3-2-2018

State v. Clarke Respondent's Brief Dckt. 45062

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45062**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2016-14857**
	)	
PETER O'DONALD CLARKE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature of the Case

Peter O'Donald Clarke appeals from the judgment of the district court, entered upon the jury verdict finding him guilty of possession of methamphetamine, possession of marijuana and possession of paraphernalia. The methamphetamine, marijuana and drug paraphernalia were all discovered during a search incident to Clarke's arrest for misdemeanor battery.

On appeal, Clarke argues the district court erred when it denied his motion to suppress on the grounds that the misdemeanor battery was not committed in the officer's presence and thus his arrest violated the Idaho and United States Constitutions. Clarke also alleges prosecutorial misconduct during the closing argument.

Statement of Facts and Course of Proceedings

Taylor Dan was at the Honeysuckle Beach with her small child when she was harassed by an unknown male, later identified as Clarke. (10/31/16 Tr., p. 14, L. 10 – p. 17, L. 9.) Clarke harassed her and "grabbed her butt" twice against her will. (Id.) Ms. Dan reported this harassment and battery to Deputy Hanson, who was parked nearby. (Id.)

Ms. Dan described the male and Deputy Hanson remembered seeing a male matching that description at the boat launch. (10/31/16 Tr., p. 16, L. 4 – p. 18, L. 7.) Deputy Hanson made contact with Clarke, who admitted to having touched Ms. Dan and to having grabbed her butt. (Id.) However, Clarke claimed it was a consensual grabbing.

(Id.) It took approximately one minute from Ms. Dan's report for Deputy Hanson to make contact with Clarke. (Id.)

Deputy Hanson arrested Clarke for battery in violation of Idaho Code § 18-903. (Id.; R., pp. 11, 16-18.) During the search incident to arrest, Deputy Hanson found syringes, a baggie of marijuana, and a baggie of a white crystalline substance which was discovered to be methamphetamine. (Id.) The state charged Clarke with possession of methamphetamine, possession of marijuana, possession of drug paraphernalia, and battery. (R., pp. 60-62, 122-124.)

Clarke filed a motion to suppress. (R., pp. 45-46, 65-77, 91-94.) The state responded. (R., pp. 80-88.) Clarke argued that because the battery did not occur in Deputy Hanson's immediate presence, his arrest was unconstitutional and, therefore, the subsequent search incident to arrest was likewise unconstitutional. The court held a hearing. (R., pp. 95-98.) Clarke and Deputy Hanson testified. (10/31/16 Tr., p. 13, L. 24 – p. 19, L. 24, p. 20, L. 23 – p. 28, L. 10.)

The district court found that Deputy Hanson had probable cause to believe Clarke committed a battery, which satisfied the constitutional requirements for a lawful arrest. (See 10/31/16 Tr., p. 39, L. 1 – p. 40, L. 2.) The district court also found that Deputy Hanson complied with Idaho Code § 19-603(6), which allows an officer to arrest for a misdemeanor battery that occurs outside of his presence. (10/31/16 Tr., p. 40, Ls. 3-13, p. 43, Ls. 7-15.) The district court denied Clarke's motion to suppress. (Id.) Prior to jury trial the state dismissed the battery charge. (R., pp. 118-119.)

At the jury trial, Deputy Hanson testified that Clarke was wearing a backpack. (11/18/16 Tr., p. 131, L. 19 – p. 134, L. 21.) When Deputy Hanson placed Clarke in handcuffs he removed the backpack and searched it to see if there was anything dangerous inside. (Id.) When Deputy Hanson opened the backpack he smelled marijuana. (Id.) Inside the backpack Deputy Hanson found cigarette packages, and inside one of those packages he found marijuana. (Id.) The marijuana was packaged and labeled as marijuana, likely sold from a dispensary. (11/18/16 Tr., p. 135, Ls. 6-11, p. 136, L. 16 – p. 137, L. 14; Exs. 1-2.) Deputy Hanson also found syringes and three driver's licenses, all in Clarke's name, in Clarke's backpack. (11/18/16 Tr., p. 135, Ls. 1-21; Ex. 1.)

Prior to booking Clarke into the jail, Deputy Hanson asked Clarke if he had anything illegal on his person because, if he did, he could be charged if he took it into the jail. (11/18/16 Tr., p. 138, L. 7 – p. 140, L. 1; Exs. 3-4.) In response, Clarke began limping. (Id.) Deputy Hanson asked Clarke why he was limping and Clarke claimed to have a rock in his shoe. (Id.) A search revealed a syringe with methamphetamine hidden in Clarke's shoe. (Id; p. 141, L. 22 – p. 142, L. 23.)

Clarke said he was unaware of the syringe in his shoe and that it must have fallen in there while he was walking. (11/18/16 Tr., p. 142, L. 24 – p. 143, L. 10.) Clarke also denied knowing about the marijuana in his backpack, and claimed somebody must have put the marijuana in his backpack without his knowledge. (11/18/16 Tr., p. 143, Ls. 11-16.) Clarke also claimed the syringes in his backpack were for a diabetic friend, but he

would not give Deputy Hanson any contact information for this diabetic friend. (11/18/16 Tr., p. 143, Ls. 17-24.)

David Sincerbeaux, an analytical chemist with the Idaho State Police Forensic Laboratory, testified that the substance, found in the syringe in Clarke's shoe, contained methamphetamine. (11/18/16 Tr., p. 156, L. 23 – p. 157, L. 8, p. 146, Ls. 4-17; Ex. 7.) Mr. Sincerbeaux also testified that it was marijuana that Deputy Hanson found in Clarke's backpack. (11/18/16 Tr., p. 156, Ls. 9-22, p. 145, L. 8 – p. 146, L. 3; Ex. 6.)

The jury found Clarke guilty of all three charges. (R., p. 129.) The district court entered judgment and sentenced Clarke to four years with two years fixed. (R., pp. 177-184.) The district court suspended the sentence and placed Clarke on probation for three years. (Id.) Clarke timely appealed. (R., pp. 189-192.)

ISSUES

Clarke states the issues on appeal as:

> I. Did the district court err by denying Mr. Clarke's motion to suppress evidence obtained following his warrantless arrest for an alleged misdemeanor committed outside the police officer's presence?
>
> II. Did the State violate Mr. Clarke's constitutional right to a fair trial when the prosecutor committed misconduct by misstating the evidence in her closing argument?

(Appellant's brief, p. 7.)

The state rephrases the issues as:

1. Has Clarke failed to show that the district court erred when it denied his motion to suppress because the warrantless arrest for misdemeanor battery was supported by probable cause and any "in the presence" requirement is not constitutionally based?

2. Has Clarke failed to show the prosecutor committed prosecutorial misconduct during the closing argument?

ARGUMENT

I.
The District Court Did Not Err When It Denied Clarke's Motion To Suppress

A. Introduction

The district court found that Officer Hanson's arrest of Clarke was supported by probable cause. (10/31/16 Tr., p. 39, L. 1 – p. 45, L. 19.) The district court also found that Officer Hanson complied with Idaho Code § 19-603(6), which permits an officer to arrest a person "upon immediate response to a report of a commission of a crime [when] there is probable cause to believe, that the person arrested has committed a violation of section ... 18-903 (battery)." (See id.) On appeal Clarke argues the district court erred because, he claims, under the Idaho and United States Constitutions an officer can only make a warrantless arrest for a misdemeanor if that misdemeanor is committed in the officer's "presence." (See Appellant's brief, pp. 8-25.)

Contrary to Clarke's argument on appeal, the "in the presence" requirement is not part of the United States or Idaho Constitutions. While there is no Idaho or United States Supreme Court decision directly on point, there is a consensus among other courts that there is no "in the presence" requirement to arrest for a misdemeanor. Rather, the test for constitutionality has been, and should continue to be, whether the officer had probable cause to believe the defendant committed the offense.

B. Standard Of Review

In reviewing an order denying a motion to suppress evidence, this appellate court applies a bifurcated standard of review. State v. Anderson, 154 Idaho 703, 302 P.3d 328

(2012) (citing State v. Purdum, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009)). The appellate court will accept the trial court's findings of fact unless they are clearly erroneous but will freely review the trial court's application of constitutional principles to the facts found. Id.

C. The District Court Did Not Err When It Determined That Deputy Hanson Had Probable Cause To Believe Clarke Committed A Battery And That The Arrest Did Not Violate Either The Idaho Or Federal Constitution

The district court found that Deputy Hanson had probable cause to believe that Clarke committed a battery. (10/31/16 Tr., p. 39, L. 1 – p. 41, L. 4.) The court also found that Deputy Hanson immediately responded to Ms. Dan's battery report and arrested Clarke. (10/31/16 Tr., p. 43, Ls. 7-15.) The district court found that Deputy Hanson's response was immediate because it was "within a minute." (Id.) The district court found the arrest was lawful and complied with Idaho Code § 19-603(6). (10/31/16 Tr., p. 39, L. 1 – p. 45, L. 19.) The district court denied Clarke's motion to suppress. (Id.)

Clarke argues that the district court erred when it ruled that Clarke's arrest was lawful. (See Appellant's brief, pp. 8-25.) Clarke argues that a warrantless arrest for a misdemeanor offense, not committed in the officer's presence, violates both the Idaho and United States Constitutions. (See id.) Clarke does not argue that Idaho Code § 19-603(6) or (7), which authorizes the arrest upon an immediate response to a report of certain violent misdemeanors or misdemeanors on an airplane, is unconstitutional. (See id.) Instead, Clarke appears to argue that compliance with the statute does not matter because the Idaho and United States Constitution include a requirement that an officer may only arrest for misdemeanors committed in their presence. (See id.) Clarke's

argument fails because the "presence" requirement for a warrantless misdemeanor arrest is purely statutory and does not have a basis in either the Idaho or United States Constitution. Rather, an arrest satisfies constitutional standards if it is based on probable cause.

Probable cause is sufficient to justify an arrest. See Whren v. United States, 517 U.S. 806, 819 (1996); Virginia v. Moore, 553 U.S. 164, 168 (2008).

> We are convinced that the approach of our prior cases is correct, because an arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure. Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation.

Moore, 553 U.S. at 168 (2008) (citing Whren, 517 U.S. at 817; Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); W. LaFave, *Arrest: The Decision to Take a Suspect Into Custody*, 177–202 (1965)). While the Virginia v. Moore Court did reference the "presence" language near the end of its decision, that language is dicta and is not supported by the logic of the decision. See People v. Burton, 162 Cal. Rptr. 3d 510, 513–14 (Cal. App. Ct. 2013) ("Again, any language referring to 'in the presence' is mere dicta not supported by the logic of the Supreme Court decision."); State v. Harker, 240 P.3d 780, 786-787 (Utah 2010) (After analyzing Virginia v. Moore, Utah Supreme Court held, "Indeed, *Moore* establishes that a state law requiring an officer's presence does not impact the constitutionality of such an arrest.").

Although the United States Supreme Court has not explicitly ruled on the issue, there is a consensus among other courts that the "presence" requirement is not constitutionally based.

> As for the second Fourth Amendment issue regarding warrantless misdemeanor arrests, whether the "in presence" requirement is constitutional in nature, the consensus is that the answer here is also no. Though the Supreme Court has asserted that "warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime," it has never held that a warrant for lesser offenses occurring out of the presence of an officer is constitutionally required.

W. LaFave, 3 Search & Seizure § 5.1(b) (5th ed., 2017); see also W. LaFave, 3 Search & Seizure § 5.1(c) (5th ed., 2017) (the presence test is not mandated by the Fourth Amendment); see also Atwater, 532 U.S. at 341, n.11 ("We need not, and thus do not, speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests."); Welsh v. Wisconsin, 466 U.S. 740, 756 (1984) (White, J., dissenting) ("[T]he requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment.").

The Seventh Circuit found that there was an "overwhelming consensus" of circuit courts rejecting the adoption of the "in the presence" requirement. See Woods v. City of Chicago, 234 F.3d 979, 994-995 (7th Cir. 2000). The Seventh Circuit rejected claims that a warrantless arrest for a misdemeanor not committed in the presence of the officer violates the Constitution. Woods, 234 F.3d at 992–993. Rather the inquiry to determine if an arrest is constitutional is based on the existence of probable cause. See id.

> The Supreme Court has never held that a police officer violates the Fourth Amendment merely by arresting someone without a warrant for a misdemeanor offense which did not occur in the officer's presence and/or did not involve a breach of the peace. Rather, when determining the constitutionality of a warrantless arrest for a criminal offense, the Court has repeatedly focused its inquiry on the existence of probable cause for the arrest.

Id. (citation omitted). The Seventh Circuit also noted that the United States Supreme Court has "strongly and unequivocally affirmed its traditional view that, absent certain extraordinary circumstances, a seizure is reasonable under the Fourth Amendment when it is based upon probable cause regardless of the severity of the offense involved." Id. at 993 (citing Whren, 517 U.S. at 817-818). Other circuits have "uniformly" rejected the "in the presence" rule as part of the Fourth Amendment. See id. at 995.

> Therefore, given the weight of Supreme Court authority on this issue, the overwhelming consensus of the circuits, and our similar holding in *Ricci*, we reject Woods' invitation to constitutionalize the framing-era common law of misdemeanor arrests and to overturn any Illinois state or municipal laws which abrogate it.

Id.

The Ninth Circuit likewise determined that, while under California state law an officer may make a warrantless misdemeanor arrest only if he has reasonable cause to believe the offense was committed in his presence, the presence requirement is not grounded in the Constitution. Barry v. Fowler, 902 F.2d 770, 772 (9th Cir. 1990) ("The requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment." (citations omitted)).

The Fourth Circuit also noted that other circuits have held that the Fourth Amendment does not contain an "in the presence" requirement. United States v. McNeill, 484 F.3d 301, 311 (4th Cir. 2007). The Sixth Circuit is in accord. The right to be arrested only when a misdemeanor is committed in the presence of the arresting officer is based on a state statute, and is not grounded in the federal constitution. Pyles v. Raisor, 60 F.3d 1211, 1215 (6th Cir. 1995).

The Fifth Circuit also held that a warrantless arrest for a misdemeanor, outside of the presence of the officer, is constitutionally valid if the arrest was supported by probable cause. See Fields v. City of South Houston, 922 F.2d 1183, 1189-1190 (5th Cir. 1991). Texas law requires an officer to be present for the offense or have the offense occur within his view if the officer is going to arrest for a misdemeanor offense without a warrant. Id. Even though, in Fields, the offense was not committed in the officer's presence the arrest did not violate the Constitution because the Constitution does not require a warrant for misdemeanors not occurring in the presence of the officer. Id.

State courts also have found that the "in the presence" requirement is not based in the constitution. The Washington Supreme Court addressed whether the Washington state constitution incorporated the common law rule that an officer may not make a warrantless arrest for a misdemeanor unless the misdemeanor was committed in the presence of the officer. State v. Walker, 138 P.3d 113, 116 (Wash. 2006). The Washington Supreme Court analyzed the interplay between constitutional rights and legislative authority and determined there was no constitutional "in the presence" requirement for misdemeanors. See id. at 116-119. The Washington Supreme Court concluded that as long as the state legislature has authorized such an arrest and there is probable cause to support it, the arrest is valid.

> We can find no cases from this state or any other state, nor any statutes or other laws that support the argument that a person's private affairs encompass the constitutional right to be free from warrantless misdemeanor arrests. So long as legislative authority exists and any such arrest is based on probable cause, the arrest is valid.

Id. at 119.

The court then noted that "every state provides for certain warrantless misdemeanor arrests involving domestic violence, even if they are not committed in the officer's presence." Id. (Citing Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,* 109 HARV. L. REV. 1849, 1859 (1996); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment,* 58 MO. L. REV. 771, 811–17 (1993)). The unifying feature of all of the statutes authorizing such an out-of-presence arrest, including the Washington statute, is that they all require the officer to have probable cause before making an arrest. See id. ("Significantly, all of these statutes, including the one at issue here, require the officer to have probable cause before making an arrest.") It is the "overwhelming practice of other jurisdictions to allow for limited warrantless misdemeanor arrests not committed in the presence of the arresting officer[.]" Id.

The Supreme Court of Utah came to the same conclusion. See State v. Harker, 240 P.3d 780 (Utah 2010). The Utah Supreme Court determined that the officer's arrest of the defendant for a misdemeanor did not satisfy Utah state statutes because the misdemeanor was not committed in the presence of the officer. See id. at 785. However, the Utah Supreme Court found that the arrest passed constitutional muster because the arrest was supported by probable cause. See id. at 786-787.

> The recent United States Supreme Court decision in *Virginia v. Moore* makes it clear that for an arrest to be "lawful" in the context of searches incident to a lawful arrest, all that is required is that the arrest be constitutional; and all the Constitution requires for an arrest to be "lawful" is for the arrest to be based on probable cause.

Id. at 786.

California reached a similar conclusion and held that the Fourth Amendment supports arrests for misdemeanors when there is "objective and reasonable probable cause to justify the arrest," regardless of a state statute requiring the misdemeanor to be committed in the officer's presence. Burton, 162 Cal. Rptr. 3d at 14. Idaho has adopted the same principle, that a violation of statutory arrest rules does not necessarily violate the constitution. See State v. Green, 158 Idaho 884, 354 P.3d 446 (2015).

While the Idaho Supreme Court is not required to follow other courts' precedent when interpreting the Idaho Constitution, the Idaho Supreme Court has found that there is merit in having the same rules of law apply to the Fourth Amendment and its counterpart Article I, § 17. See State v. Donato, 135 Idaho 469, 471, 20 P.3d 5, 7 (2001) "The guarantees under the United States Constitution and the Idaho Constitution are substantially the same." State v. Jenkins, 143 Idaho 918, 920, 155 P.3d 1157, 1159 (2007) (citing State v. Fees, 140 Idaho 81, 88, 90 P.3d 306, 313 (2004)). "The purpose behind Article 1, § 17 of the Idaho Constitution parallels the statement of purpose given by the United States Supreme Court: "'The Fourth Amendment and art. 1 § 17 are designed to protect a person's legitimate expectation of privacy, which 'society is prepared to recognize as reasonable.'" Donato, 135 Idaho at 471, 20 P.3d at 7 (citing State v. Thompson, 114 Idaho 746, 749, 760 P.2d 1162, 1165 (1998); Rakas v. Illinois, 439 U.S. 128, 143 (1978)). The Idaho Supreme Court may deviate from the United States Constitution when a deviation is based upon "the uniqueness of our state, our Constitution, and our long-standing jurisprudence." Id. at 472, 20 P.3d at 8. Where those

factors are not present the Idaho Courts will not deviate from the interpretation of the Fourth Amendment. See id.

Here, there is no reason to interpret the Idaho Constitution any differently from the United States Constitution with regard to the standard for lawful arrests. Both Constitutions provide that the fundamental basis of a constitutional arrest is that an officer may arrest an individual for an offense in a public place if the officer has probable cause to believe the offense occurred. The additional "presence" requirements for a misdemeanor offense are additional protections offered by statute, and are not constitutionally based. See I.C. § 19-603.

As already noted, Idaho has adopted this principle, that a violation of statutory arrest rules, does not necessarily violate the constitution. See Green, 158 Idaho 884, 354 P.3d 446. Green was stopped for a traffic violation and the officer discovered that Green had an invalid driver's license. Id. at 885, 354 P.3d at 447. The officer arrested Green for possessing an invalid license. Id. However, this arrest violated Idaho Code § 49-1407, which provided that, in Green's circumstances, the officer could not arrest, but only cite, Green. Id. at 887, 354 P.3d at 449. The district court granted Green's motion to suppress finding the arrest was unlawful and therefore violated Green's rights under Article 1, Section 17 of the Idaho Constitution. Id. at 885, 354 P.3d at 447. The Idaho Supreme Court reversed.

In Green, the question on appeal was "whether an arrest that complies with the Federal Constitution because it was made based on probable cause, but that does not comply with an Idaho statute governing arrest, is 'lawful' in the context of Article I,

Section 17 of the Idaho Constitution." Id. at 887, 354 P.3d at 449. The Idaho Supreme Court analyzed some of the principles governing arrest that were in effect when the Idaho Constitution was adopted. See id. at 888, 354 P.3d at 450. The Court noted that subsequently enacted statutes governing arrest do not set constitutional standards for arrest. See id. at 888-889, 354 P.3d at 450-451. The Court concluded by finding that suppression is inappropriate where there is only a violation of a state statute. See id. at 892, 354 P.3d at 454.

Here, Clarke flips the Green analysis on its head. Where Green held that *violation* of a statute does not necessarily equate to a constitutional violation, Clarke argues that *compliance* with a statute violates the constitution. (See Appellant's brief, pp. 8-25.) Clarke interprets Green to mean that the Idaho Constitution essentially incorporates, in total, the specific language of Idaho Code § 19-603(1)-(5) because it was a statute that was in effect at the time the Idaho Constitution was adopted. (See id.) Clarke then takes a further step and argues that if an arrest does not comply with Idaho Code § 19-603(1)-(5) as it existed at time of the adoption of the Idaho Constitution then that arrest must be unconstitutional. (See Appellant's brief, pp. 11-12.) Clarke's reading and interpretation of the scope of Green is misguided.

First, Clarke's argument that the Idaho Constitution essentially adopted the language of existing statutes into the Constitution is contradicted by the plain language of the Idaho Constitution itself. Article XXI, § 2 of the Idaho Constitution specifically provides that all existing statutes, "shall remain in force" until they are "altered or repealed by the legislature."

Article XXI, § 2. Laws continued in force

> All laws now in force in the territory of Idaho which are not repugnant to this Constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature.

Idaho Const. art. XXI, § 2.

Thus, contrary to Clarke's argument on appeal, statutes existing at the time of the adoption of the Idaho Constitution did not become some sort of super-statute that are immune to legislative amendment. It is the opposite. Article XXI, Section 2, explicitly provides that the legislature *can* alter or repeal all the laws that were in force. And that is exactly what happened here.

While it is true, as recognized by the Court in Green, that the Court can look back to common law and then existing statutes to assist with Constitutional interpretation, it does not mean that the then existing common law or statutes become incorporated verbatim into the Constitution. Instead, as discussed in Green, the then existing statutes can be used as general principles to help interpret the constitution. See Green, 158 Idaho at 888-889, 354 P.3d at 450-451 ("Because the constitutional guarantee against unreasonable seizure of the person includes an arrest, the Idaho Constitution incorporated the principles regarding arrest in the Idaho statutory and common law in 1890 when the constitution was adopted." "As discussed above, constitutions are to be interpreted in light of the statutory and common law that existed at the time of their adoption."). However, this principle does not override art. XXI, § 2 and mean that statutes cannot be amended, and does not mean that arrests for misdemeanors, based upon a finding of probable cause, violate the Idaho Constitution.

The Green Court never held that Idaho Code § 19-603(6)-(7) were unconstitutional. See Green, 158 Idaho at 888, 354 P.3d at 450. The Court simply held that subsequently enacted statutes do not set constitutional standards and thus violation of those statutes are not subject to constitutional remedies. Id. ("Because these subsequently enacted arrest standards are merely statutory, constitutional remedies are inappropriate when those statutes have been violated by police."). Green simply noted that those amendments were statutory, and constitutional remedies are inappropriate for statutory violations.

Further, Clarke's argument that there should be different constitutional standards for warrantless arrests depending on whether the crime is a misdemeanor or whether the crime is a felony would give the legislature the power to determine what constitutes a constitutional arrest. The legislature has the power to determine what is a felony and what is a misdemeanor. If there were two standards for arrest, the legislature could simply categorize one crime as a felony and another a misdemeanor and thus control which constitutional standards of arrest apply for each crime. This appears to be problematic.

Therefore, this Court should determine, as have a consensus of courts in the country, that the constitutional standard for a warrantless arrest is the existence of probable cause. Deputy Hanson's arrest of Clarke for battery complied with both the Idaho and United States Constitutions because the arrest was supported by probable cause. Clarke has failed to show error in the denial of his motion to suppress.

II.
The Prosecutor Did Not Commit Prosecutorial Misconduct During The Closing Argument

A. Introduction

After finding marijuana and drug paraphernalia, Officer Hanson asked Clarke if he had anything else illegal on him and, in response, Clarke started limping. (See 11/18/16 Tr., p. 138, L. 7 – p. 140, L. 1; Exs. 3-4.) During a subsequent search the police found a syringe with methamphetamine in Clarke's shoe. (See id.) Clarke argues that the prosecutor misstated the evidence and therefore committed misconduct when, during her closing argument she stated that Clarke admitted to having a syringe in his shoe and that Officer Hanson asked Clarke about "drugs" or "controlled substances." (See Appellant's brief, pp. 25-32.) Clarke's argument on appeal fails. The prosecutor's closing argument was a fair extrapolation of the evidence presented at trial. Clarke has shown no misconduct as to the only preserved claim of prosecutorial misconduct she raises on appeal and has shown no misconduct, much less misconduct rising to the level of fundamental error, as to the claims she raises for the first time on appeal.

B. Standard Of Review

"On appeal, the standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). If a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged

misconduct rises to the level of fundamental error. State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

A claim of error unpreserved for appellate review by a timely objection may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." Perry, 150 Idaho at 224, 245 P.3d at 976. Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated"; (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision"; and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial court proceedings." Id. at 226, 245 P.3d at 978.

If a defendant objects to alleged prosecutorial misconduct at trial, the appellate court need not engage in the fundamental error analysis. Severson, 147 Idaho at 720, 215 P.3d at 440 (citing State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007)). Instead, the appellate court utilizes a two-part test for misconduct, "which asks whether the conduct was proper and, if not, whether it was harmless error." Id. (citing Field, 144 Idaho at 571, 165 P.3d at 285).

C. The Prosecutor Did Not Commit Misconduct In Closing Argument

Clarke argues that the prosecutor committed misconduct by misstating the evidence during the closing argument. (Appellant's brief, pp. 25-32.) Clarke's argument focuses on three comments made by the prosecutor; the first and third were un-objected to, and the second was objected to but the objection was overruled by the district court. (See id.) All of the prosecutor's comments referenced the following testimony by Deputy Hanson about events that occurred after Deputy Hanson found marijuana and syringes in Clarke's backpack:

> Q. Can you describe to me generally what happens when someone's brought into the jail?
>
> A. Yes. So prior to escorting an individual into the jail I always inform them if they have anything illegal on them that I haven't located, uh, that could be an additional felony charge if they introduce that into the secure facility. In this case I advised Mr. Clarke if he had anything illegal that I had missed that he still had on him to advise me of that.
>
> Um, then I – at that point I escort somebody into the jail where they are searched again by the detention deputies, and at that point their shoes and outer layer of clothing is removed.
>
> Q. So did you go through that procedure in this case?
>
> A. I did.
>
> Q. So as you're walking Mr. Clarke in did you ask him any questions?
>
> A. I did.
>
> Q. What'd you ask him?
>
> A. If he had anything illegal on him that the jail deputies might find on him.
>
> Q. And what did he do then in response?

A. He began limping.

Q. Did he say anything?

A. I asked him why he was limping, and he said he felt there was a rock in his shoe.

Q. Had you observed him walking prior to that point?

A. I did.

Q. Had you seen him limping then?

A. He had not been limping.

Q. And so then did the jail staff there search him?

A. They did.

Q. Did you watch that?

A. I did.

Q. So you were present?

A. I was.

Q. And did Mr. Clarke remove his shoes?

A. He did.

Q. And what did you observe when that happened?

A. As Mr. Clarke removed his shoes, I took possession of them, looked inside of them. In his right shoe I located a syringe.

(11/18/16 Tr., p. 138, L. 7 – p. 140, L. 1; Exs. 3-4.) Deputy Hanson also testified that there appeared to be methamphetamine in the syringe. (11/18/16 Tr., p. 141, L. 22 – p. 142, L. 23.)

During closing argument the prosecutor explained that Deputy Hanson had found the marijuana, syringes and Clarke's identification in Clarke's backpack. (11/18/16 Tr., p. 182, L. 10 – p. 183, L. 18.) After explaining Deputy Hanson found drugs and drug paraphernalia in Clarke's backpack the prosecutor referenced Deputy Hanson's warning about bringing illegal items into the jail and the questionable nature of Clarke's explanation for how the syringe got there:

> Then let's go on. So when he goes to the jail, Deputy Hanson kind of warns Mr. Clarke, saying, okay, don't bring controlled substances in here, he asks him if he has anything else that should not be introduced into the jail, and then and only then does Mr. Clarke say, uh, there actually is something in my shoe, there's a rock in there, and his story is that it got in his shoe just the way a rock gets into your shoe sometimes. We all have experience walking. A syringe of meth does not work its way into your shoe as you're walking around. That does not happen. That story defies logic, and that is not a reasonable doubt, ladies and gentlemen.
>
> Mr. Clarke – [as defense counsel] said, the issue that you might be concerned with is knowledge. Did Mr. Clarke know this was there? Did he know it was a controlled substance? Of course he did. That's why he didn't admit it 'til he got to the jail. That's why it was hidden in his shoe. That's why he didn't say it until Deputy Hanson said can't bring drugs in here, and then he remembered, oh yeah. He didn't want to be – he didn't want to be found with that again.

(11/18/16 Tr., p. 182, L. 21 – p. 183, L. 18.) Clarke did not object to this portion of the prosecutor's argument below, but argues on appeal that the prosecutor misstated the evidence because Deputy Hanson testified he told Clarke he could not bring "anything illegal" into the jail, but the prosecutor used the word "drugs" instead of "anything illegal." (See Appellant's brief, pp. 30-32.) Clarke's argument fails all three prongs of the fundamental error analysis.

First, the reference to "drugs" instead of "anything illegal" does not violate one of Clarke's unwaived constitutional rights. "A defendant's right to a fair trial is impacted '[w]here a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence.'" State v. Parker, 157 Idaho 132, 145, 334 P.3d 806, 819 (2014) (quoting Perry, 150 Idaho at 227, 245 P.3d at 979). "It is improper to misrepresent or mischaracterize the evidence in closing argument." State v. Moses, 156 Idaho 855, 871, 332 P.3d 767, 783 (2014) (quoting State v. Rothwell, 154 Idaho 125, 133, 294 P.3d 1137, 1145 (Ct. App. 2013)). "Indeed, the prosecutor 'has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics.'" Id. (citing State v. Griffiths, 101 Idaho 163, 166, 610 P.2d 522, 525 (1980) (overruled on other grounds by State v. LePage, 102 Idaho 387, 630 P.2d 674 (1981)). Generally the parties are given wide latitude in making closing arguments to the jury and discussing the evidence and inferences that can be made therefrom. State v. Montgomery, ___ Idaho ___, 408 P.3d 38, 45 (2017) (citing Severson, 147 Idaho at 720, 215 P.3d at 440). "The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone." Id. (quoting State v. Carson, 151 Idaho 713, 721, 264 P.3d 54, 62 (2011)). "In reviewing allegations of prosecutorial misconduct, this Court must keep in mind the realities of trial." Id. (quoting State v. Ellington, 151 Idaho 53, 62, 253 P.3d 727, 736 (2011)). A fair trial is not necessarily a perfect trial. Id. (citing Ellington, 151 Idaho at 62, 253 P.3d at 736).

Here, it was a reasonable inference from the evidence that Officer Hanson's question about "anything illegal" included "drugs." When Deputy Hanson opened Clarke's backpack he smelled marijuana. (11/18/16 Tr., p. 131, L. 19 – p. 134, L. 21.) Inside the backpack Deputy Hanson found marijuana. (Id.) The marijuana was packaged and labeled as marijuana, likely sold from a dispensary. (11/18/16 Tr., p. 135, Ls. 6-11, p. 136, L. 16 – p. 137, L. 14; Exs. 1-2.) Deputy Hanson also found syringes in Clarke's backpack. (11/18/16 Tr., p. 135, Ls. 1-21; Ex. 1.) Based upon these search results, it is a reasonable inference that when Deputy Hanson asked Clarke about "anything illegal" he might have on him, he was including illegal drugs.

It is also reasonable to infer that Clarke knew that when Deputy Hanson asked him about "anything illegal" he meant "drugs" because Clarke began limping in response to the question – and the syringe with methamphetamine was found in his shoe. Thus, it is a reasonable inference from the evidence introduced at trial that when Deputy Hanson asked Clarke about "anything illegal" on his person he was talking about illegal drugs and it is reasonable that Clarke knew they were talking about illegal drugs. Thus, the prosecutor's reference to illegal drugs during the closing argument was based on a reasonable inference from the evidence.

Nor is this alleged error clear from the record. A reasonable interpretation of the interaction between Clarke and Deputy Hanson was they were talking about illegal drugs. While the prosecutor did not use the precise verbiage used by the officer, it is clear from the context of the officer's testimony that he was referring to anything illegal, including

illegal drugs. Thus, Clarke cannot show that any error was clear from the record, and thus fails the second prong of the fundamental error analysis.

Finally, Clarke has also failed to show that the prosecutor's argument affected the outcome of the trial. The district court instructed the jury that closing arguments are not evidence. (11/18/16 Tr., p. 174, Ls. 7-17.) The district court further instructed the jury that if the facts represented by the attorneys in their closing arguments were different than they remembered then the jurors should follow their memory. (Id.)

> Certain things you have heard or seen are not evidence including: One, arguments and statements by lawyers. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is included to help you interpret the evidence but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, follow your memory.

(11/18/16 Tr., p. 174, Ls. 7-14; see also R., pp. 132, 156-157.) The jury is presumed to follow the district court's instructions. Moses, 156 Idaho at 871, 332 P.3d at 783 (citing Carson, 151 Idaho at 718, 264 P.3d at 59). Thus, the jury is presumed to have followed the district court's instructions that the closing argument was not evidence and to disregard the attorneys' representations of facts that differ from the jurors' memory.

Further, it is difficult to see how this argument could have changed the outcome of the trial. Several syringes were found on Clarke, but the only syringe containing methamphetamine was found in his shoe. The prosecutor's statement during closing argument did not affect the outcome of the trial.

Clarke's second argument focus on a reference to this same interaction between Clarke and Deputy Hanson, during the prosecutor's rebuttal. (See Appellant's brief, p. 28.) During Clarke's closing argument, defense counsel argued that the state failed to

show Clarke knew there was methamphetamine in the syringe. (See 11/18/16 Tr., p. 184, L. 9 – p. 188, L. 16.) The state responded by arguing Clarke knew there was methamphetamine in the syringe because it was the only syringe he hid in his shoe. (11/18/16 Tr., p. 189, Ls. 6-17.) The state went on to reference Deputy Hanson's warning about the jail:

> [Prosecutor]: He was already being arrested. He was already being taken to jail. He'd already been found with marijuana and syringes, and it's not until the deputy's bringing him in, asked about controlled substances, asked him about drugs specifically –
>
> [Defense Counsel]: Objection, Your Honor. I believe the testimony was he asked if he had anything illegal, not if he had any illegal drugs.
>
> THE COURT: That objection's overruled.

(11/18/16 Tr., p. 189, L. 24 – p. 190, L. 7.) Clarke again argues that this reference to "controlled substances" and "drugs" misstated the evidence. (See Appellant's brief, pp. 28-29.) Clarke has failed to show error.

Regarding the prosecutor's reference to "controlled substances" and "drugs," the same rationale as above applies. It is a fair inference from the evidence that when Deputy Hanson was talking about "anything illegal" he was talking about illegal drugs. Illegal drugs were the context for everything after the initial arrest for battery. While the prosecutor could have been more specific about how she was drawing the inference, it still is a proper inference. There is simply nothing else that Deputy Hanson and Clarke would have been specifically talking about.

Even if the prosecutor's characterization of Deputy Hanson's testimony was error, it was harmless. As noted above the jury is presumed to have followed the jury

instructions that instructed the jurors to follow their memory and that closing argument of the parties is not evidence. Further, the only syringe with methamphetamine was found in Clarke's shoe. And he only began limping after Deputy Hanson asked him if he had anything illegal on him. There is nothing inherently illegal about a syringe; therefore the limping was evidence of Clarke's consciousness of guilt. Nor was Clarke's defense based upon a distinction between "anything illegal" and "drugs." His defense was that he did know there was methamphetamine in the syringe. Clarke's defense was not that he knew he had something else illegal on him.

Finally, the third comment to which Clarke attributes prosecutorial misconduct involved the prosecutor's reference to Clarke's limping in response to Deputy Hanson's question and drawing inferences from those circumstances.

> [Prosecutor]: That is when Mr. Clarke decided to say there's something in there, I remember now, there's a syringe in my shoe. Ladies and gentlemen, we can never tell what someone's thinking, right? That's not what you can do. It's not what I can do. We don't know what's running through someone's mind, but what we do is look at the circumstances. We look at everything about this circumstance, and everything here indicates that he knew there was a legal – illegal controlled substance in his shoe. He was standing on it, and that's why he hid it.

(11/18/16 Tr., p. 190, Ls. 8-18.) For the first time on appeal, Clarke argues that this argument misstated the evidence because Clarke did not verbally say "there's something in there, I remember now, there's a syringe in my shoe." (See Appellant's brief, pp. 31-32.) Clarke's argument fails.

As an initial matter, Clarke fails to argue, let alone show, that this comment constituted fundamental error. (See Appellant's brief, pp. 25-32.) Clarke appears to lump this statement in with the prior reference to "controlled substances" (which was

objected to) because they appeared close in time. (See 11/18/16 Tr., p. 189, L. 24 – p. 190, L. 7.) However, this statement was un-objected to, thus the fundamental error analysis applies. Because Clarke has not even argued, much less attempted to demonstrate, fundamental error, this Court should decline to review this unpreserved claim of prosecutorial misconduct. In the event the Court does review the argument, it fails under the fundamental error analysis.

First, the statement did not violate any of Clarke's unwaived constitutional rights. In response to Deputy Hanson's question regarding if Clarke had anything illegal, he began limping. (See 11/18/16 Tr., p. 138, L. 7 – p. 140, L. 1; Exs. 3-4.) Clarke was not limping before. (See id.) While Clarke did not verbalize "there's something in my shoe," his nonverbal actions in response to the question, clearly communicated to Deputy Hanson that "there's something in my shoe." The prosecutor's argument was about how it is impossible to get into the mind of another person, so the jury needed to look at the circumstances surrounding Clarke's actions to determine whether Clarke knew there was methamphetamine in his shoe. It was a proper argument based upon the evidence presented.

Even if there was error it is not clear from the record. Clarke's nonverbal reactions in response to Deputy Hanson's questions can leave some room for differing interpretations. However, because there can be differing interpretations there is no clear error.

Even if there was clear error, Clarke cannot show the error was not harmless, for the same reasons as articulated above. In addition, it is difficult to see how the

prosecutor's argument could have changed the outcome of the trial since the syringe with methamphetamine was found in Clarke's shoe.

The prosecutor's statements during closing argument were not prosecutorial misconduct. The Idaho Court of Appeals provided some examples of conduct during closing argument that has risen to the level of prosecutorial misconduct. See State v. Adams, 147 Idaho 857, 863, 216 P.3d 146, 152 (Ct. App. 2009).

> This Court has reversed convictions for prosecutorial misconduct during closing argument where timely objections to the argument were made and overruled and the misconduct was patent, repeated and egregious. For example, in [*State v.*] *Phillips,* 144 Idaho [82,] 87–88, 156 P.3d [583,] 588–89 [(Ct. App. 2007)], we reversed a conviction where the prosecutor repeatedly and improperly appealed to the emotions of the jury by arguing that the jury should be upset and irritated by trial evidence that he attributed to the defense, but that was actually elicited by the prosecution. Similarly, in *State v. Beebe,* 145 Idaho 570, 574–76, 181 P.3d 496, 500–02 (Ct. App. 2007), we reversed a conviction when the prosecutor misstated the evidence, misstated the law by grotesquely mischaracterizing the defendant's defense, and repeatedly appealed to the jury to decide the case on factors other than evidence of guilt. We have also held that the prosecutorial misconduct to which no objection was made at trial rose to the level of fundamental error where the prosecutor repeatedly disparaged defense counsel by implying that the defense attorney participated in or facilitated the defendant's "lies," asked the jury to rely on the prosecutor's self-proclaimed trustworthiness and integrity and that of the arresting officer, and appealed to the emotion and passion of the jury by asking its members to step into the shoes of a hypothetical victim of the defendant's alleged drunk driving. *State v. Gross,* 146 Idaho 15, 19–21, 189 P.3d 477, 481–83 (Ct. App. 2008). We held that all of these improper arguments sought a finding of guilt based on factors outside the evidence and that, in light of the evidence adduced at trial, the misconduct was not harmless.

Id.

The prosecutor's statements in this case simply do not rise to these levels. Clarke has failed to show the prosecutor committed prosecutorial misconduct in the closing argument.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 2nd day of March, 2018.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 2nd day of March, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd