12-14-2017

State v. Herrera Respondent's Brief Dckt. 44596

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44596**
Plaintiff-Respondent,	)	
	)	**Benewah County Case No.**
v.	)	**CR-2011-2053**
	)	
JOSEPH DUANE HERRERA,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

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STATEMENT OF THE CASE

Nature Of The Case

Joseph Duane Herrera appeals from his conviction for second-degree murder.

Statement Of The Facts And Course Of The Proceedings

Herrera shot his girlfriend, Stefanie Comack, in the head on Christmas morning. State v. Herrera, 159 Idaho 615, 616-17, 364 P.3d 1180, 1181-82 (2015).[1] The state charged him with second-degree murder. Id. at 617, 364 P.3d at 1182. A jury convicted Herrera of second-degree murder after a trial. Id. at 617-18, 364 P.3d at 1182-83. The Idaho Supreme Court reversed the conviction because inadmissible evidence of Herrera's prior violence and threats toward the victim, and her fear of him and desire to leave him, had been improperly presented at the trial. Id. at 620-24, 364 P.3d at 1185-89.

On remand, a new jury convicted Herrera of second-degree murder. (R., vol. II, p. 240 – vol. III, p. 332.) Herrera filed a notice of appeal timely from the entry of judgment. (R., vol. III, pp. 447-52.)

[1] The facts of the case and procedure prior to the remand are also set forth in the Court's opinion. Herrera, 159 Idaho at 616-18, 364 P.3d at 1181-83.

ISSUES

Herrera states the issues on appeal as:

> I. Did the state vindictively prosecute Mr. Herrera by adding a firearm sentencing enhancement, and did the State commit misconduct when it misled the district court in order to get its motion to amend the complaint [sic] granted?
>
> II. Did the district court err in failing to conduct a sufficient inquiry of Mr. Herrera and his trial counsel upon Mr. Herrera's request for substitute counsel?
>
> III. Did the district court abuse its discretion when it overruled Mr. Herrera's foundation objections to Detective Berger's testimony on gunshot residue analysis?
>
> IV. Did the State commit prosecutorial misconduct in closing arguments?
>
> V. Did the accumulation of errors deprive Mr. Herrera of his right to a fair trial?
>
> VI. Did the district court impose a vindictive sentence after the second trial?

(Appellant's brief, p. 9.)

The state rephrases the issues as:

1. Has Herrera failed to show error in the district court's ruling that the amendment to add the firearm enhancement was not vindictive or fundamental error in his claim that his sentence was vindictive?

2. Has Herrera has failed to show that he received inadequate opportunity to explain his grounds for seeking substitution of appointed counsel?

3. Has Herrera failed to show that the district court erred in allowing a detective to testify how his experience and training on the effectiveness of gunshot residue testing contributed to his decision to not have such testing performed?

4. Has Herrera failed to demonstrate fundamental error in the prosecutor's closing argument?

5. Has Herrera failed to show the cumulative error doctrine applies?

ARGUMENT

I.
Herrera Has Failed To Show A Due Process Violation For Vindictive Prosecution Or Sentencing

A. Introduction

After Herrera's conviction for second-degree murder was reversed on appeal and the case remanded, the prosecution moved to amend the information to add a sentencing enhancement for use of a firearm in the commission of a felony. (R., vol. I, pp. 58-62.) The motion included a statement by the prosecutor that he had not been the prosecutor in the original trial, and had been sworn in as prosecutor only a couple of months before the remittitur issued; the motion was not brought for vindictive reasons; that the appeal had resulted in the state having less evidence to rely on in trial and the odds of a conviction on the included offense of voluntary manslaughter were therefore greater; and that in the event of a voluntary manslaughter conviction the enhancement would allow the state to request a sentence closer to the previously imposed sentence of 22 years to life on the vacated murder conviction. (R., vol. I, pp. 58-59; see also R., vol. I, p. 16 (remittitur); Tr., vol. I, p. 34, L. 1 – p. 35, L. 18; p. 38, L. 19 – p. 39, L. 15.) The defense argued that it was prejudiced because Herrera was facing the amendment as a "result of him exercising his Constitutional [sic] rights of appeal." (Tr., vol. I, p. 36, L. 10 – p. 38, L. 17.)

The district court granted the motion to amend. (R., vol. I, pp. 97-105.) It did so after concluding that amendment would not punish the defendant for exercising his appeal rights because the amendment did not add an additional charge, merely a sentencing enhancement, and the enhancement would not increase the potential punishment for the charged offense of second-degree murder. (R., vol. I, pp. 104-05.)

At the conclusion of the trial, after the jury returned a verdict of guilty on the second-degree murder charge, the prosecution dismissed the firearm enhancement. (Supp. Tr., p.107, Ls. 7-11; p. 110, Ls. 4-14.)

The matter proceeded to sentencing, where the prosecutor requested a life sentence with 30 years determinate. (Tr., vol. II, p. 999, Ls. 13-21.) The prosecutor based this argument in part on the fact that Herrera had used a gun and the policy of punishing gun crimes more severely was demonstrated by the statutory enhancement. (Tr., vol. II, p. 996, Ls. 13-18; p. 996, L. 25 – p. 997, L. 25.) The defense objected to part of this argument, stating that the state "chose not to seek" the firearm enhancement. (Tr., vol. II, p. 996, Ls. 19-22.) The district court overruled the objection because the prosecutor's recommendation "is argument." (Tr., vol. II, p. 996, Ls. 23-24.) The defense rebutted several of the state's arguments, and asked for a sentence that "makes sense" and is "just under the circumstances." (Tr., vol. II, p. 999, L. 24 – p. 1003, L. 21.) The district court imposed a sentence of life with 30 years determinate. (Tr., vol. II, p. 1020, Ls. 1-3.)

On appeal Herrera argues that the district court erred by not sustaining his objection that the amendment to add the firearm sentencing enhancement was vindictive prosecution. (Appellant's brief, p. 14-18.) This argument fails because Herrera has failed to show error in the district court's ruling that the amendment was not actually or apparently vindictive because it did not actually increase the potential sentence for the charged offense of second-degree murder. In addition, because the enhancement was dismissed at trial prior to being submitted to the jury, any error is necessarily harmless.

Herrera also makes three claims of vindictiveness that were not preserved by objection. He argues that the prosecutor asked for a vindictive sentence by recommending

a sentence of life with 30 years fixed, which was more than the previously imposed sentence of life with 22 years fixed. (Appellant's brief, pp. 18-20.) This claim fails because Herrera did not object to the recommendation on this ground below, and he does not assert fundamental error on appeal. Herrera also argues the prosecutor obtained the court's ruling that the amendment was not vindictive by a fraud on the court when he made an "implied promise" that he would not use the firearm enhancement to enhance a murder conviction and then breached the "implied promise" when he argued at sentencing that use of a firearm was an aggravating fact in this case, which somehow shows the prosecutor "lied." (Appellant's brief, pp. 20-24.) This argument fails because it is not preserved and Herrera has failed to claim, much less show, fundamental error. Herrera also argues the district court engaged in vindictive sentencing by imposing a higher sentence than after his first conviction. (Appellant's brief, pp. 64-75.) This claim fails because there is no presumption of vindictiveness and Herrera has failed to show fundamental error.

B. Standard Of Review

Appellate courts employ a bifurcated standard of reviewing due process claims on appeal, deferring to the trial court's factual findings but freely reviewing the application of the law to the facts found. State v. Schevers, 132 Idaho 786, 788, 979 P.2d 659, 661 (Ct. App. 1999); State v. Gray, 129 Idaho 784, 796, 932 P.2d 907, 919 (Ct. App. 1997). "An allegation of vindictiveness presents a subtle and narrow question. To determine whether the sentence was vindictively imposed, [the Court] look[s] to the totality of the circumstances and examines the words and actions of the judge as a whole." Stedtfeld v. State, 114 Idaho 273, 276, 755 P.2d 1311, 1314 (Ct. App. 1988).

Claims of vindictive prosecution and sentencing not raised below are generally reviewed for fundamental error. State v. Baker, 153 Idaho 692, 695, 290 P.3d 1284, 1287 (Ct. App. 2012) ("Because there was no objection before the trial court, we will review Baker's claim of a vindictive sentence, brought for the first time on appeal, for fundamental error."). However, a claim of apparent vindictiveness cannot be raised as fundamental error because no opportunity to rebut has been provided. State v. Ostler, 161 Idaho 350, 352–53, 386 P.3d 491, 493–94 (2016).

C. Herrera Has Failed To Show Error In The District Court's Ruling That Amending The Information To Add The Firearm Enhancement Was Not Vindictive

A defendant's due process rights are violated if a "prosecutor vindictively retaliates against a defendant for exercising a legally protected right." Ostler, 161 Idaho at 352, 386 P.3d at 493. "In order to demonstrate prosecutorial vindictiveness, a defendant must show either actual vindictiveness or apparent vindictiveness." Id. To show actual vindictiveness the defendant must "prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." Id. at 352–53, 386 P.3d at 493–94 (internal quotes omitted). To show apparent vindictiveness a defendant must demonstrate a "realistic likelihood of vindictiveness," which raises "a presumption of vindictiveness, which may be overcome only by objective information in the record." Id. at 353, 386 P.3d at 494 (internal quotations and citation omitted).

Application of this law to the facts shows no error by the district court. The district court looked at cases where the amendment added new charges or increased the potential sentence and concluded the "distinguishing feature in the present case" was that the

requested amendment "does not *increase* the potential sentence for the crime Herrera was convicted of in the first trial" because the firearm enhancement "has no effect" on the range of sentencing available to the court for second-degree murder. (R., vol. I, pp. 104-05 (emphasis original).) The district court was "unable to see" how standards of vindictive prosecution prevented adding the firearm enhancement, which could only increase the range of possible sentences for an included offense. (R., vol. I, p. 105.)

The district court was correct. The amendment did not add new charges, nor did it increase the potential penalty if Herrera was again convicted of the charged offense of second-degree murder. Even if the amendment increased the possibility of a greater sentence if there was a conviction on the included offense, such would not be facially punitive of Herrera for his appeal. The record supports the district court's conclusion that the proposed amendment was neither actually nor apparently vindictive.

Herrera first argues the district court erred because the change of prosecutors did not insulate the new prosecutor from vindictiveness. (Appellant's brief, p. 16.) The state agrees that a new prosecutor may not engage in vindictive prosecution (although the change in prosecutors might be *evidence* of a lack of vindictiveness). The argument is irrelevant, however, to the district court's ruling, which was based on the conclusion that the amendment did not increase the number of charges nor the potential punishment for the charged offense.

Herrera next argues that by seeking to increase the potential penalties for the included offense "the prosecutor was seeking to 'protect a sentence' that had been obtained by the initial prosecutor's misconduct in eliciting testimony that the district court had ruled was inadmissible." (Appellant's brief, p. 17.) The state does not discern a cogent argument

related to either apparent or actual vindictiveness in this second point. As noted above, the issue is whether the prosecutor was actually or apparently "motivated by a desire to punish [Herrera] for doing something that the law plainly allowed him to do." Id. at 352–53, 386 P.3d at 493–94 (internal quotes omitted). The prior prosecutor's actions tell us nothing about the present prosecutor's motivations, nor do they undermine the district court's conclusion that an amendment that neither adds new charges nor changes the possible sentencing range of the charged offense does not punish the defendant for appealing.

Herrera's third argument is that the prosecutor's "purported change in circumstances," the increased possibility of a manslaughter conviction, was "fictional." (Appellant's brief, p. 17.) This third argument, like the first two, is irrelevant because the district court determined that the enhancement, because it was neither a new charge nor would affect the length of the sentence on the charged crime, was not actually nor apparently motivated by a desire to punish Herrera for appealing. Whether the prosecutor had a rebuttal for apparent vindictiveness was therefore irrelevant. Even if Herrera had met his initial burden of showing that the prosecutor was apparently vindictive in seeking to add the firearm enhancement, the prosecutor's non-vindictive explanation—that his assessment of the evidence in light of the Idaho Supreme Court's ruling holding evidence at trial inadmissible increased the possibility of manslaughter verdict—was still proper and not "fictional." See Herrera, 159 Idaho at 620-24, 364 P.3d at 1185-89.

Herrera's final argument is that whether he was guilty as charged or guilty of an included offense was a "question for the jury" and because no jury had found him guilty of manslaughter there was no sentence to "'protect.'" (Appellant's brief, pp. 17-18 (quote

original, although unattributed in the brief).) Again, Herrera's argument is irrelevant to the district court's decision that the proposed amendment was not actually or apparently an attempt to punish Herrera for pursuing an appeal.

The district court concluded that the proposed amendment to add the firearm enhancement was not, under the facts of this case, actually or apparently an attempt to punish Herrera for prevailing on appeal. Herrera's arguments fail to address the district court's analysis, and are irrelevant to that analysis. Herrera has therefore failed to show error by the district court.

Even if the district court had erred, such error would necessarily be harmless. Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded." I.C.R. 52. The proper inquiry is whether "'the guilty verdict actually rendered in this trial was surely attributable to the error.'" State v. Joy, 155 Idaho 1, 12, 304 P.3d 276, 286 (2013) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (emphasis omitted)). "An error is harmless beyond a reasonable doubt if the Court can conclude, based upon the evidence and argument presented during the trial, that the jury would have reached the same result absent the error." State v. Christiansen, 144 Idaho 463, 471, 163 P.3d 1175, 1183 (2007). The firearm enhancement was dismissed at trial, prior to being considered by the jury, and therefore could not have affected the verdict. Moreover, the sentencing range applicable to the murder conviction was the same with or without the enhancement. Therefore, any conceivable error in allowing the amendment to add the firearm enhancement was necessarily harmless.

D. Herrera Has Failed To Argue, Much Less Show, Fundamental Error In His Non-Preserved Claims Of Vindictive Prosecution And Sentencing

Herrera claims for the first time on appeal[2] that the prosecutor "lied," and possibly violated the requirement of candor to the court under Idaho R. Prof. Conduct 3.3(a)(1), "when he claimed that the firearms enhancement would only be used to protect the original sentence" because that was an "implied promise" he would not "argue[] in favor of an increased penalty based on the intent of the dismissed firearm enhancement at sentencing." (Respondent's brief, p. 20.) This accusation is made with reckless disregard for the truth.

"When prosecutorial misconduct is not objected to at trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error." State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). To prevail on a claim of fundamental error a defendant must demonstrate (1) violation of an unwaived constitutional right; (2) that the error is clear or obvious and lack of objection was not tactical; and (3) prejudice. Id. at 226, 245 P.3d at 978. "The party asserting a claim of fraud on the court must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense." Rae v. Bunce, 145 Idaho 798, 801, 186 P.3d 654, 657 (2008) (internal quotation omitted). Because Herrera makes no argument that the error he claims for the first time on appeal was fundamental, he has necessarily failed to meet his burden.

[2] The objection asserted below was that the state had forfeited any argument based on the firearm enhancement statute by dismissing the enhancement at trial. (Tr., vol. II, p. 996, Ls. 19-22.)

If not barred from consideration, the claim that the prosecutor "breached an implied promise when he argued in favor of an increased penalty based on the intent of the dismissed firearm enhancement at sentencing" (Appellant's brief, p. 20) is specious. It is based on the allegation that the prosecutor "claimed that the firearms enhancement would only be used to protect the original sentence." (Id.) No such claim, much less any "implied promise," is in the record.

The prosecutor argued, in part, that the proposed amendment to add the firearm enhancement was not vindictive because "the State would still like the opportunity to argue for the same determinate sentence" of 22 years if the jury should convict of the included offense of manslaughter. (R., vol. I, p. 59.) At the hearing on the motion the prosecutor represented that he would have included the enhancement in the original information were he the prosecutor at that time. (Tr., vol. I, p. 34, Ls. 19-25.) He further argued that the appeal "limited the evidence that is going to be coming in" and, although the evidence of murder was strong, there was at that time "some possibility of a manslaughter being found." (Tr., vol. I, p. 35, Ls. 1-11.) If the verdict were returned for manslaughter, the state wanted a sentence of "25 or 30 years" "available" "as a matter of law." (Tr., vol. I, p. 35, Ls. 11-18.[3]) The prosecutor's argument centered on what sentence he hoped to seek if Herrera was convicted of manslaughter. He made *no* representations about what sentence the state would recommend if Herrera were convicted of murder, much less

[3] The complete quote is:

> it's important to the State to have the potential, if manslaughter is found by the jury, to be able to have the sentencing range that we would be—or that would be available to the State as a matter of law, and that would be the 25 or 30 years with that sentencing enhancement added to either of the manslaughter—potential manslaughter charges, and that's it.

(Tr., vol. I, p. 35, Ls. 11-18.)

"imply" what arguments he would make in support of that recommendation. The accusation that the prosecutor "lied" by means of an "implied promise" is absurd on its face and is based on an unreasonable reading of the prosecutor's motion. The argument fails on all three prongs of the fundamental error test: there was no constitutional violation, by definition an "implied promise" is not clear on the record, and amending to include the later dismissed enhancement did not prejudice Herrera.

Herrera next argues the prosecutor engaged in vindictive prosecution by requesting a sentence of life with 30 years fixed, a sentence with eight more years determinate than the sentence originally imposed. (Appellant's brief, pp. 18-20.) Herrera did not object to the prosecutor's sentencing recommendation on this basis below. The objection asserted in the trial court was that the state had forfeited any argument based on the firearm enhancement statute by dismissing the enhancement at trial. (Tr., vol. II, p. 996, Ls. 19-22.) Because the objection that the recommendation was vindictive was not asserted below, and Herrera does not claim fundamental error when he asserts that theory for the first time on appeal, he has necessarily filed to show fundamental error.

Moreover, any claim of fundamental error is not supported by the record. No clear constitutional violation is established by the record because actual vindictiveness was not proven and, because the issue was not raised below, no theory of apparent vindictiveness was developed. Ostler, 161 Idaho at 354, 386 P.3d at 495 (finding no fundamental error where no apparent vindictiveness shown by record and no opportunity to rebut presumption created by apparent vindictiveness provided). In addition, no showing of prejudice has been made, especially in light of the district court's comments that it had reached its sentence independent of the prosecutor's argument and for a reason other than offered by

the prosecutor. (Tr., vol. II, p. 1021, L. 15 – p. 1022, L. 4 (court was considering sentence of life with 30 years fixed before prosecutor made recommendation); p. 1022, L. 25 – p. 1023, L. 4 (reason for longer fixed time was Herrera's reliance on false versions of events previously given).) Herrera has failed to show fundamental error because he has not attempted to show fundamental error and because the record does not show fundamental error.

Herrera finally argues the district court vindictively imposed a longer sentence of life with 30 years fixed after considering the prosecutor's argument based on a policy of punishing firearm crimes more harshly. (Appellant's brief, pp. 64-75.) This time Herrera acknowledges the lack of an objection and his need to establish fundamental error. (Appellant's brief, p. 67.) He further, correctly, acknowledges that because the second sentencing was conducted by a different judge, no presumption of vindictiveness applies. (Appellant's brief, p. 69 (citing State v. Robbins, 123 Idaho 527, 532, 850 P.2d 176, 181 (1993).) Review of the record in light of the fundamental error standard shows his vindictive sentencing fundamental error claim to be without merit.

The claim of an actual, clear, and prejudicial constitutional violation fails. The sentencing in front of a different judge, as it did in Robbins, "removed any reasonable likelihood of actual vindictiveness in the resentencing." Robbins, 123 Idaho at 531-32, 850 P.2d at 180-81. The district court specifically stated one difference in the evidence before it as opposed to the original sentencing:

> The greatest thing that impacts my decision compared to Judge Gibler's decision is a couple more years have ticked on and we still don't know what happened the morning of December 25th, 2011, and that's the way it will remain forever.

(Tr., vol. II, p. 1022, L. 25 – p. 1023, L. 4; see also p. 1009, L. 8 – p. 1014, L. 25 (explaining why the court did not accept as true the various versions of the facts told by Herrera).) The district court also stated one difference in the legal standards applied by the courts, namely that the prior judge had applied a legally and factually unnecessary restriction to the scope of its sentencing discretion. (Tr., vol. II, p. 1015, L. 1 - p. 1017, L. 22.) The district court in re-sentencing specifically applied the relevant sentencing factors to the facts of the case. (Tr., vol. II, p. 1017, L. 11 – p. 1020, L. 3.) The record here thus shows that a different judge applied the correct legal standards to the facts of this case (some of which were not available at the prior sentencing) and independently exercised his discretion. That he reached a slightly different conclusion than the prior judge does not show actual vindictiveness, much less make such clear on the record.

Herrera argues that the district court's comments about a lack of "closure" show actual vindictiveness. (Appellant's brief, pp. 69-74.) The core of his argument is that the "lack of closure" relied on by the district court "stemmed from Mr. Herrera exercising his right to appeal and the resulting second trial." (Appellant's brief, p. 70.) This is not a reasonable or fair reading of the district court's comments, much less a showing of a clear constitutional violation in the record.

The district court did mention "closure" in its comments at sentencing. The court stated that there was a lack of "closure" "because nobody in this courtroom, your family included, know[s] what happened." (Tr., vol. II, p. 1010, Ls. 7-13.) The reason no one knew what happened was because Herrera had not "come forward with what actually happened" but instead told "three stories" about what happened. (Tr., vol. II, p. 1009, L. 24 – p. 1010, L. 6.) None of the versions told was actually credible. (Tr., vol. II, p. 1012,

L. 7 – p. 1014, L. 25.) This lack of "closure" not only detrimentally affected the victim's family, but showed a "lack of responsibility, accountability" by Herrera. (Tr., vol. II, p. 1010, L. 14 – p. 1011, L. 4.) The district court did mention "closure" once in the sense of an end of legal proceedings, but did so as a reason *not to impose a fixed life sentence*, even though such a sentence was warranted. (Tr., vol. II, p. 1021, Ls. 15-25.) Far from pinning the lack of closure on the decision to appeal instead of accept the results of the first trial, the district court was concerned with the lack of closure caused by Herrera's multiple and untruthful recitations of events surrounding the murder. The claim that the district court's comments about closure showed vindictiveness for appealing is not supported, much less clear, in the record.

II.
Herrera Has Failed To Show That He Received Inadequate Opportunity To Explain His Grounds For Seeking Substitution Of Appointed Counsel

A. Introduction

Herrera filed a "Motion to Replace Defense Attorney," with an attached letter requesting a meeting with the judge "for the purpose of requesting a change of lawyer." (R., vol. I., pp. 56-57.) At the hearing counsel stated that Herrera had concerns about counsel's ability to be prepared for trial, concerns counsel also had. (Tr., vol. I, p. 73, L. 18 – p. 75, L. 8.) Counsel also stated that Herrera had expressed disagreement with some of trial counsel's tactical decisions and trial strategy, which counsel did not wish to "discuss in open court." (Tr., vol. I, p. 75, Ls. 9-19.) Counsel also informed the district court that Herrera wanted to personally address the court, which he did. (Tr., vol. I, p. 77, Ls. 16-22.) Herrera expressed concerns that his trial counsel had represented family members of

the victim in his capacity as the public defender, and counsel explained the nature of those representations. (Tr., vol. I, p. 77, L. 23 – p. 80, L. 5.)

The motion also relied on two letters, one by Herrera to counsel and counsel's response letter. (Tr., vol. I, p. 78, Ls. 9-16.) The letter from Herrera "indicat[ed] his position." (Tr., vol. I, p. 73, Ls. 18-19.) The letters were returned to Herrera, and are apparently not in the record on appeal. (Tr., vol. I, p. 78, Ls. 9-16.)

The district court denied the motion for new counsel, without prejudice to filing a motion to continue the trial. (Tr., vol. I, p. 80, L. 6 – p. 81, L. 9; R., vol. I, p. 114.)

On appeal Herrera contends the district court erred because it "did not question Mr. Herrera as to the specifics of Mr. Herrera's claim that his counsel would not be able to devote sufficient time to his case before the trial date" and did not let Herrera "finish explaining the conflict" of interests allegedly created by the public defender's prior representation of the victim's siblings. (Appellant's brief, p. 29.) Thus, Herrera argues, the district court "conducted an incomplete assessment" and "failed to understand the totality of both of Mr. Herrera's claims." (Id.) This argument fails for two reasons. First, it is based on an incomplete appellate record. Second, review of even the existing record shows it is without merit.

B. Standard Of Review

The decision whether to grant or deny a request for substitute counsel is "within the discretion of the trial court." State v. Daly, 161 Idaho 925, 928, 393 P.3d 585, 588 (2017). An abuse of discretion will be found "when the denial of the motion results in a violation of the defendant's right to counsel." State v. Nath, 137 Idaho 712, 715, 52 P.3d 857, 860 (2002).

C. Herrera Has Failed To Provide A Complete Record Allowing Appellate Review Of His Claim

"It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error." Greenfield v. Smith, 162 Idaho 246, 395 P.3d 1279, 1286 (2017) (internal quotation and citation omitted). See also State v. Starr, 161 Idaho 345, 348, 385 P.3d 900, 903 (Ct. App. 2016). Review of the law and the transcript shows the record provided by Herrera is inadequate to support his claims of error.

"Upon being made aware of a defendant's request for substitute counsel, the trial court must afford the defendant a full and fair opportunity to present the facts and reasons in support of a motion for substitution of counsel." State v. Gamble, 146 Idaho 331, 336, 193 P.3d 878, 883 (Ct. App. 2008). Moreover, "a trial court has an affirmative duty to inquire into a potential conflict [of interests] whenever it knows or reasonably should know that a particular conflict may exist." State v. Carver, 155 Idaho 489, 491, 314 P.3d 171, 173 (2013) (internal quotations omitted). This can be done by making "reasonable, nonsuggestive efforts to determine the nature of the defendant's complaints and to apprise itself of the facts necessary to determine whether the defendant's relationship with his or her appointed attorney has deteriorated to the point that sound discretion requires substitution or even to such an extent that his or her Sixth Amendment right would be violated but for substitution." State v. Lippert, 152 Idaho 884, 887, 276 P.3d 756, 759 (Ct. App. 2012). Giving the defendant "the opportunity to express his concerns" in open court is generally sufficient. Gamble, 146 Idaho at 336, 193 P.3d at 883. The court's duty is to "afford defendant a full and fair opportunity to present the facts and reasons in support of his motion for substitution of counsel," but the court is not "required to act as advocate for

the defendant in a criminal proceeding." State v. Clayton, 100 Idaho 896, 898, 606 P.2d 1000, 1002 (1980).

When the district court first took up the motion for substitute counsel, Herrera's counsel stated that the court had "the letter from my client indicating his position." (Tr., vol. I, p. 73, Ls. 15-19.) Herrera's counsel specifically addressed two concerns: his ability to prepare for trial as set and "differences" regarding "trial tactics." (Tr., vol. I, p. 73, L. 19 – p. 75, L. 19.) Herrera's counsel informed the district court that Herrera wished to address the court, which he did, raising a claim of a conflict because counsel, as public defender, had represented the victim's siblings. (Tr., vol. I, p. 77, L. 16 – p. 78, L. 5.) The district court put on the record that it was "hand[ing] back" two letters, one from Herrera to counsel, and one from counsel to Herrera. (Tr., vol. I, p. 78, Ls. 9-16.) The record thus establishes that the district court considered at least two, and possibly three, letters in relation to the motion for substitution of counsel. These letters do not appear in the appellate record, at least in part because they were returned to the defense.[4] Because the claim here is that the district court did not allow Herrera to fully develop his claims, but this Court cannot review all the information the district court did in fact consider, the appellate record is inadequate to sustain Herrera's claim of error.

[4] The state notes that Herrera's counsel was concerned about the possibility of waiving attorney-client privilege by going into the details of the differences regarding tactics. (Tr., vol. I, p. 75, Ls. 17-19; p. 77, Ls. 18-20.) The record suggests the possibility that letters between Herrera and his counsel were reviewed by the district court without providing them to the prosecutor so the privilege would be preserved. (See Tr., vol. I, p. 73, Ls. 18-19; p. 76, Ls. 3-12; p. 78, Ls. 9-16.) This also provides an alternate explanation for why the district court did not engage in any sort of colloquy with Herrera regarding the alleged differences about how the case should be conducted.

In addition, the record this Court does have, even though incomplete, shows no error. The motion was based on three grounds: ability of counsel to prepare for trial (Tr., vol. I, p. 73, L. 19 – p. 75, L. 8); differences between Herrera and counsel in regard to trial tactics (Tr., vol. I, p. 75, Ls. 9-19); and the possibility of a conflict of interests from counsel's prior representation of relatives of the victim on misdemeanor charges, in his capacity as public defender (Tr., vol. I, p. 77, L. 23 – p. 80, L. 5). The district court denied the motion on all three grounds. It denied substitution of counsel based on any inability to prepare grounds, noting that it did not have pending a motion to continue. (Tr., vol. I, p. 80, Ls. 6-9; p. 80, L. 23 – p. 81, L. 8.) It denied the claim of "fundamental differences" holding that it did not have "any evidence of that." (Tr., vol. I, p. 80, Ls. 10-22.) It denied the claim of a conflict of interests on the basis of the attorney's representation that his prior representation of family members of the victim did not constitute a conflict of interests. (Tr., vol. I, p. 80, Ls. 10-18.) This record shows that the district court both ruled on all three theories presented and gave Herrera a full and fair hearing on those theories.

Herrera claims the district court "failed to address" his claims that "counsel was unprepared for trial and that there was an actual conflict." (Appellant's brief, p. 28.) This claim is contrary to the record.

The record shows that the district court did address the claim counsel could not be prepared for the April 25 trial date. The district court twice referenced the absence of a motion for continuance as a ground for denying the motion for substitution of counsel. (Tr., vol. I, p. 80, Ls. 6-9; p. 81, Ls. 6-8.) Because both parties represented they would have difficulties getting prepared for the trial per the deadline as then set and wanted a continuance (Tr., vol. I, p. 74, Ls. 11-23 (counsel "deeply concerned" about ability to

prepare for trial as set, wants additional 60 days); Tr., vol. I, p. 76, L. 13 – p. 77, L. 13 (prosecutor not objecting to continuance and noting state might also have difficulty preparing for trial as set)), the district court did not err in concluding that an alleged inability to prepare for the current trial setting was not a proper reason to substitute counsel until the court had finally ruled on a potential continuance. The trial was ultimately delayed well past the date defense counsel represented he could be prepared for trial (compare Tr., vol. I, p. 74, Ls. 21-23 (defense counsel representing he could be prepared "within 60 days" of April 25) with p. 162, Ls. 2-11 (trial started July 18, more than 60 days after April 25)), which rendered the claim of an inability to prepare for the earlier date moot. The argument the district court did not address the claim that inability to prepare for trial was grounds for substitution of counsel is without merit.

Likewise, the claim the district court failed to consider the claim of a conflict of interests is without merit. The district court specifically rejected the claim of a conflict on the basis of counsel's representation that there was no conflict. (Tr., vol. I, p. 80, Ls. 10-18.) "[I]n determining whether a conflict exists, trial courts are entitled to rely on representations made by counsel." State v. Severson, 147 Idaho 694, 704, 215 P.3d 414, 424 (2009) (citation omitted). Herrera's claim is without merit because it is contrary to the record.

Herrera also asserts the district court erred because it did not "question" him about counsel's ability to prepare for trial and "did not allow him to finish explaining" the alleged conflict of interests. (Appellant's brief, p. 29.) There is on this record, however, no reason to believe that Herrera could have provided any relevant personal information related to these issues. Trial counsel fully explained his difficulties in trial preparation and the scope

of his representation of the victim's siblings. (Tr., vol. I, p. 73, L. 18 – p. 75, L. 8; p. 78, L. 22 – p. 80, L. 5.) Nothing in this record suggests Herrera had any actual knowledge, much less personal knowledge, of the scope or nature of counsel's representation of prior clients or his ability to prepare for trial. The record shows Herrera had a full and fair opportunity to present the facts and reasons in support of a motion for substitution of counsel.

Herrera has shown no abuse of discretion in the denial of his motion for substitution of counsel. First, he has failed to provide a complete record, and therefore appellate review is not possible. Second, he has failed to show any infirmity in either the district court's reasoning that counsel's concerns about his ability to be prepared for the first trial date was not grounds for substitution where a motion to continue might be filed and granted, or the court's conclusion that trial counsel's representations were sufficient to show there was no actual conflict of interests created by trial counsel's prior representation of the victim's siblings. Finally, Herrera has failed to show that the hearing was inadequate to present all his reasons and evidence for the request for substitute counsel. The record and the law support the district court's exercise of discretion.

III.
The District Court Did Not Err By Admitting A Detective's Testimony About Why He Did Not Order Gunshot Residue Tests

A. Introduction

In opening statements defense counsel stated that the jury would hear evidence that Stefanie Comack "grabbed the weapon" and that the state performed a "forensic examination of her hands that —they took a gun residue test for hands." (Tr., vol. I, p.307, Ls. 22-25.) Counsel argued the only reason for performing such a test was "if she handled the weapon." (Tr., vol. I, p. 307, L. 25 – p. 308, L. 1.) During trial Detective Greear

testified that he put bags on Stefanie's hands after her death to "preserve any kind of trace evidence." (Tr., vol. II, p. 473, L. 25 – p. 475, L. 18 (non-words omitted).) He further testified in cross-examination that Dr. Aiken swabbed Stefanie's hands during the autopsy and turned over "gun residue kits" to Detective Greear. (Tr., vol. II, p. 484, Ls. 6-13 (phrasing that of defense counsel).) The state later re-called Detective Berger to the stand. (Tr., vol. II, p. 692, Ls. 20-22.) Detective Berger testified that he was the supervising police officer in charge of the investigations and controlled what testing of evidence was performed. (Tr., vol. II, p. 700, Ls. 5-20.) He testified that he did not instruct that gunshot residue tests be performed in this case because they "already knew" Stefanie had been shot in the head and Herrera had confessed that he had shot the gun. (Tr., vol. II, p. 703, Ls. 7-19.) Detective Berger also testified, over objections to foundation and his expertise, that certain "limitations" on gunshot residue testing were factors in his decision to not have gunshot residue testing performed. (Tr., vol. II, p. 703, L. 20 – p. 705, L. 3.[5]) Cross-examination focused on why Detective Berger decided to not change his mind and test the residue collected from Stefanie's hands after Herrera changed his statement and, under

[5] Herrera's appellate counsel assert that some of this testimony "was factually incorrect," contending it is inconsistent with a summary of expert testimony contained in a 1979 court opinion. (Appellant's brief, p. 36, n. 8 (citing State v. Warden, 100 Idaho 21, 24, 592 P.2d 836, 839 (1979), for the proposition that a recitation of testimony in that case makes certain facts in this case "well-established")). The flaws in this assertion are legion, but the state would like to point out two: First, the expert in that case testified prior to 1979 regarding "neutron activation analysis" to detect "barium antimony." Warden, 100 Idaho at 24, 592 P.2d at 839. Nothing in this record shows that Detective Berger was talking about the same testing, or that the testing and methodology used in 1979 would still be considered scientifically valid, much less "well-established," today. Second, trial counsel specifically interjected the theory that the only reason the police would have taken and preserved evidence of possible residues on Stefanie's hands was if she handled the weapon. (Tr., vol. I, p. 307, L. 25 – p. 308, L. 1.) Evidence of what the testing would or would not have shown was a trial issue; it is far too late for Herrera to just now be introducing his rebuttal to the detective's testimony.

oath, claimed Stefanie had grabbed the gun, causing it to discharge. (Tr., vol. II, p. 706, L. 6 – p. 708, L. 4.) In re-direct examination, again over objections to foundation and qualifications as an expert, Detective Berger testified that he did not change his mind and have the testing conducted because he did not believe testing would be beneficial because Stefanie was known to be close to the gun when it discharged. (Tr., vol. II, p. 708, L. 8 – p. 713, L. 8.)

On appeal Herrera challenges the district court's rulings overruling his objections to foundation and expertise by Detective Berger. (Appellant's brief, pp. 29-38.) Application of the relevant law shows no abuse of discretion by the district court because Detective Berger was properly allowed to testify about his reasons for not conducting gunshot residue testing.

B. Standard Of Review

"The determination of whether expert testimony will assist the trier of fact lies within the broad discretion of the trial court." State v. Parton, 154 Idaho 558, 563, 300 P.3d 1046, 1051 (2013) (quoting Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 252, 245 P.3d 992, 1004 (2010)).

C. Detective Berger's Testimony About His Reasons For Not Conducting Gunshot Residue Testing Was Admissible

"To be admissible, the expert's testimony must assist the trier of fact to understand the evidence or to determine a fact in issue." State v. Joslin, 145 Idaho 75, 81, 175 P.3d 764, 770 (2007) (quotations omitted); see also I.R.E. 702. "The function of the expert is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror." State v. Arrasmith, 132 Idaho 33, 42, 966 P.2d 33, 42 (Ct.

App. 1998) (citations omitted). A witness may be "qualified as an expert by knowledge, skill, experience, training, or education." I.R.E. 702.

The whole point of Detective Berger's testimony when he was recalled was to establish why he, as supervising detective, decided to not have gunshot residue testing performed during the course of the investigation or after Herrera gave a very different version of events in his testimony. He was therefore testifying as an expert in deciding what investigation to conduct. He needed no further expertise than his training and experience as an investigator to testify that his reasons for not ordering gunshot residue testing included his belief that such testing would not materially add to the evidence collected.

Even to the extent the testimony was admitted to prove the accuracy of Detective Berger's underlying premise—that gunshot residue testing would not have added materially to the evidence—the evidence showed Detective Berger's expertise. Detective Berger testified that he was familiar with gunshot residue testing through "experience and training … and cases [he's] worked." (Tr., vol. II, p. 701, Ls. 3-7.) Detective Berger was "a sergeant in detectives with the Idaho State Police." (Tr., vol. II, p. 530, L. 25 – p. 531, L. 2.) He had been a detective since 1999 (about 17 years at the time) and had been a police officer for about 26 years total. (Tr., vol. II, p. 531, Ls. 15-21.) He had completed police training and taken advanced training, and taken classes on "crime scene reconstruction, crime scene schools, [and] homicide schools." (Tr., vol. II, p. 531, L. 21 – p. 532, L. 10.) In his experience, gunshot residue testing was something they "used to" do to "determine if there was gunshot residue on the hands and any part of the body." (Tr., vol. II, p. 701, Ls. 8-14.) That Detective Berger was not a chemist or forensic scientist is

immaterial. He was clearly qualified to testify generally about what investigative techniques were likely to produce material evidence and why. The district court did not abuse its discretion.

Herrera argues that Detective Berger was not "qualified as an expert on the topic of gunshot residue analysis." (Appellant's brief, pp. 35-36.) While this assertion is apparently true, it is just as apparently irrelevant. No evidence was provided that Detective Berger did or could have performed gunshot residue analysis. Such analysis would ostensibly have been performed by a forensic scientist at the state laboratory. Detective Berger only testified to why, based on his training and experience, he had decided to not send the residue samples to the state lab for testing. Herrera does not argue, much less show, that Detective Berger was not qualified to present that testimony.

Finally, any error was harmless. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected …." I.R.E. 103(a). See also I.C.R. 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). "The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence." State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)). As noted above, Detective Berger was certainly qualified to testify regarding how his own reasoning, experience and training led to the decision to not have the residue samples tested, and his testimony was admissible to rebut the defense argument that the decision was based on a desire to not produce exculpatory evidence. Any error in admitting evidence beyond the reasons underlying the detective's decision was

harmless in the context of the trial and given the overwhelming evidence that Herrera shot Stefanie.

Herrera argues the error was not harmless because the state "would have lost some support for its theory of the case" and would not have been able to argue that gunshot residue testing would have been useful only to determine presence and proximity to the gun when it was fired. (Appellant's brief, p. 38.) As acknowledged by Herrera, however, the state was responding to the defense argument the Detective Berger chose not to conduct the testing "'[b]ecause it doesn't fit their theory of the case.'" (Appellant's brief, p. 37 (quoting Supp. Tr., p. 64, Ls. 8-13).) This is a tacit admission that the evidence was properly admitted for at least the purpose of rebutting the inference of some improper motivation in deciding not to conduct the testing. After all, if the jury could, without the benefit of expert testimony, draw the inference that the detective was trying to avoid generating exculpatory evidence, as advocated by Herrera's trial counsel, surely it was not improper to provide evidence that Detective Berger made the decision on the basis of his training and experience leading him to conclude that the testing would not produce evidence material to either the prosecution or the defense. Even if the testimony were inadmissible beyond the purpose of rebutting the inference of an improper motive for not conducting the testing, such a limitation would not have changed the trial or the arguments in any meaningful way. Any error, even if there was error, was necessarily harmless.

IV.
Herrera's Claims Of Prosecutorial Misconduct Amounting To Fundamental Error Rely On Blatant Misrepresentations Of The Record Or Are Otherwise Without Merit

A. Introduction

Herrera did not object to the prosecuting attorney's closing arguments. (Supp. Tr., p. 44, L. 2 – p. 60, L. 15; p. 77, L. 17 – p. 90, L. 16.) On appeal Herrera claims the prosecutor engaged in multiple acts of misconduct that amount to fundamental error. (Appellant's brief, pp. 38-63.) Review shows these claims are based on dubious or outright false assertions.

B. Standard Of Review

"When prosecutorial misconduct is not objected to at trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error." State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). To prevail on a claim of fundamental error a defendant must demonstrate (1) violation of an unwaived constitutional right; (2) that the error is clear or obvious and lack of objection was not tactical; and (3) prejudice. Id. at 226, 245 P.3d at 978.

C. Appellate Counsels' Claim That The Prosecutor Repeatedly Stated Herrera Was A Liar Is A Misrepresentation Of The Record

It is proper to explain how the evidence adduced at trial affects the credibility of various witnesses, including the defendant. State v. Ehrlick, 158 Idaho 900, 928, 354 P.3d 462, 490 (2015) (not misconduct to "comment" on defendant's credibility and "explain" how evidence showed he was "dishonest"); State v. Moses, 156 Idaho 855, 871–72, 332 P.3d 767, 783–84 (2014) (argument that jury could put transcript of defense witness testimony "in the trash" was proper); State v. Norton, 151 Idaho 176, 188, 254 P.3d 77, 89

(Ct. App. 2011) (prosecutor's arguments that the defendant had lied did "not constitute misconduct" where supported by evidence). However, "it may be improper to label the defendant as a 'liar'" in the absence of an admission to lying, because "excessive labeling of the defendant as a 'liar' could be viewed as an improper attempt to obtain a finding of guilt by disparaging the defendant before the jury." State v. Gross, 146 Idaho 15, 18–19, 189 P.3d 477, 480–81 (Ct. App. 2008) (prosecutor's use of the term "liar," though "troubling," was not misconduct); State v. Lankford, 162 Idaho 477, 399 P.3d 804, 827 (2017) (repeated use of the term "liar" was "troubling and ill-advised" but "did not rise to the level of prosecutorial misconduct" where accusation was supported by evidence presented at trial and was tactic also employed by defense counsel). Because the label "liar" may go to character instead of just representing comment on the evidence, Idaho courts have generally drawn a distinction between arguing, based on the evidence, that statements were lies, and accusations that defendants are liars. See Moses, 156 Idaho at 872–73, 332 P.3d at 784–85; State v. Kuhn, 139 Idaho 710, 716, 85 P.3d 1109, 1115 (Ct. App. 2003). In Kuhn, perhaps the seminal case on this distinction, the prosecutor "permissibly argued" that inconsistencies in the defendant's testimony were because the defendant "lied under oath," and also properly argued that the false testimony "was not the first time" the defendant had "committed dishonest acts." Id. at 716, 85 P.3d at 1115. The prosecutor, however, "crossed the line of propriety" when he called the defendant "a liar and a thief." Id.

It is indisputable that one of the prosecutor's main themes in closing argument was that the evidence showed Herrera had lied about events leading to and causing Stefanie's death, and that his lies were in turn evidence that Herrera had acted with malice

aforethought. (Supp. Tr., p. 44, L. 2 – p. 60, L. 15; p. 77, L. 17 – p. 90, L. 16.) As shown by the above-cited law, this was entirely proper argument. It was therefore not clear constitutional error that prejudiced Herrera.

Herrera's appellate counsel argue "the prosecutor committed misconduct by calling Mr. Herrera a liar more than twenty times in closing arguments." (Appellant's brief, p. 41 (underlining and capitalization omitted).) They contend the prosecutor "repeatedly called Mr. Herrera a liar." (Appellant's brief, p. 41.) They allege it is a "fact" that the prosecutor called him a "'liar.'" (Appellant's brief, p. 43.) Despite a specific quote of "liar," and the claim of "fact," Herrera's appellate counsel do not provide any citation to anywhere in the transcript that the prosecutor actually used that word. (Appellant's brief, pp. 41-46.) In "fact," the prosecutor did not call Herrera a "liar" "more than twenty times"; review of the transcript of the prosecutor's argument shows he called Herrera a "liar" exactly *zero* times. (Supp. Tr., p. 44, L. 2 – p. 60, L. 15; p. 77, L. 17 – p. 90, L. 16.) Herrera's claim of prosecutorial misconduct is based on a misrepresentation of the record. That Herrera supported his fundamental error argument with a misrepresentation of the record shows that the claim fails on at least the second prong of the test, requiring that the error be "clear" in the record.

Even to the extent Herrera's argument does not rely on the misrepresentation by Herrera's appellate counsel it falls far short of showing error, much less constitutional error that is clear on the record and prejudicial. Herrera argues the prosecutor's arguments went "beyond a comment on the evidence" and constituted "a personal attack upon the defendant," which personal attack would "lead the jury to believe there is additional evidence not introduced at trial to which the prosecutor must be referencing." (Appellant's

brief, pp. 43-44.) This argument, beyond being perfectly circular, shows no error, much less clear, prejudicial constitutional error.

The prosecutor specifically argued that the "evidence" showed Herrera lied and his "statements are not to be believed" because his statements were "inconsistent" and contrary to the "physical evidence." (Supp. Tr., p. 44, Ls. 15-18; see also Supp. Tr., p. 48, L. 2 – p. 49, L. 16 (Herrera's first statement to police not believable because contrary to evidence); p. 49, L. 17 – p. 50, L. 13 (version of events in Herrera's statement to police inconsistent with version Herrera subsequently gave in sworn testimony); p. 50, Ls. 14-25 (Herrera's version of events changed when and because he was confronted with evidence refuting his original version); p. 51, Ls. 1-22 (Herrera's second version of events also contradicted by physical evidence); p. 51, L. 23 – p. 56, L. 5 (Herrera's second version not plausible because lacking in important details, internally inconsistent, and did not make sense).) The closest the prosecutor came to arguing a character trait of untruthfulness was, when arguing that Herrera's emotional state immediately after the shooting did not make his factual claims near that time reliable, the prosecutor mentioned Herrera's "capacity for deceit," but even there, in context, it is clear that the prosecutor was relying on the argument already made that inconsistency and physical evidence show Herrera was lying about the events surrounding the shooting. (Supp. Tr., p. 57, L. 9 – p. 58, L. 16.) In rebuttal the prosecutor again specifically relied on contradictions in Herrera's various versions of how the shooting happened contained within his statements and their inconsistency with the physical evidence to argue that Herrera lied in his statements. (Supp. Tr., p. 79, L. 7 – p. 81, L. 7.) Herrera's argument that the record makes clear that the prosecutor was relying

on "additional evidence not introduced at trial" (Appellant's brief, pp. 43-44) has no support in any reasonable reading of the record.

Herrera's appellate counsel next argue the prosecutor committed fundamental error when he argued "'only the guilty lie.'" (Appellant's brief, p. 44.) Despite its placement in quotation marks, however, the prosecutor never uttered the phrase "only the guilty lie" in closing or rebuttal argument. (Supp. Tr., p. 44, L. 2 – p. 60, L. 15; p. 77, L. 17 – p. 90, L. 16.) Although the prosecutor did not utter the quote attributed to him by appellate counsel, he did argue something similar. The argument that what the prosecutor actually said amounts to fundamental error is without merit.

In closing argument the prosecutor argued that Herrera lied about the shooting in his first version of events, when he claimed he was a distance away from Stefanie, because the physical evidence showed the gun was in contact with Stefanie's forehead. (Supp. Tr., p. 49, Ls. 2-15.) He concluded that part of his argument stating, "Innocent people do not lie. Guilty people lie." (Supp., Tr., p. 49, Ls. 15-16.) In rebuttal argument the prosecutor responded to an argument that Herrera's uncontradicted statements were truth by arguing that his inconsistent statements showed neither version was the truth. (Supp. Tr., p. 80, L. 6 – p. 81, L. 10.) He concluded with the statement that Herrera's "lies are corroboration that he is guilty because innocent people do not lie. Guilty people lie because they have something to hide …." (Supp. Tr., p. 81, Ls. 10-12.) Certainly it is proper to argue that lying about the underlying facts of a crime is evidence of consciousness of guilt. See, e.g., State v. Pokorney, 149 Idaho 459, 463, 235 P.3d 409, 413 (Ct. App. 2010) ("Evidence of a defendant's efforts to influence or affect evidence, such as intimidating a witness, offering to compensate a witness, and fabrication, destruction or concealment of evidence

may be relevant to demonstrate consciousness of guilt."). Herrera's assertion that such an argument might be considered objectionable in Iowa under certain circumstances (Appellant's brief, p. 44 (citing two Iowa cases where the argument appellate counsel falsely attributed to the prosecutor in this case was deemed "perilously close to impermissible" (internal quotation omitted) in one case and assumed "arguendo" (internal quotation omitted) to be improper in the other) falls far short of demonstrating clear and prejudicial constitutional error.

Herrera's claim of prosecutorial misconduct is based primarily on manufactured quotes. He has failed to show clear and prejudicial constitutional error.

D. Herrera's Claims That The Prosecutor Misrepresented The State's Burden Or The Law Are Without Merit, Much Less Demonstrate Fundamental Error

"Misconduct may occur by the prosecutor diminishing or distorting the State's burden to prove the defendant's guilt beyond a reasonable doubt." State v. Ehrlick, 158 Idaho 900, 930, 354 P.3d 462, 492 (2015) (internal quotations omitted). See also State v. Ruiz, 159 Idaho 722, 726, 366 P.3d 644, 648 (Ct. App. 2015). "Both the prosecutor and defense counsel, however, are 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." State v. Rocha, 157 Idaho 246, 252, 335 P.3d 586, 592 (Ct. App. 2014). "[S]o long as the prosecution does not draw attention to the defendant's failure to testify, it may comment on the defendant's failure to present exculpatory evidence." State v. Adamcik, 152 Idaho 445, 482, 272 P.3d 417, 454 (2012). See also State v. Mendoza, 151 Idaho 623, 627, 262 P.3d 266, 270 (Ct. App. 2011) (rule against commenting on defendant's failure to testify "does not extend to comments on the

state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses"). Likewise, "comments intended to highlight the weaknesses of a defendant's case" generally "do not shift the burden of proof to the defendant." Adamcik, 152 Idaho at 482, 272 P.3d at 454. Application of these standards shows no improper argument, much less fundamental error.

The prosecutor argued that evidence of Herrera's extreme emotional state after the killing was a result of his methamphetamine use, not evidence of innocence. (Supp. Tr., 57, Ls. 9-21; p. 59, Ls. 3-14; p. 78, L. 21 – p. 79, L. 22.) The argument that evidence admitted at trial was not evidence of innocence was proper and did not diminish or distort the state's burden of proving Herrera's guilt beyond a reasonable doubt.

The prosecutor also argued that evidence that the fatal wound was a contact gunshot wound and evidence that Herrera repeatedly lied about events surrounding the death were compelling, stating that these things alone or together established Herrera's guilt. (Supp. Tr., p. 44, L. 2 – p. 60, L. 15; p. 77, L. 17 – p. 90, L. 16.) Indeed, it is fair to say that the theme of the prosecutor's argument was that the case was "as simple as 1 + 1 equals 2: A contact gunshot wound plus a lying defendant equals murder." (Supp., Tr., p. 44, Ls. 18-20.) This theme was specifically given in the context that most of the five elements of murder in the court's jury instructions "do not appear to be in dispute," leaving the only seriously disputed element whether Herrera acted with malice aforethought. (Supp. Tr., p. 44, L. 24 – p. 45, L. 20.) The argument—that evidence that the fatal wound was inflicted by placing the muzzle of the .380 handgun against Stefanie's forehead before it was fired and that Herrera told several lies attempting to exculpate himself was compelling evidence of malice aforethought—was entirely proper.

Herrera argues that the above two arguments, that Herrera's agitated emotional state was the result of methamphetamine use and that the contact gunshot wound plus the lies showed malice aforethought, misstated the state's burden of proof. (Appellant's brief, pp. 47-52.) Herrera's argument depends on giving the prosecutor's argument an unreasonable interpretation. Taking the arguments in context and giving them their least silly meaning shows no error, much less fundamental error. Even if the argument could reasonably be construed as argued by Herrera, there is no reason to believe the jury did not follow the court's instruction on the burden of proof. (Supp. Tr., p. 32, L. 22 – p. 33, L. 11 (burden of proof beyond a reasonable doubt); p. 44, L. 24 – p. 45, L. 11 (prosecutor's argument accepting burden of proving guilty beyond a reasonable doubt); p. 61, Ls. 8-23 (defense argument regarding presumption of innocence and burden of proof); R., vol. II, pp. 297, 310.) Herrera's claim of fundamental error is meritless.

E. Herrera's Argument That The Prosecutor Committed Fundamental Error By Misstating The Evidence Is Without Merit

"In closing argument, the prosecution has a duty to avoid mischaracterizing or misstating evidence." Ehrlick, 158 Idaho at 930, 354 P.3d at 492. A prosecutor may, however, make "fair comment based on logical inferences supported by the evidence." Id. at 931, 354 P.3d at 493. See also State v. Felder, 150 Idaho 269, 274, 245 P.3d 1021, 1026 (Ct. App. 2010) (argument "analyzing the evidence bearing upon witnesses' credibility and stating the conclusions which he urged the jury to draw therefrom" was proper (internal quotes omitted)).

Herrera first argues the prosecutor made "blatant misstatements" regarding the testimony of Daniel Ducommun. (Appellant's brief, p. 54.) Ducommun testified, in

response to questions by the prosecutor, that in his experience methamphetamine "amplifies" Herrera's "underlying emotional state." (Tr., vol. II, p. 935, Ls. 11-19.) The prosecutor characterized this testimony as follows: "The defendant's own witness, his own friend of many years, testified that when the defendant is under the influence of meth, it amplifies his underlying emotional state." (Supp. Tr., p. 57, Ls. 16-19.) The prosecutor quite obviously did not misrepresent this evidence.

Herrera goes on to argue, "Essentially, the prosecutor argued that Mr. Herrera was lying about what happened when the accident occurred, and then faked his hysteria and distress after the shooting." (Appellant's brief, p. 55.) The argument that this was improper argument amounting to fundamental error fails because, even if the prosecutor "essentially" argued Herrera faked hysteria after killing Stefanie, he did not do so by misrepresenting any evidence. Rather, the argument that Herrera's emotional agitation did not make his claims of accident more likely was a fair comment based on logical inferences supported by the evidence. Moreover, Herrera's defense counsel specifically confronted this argument in his own closing argument (Supp. Tr., p. 62, L. 23 – p. 64, L. 13; p. 68, Ls. 7-15), suggesting any lack of objection was a tactical choice. Even if the argument were objectionable, which it was not, it did not rise to the level of fundamental error.

F. The Prosecutor's Rebuttal Argument That The Evidence Did Not Exclude Alternative Explanations For Blood Being On The Magazine Was Not Improper, Much Less Fundamental Error

During closing argument, Herrera's trial counsel argued that the evidence showed Herrera believed the gun was unloaded. (Supp. Tr., p. 69, L. 25 – p. 71, L. 6.) That argument included an assertion that evidence showing the magazine was on the floor with blood on it indicated Herrera had ejected it before the shooting. (Supp. Tr., p. 70, L. 24 –

p. 71, L. 6.) The prosecutor responded to that argument, first by pointing out that Herrera's actions of pulling out a gun while he was high on methamphetamine during the course of an argument was inherently dangerous regardless. (Supp. Tr., p. 86, L. 25 – p. 87, L. 21.) He addressed the argument about the magazine:

> Well, all you know is that the magazine was out. Perhaps it was popped out after there was blood on the floor, after the EMT's, people kicking stuff around. You don't know when that magazine was kicked out. There were two magazines for that when recovered.

(Supp. Tr., p. 87, L. 22 – p. 88, L. 3.)

The prosecutor's argument was proper. A prosecutor may "suggest a reasonable inference that could be drawn by the jury" from the evidence presented. State v. Ortiz, 148 Idaho 38, 42, 218 P.3d 17, 21 (Ct. App. 2009). Moreover, a prosecutor's rebuttal argument "must be evaluated in light of defense counsel's closing argument that immediately preceded it." State v. Jackson, 151 Idaho 376, 382, 256 P.3d 784, 790 (Ct. App. 2011). Defense counsel argued that the presence of blood on the magazine showed it was ejected prior to the shooting. (Supp. Tr., p. 70, L. 24 – p. 71, L. 6.) The prosecutor rebutted by arguing that the evidence did not exclude other explanations for how the blood got on the magazine, including that it could have gotten blood on it if it was ejected after the shooting and been disturbed ("kicked") by someone in the room before it was photographed by the police. (Supp. Tr., p. 87, L. 22 – p. 88, L. 3.) There was nothing objectionable in arguing the theory that the evidence did not exclude other possibilities for how blood got on the magazine to rebut the defense argument that the presence of the blood was proof the magazine had been ejected prior to the shooting.

On appeal, for the first time, Herrera argues the prosecutor argued "facts not in evidence" and that his "comments were speculative" because the evidence did not show

that anyone kicked the magazine. (Appellant's brief, p. 55.) He dedicates pages of his brief to demonstrating that it is unlikely that anyone kicked the magazine and that the bedroom was not chaotic. (Appellant's brief, pp. 55-58.) This argument misses the fundamental point that the prosecutor did not argue that someone had kicked the magazine, only that the evidence did not disprove it. Even assuming that a jury would ultimately have concluded, either by a preponderance or even beyond a reasonable doubt, that the evidence of blood on the magazine proved the magazine was ejected from the handgun prior to the fatal shot, such would not make the argument improper. After all, it is not misconduct for defense counsel to argue that the evidence does not exclude theories of innocence even where the evidence of guilt is overwhelming. Herrera has failed to show the argument was improper, much less that it amounted to a clear and prejudicial constitutional violation.

V.
Herrera Has Shown No Errors To Cumulate

"The cumulative error doctrine requires reversal of a conviction when there is an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show the absence of a fair trial, in contravention of the defendant's constitutional right to due process." State v. Draper, 151 Idaho 576, 594, 261 P.3d 853, 871 (2011) (citations, quotations and alteration omitted). A necessary predicate to application of the cumulative error doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). In addition, "it is well-established that alleged errors at trial, that are not followed by a contemporaneous objection, will not be considered under the cumulative error doctrine unless said errors are found to pass the

threshold analysis under our fundamental error doctrine." State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2010).

In State v. Moses, 156 Idaho 855, 873, 332 P.3d 767, 785 (2014), the Court found "two errors that occurred at trial." One of those errors, however, "was not objected to at trial and failed our inquiry for fundamental error" and, therefore, could not be considered under the fundamental error analysis. Id. Because there was only one error that could be included in the analysis, the cumulative error doctrine did not apply. Id.

The only appellate issues based on claims of error followed by contemporaneous objection are the amendment to add the firearm enhancement and allowing Detective Berger to testify about the reasons he did not order gunshot residue testing. Only the latter of these is alleged to be a trial error. Because Herrera has only asserted one claim of objected-to trial error, he has failed to show that the cumulative error doctrine is even theoretically applicable in this appeal.

Even if the cumulative error doctrine were theoretically applicable, Herrera has failed to show cumulative error because he has failed to show error and failed to show multiple errors that were individually harmless but cumulatively denied him a fair trial.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction and sentence.

DATED this 14th day of December, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of December, 2017, 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

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd