbal attempts to stop her from leaving with the car failed, Mr. Cruse reasonably believed that the only way to stop her from driving the car while drunk was to physically carry her, the least offensive option. (Tr., p.438, L.11 – p.439, L.8.) Mr. Cruse perhaps could have called the police, but even had the police responded extremely quickly, the few minutes it took for their response have been too long as Ms. Hume could have gotten into an accident in an instant, particularly as intoxicated as she was.

Finally, there was evidence that the harm caused was not disproportionate to the harm avoided. Ms. Hume did not report any physical injuries from Mr. Cruse restraining her outside the apartment. (Tr., p.249, L.24 – p.250, L.2.) Ms. Hume had downed *at least* seven or eight drinks that day and, by even her own account, was drunk. (Tr., p.235, Ls.8-10; p.239, L.6 – p.241, L.12; p.425, L.17 – p.434, L.4.) Had Ms. Hume driven the car at that time, she might have gotten in a serious accident, harming another person or even herself. (Tr., p.562, Ls.2-9.) Alternatively, she definitely would have been driving while intoxicated, and she may have been arrested for DUI. (Tr., p.564, Ls.17-22.)

Since there was a reasonable view of the evidence supporting the necessity defense, the district court was obligated to give that instruction. *Howley*, 128 Idaho at 878. However, the defense of necessity was not placed within the jury's consideration.

The district court was incorrect in concluding that the necessity defense was adequately covered by instructions as to *other* defenses. Both self-defense and necessity constitute justifications for the allegedly-criminal conduct, which means, if the defense is proved, the defendant will not be punished for what would ordinarily be a criminal act. *See State v. Barton*, 154 Idaho 289, 292 (2013). Both necessity and self-defense require the jury to find that the defendant performed the conduct, but lacked the *mens rea* necessary for the act to constitute a

crime. Necessity and self-defense share a similar theory – the defendant's actions are justified because they were made in response to a threat to the defendant. *See* ICJI 1512, ICJI 1517.

In this case, Mr. Cruse admitted some of the underlying conduct, as he testified that he did touch or pick up Ms. Hume in the common area. (Tr., p.438, L.15 – p.439, L.7.) Mr. Cruse's testimony reveals that he was asserting that he did not have the necessary *mens rea* to be found guilty – he did not intentionally and *unlawfully* touch Ms. Hume. The district court gave the self-defense instruction (R., pp.202-04), the defense of property instruction (R., p.205), and the mistake or accident instruction (R., p.201). However, these instructions did not include all of the necessity elements of necessity to encompass Mr. Cruse's explanation of his actions in the outside common area. For example, in order to assert self-defense, the defendant must show he reasonably believed he was in imminent danger of bodily harm, and he reasonably believed the amount of force used was necessary to repel the victim's attack. *State v. Iverson*, 155 Idaho 766, 772 (Ct. App. 2014); ICJI 1517. Further, the circumstances must reflect that a reasonable person, under similar circumstances, would have believed he was in imminent danger of bodily injury and that the action taken was necessary. ICJI 1517. Finally, the defendant must have acted only in response to the danger presented and not for some other motivation. ICJI 1517. While the self-defense jury instruction does include consideration "that the action taken was necessary," it also includes several other conditions to which Mr. Cruse did not testify to regarding his actions in the common area, including a fear by Mr. Cruse that his bodily injury was imminent. *See* ICJI 1517. The defense of property jury instruction required Mr. Cruse to establish that the degree and extent of force he used was reasonably necessary to prevent a threatened injury. *See* ICJI 1522. This instruction requires additional, different elements than that of the necessity jury instruction. Further, the defense that the conduct occurred as the result

of misfortune or by accident bears no similarity to the elements of the necessity defense and does not comport with Mr. Cruse's testimony regarding what occurred in the common area. *See* ICJI 1508.

The district court erred. Because Mr. Cruse had a right to a necessity defense, the district court erred by refusing to give his proposed instruction. A reasonable view of the evidence supported Mr. Cruse's requested instruction and the pattern instruction accurately stated the law. The district court's refusal to instruct the jury on the necessity defense left Mr. Cruse unable to present a complete defense. By refusing to instruct the jury regarding Mr. Cruse's defense, the district court denied him a fair opportunity to defend against the domestic battery charge (Count II). Indeed, the district court relieved the State of its burden to prove both the elements of the domestic battery charge and that Mr. Cruse was not acting out of necessity. *See* I.C. §§ 18-918(3)(b), 18-903(a) (defining battery as the *unlawful* use of force, an *unlawful* touching or striking, or *unlawfully* causing bodily harm); ICJI 1203 (same).

II.

The State Committed Prosecutorial Misconduct

A. Introduction

Mr. Cruse asserts that the prosecutor committed misconduct in his case which requires the vacation of his convictions. During closing argument, defense counsel objected to an instance of prosecutorial misconduct whereby the prosecutor falsely argued to the jury that Mr. Cruse admitted to Count II. (Tr., p.534, Ls.21-23.) As such, Mr. Cruse asserts his convictions should be vacated.

B. Standard Of Review

The Idaho Supreme Court has held:

> [W]hen an objection to alleged prosecutorial misconduct is raised at trial, we use a two-part test to determine whether the misconduct requires reversal. First, we ask whether the prosecutor's challenged action was improper. If it was not, then there was no prosecutorial misconduct. If the conduct was improper, we then consider whether the misconduct "prejudiced the defendant's right to a fair trial or whether it was harmless."

State v. Severson, 147 Idaho 694, 716 (2009) (citations omitted).

C. The State Committed Prosecutorial Misconduct

"Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *State v. Perry*, 150 Idaho 209, 227 (2010). "[T]he prosecutor has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics." *State v. Moses*, 156 Idaho 855, 871 (2014) (internal punctuation omitted). Misrepresentations or diminishments of the State's burden to prove the defendant's guilt beyond a reasonable doubt are inappropriate. *State v. Raudebaugh*, 124 Idaho 758, 769 (1993); *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). "It is improper to misrepresent or mischaracterize the evidence in closing argument." *Moses*, 156 Idaho at 871 (quoting *State v. Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)).

Mr. Cruse was charged with domestic battery under I.C. §§ 18-918(3)(b), 18-903(a), which define battery as the *unlawful* use of force, an *unlawful* touching or striking, or *unlawfully* causing bodily harm. (*See* R., pp.198, 200; *see also* ICJI 1203.) Thus, this offense required the state to prove:

1. On or about June 9, 2019;

2. in the state of Idaho;

3. the defendant, David Ray Cruse, committed a battery upon Danyelle Hume, by pushing and/or grabbing Danyelle Hume;

4. while they were household members.

(R., p.199.) During her closing remarks, the prosecutor committed misconduct when she stated that Mr. Cruse had admitted to Count II. The prosecutor stated that Mr. Cruse "also admitted Count II on cross-examination. So on his direct testimony, just doesn't make sense about Count II." (Tr., p.534, Ls.21-23.) Defense counsel objected on the basis that the prosecutor misstated the evidence. (Tr., p.534, L.24 – p.535, L.2) The district court implicitly overruled the objection, stating, "The argument – the argument would be that he admitted facts which the prosecution contends results in the admission. He didn't specifically admit it, so the defense – the State is certainly entitled to argue what facts they think he admitted." (Tr., p.535, Ls.3-8.)

Contrary to the State's argument, Mr. Cruse did not ever admit that he unlawfully grabbed Ms. Hume. (Tr., p.438, L.15 - p.439, L.7; p.451, Ls.3-10.) While Mr. Cruse did admit to corralling Ms. Hume or picking her up and carrying her, the State was still required to prove the conduct was unlawful. *See* I.C. § 18-913. Where the district court had instructed the jury on Mr. Cruse's multiple affirmative defenses (although the jury was erroneously not instructed on the necessity defense, see Part I), the prosecutor mischaracterized the nature and significance of Mr. Cruse's testimony.

