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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44858**
Plaintiff-Respondent,	)	
	)	**Idaho County Case No.**
v.	)	**CR-2014-57506**
	)	
JASON ANDREW GODWIN, SR.,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Jason Andrew Godwin, Sr., appeals from his judgment of conviction for the second degree murder of Kyle Anderson, entered upon a jury's unanimous finding of his guilt.

Statement Of The Facts And Course Of The Proceedings

In the evening of June 9, 2014, Godwin, in company with Ernie Ruiz, Beau Lynch, and a lady friend named Carla, drove up to Kyle Anderson's trailer with the intention of robbing him of illegal drugs and/or stolen guns. (See Int. Tr.,[1] p.29, Ls.10-20; p.35, L.25 – p.37, L.22; p.51, Ls.11-19.) At the trailer, Godwin killed Mr. Anderson by shooting him in the neck. (Tr., p.768, Ls.6-12; p.825, Ls.3-11; p.897, L.19 – p.898 L.12; p.949, Ls.7-9; p.1134, L.25 – p.1135, L.5; p.1145, Ls.8-17.) Amanda Jones, Mr. Anderson's girlfriend, was present at the scene and a witness to the murder. (See Tr., p.763, L.19 – p.774, L.21.) After shooting Mr. Anderson, Godwin exited his vehicle and, holding a gun to Ms. Jones's head, demanded that she tell him where the guns were, but she could not. (Tr., p.772, L.9 – p.773, L.12; p.793, Ls.10-22; p.951, L.8 – p.952, L.4.) Mr. Ruiz, meanwhile, had taken Mr. Anderson's gun and was wiping it down. (Int. Tr., p.21, Ls.12-25; see also Tr., p.1251, L.15 – p.1252, L.14.) Godwin took the gun from Mr. Ruiz. (Int. Tr., p.22, Ls.2-6; see also Tr., p.1252, Ls.15-22.) He also tried to throw Mr. Anderson, who was still alive, into the back of his truck, apparently with the intent of disposing of his body in the river. (Compare Tr., p.792, Ls.8-12 with p.952, L.18 – p.953, L.4 and Int. Tr.,

[1] There are multiple volumes of transcripts in the appellate record. Citations to "Tr." refer to the volume that includes the transcript for the evidentiary hearing held on 8/20/2015, the combined multiday trial transcripts, and the sentencing hearing transcript. All page citations are to the <.pdf> file. Citations to "Int. Tr." refer to the district court's transcription of the audio of Godwin's police interview held on June 10, 2014, which is contained in the supplemental transcripts. An audio recording of this interview was entered as State's Exhibits 68 and 69 at Godwin's trial. (See Tr., p.1030, L.7 – p.1033, L.11.)

p.20, L.23 – p.21, L.10; see also Int. Tr., p.23, Ls.2-5; Tr., p.1275, Ls.19-24.) Ms. Jones told Godwin and those with him that she would report the murder to the police, and they threatened to kill her, too. (See Tr., p.792, Ls.12-15; p.793, Ls.3-7.) Ms. Jones retreated into the trailer, locking the door behind her. (Tr., p.774, L.19 – p.775, L.20.) After Godwin and the others drove away, Ms. Jones flagged down a police officer and reported the murder. (Tr., p.778, L.4 – p.779, L.24.)

Following up on reports that Godwin's vehicle was seen leaving the scene of the murder, police reached out to Godwin by phone at around 2:30 a.m. on June 10. (R., p.501; see also Tr., p.1123, L.24 – p.1125, L.8.) He claimed that he was away from the area, having left around noon the day before. (R., p.501; see also Tr., p.1125, Ls.7-15; p.1258, Ls.3-13.) However, later that morning, at approximately 8:30, Godwin called the police and then voluntarily came to the police substation an hour later for an interview. (R., p.501; see also Tr., p.1126, L.17 – p.1127, L.11; p.1263, L.13 – p.1264, L.2.) During that interview, both before and after receiving Miranda[2] warnings, Godwin repeatedly admitted shooting Mr. Anderson, but claimed he did so in self-defense. (See Int. Tr.) He also told the police that both his and Mr. Anderson's guns were hidden under Godwin's bed in his trailer. (Int. Tr., p.12, Ls.11-13; p.52, Ls.23-25; Tr., p.1045, Ls.14-23.) With Godwin's permission (Int. Tr., p.51, L.25 – p.52, L.6) and a warrant (R., pp.27-39; Tr., p.1078, L.24 – p.1079, L.1), police retrieved the firearms (Tr., p.1045, L.24 – p.1046, L.4; p.1113, Ls.1-13).

The state charged Godwin with second degree murder. (R., pp.55-56.) Godwin filed a motion to suppress his confession (R., pp.178-89), which was denied (R., pp.500-08). The state filed a motion in limine to prevent a pair of defense witnesses from testifying to specific

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

instances of violent conduct by Mr. Anderson, of which Godwin was unaware before he murdered Mr. Anderson. (R., pp.544-47.) The district court granted the motion. (R., pp.700-01.) Godwin also filed notice of his intent to put on the affirmative defense of self-defense (R., p.148) and requested jury instructions consistent therewith (R., pp.529-34), which the district court granted (Tr., p.1191, L.3 – p.1194, L.3; see also Jury Instruction Nos. 20-23).

The case proceeded to trial, after which the jury rendered its unanimous verdict that Godwin was guilty of the second degree murder of Mr. Anderson. (R., p.760.) The district court entered judgment against Godwin and sentenced him to a unified term of 25 years with 15 years fixed. (R., pp.843-44.) Godwin filed a timely notice of appeal. (R., pp.853-55.)

ISSUES

Godwin states the issues on appeal as:

> I. Did the district court err when it denied Mr. Godwin's motion to suppress?
>
> II. Did the district court err when it ruled Mr. Godwin could only present opinion or reputation evidence of Mr. Anderson's violent and/or aggressive character after showing that Mr. Godwin was aware of Mr. Anderson's propensity for violence?
>
> III. Should this Court overrule *State v. Custodio* and hold specific instances of a victim's conduct, showing a violent character, can be an essential element of a self-defense claim and are admissible under Idaho Rule of Evidence 405?
>
> IV. Did the district court's failure to instruct the jury on justifiable homicide pursuant to I.C. § 18-4009(1) amount to fundamental error?
>
> V. Did the State violate Mr. Godwin's right to a fair trial by committing prosecutorial misconduct?
>
> VI. Do the errors in Mr. Godwin's case amount to cumulative error?

(Appellant's brief, pp.9-10.)

The state rephrases the issues as:

1. Has Godwin failed to show that the district court erred when it denied his motion to suppress his voluntary confession?

2. Has Godwin failed to show that the district court abused its discretion when, adhering to binding precedent, it determined that specific instances of Mr. Anderson's alleged conduct were inadmissible under Idaho Rule of Evidence 405?

3. Godwin has failed to show any basis for overruling or disavowing State v. Custodio. Should this Court therefore decline Godwin's invitation to overrule that precedent?

4. Has Godwin failed to show fundamental error entitling him to review of his unpreserved claim of instructional error?

5. Has Godwin failed to show fundamental error entitling him to review of his unpreserved claims of prosecutorial misconduct?

6. Has Godwin failed to show that the cumulative error doctrine applies to this case?

ARGUMENT

I.
Godwin Has Failed To Show That The District Court Erred When It Denied His Motion To Suppress His Voluntary Confession

A. Introduction

Investigation into the June 9th murder of Mr. Anderson quickly led officers to suspect that Godwin could be a person of interest in the case. The district court, setting forth background facts relevant to this investigation, explained that

> a vehicle noted to be Defendant's was identified as leaving the scene of the crime. In light of that information, law enforcement travelled to the Defendant's residence near Kooskia. Officers did not find him at his residence, but observed that it looked like someone had left the place in a hurry. His place was placed under surveillance.
>
> Idaho County Sheriff's Lieutenant Doug Ulmer called Godwin on his cellphone at about 2:30 a.m. on June 10, 2014. Godwin first told Ulmer that he was at home, but Ulmer told him that he was there and Godwin was not. Godwin then said he had gone to Dudley, Idaho about noon on June 9 and was still there. During that conversation, Ulmer did not tell him why he wanted to talk to him.
>
> Defendant contacted Lieutenant Ulmer by phone about 8:30 a.m. on June 10, and he voluntarily showed up for an interview about an hour later at the Kooskia Sheriff's Office substation, where he was interviewed by Hewson….

(R., p.501.) During that interview, before officers advised Godwin of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), the following exchange took place:

> Q. There's people that saw you at the trailer at 7:00, Jason. That's what I'm talking about.
>
> A. (Inaudible).
>
> Q. I'm not trying to ride you, please.
>
> A. Okay.

Q. Okay. I don't like treating people like that, but you got to kind of understand what I am—

A. They're trying to accuse me of shooting this guy or (inaudible)?

Q. They are saying that, yes, something happened between you and him, and it was more or less an accident. And that's all we're trying to get cleared up. If something happened between you guys and it was an accident, I wish that you would talk to us about it.

A. Fine. Pulled up there and—

Q. What time?

A. —the guy pointed a gun at me, and I grabbed my gun and shot him.

(Int. Tr., p.9, Ls.2-19.) Following this initial confession, Godwin made repeated confessions, both before and after being advised of his Miranda rights. (See Int. Tr., pp.9-51.)

Godwin moved to suppress his confessions, claiming that his statements were coerced and in violation of his supposed request for counsel. (R., pp.178-89.) The district court denied that motion finding both that Godwin's statements were voluntary and that, as a matter of fact, he never requested counsel. (R., pp.500-06.) The district court further noted that, even had Godwin invoked his right to counsel, such invocation would be ineffective because Godwin was never in custody such that his Miranda rights could be invoked. (R., pp.506-08.)[3]

Now, for the first time on appeal, apparently conceding that his initial confession was voluntary and not offered while in custody, Godwin argues that this initial confession transformed his police interview into a custodial interrogation, such that Miranda warnings were then immediately required. (Appellant's brief, pp.10-34.) This argument was never presented to

[3] The state makes no intimation regarding whether Godwin could effectively invoke his Miranda rights once those rights had been explained to him but before he was in custody. The dispositive fact is that Godwin did not invoke those rights. (R., p.505-06.) And that fact is unchallenged on appeal. (Appellant's brief, p.15.)

the district court below and should not be considered on appeal. Even if addressed, application of the correct legal standards to the facts shows no error in the district court's conclusion that Godwin was not in custody such that the dictates of Miranda applied. The district court correctly denied Godwin's suppression motion and should be affirmed.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Page, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004).

C. Godwin Has Not Preserved His Confession-As-Custody Argument For Appellate Review

Below, Godwin presented two grounds on which to suppress his confession: First, he argued that, because the police "employed minimization techniques, indicated that it sounded like [his murder of Mr. Anderson] was all just an accident, implied that there would be consequences for not telling the truth, told the defendant he was gaining credibility with his interrogator, and suggested that the defendant might not be arrested," his confession was coerced. (R., pp.184-85.) Second, he argued that he unambiguously invoked his right to counsel under Miranda, and that right was not honored. (R., pp.186-88.) The district court found that Godwin's confession was voluntary and that he never invoked his right to counsel. (R., pp.502-06.) The district court further concluded that, even if Godwin had invoked his right to counsel, it would be irrelevant; Godwin, the district court found, was never in custody such that Miranda would apply. (R., pp.506-08.)

On appeal, Godwin does not challenge the district court's findings that his confession was voluntary and that Godwin never unambiguously invoked his right to counsel. Instead, Godwin presents a narrower theory: Citing to several out-of-state jurisdictions, he argues that his initial confession transformed his police interview into a custodial interrogation, and that officers' failure to immediately inform him of his Miranda rights following that confession violated the Fifth Amendment. (Appellant's brief, pp.17-34.) This is not the same theory that Godwin presented below, nor did he cite to any of the out-of-state cases now heavily relied upon by Godwin. (Compare R., pp.178-89 with Appellant's brief, pp.10-34.)

"Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (citations omitted). Thus, even where application of the correct legal standard would show error by the district court, if that standard was not argued to the district court the appellate court will not reverse. See Id. at 275-76, 396 P.3d at 704-05 (rejecting a "wrong result-wrong theory" approach and refusing to reverse the district court by application of the correct legal theory). This is because it is "manifestly unfair" to ask the appellate court to decide a question the party failed to present to the trial court. Id. at 276, 396 P.3d at 705 (quoting Smith v. Sterling, 1 Idaho 128, 131 (1867)).

Even if Godwin's new theories had merit (which it will be shown below is a dubious proposition), it would be "manifestly unfair" to consider them and to address theories and issues not presented to the district court. The new theories based on these authorities, raised for the first time on appeal, cannot be considered.

D. Godwin Was Not In Custody Equivalent To Formal Arrest, And Therefore The Dictates Of *Miranda* Did Not Apply

Even if Godwin's novel theory could somehow be shoehorned into the argument he presented to the district court below, it would still fail on its merits. To safeguard the privilege against self-incrimination afforded by the Fifth Amendment of the United States Constitution, the United States Supreme Court held in Miranda that before an individual is subjected to custodial interrogation, the interrogating officers must advise the individual of certain rights, including the right to remain silent and the right to counsel. Id., 384 U.S. at 478-79. The test for determining whether an individual is in custody for purposes of Miranda is whether, considering the totality of the circumstances surrounding the interrogation, there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). The defendant bears the burden of establishing that he was in custody for purposes of Miranda. State v. James, 148 Idaho 574, 577, 225 P.3d 1169, 1172 (2010).

Below, Godwin asserted that he was in custody for purposes of Miranda because his police interview took place at the police station, he was the primary suspect in the murder of Mr. Anderson, and his interview was designed, with police employing minimization techniques, to elicit incriminating responses. (R., pp.184, 88.) As the United States Supreme Court explained in Beheler, these factors do not show custody for purposes of Miranda. See Beheler, 463 U.S. at 1123-25. The Supreme Court has "explicitly recognized that Miranda warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'" Id. at 1125 (quoting Mathiason, 429 U.S. at 495). Rather, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Id.

The district court properly weighed the totality of the circumstances and correctly rejected Godwin's argument below, noting that Godwin

> came voluntarily to the sheriff sub-station for the interview. He was not handcuffed or patted down before the interview. At no time did Hewson [the interviewing officer] tell him that [he] had to stay and answer the questions. A review of the transcript of the interview shows that Hewson was not threatening or intimidating. The interview lasted about an hour, which included time for a cigarette break. Hewson was the only officer talking with him, although Hewson testified that another officer accompanied Godwin when he went outside for a cigarette.

(R., p.506.) Godwin, therefore, was never in custody during the police interview.

Godwin now argues on appeal that, though he was not in custody when he voluntarily came to the police station and began the interview, as soon as he made his initial confession to killing Mr. Anderson, Godwin's noncustodial interview transformed into a custodial interrogation. (Appellant's brief, pp.17-26.) Godwin asserts that once a confession to a serious crime has been made, a future arrest is a foregone conclusion and no reasonable person would consider himself free to leave at that point. (Id.) But it appears that the Idaho Supreme Court has already rejected that approach; in James, *supra*, it held that even the explicit threat of (lawful) future arrest does not transform noncustodial questioning into a custodial interrogation. See James, 148 Idaho at 578, 225 P.3d at 1173.

Without Idaho authority for his novel proposition, Godwin looks to several out-of-state courts and decisions, including the dissent in State v. Bartelt, 906 N.W.2d 684 (Wis. 2018). The dissenting judge in that case, as quoted by Godwin on appeal, explained that it "stretches the bounds of credulity" that a suspect could "confess[] to a serious, violent felony … and then march past detectives on the way out of the interrogation room and the police station." Id. at 702 (Bradley, J., dissenting). But, as credulity-stretching as it may seem, that is exactly what

happened in this case: After making his initial confession—in fact, after making repeated confessions—and even after receiving his Miranda warnings, Godwin took a cigarette break and not only left the interview room, he actually left the police station. (Tr., p.126, L.19 – p.129, L.8; see esp. p.127, Ls.6-10.)

That Godwin would reasonably feel free to leave during the interview is understandable when it is recognized that he did not exactly confess to a violent crime; rather, he consistently set forth an affirmative defense to a violent crime: He had killed Mr. Anderson *in self-defense*. (See Int. Tr., p.9, Ls.16-19; p.10, Ls.4-14; p.12, Ls.7-18; p.13, Ls.13-15; p.14, L.23 – p.15, L.13; p.16, Ls.4-5; p.16, L.25 – p.17, L.1; p.18, Ls.12-14; p.21, L.12 – p.22, L.14; p.23, Ls.10-21; p.24, Ls.2-8; p.26, L.2; p.27, Ls.7-10; p.36, Ls.6-9; p.38, L.12 – p.39, L.24; p.41, Ls.10-19; p.47, Ls.22-25; p.50, Ls.17-21.) Godwin's belief that he would be free to leave was also supported by the interviewing officer, who explained during the suppression hearing that "[i]f [Godwin] wanted to he was allowed to leave. I did not have personally enough information to arrest him or detain him. If he wanted to leave, as far as I was concerned, he could have left." (Tr., p.127, Ls.19-24.) And during their interview, Officer Hewson repeatedly reassured Godwin that he was not under arrest and that arresting and charging decisions would be made by other officers. (Int. Tr., p.15, L.17 – p.16, L.3; p.16, Ls.14-20; p.41, L.21 – p.42, L.2.) Until Godwin was formally arrested, he *was* free to leave.

Again, as the United States Supreme Court has made clear, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Beheler, 463 U.S. at 1125 (quoting Mathiason, 429 U.S. at 495). As the evidence demonstrates, there was no restraint on Godwin's movements, much less the restraint associated with formal arrest. Godwin has failed to meet his burden, both below and

on appeal, of demonstrating that he was in custody during his police interview such that the dictates of Miranda would apply to his case. Until Godwin was formally arrested following his police interview, he was never in custody, and Miranda warnings, therefore, were not required.[4]

E. Harmless Error

Finally, under the facts of this case, any error in denying Godwin's suppression motion would necessarily be harmless. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). The standard for determining whether error is harmless is whether there is a reasonable possibility that the error contributed to the jury's verdict "and that the court must be able to declare a belief that it was harmless beyond a reasonable doubt." State v. Jones, 125 Idaho 477, 488, 873 P.2d 122, 133 (1994). "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) (citation omitted).

Even if Officer Hewson's failure to immediately explain to Godwin his rights under Miranda following Godwin's initial confession violated Godwin's rights, the district court's error in admitting Godwin's subsequent statements would be harmless. First, Godwin does not seek to suppress his initial confession—Godwin in fact concedes that suppression would not apply to his initial confession (Appellant's brief, p.17)—only his cumulative confessions. The state,

[4] Godwin also asserts that his post-Miranda statements should be suppressed. (Appellant's brief, pp.26-34.) Contrary to his assertions (again, raised for the first time on appeal), there is nothing in the interview transcript that suggests, much less shows, that Officer Hewson engaged in a "deliberate ask first, warn later" strategy to prevent Godwin from exercising his Miranda rights. Cf. State v. Wass, 162 Idaho 361, 396 P.3d 1243 (2017). Rather, the officer did not immediately advise Godwin of his Miranda rights because Godwin was not in custody, and so Miranda did not apply. (See Int. Tr., p.16, Ls.4-22.)

therefore, could properly rely in its case-in-chief on Godwin's admission to shooting Mr. Anderson (Int. Tr., p.9, Ls.16-19), which caused his death. Second, physical evidence—in this case the gun Godwin used to murder Mr. Anderson and the gun that was in Mr. Anderson's possession—is not subject to suppression for a mere violation of Miranda. United States v. Patane, 542 U.S. 630, 636-37 (2004). Therefore, the state would still be able to use the guns, located under Godwin's bed in his trailer, in its case-in-chief at trial. Third, statements elicited in violation of Miranda can be used in impeachment. Kansas v. Ventris, 556 U.S. 586, 593 (2009). With his confession to killing Mr. Anderson and the physical evidence tying him to the scene of the crime, Godwin's only hope in acquittal was in presenting an affirmative defense. To present that defense, he would have to take the stand. Once he took the stand, his subsequent statements would still be admissible as impeachment.[5]

Thus, even had the district court ruled as Godwin now claims it should have, the evidence that would be presented to the jury in that hypothetical trial—even if not presented in the same order or through the same means—would ultimately be the same as the evidence presented at Godwin's actual trial. This Court can therefore conclude, beyond a reasonable doubt, that the ultimate verdict of guilt would have been the same. Any error in failing to suppress Godwin's statements made after his initial confession would therefore necessarily be harmless.

II.
Godwin Has Failed To Show That The District Court Abused Its Discretion When, Adhering To Binding Precedent, It Determined That Specific Instances Of Mr. Anderson's Conduct Were Inadmissible Under Idaho Rule Of Evidence 405

Godwin asserts that the district court erred when it granted the state's motion in limine, prohibiting two of the defense's witnesses "from testifying about specific instances of conduct

[5] And Godwin was thoroughly impeached during cross-examination. (See Tr., p.1258, L.1 – p.1291, L.9.)

unless proper foundation was laid to show that Mr. Godwin was aware of Mr. Anderson's propensity for violence." (Appellant's brief, pp.34-39.) This issue is controlled by the Court of Appeals' opinion in State v. Custodio, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001), and its progeny, which held that, because "[p]roof of a victim's violent character, standing alone, does not prove an element of a claim of self-defense" (i.e., it "does not show that the victim was the first aggressor in a particular conflict"), proof of character in the form of specific instances of conduct is not admissible. Id., 136 Idaho at 204, 30 P.3d at 982. Godwin recognizes this line of controlling cases (Appellant's brief, p.39) and "acknowledges the district court's decision regarding the admissibility of specific instances of a victim[']s conduct was proper based upon currently controlling precedent" (Appellant's brief, p.42). Godwin has therefore failed to show that the district court abused its discretion[6] when, properly following controlling precedent, it granted the state's motion in limine. The district court should be affirmed.

III.
Godwin Has Failed To Show Any Basis For Overruling Or Disavowing *State v. Custodio*

Recognizing that the district court was bound by the controlling precedent of State v. Custodio, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001), Godwin invites this Court on appeal to overrule or disavow that case and its progeny, and to rule instead that specific instances of a victim's conduct are admissible to show a violent character under Idaho Rule of Evidence 405. (Appellant's brief, pp.39-51.) This Court should decline Godwin's invitation. Idaho jurisprudence requires respect for its own precedents. The rule of *stare decisis* dictates that

[6] The state also notes that Godwin's standard of review for this claim of error is itself in error. Godwin claims that the district court erred in its evidentiary ruling. (Appellant's brief, p.34.) Evidentiary rulings by the trial court are reviewed for an abuse of discretion, State v. Porter, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997), not *de novo*.

controlling precedent be followed "unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Dana, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002).[7] Godwin cannot meet this burden.

Under the Idaho Rules of Evidence, character evidence is admissible to show "a pertinent trait of character of the victim of the crime…." I.R.E. 404(a)(2). Rule 405 governs the admissibility of such evidence and provides two means for showing character: (1) by reputation or opinion, and (2) by specific instances of conduct. It provides:

> (a) **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) **Specific instances of conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

I.R.E. 405. In his brief, Godwin stresses that testimony of specific instances of Mr. Anderson drawing his gun during altercations would have been "especially relevant" to his self-defense claim, as a showing that Mr. Anderson had violent propensities might have supported Godwin's theory that Mr. Anderson was the initial aggressor. (Appellant's brief, pp.44-51.) But under the plain language of Rule 405(b), mere relevance is insufficient to admit testimony of specific instances of conduct. Rather, the character trait must be "an *essential element* of a charge, claim, or defense." I.R.E. 405(b) (emphasis added). Mr. Anderson's alleged violent character, while

[7] Though Custodio is not binding on the Idaho Supreme Court, it was on the district court. Principles of *stare decisis* also apply because, absent an opinion from the Idaho Supreme Court, Custodio has been controlling precedent for almost two decades.

perhaps relevant to a claim of self-defense, is not essential, and therefore evidence of specific instances of conduct would be inadmissible.

In Custodio, the Court of Appeals directly addressed this issue and adopted the majority view articulated in other jurisdictions, explaining:

> The Ninth Circuit Court of Appeals addressed this issue in United States v. Keiser, 57 F.3d 847 (9th Cir. 1995). The court in Keiser determined that "the relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to opinion of reputation." Id. at 856 (footnote omitted). The court in Keiser went on to hold that the victim's violent character did not constitute an essential element of a self-defense claim. Id. at 857. We agree. Proof of a victim's propensity for violence, standing alone, does not prove an element of a claim of self-defense.
>
> Thus, although evidence relating to the victims' violent character was relevant for the purpose of inferring that the victims acted in conformity therewith on the morning in question, the victims' propensities for violence was not an essential element of Custodio's claim of self-defense. Therefore, Custodio has failed to show that the district court erred in excluding this evidence in the form of a specific instance of the victims' propensities for violence pursuant to Rule 405.

136 Idaho at 204, 30 P.3d at 982.

Godwin asks this Court to reject the majority rule and instead adopt the minority view articulated in Commonwealth v. Adjutant, 824 N.E.2d 1 (Mass. 2005), and similar cases,[8] that a

[8] The state notes that not all of the cases cited by Godwin stand for the proposition that specific instances of violent conduct to show the victim's character are admissible under Rule 405(b) in self-defense cases. For instance, Godwin claims that State v. McIntyre, 488 N.W.2d 612 (N.D. 1992), allowed evidence of specific conduct "to corroborate other evidence that victim was the aggressor." (Appellant's brief, p.46.) But review of that opinion shows that the admission of specific instances of conduct was limited to cross-examination, consistent with Rule 405(a). See McIntyre, 488 N.W.2d at 617-18. Similarly, People v. Lynch, 470 N.E.2d 1018 (Ill. 1984), is inapplicable; Illinois (like California and Wyoming) has a distinct rule allowing such evidence. See Ill. R. Evid. 405(b)(2). Idaho has no such rule. And Jordan v. Commonwealth, 222 S.E.2d 573 (Va. 1976), was decided before Virginia first *proposed* rules of evidence in 1983, much less first adopted its rules in 2012.

specific instance of a victim's violent conduct can be admissible because of its *importance* to a self-defense claim. See id., 824 N.E.2d at 12. States that have adopted Godwin's interpretation of rules similar or identical to Rule 405(b) seem to have strayed from the pertinent question—whether a victim's character trait for violence constitutes "an *essential* element" of a self-defense claim—and instead resort to relevance-type considerations. For instance, in Adjutant, the Massachusetts Supreme Court repeatedly stressed that evidence of a victim's violent propensities was *relevant* to the first aggressor issue of self-defense, and so specific conduct could be admitted "to support the defendant's claim of self-defense." Id. at 12-13. Similarly, in State v. Lewchuk, 539 N.W.2d 847, 853-854 (Neb. App. 1995), the Nebraska Court of Appeals concluded that the defendant was "entitled to present evidence of specific instances of conduct demonstrating [the victim's] violent, aggressive character to *corroborate* [the defendant's] claim that [the victim] was the first aggressor." Id., 539 N.W.2d at 853, 855 (emphasis added). And in State v. Dunson, 433 N.W.2d 676 (Iowa 1988), the Iowa Supreme Court went beyond the plain language of Rule 405(b)'s requirement that the character trait be an "*essential* element" of the defense, ruling instead "that the evidence in question was *material* to several elements of [the defendant's] defense." Id., 433 N.W.2d at 680-81 (emphasis added). Nowhere in these cases is there a reasoned explanation for departing from Rule 405(b)'s plain language allowing evidence of specific instances of conduct only when the victim's "character or a trait of character … is an *essential* element" of the defense.

The majority of states (including Idaho), as well as the federal courts, reject this approach and instead adhere to the plain language of Rule 405(b). For instance, in State v. Barnes, 759 N.E.2d 1240 (Ohio 2002), after setting forth the applicable elements of self-defense, the Ohio Supreme Court explained:

> Although a victim's violent propensity may be pertinent to proving that he acted in a way such that a defendant's responsive conduct satisfied the elements of self-defense, *no element requires proof of the victim's character or character traits. A defendant may successfully assert self-defense without resort to proving any aspect of a victim's character*. Therefore, Evid.R. 405(B) precludes a defendant from introducing specific instances of the victim's conduct to prove that the victim was the initial aggressor.

Id., 759 N.E.2d at 1244-45 (citations omitted; emphasis added). Recognizing that "some courts in other jurisdictions [had] reached contrary results," the Ohio Supreme Court chose to align itself with the majority rule, noting that the "[f]ederal courts, interpreting the analogous Fed.R.Evid. 404 and 405, have held that specific instances of a victim's violent propensities are not admissible to prove whether the victim was the initial aggressor in a particular instance." Id. (citing Keiser, 57 F.3d at 857; United States v. Smith, 230 F.3d 300, 308 (7th Cir. 2000); United States v. Bautista, 145 F.3d 1140, 1152 (10th Cir. 1998); United States v. Piche, 981 F.2d 706, 713 (4th Cir. 1992)). The Ohio Supreme Court concluded:

> Given the plain language of Evid.R. 404 and 405 and the weight of compelling persuasive authority, we hold that a defendant asserting self-defense cannot introduce evidence of specific instances of a victim's conduct to prove that the victim was the initial aggressor. Accordingly, the trial court did not abuse its discretion in excluding the evidence of [the victim's] prior instances of conduct, and the court of appeals erred in holding to the contrary.

Id.

Similarly, the New Jersey Supreme Court has recognized that "[a]n 'essential element' for purposes of … Rule 405, extends only to those elements that a party must prove or disprove to make out a prima facie case for a claim or defense. An accused can assert self-defense successfully without offering any evidence regarding a victim's character." State v. Jenewicz, 940 A.2d 269, 281 (N.J. 2008). Thus, "a victim's violent character is not an essential element of self-defense." Id. The majority of other states have taken this same approach. See, e.g., State v.

Jackson, 841 N.W.2d 791, 787-88 (Wisc. 2014) (specific instances of conduct to show violent character to bolster first aggressor theory not essential and so not admissible); Anderson v. State, 118 S.W.3d 574, 578 (Ark. 2003) (victim's violent character "is not an essential element of a defendant's self-defense claim in a first-degree murder case because one might plead self-defense after having killed the most gentle soul who ever lived"); State v. Hutchinson, 959 P.2d 1061, 1073 (Wash. 1998); Brooks v. State, 683 N.E.2d 574, 576-77 (Ind. 1997); State v. Newell, 679 A.2d 1142, 1144-45 (N.H. 1996); State v. Buchanan, 431 N.W.2d 542, 551 (Minn. 1988); State v. Doherty, 437 A.2d 876, 877 (Me. 1981); Dahlen v. Landis, 314 N.W.2d 63, 70 (N.D. 1981) (specific instances of conduct essential to defense only in rare "character in issue" cases).

The Arizona Court of Appeals has also joined "the majority of jurisdictions with similar evidentiary rules," and held that "a defendant may not introduce evidence of specific acts unknown to the defendant at the time of the alleged crime to show that the victim was the initial aggressor." State v. Fish, 213 P.3d 258, 270 (Ariz. App. 2009). The logic of this rule is compelling and should continue to be upheld by this Court. Idaho law does not recognize a theory of retroactive self-defense. Unless Godwin was aware of Mr. Anderson's alleged violent tendencies before he murdered him, such rumored character traits could not have played a role in Godwin's decision to gun down Mr. Anderson—much less could specific instances of conduct of which Godwin was completely unaware.

Godwin cannot show that Custodio was manifestly wrong, unjust, or unwise. Consistent with Custodio, the majority of state and federal courts follow the plain language of Rules 404 and 405 and hold that Rule 405(b) does not permit, in a self-defense case, a victim's character for violence to be proved by specific instances of conduct. Regardless of whether such proof may be relevant to one or more of the elements of self-defense, no element of that affirmative

defense actually *requires* proof of the victim's character or character traits. Godwin, therefore, was able to assert his self-defense claim in this case without having to prove Mr. Anderson's character for violence through specific instances of conduct. Godwin has failed to provide any valid reason for overruling or disavowing Custodio. This precedent, and the district court's ruling based upon this precedent, should be affirmed.

IV.
Godwin Has Failed To Show Fundamental Error In The Jury Instructions

A. Introduction

Godwin argues, for the first time on appeal, that the district court committed fundamental error when, after giving Godwin's requested jury instructions (which were consistent with the affirmative defense he presented), the district court did not then, *sua sponte*, give additional jury instructions, which were never requested, on an additional affirmative defense, which was never raised by Godwin. (Appellant's brief, pp.51-66.) Application of the correct legal standards to the facts of this case shows no error, much less fundamental error entitling Godwin to review of this unpreserved issue.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587-88, 261 P.3d 853, 864-65 (2011) (citing State v. Humphreys, 134 Idaho 657, 659, 8 P.3d 652, 654 (2000)). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." State v. Shackelford, 150 Idaho 355, 373-74, 247 P.3d 582, 600-01 (2010) (citing Kuhn v. Proctor, 141 Idaho 459, 462, 111 P.3d 144, 147 (2005)).

C. Where Godwin Affirmatively Accepted The Jury Instructions Below, Any Claim Of Instructional Error Is Waived And Should Not Be Considered On Appeal

As a prefatory matter, if this case is assigned to the Idaho Supreme Court, it should reinstate the rule that claims of instructional error not raised before the district court are waived for purposes of appeal. This rule was recognized by the Idaho Supreme Court in State v. Carter, 103 Idaho 917, 919, 655 P.2d 434, 436 (1981). The rule and its logic were later discussed by the Idaho Supreme Court in State v. Smith, 117 Idaho 225, 228, 786 P.2d 1127, 1131 (1990). In Smith, the Court explained that the criminal trial underlying Carter took place in 1978, and the version of Idaho Criminal Rule 30 that was then in effect stated, "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto prior to the time that the jury is charged." Id. In 1980, however, Rule 30 was amended and this sentence was removed. Id. Because that language had been removed from the rule, the Idaho Supreme Court retreated from its holding in Carter and allowed defendants to challenge jury instructions on appeal, even where they had not objected below. Id. at 229, 786 P.2d at 1131.

Idaho Criminal Rule 30 has since been amended again. In 2016, when Godwin stood trial, the rule once more contained the language:

> No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection.

I.C.R. 30(b) (2004).[9] Under the Idaho Supreme Court's holdings and logic in Carter and Smith, *supra*, because the rule again does not allow assigning as error the giving (or failure to give) specific instructions without objection, any such claim of error is waived.

[9] The most recent amendment to the rule keeps the same language. See I.C.R. 30(b)(4) (2017).

Moreover, under the facts of this case, even if Godwin's claim of instructional error is not waived by operation of Rule 30(b), Godwin *affirmatively* waived any objections to the instructions. The district court's formal jury instruction conference is reported in the trial transcript. (See Tr., pp.1183-97.) During that conference, the district court methodically reviewed each instruction with the parties. (Id.) Defense counsel made several requests for modifications to the instructions, all of which were granted. (See Tr., p.1185, L.3 – p.1186, L.2; p.1190, Ls.9-25; p.1192, L.14 – p.1195, L.16; p.1195, L.24 – p.1196, L.10.) The district court asked, "Are there any other additional instructions requested by defense at this time?" (Tr., p.1196, Ls.10-11.) Defense counsel responded, "Not at this time, Your Honor" (Tr., p.1196, L.12), and the district court reserved the issue until defense counsel could consult with Godwin and had presented his defense (Tr., p.1196, Ls.13-16). After the defense closed its case, instructions were again taken up by the court and finalized. (See Tr., p.1302, L.6 – p.1304, L.25.) The district court again asked defense counsel if there were "any other issues with reference to jury instructions." (Tr., p.1303, L.25 – p.1304, L.2.) Defense counsel responded, "No, Your Honor. I believe that covers it." (Tr., p.1304, Ls.3-4.) The parties then thoroughly reviewed the final jury instructions and counsel reported back to the district court that the defense had no objections to the jury instructions. (Tr., p.1305, Ls.3-14.)

If there were any errors or omissions in the jury instructions, it would at best result in invited error on appeal. "It has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited. Errors consented to, acquiesced in, or invited are not reversible." State v. Dunlap, 155 Idaho 345, 379, 313 P.3d 1, 35 (2013) (quoting State v. Owsley, 105 Idaho 836, 838, 673 P.2d 436, 438 (1983)) (internal citations omitted). The purpose of the invited error doctrine is to prevent a party who "caused or played an important

role in prompting a trial court" to take a particular action from "later challenging that decision on appeal." State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). Having affirmatively accepted the jury instructions below, Godwin should not now be heard on appeal to argue that the jury instructions were in error, even under the fundamental error standard.

D. Godwin Has Failed To Show Error, Much Less Fundamental Error, Entitling Him To Review Of His Unpreserved Claim Of Instructional Error

If the Court addresses the merits of Godwin's unpreserved claim of instructional error, that claim still fails. Homicide is justifiable if committed in self-defense, as set forth in Idaho Code §§ 18-4009 and 18-4010. These statutes, in pertinent part, provide the following:

> **Idaho Code section 18–4009:**
>
> Homicide is … justifiable when committed by any person in either of the following cases:
>
> 1. When resisting any attempt to murder any person … or to do some great bodily injury upon any person; or,
>
> …
>
> 3. When committed in the lawful defense of such person ... when there is reasonable ground to apprehend a design ... to do some great bodily injury, and imminent danger of such design being accomplished....
>
> **Idaho Code section 18–4010:**
>
> A bare fear of the commission of any of the offenses mentioned in subdivision[] 3 of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

Below, Godwin asked for instructions on justifiable homicide consistent with Idaho Code § 18-4009(3) (R., pp.529-33), which were granted by the district court (See Instruction Nos. 20-23).

Godwin now claims on appeal that the district court committed fundamental error when it failed to also instruct the jury on justifiable homicide under Idaho Code § 18-4009(1), though the defense never requested such instructions below.

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000); see also Draper, 151 Idaho at 588, 261 P.3d at 865 ("An error generally is not reviewable if raised for the first time on appeal.") (citing State v. Sheahan, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003)). This principle applies to alleged errors in jury instructions. See I.C.R. 30(b)(4) ("No party may assign as error the giving of or failure to give an instruction unless the party objects to the action before the jury retires to consider its verdict. The objection must distinctly state the instruction to which the party objects and the grounds of the objection."); Draper, 151 Idaho at 588, 261 P.3d at 865. Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. Id.; see also State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

To establish fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980. Godwin cannot meet this burden. Application of the correct legal standards to the evidence presented in this case shows no error in the jury instructions, much less fundamental error entitling Godwin to review of this unpreserved issue.

1. Based On The Evidence Presented Below, Godwin Was Not Entitled To A Justifiable Homicide Instruction Under Idaho Code § 18-4009(1)

Before the issue of fundamental error can be reached, the first inquiry is whether there was error at all. State v. Skunkcap, 157 Idaho 221, 227, 335 P.3d 561, 567 (2014). "In charging the jury, the court must state to them all matters of law necessary for their information." State v. Hall, 161 Idaho 413, 423, 387 P.3d 81, 91 (2016). "A defendant is entitled to an instruction where there is a reasonable view of the evidence presented in the case that would support the theory." State v. Eastman, 122 Idaho 87, 90, 831 P.2d 555, 558 (1992) (internal quotations omitted). A defendant, however, is not entitled to an instruction on an affirmative defense that is unsupported by the evidence. State v. Johns, 122 Idaho 873, 880-81, 736 P.2d 1327, 1334-35 (1987). Under the evidence presented in Godwin's case, he was not entitled to an instruction on justifiable homicide under Idaho Code § 18-4009(1), so there can be no error in the district court's failure to instruct the jury on that (unraised) theory.

As the Idaho Supreme Court noted in Hall, justifiable homicide under subsection (1) requires the defendant to be resisting an "actual, ongoing attack" that attempted to inflict great bodily harm. Hall, 161 Idaho at 423, 387 P.3d at 91. Justifiable homicide under subsection (3), however, only requires that the defendant be responding to an immediate *threat* of great bodily harm, and that his action be precipitated by a reasonable fear of such immediate harm. I.C. §§ 18-4009(3), 18-4010. In other words, justifiable homicide under subsection (1) applies when responding to an aggravated battery, I.C. §§ 18-903, 18-907, or at least an inchoate aggravated battery, I.C. §§ 18-901(1), 18-905; whereas subsection (3) applies when responding to an aggravated assault by threat, I.C. §§ 18-901(2), 18-905.

The evidence presented below at best showed that Godwin's murder of Mr. Anderson was in response to an aggravated assault by threat, I.C. §§ 18-901(2), 18-905. Godwin

consistently claimed, both during his police interview and at trial (though alone of all the witnesses that testified), that he shot Mr. Anderson in response to the latter "pointing a gun at [him]." (See, e.g., Int. Tr., p.9, Ls.16-19; Tr., p.1246, L.6 – p.1247, L.18.) But Godwin never claimed that Mr. Anderson *fired* the gun at him. Clearly the act of pointing a gun at someone, by itself, could reasonably be interpreted as a threat of immediate harm and, if believed by the jury, would fit squarely under subsection (3). However, in a case relating to firearms, until Mr. Anderson actually discharged the weapon at Godwin, there was no actual ongoing attack to which Godwin could respond—just the threat of a potential attack. Therefore, justifiable homicide under subsection (1) was not applicable to Godwin's case, and the district court could not err by failing to give an instruction to which Godwin was not entitled.

2. Even If The Evidence Presented In This Case Could Be Stretched To Meet The Evidentiary Standard Of Idaho Code § 18-4009(1), Godwin Has Still Failed To Show Fundamental Error

Even if Godwin could demonstrate that he was entitled, based on the evidence presented at trial, to instructions on justifiable homicide under subsection (1), he still cannot show fundamental error in the omission of such unrequested instructions. First, he cannot meet his burden under the first prong of Perry of establishing that the alleged errors violated an unwaived constitutional right. Godwin contends that the giving of his requested self-defense instructions, which were consistent with Idaho Code § 18-4009(3), without giving unrequested instructions consistent with Idaho Code § 18-4009(1), violated his due process right to a fair trial by, essentially, lowering the state's burden to disprove his affirmative defense. (Appellant's brief, pp.62-65.) This argument must fail because there is no constitutional obligation that the state disprove an affirmative defense.

As the United States Supreme Court has held, due process demands that a jury find "beyond a reasonable doubt … every fact necessary to constitute the crime with which he is charged." Martin v. Ohio, 480 U.S. 228, 231-32 (1987) (citing In re Winship, 397 U.S. 358, 364 (1970)). Due process does not, however, require that the state *disprove* a defendant's affirmative defense. Id. at 236. Rather, a requirement that the state "assume[] the burden of disproving affirmative defenses" is a matter of state law, and states that place the burden on defendants to prove an affirmative defense are not "in violation of the Constitution." Id. (citing Patterson v. New York, 432 U.S. 197, 211 (1977)). Because the state had no constitutional burden to disprove Godwin's (unraised) self-defense claim, he cannot show that failure to instruct the jury on the unrequested theory of self-defense violated his constitutional rights.[10]

A defendant does have a constitutional due process right to present his defense, In re Oliver, 333 U.S. 257, 273 (1948), and that right was honored. Godwin does not argue that he did not get to present his defense; rather, he argues that the district court somehow erred when it did not supplant Godwin's theory of the case (that Mr. Anderson pulled a gun on him and, fearing for his life, he killed Mr. Anderson in self-defense (see Tr., p.1047, L.7 – p.1048, L.4; p.1246, L.6 – p.1247, L.18)) for what Godwin now thinks may have been a better theory. But "[a] defendant in a criminal action is entitled to have *his* theory of the case submitted to the jury under proper instructions," not the district court's theory. State v. Olsen, 103 Idaho 278, 285, 647 P.2d 734, 741 (1982) (emphasis added). Godwin's argument amounts to an assault on the attorney-client relationship and should be rejected.

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[10] While Godwin makes a passing reference to Article I, § 13 of the Idaho Constitution as supporting his claim of a due process violation (see Appellant's brief, p.62), he has offered no argument why that provision should be interpreted any differently than its federal counterpart. This Court should therefore decline to consider any argument that the Idaho Constitution affords greater protection than United States Constitution in this regard. See State v. Wheaton, 121 Idaho 404, 406-07, 825 P.2d 501, 503-04 (1992).

This is underscored by the second prong of Perry, which requires that Godwin show that the alleged error is "clear or obvious" on the existing record, "without any need for additional information," including information "as to whether the failure to object" to the allegedly erroneous instructions "was a tactical decision." Perry, 150 Idaho at 226, 245 P.3d at 978. Godwin claims that defense counsel's decision to pursue the affirmative defense of justifiable homicide exclusively under Idaho Code § 18-4009(3) instead of also under subsection (1) could have served no tactical purpose. (Appellant's brief, p.65.) That is simply untrue. Even if the facts could be stretched to fit a theory that Godwin's murder of Mr. Anderson was in response to an ongoing attack, they would still have to be stretched. The facts, as related by Godwin, clearly fit a self-defense theory of responding to a reasonable threat of imminent harm much better. A clear, concise argument, focused on the defendant's strongest theory and strongest evidence, is always tactically superior to a lengthy, sometimes confusing, and often inconsistent argument.

Finally, Godwin cannot meet his burden under the third prong of Perry of establishing a reasonable probability that the error he alleges actually affected the outcome of the trial. See Perry, 150 Idaho at 226, 245 P.3d at 978. Godwin asserts prejudice due to the fact that, to sustain a claim of self-defense under Idaho Code 18-4009(3), the defendant must have been responding to a reasonable fear, whereas there is no such requirement under subsection (1). (See Appellant's brief, pp.53-55, 66.) But even assuming, as Godwin does, that the elements under subsection (1) would be easier to meet than under subsection (3), failure to instruct on the former would not affect the outcome of Godwin's trial. For Godwin to prevail on a claim of self-defense under subsection (1) but fail on the claim he actually raised, the jury must have concluded (1) that Mr. Anderson pulled a gun on Godwin—despite every other witness testifying that Mr. Anderson did not display a gun (see Tr., p.765, L.24 – p.766, L.3; p.897, Ls.5-11; p.947,

Ls.6-16); (2) that Godwin killed Mr. Anderson only in response to this ongoing attack (assuming, *arguendo*, that the mere act of drawing a weapon constitutes an ongoing attack rather than a *threat* of attack, which it does not), and not for some other reason; and (3a) that Godwin, despite his consistent testimony to the contrary (see, e.g., Tr., p.1246, Ls.13-23; p.1247, Ls.5-18; p.1273, Ls.11-14), really was not in fear for his life, or (3b) that fear for one's life when under "attack" by a gun-wielding belligerent is not reasonable. Godwin has failed to establish the prejudice required under the third prong of Perry.

Godwin has failed to show, under the facts of this case, that he was entitled to a jury instruction on justifiable homicide under Idaho Code § 18-4009(1). He has therefore failed to show instructional error, much less fundamental error. Even if the facts presented below could be stretched to fit a theory of self-defense under subsection (1), Godwin has failed to show fundamental error entitling him to review of this unpreserved issue: Godwin has failed to show that he was constitutionally entitled to the state carrying any burden to disprove his affirmative defense, much less a clear violation of that right; he has failed to show that defense counsel's decision to pursue self-defense under subsection (3) instead of subsection (1) could not have served a tactical purpose; and he has failed to show prejudice. Having failed to show fundamental error, Godwin is not entitled to review of this unpreserved issue.

V.
Godwin Has Failed To Show Fundamental Error Entitling Him To Review Of His Unpreserved Claims Of Prosecutorial Misconduct

A. Introduction

Cherry-picking several quotes, Godwin argues, for the first time on appeal, that the prosecutor committed misconduct by allegedly "vouching" for the state's case and witnesses. (Appellant's brief, pp.66-74.) Application of the correct legal standards to the record, however,

shows that Godwin has failed to show error, much less fundamental error entitling him to review of this unpreserved issue.

B. Standard Of Review

"[T]he standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2008). If a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

C. The Challenged Portions Of The Prosecutor's Closing Argument Do Not Constitute Misconduct, Much Less Fundamental Error

Because Godwin failed to preserve his claims of prosecutorial misconduct by timely objection below, he is required to show fundamental error on appeal. Perry, 150 Idaho at 226, 245 P.3d at 978. To establish fundamental error,

> the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

Id. at 228, 245 P.3d at 980. Because review of the record shows that the prosecutor's statements were not improper, Godwin has failed to show error, much less fundamental error entitling him to review of these unpreserved claims of error.

"Generally, both parties are given wide latitude in making their arguments to the jury and discussing the evidence and inferences to be made therefrom." State v. Severson, 147 Idaho 694,

720, 215 P.3d 414, 440 (2009) (citations omitted). Prosecutorial misconduct only occurs where the prosecutor "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." State v. Sanchez, 142 Idaho 309, 318, 127 P.3d 212, 221 (Ct. App. 2005). With respect to alleged prosecutorial misconduct in the context of closing argument, the United States Supreme Court has stated:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions [as consistent and repeated misrepresentation that may have a significant impact on a jury's deliberations]. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974).

The Idaho Supreme Court has reiterated the importance of reviewing closing arguments in light of their improvisational nature, noting that "in reviewing allegations of prosecutorial misconduct [the appellate court] must keep in mind the realities of trial." State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007) (quoting State v. Estes, 111 Idaho 423, 427-428, 725 P.2d 128, 132-133 (1986)). Moreover, a prosecutor's comments "must be evaluated in light of defense conduct and in the context of the entire trial." Severson, 147 Idaho at 720, 215 P.3d at 440 (citations and quotations omitted); see also Darden v. Wainwright, 477 U.S. 168, 179 (1986) ("[t]he prosecutors' comments must be evaluated in light of the defense argument that preceded it"); United States v. Young, 470 U.S. 1, 11 (1985) ("only by [viewing the prosecutor's comments in context] can it be determined whether the prosecutor's conduct affected the fairness of the trial"). Finally, the Idaho Court of Appeals has recognized "[t]he right to due process does

not guarantee a defendant an error-free trial but a fair one," and the function of appellate review is "not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial." State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991).

Application of the foregoing standards shows that the prosecutor's statements, taken in context and recognizing the improvisational and imprecise nature of closing argument, do not constitute misconduct, much less fundamental error.

As noted above, fundamental error requires Godwin to show the clear violation of an unwaived constitutional right. Perry, 150 Idaho at 228, 245 P.3d at 980. As the United States Supreme Court explained in Young, the primary danger in a prosecutor's vouching for credibility or expressing personal opinion (unsupported by evidence) of the defendant's guilt is that it may "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 be tried solely on the basis of the evidence presented to the jury…." Young, 470 U.S. at 18-19. On appeal, Godwin claims that the prosecutor crossed this line and that his "statements went much further than the permissible bounds and encouraged the jury to rely on the prosecutor's beliefs." (Appellant's brief, p.68.) In fact, Godwin's cherry-picked quotes discussing the credibility of state's witnesses Amanda Jones and Beau Lynch show the opposite.

In Godwin's first quote discussing Amanda Jones, the prosecutor told the jurors that they had to judge the witnesses' testimony and credibility, based on the evidence, and reminded the jury that the attorneys' statements, including his, were not evidence: Specifically, he said he

> would submit to [the jury] and *you judge her testimony*. I would submit to you that she was telling the truth, and *that's something you have to decide, not me*. And *what Mr. Monson and I tell you is not evidence*, but the evidence proves that Mr. Godwin is guilty of second degree murder.

(Tr., p.1325, Ls.17-24 (emphasis added).)

Godwin removes his second quote relating to Ms. Jones's credibility—wherein the prosecutor explained that, if the jury believed Ms. Jones's credible testimony, it would not be consistent to also accept Godwin's claim of self-defense (see Tr., p.1328, L.13 – p.1329, L.2)—from its context: A lengthy review of the evidence and an argument for central inference that should arise therefrom: that Godwin's actions were wholly inconsistent with acting in self-defense when he murdered Mr. Anderson. (Tr., p.1326, L.9 – p.1331, L.19.) It is not improper for the prosecutor to express a belief that a witness is credible when his comment is based on inferences from evidence presented at trial. See State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003) (citing State v. Porter, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997)). Rather, discussing the evidence fully, and inferences that should arise from the evidence, including which witnesses are credible, is appropriate closing argument. See State v. Mendoza, 151 Idaho 623, 627, 262 P.3d 266, 270 (Ct. App. 2011).

Godwin also removes the quote relating to Beau Lynch—that though he was apparently scared and nervous while testifying, Mr. Lynch still told the truth (see Tr., p.1326, Ls.15-18)—from the context of this same review of the evidence (all of which evidence was presented to the jury) that showed that Godwin did not act in self-defense when he murdered Mr. Anderson. Again, a prosecutor may properly express his belief that a witness is credible when that belief is based solely on inferences from evidence presented at trial. But even reviewing Godwin's excerpt, removing all of this context, the prosecutor's statement is still appropriate closing argument. Not only did the prosecutor not allude to anything outside of the record or place his personal prestige ahead of the witness's credibility, he again specifically told the jury to "judge

[the witness's] testimony" and reminded them that "these credibility questions are what you have to answer." (Tr., p.1326, Ls.9-19.)

Godwin's final cherry-picked quote—the prosecutor's submission to the jury that the evidence presented by its witnesses was credible (see Tr., p.1360, Ls.15-18)—comes from the end of the prosecutor's rebuttal argument. Godwin ignores all of the context from which this quote was lifted. First, during the defense argument that preceded the prosecutor's rebuttal argument, defense counsel claimed that "[i]n order to make their case, the State really needs you to believe Amanda Jones." (See Tr., p.1339, Ls.4-5.) As the prosecutor noted, that was not true: The state's case relied on Ms. Jones's testimony, *and* Mr. Lynch's, *and* Ernie Ruiz's, *and* the expert testimony of Dr. Groben, *and* "all of the physical evidence that you've examined and the photos and you can consider all that in your deliberations." (Tr., p.1356, Ls.15-20.) The state then, after again briefly reviewing the evidence and key instructions, submitted the issue of credibility to the jury, asking them to "follow Judge Fitzmaurice's instructions and not what the attorney[s] say," but rather to "decide this case" based on the overwhelming evidence of Godwin's guilt presented at trial. (Tr., p.1359, L.19 – p.1360, L.19.)

The prosecutor's closing argument was proper. Godwin cannot show error, much less fundamental error entitling him to review of this unpreserved issue.

Moreover, even if Godwin could show that any of the prosecutor's statements "went much further than the permissible bounds," his claim would still fail under the fundamental error standard. As noted above, part of the second prong of Perry requires the defendant to show that his counsel's failure to object was not a tactical decision. Perry, 150 Idaho at 228, 245 P.3d at 980. Godwin cannot meet this burden. Defense counsel may have reasonably chosen to refrain from objecting to the above-referenced statements so as not to focus the jury's attention on the

strong credibility of the state's witnesses, contrasted with the strong *in*credibility of Godwin's testimony, as shown by the evidence presented during the trial.

Third, even if Godwin could show that the prosecutor clearly vouched for the witnesses' credibility based solely on his personal beliefs, and that such violated a constitutional right, Godwin cannot show the prejudice required to sustain a claim of fundamental error. As noted above, the primary danger in vouching for a witness's credibility is the possibility that the jury might believe that there is evidence "known to the prosecutor," but "not presented to the jury." Young, 470 U.S. at 18-19. The prosecutor did not convey any impression that he was aware of evidence that had been withheld from the jury; rather, he relied on the evidence which had been presented to the jury and argued inferences therefrom. Godwin, therefore, was not prejudiced by the prosecutor's so-called statements of personal belief.

Ultimately, Godwin has failed to demonstrate prosecutorial misconduct, let alone misconduct that satisfies the Perry fundamental error standard, with respect to any of the challenged portions of the prosecutor's closing argument. Having failed to show fundamental error, Godwin is not entitled to review of this unpreserved issue. The judgment of the district court should be affirmed.

VI.
Godwin Has Failed To Establish That The Cumulative Error Doctrine Applies To This Case

Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 407, 958 P.2d 22, 33 (Ct. App. 1998). These

must be preserved errors, as, analytically, unpreserved errors cannot be accumulated.[11] Godwin appears to recognize this limitation, at least to a degree, limiting his claim of cumulative error to the first four issues in his brief, omitting the unpreserved allegations of prosecutorial misconduct. (See Appellant's brief, p.74.) Godwin has failed to show that any objected-to errors occurred at his trial, and therefore the doctrine is inapplicable to this case. See, e.g., LaBelle v. State, 130 Idaho 115, 121, 937 P.2d 427, 433 (Ct. App. 1997).

Even if this Court concludes that objected-to errors occurred during Godwin's trial, Godwin has still failed to show that any of those alleged errors deprived him of his due process right to a fair trial, and only that would require reversal. State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000) (accumulation of errors still deemed harmless absent prejudice); State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997). As noted above, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Even assuming some error on the issues where Godwin raised objections below, such errors did not deprive Godwin of a fair trial, and he has therefore failed to show reversible error on any of these issues.

Finally,[12] any error or accumulation of errors is still 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) (citation omitted). In this case, the evidence of Godwin's

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[11] Unpreserved errors will only be reached if they constitute fundamental error. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). To show fundamental error, the appellant is required to show that he was prejudiced by a clear violation of a constitutional right which occurred at trial. Id. at 228, 245 P.3d at 980. If the appellant shows fundamental error, then the appellant is entitled to reversal. Id. If the alleged violation was not prejudicial, then there is no fundamental error to accumulate.

[12] The state notes that this argument applies with equal force to all prior issues addressed herein.

guilt was overwhelming. It was uncontested that he killed Mr. Anderson when he shot him in the neck. (See Tr., p.768, Ls.6-12; p.825, Ls.3-11; p.897, L.19 – p.898, L.12; p.949, Ls.7-9; p.1134, L.25 – p.1135, L.5; p.1145, Ls.8-17.) Godwin's only defense—that he had acted in self-defense—rested on his own testimony that, immediately upon arriving at Mr. Anderson's trailer, Mr. Anderson threatened him with a gun and, fearing for his life, Godwin responded by drawing his weapon and shooting Mr. Anderson. (See Tr., p.1246, L.6 – p.1247, L.18.) But every other witness testified consistently that (1) Godwin's gun was already drawn and trained on Mr. Anderson when they first arrived at the trailer (see Tr., p.764, L.20 – p.765, L.20; p.895, Ls.6-15; p.946, L.16 – p.947, L.3) and (2) Mr. Anderson never drew his gun (see Tr., p.765, L.24 – p.766, L.3; p.897, Ls.5-11; p.947, Ls.6-16). Godwin's whole defense, therefore, rested on his own credibility *and nothing else*, and that credibility was thoroughly impeached. (See Tr., p.1258, L.1 – p.1298, L.15.) This Court can therefore conclude beyond a reasonable doubt that any possible errors, or accumulation of errors, did not affect the outcome of this trial. Godwin's conviction for the second degree murder of Mr. Anderson should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm Godwin's conviction for the second degree murder of Kyle Anderson.

DATED this 18th day of July, 2018.

/s/ Russel J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of July, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorneys listed below by means of iCourt File and Serve:

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RJS/dd