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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45031
Plaintiff-Respondent,	)	
	)	CANYON CO. NO. CR 2016-9636
v.	)	
	)	
JUAN CARLOS MALDONADO,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE DAVIS F. VANDERVELDE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Juan Carlos Maldonado appeals from his judgment of conviction for domestic abuse with traumatic injury. Mr. Maldonado was found guilty following a jury trial. He submits that the district court abused its discretion when it allowed hearsay statements to be admitted into evidence. He also asserts that the district court erred when it denied his motion for a mistrial. Further, Mr. Maldonado asserts that these errors are not harmless or, alternatively, that the errors amount to cumulative error, depriving him of his right to a fair trial.

Statement of the Facts and Course of Proceedings

Given the disparate issues in this case, for purposes of clarity, the facts relevant to each issue will be set forth in the respective sections of the brief. Generally, however, on May 31, 2016, law enforcement responded to a Nampa house after a report of a domestic battery, and a woman possibly being held against her will. (11/17/16 Tr., p.280, L.8 – p.281, L.6.) Once the officers arrived at the house, they approached the front door and ordered anyone in the house to come out. (11/17/16 Tr., p.286, Ls.4-18.) After that announcement, two people exited the house, and then Mr. Maldonado came out. (11/17/16 Tr., p.286, L.19 – p.287, L.8, p.295, Ls.7-11.) Subsequently, the officers entered the home and discovered Nelida Maldonado,[1] who went by "Nellie," in the basement; she had sustained bruising to both eyes, a bruise on the bridge of her nose, and a swollen lip. (11/17/16 Tr., p.289, L.10 – p.292, L.25; State's Exhibit 12.)

The State charged Mr. Maldonado, by Information, with domestic battery with traumatic injury committed upon his wife. (R., pp.37-38.) Mr. Maldonado proceeded to trial. When

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[1] At certain points in the transcript, Ms. Maldonado is referred to as Nelida Valenzuela. (*See e.g.* 11/18/16 Tr., p.18, Ls. 14-15.)

Ms. Maldonado testified, she denied that Mr. Maldonado was responsible for her injuries and said her boyfriend had battered her, and she only told the authorities that Mr. Maldonado hit her to protect her boyfriend. (11/18/16 Tr., p.56, L.4 – p.57, L.8, p.76, L.22 – p.77, L.7.) Ultimately, however, the jury found Mr. Maldonado guilty of one count of domestic abuse with traumatic injury and one related misdemeanor. (R., pp.117-18.) It also found that Mr. Maldonado was a persistent violator of the law. (R., p.119.) Mr. Maldonado filed a notice of appeal timely from the judgment of conviction. (R., pp.165-66.)

ISSUES

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?

ARGUMENT

I.

The District Court Abused Its Discretion When It Allowed Hearsay Statements Regarding The Identity Of Ms. Maldonado's Assailant To Be Admitted

A. Introduction

The district court abused its discretion by admitting the hearsay statements of Ms. Maldonado regarding the identity of her assailant because that information was not pertinent to her medical treatment or diagnosis.

B. Relevant Facts

On the day of the incident, paramedics arrived at the house shortly after law enforcement and began talking with Ms. Maldonado; Haley Glenn, with the Canyon County Paramedics, met with Ms. Maldonado first. (11/17/16 Tr., p.319, L.9 – p.322, L.16.) Prior to trial, the State told the district court that it would be seeking to introduce, pursuant to the hearsay exception for medical treatment or diagnosis, Ms. Maldonado's statements to Ms. Glenn and to the Physician's Assistant at the hospital—Mr. Nelson—regarding the identity of her assailant.[2] (11/17/16 Tr., p.14, L.20 – p.16, L.13.) And, prior to its opening statement, the State told the district court that it had a "paragraph on the EMT" in its opening, in which it would repeat what Ms. Glenn put in her report regarding the identity of her assailant. (11/17/16 Tr., p.217, L.8 – p.220, L.24.) Defense counsel objected and said that "there was nothing about the identity of attacker that was going to be used in any way for diagnosis or treatment." (11/17/16 Tr., p.222, Ls.12-14.) The district court stated that the "indicia of reliability of the statement made to the medical

personnel" was present but said that it "may or may not be pertinent to [Ms. Maldonado's] diagnosis. However, it also becomes one of those facts that's inescapable." (11/17/16 Tr., p.222, L.15 – p.223, L.7.) The district court ultimately allowed the State to make the comment regarding identity in its opening statement and to question Ms. Glenn on the identity issue under the medical treatment or diagnosis exception to the hearsay rule. (11/17/16 Tr., p.223, Ls.8-14.) It stated that defense counsel was on record as objecting. (11/17/16 Tr., p.223, Ls.14-18.) Subsequently, the State said in its opening: "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.12-14.)

At the trial, Ms. Glenn testified that Ms. Maldonado said she was awoken by her significant other earlier that day, and they got into an argument that turned physical. (11/17/16 Tr., p.322, L.14 – p.323, L.5.) On cross-examination, Ms. Glenn acknowledged that Ms. Maldonado said she was arguing with her "boyfriend," but Ms. Glenn said she used the term "significant other" in her written report of the incident. (11/17/16 Tr., p.329, L.7 – p.332, L.4.) Defense counsel asked if, given the nature of Ms. Maldonado's injuries, the identity of the person who inflicted the injuries was necessary for diagnosis or treatment, and Ms. Glenn responded, "Not the identity, I wouldn't say," and she stated that what was important for her to know was the "mechanism of injury." (11/17/16 Tr., p.327, L.17 – p.329, L.6.)

Prior to any testimony the following day, the State told the district court that the Physician's Assistant who treated Ms. Maldonado at the hospital—David Nelson—would also be testifying about what Ms. Maldonado told him regarding the identity of her assailant. (11/18/16

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[2] The district court noted that this issue came up at the preliminary hearing, defense counsel objected, but the magistrate court overruled defense counsel's objection. (11/17/16 Tr., p.15, L.22 – p.16, L.6; Prelim. Tr., p.10, L.17 – p.11, L.6.)

Tr., p.10, L.16 – p.17, L.8.) Defense counsel stated that he had the same hearsay objection to that testimony and said—with respect to Ms. Glenn's testimony the prior day—that "there was really no relation to the identity of the attacker to either diagnosis or treatment . . . ." (11/18/16 Tr., p.10, L.20 – p.11, L.1.) He also said that, before Mr. Nelson could testify regarding identity, he would "like to see at least that foundation be present in the evidence." (11/18/16 Tr., p.11, Ls.1-3.) The State explained that Ms. Maldonado told Mr. Nelson during the exam that her husband inflicted the injuries, and this could rebut the contention that it could have been another person who committed the crime. (11/18/16 Tr., p.11, L.11 – p.12, L.23.) The district court then attempted to clarify its prior ruling on the issue; it stated, "the identity of the perpetrator in that presentation to the EMT is so intertwined with the patient's description of events that the basis for the reliability of the exception to the hearsay rule for a patient statement to a physician in support of medical diagnosis or evaluation and treatment, that that is just as reliable as the patient's statement." (11/18/16 Tr., p.13, L.7 – p.15, L.23.)

Mr. Nelson then testified out of the presence of the jury to lay foundation for his testimony on this issue. (11/18/16 Tr., p.16, L.10 – p.27, L.6.) He explained that there were subjective and objective portions to a patient exam. (11/18/16 Tr., p.17, L.27 – p.18, L.1.) He said that the subjective portion includes asking what happened to find out what brought the patient to the hospital, and the objective portion is a physical exam. (11/18/16 Tr., p.17, L.20 – p.18, L.1.) He also said that after the exam is completed, he develops a plan for the patient. (11/18/16 Tr., p.18, Ls.2-4.) When asked if it was important to know the identity of the attacker, he explained that it was important that he make a record of such information, but he was more focused on "understanding what we would call the mechanism of the injuries. So, it isn't exactly

who, but . . . in this case, was it a man or a woman who hit you? Is it someone larger or smaller than you? Did you fall off your porch?" (11/18/16 Tr., p.19, Ls.16-24.)

On cross-examination, when asked whether an assailant's identity was relevant to his diagnostic evaluation, Mr. Nelson said, "[I]f there's suspected abuse, that is something that we try to elicit. We want to know more about that. But I don't go into details about who it was. If they just say who it was . . . I just record what they say." (11/18/16 Tr., p.20, Ls.15-23.) Additionally, when asked whether there was anything about who hit Ms. Maldonado that was relevant for a long-term treatment plan, Mr. Nelson said there was no paperwork that he sent home with patients about domestic assault treatment. (11/18/16 Tr., p.21, L.2 – p.22, L.4.)

The district court then questioned Mr. Nelson. It asked him if a patient came in and said her husband had hit her, would that be pertinent because Mr. Nelson would know it was a man who inflicted the injuries. (11/18/16 Tr., p.22, Ls.10-17.) Mr. Nelson said that that "would be a reasonable thing for us to understand as far as the mechanism of the injury." (11/18/16 Tr., p.22, Ls.18-19.) The district court then asked, "You don't say was it a man or a woman. You just say tell me what happened. And then they explain it to you and then you glean from that what is pertinent to your diagnosis?" (11/18/16 Tr., p.22, Ls.20-23.) Mr. Nelson confirmed that was true. (11/18/16 Tr., p.22, L.24.) The district court then asked, "[I]f the patient then was going to tell you I'm going to go back home then to the house where he's at, would that be a concern in your diagnosis of recommendations to her subsequently?" (11/18/16 Tr., p.23, Ls.1-4.) Mr. Nelson said it would be of concern, but in this case, police were in the emergency room, and if he is aware that law enforcement is involved in a case and feels that the patient is stable medically and could be discharged, then he turns the issue over to the patient's family and law enforcement for what happens "socially . . . beyond the discharge." (11/18/16 Tr., p.23, Ls.5-

17.) The State questioned Mr. Nelson further, and he confirmed again that it was important to know "the mechanism of the injury" as that could be important for subsequent medical providers also. (11/18/16 Tr., p.24, L.2 – p.25, L.19.)

At that point, the State argued that the fact that Ms. Maldonado said it was her husband was relevant. (11/18/16 Tr., p.27, L.19 – p.28, L.2.) Defense counsel, however, pointed out that only some of the information Ms. Maldonado gave to medical personnel fell under the exception to hearsay rule, and he still did not believe that sufficient foundation could be laid in this case for admitting the identity of Ms. Maldonado's assailant. (11/18/16 Tr., p.28, Ls.8-17.)

The district court then issued its final ruling on the issue. It stated that Mr. Nelson asked "open-ended questions" and, if the patient said she was hit by her husband, that would be pertinent because he would know she was hit by a man as opposed to a child or some other mechanism of injury…." (11/18/16 Tr., p.29, Ls.6-25.) The district court also stated, "[T]he rule is and the longstanding hearsay exception is statements made in support of medical diagnosis and treatment . . . and based on the way that Mr. Nelson . . . asked questions . . . he's eliciting any information that the patient has to tell him about the event . . . ." (11/18/16 Tr., p.30, Ls.5-12.) It went on to say, "Therefore, these are parts of the sum and substance and intertwined with the statement made for medical diagnosis." (11/18/16 Tr., p.30, Ls.13-15.) Finally, it stated, "But when the patient is telling things that this person is specifically looking for, who did it, and then from that they intertwine other things, not necessarily the identity is so important, it's what they can glean from the identity, it was a man, this type of thing. So I'm going to allow it into evidence." (11/18/16 Tr., p.30, Ls.19-24.)

Mr. Nelson then testified before the jury and explained his evaluation process again. (11/18/16 Tr., p.39, L.15 – p.41, L.20.) When the State asked him what Ms. Maldonado said

when he asked her what happened, he said, "She told me that she was assaulted, more or less, she was punched several times . . . and then I asked her who did this or if she knows who did this." (11/18/16 Tr., p.44, Ls.11-20.) The State asked how she replied to that question, and Mr. Nelson said, "She said it was her husband." (11/18/16 Tr., p.44, Ls.21-22.)

C. Standard Of Review

"The trial court has broad discretion in the admission and exclusion of evidence," but its decision to admit evidence will be reversed "when there has been a clear abuse of that discretion." *State v. Lopez-Orozco*, 159 Idaho 375, 377 (2015) (quoting *State v. Robinett*, 141 Idaho 110, 112 (2005)). When evidence is admitted under a recognized hearsay exception, the inquiry is "whether the district court recognized that it did not have discretion to admit the hearsay evidence if the requirements for an exception were not met; whether it acted consistently with the rules governing hearsay exceptions; and whether it reached its decision to admit the hearsay by an exercise of reason." *Id.* (quoting *State v. Watkins*, 148 Idaho 418, 423 (2009)).

D. The District Court Abused Its Discretion By Allowing Ms. Glenn And Mr. Nelson To Offer Inadmissible Hearsay Evidence Regarding The Identity Of Her Assailant As That Information Was Not Pertinent To Medical Diagnosis Or Treatment

Whether the identity of an assailant who inflicted injuries during a domestic battery that required medical treatment can be admitted under this exception appears to be an issue of first impression in Idaho.[3] Hearsay is an out-of-court statement offered for the truth of the matter asserted. I.R.E. 801(c). Such statements are inadmissible as evidence unless they fall under a

[3] As the district court noted, the Idaho Court of Appeals addressed the issue briefly in *State v. Crawford*, 110 Idaho 577 (Ct. App. 1986). (11/18/16 Tr., p.12, L.24 – p.13, L.4.) In *Crawford*, the Court of Appeals stated, "We question whether the identity of the assailant was necessary for

recognized exception to the hearsay rule. I.R.E. 802. One of those exceptions applies to out-of-court statements made for purposes of medical diagnosis or treatment. I.R.E. 803(4). Under this exception, the source of an injury may be admitted if it is "reasonably pertinent to diagnosis or treatment." I.R.E. 803(4); *State v. Nelson*, 131 Idaho 210, 215 (Ct. App. 1998).

The rationale behind the exception is that "'the declarant's motive to disclose the truth because his treatment will depend in part on what he says, guarantees the trustworthiness of the statements.'" *State v. Kay*, 129 Idaho 507, 518 (Ct. App. 1996) (quoting Report of Idaho State Bar Evidence Committee, C. 803, p. 6 (1983)). That motive only applies to statements made for the purpose of treatment as the exception "is premised on the assumption that such statements 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." *Nelson*, 131 Idaho at 215 (emphasis added). Indeed, in a case factually similar to this one, the district court limited admission of a victim's statements to an EMT, excluding the statements as to the assailant's identity. *State v. Hoover*, 138 Idaho 414, 418 (Ct. App. 2003) ("The court overruled Hoover's hearsay objection regarding EMT Maines' testimony as to James' [the victim] statements to him and permitted that testimony under a Rule 803(4) exception for statement to medical personnel. The court, however, limited Maines' testimony to James' statements as to how her injuries had occurred, and did not permit Maines to testify as to who James said had caused those injuries.").[4] Thus, nothing in Idaho precedent suggests that anything but statements made for the purpose of medical treatment or diagnosis would meet the

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the doctor's diagnosis of the injuries." *Id.* at 580. However, the court did not decide the issue as it held that the doctor's testimony was "simply cumulative" because the victim's parents had already testified regarding the victim's "statements incriminating her husband." *Id.* at 580-81.

[4] This was not an issue on appeal in *Hoover*, but was noted by the Court of Appeals in its discussion of the case.

rationale for the I.R.E. 803(4) exception. Not every statement made to medical personnel meets this rationale, as acknowledged by the district court in *Hoover*.

Other relevant authority on the issue is mixed in large part because some courts have held that the identity of the perpetrator can be pertinent to treatment in sex abuse cases. For example, in *United States v. George*, 960 F.2d 97, 99 (9th Cir. 1992), the court held that the identity of the person who was accused of sexual abuse could be admitted under the exception. It noted that, "sex abuse involves more than physical injury; the physician must be attentive to treating the victim's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser." *Id.* (citation omitted). And it went on to state, "depending upon the nature of the sexual abuse, the identity of the abuser may be pertinent to the diagnosis and treatment of sexually transmitted diseases." *Id.*

George relied in part on *United States v. Renville,* 779 F.2d 430 (8th Cir. 1985). *Id.* *Renville* was also a sex abuse case in which the court held that the district court "did not abuse its discretion in admitting the victim's statements to the treating physician identifying her abuser." *Id.* at 439. The *Renville* Court applied a two-part test for admissibility of such statements that was first established in *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 (1981). That test was as follows: "first, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." *Id.* at 436. The *Renville* Court noted that *Iron Shell* recognized that statements regarding identity "'would seldom, if ever' be reasonably pertinent to treatment or diagnosis," but wrote, "We believe that a statement by a child abuse victim that the abuser is a member of the victim's immediate household presents a sufficiently different case from that envisaged by

the drafters of rule 803(4) that it should not fall under the general rule." *Id.* (quoting *Iron Shell*, 633 F.2d at 84.) As such, it held, "Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household *are* reasonably pertinent to treatment." *Id.* (emphasis in original).

Subsequently, the Supreme Court of Wyoming applied the two-part test from *Renville* to a domestic abuse case in *Oldman v. State*, 998 P.2d 957 (Wyo. 2000). *Oldman* acknowledged that "[i]dentity rarely is germane to the promotion of treatment or diagnosis," but noted that, "other courts have recognized that such statements can be relevant to treatment in instances of child abuse" and found that there was "no logical reason for not applying this rationale to non-sexual, traumatic abuse within a family or household, since sexual abuse is simply a particular kind of physical abuse" and thus held that the first prong of the *Renville* test was met. *Id.* at 961-62 (internal citations omitted). It also held that the second prong of the test was met because the "victim's injuries included numerous human bites" and thus "[i]t was important for the emergency room physician to know the source of the bites in order to treat the victim properly for any infectious condition related to the assailant." *Id.* at 962. It went to state that "the victim had been so brutally abused by the named assailant that the hospital reasonably could rely on her statement in order to deny access to the hospital by the assailant." *Id.* Therefore, it held that the trial court did not abuse its discretion in admitting the identity of the assailant. *Id.*

More recently, however, at least two state supreme courts have held that a "*Renville*-type" analysis is flawed in that it conflicts with the customary understanding of the medical treatment or diagnosis exception. In *Colvard v. Com.*, 309 S.W.3d 239 (Ky. 2010)—a sex abuse case—the court acknowledged that it had previously adopted the *Renville* reasoning in a prior sex abuse case. *Id.* at 244. But it then stated, "Upon reconsideration of the plain language of

KRE 803(4) and its underlying purpose," it had "come to the view that the identification exception" it adopted was "based upon an ill-advised and unsound extension of a traditional exception to the hearsay rule." *Id.*

The court then considered the history of the exception and wrote, "There is no inherent trustworthiness to be found in a hearsay statement identifying the perpetrator when that statement did not arise from the patient's desire for effective medical treatment." *Id.* at 245. The court went on to note that various sources had commented that an expansion of the exception for treatment of psychological issues was not consistent with the rule. *Id.* at 246. It then stated that it had "carefully considered the *Renville* rule, its merits and demerits," and it now concluded that its "adoption of the rule was an unwise departure from the traditional hearsay rule that has served our system of justice well for many generations." *Id.* Finally, it stated, "The *Renville* rule is inconsistent with the plain language of KRE 803(4), and . . . the reliability of a child's identification of the perpetrator of the abuse to a medical professional contains the same tangible risks of unreliability generally inherent in all hearsay testimony." *Id.* at 246-47. It noted that there could be cases where "statements of a child victim to medical personnel identifying an abuser" would "comport with the requirements of" the exception, but this was "not such a case." *Id.* at 247. Therefore, the court held it was error for the trial court to admit the identity of the alleged perpetrator. *Id.*

The Supreme Court of Iowa recently arrived at a similar conclusion in a domestic abuse case. *State v. Smith*, 876 N.W.2d 180 (Iowa 2016). In *Smith*, as in this case, the State—in response to information that the victim might recant her statements regarding the identity of her assailant—sought to prove Smith was the assailant by introducing the victim's statements regarding who had inflicted her injuries to the emergency room nurse and doctor under the

medical treatment and diagnosis exception. *Id.* at 183. The defendant argued that those statements were not pertinent to medical diagnosis or treatment, but the district court admitted the statements under the exception. *Id.*

As in *Colvard*, the *Smith* Court examined the history of the exception. *Id.* at 185. It then stated, "When the identity of the perpetrator of an injury is not necessary information for effective medical treatment, a declarant could remain motivated to truthfully describe the cause of injuries while being motivated to suppress or twist the identity of the perpetrator towards their own ends." *Id.* at 186 (citation omitted). The court noted that the State was arguing that cases of domestic abuse should "fall within the same rule that commonly allows statements of the identity of perpetrators in cases of child abuse to be admitted." *Id.* It then wrote, "There is no rule that provides a categorical exception for victims of child abuse or domestic abuse." *Id.* at 187. It acknowledged that domestic abuse was a serious problem, but said, "until a categorical rule exists," the explanation of how the identity of the assailant would be pertinent to medical treatment, "must be supplied from the testimony of doctors in the form of foundation pursuant to the broad rule providing for the admission of hearsay statements for all types of medical treatment." *Id.* at 188 (citation omitted).

It then stated that such foundation "need not be elaborate" but would have to establish "why the identity of the assailant is important in a domestic abuse case, as opposed to stranger assault, and what effect that identity has on diagnosis or treatment." *Id.* at 189. It recognized that there was "a difference between the need to know the cause or external source of the injuries—i.e., 'what happened'—and the need to know the identity of the person causing the injuries." *Id.* at 189. Finally, the court found that, "the foundational evidence relating to [the victim's] statements only pertained to the treatment she received for her physical injuries, not

treatment she might have needed for her emotional, psychological, or other injuries as a result of the domestic violence." *Id.* Further, there was,

> no evidence to suggest [the victim] believed the identity of the perpetrator was reasonably pertinent to her treatment or diagnosis. There was no evidence the nurse or doctor told [the victim] the identity of the perpetrator was important to the treatment or diagnosis of her injuries. There was no evidence the nurse or doctor used the identity of the perpetrator to treat or diagnosis [the victim's] injuries. In fact, there was nothing from the circumstances at the hospital to reasonably indicate [the victim's] treatment or diagnosis would have been different if she had not mentioned the identity of her perpetrator in describing how she was injured.

Id. at 190. Thus, the court held, "the circumstances mandated by the exception to show [the victim] was self-motivated to truthfully describe her assailant were not established. Without this foundation, the trial court erred in admitting the portion of the statement that identified Smith as the assailant." *Id.*

None of the above foundational requirements were met in this case either. There was no evidence to suggest that Ms. Maldonado believed the identity of her assailant was pertinent to her treatment or that Ms. Glenn or Mr. Nelson used the identity she revealed to them to treat or diagnosis her injuries. Indeed, her treatment would not have been any different if she had not mentioned who her assailant was. The analysis discussed by the courts in *Colvard* and *Smith* is appropriate as it represents the traditional understanding of the exception. However, even if this Court were to apply the test articulated in *Renville*, the facts of this case fail to meet even the first prong of that test; there is no indication that Ms. Maldonado mentioned the identity of her assailant to promote her treatment.

The district court, however, did not consider any of these factors in its analysis. Instead, it relied on an incorrect analysis.

Ms. Glenn testified as follows:

Q: So what did Nelida tell you?

A: She told me 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 torso.

(11/17/16 Tr., p.324, Ls.9-16.) On cross-examination, Ms. Glenn was asked:

Q: Did Nellie appear to have any bites or anything on her?

A: I did not see any bites.

Q: Okay, so this was all blunt force trauma?

A: Correct.

Q: So you want to know the mechanism of the injury, probably, whether there was any instruments used or if it's just fists or something else?

A: Yes.

(11/17/16 Tr., p.327, L.17 – p.328, L.2.) And once Ms. Glenn confirmed that there was nothing other than blunt force trauma, defense counsel asked:

Q: Now, regarding the person that had done this to her, is that — is the identity of that person necessary for diagnosis or treatment?

A: Not the identity I wouldn't say.

Q: Just primarily the mechanism of the injury?

A: Yes.

(11/17/16 Tr., p.328, Ls.16-22.)

Despite her testimony to this effect, the district court stated, "It appears to me the identity of the perpetrator is so intertwined with the patient's description of events that the basis for the reliability of the exception to the hearsay rule for a patient statement to a physician in support of

medical diagnosis or evaluation and treatment, that that is just as reliable as the patient's statement." (11/18/16 Tr., p.15, Ls.1-7.) The district court went on to say, "[T]he 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.15, Ls.13-16.) Based on this, it held that this information could come in under the exception. This was not the proper inquiry. "Only out-of-court statements necessary for medical diagnosis and treatment are admissible under I.R.E. 803(4)." *State v. Zimmerman*, 121 Idaho 971, 974 (1992). And, as Ms. Glenn readily admitted, who inflicted the injuries was not necessary for diagnosis or treatment in this case.

The district court's analysis of the potential testimony of the physician's assistant—Mr. Nelson—was similarly flawed. After questioning Mr. Nelson, it stated that Mr. Nelson asked "open-ended questions" and it said that if the patient said she was hit by her husband that would be pertinent because Mr. Nelson would know she was hit by a man as opposed to a child or something else. (11/18/16 Tr., p.29, Ls.6-25.) The district court also said, "[T]he rule is and the longstanding hearsay exception is statements made in support of medical diagnosis and treatment . . . and based on the way that Mr. Nelson . . . asked questions . . . he's eliciting any information that the patient has to tell him about the event . . . ." (11/18/16 Tr., p.30, Ls.5-12.) "Therefore, these are all parts of the sum and substance and intertwined with the statement made for medical diagnosis." (11/18/16 Tr., p.30, Ls.13-15.) Finally, it stated, "But when the patient is telling things that this person is specifically looking for, who did it, and then from that they intertwine other things, *not necessarily the identity is so important,* it's what they can glean from the identity, it was a man, this type of thing. So I'm going to allow it into evidence." (11/18/16 Tr., p.30, Ls.19-24 (emphasis added.).)

Again, this was the wrong analysis. The crucial inquiry is whether the identity of the assailant was reasonably pertinent to treatment or diagnosis. And the fact that Ms. Maldonado's statements regarding identity were in some way "intertwined" with the rest of her statements, did not mean they could be or should be admitted under the exception. Who inflicted her injuries was not pertinent to her diagnosis or treatment. Whether she was hit by her husband, her boyfriend, or a stranger made no difference to how she was diagnosed or treated.

Moreover, Mr. Nelson's testimony before the jury showed that he did not ask an open-ended question to find out who inflicted Ms. Maldonado's injuries. He said he initially asked open-ended questions, and when he asked her what happened, he said Ms. Maldonado told him "she was punched several times." (11/18/16 Tr., p.44, Ls.12-19.) Mr. Nelson then said, "[A]nd then I asked her who did this or if she knows who did this." (11/18/16 Tr., p.44, Ls.19-20.) Then the State asked how she responded, and Mr. Nelson said, "She said it was her husband." (11/18/16 Tr., p.44, Ls.21-22.) The only thing that was necessary for Mr. Nelson to know for the purpose of diagnosis and treatment was that Ms. Maldonado was punched several times.

As such, the district court abused its discretion when it allowed hearsay statements regarding the identity of Ms. Maldonado's assailant to be admitted because it did not act consistently with the rules governing hearsay exceptions. The hearsay statements that the State used in its opening, and that the State elicited through the testimony of Ms. Glenn and Mr. Nelson, did not fall within the exception for statements made for purposes of medical diagnosis or treatment.

II.

The District Court Erred 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

A. Introduction

The State presented the testimony of Detective Marang and questioned him regarding his interview with Ms. Maldonado at the hospital. Subsequently, the State played an audio recording of that interview. On that recording, Ms. Maldonado can be heard telling Detective Marang that Mr. Maldonado had previously been in prison for a long time. Defense counsel later moved for a mistrial. The district court agreed that the testimony was prejudicial, but—relying on authority in a similar case—denied the motion for a mistrial, struck the recording from the record, and told the jury that they were to disregard the information in the recording. The district court, however, subsequently allowed the State to recall Detective Marang for further questioning about the recording and then admitted a redacted version of the exhibit. That additional testimony, and the redacted recording, reminded the jury of the prejudicial information contained in the original recording, and thus the instruction provided by the district court was insufficient to cure the prejudice. As such, Mr. Maldonado asserts that the motion for a mistrial was erroneously denied.

B. Relevant Facts

Detective Marang conducted a recorded interview with Ms. Maldonado at the hospital after the incident. (11/18/16 Tr., p.113, Ls.11-16; State's Exhibit 23, State's Exhibit 5.) The district court allowed Detective Marang to testify as to what Ms. Maldonado told him to come in for impeachment. (11/18/16 Tr., p.115, L.19 – p.116, L.13.) After the State questioned

Detective Marang about the interview, it moved for the admission of the audio recording of the interview, and the district court admitted it for impeachment also. (11/18/16 Tr., p.114, Ls.6 – p.120, L.12; State's Exhibit 23.) The State then played the audio. (11/18/16 Tr., p.121, L.16.) Subsequently, defense counsel moved for a mistrial because, in the audio, Ms. Maldonado said that Mr. Maldonado had been "in prison for a long time." (11/18/16 Tr., p.126, L.21 – p.127, L.10; State's Exhibit 23 at 5:30 – 5:45.) The State admitted that it had planned to play a redacted copy of the audio but it mistakenly played the unredacted version. (11/18/16 Tr., p.127, Ls.20-23.)

Subsequently, the parties listened to the audio again out of the presence of the jury and discussed the motion for a mistrial. (11/18/16 Tr., p.151, L.7 – p.164, L.15.) Defense counsel pointed out that the information on the audio was "extremely prejudicial." (11/18/16 Tr., p.152, L.19 – p.153, L.1.) The State proposed replacing the exhibit with the redacted version. (11/18/16 Tr., p.154, Ls.6-17.) The district court said it was considering striking the entire exhibit because it did not want to draw attention to it by mentioning it to the jury. (11/18/16 Tr., p.155, L.19 – p.157, L.6.) However, defense counsel said, "[Y]ou can't un-ring the bell. The jury has heard all of this." (11/18/16 Tr., p.157, Ls.9-11.)

The State objected to striking the audio because it was "valuable impeachment evidence" and said that it thought the error could be cured by replacing the audio with the redacted version. (11/18/16 Tr., p.157, L.23 – p.158, L.9.) The district court said it would consider a remedy other than mistrial but noted that defense counsel preferred a mistrial. (11/18/16 Tr., p.158, L.23 – p.159, L.21.) It said it would consider alternative remedies and that if Detective Marang's testimony was enough to get in "the substance of [Ms. Maldonado's] inconsistent testimony," there would be "less harm in . . . striking that from what the State's trying to gain and also helps

protect the defendant." (11/18/16 Tr., p.161, Ls.1-11.) The district court then told the parties it was going to strike the exhibit; it said the State could offer a redacted version, but the audio was "almost cumulative in effect." (11/18/16 Tr., p.165, L.6 – p.166, L.21.) Ultimately, the district court denied the motion for a mistrial and instructed the jury that Exhibit 23 was stricken from the record and should be disregarded. (11/18/16 Tr., p.169, Ls.5-7, p.176, Ls.1-17.)

Later, the State recalled Detective Marang. (11/18/16 Tr., p.245, Ls.1-6.) He confirmed that he had listened to the State's redacted version of the audio—State's Exhibit 5—and that it contained his interview with Ms. Maldonado. (11/18/16 Tr., p.245, L.9 – p.246, L.10.) Among other things, the State asked Detective Marang with respect to the redacted audio, "This is just basically the same thing we heard earlier?" and Detective Marang confirmed that it was. (11/18/16 Tr., p.247, Ls.14-16.) The State moved for the admission of State's Exhibit 5, and the district court granted the motion. (11/18/16 Tr., p.247, Ls.17-20.) The district court instructed the jury that the audio was admitted for the purpose of impeachment and admitted it into evidence. (11/18/16 Tr., p.246, L.16 – p.247, L.21.)

C. Standard Of Review

Idaho's appellate courts effectively review denials of motions for mistrial *de novo*. *State v. Field*, 144 Idaho 559, 571 (2007).

> [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. (quoting *State v. Sandoval-Tena,* 138 Idaho 908, 912 (2003) (quoting *State v. Shepherd,* 124 Idaho 54, 57 (Ct. App. 1993) (quoting *State v. Urquhart,* 105 Idaho 92, 95 (Ct. App. 1983))). Error is harmless and not reversible if the reviewing court is convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Perry,* 150 Idaho 209, 221 (2010).

D. <u>The District Court Erred In Denying The Motion For A Mistrial Made After The State Played An Audio Exhibit In Which The Victim Can Be Heard Telling Detective Marang That Mr. Maldonado Had Previously Spent A Long Time In Prison</u>

A motion for a mistrial is controlled by I.C.R. 29.1, which provides that "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a); *State v. Canelo,* 129 Idaho 386, 389 (Ct. App. 1996).

In this case, the jury learned that Mr. Maldonado had been previously convicted of at least one felony when it heard that he had been "in prison for a long time." (State's Exhibit 23 at 5:30 – 5:35; 11/18/16 Tr., p.151, L.24 – p.152, L.3.) Ms. Maldonado went on to say in the unredacted audio, "And, in prison, that's a state of mind where you don't like to be disrespected." (State's Exhibit 23 at 5:33 – 5:40.) Such information is inherently prejudicial. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith." *State v. Grist*, 147 Idaho 49, 52 (2009) (citing I.R.E. 404(b)). "'The prejudicial effect of [character evidence] is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of

criminal character.'" *Id.* (quoting *State v. Wrenn,* 99 Idaho 506, 510 (1978)). "Character evidence, therefore, takes the jury away from their primary consideration of the guilt or innocence of the particular crime on trial." *Id*. (citation omitted).

The district court acknowledged that this information was a "significant aggravating factor about the case that could cause the jurors" to be unfairly prejudiced against Mr. Maldonado. (11/18/16 Tr., p.157, Ls.1-6.) Nevertheless, the district court denied the motion for a mistrial and told the jury, "because I have determined that [the audio] 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 to disregard anything you may have heard or understood from the Exhibit 23 audio recording." (11/18/16 Tr., p.169, L.6., p.176, Ls.5-11.)

The district court stated that its decision to deny the motion for a mistrial was "consistent with" *State v. Fluery,* 123 Idaho 9 (Ct. App. 1992). (11/18/16 Tr., p.166, L.6.) In *Fluery*, a co-defendant testified that Mr. Fluery's probation officer was present when he was arrested. *Id.* at 10. Mr. Fluery moved for a mistrial, but the district court denied the motion and struck the testimony. *Id.* at 10-11. The Court of Appeals affirmed the district court's order denying the motion for a mistrial. *Id.* at 11. It stated, "Given the fact that this inadvertent statement was not admitted, let alone erroneously admitted, and that a proper limiting instruction was given, we find that there is no reasonable possibility that [the co-defendant's] statement contributed to Fluery's conviction." *Id.*

This case, however, is distinguishable from *Fluery* for several reasons. First, the exhibit was erroneously admitted and played to the jury. (11/18/17 Tr., p.120, L.12 – p.121, L.16.) Second, the statement of the witness in *Fluery* was certainly not as prejudicial as the statement in the audio recording here. The presence of a probation officer could simply mean that the

defendant in *Fluery* was on misdemeanor probation, or had received a sentence of probation only. By contrast, when the jury learned that Mr. Maldonado had previously been in prison for a long time, the jurors would likely believe that he had previously committed very serious crimes in the past. And finally, in *Fluery*, there was no indication that there was any further testimony about the facts surrounding Mr. Fluery's arrest. Here, the State recalled Detective Marang for further testimony about the audio, and then the district court admitted a redacted audio recording of the same interview with Ms. Maldonado. (11/18/17, p.247, Ls.14-21; State's Exhibit 5.)

When the State recalled Detective Marang, the questioning went as follows:

Q. Detective Marang, you remember testifying earlier today?

A. I do.

Q. And an audio was admitted of your conversation with Nelida Maldonado?

A. Yes.

Q. Okay. That's since been retracted. I'm going to show you what's been marked as State's Exhibit 5. Have you had an opportunity to listen to State's Exhbit 5?

A. I have.

Q. And what's contained within State's 5?

A. The interview with Nelida.

Q. All right. And this one's been redacted to conform with the Court Order?

A. Okay.

Q. Has it?

A. Yes.

Q. All right. Have you heard some things that have been taken out?

A. Yes.

Q. But in sum, does it contain the statements Nelly made to you?

A. It does.

(11/18/17, p.245, L.8 – p.246, L.10.) This testimony reminded the jury of the prejudicial information again when it referenced "some things" that had "been taken out" and thus only served to draw attention to it. This was exactly what the district court was concerned about when discussing the motion for a mistrial. (11/18/16 Tr., p.149, Ls.4-7, p.167, Ls.7-8.) Further, the district court admitted the redacted audio even though it admitted it was "almost cumulative in effect," and the State had already "gotten a lot of mileage" from Detective Marang's testimony. (11/18/16 Tr., p.166, Ls.18-21, p.168, Ls.8-15.)

Thus the district court's attempt to cure the error was not comparable with the quick and precise action the district court took in *Fluery*. Even 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. Therefore, the prior limiting instruction was not sufficient to cure the error, and the limiting instruction did not cure the prejudicial inference of guilt and likely had a continuing impact on the trial. It is probable that a jury hearing that Mr. Maldonado had been previously convicted of a crime for which he had spent a long time in prison would not evaluate the case in the same way as it would have had it not learned this information and then been reminded of it again through the admission of State's Exhibit 5 and the additional testimony of Detective Marang.

As such, there is a great danger that the jury did not disregard the stricken information in the audio, but that it considered it to Mr. Maldonado's detriment, that it had a continuing impact

on the trial, may have contributed to the verdict, and, ultimately, deprived Mr. Maldonado of his right to a fair trial. As such, it was error for the district court to not declare a mistrial.

III.

Even If The Above Errors Are Individually Harmless, Mr. Maldonado's Fourteenth Amendment Right To Due Process Of Law Was Violated Because The Accumulation Of Errors Deprived Him Of His Right To A Fair Trial

Mr. Maldonado asserts that if the Court finds that the above errors were harmless, the district court's errors combined amount to cumulative error. "The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process." *State v. Paciorek,* 137 Idaho 629, 635 (Ct. App. 2002). This Court can find cumulative error if it concludes "that there is merit to more than one of the alleged errors" and then concludes "that these errors, when aggregated, denied the defendant a fair trial." *Id.* (citing *State v. Lovelass,* 133 Idaho 160, 171 (Ct. App. 1999)). Under that doctrine, even when individual errors are deemed harmless, an accumulation of such errors can deprive a defendant of a fair trial. *State v. Martinez,* 125 Idaho 445, 453 (1994) (citations omitted).

Mr. Maldonado asserts that the district court's errors discussed in sections I and II above amounted to actual errors and deprived him of a fair trial.

CONCLUSION

Mr. Maldonado respectfully requests that his judgment of conviction be vacated and his case remanded for further proceedings.

DATED this 14th day of December, 2017.

___________/s/______________
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of December, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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RPA/eas