III.

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

Mr. Cruse asserts that if the Court finds that the above errors were harmless, the district court's errors combined amount to cumulative error. The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process. *State v. Paciorek*, 137 Idaho 629, 635 (Ct. App. 2002). As the Idaho Supreme Court recently explained:

> "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *State v. Johnson*, 163 Idaho 412, 428, 414 P.3d 234, 250 (2018) (quoting *Perry*, 150 Idaho at 230, 245 P.3d at 982). "The presence of errors, however, does not by itself require the reversal of a conviction, since under due process a defendant is entitled to a fair trial, not an error-free trial." *Id.* (quoting *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998)). "[A]lleged errors at trial[ ] that are not followed by a contemporaneous objection[ ] will not be considered under the cumulative error doctrine unless said errors are found to pass the threshold analysis under our fundamental error doctrine." *Perry*, 150 Idaho at 230, 245 P.3d at 982.

State v. Garcia, 166 Idaho 661, ___, 462 P.3d 1125, 1142-43 (2020).

Mr. Cruse asserts that the aggregate of errors in his trial amounted to actual errors depriving him of a fair trial. His arguments in support of this assertion are found in sections I - II above, and need not be repeated, but are incorporated herein by reference.

IV.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Twenty Years, With Ten Fixed, Upon Mr. Cruse Following His Conviction For Domestic Battery

Mr. Cruse asserts that, given any view of the facts, his unified sentence of twenty years, with ten years fixed, is excessive. Where a defendant contends that the sentencing court imposed

an excessively harsh sentence, the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). In reviewing a trial court's decision for an abuse of discretion, the relevant inquiry regards four factors:

> Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018).

Mr. Cruse does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show the district court abused its discretion by failing to reach its decision by the exercise of reason, Mr. Cruse must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of the mitigating factors present in this case, Mr. Cruse's sentence is excessive considering any view of the facts. Mr. Cruse was found guilty of misdemeanor domestic battery for picking up his fiancée and carrying her back into the house. That domestic battery was enhanced to a felony due to his having a prior felony domestic violence conviction within the last fifteen years, pursuant to I.C. § 18-918(5). The (now) felony domestic battery had an Information Part II filed, and Mr. Cruse pled guilty to being a persistent violator. Mr. Cruse pled guilty to both the charged enhancement and the sentencing enhancement after the jury returned a guilty verdict on the misdemeanor domestic battery. So Mr. Cruse was sentenced to 20 years,

with 10 years fixed for what started out as a misdemeanor domestic battery without traumatic injury, a case in which the victim was not injured but broke a beer glass over Mr. Cruse's head and who was filmed sitting on top of Mr. Cruse, when officers arrived at the house.

Mr. Cruse had a difficult and extremely traumatic childhood, rife with violence. (PSI, pp.354-55.) Although Mr. Cruse's parents divorced when he was [redacted] his father was violent towards him once Mr. Cruse turned thirteen. (PSI, p.354.) When Mr. Cruse lived with his father, his father would hit him every other week—Mr. Cruse regularly went to school with black eyes. (PSI, p.355.) His father would charge at him, grab him and throw him down, or would slap him or punch him in the face. (PSI, p.355.) Mr. Cruse was even bitten by his father. (PSI, p.355.) Mr. Cruse reported that fighting back "made it worse." (PSI, p.355.)

Most of Mr. Cruse's criminal history can be attributed to his alcohol addiction. (PSI, pp.361-62, 382-85.) As he told the domestic violence evaluator, "Alcohol has almost ruined me. I am here because of alcohol." (PSI, p.364.) Mr. Cruse knows he needs more alcohol treatment. (PSI, p.366.) Mr. Cruse wrote to the court that he had made a lot of poor choices over the years due to his alcohol use; he stated, "I have let this almost ruin my life for good, I want to stay sober and to get treatment for this . . . ." (PSI, p.389.)

Mr. Cruse now has a supportive family to assist him in his rehabilitation. (Tr., p.624, L.22 - p.627, L.3; PSI, p.355.) Mr. Cruse has a good relationship with his grandmothers, father, sister, and his ex-wife. (PSI, p.355.) *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts).

Further, Mr. Cruse expressed considerable remorse and accepted responsibility for his actions. (Tr., p.638, L.25 – p.640, L.12; PSI, pp.366, 382, 329.) At his sentencing hearing,

Mr. Cruse expressed regret and told the court and the victim how sorry he was for his actions. He told the court:

> First of all, I would -- I want to apologize to my victims in this case. It wasn't just Danyelle; it was my ex-wife and my daughter and my other children that have suffered because of this.
>
> But with Danyelle, I am sorry this happened. I am sorry our relationship went the direction it went. I know that alcohol is a contributing factor to this, but I also know that there needs to be a time for me to work on some fundamental issues of my, obviously, belief system so I can be a better father and potential partner, just a better person overall.
>
> The thing is -- and this is the tough part for me -- as a sober person, I am a very productive member of society. I was at this time on probation, yes, but I was afforded the opportunity to be a general manager of a car lot. I was placed with a lot of responsibility. I was starting to rebuild my life. And there was drinking involved, and that was a poor decision on my part. And I've battled with that for years.
>
> In regards to doing probation and being able to accomplish it, I was placed on felony probation in 2003, and I was taken off of felony probation in 2007 after only doing four years of a five-year period because I had no allegations. I didn't mess up. I was married to Tara. That was probably the biggest mistake of my life to not stay married to her, but it didn't work out.
>
> I've made lots of mistakes. Lots of them. I'm not even going to say mistakes. I apologize for that word. I made a ton of poor choices. And I am more than just a sum of all these convictions, of the problems that I have had with alcohol. I am a father, a grandson, a son, and I am going to be a grandfather here in two months.

(Tr., p.638, L.25 – p.640, L.12.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *Shideler*, 103 Idaho at 595; *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Based upon the above mitigating factors, Mr. Cruse asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered the nature of the crime, his considerable remorse, alcoholism, and his family support, it would have imposed a less severe sentence.

V.

The District Court Abused Its Discretion When It Denied Mr. Cruse's Rule 35 Motion For A Sentence Reduction In Light Of The New Information Offered In Support Of His Rule 35 Motion

Although Mr. Cruse contends that his sentence is excessive in light of the information in front of the district court at the time of his January 22, 2020 sentencing hearing (*see* Part IV, *supra*), he asserts that the excessiveness of his sentence is even more apparent in light of the new information submitted in conjunction with his Rule 35 motion. Mr. Cruse asserts that the district court's denial of his motion for a sentence modification represents an abuse of discretion.

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction. *Id.*

Mr. Cruse asked the court to reduce his sentence from twenty years, with ten years fixed, to fifteen years, with five years, fixed. (R., p.315.) In support of his motion for a sentence reduction, Mr. Cruse submitted several letters from former employers, family, and members of the community advising the district court that Mr. Cruse, when sober, was an outstanding citizen, a hard worker, and a good dad and uncle. (R., pp.318-23.) For example, Mr. Cruse's employer at the auto dealership described him as a hard worker who was both "kind and sincere." (R., p.323.)

Despite the outpouring of support for Mr. Cruse, the district court denied Mr. Cruse's Rule 35 motion, finding "the Defendant has not shown an entitlement to leniency with respect to the sentence this Court lawfully imposed." (Aug., p.4.)

In light of Mr. Cruse's documented family and community support, the district court should have reduced his sentence. Based on the foregoing, in addition to the mitigating evidence before the district court at the time of sentencing, it is clear the district court abused its discretion in failing to reduce Mr. Cruse's sentence in response to his Rule 35 motion.

CONCLUSION

Mr. Cruse respectfully requests that this Court vacate his convictions on all counts and remand this matter for a new trial. Alternatively, Mr. Cruse respectfully requests that this Court reduce his sentence as it deems appropriate or remand his case to the district court for a new sentencing hearing.

DATED this 2nd day of November, 2020.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas