4-5-2018

State v. Maldonado Respondent's Brief Dckt. 45031

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45031**
Plaintiff-Respondent,	)	
	)	**Canyon County Case No.**
v.	)	**CR-2016-9636**
	)	
JUAN CARLOS MALDONADO AKA CARLOS JUAN MALDONADO,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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Nature Of The Case

Juan Carlos Maldonado appeals from the judgment entered upon the jury verdicts finding him guilty of felony domestic battery and of being a persistent violator. On appeal, Maldonado argues (1) the trial court abused its discretion by admitting statements the victim made during medical examinations by a paramedic and (later) a Physician's Assistant, (2) the trial court erred by denying his motion for a mistrial after the state mistakenly gained admission of, and published to the jury, an unredacted version of the victim's recorded statements to police in which she said Maldonado had been in prison before, and (3) even if the errors he alleges are deemed individually harmless, the cumulative effect of the errors warrants reversal.

Statement Of The Facts And Course Of The Proceedings

The state charged Maldonado with domestic battery – traumatic injury (felony) and with being a persistent violator. (R., pp.37-40.) Maldonado pled not guilty and the case proceeded to trial. (R., pp.41, 78-103, 106-116.) At the conclusion of the trial, the jury found Maldonado guilty of both the charge and the enhancement. (R., pp.117-119.) The district court sentenced Maldonado to a unified sentence of 20 years with six years fixed. (R., pp.154-155.) Maldonado filed a Rule 35 motion for reduction of sentence, which was denied. (R., pp.175-177; 8/29/17 Order Denying Rule 35 Motion.) Maldonado timely appealed. (R., pp.165-167, 191-195.)

ISSUES

Maldonado states the issues on appeal as:

> I. Did the district court abuse its discretion when it allowed hearsay statements regarding the identity of Ms. Maldonado's assailant to be admitted?
>
> II. Did the district court err in denying the motion for a mistrial made after the State played an audio in which Ms. Maldonado told law enforcement that Mr. Maldonado had previously been in prison for a long time?
>
> III. Even if the above errors are individually harmless, was Mr. Maldonado's Fourteenth Amendment right to due process of law violated because the accumulation of errors deprived him of his right to a fair trial?

(Appellant's Brief, p.3.)

The state rephrases the issues as:

1. Has Maldonado failed to show that the district court abused its discretion by admitting statements the victim made during medical examinations to the paramedic and the Physician's Assistant identifying Maldonado as the assailant?

2. Has Maldonado failed to show that the district court erred in denying his motion for a mistrial?

3. Has Maldonado failed to show cumulative error?

ARGUMENT

I.
Maldonado Has Failed To Show That The District Court Abused Its Discretion By Admitting Statements The Victim Made To The Paramedic And The Physician's Assistant Identifying Maldonado As The Assailant

A. Introduction

Maldonado argues that the trial court abused its discretion by permitting the state to introduce, during its opening statement and case-in-chief, statements by the victim (Maldonado's wife, Nellie)[1] to a treating paramedic (Haley Glenn) and a treating Physician's Assistant (David Nelson) that identified Maldonado as the person who battered her. As he did below, Maldonado contends that, contrary to I.R.E. 803(4), the identity of the person who inflicted Nellie's injuries was not "reasonably pertinent to diagnosis or treatment," and, therefore, the challenged statements were inadmissible hearsay. (Appellant's Brief, pp.4-18.)

Maldonado's argument fails. Idaho's appellate courts have not specifically determined whether the identity of a perpetrator is, or can be, "reasonably pertinent to diagnosis or treatment" under I.R.E. 803(4). However, a review of the record and of the generally applicable law supports the trial court's determination that the challenged statements were reasonably pertinent to the medical diagnosis and treatment of Nellie, and admissible under I.R.E. 803(4). Even assuming the trial court abused its discretion in admitting the challenged "identification" portions of Nellie's statements, any such error was harmless and did not affect Maldonado's substantial rights.

[1] At trial, Nellie denied that Maldonado was the person who battered her. (11/18/16 Tr., p.56, Ls.13-17; p.60, L.21 – p.61, L.5; p.67, Ls.2-5.)

B. Standard Of Review

A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010); State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009). In reviewing a discretionary decision, the appellate court "examine[s] whether: (1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer bounds of its discretion and with applicable legal standards: and (3) the trial court reached its decision through an exercise of reason." Id. (citations omitted); accord State v. Shackelford, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010) (internal citations and quotation marks omitted).

C. Maldonado Has Failed To Show The Trial Court Abused Its Discretion By Permitting The State To Present Nellie's Statements To The Paramedic And The Physician's Assistant Identifying Him As Her Assailant

Prior to jury selection, the prosecutor informed the trial court that he intended to "introduce evidence that the victim told two separate medical providers about her injuries and who injured her[,]" pursuant to I.R.E. 803(4) as "statements made for the purposes of medical diagnosis or treatment." (11/17/16 Tr., p.14, L.20 – p.15, L.2.) Maldonado has failed to show that the trial court abused its discretion in admitting those statements under I.R.E. 803(4).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Hearsay evidence is generally inadmissible. I.R.E. 802. However, I.R.E. 803(4) specifically excepts from the hearsay rule statements made for purposes of medical diagnosis or treatment. Specifically, the rule provides that the following are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness:

> **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment.

I.R.E. 803(4).

The rationale behind this firmly-rooted hearsay exception is that statements made for purposes of medical diagnosis and treatment are "generally trustworthy because the declarant is motivated by a desire to receive proper medical treatment and will therefore be truthful in giving pertinent information to the physician." State v. Nelson, 131 Idaho 210, 215, 953 P.2d 650, 655 (Ct. App. 1998) (citing State v. Kay, 129 Idaho 507, 518, 927 P.2d 897, 908 (Ct. App. 1996)). This is especially true where, as here, the hearsay declarant is an adult. In such cases, "the motive to speak the truth to a physician in order to advance a self-interest in obtaining proper medical care for the declarant or another is generally assumed." Kay, 129 Idaho at 518, 927 P.2d at 908.

In order to qualify as a statement made for purposes of medical diagnosis or treatment, admissible pursuant to I.R.E. 803(4), the out-of-court statement(s) sought to be introduced must meet three foundational requirements:

> The proponent must show: (1) that the statements were "made for purposes of medical diagnosis or treatment"; (2) that the statements described "medical history, or past or present symptoms, pain, or sensations, or the source thereof"; and (3) that the statements were "reasonably pertinent to diagnosis or treatment."

Kay, 129 Idaho at 518, 927 P.2d at 908. See also Nelson, 131 Idaho at 216, 953 P.2d at 656. So long as there is sufficient evidence to support a finding that these foundational requisites have been satisfied, the trial court's decision to admit a statement as one made for the purposes of medical diagnosis or treatment will not be disturbed on appeal. Nelson, 131 Idaho at 215-16, 953 P.2d at 655-56; Kay, 129 Idaho at 518-19, 927 P.2d at 908-09.

Applying these principles in this case, it is clear that the district court did not abuse its discretion in allowing Paramedic Glenn and Physician's Assistant Nelson to testify about Nellie's identification of Maldonado as her assailant.

1. Nellie's Statement To Paramedic Haley Glenn

After jury selection, the prosecutor advised the trial court that he wanted to tell the jury in his opening statement that, after the EMT (Haley Glenn) "asked Nellie what happened[,]" Nellie "told her *significant other* had punched her multiple times in the head." (11/17/16 Tr., p.217, Ls.8-12 (emphasis added).) In ruling on the state's request, the court explained that the identification of the perpetrator was "intertwined with the statement[,]" that it "may or may not be pertinent to their diagnosis[,]" but that "it also becomes one of those facts that's inescapable. It's not like a separate series of things that occurred."[2] (11/17/16 Tr., p.222, L.25 – p.223, L.7.) The court permitted the state to "make that comment during opening statement[,]" and noted Maldonado's standing objection to the state's request. (11/17/16 Tr., p.223, Ls.10-18.)

[2] On the second day of trial, the trial court further explained how Nellie "relayed this information to EMT Glenn,[,]" stating:

> [Nellie had] been waken [sic] up in the morning by her boyfriend leaving. They'd been arguing. The argument escalated, it became physical and he began punching her in the face and torso.
>
> It appears to me the identity of the perpetrator in that presentation to the EMT is so intertwined with the patient's description of events . . . .
>
> . . . .
>
> And therefore, the reliability of that statement doesn't appear to be a basis to separate that, because it seems to be intertwined with the information that's being collected."

(11/18/16 Tr., p.14, L.22 – p.15, L.16.)

During opening statement, the prosecutor told the jury: "[Haley Glenn] asked Nellie what happened. And Nellie said her significant other that morning had punched her repeatedly in the face and hit her in the ribs." (11/17/16 Tr., p.249, Ls.11-14.)

At trial, Ms. Glenn testified that on the morning of May 31, 2016, she was working as a Canyon County Paramedic when she responded to a Nampa residence and, after waiting about 46 minutes before making contact with anyone at the scene, she went inside and saw Nellie sitting on a couch in the living room. (11/17/16 Tr., p.319, L.11 – p.321, L.20.) Nellie had bruising on both sides of her face and the bridge of her nose, and her lip was swollen. (11/17/16 Tr., p.322, Ls.6-10.) Ms. Glenn testified that when she asked Nellie what happened, Nellie said "her significant other had woken her up, got into an argument with her. It escalated, became physical in nature and went from there for about 30 minutes." (11/17/16 Tr., p.322, L.14 – p.323, L.5.) Ms. Glenn further testified:

> She told me that her significant other had woken her up and began arguing with her. About what, I do not know. But that the argument escalated and became physical and he began punching her in the face and the torso.

(11/17/16 Tr., p.324, Ls.12-16.) The paramedics transported Nellie to a hospital by ambulance. (11/17/16 Tr., p.325, Ls.15-18.)

Although Ms. Glenn testified on direct examination that Nellie said her "significant other" had battered her (11/17/16 Tr., p.324, Ls.9-16), on cross-examination she clarified that Nellie actually used the term "boyfriend," and that she (Ms. Glenn) wrote "significant other" in her report because she felt "like it painted a better picture[,]" and to her, "[s]ignificant other . . . is boyfriend." (11/17/16 Tr., p.329, L.7 – p.330, L.1.) Ms. Glenn also denied that the identity of the person who battered Nellie was necessary for medical

diagnosis or treatment, and agreed that "just primarily . . . the mechanism of injury" was necessary for that purpose. (11/17/16 Tr., p.328, Ls.16-22.)

Despite the fact that Ms. Glenn's testimony did not provide a foundation for concluding that the identity of the perpetrator was reasonably pertinent to Nellie's medical diagnosis or treatment, the district court correctly concluded that the perpetrator's identity was intertwined with those portions of Nellie's statement that were pertinent to those purposes and "becomes one of those facts that's inescapable,"[3] "not like a separate series of things that occurred." (11/17/16 Tr., p.222, L.25 – p.223, L.7.)

As the trial court surmised, segregating the identification portion of Nellie's statement from the rest of her statement to Ms. Glenn would have been problematic. Nellie's statement that she was woken up out of her sleep and punched repeatedly during an argument that ensued would have made it implausible to conceal the fact that Maldonado was the only other person with her at the time: Nellie testified that she and Maldonado had been staying together in the downstairs of the house a couple of days before the incident, and got into an argument after he woke her up that morning; Maldonado told Detective Wilber he was with Nellie on the morning of the incident, he told the women who came downstairs to intervene in the argument that they should stay out of it, and he was angry when he argued with Nellie. (11/18/16 Tr., p.55, L.21 – p.57, L.24; p.140, L.17 – p.141, L.10; see generally State's Ex. 6.) Any attempt to omit the obvious identity of the perpetrator from Nellie's statement would have been impractical and pointless.

[3] The recorded statements of Miriam Murillo and Janell Ozuna (State Exhibits. 22, 24), admitted as substantive evidence under I.R.E. 804(b)(5), leave little doubt that Maldonado was the person who battered Nellie early on the morning of May 31, 2016. (See section C, infra, for a more detailed discussion of statements by Ms. Murillo and Ms. Ozuna.)

Maldonado has failed to show that the district court abused its discretion in allowing Ms. Glenn to testify about Nellie's identification of the person who battered her.

2. Nellie's Statement To Physician's Assistant David Nelson

After Nellie was transported to the hospital on May 31, 2016, Physician's Assistant David Nelson assessed and treated her injuries. (11/18/16 Tr., p.41, L.21 – p.42, L.7.) During his opening statement, the prosecutor told the jury that the Physician's Assistant is "going to tell you what Nellie told him had occurred[,]" but the prosecutor did not tell the jury at that point that Nellie identified Maldonado as her assailant. (11/17/16 Tr., p.249, Ls.14-21.) At the start of the second day of trial, Maldonado's attorney's told the court he anticipated that the state was going to admit evidence of "who the assailant was" through Mr. Nelson's testimony about what Nellie told him, and that he would object to such testimony. (11/18/16 Tr., p.10, Ls.14-21.) After the prosecutor confirmed that he was going to present such testimony, the court (at the request of defense counsel) allowed the prosecutor to lay a foundation for Mr. Nelson to testify about why Nellie's identification of Maldonado was related to her medical diagnosis or treatment. (11/18/16 Tr., p.10, L. 23 – p.11, L.10.)

In relevant part, Mr. Nelson testified outside the presence of the jury that: (1) he uses the "SOAP" method to assess patients, which stands for "subjective objective assessment and plan" (11/18/16 Tr., p.17, Ls.17-21; p.28, L.19 – p.29, L.5); (2) during the "subjective" portion of the patient assessment he asks open-ended questions such as "What brings you in today?" and writes down what the patient says (id., p.17, Ls.20-24; p.20, Ls.21-23); (3) it is important to know whether it was a man or a woman who assaulted a patient because of the need to know how large the person was who inflicted the injury (id.,

p.19, Ls.22-24; p.19, Ls.5-9; p.22, Ls.7-19); (4) if mentioned by the patient, the identity of the perpetrator is something he would write down in the medical chart so "the next provider can read and say, oh, this is how these injuries were sustained" (id., p.25, Ls.2-19); and (5) he agreed "it would be pertinent to write that it was her husband, because some later physician may read this, see additional injuries, look back at this, see evidence of abuse in the past" (id., p.26, Ls.4-10).

The trial court ruled that the state could present the "identity" portion of Nellie's statement to Mr. Nelson, explaining that once the patient responds to the open-ended questioning during the subjective phase of the assessment, the Physician's Assistant "glean[s] what is pertinent from what the patient says." (11/18/16 Tr., p.29, Ls.7-17.) The court explained that determining whether the assailant was a man, woman, or child "is pertinent to [the] evaluation."[4] (11/18/16 Tr., p.29, Ls.12-17.) The court also stated that Nellie's identification of Maldonado as the assailant was "intertwined with the statement made for medical diagnosis," which, as discussed above with regard to Ms. Glenn's testimony, was well-founded. (11/18/16 Tr., p.30, Ls.13-15.)

Further, although the trial court did not mention it in its ruling, it should nonetheless be considered that, according to Mr. Nelson, the identity of the assailant was pertinent to Nellie's medical diagnosis or treatment so that a "later physician may read [it], see additional injuries, [and] look back at this, [and] see evidence of abuse in the past." (11/18/16 Tr., p.26, Ls.4-10.) See State v. Stewart, 149 Idaho 383, 388, 234 P.3d 707, 712 (2010) (affirming denial of motion on correct theory, one not reached by trial court);

[4] According to Mr. Nelson, knowing the size of an assailant is important for understanding the "mechanism of their injuries." (11/18/16 Tr., p.19, Ls.18-24; p.22, Ls.14-19.)

McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999) (if trial court reaches the correct result by erroneous theory, appellate court will affirm upon the correct theory).

The trial court was correct. Mr. Nelson's foundational testimony established that the identity of the person who battered Nellie was "reasonably pertinent to [her] diagnosis and treatment." Kay, 129 Idaho at 518, 927 P.2d at 908. Because the challenged statement was made for the purposes of medical diagnosis and treatment, the district court properly admitted it pursuant to I.R.E. 803(4).[5]

D. Even If The Trial Court Abused Its Discretion In Admitting The Challenged Statements, The Error Was Harmless

Even if a trial court has abused its discretion, such "abuse of discretion may be deemed harmless if a substantial right is not affected. In the case of an incorrect ruling regarding evidence, this Court will grant relief on appeal only if the error affects a substantial right of one of the parties." Shackelford, 150 Idaho at 363, 247 P.3d at 590 (citation omitted). See also State v. Watkins, 148 Idaho 418, 420, 224 P.3d 485, 487 (2009) ("Unless an error affects a substantial right of a party, the error does not constitute grounds for reversal." (Citation omitted)).

Here, assuming the district court abused its discretion in admitting one or both of the Nellie's statements to Paramedic Glenn and Physician's Assistant Nelson, the error did not affect Maldonado's substantial rights. First, Maldonado's defense completely centered on Nellie's extensive testimony that her "boyfriend" Victor battered her the night before, and that, in order to protect Victor, she initially blamed Maldonado for her injuries.

[5] During his trial testimony, Mr. Nelson told the jury that Nellie said she was assaulted by her "husband" early in the morning in her home, and that he punched her several times in the face and chest. (11/18/16 Tr., p.44, Ls.17-25; p.48, L.15 – p.49, L.11.)

(11/18/16 Tr., p.58, Ls.3-14; p.64, L.6 – p.65, L.11; p.70, L.25 – p.71, L.10; p.72, Ls.12-21; p.75, L.6 – p.77, L.7.) Regardless of any error in its admission, Ms. Glenn's testimony that Nellie said that the person who battered her was her "boyfriend" was totally supportive of Maldonado's defense. (See 11/17/16 Tr., p.329, L.7 – p.330, L.1.)

As discussed, Maldonado told Detective Wilber he was with Nellie on the morning of the incident and they were arguing when the two women tried to intervene. He told the women they should stay out of it, and he was angry with Nellie at the time because she would not account for her facial injuries. (11/18/16 Tr., p.55, L.21 – p.57, L.24; p.140, L.17 – p.141, L.10; see generally State's Ex. 6.) Nellie testified to the underlying facts that Maldonado woke her up at 5:00 a.m. that morning, and that Janell and Jeanette (Miriam Murrilo) came downstairs to the door as Maldonado yelled at Nellie and told her to stop lying about her boyfriend.[6] (11/18/16 Tr., p.7, Ls.5-8; p.57, L.9 – p.58, L.5.)

Also incriminating are Maldonado's jail calls to Nellie and the recorded statements of Miriam Murillo and Janell Ozuna.

1. First Jail Call

A close approximation of the most relevant parts of the first jail call from Maldonado to Nellie, made on May 31, 2016, the day of the crime, is as follows:

> Maldonado: I told them that you came home all crushed up and that's why we were arguing, because someone had texted you . . . but you wouldn't tell me . . . . (St. Ex. 1, 00:25-00:42)

[6] However, Nellie further testified, contrary to her statements to law enforcement and the Physician's Assistant, that her facial injuries were inflicted by her boyfriend Victor the night before, stating, "when [Maldonado] had woke up . . . he seen my face and he was pissed. He wanted to go after this guy." (11/18/16 Tr., p.58, Ls.7-9.)

Nellie: Oh, Carlos, show them, okay? You need to fucking show them that you have some sort of fucking remorse and you need help Carlos.

Maldonado: I told them . . . .

Nellie: If you don't and you fight, if you fight this . . . . (St. Ex. 1, 00:55-1:00.)

Maldonado: I told them I needed help man, I told them, I told them that I need help . . . I promise you I did dude, But I didn't fucking tell them that I [. . .] that shit man. (St. Ex. 1, 01:13-01:25.)

Nellie: You did? (St. Ex. 1, 01:26.)

Maldonado: . . . I didn't tell them I did that shit to you. (St. Ex. 1, 01:29-01:31.)

Nellie: I told them that we both needed help and that you weren't like this. You are not like this. (St. Ex. 1, 01:48-01:54.)

At the end of the call, Maldonado said "sorry babe" and "I'm so sorry." (St. Ex. 1, 03:44-04:05.)

In short, at the same time Maldonado was rehearsing a story to exculpate himself in the courtroom, he was tacitly admitting that he battered Nellie by apologizing to her and agreeing that he needed help.

2. Second Jail Call

In a second call from jail to Nellie on May 31, 2016, Maldonado asked what she had said, and she told him that she did not tell "them" anything and that he "fucked [her] up good." (St. Ex. 2, 00:25-00:33; 11/18/16 Tr., p.224, L.19 – p.225, L.3.) After discussing who had called the police that morning, Maldonado asked Nellie what she had said, and she replied that she told them she did not want to talk to them right now, that they both needed to get help, and she didn't want him "to go to prison or anything like that." (St. Ex.

2, 01:03-01:26.) When Nellie asked Maldonado if he told them anything, he said he told them he had been sick in bed, and that she had been in and out of the house, and when she came back later on that night . . . "(inaudible) . . . oh shit man." (St. Ex. 2, 01:45-02:12.) Nellie immediately cut Maldonado off, saying, "babe, you can't, listen," and then the phone call timed out. (St. Ex. 2, 02:13-02:15.)

Plainly, the primary purpose of the second phone call was to make sure that Nellie's version of the events coincided with Maldonado's.

3. Third Jail Call

One week prior to trial, on November 10, 2016, Maldonado made another call from jail to Nellie. (See St. Ex. 3.) Nellie told Maldonado, "that fucking Janell got fucking served," and when he asked what that meant, she said that she did not know. (St. Ex. 3, 01:20-01:27.) Maldonado told Nellie, "They don't got to go, you know that, right? They don't get in trouble . . . hear me? (St. Ex. 3, 01:30-01:37.) Nellie said, "I keep telling them, they're all fucking retarded, man," and Maldonado replied, "Well, you better stop telling them and fucking start making them . . . nothing happens to 'em babe, they get threatened and threatened and threatened and nothing happens; that's all that happens, it's not a charge, its nothing." (St. Ex. 3, 01:38-02:06.) Nellie said "okay." (St. Ex. 3, 02:12.)

Based on the third phone call, the trial court ruled, pursuant to I.R.E. 804(b)(5), that Maldonado "engaged in wrongdoing that was intended to, and did, procure the unavailability of [Janell Ozuna and Miriam Murillo] as [witnesses][,]" and therefore allowed the absent witness's recorded statements to be admitted as substantive evidence at trial. (See generally 11/18/16 Tr., p.96, L.21 – p.104, L.6.)

4. Fourth Jail Call

In a fourth jail call from Maldonado to Nellie, made on November 12, 2016, Nellie said she had seen Janell Ozuna that morning, and asked Maldonado if it would be better if she did go (presumably to the trial), and he said "yes." (St. Ex. 25, 00:18-00:25.) When Maldonado told Nellie that "they're gonna dissect her," she said that she would not tell her to go. (St. Ex. 25, 00:48-01:05.) Maldonado explained that if she did not go, "then no eyewitness, comprende?" (Nellie interjected that she understood), and "because of her shit . . . her testimony, her statement, audio . . . that's gonna fuck, but if she goes and tell 'em I was scared, this is what really happened and this is the reason why I said all that, uh, then that dismisses all that and I get off." (St. Ex. 25, 01:06-01:43.) Nellie agreed, and Maldonado told her about another domestic violence case in which the defendant's "old lady got smart," and because she did not testify, "no witness, no fucking charge." (St. Ex. 25, 01:45-02:05.) Nellie responded, "I told you that from the fucking beginning and you wouldn't fucking listen to me man . . . I knew that, I fucking knew that!" (St. Ex. 25, 02:06-02:16.) After further discussing his options on what to tell the two witnesses, Maldonado said, "It's okay . . . as long as they detract their shit, palabras,[7] then everything will be okay, baby, okay?" (St. Ex. 25, 02:40-02:51.)

As in the third jail call, Maldonado's fourth call attempts to undermine the judicial process by making sure that Janell Ozuna either retracts her statements to law enforcement, or simply fails to show up for trial. Significantly, Maldonado said that if Janell did not go

[7] Joanna Torres, a Canyon County Victim Witness Coordinator, testified that she speaks and understands Spanish and that the word "palabras" means "words." (11/18/16 Tr., p.238, L.12 – p.239, L.11; p.243, L.25 – p.244, L.11.)

to the trial, there would be no "eyewitness" – an indication that he considered Janell an eyewitness to *his* – not Victor's – commission of the crime.

5. Miriam Murillo's Statement As Substantive Evidence

Miriam (Jeanette) Murillo testified through her recorded statement to Detective Wilber (as substantive evidence) that Nellie had been living at Janell's house for two to three weeks, and that Maldonado had been staying there a couple of days before the May 31, 2016 incident. (St. Ex. 24, 02:30-02:50.) Miriam and her son stayed on one side of a false wall of a room in the downstairs area, and Nellie and Maldonado stayed on the other side of the wall. (St. Ex. 24, 01:20-01:09.) When Miriam got up to go to the bathroom at about 5:00 a.m., she heard Nellie crying and when she asked her if she was okay, Maldonado said, "get the fuck out of here." (St. Ex. 24, 04:50-6:00.) Most significantly, Miriam heard a hitting or slapping noise two times, like skin on skin, followed by Nellie crying, and Maldonado telling Nellie to shut up. (St. Ex. 24, 04:57-08:27; 11:00-11:25.)

Miriam went upstairs and got Janell to go back downstairs with her. (St. Ex. 24, 11:25-11:30.) Maldonado told Janell there was nothing wrong and he was just talking to Nellie. (St. Ex. 24, 07:20-07:25.) When Janell asked Nellie if she was okay, Nellie told Janell, "don't leave me alone." (St. Ex. 24, 06:20-07:00.)

6. Janell Ozuna's Statement As Substantive Evidence

Janell Ozuna, the owner of the house, was woken up early in the morning on May 31, 2016, by Miriam, who told her to "come quickly, he's got a knife and he gonna hurt her." (St. Ex. 22, 00:20-00:49.) When she got downstairs, she opened the curtain that hung in the room's doorway and said "Carlos, come here please," and he told her to leave him

alone, get away, and that he was going to hit her. (St. Ex. 22, 00:50-01:28; 11/18/16 Tr., p.133, Ls.18-24.) Maldonado told Nellie that she better tell him the truth. (St. Ex. 22, 01:27-01:40.) Janell told Maldonado to "just come here," and he told her to get out; this time he turned towards Janell and started walking to her, so she shut the curtain. (St. Ex. 22, 01:50-02:05.) Janell saw that Maldonado held a knife with the blade exposed in his left hand. (St. Ex. 22, 02:10-02:35.)

7. Nellie's Injuries And Demeanor

Nellie suffered obvious traumatic injury to her face, as evidence by close-up photos of her face that were admitted at trial.[8] (See State's Exhibits 13, 14, and 15.) Although, Physician Assistant Nelson testified that Nellie did not have any broken bones, her injuries were serious enough to cause her to undergo two CT scans (one to determine if there was any cranial bleeding, another to see if there were "any fractures or processes" to her facial bones), and she was physically examined to determine if any of her ribs were broken. (11/18/16 Tr., p.46, L.12 – p.47, L.19.) Mr. Nelson explained that the swelling around Nellie's eyes was "impressive," meaning that (on a rating from mild, moderate, severe or impressive), "in this case, walk in the room and it's obvious from across the room that there's swelling in the area." (11/18/16 Tr., p.47, L.20 – p.48, L.7.)

Captain Curt Shankel testified that, after responding to the house, he found Nellie behind a door to the downstairs laundry room crying, apparently frightened, "just making

[8] The distinct element between felony domestic violence and misdemeanor domestic battery is the infliction of a traumatic injury. Compare I.C. § 18-918(2)(a) with I.C. § 18-918(3)(b). "'Traumatic injury' means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by physical force." I.C. § 18-918(1)(b). There is no question that Nellie suffered a traumatic injury.

herself small," and "[s]he had the hands up and was shaking."[9] (11/17/16 Tr., p.289, L.24 – p.290, L.8; p.294, Ls.2-7.) When the Captain reached out to her and asked her to come out, "she just stayed there." (11/17/16 Tr., p.294, Ls.11-14.) Corporal Tonna Marek also went to the residence and described Nellie as "crying, shaking, [and] extremely fearful." (11/17/16 Tr., p.305, Ls.10-15; see also St. Ex. 4 (Corporal Marek's video recording of her contact with Nellie at the residence).)

8. Summary

In light of the trial testimony, as outlined above, there is no reasonable possibility that the challenged statements (i.e., Nellie's statements to the paramedic and Physician's Assistant identifying the batterer) affected the outcome of Maldonado's trial. If there was error, it was harmless.

II.
The Statement By Nellie About Maldonado Having Been In Prison Did Not Constitute Reversible Error Because It Did Not Deprive Maldonado Of A Fair Trial

A. Introduction

During trial, the state inadvertently admitted and published a tape-recorded interview of Nellie by Detective Marang in which she said that Maldonado had been "in prison for a long time," and "in prison . . . state of mind where you don't like to be disrespected." (St. Ex. 23, 05:30-05:45.) Maldonado moved for a mistrial (11/18/16 Tr., p.127, Ls.9-10), which was denied by the trial court (11/18/16 Tr., p.169, Ls.5-7). On

[9] Nellie's mother, Ysabel Castro, had received a text message from another daughter that alarmed her, and she called 911 before driving to the Nampa residence where Nellie was staying, and the police had already arrived. (11/17/16 Tr., p.258, L.5 – p. 263, L.22.)

appeal, Maldonado contends the trial court committed reversible error in denying his motion. Maldonado's argument fails.

B. Standard Of Review

The standard of review applicable to the denial of a motion for mistrial is well established. State v. Ruiz, 159 Idaho 722, 724, 366 P.3d 644, 646 (Ct. App. 2015).

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

Id. (citing State v. Urquhart, 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct. App. 1983)). "An error is harmless, not necessitating reversal, if the reviewing court is able to declare beyond a reasonable doubt that the error did not contribute to the verdict." Id. (citing State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010); State v. Watkins, 152 Idaho 764, 766, 274 P.3d 1279, 1281 (Ct. App. 2012)).

C. Factual Background

The statement from Nellie to Detective Marang about Maldonado having been in prison does not constitute reversible error. "A mistrial may be declared on motion of the defendant when there occurs during the trial, either inside or outside the courtroom, an error or legal defect in the proceedings, or conduct that is prejudicial to the defendant and

deprives the defendant of a fair trial." I.C.R. 29.1. The statement made by Nellie did not deprive Maldonado of a fair trial. I.C.R. 29.1.

Although the prosecutor had prepared a redacted version of Nellie's interview which omitted her reference to prison (see St. Ex. 5), he inadvertently gained admission (through Detective Marang's testimony) of Nellie's unredacted taped interview (see St. Ex. 23) and published it to the jury over Maldonado's "hearsay" objection. (11/18/16 Tr., p.119, L.15 – p.121, L.16; p.127, Ls.20-23; p.154, Ls.10-15.) After Detective Marang was excused, Maldonado's attorney informed the court that "in the audio [Nellie] makes reference [that] Carlos spent time in prison and that he felt, you know, disrespected[,]" and requested a mistrial. (11/18/16 Tr., p.126, L.21 – p.127, L.10.) The trial judge said that he had not heard that comment when it was first published, but when the issue was taken up again later during the jury's lunch break, the court replayed State's Exhibit 23 and heard Nellie say, in effect, "He's been in prison for a long time and he doesn't like the disrespect." (11/18/16 Tr., p.150, L.17 – p.151, L.22.)

After protracted discussion and argument, the trial court denied Maldonado's mistrial motion (11/18/16 Tr., p.169, Ls.5-7), and instructed the jury as follows:

> In addition, portions of State's Exhibit Number 23, an audio recording of Detective Marang's interview with Nelida Maldonado, were played into the record also under the same limiting instructions by the Court.
>
> However, because I have determined that that recording inadvertently contained information that is inadmissible, I am now ruling that the audio recording of Exhibit 23 is to be stricken from the record. And you are instructed that you are to disregard anything you may have heard or understood from the Exhibit 23 audio recording of Nelida Maldonado.

(11/18/16 Tr., p.175, L.25 – p.176, L.11.)

After five more witnesses testified, the state recalled Detective Marang, who testified that State's Exhibit 5 was a recording of his taped interview with Nellie that had been redacted to conform with the court's prior order (in regard to stricken St. Ex. 23), and agreed that he "heard some things that have been taken out." (11/18/16 Tr., p.245, L.15 – p.246, L.7.) Maldonado's counsel said he had "the same objection that I made previously," which was a hearsay objection. (11/18/16 Tr., p.119, Ls.15-18; p.246, Ls.11-15.) The trial court admitted States Exhibit 5 into evidence with the admonition that it was being offered for statements made by Nellie that may not be consistent with her trial testimony. (11/18/16 Tr., p.246, L.16 – p.247, L.9.)

D. The Statement By Nellie Did Not Constitute Reversible Error Because It Did Not Deprive Maldonado Of A Fair Trial

"A mistrial may be declared, upon the defendant's motion, if there has been an error or legal defect during the trial which is prejudicial to the defendant and deprives the defendant of a fair trial." State v. Dopp, 129 Idaho 597, 603, 930 P.2d 1039, 1045 (Ct. App. 1996) (citing I.C.R. 29.1); accord, e.g., Ruiz, 159 Idaho at 724, 366 P.3d at 646. "The admission of improper evidence does not automatically require the declaration of a mistrial." Ruiz, 159 Idaho at 724, 366 P.3d at 646 (citing State v. Hill, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004)). Rather, "[t]he core inquiry" when denial of a mistrial is challenged on appeal is "whether it appears from the record that the event triggering the mistrial motion contributed to the verdict, leaving the appellate court with a reasonable doubt that the jury would have reached the same result had the event not occurred." State v. Palin, 106 Idaho 70, 75, 675 P.2d 49, 54 (Ct. App. 1983).

In conducting this inquiry, the appellate court "normally presume[s] that a jury will follow an instruction to disregard inadmissible evidence." Watkins, 152 Idaho at 768, 274 P.3d at 1283; accord Ruiz, 159 Idaho at 724, 366 P.3d at 646. To overcome the presumption, a defendant claiming error in the denial of a mistrial motion must show "there is an overwhelming probability that the jury [was] unable to follow the court's instructions and a strong likelihood that the effect of the evidence [was] devastating to the defendant." Ruiz, 159 Idaho at 724-25, 366 P.3d at 646-47 (citing Hill, 140 Idaho at 631, 97 P.3d at 1020). Where, as here, a defendant claims a curative instruction was insufficient to remedy the prejudicial effect of inadmissible evidence, the appellate court's analysis focuses not only on the curative instruction, but also on the "strength of the evidence" and "the significance of the improperly disclosed information." Watkins, 152 Idaho at 768, 274 P.3d at 1283; Ruiz, 159 Idaho at 725, 366 P.3d at 647.

Contrary to Maldonado's assertions on appeal, application of the above principles to the facts of this case shows that Nellie's statement to Detective Marang about Maldonado having been in prison a long time and disliking being disrespected, though inadmissible, was harmless and did not necessitate a mistrial. After the court was informed of the inadvertent admission and publication of Nellie's improper comments, it acknowledged that they "could cause the jurors unfair prejudice" against Maldonado. (11/18/16, p.157, Ls.4-6.) After much discussion and argument, the court denied Maldonado's motion for a mistrial, but took the curative measures of striking the entire recording (St. Ex. 23) from the record and instructing the jury "to disregard anything you may have heard or understood from the Exhibit 23 audio recording of Nelida

Maldonado."[10] (11/18/16 Tr., p.175, L.25 – p.176, L.11.) The court later instructed the jury that it was to "decide the facts from all the evidence presented in the case" and reminded it that "[c]ertain things you have heard or seen are not evidence, including … testimony that has been excluded or stricken, or which you have been instructed to disregard." (11/21/16 Tr., p.10, Ls.7-22.) "Absent compelling circumstances dictating the opposite conclusion," the court's curative instructions must be deemed to have been "an effective remedy" for any potential prejudice occasioned by Nellie's comment about "prison." State v. Frauenberger, 154 Idaho 294, 302, 297 P.3d 257, 265 (Ct. App. 2013) (citing Watkins, 152 Idaho at 767-69, 274 P.3d at 1282-84)).

Maldonado points out that when the prosecutor laid the foundation for subsequently admitting the properly redacted recording of Nellie's interview (St. Ex. 5) into evidence, he asked Detective Marang, "Have you heard 'some things' that have 'been taken out'[?]" and the detective answered "Yes." (Appellant's Brief, p.24 (quoting 11/18/16 Tr., p.246, Ls.24-25 (emphasis added).) Based in part on that exchange, Maldonado contends that, "[e]ven with the district court's instruction, the jurors were likely unable to put the prejudicial information out of their minds because they were reminded of it when Detective Marang testified about it again and when they could listen to the redacted audio of the interview as they deliberated." (Appellant's Brief, p.25.) Maldonado's argument that the prosecutor's reference to "some things" that have "been taken out" improperly drew the

[10] In part, the trial court relied upon State v. Fluery, 123 Idaho 9, 843 P.2d 159 (Ct. App. 1992), in which the Idaho Court of Appeals affirmed the measure employed by the trial court in curing improper (and unsolicited) testimony that Fluery's probation officer was with police when Fluery was arrested; the Court approved the trial court's striking of the entire testimony surrounding Fluery's arrest with a limiting instruction. (11/18/16 Tr., p.155, L.21 - p.156, L.9.) Similar to Maldonado's trial, the improper testimony in Fluery had been made inadvertently. Fluery, 123 Idaho at 11, 843 P.2d at 161.

jury's attention to Nellie's "prison" comments is not persuasive. In laying a foundation to admit State's Exhibit 5, it was necessary for the prosecutor to show that the recording had been altered – i.e., that "some things" had "been taken out." There is nothing about that innocuous remark that would have made the jury disregard the trial court's instructions instead of rendering a verdict based solely on the admissible evidence that overwhelmingly established Maldonado's guilt.

Indeed, Idaho appellate courts have repeatedly held that a brief reference to the defendant being in custody does not deprive him of a fair trial where the district court instructs the jury to disregard the comment. See State v. Hedger, 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989); State v. Hill, 140 Idaho 625, 630-31, 97 P.3d 1014, 1019-20 (Ct. App. 2004).

In Hedger, when the prosecutor asked the victim how she knew that she had locked her windows on the night of her attack, the victim testified that she "made double sure since the time [the defendant] had gotten out of jail." 115 Idaho at 601, 768 P.2d at 1334. The prosecutor then asked when the defendant "got out of jail," and the victim testified that the defendant "got out of jail on a Tuesday, the Tuesday before the 9th." Id. Similar to Maldonado's case, the district court in Hedger struck the testimony, instructed the jury to disregard it, and denied the defendant's motion for a mistrial. Id. The Idaho Supreme Court held "there was no error in the trial court's handling of the issue" because, where improper testimony is introduced "and the trial court promptly instructs the jury to disregard the evidence, it must be presumed that the jury obeyed the trial court's direction entirely." Id.; see Hill, 140 Idaho at 631, 97 P.3d at 1020 (holding defendant had fair trial where prosecutor asked when witness "spoke to [the defendant] in jail" and the district

court "instructed the jury to disregard the prosecutor's question"); see also State v. Harrison, 136 Idaho 504, 507, 37 P.3d 1, 4 (Ct. App. 2001) (holding prosecutor's references to defendant's "custody status" did not affect the outcome of the trial even where the district court did not instruct the jury to disregard all of the references).

Even if the curative instruction is not itself determinative, this Court can nevertheless easily conclude the stricken testimony was harmless because the state presented overwhelming evidence of Maldonado's guilt. Watkins, 152 Idaho at 768, 274 P.3d at 1283; Ruiz, 159 Idaho at 725, 366 P.3d at 647. As demonstrated above, the state's evidence showing that Maldonado was the person who battered Nellie and caused her to suffer traumatic injury was not just compelling, it was overwhelming. For the reasons set forth in Section I.D., supra (regarding harmless error), and relied upon here, the state's evidence convincingly showed that Maldonado was guilty of felony domestic battery.

Considering the strength of the evidence and the trial court's curative instructions, there is no reasonable possibility that the stricken statement by Nellie regarding Maldonado having been in prison contributed to the jury's verdict. Maldonado has failed to show the trial court erred in denying his motion for a mistrial.

III.
Maldonado Has Failed To Show Cumulative Error

Under the doctrine of cumulative error, a series of errors, harmless in 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, 958 P.2d 22 (Ct. App. 1998).

Maldonado has failed to show that two or more errors occurred in 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 errors in the trial had been shown, they would not amount to a denial of due process that would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997); State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000) (accumulation of errors deemed harmless).

CONCLUSION

The state respectfully requests that this Court affirm Maldonado's judgment of conviction.

DATED this 5th day of April, 2018.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of April, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

JCM/dd