1-12-2018

State v. Bernal Respondent's Brief Dckt. 44556

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44556**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR-FE-2016-4439**
	)	
JOHN JACOB BERNAL,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

John Jacob Bernal appeals from the judgment of the district court entered upon the jury verdict finding him guilty of aggravated assault, use of a deadly weapon during the commission of a crime, reckless driving and leaving the scene of an accident involving vehicle damage.

On appeal, Bernal argues the unobjected-to reckless driving and aggravated assault instructions created a fatal variance which amounted to fundamental error. He also argues the prosecutor made statements in closing argument that amounted to fundamental error.

Statement of Facts and Course of Proceedings

Carmen Becerra and Bernal had been dating but recently broke up. (8/2/16 Tr., p. 14, L. 12 – p. 15, L. 3.) Ms. Becerra was leaving her cousin's house in Meridian, when she was surprised to see Bernal. (8/2/16 Tr., p. 15, L. 4 – p. 16, L, 4.) Ms. Becerra agreed to meet Bernal at his aunt's house, who lived off Granger street in Boise. (8/2/16 Tr., p. 16, Ls. 5-13.) Ms. Becerra drove a dark blue 2002 Ford Explorer. (8/2/16 Tr., p. 16, Ls. 12-15.) Bernal drove a light blue Buick. (8/2/16 Tr., p. 16, Ls. 16-24.)

While she was driving on Five Mile Road, Ms. Becerra had to stop because of a construction zone. (8/2/16 Tr., p. 16, L. 25 – p. 22, L. 12; Ex. 1.) When she stopped,

Bernal got out of his car and came towards Ms. Becerra's car. (Id.) Bernal looked angry. (Id.) Ms. Becerra turned right on to Cory Lane in an attempt to avoid the situation. (Id.)[1]

Ms. Becerra drove fast in an attempt to get away from Bernal. (Id.) Bernal followed Ms. Becerra on to Cory Lane and he also drove fast. (Id.) Bernal followed Ms. Becerra very close behind her. (Id.) He was tailgating her car. (Id.) Ms. Becerra was scared. (Id.) She drove to Hampton Avenue and took a right on Granger Avenue. (Id.) When she turned on to Granger Avenue, Ms. Becerra sped up and Bernal sped up. (Id.) Ms. Becerra hit her brakes and Bernal also hit his brakes but it caused him to lose control and spin out. (Id.) Bernal's car spun out and crashed into a parked car. (Id.)

Bernal got out of his car. (8/2/16 Tr., p. 22, L. 16 – p. 25, L. 25.) Ms. Becerra then drove off and towards her home on Alliance Street, where she lived with her brother and her brother's family. (8/2/16 Tr., p. 22, L. 16 – p. 25, L. 25.) When Ms. Becerra got home she went inside. (8/2/16 Tr., p. 25, Ls. 8-25.)

While Ms. Becerra was driving she had called her brother, Gustavo Becerra, for help. (8/2/16 Tr., p. 22, L. 16 – p. 25, L. 25; p. 31, Ls. 16-24.) On the phone, Gustavo could hear screaming, speeding, braking, commotion, and Ms. Becerra abruptly hanging up. (8/2/16 Tr., p. 33, Ls. 19-25.) After Gustavo received the call from his sister he drove to their house. (8/2/16 Tr., p. 35, L. 24 – p. 39, L. 1.) On his way home, Gustavo saw Bernal purposefully walking towards the house. (8/2/16 Tr., p. 38, Ls. 1-13.)

[1] It appears from Exhibit 1, a Google Maps printout, that it is Cory Street that intersects with Five Mile Road. (See Ex. 1.) It does appear that Cory Street becomes Cory Lane after it intersects with Mitchell Street. (See id.)

When Gustavo got home he was scared to stay in the house, so he got a baseball bat and went outside to wait to see what Bernal would do. (8/2/16 Tr., p. 39, L. 14 – p. 41, L. 19.) He set the bat against the side of the house. (Id.) Almost immediately after Gustavo got on the porch, Bernal arrived on foot. (Id.) Gustavo started calling Bernal's name. (Id) He told Bernal that he needed to go, that Bernal needed to leave. (Id.) Bernal did not listen. (Id.) Bernal just looked Gustavo right in the eyes. (Id.) Bernal had his hands in his pocket and was holding something. (Id.) Bernal kept walking towards Gustavo. (Id.) Gustavo kept telling Bernal to leave, to "just go." (Id.) Bernal kept walking. (Id.) When Bernal made it about halfway through the yard, Gustavo, who was still on the porch, finally picked up the baseball bat, which had been leaning against the house. (Id.)

Bernal kept moving towards Gustavo, and when Bernal got close he told Gustavo to stay out of it and to move out of the way. (8/2/16 Tr., p. 41, L. 24 – p. 44, L. 23.) Bernal pulled his hand out of his pocket and Gustavo could see Bernal was holding a knife with a blade of about 4 to 5 inches long. (Id.) Gustavo hit Bernal on the leg with the bat. (Id.) Bernal took a step back, and pulled out the blade completely. (Id.) Bernal took an aggressive stance. (Id.) Gustavo stepped back. (Id.) Gustavo again told Bernal to leave. (Id.) Bernal said he needed a ride, and Gustavo told him he was not getting a ride. (Id.) Bernal then started approaching the door again and Gustavo got in between him and the door. (Id.) Bernal then lunged at Gustavo with the knife out. (Id.) Gustavo again hit him with the bat. (Id.)

Bernal backed up and told Gustavo that he was going to catch him sleeping, and he was going "F" him up. (8/2/16 Tr., p. 44, L. 24 – p. 47, L. 24.) Gustavo backed up again and kept telling Bernal to leave. (Id.) Bernal kept threatening Gustavo, but began to reluctantly walk away. (Id.) Gustavo started following Bernal to make sure Bernal left his property. (Id.) Bernal walked to the street and Gustavo walked to the edge of his property. (Id.) Bernal then "whipped the knife out of his pocket," turned around, and lunged at Gustavo again. (Id.) Bernal took about three steps and swiped the blade at Gustavo's face. (Id.) The knife missed Gustavo's face by only 3 to 4 inches. (Id.)

Bernal said that he would be back and he would see Gustavo soon. (Id.) Bernal slowly walked away. (Id.) Once Bernal was gone Gustavo called the police. (Id.)

The state charged Bernal with aggravated assault, use of a deadly weapon during the commission of a crime, reckless driving and leaving the scene of an accident involving vehicle damage. (R., pp. 47-49.)

At trial, Ms. Becerra testified that she saw Bernal lunge toward her brother and saw her brother hit Bernal with a bat. (8/2/16 Tr., p. 25, L. 8 – p. 26, L. 25.) Gustavo also testified about the assault. (See 8/2/16 Tr., p. 41, L. 24 – p. 47, L. 24.) Mr. Le, the owner of the parked car that was hit by Bernal, also testified. (See 8/2/16 Tr., p. 62, L. 7 – p. 66, L. 22; Ex. 2.) Mr. Le parked his car in front of his house on Granger Avenue. (Id.) Mr. Le saw a blue Buick hit and damage his parked car. (Id.) The driver of the blue Buick never stopped or talked to Mr. Le. (Id.)

After the close of evidence, Bernal told the district court that he did not have any objections to the proposed jury instructions. (8/2/16 Tr., p. 70, Ls. 2-25.) Nor did Bernal request any additional jury instructions. (Id.)

During the closing arguments, Bernal argued, among other things, that Mr. Le did not identify Bernal as the driver of the car and "We don't really know whose car, if any, Mr. Bernal hit." (See 8/2/16 Tr., p. 96, Ls. 10-15.) Bernal also argued that Gustavo's testimony was not credible. (8/2/16 Tr., p. 97, L. 12 – p,. 102, L. 20.) Bernal argued that Gustavo was actually the aggressor and that Bernal never had a knife. (See id.) In addition, Bernal argued that Ms. Becerra was credible because she testified, contrary to her statement to police, that she did not see the knife herself. (8/2/16 Tr., p. 97, Ls. 19-25.)

The jury found Bernal guilty of aggravated assault, use of the deadly weapon in the commission of the aggravated assault, reckless driving and leaving the scene of the accident involving vehicle damage. (8/3/16 Tr., p. 2, L. 8 – p. 4, L. 19; R., pp. 103-106.) The district court entered judgment and sentenced Bernal to ten years with three years fixed. (R., pp. 108-111.) Bernal timely appealed. (R., pp. 112-114.)

ISSUES

Bernal states the issues on appeal as:

> I. Did the district court's instruction to the jury on the elements of reckless driving constitute a fatal variance?
>
> II. Did the district court's instruction to the jury on the elements of assault constitute a fatal variance?
>
> III. Did the State commit prosecutorial misconduct by misrepresenting its theory of guilt?
>
> IV. Did the State commit prosecutorial misconduct during closing arguments by bolstering the testimony of its witnesses?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Bernal failed to show the district court committed fundamental error when it instructed the jury on the elements of reckless driving?

2. Has Bernal failed to show the district court committed fundamental error when it instructed the jury on the elements of assault?

3. Has Bernal failed to show the state's closing argument – that the state had introduced evidence proving assault under both definitions provided in the unobjected-to jury instruction – constituted prosecutorial misconduct and fundamental error?

4. Has Bernal failed to show the state impermissibly vouched for the credibility of witnesses during the closing argument, amounting to prosecutorial misconduct and fundamental error?

ARGUMENT

I.
The District Court Did Not Commit Fundamental Error When It Instructed The Jury On The Elements Of Reckless Driving Because The Elements Instruction Did Not Fatally Vary From The Information

A. Introduction

The district court instructed the jury on the elements of reckless driving. (R., p. 93.) Bernal did not object. (8/2/16 Tr., p. 70, Ls. 2-25.) On appeal, Bernal argues the reckless driving jury instruction fatally varied from the Information, because the Information referenced Five Mile Road, and the jury instruction did not specifically mention the road. (See Appellant's brief, pp. 6-13.) Contrary to his argument on appeal, the reckless driving instruction did not create a fatal variance because both the Information and the jury instruction referenced the same continuing driving event. Bernal was on notice of the charged conduct. Further, because his defense was that there never was any reckless driving, his defense was not impaired. Bernal has failed to show a variance, let alone a fatal one, and has thus failed to show fundamental error.

B. Standard Of Review

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, 224, 245 P.3d

961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated"; (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision"; and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Id. at 226, 245 P.3d at 978.

Whether an impermissible variance exists between a charging instrument and jury instructions is a question of law over which the appellate court exercises free review. State v. Sherrod, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998) (citing State v. Colwell, 124 Idaho 560, 565, 861 P.2d 1225, 1230 (Ct. App. 1993); State v. McBride, 123 Idaho 263, 266, 846 P.2d 914, 917 (Ct. App. 1992)).

C. The Reckless Driving Instruction Did Not Create A Fatal Variance And Was Not Fundamental Error

The state charged Bernal with reckless driving in violation of Idaho Code § 49-1401. (R., pp. 47-49.) The Information alleged:

> That the Defendant, JOHN JACOB BERNAL, on or about the 11th day of March, 2016, in the County of Ada, State of Idaho, did operate a motor vehicle, to-wit: a blue Buick upon Five Mile Rd., Boise, carelessly and heedlessly by driving aggressively and stopped his vehicle in front of Carmen Becerra's vehicle blocking traffic.

(Id.) Jury Instruction No. 12 provided the elements of reckless driving:

1. On or about March 11, 2016,
2. in the state of Idaho,

3. the defendant John Jacob Bernal drove or was in actual physical control of a vehicle
4. upon a highway, or upon public or private property open to the public, and
5. the defendant drove the vehicle carelessly or heedlessly or without due caution and circumspection and in a manner as to endanger or be likely to endanger any person or property[.]

(R., p. 93.) Bernal informed the district court that he did not have any objections to the court's jury instructions. (8/2/16 Tr., p. 70, Ls. 2 – 25.) Nor did Bernal request any additional jury instructions. (Id.)

On appeal Bernal now argues that Jury Instruction No. 12 created a variance with the Information amounting to fundamental error, because the jury instruction did not specify where the reckless driving took place. (See Appellant's Brief, pp. 6-13.) Bernal has failed to establish fundamental error.

1. Bernal Has Failed To Show That The Reckless Driving Instruction Violated His Constitutional Right To Due Process Because There Was No Variance And, Even If There Was A Variance, It Was Not Fatal

Bernal has failed to show there was a fatal variance in the reckless driving instruction that violated his unwaived constitutional rights. Determining whether there is an impermissible variance is a two-fold task. State v. Gas, 161 Idaho 588, 592, 388 P.3d 912, 916 (Ct. App. 2016). First, the court must determine whether there is a variance between the Information used to charge the crime and the instructions presented to the jury. Id. (citing State v. Brazil, 136 Idaho 327, 329, 33 P.3d 218, 220 (Ct. App. 2001)). Second, if the court determines a variance does exist, then the court must examine whether it rises to the level of prejudicial error requiring reversal of the conviction. Id. (citing Brazil, 136 Idaho at 329, 33 P.3d at 220). "A variance between a charging

instrument and a jury instruction necessitates reversal only when it deprives the defendant of the right to fair notice or leaves him or her open to the risk of double jeopardy." Id. (citing State v. Windsor, 110 Idaho 410, 417–18, 716 P.2d 1182, 1189–90 (1985); Brazil, 136 Idaho at 330, 33 P.3d at 221).

Bernal has failed the first step because there is no variance between the charging language in the Information and the jury instruction regarding reckless driving. (See R., pp. 47-49, 93.) A variance exists when a jury instruction allows a jury to find the defendant guilty of crimes other than those charged in the Information. See Brazil, 136 Idaho at 330, 33 P.3d at 221 (finding variance where instruction "allowed the jury to find Brazil guilty of batteries other than the shooting charged in the Information"). In Brazil, Brazil attacked his former girlfriend, bit her lips and ear, tore her underwear off and shot her twice in one finger. Id. at 328-329, 33 P.3d at 219-222. He also handcuffed her and carried her to his car. Id. Among other things the state charged Brazil with two counts of aggravated battery with a deadly weapon enhancement. Id. A jury convicted Brazil. Id. On appeal Brazil argued that his two aggravated battery convictions should be vacated because of a fatal variance between the Information and the jury instruction. Id. at 329, 33 P.3d at 222. The Information charged Brazil with two counts of aggravated battery, each under two alternative theories. Id. The first aggravated battery charge alleged Brazil caused great bodily harm by "shooting [the victim's] knuckle, and/or by means of a deadly weapon; instrument, to-wit: a firearm" and the second alleged that Brazil caused great bodily harm by "shooting the tip of [the victim's] finger, and/or by means of deadly

weapon; instrument, to-wit: a firearm[.]" Id. Jury Instruction No. 19 instructed the jury regarding the elements of aggravated battery for both counts:

> 3. the defendant WILLIAM HENRY BRAZIL committed a battery upon [the victim], and
>
> 4a. when doing so the defendant caused great bodily harm.
> and/or
> 4b. used a deadly weapon or instrument.

Id. The Court of Appeals held that a variance existed because each aggravated battery charge in the Information specifically limited the alleged injuries and the jury instruction did not. Id. This created a variance because testimony was elicited regarding additional injuries, including "that the victim suffered a lacerated ear lobe, a cut lip, two black eyes, a cut on her left eye, bruising on her ankles and wrists, and a wound on her scalp as a result of Brazil's attack." Id. "Thus, instruction 19 allowed the jury to find Brazil guilty of batteries other than the shootings charged in the information." Id.

Here, the jury instruction did not allow the jury to find Bernal guilty of reckless driving crimes other than the continuing reckless driving charged in the Information. The Information alleged that Bernal "on or about the 11th day of March, 2016, in the County of Ada, State of Idaho, did operate a motor vehicle, to-wit: a blue Buick upon Five Mile Rd., Boise, carelessly and heedlessly by driving aggressively and stopped his vehicle in front of Carmen Becerra's vehicle blocking traffic." (R., pp. 47-49.) The jury instruction stated Bernal was guilty of reckless driving if, on that same day, and upon public or private property, he "drove the vehicle carelessly or heedlessly or without due caution and circumspection and in a manner as to endanger or be likely to endanger any person or property[.]" (R., p. 93.) Unlike the aggravated battery charges in Brazil, the reckless

driving charge is a continuing course of conduct that cannot be separated out into discrete and separate driving events. See I.C. § 49-1401(1). If, during the same drive, the driver commits several driving violations (driving too fast, changing lanes without signaling, etc.) each separate driving violation is not a separate and distinct reckless driving charge. It is all one charge. That is exactly what the prosecutor argued during the closing argument. (See 8/2/16 Tr., p. 91, L. 22 – p. 94, L. 2.) While the words in the Information are more specific and the jury instruction uses different language, the offense is the same. Unlike in Brazil, there was no testimony elicited regarding some uncharged separate or distinct reckless driving crime. The jury could only find Bernal guilty of the single reckless driving crime he committed on March 11, 2016.

Bernal has also failed the second step of the fatal variance analysis. Even if there was a variance between the Information and the jury instruction, it was not fatal. "A variance between a charging instrument and a jury instruction necessitates reversal only when it deprives the defendant of the right to fair notice or leaves him or her open to the risk of double jeopardy." State v. Calver, 155 Idaho 207, 215, 307 P.3d 1233, 1241 (Ct. App. 2013) (citing Windsor, 110 Idaho at 417-418, 716 P.2d at 1189-1190; Brazil, 136 Idaho at 330, 33 P.3d at 221). Bernal does not argue that any variance in the reckless driving charge left him open to the risk of double jeopardy. (See Appellant's brief, pp. 6-12.) Bernal instead argues that he did not have fair notice of the reckless driving on Granger Street and thus was unable to present a defense to that allegation. (See id.) Bernal's argument is without merit.

Bernal had notice that his driving on Granger street was at issue. As noted above reckless driving involves a course of conduct, and Bernal's driving on Five Mile was connected to his driving on Granger Avenue. It is notable that defense counsel below never objected to the jury instruction. If defense counsel below did not have notice, defense counsel would have objected.

In addition, Count IV, the leaving the scene of the accident involving vehicle damage charge, alleged that Bernal "was the driver of a vehicle involved in an accident resulting in damage to a vehicle, to-wit: a Mercedes driven or attended by W. Lee [sic] at 9881 W. Granger Ave[.]" (R., pp. 47-49.) Thus, he was on notice that his driving on Granger Avenue was at issue.

Further, if a defendant's defense was not thwarted then there is no harm in any variance. See State v. Gas, 161 Idaho 588, 593, 388 P.3d 912, 917 (Ct. App. 2016) (citing State v. Ormesher, 154 Idaho 221, 296 P.3d 427 (Ct. App. 2012); State v. Hickman, 146 Idaho 178, 182, 191 P.3d 1098, 1102 (2008)). In Gas, the defendant alleged there was a fatal variance between the charging document, which charged Gas with rape, and the jury instruction. See id. at 592-593, 388 P.3d at 916-917. The Court of Appeals held that even if there were a variance it would not be fatal because Gas' defense was not thwarted by any potential variance. Id. at 593, 388 P.3d at 917. In Gas, the defendant's defense was that he was not even present for the rape. Id.

Bernal's defense was likewise not thwarted in this case. In closing argument, defense counsel addressed reckless driving and leaving the scene charges together and argued the evidence was not sufficient to prove either one. Specifically, Bernal argued

that Mr. Le was unable to identify that Bernal was the one driving on Granger Avenue who hit Mr. Le's car. (See 8/2/16 Tr., p. 96, L. 10 – p. 97, L. 5.)

> [Bernal] was going down the road; he is supposed to be meeting up with [Ms. Becerra], and all of sudden things go awry. We don't really know whose car, if any, Mr. Bernal hit. Mr. Le's testimony didn't identify John Bernal as the driver of the vehicle that hit his car.

(Id.) Bernal's defense regarding the reckless driving on Granger Avenue was that his driving was not reckless because he was following Ms. Beccera and she slammed on the brakes. (See 8/2/16 Tr., p. 97, Ls. 6-11.)

> As to the reckless driving, the testimony is that [Ms. Beccera's] driving down the road, [Bernal's] behind her, she slams on his [verbatim] brakes, and he goes to avoid a collision and hits a car. That's [Ms. Beccera's] testimony. That's not reckless driving if she slams on his brake – on her brakes and he goes to avoid a collision.

(Id.) Defense counsel clearly was not surprised that the entire course of driving on Five Mile to Granger constituted the basis for the reckless driving charge. Regardless of what the prosecutor's closing argument was, the defense did not depend on the reckless driving only occurring on Five Mile. Bernal's defense was that there was no reckless driving at all. Any variance caused by not explicitly using the words "Granger Avenue" in the information did not thwart Bernal's defense. Bernal has failed to show a variance, and even if there was a variance, it was not fatal and thus did not violate any of Bernal's unwaived constitutional rights.

2. Bernal Has Failed To Show That Any Variance Is Clear Or Obvious On The Record

Bernal argues that the error is clear and obvious from the record because the language used in the jury instruction is different from the language in the Information, and he claims he gained no strategic advantage from allowing the jury to convict him on an alternate act. (See Appellant's brief, p. 12.) While Bernal is correct that the language in the Information does not exactly match the language in the jury instruction, Bernal has still failed the second prong of the fundamental error analysis.

Simply because the language in the charging document is different from the language in the jury instruction does not mean there is clearly a variance or an error. For example in Calver, the language of the Information did not match the language used in the jury instruction, but the Court of Appeals held there was no variance. Calver, 155 Idaho at 215-216, 307 P.3d at 1241-1242 (holding that even though the Information and jury instruction provided different legal definition, the difference did not create a variance). Therefore, in order to determine whether the error alleged is clear this Court should look at more than simply the Information and the jury instruction. Bernal did not object to the reckless driving instructions, and at no time did he complain or argue that he was not given notice of the charged conduct. The fact that Bernal actually defended against the allegations and the evidence presented at trial, and did not object or complain about a lack of notice, demonstrates that any error is not clear error. In this case, the charged conduct involved driving on Five Mile, an accident on Granger Avenue and eventually led to an armed assault. (See R., pp. 47-49.) All of this was charged in the

Information, and there is no clear error in Bernal's decision to not object the jury instructions.

3. The Harmless Error Prong Of The Fundamental Error Analysis Is Moot

The third prong of the fundamental error analysis is moot. If this Court finds that Bernal has met the first and second prong of the fundamental error analysis, then this Court will necessarily have found the variance to be fatal. If this Court finds a fatal variance that is clear on the record then the state would concede that the error was not harmless. However, if this Court finds there was not a clear variance, or that it was not fatal, then this third prong is also moot because Bernal will have failed to show the first and/or second prongs of the fundamental error analysis.

II.
The Jury Instructions For Aggravated Assault Did Not Create A Fatal Variance And Therefore Did Not Constitute Fundamental Error

A. Introduction

The district court instructed the jury on the elements of aggravated assault and the definition of "assault." (R., pp. 89-90.) Bernal did not object. (8/2/16 Tr., p. 70, Ls. 2 – 25.) On appeal, Bernal argues that the instruction defining assault creates a fatal variance with the Information, because the instruction defining assault includes both an "assault-by-attempt" and "assault-by-threat" definition. (See Appellant's brief, pp. 14-18.) Contrary to his argument on appeal, the definition of assault did not create a fatal variance because, regardless of which definition of assault is used, both the Information and the

jury instructions required the state to prove that Bernal attempted to stab Gustavo with a knife.

Bernal was on notice of the charged conduct. Further, because his defense was that there never was any knife and that Gustavo was the aggressor, his defense was not impaired. Bernal has failed to show a variance and has failed to show fundamental error.

B. Standard Of Review

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it "constitutes fundamental error." Johnson, 149 Idaho at 265, 233 P.3d at 196. In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." Perry, 150 Idaho at 224, 245 P.3d at 976. Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated"; (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision"; and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Id. at 226, 245 P.3d at 978.

Whether an impermissible variance exists between a charging instrument and jury instructions is a question of law over which the appellate court exercises free review. Sherrod, 131 Idaho at 57, 951 P.2d at 1284 (citations omitted).

C. The Instruction Defining Assault Did Not Constitute Fundamental Error Because It Did Not Create A Fatal Variance

The state charged Bernal with aggravated assault in Count I of the Information:

> COUNT I
> That the Defendant, JOHN JACOB BERNAL, on or about the 11th day of March, 2016, in the County of Ada, State of Idaho, did unlawfully and with apparent ability, attempt to commit a violent injury upon the person of Gustavo Becerra, with a deadly weapon, to-wit: a knife and/or by means likely to produce great bodily harm, to-wit: by attempting to stab Gustavo Becerra with a knife.

(R., pp. 47-49.)

The district court instructed the jury regarding the elements of aggravated assault:

> 1. On or about March 11, 2016,
> 2. in the state of Idaho,
> 3. the defendant John Jacob Bernal committed an assault upon Gustavo Becerra
> 4. by attempting to stab him with a knife, and
> 5. the defendant committed that assault with a deadly weapon or instrument.

(R., p. 89.) The district court also instructed the jury on the definition of assault:

> An "assault" is committed when a person:
>
> (1) unlawfully attempts, with apparent ability, to commit a violent injury on the person of another; or
>
> (2) intentionally and unlawfully threatens by word or act to do violence to the person of another, with an apparent ability to do so, and does some act which creates a well-founded fear in the other person that such violence is imminent. "Imminent" means about to take place.

(R., p. 90.)

On appeal, Bernal argues the instruction defining assault amounted to a fatal variance because it allowed the jury to find that Bernal committed the assault by means of "intentional and unlawful threats." (See Appellant's brief, p. 15 ("The district court's

instruction to the jury on two theories, assault-by-attempt *and* assault-by-threat, is a variance.").) Bernal has failed to show this constitutes a variance, let alone a fatal one.

1. The Aggravated Assault Instruction Did Not Create A Variance Because Both The Jury Instruction And The Information Required The State To Prove That Bernal Attempted To Stab Gustavo Becerra With A Knife

Bernal has failed to show there was a fatal variance in the aggravated assault instruction that violated his unwaived constitutional rights. As cited above, determining whether there is an impermissible variance is a two-fold task. Gas, 161 Idaho at 592, 388 P.3d at 916. First, the court must determine whether there is a variance between the Information used to charge the crime and the instructions presented to the jury. Id. (citation omitted). Second, if the court determines a variance does exist, then the court must examine whether it rises to the level of prejudicial error requiring reversal of the conviction. Id. (citation omitted). "A variance between a charging instrument and a jury instruction necessitates reversal only when it deprives the defendant of the right to fair notice or leaves him or her open to the risk of double jeopardy." Id. (citations omitted).

Here, there is no variance. The Information alleged that Bernal "did unlawfully and with apparent ability, attempt to commit a violent injury upon the person of Gustavo Becerra, with a deadly weapon, to-wit: a knife and/or by means likely to produce great bodily harm, to-wit: by attempting to stab Gustavo Becerra with a knife." (R., pp. 47-49.) The instruction defining the elements of aggravated assault instructed the jury that Bernal was guilty if he "committed an assault upon Gustavo Becerra...by attempting to stab him with a knife" and that the assault was done with a deadly weapon. (R., p. 89.)

On appeal, Bernal errs by focusing almost exclusively on the instruction defining assault, and ignoring the aggravated assault elements instruction. (See Appellant's brief, pp. 13-18.) Bernal argues that because the instruction defining assault includes both the "assault-by-attempt" and "assault-by-threat" definition, it creates a variance with the Information. (See id.) However, this argument ignores the aggravated assault elements instruction, because regardless of which assault definition is used, the fourth element of the aggravated assault instruction still required the state to prove Bernal committed the assault "4. by attempting to stab [Gustavo] with a knife[.]" Thus, even if the "assault-by-threat" definition is used, the aggravated assault instruction still required the state to prove that Bernal attempted to stab Gustavo, with a knife, "with an apparent ability to do so" and that "such violence was imminent." (R., pp. 89-90.) This does not vary from the Information, which alleged that Bernal attempted to stab Gustavo with a knife.

Even if the definition of assault had to conform to the language of the elements instruction and the Information, it did. The "assault-by-threat" definition states that an "assault is committed when a person ... intentionally and unlawfully threatens by word **or act** to do violence to the person of another[.]" (R., p. 90) (emphasis added). The information alleged that Bernal attempted to stab Gustavo with a knife. (R., pp. 47-49.) Attempting to stab someone with a knife is a threat by act. Bernal has failed to show a variance.

Bernal has also failed the second step of the fatal variance analysis. "A variance between a charging instrument and a jury instruction necessitates reversal only when it deprives the defendant of the right to fair notice or leaves him or her open to the risk of

double jeopardy." Calver, 155 Idaho at 215, 307 P.3d at 1241 (citing Windsor, 110 Idaho at 417-418, 716 P.2d at 1189-1190; Brazil, 136 Idaho at 330, 33 P.3d at 221). Here, Bernal does not argue the alleged variance subjected him to the risk of double jeopardy, but instead argues that the alternate definition in the assault definition deprived him of the right to fair notice. (See Appellant's brief, pp. 14-18.) As noted above, the Information alleged that Bernal attempted to stab Gustavo with a knife – and that is exactly how the jury was instructed.

Further, if a defendant's defense was not thwarted then there is no harm in any variance. See Gas, 161 Idaho at 593, 388 P.3d at 917 (citations omitted). Bernal's defense at trial was that Gustavo's testimony was not credible, that Bernal never even had a knife, and Gustavo was the aggressor. (See 8/2/16 Tr., p. 97, L. 12 – p,. 102, L. 20.) Therefore, regardless which assault definition is used, Bernal's defense was not impaired. Bernal has failed to show a variance, let alone a fatal one. Bernal has failed the first prong of the fundamental error analysis.

2. Bernal Has Failed To Show That Any Variance Is Clear Or Obvious On The Record And Has Failed To Show That The Failure To Object Was Not A Tactical Decision

Again Bernal argues that the error is clear and obvious from the record because the language used in the jury instruction is different from the language in the Information, and he claims he gained no strategic advantage from allowing the jury to convict him on an alternate act. (See Appellant's brief, p. 17.) As explained above, this simplistic interpretation of what constitutes a variance is not supported by case law. See e.g. Calver, 155 Idaho at 215-216, 307 P.3d at 1241-1242. As above, where the claimed error

is lack of notice, it is hard to see how the error is clear where defense counsel did not object or claim a lack of notice. Instead of objecting or arguing he did not have notice, Bernal defended the allegations. There is not a clear lack of notice.

It is also not clear from the record that there was a variance because the aggravated assault instruction limited the assault to an attempted stabbing with a knife, and an attempted stabbing with a knife meets the assault-by-threat definition. Thus it is not clear that from the record there was even a variance. In addition, because Bernal's defense was that he did not even have a knife, and that the state's witnesses were not telling the truth, it very well could have been a tactical decision not to object to the assault instruction. It simply did not matter to Bernal's defense. Thus Bernal has failed the second prong of the fundamental error analysis.

3. The Harmless Error Prong Of The Fundamental Error Analysis Is Moot

Similar to the augment above, the third prong of the fundamental error analysis is moot. If this court finds that Bernal met the first and second prong of the fundamental error analysis, then this Court will necessarily have found the variance to be fatal. If this Court finds a fatal variance that is clear on the record then the state would concede the harmless error prong of the fundamental error analysis. However, if this Court finds there was not a clear variance, or that it was not fatal, then this third prong is also moot because Bernal will have failed to show the first prong of the fundamental error analysis.

III.
The Prosecutor's Argument That The State Had Proven The Elements Of Aggravated Assault, Including Both Definitions Of Assault, Was Not Misconduct

A. Introduction

The district court instructed the jury on the elements of aggravated assault and the definition of assault. (See R., pp. 89-90.) Bernal did not object to those instructions. (8/2/16 Tr., p. 70, Ls. 2 – 25.) During closing argument, the prosecutor argued that the state had introduced evidence that met all of the elements of aggravated assault, including evidence supporting both definitions of assault. (See 8/2/16 Tr., p. 84, L. 4 – p. 91, L. 6.) Bernal did not object. (See id.) On appeal, Bernal argues that the closing argument amounted to prosecutorial misconduct and fundamental error because, by citing the jury instruction defining assault, the prosecutor mispresented its theory of guilt and the law. (See Appellant's brief, pp. 19-25.) Bernal's argument on appeal fails. It was not misconduct, let alone fundamental error, for the state to argue that it introduced evidence that met the elements and definitions in the jury instructions.

B. Standard Of Review

"On appeal, the standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). If a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. Perry, 150 Idaho at 228, 245 P.3d at 980.

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it "constitutes fundamental error." Johnson, 149 Idaho at 265, 233 P.3d at 196. In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." Perry, 150 Idaho at 224, 245 P.3d at 976. Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated"; (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision"; and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Id. at 226, 245 P.3d at 978.

C. The State's Argument That It Proved All Of The Elements Of Aggravated Assault, As Instructed In The Jury Instructions, Was Not Prosecutorial Misconduct And Not Fundamental Error

During closing argument the prosecutor cited the jury instructions and argued that the state had introduced evidence that met all of the elements of aggravated assault, including both definitions of assault. (See 8/2/16 Tr., p. 84, L. 4 – p. 91, L. 6.) On appeal, Bernal argues that by referencing the two definitions of assault, as described in the jury instruction, the prosecutor misrepresented its theory of guilt and the law, and thus committed prosecutorial misconduct and fundamental error. (See Appellant's brief, pp. 19-25.) Bernal's argument on appeal fails because it was not misconduct or a

misrepresentation of the law for the prosecutor to cite to the unobjected-to jury instruction during the closing argument.

1. The State's Closing Argument, That The Evidence Had Shown Both Definitions Of Assault, Was Not Misconduct And Did Not Violate Any Of Bernal's Unwaived Constitutional Rights

The district court instructed the jury regarding the elements of aggravated assault, which included that "the defendant John Jacob Bernal committed an assault upon Gustavo Becerra...by attempting to stab him with a knife, and ... the defendant committed that assault with a deadly weapon or instrument." (R., p. 89; 8/2/16 Tr., p. 76, L. 12 – p. 77, L. 2.) The jury instructions also included both definitions of assault. (R., p. 90; 8/2/16 Tr., p. 77, Ls. 5-13.) During closing argument the prosecutor argued that the state had proven the elements of aggravated assault, including both types of assault. (See 8/2/16 Tr., p. 84, L. 4 – p. 91, L. 6.) Bernal argues this was misconduct because he believes the aggravated assault charge in the Information only included one of the definitions of assault. (See Appellant's brief, p. 23 ("[T]he State was ultimately telling the jury that it could proceed on either theory, despite having charged Mr. Bernal with the attempt provision of the assault statute.").) Bernal's argument is unavailing.

Bernal's underlying assumption is incorrect. As argued in the preceding section, the aggravated assault jury instruction and assault definitions, when examined as a whole, comported with the Information. Further, attempting to stab someone with a knife, as alleged in the Information, is a threat by act and thus falls under the "assault-by-threat" definition. (See R., pp. 47-49, 90.) Thus there was no variance between the Information and the jury instructions.

In addition, as a basic premise, it is not misconduct to attempt to secure a verdict based upon the law as set forth in the jury instructions. "A defendant's right to a fair trial is impacted '[w]here 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 during trial, including reasonable inferences that may be drawn from that evidence.'" State v. Parker, 157 Idaho 132, 145, 334 P.3d 806, 819 (2014) (quoting Perry, 150 Idaho at 227, 245 P.3d at 979). Here, the prosecutor did not attempt to secure a verdict on any other factor than the law set forth in the jury instructions and the evidence at trial. (See 8/2/16 Tr., p. 84, L. 4 – p. 91, L. 6.) It was the opposite. The prosecutor attempted to secure a verdict based upon the law as set forth in the jury instructions. As explained by the prosecutor:

> Your Honor – ladies and gentlemen, the – the Judge just instructed you about what the State has to proof [sic] in order to establish this case, in order prove this case, to eliminate that presumption of innocence. And I intend to go through those things with you because it is my burden. At the outset of the trial, we discussed that.
>
> This is the State's burden, this case. So I – I'd like to go through with you the element instructions, that's what we'll call them, the – the elements that the State must establish to show that the defendant committed each of these crimes.

(8/2/16 Tr., p. 83, L. 22 – p. 84, L. 8.) The prosecutor then went through each of the elements of aggravated assault and the instructed definitions. (See 8/2/16 Tr., p. 84, L. 4 – p. 91, L. 6.) This is simply not misconduct. The prosecutor properly argued to the jury that the state had met all of the elements as instructed by the judge. There is no misconduct.

2. Because The State Argued That It Had Proven The Elements Of The Unobjected-To Jury Instructions, Any Potential Prosecutorial Misconduct Is Not Clear From The Record

Even if it was somehow error for the prosecutor to argue that it had met all of the elements of the crime during closing argument, that error is not clear from the record. The district court instructed the jury on the elements of aggravated assault and the definition of assault. (See R., pp. 89-90.) Bernal did not object to those instructions. (8/2/16 Tr., p. 70, Ls. 2 – 25.) The prosecutor then argued based upon those instructions. (See 8/2/16 Tr., p. 84, L. 4 – p. 91, L. 6.) Bernal's decision not to object to the prosecutor's closing argument is also potentially a tactical decision because Bernal likely perceived there was no variance in the instructions and thus there would be no misconduct. On the face of this record, any error is not clear.

3. Bernal Has Failed To Show That Any Potential Prosecutorial Misconduct Had A Reasonable Probability To Change The Outcome Of The Trial

Bernal has also failed to show a reasonable probability that the error affected the outcome of the trial. Bernal argues that the alleged error affected the outcome of the trial because the "the jury was left with the impression that it could convict Mr. Bernal even if it found that he *did not* attempt to stab Mr. Becerra with a knife." (R., p. 25.) This argument is not supported by the record. Bernal's argument again focuses on the definition of assault and ignores the controlling aggravated assault instruction. The district court instructed the jury regarding the elements of aggravated assault:

1. On or about March 11, 2016,
2. in the state of Idaho,

3. the defendant John Jacob Bernal committed an assault upon Gustavo Becerra
4. *by attempting to stab him with a knife*, and
5. the defendant committed that assault with a deadly weapon or instrument.

(R., p. 89 (emphasis added).) Therefore, contrary to Bernal's argument on appeal, regardless of which assault definition is used, the jury was instructed that Bernal was only guilty if he attempted to stab Gustavo with a knife. In addition, as cited above, the Information alleged that Bernal attempted to stab Gustavo with a knife, and an attempted stabbing is a threat by act such that it falls within the "assault-by-threat" definition. (See R., pp. 47-49, 90.)

Further, even if Bernal's argument is accepted, the prosecutor's argument regarding the definition of assault did not affect the outcome of the trial. Bernal's defense was that he never had a knife and Gustavo was not telling the truth. (See, e.g., 8/2/16 Tr., p. 97, L. 12 – p. 102, L. 20.) Therefore, the factual issues before the jury would have necessarily focused on these questions, not necessarily the uncontested definition of assault.

IV.
The State's Closing Argument Did Not Impermissibly Vouch For The Credibility Of Witnesses And Was Not Fundamental Error

A. Introduction

During his closing argument, Bernal argued that Ms. Becerra was telling the truth, and that Gustavo was not. (See 8/2/16 Tr., p. 96, L. 5 – p. 103, L. 9.) In response, the state argued that Ms. Becerra was telling the truth and the testimony of other witnesses, while they "mixed some stuff up," was generally consistent. (See 8/2/16 Tr., p. 104, L. 8

– p. 105, L. 10, p. 107, L. 7 – p. 108, L. 3.) On appeal Bernal argues the state's closing argument amounted to improper vouching, prosecutorial misconduct and fundamental error. (See Appellant's brief, pp. 25-30.) Contrary to his argument, the state's closing argument was based upon reasonable inferences drawn from the evidence and was not improper.

B. Standard Of Review

"On appeal, the standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." Severson, 147 Idaho at 715, 215 P.3d at 435. If a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. Perry, 150 Idaho at 228, 245 P.3d at 980.

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it "constitutes fundamental error." Johnson, 149 Idaho at 265, 233 P.3d at 196. In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." Perry, 150 Idaho at 224, 245 P.3d at 976. Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated"; (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to

whether the failure to object was a tactical decision"; and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Id. at 226, 245 P.3d at 978.

C. Bernal Has Failed To Show The Prosecutor Impermissibly Vouched For The Credibility Of Witnesses And Has Failed To Show Fundamental Error

Bernal argues the prosecutor committed misconduct by impermissibly vouching for the credibility of Ms. Becerra, Gustavo and Mr. Le, such that it created fundamental error. (See Appellant's brief, pp. 25-30.) Bernal's argument fails. The prosecutor's closing arguments regarding the credibility of witnesses were based solely on inferences from evidence presented at trial, and thus were not improper.

1. The Prosecutor Did Not Impermissibly Vouch For The Credibility Of Witnesses Because The Prosecutor's Arguments Were Based Solely On Inferences From Evidence Presented At Trial

Ms. Becerra testified that her initial statement to the police was incorrect. (8/2/16 Tr., p. 27, Ls. 8-14, p. 28, L. 11 – p. 29, L. 3.) Ms. Becerra initially told the police that she saw Bernal with a knife, but testified at trial that she could not tell whether he had a knife. (Id.)

During Bernal's closing argument, Bernal argued that Ms. Becerra was telling the truth when she testified that she did not see a knife. (8/2/16 Tr. p. 98, L. 25 – p. 99, L. 6.) Bernal argued:

> Unfortunately for Gustavo [Becerra], [Ms. Becerra], under oath today, decided to tell the truth, that she didn't see a knife. She didn't really see what was happening.

(8/2/16 Tr., p. 98, L. 25 – p. 99, L. 2.)

The prosecutor likewise argued that Ms. Becerra was telling the truth. (See 8/2/16 Tr., p. 104, L. 8 – p. 105, L. 10.)

> Let's talk about [Ms. Becerra]. [Ms. Becerra] changed her story. Defense Counsel and I agree; she did. And her change of store – her change in story really shows one thing, she's honest. Because what happened was, she wrote a statement at the scene. She was emotional, she was frightened. She had just gone through a very scary ordeal with this whole driving thing, and then her ex-boyfriend showing up at her house and her brother getting into a scuffle with him. And, you know, she's – she's pretty upset and she's writing a statement.
>
> And in her statement, she says something about the defendant having a knife. Well, today she – she cleared that up, and she said, well, I actually didn't see a knife, I couldn't see his hand. I saw him lunge at my brother. Ladies and gentlemen, that shows she's honest. She just wants to tell the truth.

(See 8/2/16 Tr., p. 104, Ls. 8-23.) The prosecutor's argument was not improper. "It is improper ... for the prosecution to express a personal belief as to the credibility of witnesses, unless the comment is based solely on inferences from evidence presented at trial. State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003) (citing State v. Porter, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997)). Here, the prosecutor's closing, like Bernal's closing, was based upon inferences from evidence presented at trial. The prosecutor and defense counsel both argued the reasonable inference that, because Ms. Becerra was willing to admit to misstatements, her testimony was credible. This is a reasonable inference from evidence and was not misconduct.

The prosecutor argued that Mr. Le's testimony was credible because he was a disinterested witness. (8/2/16 Tr., p. 107, Ls. 7-19.) Bernal argues this is also impermissible vouching. (See Appellant's brief, p. 28.) Again, the prosecutor's

argument, that Mr. Le had no motivation to fabricate a story because he was a disinterested witness, is a reasonable inference based upon the admitted evidence. It was not impermissible vouching. The prosecutor's reasonable comments regarding the credibility of witnesses was not prosecutorial misconduct and did not violate one of Bernal's unwaived constitutional rights.

In response to Bernal's closing argument the state also argued that the witnesses' stories were generally consistent and thus they were credible. (See 8/2/16 Tr. p. 107, L. 20 – p. 108, L. 3.)

> At the end of this, what we have are two people, really, [Ms. Becerra] and Gustavo [Becerra], who come and they take the stand, and they tell the truth. They talk about what happened. They use details, they talk about details. Yeah, they mixed some stuff up. Well, we're human; you can't remember everything with perfect detail.
>
> But what they were consistent on are all the major facts. What they are consistent on is this whole underlying motive.

(8/2/16 Tr., p. 107, L. 20 – p. 108, L. 3.) The state was responding to Bernal's closing argument that the witnesses were not credible. This credibility argument was properly based upon inferences from evidence in the record. The state admitted that the witnesses "mixed some stuff up" but argued the testimony was generally consistent. This was not impermissible vouching.

2. Bernal Has Failed To Show Any Impermissible Vouching Was Clear From The Record

Bernal has also failed to show any impermissible vouching is clear from the record. Both the prosecutor and Bernal commented on the credibility of witnesses. (8/2/16 Tr., p. 98, L. 25 – p. 99, L. 2, p. 104, L. 8 – p. 105, L. 10.) Bernal's closing was

largely devoted to arguing that Gustavo was not credible and not telling the truth. (See 8/2/16 Tr. p. 97, L. 14 – p. 103, L. 9 ("The only person that says that there was a knife is Gusatvo Becerra, and his testimony is less than credible.").) Thus, the prosecutor's closing argument necessarily had to argue the credibility of the witnesses based upon inferences from evidence in the record. (See 8/2/16 Tr., p. 103, L. 11 – p. 108, L. 9.) Bernal has failed to show any clear error arising from the prosecutor's responsive argument, based on inferences in the record.

3. Bernal Has Failed To Show That If Any Impermissible Vouching Occurred It Had A Reasonable Probability To Change The Outcome Of The Trial

Bernal has failed to show any impermissible vouching. And even if he had Bernal has failed to show a reasonable probability that it changed the outcome of the trial. First, it is hard to discern how any potential vouching regarding Ms. Becerra's testimony would harm Bernal. Bernal argued that Ms. Becerra was telling the truth when she testified that she did not see a knife. (8/2/16 Tr. p. 98, L. 25 – p. 99, L. 6.) Thus, if Ms. Becerra were credible, it would help Bernal's case.

Further, the other statements – that Mr. Le was a disinterested witness and Gustavo Becerra was generally consistent – are not "so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded." State v. Lankford, 162 Idaho 477, __ 399 P.3d 804, 828–29 (2017) (citing Parker, 157 Idaho at 146, 334 P.3d at 820). Here, as in Lankford, the court explicitly informed the jury that comments during closing statements were not to be considered as evidence. (See R., p. 84); see also

Lankford, 162 Idaho at __, 399 P.3d at 828–29. Even if the prosecutor's comments in this case were error they did not rise to the level of fundamental error. See, e.g., id.; State v. Lovelass, 133 Idaho 160, 168–69, 983 P.2d 233, 241–42 (Ct. App. 1999) ("Although we are troubled by the prosecutor's less than artful comments, they appear to fall within the broad range of fair comment on the evidence rather than express a personal belief. At the very least, these statements do not constitute fundamental error."); State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003) (argument that defense counsel lied to the jury was improper, but did not rise to fundamental error warranting reversal). Here, Bernal argued the witnesses were not credible, and the state responded by arguing the opposite. The state did not make egregious or inflammatory arguments. Bernal has failed to show any vouching and has failed to show fundamental error.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 12th day of January, 2018.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 12th day of January, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd