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State of Idaho v. Eric James Gunter Appellant's Brief Dckt. 47890

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 47890-2020**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-19-29491**
v.	)	
	)	
ERIC JAMES GUNTER,	)	**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

HONORABLE MICHAEL REARDON
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Eric Gunter contends the district court erred in its rulings related to the evidence at his trial for domestic battery, in that it improperly allowed the State to present irrelevant evidence and it improperly denied his motion for a mistrial when evidence was elicited in violation of a ruling *in limine*. For both of those reasons, this Court should vacate his conviction and remand this case for a new trial.

Statement of the Facts and Course of Proceedings

Mr. Gunter and his girlfriend, Kimberly Rey, decided to spend a weekend watching Netflix and drinking. (*See* Tr., p.192, Ls.19-22.) Both admitted that their memories of the events of that weekend were not great. (*E.g.,* Tr., p.214, Ls.12-14; Tr., p.277, L.24 - p.278, L.1.) Still, they both agreed the weekend had not gone smoothly.

For example, Ms. Rey testified they had an argument on the first evening about tight finances, as they were waiting for a check from Mr. Gunter's boss. (Tr., p.186, Ls.4-14.) She asserted that, during that argument, Mr. Gunter had batted her head between his hands several times. (Tr., p.187, Ls.14-21.) She also testified that she woke the next morning feeling sore and found bruises on her ribs and back and a lump or bruise on her chest. (Tr., p.191, Ls.7-10.) She was not sure how she got those injuries, but testified they were new that morning. (Tr., p.191, L.19 - p.192, L.8.) Mr. Gunter did not remember the events of that first evening, but he also woke the next morning feeling sore. (Tr., p.277, L.24 - p.278, 4; Tr., p.281, Ls.8-10.) Specifically, his face felt sore and his conclusion was that Ms. Rey had slapped him the night before. (Tr., p.281, Ls.12-14.) Ms. Rey did not recall slapping Mr. Gunter. (Tr., p.189, Ls.8-9.)

Nevertheless, they decided to continue with their weekend of movies and drinking. (*See* Tr., p.192, Ls.18-22; Tr., p.282, L.19 - p.283, L.18.) Later that afternoon, Mr. Gunter explained that they got into another argument about money, and particularly, about the stresses of potentially moving to a new city for a new job. (Tr., p.283, L.25 - p.284, L.20.) Ms. Rey testified that she simply woke from a long nap with Mr. Gunter yelling at her. (Tr., p.194, Ls.10-14.) She testified he began throwing an empty liquor bottle at her. (Tr., p.196, Ls.17-18.) However, she admitted she did not think he actually hit her with the bottle. (Tr., p.197, Ls.2-5.) Mr. Gunter testified he only remembered a verbal argument. (*See* Tr., p.284, L.18 - p.285, L.16.)

Ms. Rey said she pushed past Mr. Gunter and ran outside to try to get into the car. (Tr., p.197, L.25 - p.198, L.5.) She testified that a naked Mr. Gunter chased her outside, grabbed her, and threw her back into the house. (Tr., p.199, Ls.4-8.) She asserted that he then slammed the door on her legs, which had not gone all the way inside. (Tr., p.199, Ls.10-14.)

Ms. Rey testified that Mr. Gunter then went to throw various items out of the refrigerator and then to the bathroom to put on a pair of shorts. (Tr., p.200, Ls.4-6; Tr., p.200, L.20 - p.201, L.2.) Meanwhile, she said she was looking through her purse for her car keys. (Tr., p.200, Ls.2-4.) She was unsuccessful in that search, but testified she still went back outside and got into the car through an open window. (Tr., p.200, Ls.16-24.) She testified Mr. Gunter followed her to the car and that, as he tried to get in the driver's side door, she slid across and got out the passenger side door. (Tr., p.201, Ls.1-6.) She testified he proceeded to chase her around the car. (Tr., p.201, Ls.5-6.) At that point, a neighbor came over, escorted her across the street and had her call 911.[1] (Tr., p.201, Ls.8-20.) Mr. Gunter remained in their yard. (*See* Tr., p.203, Ls.4-6.)

[1] The neighbor was not called to testify in the trial. (*See generally* Tr.)

For his part, Mr. Gunter recalled that Ms. Rey got up to leave during the argument. (Tr., p.284, L.18 - p.285, L.5.) He testified he followed her outside and chased her around the car, but only because he did not want her driving away while drunk. (Tr., p.285, Ls.6-13.) He agreed the neighbor came over in response to the yelling and escorted Ms. Rey across the street to call the police. (Tr., p.285, L.15 - p.286, L.2.) He testified he did not remember throwing Ms. Rey back into the house or otherwise hitting or pushing her. (Tr., p.286, Ls.18-23.)

While Ms. Rey was talking to the 911 operator, another random person ran up and punched Mr. Gunter in the face.[2] (Tr., p.208, Ls.9-18; Tr., p.286, Ls.4-5; *see generally* Exhibit 27 (recording of the 911 call).) Ms. Rey told the 911 operator that Mr. Gunter had just been punched, but did not mention whether he said anything as he did so. (Tr., p.208, Ls.19-21; *see generally* Exhibit 27.) However, at the preliminary hearing, Ms. Rey testified that the random person had said something to the effect of "You're going to hit a girl?" when he punched Mr. Gunter. (Prelim. Tr., p.20, Ls.1-5.)

Medical personnel documented several bruises or scrapes on Ms. Rey's head, arms, torso, and legs. (*See generally* Exh., pp.12-19, 23-37.) The State ultimately charged Mr. Gunter with two counts of domestic battery.[3] (R., pp.44-45.) The first charge was for "punching and/or hitting" Ms. Rey on the first evening. (R., p.45.) The second charge was for "striking, punching, and/or slamming a door" on Ms. Rey on the second evening and causing a traumatic injury in the

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[2] The random person was never identified. (*See* Tr., p.25, Ls.9-12.) As such, he was not available to testify at trial. (*See generally* Tr.) Although there were points in the trial where he was described as a "neighbor," (*see, e.g.,* Tr., p.257, L.21 - p.258, L.2) in order to maintain clarity between the two unidentified people who were involved in this case, the one who called 911 with Ms. Rey will be referred to as "the neighbor" and the one who punched Mr. Gunter will be referred to as "the random person."

[3] There was an allegation for an enhancement based upon a prior conviction attached to both charges, but that enhancement became irrelevant based on the verdict rendered. (*See* R., p.45; Tr., p.352, Ls.4-6.)

form of "swelling,[4] bruising, and/or scrapes" in doing so. (R., p.45) Mr. Gunter exercised his right to a trial.

On the morning of trial, both the prosecutor and Mr. Gunter indicated there were some evidentiary issues which needed to be taken up. (Tr., p.11, Ls.4-6.) One of them dealt with the portions of the 911 recording and of a body camera video of an interrogation of Mr. Gunter which the State intended to present as exhibits. Defense counsel asserted that copies of the redacted exhibits had only been provided the week before. (*See* Tr., p.11, Ls.13-16.) Among the issues raised with respect to those proposed exhibits, Mr. Gunter moved for the redaction of the references to the random person punching Mr. Gunter. (Tr., p.15, Ls.2-21; *see also* Tr., p.24, Ls.11-14 (moving to exclude the witnesses from talking about the incident with the random person because it was not relevant).) The district court took that motion under advisement so it could review the proposed exhibits. (Tr., p.19, Ls.8-11, p.23, Ls.21-25.) However, it stated that it felt the incident with the random person was probably relevant and not unduly prejudicial. (Tr., p.26, Ls.8-17.)

After having a chance to review the proposed exhibits, the district court revised its initial thoughts. Specifically, it was concerned that the recitation of what the neighbor had said was hearsay. (Tr., p.144, Ls.6-10.) It also pointed out, "if there's no context for him being punched, then the fact that he's punched isn't particularly relevant." (Tr., p.144, Ls.22-24.) When the district court put that question to the prosecutor, the prosecutor conceded the punching was only probative if "we know why he got punched." (Tr., p.145, Ls.17-20.) The prosecutor tried to argue that the statement should still be admitted because it would not be admitted for its truth, but the district court rejected that argument. (*See* Tr., p.145, L.20 - p.146, L.15.) The district

[4] There is a typo in the charging document with respect to the term "swelling" which was corrected at the trial. (*See* R., p.45; Tr., p.249, Ls.1-12.)

court also noted "there's no way to test whether or not his perception was accurate, whether or not there was other motivations for him to make that statement." (Tr., p.146, Ls.20-23.) The district court ultimately excluded the random person's statement, but despite its initial concerns about its relevance without that context, it still allowed the State to present evidence of the fact that Mr. Gunter had been punched. (Tr., p.146, L.24 - p.147, L.11.) In clarifying the precise scope of that ruling, the prosecutor represented that Ms. Rey "didn't hear anything that was said. She just saw it." (Tr., p.147, Ls.12-14.)

However, when Ms. Rey actually testified about the punching incident, she testified consistent with her preliminary hearing testimony: that the random person was walking down the road and ran over to punch Mr. Gunter in the face, saying, "You're going to hit a girl?" (Tr., p.202, Ls.8-16.) Mr. Gunter objected and the district court sustained that objection, and *sua sponte* instructed the jurors to disregard that statement. (Tr., p.202, Ls.17-22.)

Subsequently, out of the presence of the jury, Mr. Gunter moved for a mistrial based on Ms. Rey's testimony about the random person's statement. (Tr., p.204, Ls.15-19.) Defense counsel argued it was prejudicial and violated Mr. Gunter's right to confrontation. (Tr., p.204, Ls.20-24.) She also argued the curative instruction was not sufficient to cure the prejudice that particular statement caused. (Tr., p.204, L.25 - p.205, L.4.) The prosecutor explained that she had not been trying to elicit that particular testimony. (Tr., p.206, Ls.11-13.) The district court found the prosecutor believable in that regard based on her prior representation that she did not believe Ms. Rey knew what was said, and as such, there had been no reason to admonish her to not go into that topic. (Tr., p.206, Ls.13-22.)

The district court concluded the prejudice from the presentation of that statement was not enough to undermine Mr. Gunter's right to a fair trial because it had been a "close call" on

whether to admit it in the first place. (Tr., p.205, Ls.10-12.) The district court explained that it was relevant because "a neutral party rushing in and punching a perceived attacker in the midst of a conflict is sort of an understandable reaction." (Tr., p.205, Ls.12-17.) It also concluded his statements would probably be admissible hearsay under the present sense impression or excited utterance exceptions. (Tr., p.205, Ls.17-21.) However, it explained it had excluded that statement in an abundance of caution because of the potential confrontation issues: "we don't have that person and we can't ask him what his state of mind was and we don't have any other information about the state of mind." (Tr., p.205, L.22 - p.206, L.2.)

At the end of the first day of trial, the prosecutor asked the district court for permission to recall one of her witnesses to rehabilitate Ms. Rey's testimony. (Tr., p.245, Ls.1-4.) The district court declined to allow the prosecutor to do so. It explained that, while Ms. Rey's testimony had been challenged on cross-examination, it was on the basis that she could not remember aspects of the argument due to the influence of alcohol, and not that her testimony was fabricated. (*See* Tr., p.246, Ls.4-10.) As such, the district court specifically found that Ms. Rey's testimony had not actually been "impeached" to the point where evidence bolstering her credibility would be relevant. (Tr., p.246, Ls.11-14.)

The district court reaffirmed its decisions in that regard when the trial resumed. (Tr., p.254, L.19 - p.255, L.21.) For that same reason, the district court also excluded a video of the officer interviewing Ms. Rey as improperly bolstering. (Tr., p.256, Ls.11-14.) Nevertheless, it noted that its rulings on this issue could change if Mr. Gunter opened the door during his anticipated testimony. (Tr., p.258, Ls.6-15.) However, Mr. Gunter did not open that door. In fact, on cross-examination, Mr. Gunter refused to say that Ms. Rey was lying; rather, he said her testimony was just "her perspective, her perception. I don't know where she got her injuries or

her bruises." (Tr., p.292, Ls.3-12.) After the defense rested there was a bench conference which was not recorded. (*See* Tr., p.296, Ls.12-17.) After that bench conference, prosecutor declared she had no rebuttal evidence to offer. (Tr., p.296, Ls.17-18.)

The jury subsequently acquitted Mr. Gunter on the charge relating to the first evening, but found him guilty as charged with respect to the second evening. (R., pp.121-22.) Thereafter, the district court imposed a unified sentence of ten years, with six years fixed. (R., pp.156-58.) Mr. Gunter filed a notice of appeal timely from the judgment of conviction. (R., pp.160-62.)

ISSUES

I. Whether the district court erred by not excluding the evidence of the random person punching Mr. Gunter as irrelevant.

II. Whether the district court erred by not ordering a mistrial based on the improper reference to what the random person said at trial.

III. Whether the accumulation of errors in this case requires reversal even if this Court determines them all to be individually harmless.

ARGUMENT

I.

The District Court Erred By Not Excluding The Evidence Of The Random Person Punching Mr. Gunter As Irrelevant

A. Standard Of Review

The determination of whether evidence is relevant is a matter of law reviewed *de novo*. *State v. Garcia*, 166 Idaho 661, ___, 462 P.3d 1125, 1134 (2020). Evidence which is not relevant is not admissible at trial. I.R.E. 402.

B. As The Prosecutor Conceded, The Fact That A Random Person Punched Mr. Gunter, Without Any Additional Context, Was Not Relevant

Evidence is only relevant if it has a tendency to make a fact of consequence in resolving the case more or less likely. I.R.E. 401; *accord Garcia*, 462 P.3d at 1134 (noting that I.R.E. 401 only requires that the evidence be probative and material to be relevant; there is no requirement that the fact to which the evidence is probative and material be "in dispute"). As the district court initially pointed out, the mere fact that somebody ran up and punched Mr. Gunter has no tendency to make any material fact in this case more or less relevant. (Tr., p.144, Ls.22-24.) In fact, when the district court put that question to the prosecutor, the prosecutor conceded that the punching incident was not probative to anything if it was not presented in context. (Tr., p.145, Ls.17-20.)

The district court's observation and the prosecutor's concession were appropriate. The material facts which Count II required the State to prove was that, on a specific date, Mr. Gunter had struck, punched, or slammed a door on Ms. Rey, who was a household member, and had caused swelling, bruises, or scrapes in doing so. (*See* R., p.45.) The fact that Mr. Gunter got punched by some random person, by itself, does not make any of those material facts more or

less likely. This is particularly true given that the record is clear that the punch did not occur until after the confrontation between Mr. Gunter and Ms. Rey was over – she had been led across the street by the neighbor to call 911. *See also State v. Kralovec*, 161 Idaho 569, 573 (2017) (making it clear that this sort of evidence cannot be admitted to simply "complete the story," as that would be improper *res gestae*).

Therefore, the district court erred by allowing the State to present evidence about the mere fact that Mr. Gunter got punched by a random person after the confrontation with Ms. Rey had been broken up because that evidence was not relevant.

II.

The District Court Erred By Not Ordering A Mistrial Based On The Improper Reference To What The Random Person Said At Trial

A. Standard Of Review

As the Idaho Supreme Court has noted, when evaluating a decision to deny a motion for mistrial in criminal cases the appellate analysis:

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

State v. Johnson, 163 Idaho 412, 421 (2018) (internal quotation omitted). Since such issues are not properly reviewed for abuse of discretion, it appears the review for "reversible error" is one of free review. *See id.*

B. The Random Person's Statement Was Never Admissible, And The District Court's Conclusion That Admissibly Was A "Close Question" Was Based On A Clearly Erroneous Understanding Of The Facts

The trial court should declare a mistrial when an error occurs during trial which is prejudicial to the defendant and, thus, deprives him of his right to a fair trial. I.C.R. 29.1(a). The district court concluded that Ms. Rey's improper recitation of the random person's statement was not unduly prejudicial, and so, did not require a mistrial, because its exclusion was a "close question" since "a neutral party rushing in and punching a perceived attacker *in the midst of a conflict* is sort of an understandable reaction." (Tr., p.205, Ls.12-17 (emphasis added).) That is a clearly erroneous finding. *See Lovitt v. Robideaux*, 139 Idaho 322, 325 (2003) (explaining a finding is clearly erroneous when it is not supported by substantial, competent evidence).

The record makes it clear that the confrontation between Mr. Gunter and Ms. Rey *was over* at the time the random person punched Mr. Gunter. By the time Mr. Gunter got punched, Ms. Rey had been led across the street by another neighbor and was on the phone with 911. (*E.g.,* Tr., p.201, Ls.8-20; Exhibit 27.) Thus, the punch did not occur "in the midst of a conflict," and so, the statement's admissibility on that basis was not actually a "close question." That means the prejudicial impact from the erroneous presentation of that information remained high and should have resulted in a mistrial.

C. The Erroneous Presentation Of The Random Person's Statement Was Prejudicial To Mr. Gunter And His Right To A Fair Trial

The random person's statement was extraordinarily prejudicial for several reasons. First, regardless of whether it might have satisfied the hearsay rules, presenting it still violated Mr. Gunter's right to confrontation. *See* U.S. CONST., amend VI. The Confrontation Clause prohibits the admission of out-of-court, testimonial statements absent an opportunity to cross

examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). One type of "core" testimonial statements is "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *State v. Hooper*, 145 Idaho 139, 143 (2007) (quoting *Crawford*, 541 U.S. at 51-52).

The random person's statement, which was made *after* the confrontation between Mr. Gunter and Ms. Rey had ended, is precisely the type of statement an objective witness would reasonable believe would be available for use at a later trial. *Compare Davis v. Washington*, 547 U.S. 813, 822 (2006) (drawing a distinction between statements aimed at addressing an on-going emergency, which are non-testimonial, and statements made after the emergency is resolved, which are testimonial under *Crawford*).[5] The random person's statement was a direct accusation, an assertion of what had happened as a justification for the battery the random person was about to commit. Thus, it was a statement which an objective person would reasonably believe was designed to establish prior facts and would be available for use in *two* potential subsequent trials. As such, that statement was testimonial. Since the random person's identity was never discovered, and thus, he was unavailable to cross-examine, there should never have been any question, much less a close question, about the admissibility of his out-of-court, testimonial statement.

In fact, it was these constitutionally-based concerns which had led the district court to exclude the statement in the first place. (*See* Tr., p.146, Ls.20-23; Tr., p.205, L.22 - p.206, L.2.) Its determination that those concerns could be outweighed by the fact that the statements would

[5] While *Davis* was dealing with statements made in response to official questioning, the Supreme Court specifically noted that its analysis in that regard was also applicable to statements not made under interrogation. *Davis*, 547 U.S. at 822 n.1. Indeed, it pointed out that the quintessential example of improper testimonial evidence – the letter in the trial of Sir Walter Raleigh – was "plainly *not*" made in response to official questioning. *Id.* (emphasis from original).

be admissible under the hearsay rules is troublesome because it essentially amounts to the analysis allowed under *Ohio v. Roberts*, 448 U.S. 56 (1980), which *Crawford* expressly overruled. Under *Roberts*, introducing an out-of-court statement at trial would not violate the Confrontation Clause "so long as it has adequate indicia of reliability—*i.e.*, falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." *Crawford*, 541 U.S. at 42 (internal quotes omitted). *Crawford* explained that sort of analysis was improper because it replaced the constitutionally-prescribed method of testing evidence (cross-examination) with the "wholly foreign," constitutionally speaking, judicial determination of reliability method of testing evidence. *Id.* at 62. Such an approach, *Crawford* declared, "is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Id.* at 62-63. As such, "[t]he unpardonable vice of the *Roberts* test . . . [is] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 63.

The district court's determination – that the lack of cross-examination was not significantly concerning because the statements might satisfy the lesser standards set by the hearsay rules – echoes the unpardonable vice of *Roberts*. Rather, as *Crawford* made clear, the confrontation violation presents a prejudice all its own, unmitigated in any degree by the district court's hearsay analysis, because, without the requisite confrontation, the jurors could convict Mr. Gunter, not unlike Sir Walter Raleigh, based on precisely the sort of evidence the Constitution excludes. Simply put, this portion of the prejudice demonstrates Mr. Gunter's right to a fair trial was vitiated by the deprivation of this fundamental constitutional right.

Second, a consideration of the whole record reveals additional prejudice from this error in light of the district court's subsequent decisions to exclude other evidence to bolster Ms. Rey's

testimony as being irrelevant. (Tr., p.246, Ls.11-14.) Since the random person did not get involved until after the confrontation between Mr. Gunter and Ms. Rey was over, his statement also only served to bolster Ms. Rey's credibility in the way prohibited by the district court's subsequent rulings. Thus, the random person's statement was of a singular nature in the context of everything presented to the jury – it was the *only* contemporaneous evidence bolstering Ms. Rey's allegations of the actual battery.[6]

The prejudice in that regard is enhanced by the fact that the State's other evidence was not overwhelming. The jury acquitted Mr. Gunter on Count I despite Ms. Rey's testimony about Mr. Gunter batting her head between his hands, and her testimony (corroborated by Mr. Gunter himself as well as pictures taken by medical personnel) that she had otherwise-unexplained injuries the following morning. The evidence presented on Count II was essentially the same – Ms. Rey's testimony that Mr. Gunter battered her, Mr. Gunter corroborated other aspects of her testimony (namely that he was chasing her around the car), and there were pictures of otherwise-unexplained injuries on Ms. Rey. The main difference in the evidence was the intervention of the other people which led to this incident being reported. Thus, the probative value of the improperly-presented evidence of the random person's statement was high in the context of this particular case.

Finally, it is worth noting that, had the district court properly ruled on the admissibility of the punch itself when it initially and properly excluded the random person's statement, this issue would likely have never arisen. A proper ruling excluding the punch itself would have meant the

[6] Certainly, there was other evidence corroborating other aspects of Ms. Rey's testimony, such as the picture of the contents of the refrigerator on the floor. However, since Ms. Rey did not testify that Mr. Gunter *actually hit her* (or even tried to hit her) with any of those items, that evidence does not corroborate her testimony on the material aspects of the battery charge in the same way the random person's comment does. Rather, that reinforces the extraordinary prejudice the random person's statement presents in the context of this case.

prosecutor would not have been asking Ms. Rey about what she saw after the confrontation between her and Mr. Gunter ended.

To that point, the district court's acceptance of the prosecutor's assertion – that she was not trying to elicit the statement because she did not know Ms. Rey knew what the random person had said (Tr., p.206, Ls.13-22) – is also problematic. That is because the record demonstrates the prosecutor should have been aware that Ms. Rey did, in fact, know what the random person said.

At the preliminary hearing, Ms. Rey specifically testified about the random person's statements. (Prelim. Tr., p.20, Ls.1-5.) Thus, it is clear the State, as a party, was on notice that Ms. Rey knew what the random person had said. Moreover, while the trial prosecutor was different than the prosecutor who handled the preliminary hearing, the record indicates the trial prosecutor had reviewed Ms. Rey's preliminary hearing testimony, given that the trial prosecutor had initially moved the district court to allow Ms. Rey's preliminary hearing testimony to be introduced in lieu of live testimony. (*See* R., pp.80-87.) As such, the record indicates that the prosecutor certainly should have known that Ms. Rey could and would testify to the random person's statements. As such, asking that question without having alerted Ms. Rey to the district court's ruling *in limine* was, at least, grossly negligent. *Cf. State v. Ellington*, 151 Idaho 53, 61 (2011) (finding prosecutorial misconduct when a witness gratuitously commented on the defendant's silence even though the prosecutor asserted he had framed the question to try to avoid eliciting that particular evidence). At any rate, an objective review of the whole record (which is the applicable standard, *Johnson*, 163 Idaho at 421) reveals that the gross negligence in eliciting that improper testimony demonstrates that the erroneous presentation of the random person's statement deprived Mr. Gunter of his right to a fair trial.

For any or all these reasons, a review of the full record demonstrates the erroneous introduction of the random person's statement is one of reversible error because of its significant, continuing impact on the trial, which deprived Mr. Gunter of his right to a fair trial.

D. The Instruction To Disregard The Random Person's Statement Which The District Court Gave Was Not Sufficient To Cure The Prejudice Caused By The Improper Eliciting Of That Statement

When a curative instruction is given, it is an acknowledgement that an error is likely to have a prejudicial impact on the trial. Thus, the fact that the district court gave such an instruction *sua sponte* belies its subsequent assertion that the prejudice caused by the jury learning about the random person's statement was minimal.

And while curative instructions will often sufficiently mitigate such prejudice, and thus, avoid the need for a mistrial, they will not always do so. *State v. Watkins*, 152 Idaho 764, 767 (Ct. App. 2012) (clarifying that the existence of a curative instruction is a factor in evaluating whether an error affected the outcome of the trial, but it is not dispositive of that analysis); *accord Garcia*, 462 P.3d at 1138-39 (explaining the evaluation of harmless error looks at whether the probative impact of the error is minimal when compared to everything else presented to the jury). Some errors can still have non-minimal probative force in the context of a case *despite* a curative instruction being given. *See Watkins*, 152 Idaho at 767. Such is the case here.

First, curative instructions cannot always be presumed to be effective, regardless of the forcefulness of the curative instruction, because of the "'practical and human limitations of the jury system.'" *Id.* at 768 (quoting *Bruton v. United States*, 391 U.S. 123, 125 (1968)). In other words, sometimes the evidence at issue is so impactful in the context of the case that the jurors, as a product of human nature, will consider it despite the curative instruction. *See Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., with whom Frankfurter, J., and Murphy J.,

joined, concurring in judgment and opinion) (noting "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction") (internal citations omitted).

This was a case which boiled down to a credibility determination between Mr. Gunter and Ms. Rey. During *voir dire*, this jury panel was asked about how they would determine credibility in such cases, and several mentioned they would look to whether other people had seen what was going on. (*See generally* Tr., p.63, L.25 - p.70, L.17.) For example, Juror Number 4 said some other evidence she would like to see was, "Just witnesses or are there things other than the testimony of the two people," and when asked, "everybody" on the venire panel agreed with that view. (Tr., p.64, L.24 - p.65, L.12.) Juror Number 5 was more assertive, saying he would "[d]efinitely" be looking for whether there was "testimony from other witnesses" to the event, and Juror Number 6 agreed with that assertion.[7] (Tr., p.65, Ls.15-25.) Juror Number 11 specifically mentioned she would be looking for to see if the neighbors were involved because "neighbors usually hear, you know, arguing and bickering leading up to incidents," though she did not necessarily expect the prosecutor to call neighbors to testify. (Tr., p.70, Ls.6-16.)

The random person's statement was precisely the sort of additional evidence the jurors said they would be looking for in order to inform their credibility determination between Mr. Gunter and Ms. Rey. Moreover, because of the district court's decision not to allow other bolstering evidence, the random person's statement was the *only* such evidence which the jurors actually heard. As such, in the context of this case, it was the sort of evidence the jurors would, as a product of human nature, be hard-pressed to ignore despite the curative instruction.

[7] Juror Number 6 actually sat on the jury. (*See* Tr., p.123, Ls.7-11.)

In fact, several of the potential jurors acknowledged this aspect of human nature, as they admitted they might struggle if put in that sort of situation. Specifically, defense counsel asked the venire panel how they would judge credibility in a he-said, she-said case if one of the parties did not present their version of events. (Tr., p.101, Ls.19-22.) Several of the potential jurors – including Jurors Number 9 and 23, who both actually sat on the jury (Tr., p.123, Ls.7-11) – indicated they would struggle to not let the defendant's silence in that regard affect their considerations even if there were an instruction from the judge to do so, though they affirmed they would try to follow such an instruction. (Tr., p.105, Ls.5-22; Tr., p.106, L.16 - p.107, L.9; *see generally* Tr., p.101, L.19 - p.109, L.3.) The fact that these jurors admitted they would potentially struggle with instructions that went against their initial instincts about weighing the evidence reveals that this is the sort of case where the practical and human limitations of the jury system are at issue and this is the sort of information that these jurors cannot be presumed to have aside despite the district court's curative instruction. *Cf. State v. Joy*, 155 Idaho 1, 11-12 (2013) (holding the erroneous introduction of evidence was not harmless because resolution of the case "is primarily based upon whose version of events the jury believes" and there was no testimony from other eyewitnesses presented); *State v. Barcella*, 135 Idaho 191, 198-99 (Ct. App. 2000) (holding the erroneous introduction of evidence through a gratuitous comment by a witness was harmless when the witness in question was one of twenty state witnesses and the jury had heard various other testimony of other eyewitnesses).

Second, curative instructions cannot be presumed effective in cases where "the evidence presents a close question for the jury." *Watkins*, 152 Idaho at 768 (citing *State v. Keyes*, 150 Idaho 543, 545 (Ct. App. 2011). The record reveals this case presented a close question. As discussed in Section II(C), *supra*, the jurors were obviously skeptical of Ms. Rey's testimony,

given that they acquitted Mr. Gunter on Count I and the evidentiary basis for Count II was much the same as was offered for Count I. Thus, considered in the full context of the case, the significant prejudice caused by the erroneous presentation of the random person's statement was not sufficiently mitigated by the curative instruction, which means a mistrial still should have been ordered despite the presence of such an instruction.

III.

The Accumulation Of Errors In This Case Requires Reversal Even If This Court Determines Them All To Be Individually Harmless

Even if this Court determines that each of the errors discussed *supra* was harmless by itself, this Court should still vacate Mr. Gunter's conviction under the cumulative-error doctrine. *See, e.g., State v. Field*, 144 Idaho 559, 572-73 (2007). The accumulation of independently-harmless errors may still deprive the defendant of his right to a fair trial. *Id.* In order to find cumulative error, the appellate court must first find more than one instance of error. *State v. Sheahan*, 139 Idaho 267, 287 (2003). To prove the accumulated errors harmless, the State would have to show that the guilty verdict rendered in this case was surely unattributable to the cumulative effect of the errors. *See State v. Whitaker*, 152 Idaho 945, 953 (Ct. App. 2012); *see also Garcia*, 462 P.3d at 1138-39 (clarifying the standard for harmless error analysis).

In this case, there are several instances of error. For the reasons discussed *supra*, there is a reasonable possibility that the combined effect of those errors was not minimal in the fabric of the entire case, and so, contributed to Mr. Gunter's conviction. As a result, even if all those errors are found to be independently harmless, this Court should still vacate the judgment of conviction and remand this case for a new trial because the accumulated errors deprived Mr. Gunter of his right to a fair trial.

CONCLUSION

Mr. Gunter respectfully requests this Court vacate his conviction and remand this case for further proceedings.

DATED this 19th day of October, 2020.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 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
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas