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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44556
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR-FE-2016-4439
v.	)	
	)	
JOHN JACOB BERNAL,	)	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 DEBORAH A. BAIL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

John Bernal was convicted after a jury trial of aggravated assault with a deadly weapon, misdemeanor reckless driving, and misdemeanor leaving the scene of an accident. He received an aggregate unified sentence of ten years, with three years fixed. On appeal, Mr. Bernal contends that he was denied his right to due process because of a fatal variance between the charging document and the jury instruction on reckless driving. Mr. Bernal also contends that he was denied his right to due process because of a fatal variance between the charging document and the jury instruction defining assault. Mr. Bernal further contends that the prosecutor committed misconduct by misrepresenting its theory of guilt to the jury; a theory not charged in the Information. Finally, Mr. Bernal contends that the prosecutor committed misconduct by bolstering the testimony of the State's witnesses.

Statement of the Facts and Course of Proceedings

Mr. Bernal was charged by Information with aggravated assault by using a deadly weapon, misdemeanor reckless driving, and misdemeanor leaving the scene of an accident. (R., pp.47-49.) The case proceeded to trial.

At trial, Carmen Becerra testified that on May 10, 2016, she was driving behind a light blue Buick being driven by her ex-boyfriend, John Bernal. (Trial Tr., p.13, Ls.5-17; p.14, Ls.12-23; p.16, Ls.16-24; p.20, Ls.15-20.) She testified that, while they were stopped at a road construction site, he got out of his car and walked toward her. (Trial Tr., p.17, Ls.2-6; p.19, Ls.13-19.) When she saw him approaching, she turned off onto a side street. (Trial Tr., p.19, L.25 - p.20, L.2.) Mr. Bernal got back in his car and caught up to her again on another side street, Granger Street. (Trial Tr., p.20, Ls.8-16.) Ms. Becerra testified that she was driving very

fast, and Mr. Bernal was driving close to her bumper. (Trial Tr., p.20, L.21 - p.21, L.14.) Ms. Becerra sped up, then stomped on her brakes. (Trial Tr., p.21, Ls.16-17.) When she slammed on her brakes, Mr. Bernal was forced to slam on his brakes and he swerved around Ms. Becerra's car to avoid hitting her. (Trial Tr., p.21, L.16 – p.22, L.9.) In doing so, he hit a white parked car. (Trial Tr., p.22, Ls.10-15.) Mr. Bernal got out of his car, but apparently did not speak to the owner of the car, which had a small scrape on the fender and a broken turn signal light. (Trial Tr., p.22, Ls.16-20; p.66, Ls.15-22; State's Ex. 2.) Ms. Becerra went home, where she lived with her mother, her brother Gustavo Becerra, and his wife and child. (Trial Tr., p.23, Ls.8-18.) As she headed home, Ms. Becerra called her brother to ask him to open the front door because the door handle was broken. (Trial Tr., p.23, L.22 – p.24, L.12.)

At trial, Gustavo Becerra testified that when his sister arrived at the house, he let her in, then took a baseball bat and waited outside for Mr. Bernal to show up. (Trial Tr., p.38, L.24 – p.40, L.7.) He had seen Mr. Bernal walking a few blocks from the house. (Trial Tr., p.38, Ls.6-13.) As Mr. Bernal approached the house, Mr. Becerra told him to leave. (Trial Tr., p.40, Ls.8-25.) When he did not leave, Mr. Becerra hit him with the baseball bat, hard, in the leg. (Trial Tr., p.40, L.8 – p.43, L.8.) Mr. Becerra said he saw Mr. Bernal holding a pocket knife in his pocket. (Trial Tr., p.43, Ls.3-23; p.58, Ls.14-16.) After the first hit, Mr. Bernal stepped back, took the knife all of the way out of his pocket, and then, while holding the knife close to his own body, he stepped aggressively towards Mr. Becerra. (Trial Tr., p.43, Ls.17-19; p.44, Ls.2-16.) Mr. Bernal then asked Mr. Becerra if he could give him a ride, walked toward to door, and Mr. Becerra hit Mr. Bernal again with the bat, this time in the ribs. (Trial Tr., p.43, L.20 – p.44, L.23.) At that point, Mr. Bernal backed up, made some threats to Mr. Becerra, and began walking away from Mr. Becerra's house. (Trial Tr., p.44, L.24 – p.45, L.16.) Mr. Becerra

followed him, and when Mr. Bernal reached the street, he pulled the knife back out of his pocket and swiped the knife toward Mr. Becerra.[1] (Trial Tr., p.45, L.16 – p.47, L.5.) Mr. Becerra testified that he had moved out of the way in anticipation of Mr. Bernal's action. (Trial Tr., p.46, Ls.6-11.) After saying he would be back, Mr. Bernal walked away. (Trial Tr., p.47, Ls.11-20.) Mr. Becerra was the only witness who testified that Mr. Bernal was holding a knife during this encounter. Carmen Becerra testified that, despite what she apparently wrote in her prior police report, she never did see a knife in Mr. Bernal's hand. (Trial Tr., p.28, Ls.11-25; p.30, Ls.3-18.) Ms. Becerra, who was watching from the living room window, said she did see Mr. Bernal lunge toward Mr. Becerra before Mr. Becerra hit Mr. Bernal with the bat. (Trial Tr., p.26, Ls.1-23; p.30, Ls.3-18.) Ms. Becerra testified that Mr. Bernal left on foot after that. (Trial Tr., p.26, Ls.24-25.)

Wang Le testified that he saw a blue Buick hit his car. (Trial Tr., p.62, L.11 – p.63, L.18.) Mr. Le was not in the car, but it was parked in front of his house on Granger Street. (Trial Tr., p.62, L.7 – p.63, L.3.) Mr. Le called 911. (Trial Tr., p.64, Ls.1-6.) He did not talk to the driver of the blue Buick, but identified him as a man with long hair and a mustache. (Trial Tr., p.66, Ls.1-22.)

Both sides rested, and the jury was sent to deliberate. (Trial Tr. p.68, Ls.3-4; p.108, Ls.21-25.) During deliberations, the jury asked if they could consider a (simple) assault charge instead of an aggravated assault charge. (R., p.99.) The jurors also asked the court for a transcript of the testimony about the knife, and the district court had the court reporter re-read the testimony of Gustavo Becerra. (R., pp.99, 102.) The district court, upon the agreement of both

[1] It is not clear when the knife was in Mr. Bernal's pocket and when it was out of Mr. Bernal's pocket. Mr. Becerra's testimony about the knife was varied and inconsistent. (See Trial Tr., p.42, L.6 – p.44, L.16; p.46, L.7 – 47, L.8; 54, L.20 – 56, L.25.)

defense counsel and the prosecutor, told the jury they could not convict Mr. Bernal of the lesser included offense of simple assault. (R., p.100; Trial Tr., p.109, Ls.7-24.)

The jury found Mr. Bernal guilty of aggravated assault with a deadly weapon, reckless driving, and leaving the scene of an accident. (8/3/16 Tr., p.2, L.14 – p.3, L.6; R., pp.103-106.)

At sentencing, the district court imposed ten years, with three years fixed, for the aggravated assault with a deadly weapon conviction, and, for the two misdemeanors, the district court sentenced Mr. Bernal to one hundred twenty days in jail, to be served concurrently with each other and with the aggravated assault conviction. (10/3/16 Tr., p.19, Ls.19-24; R., pp.108-111.)

ISSUES

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?

ARGUMENT

I.

The District Court's Instruction To The Jury On The Elements Of Reckless Driving Created A Fatal Variance With The Charging Document

A. Introduction

Giving this instruction violated Mr. Bernal's right to due process—he had no notice prior to the prosecutor's closing argument that the State was alleging that he committed reckless driving on Granger Street. The Information alleged that Mr. Bernal "carelessly and heedlessly" operated a motor vehicle "upon Five Mile Rd., Boise by driving aggressively" and by "stopp[ing] his vehicle in front of Carmen Becerra's vehicle blocking traffic." (R., p.48.) The general reckless driving jury instruction enabled the prosecutor to change its theory at the end of trial by telling the jury that it could convict Mr. Bernal of reckless driving both for getting out of his car while it was stopped during construction on Five Mile Road, and by losing control of his car and hitting Mr. Le's car on Granger Street. The elements jury instruction expanded the conduct Mr. Bernal could have been convicted of by asking the jury to generally find the defendant, "drove or was in actual physical control of a vehicle upon a highway, or upon public or private property open to the public, and 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.) Although the instruction at issue was a pattern jury instruction and the Idaho Criminal Jury Instructions are presumed correct (*see State v. Merwin,* 131 Idaho 642, 647 (1998), the State had chosen to specify in the charging document what conduct it believed constituted reckless driving. Because the jury instruction lessened the State's burden of proof as alleged in the Information and the prosecutor asked the jury to convict

Mr. Bernal for uncharged conduct covered by the general jury instruction, the instruction created a fatal variance.

B. Standard Of Review

The existence of an impermissible variance is a question of law over which the reviewing courts exercise free review. *State v. Alvarez*, 138 Idaho 747, 750 (Ct. App. 2003). If it is established that a variance exists, the appellate court must determine whether it rises to the level of prejudicial error mandating reversal of the conviction. *See State v. Brazil*, 136 Idaho 327, 329 (Ct. App. 2001).

C. The District Court's Instruction To The Jury On The Elements Of Reckless Driving Created A Fatal Variance With The Charging Document

"A trial court has the duty to properly instruct the jury on the law applicable to the case before it." *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 313 (2010). Jury instructions that fall short of requiring the State to prove every element of the offense violate due process and, thus, rise to the level of fundamental error. *State v. Hickman,* 146 Idaho 178, 182 (2008); *State v. Calver*, 155 Idaho 207, 214 (Ct. App. 2013). The instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged. *State v. Hooper,* 145 Idaho 139, 147 (2007). If they do not, there can be a fatal variance between the jury instructions and the charging document. *State v. Folk*, 151 Idaho 327, 342 (2011); *State v. Day*, 154 Idaho 476 (Ct. App. 2013). A fatal variance is a due process violation. *See De Jonge v. Oregon*, 299 U.S. 353, 362 (1937), *State v. Chapa*, 127 Idaho 786, 790 (Ct. App. 1995).

A variance may occur where there is a difference between the allegations in the charging instrument and the proof adduced at trial or where there is a disparity between the allegations in

the charging instrument and the jury instructions. *State v. Montoya*, 140 Idaho 160, 165 (Ct. App. 2004). A variance between a charging document and a jury instruction or the evidence adduced at trial requires reversal only when it deprives the defendant of his substantial rights by violating the defendant's right to fair notice or leaving him or her open to the risk of double jeopardy. *State v. Windsor*, 110 Idaho 410, 417-18 (1985); *Brazil*, 136 Idaho at 330. The notice element requires courts to determine whether the record suggests the possibility that the defendant was misled or embarrassed in the preparation or presentation of his or her defense. *State v. Windsor*, 110 Idaho 410, 418 (1985).

A reviewing court must first determine whether there is a variance between the information used to charge the defendant and the instructions presented to the jury. *See Brazil*, 136 Idaho at 329. If the reviewing court does find a variance, it must then determine whether it rises to the level of prejudicial error requiring reversal of the conviction. *Id.*

The Information alleged that Mr. Bernal committed reckless driving, a violation of I.C. § 49-1401 by operating a motor vehicle:

> [U]pon Five Mile Rd., Boise, carelessly and heedlessly by driving aggressively and stopped his vehicle in front of Carmen Becerra's vehicle blocking traffic.

(R., p.48.)

The jury was instructed on the elements of reckless driving as follows:

> In order for the defendant to be guilty of Reckless Driving, the state must prove each of the following:
>
> 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

> If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(R., p.93.)

In his closing argument, the prosecutor went through each of the elements of reckless driving. When he arrived at the fourth element—that this happened upon a highway open to the public or private property open to the public—the prosecutor told the jury, "[i]t happened on Five Mile, it happened on Granger; these are public roads." (Tr., p.92, Ls.18-21.) As for the fifth element which required the State to prove "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," the prosecutor said:

> This is satisfied in a number of ways.
>
> First, we have his driving on Five Mile. He stops his car in the middle of a busy construction area. He gets out of his car and he walks towards Carmen's. That right there is careless and heedless, a careless and heedless way to drive your car. And it's in a way that can endanger people. If someone doesn't see a park -- a person stopped in that area, it causes collisions, it causes problems.
>
> This also happened when Carmen was speeding away from the defendant and the defendant chased after her. She said that he was right on her bumper. And then, they got onto Granger. And then. They were going so fast, and Carmen realized they were going so fast, that she had to put on the brakes.
>
> So she puts on the brakes, he goes around her, out of control, and strikes another vehicle. Doesn't get much more careless or heedless than that, and it certainly already did endanger people and property. Mr -- Mr. Le was right there when this happened; he was endangered. His car got hit; he was endangered.
>
> The defendant was driving reckless, he was driving aggressively, carelessly, without caution, due caution, circumspection; all of it. It establishes the fifth element of reckless driving.

(Tr., p.91, L.22 – p.94, L.2.)

Here, Mr. Bernal's defense was prejudiced by the prosecutor's last-minute assertion that he recklessly drove on Granger Street and the broad language of the reckless driving jury instruction. In its opening statement, the defense did not even mention the driving on Granger Street, and, during trial, asked no questions of Mr. Le regarding what he saw specific to Mr. Bernal's allegedly evasive action on Granger Street. (Trial Tr., p.11, L.1 – p.12, L.14; p.67, Ls.8-9.) Had defense counsel known the prosecutor intended to ask the jury to convict Mr. Bernal for reckless driving for his attempt to avoid hitting Ms. Becerra's car when she slammed on her brakes on Granger Street, defense counsel could have conducted further investigation to determine whether there were any skid marks at the scene. Counsel could have questioned Mr. Le about whether he heard one or two loud noises and could have asked Mr. Le to clarify whether the loud noise(s) was the sound of screeching brakes or the sound of vehicles colliding. (*See* Trial Tr., p.62, L.23 – p.63, L.1.) Further, the defense did not elicit any specific information from Ms. Becerra regarding how far away Mr. Bernal was from her car when he was "tailing" her. (*See* Trial Tr., p.21, Ls.3-11.) Defense counsel could have asked her how fast she thought she was traveling when she slammed on her brakes. (*See* Trial Tr., p.21, Ls.15-17.) All of this information would have been relevant and necessary for Mr. Bernal to defend against the new allegation that he was recklessly driving on Granger Street.

D. <u>The District Court's Error Rose To The Level Of A Fundamental Error</u>

Mr. Bernal acknowledges that no objection was made to these statements. Therefore, the claim raised is one of fundamental error. The Idaho Supreme Court has set forth the standard of appellate review of unobjected-to error. *See State v. Perry*, 150 Idaho 209 (2010). Pursuant to *Perry*, a defendant must demonstrate that: 1) one or more of his unwaived constitutional rights

were violated; 2) there was a clear and obvious error without the need for additional information not contained in the appellate record; and 3) the error affected the defendant's substantial rights, meaning that there is a reasonable probability that the error affected the outcome of the trial proceedings. *Id.* at 226. Mr. Bernal meets all the prongs of this test.

First, the alleged error is a violation of Mr. Bernal's right to due process. Mr. Bernal was charged with misdemeanor reckless driving. (R., pp.47-48.) The Information alleged that he blocked traffic on Five Mile Road "by driving aggressively and stopped his vehicle in front of Carmen Becerra's vehicle blocking traffic." (R., p.48.) However, the elements instruction expanded the conduct by which Mr. Bernal could have been found guilty of reckless driving, by allowing the jury to convict him if it found "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" on *any* highway open to the public (R., p.92) (emphasis added), the instruction thus expanded the conduct by which the jury could have found Mr. Bernal guilty.

Giving this instruction violated Mr. Bernal's right to due process—he had no notice that the State was alleging that he committed reckless driving on Granger Street. Although the instruction at issue was a pattern jury instruction and the Idaho Criminal Jury Instructions are presumed correct (see *State v. Merwin,* 131 Idaho 642, 647 (1998), the State had chosen to specify in the charging document what conduct it believed constituted reckless driving. For it to change its theory at the end of trial by telling the jury that it could convict Mr. Bernal of reckless driving both for getting out of his car while it was stopped during construction on Five Mile Road, and by losing control of his car and hitting Mr. Le's car on Granger Street, the State deprived Mr. Bernal of notice and eliminated his ability to put on a defense against the charge.

Second, the error is clear and obvious from the record. The law is clear that the instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged, and that if they do not, there can be a fatal variance between the jury instructions and the charging document. *State v. Folk*, 151 Idaho 327, 342 (2011); *State v. Day*, 154 Idaho 476 (Ct. App. 2013). The jury instruction is in the record, so there is no need for additional information outside the record. Further, there is no evidence that the failure to object to the instruction was a strategic decision, as Mr. Bernal gained absolutely no strategic advantage by giving the jury an opportunity to convict him based on alternative, uncharged act(s).

Third, there is a reasonable probability that the error affected the outcome of the proceedings. While the jury heard testimony that Mr. Bernal got out of his car in the middle of an intersection, the jury also heard evidence that both cars were completely stopped and waiting for road construction to clear out.[2] (Trial Tr., p.17, Ls.2-6; p.19, Ls.13-19.) It was likely that the jury believed Mr. Bernal simply got out of the car during the period of time when all of the cars in front of him were stopped and waiting for the road construction to be over. Such would not constitute reckless driving. *Perry* requires Mr. Bernal to demonstrate there is a *reasonable possibility* that the error affected the outcome of the trial. *Perry*, 150 Idaho at 226.

Further, the prosecutor, while tying the elements of reckless driving to the facts adduced at trial, specifically told the jury that had proved Mr. Bernal committed reckless driving multiple ways—both when he stopped his car on Five Mile Road and, "This also happened when Carmen

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[2] The prosecutor misrepresented the facts by telling the jury, "He used his vehicle as a weapon. He stops in the middle of Five Mile, a two-lane highway, street, where there's no getting around." (Trial Tr., p.105, Ls.17-19.) However, Ms. Becerra testified that they were stopped in a construction area, and Mr. Bernal got out of his car to come talk to her—she did not testify that Mr. Bernal's actions were holding up the flow of traffic.

was speeding away from the defendant and the defendant chased after her. She said that he was right on her bumper. And then, they got onto Granger. . . So she puts on the brakes, he goes around her, out of control, and strikes another vehicle. Doesn't get much more careless or heedless than that, and it certainly already did endanger people and property. Mr -- Mr. Le was right there when this happened; he was endangered. His car got hit; he was endangered." (Trial Tr., p.93, Ls.3-23.) Thus, the jury was told that it could convict Mr. Bernal for either his conduct on Five Mile *or* the uncharged conduct on Granger Street.

Because giving this instruction violated Mr. Bernal's right to due process, and because he meets all three prongs of Idaho's fundamental error test, Mr. Bernal's conviction for reckless driving must be vacated.

II.

The District Court's Instruction To The Jury On The Definition Of Assault Created A Fatal Variance With The Charging Document

A. Introduction

The district court's instruction to the jury defining assault created a fatal variance. Although the instruction was consistent with the pattern jury instructions, because the aggravated assault was charged under only one of the theories of assault, and the prosecutor used the general definition of assault given by the district court to tell the jury that it could find Mr. Bernal guilty under either theory, the jury instruction created a fatal variance.

B. Standard Of Review

The existence of an impermissible variance is a question of law over which the reviewing courts exercise free review. *State v. Alvarez*, 138 Idaho 747, 750 (Ct. App. 2003). If it is established that a variance exists, the appellate court must determine whether it rises to the level

of prejudicial error mandating reversal of the conviction. *See State v. Brazil*, 136 Idaho 327, 329 (Ct. App. 2001).

C. The Court's Instruction To The Jury On The Definition Of Assault Created A Fatal Variance With The Charging Document

As analyzed in Section I(C), a variance may occur where there is a difference between the allegations in the charging instrument and the proof adduced at trial or where there is a disparity between the allegations in the charging instrument and the jury instructions. *See Montoya*, 140 Idaho at 165.

The Information alleged that Mr. Bernal committed aggravated assault by attempt, a violation of I.C. § 19-901(a), 905(a) where he:

> 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 a means likely to produce great bodily harm, to-wit: by attempting to stab Gustavo Becerra with a knife.

(R., p.48.) Although the district court gave the jury an instruction that provided the elements of aggravated assault and incorporated the specific facts alleged in the Information—that Mr. Bernal committed assault "by attempting to stab him with a knife"—the court then gave the jury an instruction generally defining assault as:

> a) an unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or
>
> b) an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

(Trial Tr., p.77, Ls.5-13; R., p.90.) Immediately after the jury instructions were read to the jury, the prosecutor began his closing statements. (Trial Tr., p.83, Ls.7-9.)

During his closing statements, the prosecutor told the jury that it could proceed on either theory of assault. (Trial Tr., p.89, Ls.1-24.) Instead of arguing to the jury that it should find Mr. Bernal guilty of aggravated assault because it had proven Mr. Bernal tried to stab Mr. Becerra with a knife, the prosecutor told the jury that the first part of the assault happened "when that knife comes out" because the threat of "violence is imminent" and Mr. Becerra could see Mr. Bernal approaching with the knife. (Trial Tr., p.87, Ls.5-12.) The State went on to tell the jury that Mr. Bernal committed an assault under both sections of the instruction. (Trial Tr., p.89, Ls.12-24.) The prosecutor argued the alternate theory, despite knowing it had only charged Mr. Bernal with the attempt provision of the assault statute. Because the jury instruction impermissibly enlarged the conduct Mr. Bernal was alleged to have done in violation of the law as charged by Information (R., pp.47-48), and because the prosecutor used that instruction to argue to the jury that Mr. Bernal committed both the attempt version of assault and the threat version of assault, the assault jury instruction constituted a fatal variance.

The district court's instruction to the jury on two theories, assault-by-attempt *and* assault-by-threat, is a variance. (R., pp.89-90.) That variance, in conjunction with the prosecutor's statements to the jury telling them that it had proved assault both by attempt *and by threat*, deprived Mr. Bernal of adequate notice—notice that was Mr. Bernal's constitutional right, and thus the variance is fatal.

Mr. Bernal was prejudiced by the variance. Mr. Bernal was misled or embarrassed in presenting his defense—he lacked notice which hampered his defense. The State did not present its threat theory until closing argument. Additionally, Mr. Bernal's defense focused on whether the knife was in his hand or in his pocket, or whether there even was a knife, not on what words Mr. Bernal said to Mr. Becerra or whether Mr. Becerra believed violence was imminent. (Trial

Tr., p.28, Ls.19-25 (cross-examination of Carmen Becerra on whether she saw a knife); p.54, L.20 – p.57, L.13 (cross-examination of Gustavo Becerra about when and where he saw a knife)). Mr. Bernal's defense was hampered by the variance because his defense would have been different under each theory of assault. Ultimately, the conduct necessary to establish each theory of assault was not the same.

D. The District Court's Error Rose To The Level Of Fundamental Error

As a preliminary matter, Mr. Bernal acknowledges that no objection was made to these statements. Therefore, the claim raised is one of fundamental error, and the *Perry* standard applies. Mr. Bernal meets all the prongs of this test.

First, the alleged error is a violation of Mr. Bernal's right to due process. Mr. Bernal was charged with aggravated assault. (R., pp.47-48.) The Information alleged that he "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 a means likely to produce great bodily harm, to-wit: by attempting to stab Gustavo Becerra with a knife." (R., p.48.) However, the elements instruction expanded the conduct for which Mr. Bernal could be convicted, the "attempt" type of assault found in I.C. § 18-901(a) *or* the "threat" type of assault found in I.C. § 18-901(b). (R., p.90.) The instruction thus added an alternative theory and facts by which the jury could have found Mr. Bernal guilty.

As set forth in Section I(D), a fatal variance is a due process violation. *See De Jonge v. Oregon*, 299 U.S. 353, 362 (1937), *State v. Chapa*, 127 Idaho 786, 790 (Ct. App. 1995).

It was apparent from the jury instruction that the jury could convict Mr. Bernal based on either the attempt theory or the threat theory of assault. This legal theory is not only different from that with which Mr. Bernal was originally charged, but was not introduced until after the

jury had been instructed that there were two theories under which a person could be guilty of assault. Mr. Bernal had no notice that the State would be proceeding on *both* theories until closing arguments, a time when Mr. Bernal had no opportunity to re-open the case and re-call any witnesses the defense needed to refuse this new legal theory. This is a classic case of trial by ambush; giving this instruction violated Mr. Bernal's right to due process.

Second, the error is clear and obvious from the record. The law is clear that the instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged, and that if they do not, there can be a fatal variance between the jury instructions and the charging document. *State v. Folk*, 151 Idaho 327, 342 (2011); *State v. Day*, 154 Idaho 476 (Ct. App. 2013). The jury instruction is in the record, so there is no need for additional information outside the record. Further, there is no evidence that the failure to object to the instruction was a strategic decision, as Mr. Bernal gained absolutely no strategic advantage by giving the jury an opportunity to convict him based on an alternative theory of guilt, on facts never alleged until the end of his trial.

Third, there is a reasonable probability that the error affected the outcome of the proceedings. The jurors asked the court whether they could convict Mr. Bernal of simple assault. (Trial Tr., p.109, Ls.7-24.) Where there were two different theories of assault, if the jurors did not believe that Mr. Bernal had a knife (and there was certainly testimony that he did not have a knife but just made a lunging motion toward Mr. Becerra) (Trial Tr., p.26, Ls.1-23; p.28, L.11 – p.29, L.3; p.30, Ls.3-18), the jury asked the court if it could convict Mr. Bernal based on the threat theory of simple assault (R., p.99). If the jury found that Mr. Bernal had told Mr. Becerra that he was going to hurt him, combined with Mr. Becerra's testimony that he felt afraid, such would certainly have been sufficient to convict Mr. Bernal of simple assault by threat. Due to

the combination of the jury instruction and the prosecutor's comments, the jury was left with the impression that it could convict Mr. Bernal on either theory.

Further, with respect to the "threat" type of assault proscribed by I.C. § 18-901(b), the Idaho Court of Appeals has held that the offense requires an intent to make a threat, by word or act, to do violence to another. *State v. Dudley*, 137 Idaho 888, 890-91 (Ct. App. 2002). Therefore, Mr. Bernal must have intended to threaten Mr. Becerra, and the lack of this intent would be a defense. Further, defense counsel could have cross-examined Mr. Becerra about whether he believed Mr. Bernal would harm him, or examined Ms. Becerra on comments or statements her brother made after the incident. However, Mr. Bernal did not present such a defense, as he did not know until closing remarks that he was being accused of aggravated assault by threat.

Perry requires Mr. Bernal to demonstrate there is a *reasonable possibility* that the error affected the outcome of the trial. *Perry*, 150 Idaho at 226. Mr. Bernal has shown there is a reasonable possibility that the erroneous instruction, which gave the jury broader grounds on which to return a guilty verdict than the information set forth in the charging document, contributed to that guilty verdict.

As a result, the variance in this case constitutes fundamental error. Additionally, because the variance deprived Mr. Bernal of sufficient notice, it is a fatal variance. As such, this Court should vacate the judgment of conviction as to the aggravated assault charge and remand this case for a new trial.

III.

The State Committed Prosecutorial Misconduct By Misrepresenting Its Theory Of Guilt

A. Introduction

Mr. Bernal asserts that his right to a fair trial, guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, was violated when the prosecutor misrepresented the law—its theory of guilt—during closing arguments. The prosecutor's misconduct rises to the level of fundamental error because the misconduct was related to one or more of Mr. Bernal's constitutional rights, and was so egregious that it may have contributed to the jury's verdicts.

B. Applicable Standards Of Review

Because Mr. Bernal's prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier,* 143 Idaho 1, 2 (2006).

C. The State Committed Prosecutorial Misconduct By Misrepresenting Its Theory Of Guilt

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall … deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. Additionally, the Idaho

Constitution also guarantees that, "[n]o person shall be … deprived of life, liberty or property without due process of law." Idaho Const. art. I, § 13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. *State v. Irwin*, 9 Idaho 35, ___, 71 P. 608, 611 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.*, 71 P. at 611. The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*, 71 P. at 611.

"Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. "Indeed, the prosecutor has a duty to avoid misrepresentation of the

facts and unnecessarily inflammatory tactics." *State v. Moses*, 156 Idaho 855, 871 (2014) (internal punctuation marks omitted). "Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible." *State v. Gross*, 146 Idaho 15, 20 (Ct. App. 2008). Misrepresentations or diminishments of the State's burden to prove the defendant's guilt beyond a reasonable doubt are impermissible. *State v. Raudebaugh*, 124 Idaho 758, 769 (1993); *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). "It is improper to misrepresent or mischaracterize the evidence in closing argument." *Moses*, 156 Idaho at 871 (quoting *State v. Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)).

While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *State v. Wilbanks*, 95 Idaho 346, 354 (1973) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (internal quotation marks omitted)). Prosecutorial misconduct occurs when the prosecutor "attempts to secure a verdict on any factor other than . . . the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence," or when the prosecutor "[a]ppeals to emotion, passion or prejudice of the jury through use of inflammatory tactics." *State v. Abdullah*, 158 Idaho 386, ___, 348 P.3d 1, 81-82 (2015) (internal quotation marks omitted).

The prosecutor's comments at issue here all took place during closing argument. The Idaho Court of Appeals has held that "[c]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Gross*, 146 Idaho 15, 18 (Ct. App. 2008). The purpose of closing argument "is to enlighten the jury and to help jurors remember and interpret the evidence." *Id.* "Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *Id.* (citing *State v.*

Sheahan, 139 Idaho 267, 280 (2003)). "[P]rosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were 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." *Abdullah*, 158 Idaho at ___, 348 P.3d at 59 (internal quotation marks omitted).

The prosecutor chose to charge Mr. Bernal with the aggravated assault of Mr. Becerra by alleging that Mr. 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 a means likely to produce great bodily harm, to-wit: by attempting to stab Gustavo Becerra with a knife." (R., p.48.)

Mr. Bernal was charged with the "attempt" type of assault proscribed by I.C. § 18-901(a). (R., p.48.) The district court's elements of aggravated assault instruction was consistent with the charging document (R., p.89); however, the district court also gave a general definition of assault, which included both the attempt and threat versions (R., p.90). Despite the fact that the State had only charged Mr. Bernal with the attempt version of assault, after hearing the court's instruction, the prosecutor told the jury it had proven *both* the "attempt" type of assault *and* the "threat" type of assault, as defined by the district court's jury instruction defining assault. (Trial Tr., p.89, Ls.1-24.)

Where it was the State's burden to prove beyond a reasonable doubt that Mr. Bernal attempted to commit an aggravated assault on Mr. Becerra, as it had charged, the prosecutor instead told the jury that it could prove the State's case either by proving attempt *or by proving threat*. Sections (a) and (b) of I.C. § 18-901 define distinct crimes. While a defendant may be charged with violating both sections, they have different elements.

The prosecutor explained the meaning of the standard jury instruction on simple assault, ICJI No. 1201 (R., p.90), and told the jury:

> But the assault, ladies and gentlemen, happens when that knife comes out, when that determined face, that threat is right there because the act to do violence is imminent. That threat to do violence is imminent, it's right then as Gustavo sees him approaching and can tell that that's about to happen. That's when the first part of the assault happens. . .

(Trial Tr., p.87, Ls.5-12.) The State went on to tell the jury:

> So, it's an assault under the definition No. 1. It's also an assault under No. 2 because the defendant intentionally and unlawfully either threatened by word or act, and both are present; okay? There's – there are words that the defendant uses. Maybe not I'm going to cut you necessarily, but words like get out of the way, words that are threatening, an action if Gustavo doesn't comply. Those are threatening words. But there's also the threatening actions; the lunge, the fact that the knife is there, with its potential ability to cause such harm.
>
> And, again, that apparent ability is right there. And he does that act which creates a well-founded fear in the other person that such violence is imminent.
>
> How do we know that this created a well-founded fear in Gustavo that that violence was imminent? The bat. The bat shows it. His response to the lunging, his response to the – the knife swipe, the bat, the fact that he's hitting him with the bat shows he thinks that violence is imminent. He has a well-founded fear that the defendant is going to attack him. And what happens? He attacks him.
>
> So, both of the definitions of assault are satisfied.

(Trial Tr., p.89, Ls.1-24.)

Where the State argued that it had proven Mr. Bernal guilty because it had shown both that Mr. Bernal tried to stab Mr. Becerra and that Mr. Bernal threatened Mr. Becerra with the knife and Mr. Becerra felt afraid, the State was ultimately telling the jury that it could proceed on either theory, despite only having charged Mr. Bernal with the attempt provision of the assault statute. This "either or" theory harmonized with the simple assault jury instruction the jury was given which instructed the jury that an assault is committed when a person unlawfully attempts. .

. *or* intentionally and unlawfully threatens . . .. (*See* R., p.90) (emphasis added). In doing so, the prosecutor affirmatively misrepresented the law and its theory of guilt to the jury.

D. The Prosecutorial Misconduct Rose To The Level Of A Fundamental Error

Mr. Bernal concedes that he did not object to the prosecutor's arguments; however, he can show that the claim raised is one of fundamental error. *See Perry*, 150 Idaho at 226. Mr. Bernal meets all the prongs of the *Perry* test.

First, the alleged errors are a violation of Mr. Bernal's right to due process and a fair trial. "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. The prosecutor's statement misinformed the jury as to the State's burden of proof, which was a violation of Mr. Bernal's right to due process. *See also State v. Beebe*, 145 Idaho 570 (Ct. App. 2007) (finding prosecutorial misconduct rising to the level of a fundamental error where the prosecutor misstated the evidence, misstated the law, and appealed to the passions and prejudice of the jury).

Mr. Bernal was charged with aggravated assault "by attempting to stab Gustavo Becerra with a knife." (R., pp.47-48.) Where the prosecutor, in his closing remarks, incorrectly told the jury that Mr. Bernal could be convicted of aggravated assault under either the attempt theory or the threat theory, he ameliorated the State's burden to prove that Mr. Bernal threatened Mr. Becerra with a knife, as it had charged. Thus, giving this instruction violated Mr. Bernal's right to a fair trial and due process.

Second, the error is clear and obvious from the record. These fair trial and due process violations are apparent from the face of the record and are clear violations of well-established

law. The closing statements of the prosecutor are in the record, so there is no need for additional information outside the record.

Third, there is a reasonable probability that the error affected the outcome of the proceedings. While the jury did receive an instruction properly setting forth the elements of aggravated assault (R., p.89), it also was instructed on the general definition of simple assault (R., p.90). The reviewing court presumes that the jury follows the jury instructions given by the trial court in reaching its verdict. *State v. Carson*, 151 Idaho 713, 718 (2011). Because of the error, 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.

It was apparent from the prosecutor's misconduct in misstating the applicable law that the jury could convict Mr. Bernal on an alternate theory never charged by the State. This removed the burden on the State to prove every element of the crime as charged. Because the prosecutor's last-minute expansion of the applicable law and its theory of guilt violated Mr. Bernal's rights to due process and a fair trial, and because he meets all three prongs of Idaho's fundamental error test, Mr. Bernal's aggravated assault conviction must be vacated.

IV.

The State Committed Prosecutorial Misconduct By Bolstering The Testimony Of Its Witnesses

A. Introduction

Mr. Bernal asserts that his right to a fair trial, guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, was violated when the prosecutor bolstered the testimony of all of its witnesses. The prosecutor's misconduct rises to the level of fundamental error because the misconduct was related to one or

more of Mr. Bernal's constitutional rights, and was so egregious that it may have contributed to the jury's verdicts.

B. Applicable Standards Of Review

Because Mr. Bernal's prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier,* 143 Idaho 1, 2 (2006).

C. The State Committed Prosecutorial Misconduct By Bolstering The Testimony Of Its Witnesses

"Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. "Indeed, the prosecutor has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics." *State v. Moses*, 156 Idaho 855, 871 (2014) (internal punctuation marks omitted). "Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible." *State v. Gross*, 146 Idaho 15, 20 (Ct. App. 2008). Misrepresentations or diminishments of the State's burden to prove the defendant's guilt beyond a reasonable doubt are impermissible. *State v. Raudebaugh*, 124 Idaho 758, 769 (1993); *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). "It is improper to misrepresent or mischaracterize the evidence in closing argument." *Moses*, 156 Idaho at 871 (quoting *State v. Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)). Closing argument should not include counsel's personal opinion about the credibility of a witness or the guilt or innocence of the accused. *State v. Garcia*, 100 Idaho 108, 110-11 (1979).

The United States Supreme Court has explained that the prosecutor's vouching for the credibility of witnesses poses two dangers: first, "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to a fair trial," and second, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985).

The Idaho Supreme Court has held that "a prosecutor should avoid expressing a personal belief as to the credibility of a witness unless the comment is based solely on inferences from evidence presented at trial." *State v. Adamcik*, 152 Idaho 445, 481-82 (2012). As the Idaho Court of Appeals has held, "[a] prosecutor can improperly vouch for a witness by placing the prestige of the state behind the witness or referring to information not given to the jury that supports the witness." *State v. Wheeler*, 149 Idaho 364, 369 (Ct. App. 2010).[3]

During its closing statement, the prosecutor improperly bolstered the testimony of all of its witnesses, telling the jury that the witnesses were credible and told the truth. The prosecutor admitted to the jurors that its witness, Carmen Becerra, changed her story, but argued "her change in story really shows one thing, she's honest." (Trial Tr., p.104, Ls.8-11.) The prosecutor said that the reason she wrote in her statement at the time that Mr. Bernal had a knife, but testified at trial that she actually didn't see a knife, "shows that she's honest. She just wants to tell the truth." (Trial Tr., p.104, Ls.18-23.) The prosecutor told the jury that Ms. Becerra was there to testify at trial because she was under subpoena—she did not want to be there and didn't want to testify against Mr. Bernal, but:

> What it's about is telling the truth, and she felt compelled to do so, and she did. She told the story about what happened on Five Mile, about what happened on – at Granger. She told the story about what happened at the residence. She's just being honest.

(Trial Tr., p.104, L.24 – p.105, L.10.) The prosecutor told the jury to believe its witness because she was "being honest" and implied that it was Ms. Becerra's honesty that compelled her to testify against Mr. Bernal, not the fact that she had (presumably) been served with a subpoena ordering her to attend the trial or face being found in contempt of court.

The prosecutor then told the jury that the owner of the white car, Mr. Le, told the truth when he testified, because he was a disinterested person, "a person who doesn't know Carmen, Gustavo, or John, who sees something happen, and came and he tell -- and he told the truth." (Trial Tr., p.107, Ls.7-15.) The prosecutor told the jury that Mr. Le's testimony gave credibility to the testimony of Mr. and Ms. Becerra, and that "[a]t the end of this, what we have are two people, really, Carmen and Gustavo, who come and they take the stand, and they tell the truth." (Trial Tr., p.107, Ls.7-22.) The prosecution's statements improperly bolstered the testimony of its witnesses, which attempted to secure the verdict on facts and evidence other than that presented at trial and which appealed to the passions and prejudices of the jury and violated Mr. Bernal's right to due process.

D. The Prosecutorial Misconduct Rose To The Level Of A Fundamental Error

Mr. Bernal concedes that he did not object to the prosecutor's arguments; however, he can show that the claim raised is one of fundamental error. *See Perry*, 150 Idaho at 226. Mr. Bernal meets all the prongs of the *Perry* test.

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[3] Mr. Bernal hereby incorporates by reference the legal authority he previously referenced in explaining prosecutorial misconduct as set forth in Section III of this brief.

First, the alleged errors are a violation of Mr. Bernal's right to due process and a fair trial. "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. The prosecutor's statement misinformed the jury as to the State's burden of proof, which was a violation of Mr. Bernal's right to due process. *See also State v. Beebe*, 145 Idaho 570 (Ct. App. 2007) (finding prosecutorial misconduct rising to the level of a fundamental error where the prosecutor misstated the evidence, misstated the law, and appealed to the passions and prejudice of the jury). Prosecutorial vouching for the credibility of a witness through bolstering is not merely an evidentiary issue such as when a witness provides vouching testimony. Instead, it is a distinct form of prosecutorial misconduct that implicates a constitutional right.

Mr. Bernal was charged with aggravated assault "by attempting to stab Gustavo Becerra with a knife." (R., pp.47-48.) Where the prosecutor, in his closing remarks, incorrectly told the jury that Mr. Bernal could be convicted of aggravated assault under either the attempt theory or the threat theory, he ameliorated the State's burden to prove that Mr. Bernal threatened Mr. Becerra with a knife, as it had charged. Thus, giving this instruction violated Mr. Bernal's right to a fair trial and due process.

Second, the error is clear and obvious from the record. The State's Information and the closing statements of the prosecutor are in the record, so there is no need for additional information outside the record. Further, failure to object to the testimony was not a tactical decision by Mr. Bernal's counsel. Where the case hinged on the credibility of the State's witnesses, there is no advantage in allowing the prosecutor to tell the jury that all of its witnesses were telling the truth.

Third, there is a reasonable probability that the error affected the outcome of the proceedings. Mr. Becerra, Ms. Becerra, and Mr. Le were the only witnesses against Mr. Bernal. There was no physical evidence of either the reckless driving (as charged) or the aggravated assault. Therefore, in order for the prosecutor to obtain a conviction on both of these counts, it was necessary for the jury to believe the testimony of the State's witnesses.

The jury had a difficult time determining whether Mr. Bernal was guilty. The jury took a long time to make its credibility determinations, and even needed to re-hear Mr. Becerra's testimony about the knife. (Trial Tr., p.109, L.5 – p.110, L.5; R., pp.78-79, 99, 102.) The jury deliberated for several hours and asked several questions of the court before retiring for the night on the first evening. (Trial Tr., p.109, L.5 – p.110, L.5; R., pp.78, 99, 102.) On the second day of deliberations, the jury deliberated for another few hours, before it finally reached its verdicts. (8/3/16 Tr., p.1, L.1 – p.4, L.22; R., p.79.)

Because the prosecutor's misconduct in bolstering the testimony of its witnesses violated Mr. Bernal's rights due process and a fair trial, and because he meets all three prongs of Idaho's fundamental error test, Mr. Bernal's convictions must be vacated.

CONCLUSION

Mr. Bernal respectfully requests that this Court vacate his convictions and remand his case for a new trial.

DATED this 20th day of October, 2017.

____________/s/_______________
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day October, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOHN JACOB BERNAL
INMATE #71162
ISCC
PO BOX 70010
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DEBORAH A BAIL
DISTRICT COURT JUDGE
E-MAILED BRIEF

BRIAN C MARX
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_________/s/_________________
EVAN A. SMITH
Administrative Assistant

SJC/eas