11-14-2017

State v. Clarke Appellant's Brief Dckt. 45062

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45062**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY NO.**
v.	)	**CR 2016-14857**
	)	
PETER O'DONALD CLARKE,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE JOHN T. MITCHELL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

A police officer arrested Peter Clarke, without warrant, for an alleged misdemeanor committed outside the officer's presence. The police officer searched him and found marijuana, drug paraphernalia, and a trace amount of methamphetamine in a syringe. The State charged Mr. Clarke with possession of methamphetamine, possession of marijuana, and possession of paraphernalia.

Mr. Clarke moved to suppress the evidence obtained from his warrantless arrest and search. Among other arguments, he contended Article 1, Section 17 of the Idaho Constitution prohibited warrantless misdemeanor arrests unless the misdemeanor was committed or attempted in the police officer's presence. The district court rejected this argument. The district court refused to "go there" and rule certain misdemeanor arrests were constitutionally prohibited because, in part, "Supreme Court's not been too kind to district judges lately in their opinions, and I can't imagine what they would say about me if I were to be the first to go there, so I'm not going to." Accordingly, the district court denied Mr. Clarke's motion to suppress.

Mr. Clarke proceeded to trial. In her closing argument, the prosecutor misrepresented the evidence pertaining to Mr. Clarke's knowledge of the methamphetamine inside the syringe—the only contested element at trial. The jury found Mr. Clarke guilty as charged.

Mr. Clarke now appeals. He contends the district court erred when it denied his motion to suppress, and he asserts the prosecutor committed misconduct by misrepresenting the evidence.

Statement of Facts and Course of Proceedings

On August 2, 2016, the State alleged Mr. Clarke committed the crime of possession of a controlled substance, amphetamines, a felony, in violation of I.C. § 37-2732(c)(1). (R., pp.25–

26.) In separate citations, the State alleged Mr. Clarke committed three misdemeanors for possession of marijuana, in violation of I.C. § 37-2732(c)(3), possession of drug paraphernalia, in violation of I.C. § 37-2734A(1), and battery, in violation of I.C. § 18-903. (R., pp.23–24.) According to the probable cause form submitted by Kootenai County Police Officer Michael Hanson:

> I was flagged down while at the Honeysuckle Boat Launch by Taylor V. Dan. Dan informed me she had been harrassed [sic] by a male. Dan also told me the male had grabbed her butt twice without permission. Dan said it had been unwanted and she wished to pursue charges against the male. I checked the area and located a male who exactly matched Dan's description. I contacted the male, later identified as Peter O. Clarke, who confirmed Dan's story and admitted to grabbing her butt. I placed Clarke under arrest for I.C. 18-903 Battery. While conducting a search of Clarke's backpack, I located syringes, a baggy of marijuana, and a baggy containing several small chunks of a white crystalline substance. I informed Clarke he was also being charged with I.C. 37-2732(c)(I) Possession of a Controlled Substance, I.C. 37-2732(c)(3) Possession of Marijuana, and I.C. 37-2734A(l) Possession of Paraphernalia. While at the jail, a partially filled syringe containing a white substance was located inside Clarke's right shoe. I tested the white crystalline chunks using a NIK-A field test kit, which flashed a presumptive positive for Amphetamines.

(R., pp.10–11.) This arrest occurred at approximately 7:00 p.m. on August 1, 2016. (R., p.10.)

Following a preliminary hearing, the magistrate found probable cause for possession of methamphetamine (instead of amphetamine as originally alleged in the complaint) and bound Mr. Clarke over to district court. (R., pp.37–39, 40; *see also* Aug. R., Prelim. Hr'g Tr.) Mr. Clarke moved to suppress all evidence obtained after his warrantless arrest. (R., pp.45–46.) Shortly thereafter, the State charged Mr. Clarke by Information with felony possession of methamphetamine, misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and misdemeanor battery. (R., pp.47–48; *see also* R., pp.60–61 (Amended Information).) Mr. Clarke pled not guilty. (R., p.58.)

Mr. Clarke then filed a brief in support of his motion to suppress, and the State responded in opposition. (R., pp.65–77, 80–87.) Mr. Clarke replied. (R., pp.91–93.) In his briefing, Mr. Clarke argued his arrest was unconstitutional under Article 1, Section 17 of the Idaho Constitution and the Fourth Amendment of the U.S. Constitution because these constitutional provisions prohibited a police officer from conducting a warrantless arrest of an individual for a misdemeanor committed outside the officer's presence. (R., pp.66–71, 72–75.) Due to his unlawful seizure, Mr. Clarke argued the district court should suppress all evidence obtained from Officer Hanson's search incident to arrest and his subsequent search at the jail.[1] (R., pp.45, 77.)

The district court held a hearing on Mr. Clarke's motion. (R., pp.95–98; *see generally* Tr., p.5, L.3–p.45, L.25.) Officer Hanson and Mr. Clarke testified. (Tr., p.13, L.6–p.19, L.25, p.20, L.12–p.28, L.12.) The facts elicited from their testimony are as follows. On August 1, 2016, Officer Hanson was parked on the side of the road in the Honeysuckle Beach area. (Tr., p.14, Ls.8–12, Ls.17–18.) A woman, identified as Ms. Dan, approached his car to report a harassment at the beach. (Tr., p.14, Ls.13–21.) Officer Hanson took her report. (Tr., p.14, Ls.22–23.) Ms. Dan told Officer Hanson that an unknown male made "advances towards her," "sat down next to her," and "ended up touching her on the butt" "twice." (Tr., p.14, Ls.1–17.) Ms. Dan also told Officer Hanson that she had given the man her phone number. (Tr., p.18, Ls.21–24.) This interaction between Ms. Dan and the male occurred around 1:30 p.m. or 2:00 p.m. that day. (Tr., p.25, Ls.7–9, p.26, Ls.16–23.) Ms. Dan described the man to Officer Hanson as "a black male with a beard, approximately 30 to 40 years old, wearing a muscle shirt and

[1] Mr. Clarke also argued Officer Hanson lacked probable cause for the arrest. (R., pp.75–76.) In addition, Mr. Clarke argued the five-hour delay between the misdemeanor's alleged commission and his warrantless arrest violated I.C. § 19-603(6), which allowed a police officer to conduct a warrantless arrest for an alleged battery, but only if "upon immediate response to a report" of the crime's commission. (R., pp.71–72.)

orange shirt and black shorts with a black backpack and carrying a brown sack." (Tr., p.16, Ls.11–14.) Officer Hanson "remembered somebody matching that description" while he was at boat launch before his contact with Ms. Dan. (Tr., p.16, Ls.11–22.) About one minute after leaving Ms. Dan, at approximately 7:00 p.m., Officer Hanson found the man who he believed to match Ms. Dan's description (later identified as Mr. Clarke). (Tr., p.16, L.23–p.17, L.11, p.18, Ls.14–21.) Officer Hanson testified that Mr. Clarke admitted to touching Ms. Dan's butt, but Mr. Clarke believed it was consensual. (Tr., p.17, Ls.15–24.) Officer Hanson then arrested Mr. Clarke and searched him. (Tr., p.18, Ls.4–7, p.18, L.25–p.19, L.7.) Officer Hanson did not have a warrant. (Tr., p.19, Ls.2–3, Ls.6–7.)

The district court issued an oral ruling at the end of the suppression hearing. The district court first determined Officer Hanson had probable cause to believe Mr. Clarke committed a misdemeanor battery. (Tr., p.39, L.2–p.40, L.2.) The district court also ruled Officer Hanson complied with I.C. § 19-603(6) and, even if the statute was violated, "the remedy isn't suppression of the evidence," relying on *State v. Green*, 158 Idaho 884 (2015). (Tr., p.40, Ls.3–20, p.43, Ls.7–15.) Turning to the constitutional violations, the district court reasoned:

> Suppression of the evidence is the remedy only when there is a Constitutional violation, so what makes up a Constitutional violation? At 158 Idaho . . . Page 884 [in *Green*] the majority opinion says, quote In the context of the Federal Constitution and its interpreting case law, an arrest is lawful if officers have probable cause to believe that a person has committed a crime in their presence even if such arrest does not comply with the statutes governing arrest.
>
> So is this a case of a crime committed in their presence? You know, I don't think so. Does that make it automatically a violation of the Constitution? I don't think so. And part of the reason is that obviously this section of [I.C. § 19-603] has been in existence for quite some time. There are frequent violations of protection orders, violations of no contact orders, assaults and battery, frequent domestic violence assaults and battery, probably not that many stalkings and not that many second degree stalking cases, but all the other cases listed in there, those things happen every day even in the least busy judicial district, and the constitutionality of that has apparently never been tested, so I am—Justice Jones, Justice Warren Jones in his concurring opinion in *Green* says, "while Green's

> arrest was properly supported by probable cause under the Constitution, it violated the statute," so at least in that phrase Justice Jones doesn't limit it to a crime being committed in their presence, and so I don't know if the portion of the majority under [page] 887 in their presence is determinative. It's kind of just discussed in passing. It—probably because they found that this was, in *Green*, a crime committed in their presence, same page, 887. "Therefore, having witnessed Green driving the vehicle, the police officer had probable cause to believe Green had committed an offense in the officer's presence," so I think that's a factor that just didn't need to be addressed in *Green*.

(Tr., p.43, L.18–p.45, L.5.) After reasoning *Green* did not address the legal question here, the district court ruled:

> It may well be that this is a great argument, but I'm not going to be the district court judge that decides all assaults, batteries, domestic assaults or batteries, violation of protective order and violation of no contact orders that occur in the state of Idaho which almost universally occur outside the officer's presence is a violation of the U.S. and Idaho Constitution. I can't go there. Supreme Court's not been too kind to district judges lately in their opinions, and I can't imagine what they would say about me if I were to be the first to go there, so I'm not going to, so [defense counsel], if you'd be kind enough to prepare a quick order to that effect denying the suppression motion, and the case will remain set to trial.[2]

(Tr., p.45, Ls.6–19.)

Just prior to trial, the State moved to dismiss the charge of misdemeanor battery due to insufficient evidence. (R., p.118.) The district court granted the motion and ordered the charge dismissed. (R., p.120.) The State filed an Amended Information with the three remaining charges—felony possession of methamphetamine, misdemeanor possession of marijuana, and misdemeanor possession of paraphernalia. (R., pp.122–23; *see generally* Tr., p.46, L.1–p.199, L.9 (trial transcript).)

At trial, the State called just two witnesses: Officer Hanson and an Idaho State Police Forensic Laboratory analytical chemist. (Tr., p.129, L.10–p.149, L.15, p.150, L.1–p.161, L.24, p.162, L.4–p.164, L.14.) On the possession of methamphetamine charge, Officer Hanson

testified that he found a syringe in Mr. Clarke's shoe after he had taken Mr. Clarke to jail.[3] (Tr., p.138, L.1–p.141, L.21.) Officer Hanson further testified that he removed the syringe from the shoe and saw a white substance inside, which appeared to be methamphetamine. (Tr., p.141, L.22–p.142, L.8.) He said that he took the plunger out of the syringe and a single white crystallized chunk fell out. (Tr., p.142, Ls.9–23.) The single, solid piece was so small that it did not register on Officer Hanson's scale.[4] (Tr., p.147, Ls.14–24.) In his opinion, it was "a trace amount." (Tr., p.147, Ls.20–21, p.147, L.25–p.148, L.2.) Next, the analytical chemist testified that the trace amount substance contained methamphetamine. (Tr., p.156, L.23–p.157, L.8.) The jury found Mr. Clarke guilty of all three offenses. (Tr., p.194, L.15–p.195, L.10; Aug. R., Jury Verdict.)

For possession of methamphetamine, the district court sentenced Mr. Clarke to four years, with two years fixed, suspended execution of his sentence, and placed him on probation for three years. (R., pp.179–81; Tr., p.233, L.24–p.234, L.8.) For the two misdemeanor offenses, the district court sentenced Mr. Clarke to 180 days in jail, with 151 days suspended and credit for 29 days served, and two years of probation. (R., pp.177–78.) Mr. Clarke timely appealed from the district court's judgment of conviction. (R., pp.189–91.)

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[2] Although the district court requested a proposed order, no formal written order denying the motion was filed.

[3] There was no evidence presented on the "baggy containing several small chunks of a white crystalline substance" that Officer Hanson reported to finding in Mr. Clarke's backpack. (*See* R., p.11; Tr., p.129, L.10–p.149, L.15, p.150, L.1–p.161, L.24, p.162, L.4–p.164, L.14.) The State's evidence to prove the possession of methamphetamine charge relied entirely on the trace amount of methamphetamine in the syringe. (*See* Tr., p.124, L.13–p.126, L.22 (prosecutor's opening statement), p.181, L.25–p.184, L.6 (prosecutor's closing argument).)

[4] Officer Hanson said his scale was "not a very sensitive scale" and threshold "might be" 0.1 grams. (Tr., p.148, L.24–p.149, L.4.)

ISSUES

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?

ARGUMENT

I.

The District Court Erred 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

A. Introduction

The Idaho Constitution prohibits a police officer from arresting an individual, without a warrant, for a misdemeanor committed outside the officer's presence. This Court recently reaffirmed this long-standing principle, as well as the tenets of interpretation for the Idaho Constitution itself, in *State v. Green*, 158 Idaho 884 (2015). Moreover, these warrantless arrests are deemed unreasonable by not only the Idaho Constitution and Idaho's appellate courts, but also the Fourth Amendment of the U.S. Constitution. Here, the district court failed to apply these state and federal constitutional standards when it denied Mr. Clarke's motion to suppress evidence obtained from Officer Hanson's search of Mr. Clarke after his warrantless, misdemeanor arrest. Because Officer Hanson violated Mr. Clarke's state and federal constitutional rights to be free from unreasonable seizures, the district court should have granted Mr. Clarke's motion to suppress.

B. Standard Of Review

> In reviewing an order denying a motion to suppress evidence, this Court applies a bifurcated standard of review. *State v. Purdum*, 147 Idaho 206, 207 (2009). This 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.* Findings of fact are not clearly erroneous if they are supported by substantial and competent evidence. *State v. Bishop*, 146 Idaho 804, 810 (2009).

State v. Lee, No. 44932, 2017 Opinion No. 103, p.4, 402 P.3d 1095, 1099–1100 (Idaho Sept. 22, 2017).

C. Officer Hanson's Warrantless Arrest Of Mr. Clarke For An Alleged Completed Misdemeanor Was An Unreasonable Seizure In Violation Of The Idaho And United States Constitutions

The district court erred by denying Mr. Clarke's motion to suppress because state and federal constitutional law both prohibit warrantless arrests for misdemeanors committed outside the officer's presence (frequently referred to as "completed misdemeanors"). The Idaho Constitution only grants police officers the authority to conduct warrantless arrests for misdemeanors committed or attempted in their presence. If the misdemeanor did not occur in the officer's presence, the warrantless arrest violates the defendant's Idaho constitutional rights, and any evidence procured from the violation is must be excluded. Likewise, the Fourth Amendment prohibits warrantless arrests for completed misdemeanors and requires suppression of any evidence obtained in violation of this constitutional right. Although the U.S. Supreme Court has not explicitly decided this issue, U.S. Supreme Court dicta, history, and traditional standards of reasonableness all support this constitutional protection. Each constitutional protection will be addressed in turn below.

1. The Idaho Constitution Prohibits Warrantless Arrests For Misdemeanors Committed Outside The Police Officer's Presence

Article 1, Section 17 of the Idaho Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

IDAHO CONST. art. I, § 17. This section contains "nearly identical guarantees" as those in the Fourth Amendment of the Unites States Constitution. *Green*, 158 Idaho at 886.

Although Article 1, Section 17 and the Fourth Amendment are similar, Idaho's appellate courts "are not bound by the United States Supreme Court's interpretations of the Fourth

Amendment." *State v. Agundis*, 127 Idaho 587, 592 (Ct. App. 1995). As this Court recently stated:

> "The similarity of language and purpose . . . does not require this Court to follow United States Supreme Court precedent in interpreting our own constitution." *State v. Donato*, 135 Idaho 469, 471 (2001). "Long gone are the days when state courts will blindly apply United States Supreme Court interpretation and methodology when in the process of interpreting their own constitutions." *Id.*

State v. Koivu, 152 Idaho 511, 518 (2012). This Court is "at liberty to find within the provisions of their constitutions greater protection than is afforded under the federal constitution as interpreted by the United States Supreme Court." *Donato*, 135 Idaho at 471; *see also State v. Guzman*, 122 Idaho 981, 987–88 (1992) (discussing this Court's power to interpret the Idaho Constitution independently and grant Idaho citizens more protection). As a result, this Court has "construed Article I, section 17, to provide greater protection than is provided by the United States Supreme Court's construction of the Fourth Amendment" "[i]n some instances." *Koivu*, 152 Idaho at 519. This Court provides "greater protection to Idaho citizens based on the uniqueness of our state, our Constitution, and our long-standing jurisprudence." *Id.* (quoting *Donato*, 135 Idaho at 472).

One instance of greater protection to Idaho citizens involves warrantless arrests for misdemeanors. Generally, a warrantless seizure is presumptively unreasonable under the Idaho Constitution, unless the State shows the seizure fits within a well-established exception to the warrant requirement. *Green*, 158 Idaho at 886–87; *see also Halen v. State*, 136 Idaho 829, 833 (2002) ("When a warrantless search or seizure is challenged by the defendant, the State bears the burden to show that a recognized exception to the warrant requirement is applicable."); *State v. Hunter*, 156 Idaho 568, 570 (Ct. App. 2014) (same). To determine whether a warrantless arrest is reasonable under the Idaho Constitution, this Court examines the statutory and common law in

effect at the time of the constitutional provision's adoption. *Green*, 158 Idaho at 887–88 (citing *Higer v. Hansen*, 67 Idaho 45, 55 (1946); *see also* IDAHO CONST. art. XXI, § 2 ("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."); *State v. Mathews*, 129 Idaho 865, 869 (1997) (stating substantive rights present in Idaho law prior to the Idaho Constitution were "affirmed by Article XXI, Section 2 of the Idaho Constitution")). With respect to warrantless arrests for misdemeanors, the law in effect at the time of the Idaho Constitution's adoption flatly prohibited such arrests unless the misdemeanor was committed or attempted in the officer's presence. This prohibition of after-the-fact arrests for completed misdemeanors is not truly unique to the State of Idaho,[5] but nonetheless it provides its citizens with greater protection and is supported by Idaho's long-standing jurisprudence.

a. *The law in effect at the time of the Idaho Constitution's adoption barred warrantless arrests for completed misdemeanors*

At the time of the adoption of the Idaho Constitution in 1890, "the law governing warrantless arrests by peace officers in Idaho was found in Title III, Chapter V, Section 7540 of the Idaho Revised Statutes." *Green*, 158 Idaho at 888. It provided:

> A peace officer may make an arrest in obedience to a warrant delivered to him, *or may, without a warrant, arrest a person*:
>
> 1. *For a public offense committed or attempted in his presence*;
>
> 2. When a person arrested has committed a *felony*, although not in his presence;

[5] "Thirty-eight states, and the District of Columbia, currently institute presence requirements before an officer can make a warrantless arrest for a misdemeanor offense." Justin Rhodes, *Common Law, Common Sense? How Federal Circuit Courts Have Misapplied the Fourth Amendment and Why Officers Must be Present to Make a Warrantless Arrest for a Misdemeanor Offense*, 53 No. 4 CRIM. LAW BULL. art. 1 (2017).

> 3. When a *felony* has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it;
>
> 4. On a charge made, upon a reasonable cause, of the commission of a *felony* by the party arrested;
>
> 5. At night, when there is reasonable cause to believe that he has committed a *felony*.

Revised Statutes of the Territory of Idaho, Pt. 4 (Penal), Pt. 2 (Of Criminal Procedure), Title III, Ch. V, § 7540 (1887) (emphasis added) (*hereinafter*, R.S. § 7540); *see also Green*, 158 Idaho at 888. "[A]rrests made under the circumstances specified in this statute should be accepted as constitutionally reasonable under the Idaho Constitution." *Green*, 158 Idaho at 888. For felony offenses, this statute includes multiple specific circumstances for constitutionally reasonable arrests. R.S. § 7540(2)–(5). But for a "public offense," which includes a misdemeanor, there is only one constitutionally permissible circumstance for a warrantless arrest: "committed in [the peace officer's] presence." R.S. § 7540(1); *see also Green*, 158 Idaho at 888 (citing to *State v. Bowman*, 124 Idaho 936, 940 (Ct. App. 1993), for principle that "public offense" includes misdemeanors). "[A]n officer who arrests a person for a misdemeanor offense *committed in the officer's presence* has made a reasonable seizure under Article I, Section 17 of the Idaho Constitution." *Green*, 158 Idaho at 888 (emphasis added). As clearly laid out in R.S. § 7540, a police officer may arrest an individual for a misdemeanor without a warrant, but only if the offense occurred (or was attempted) in the officer's presence.

b. *The long-standing jurisprudence of Idaho's appellate courts confirm this constitutional prohibition on warrantless arrests for completed misdemeanors*

This in-the-presence requirement has been repeatedly and consistently referenced by Idaho's appellate courts. In 1945, this Court examined the statute and stated, "From which it

would appear that in the case of misdemeanors, an arrest without a warrant can only be made when the offense is committed or attempted in the officer's presence." *State v. Hart*, 66 Idaho 217, 223 (1945).[6] In 1987, the Court of Appeals recognized that a police officer "had no authority to make a warrantless arrest for misdemeanor offenses committed outside his presence." *State v. Simpson*, 112 Idaho 644, 646 (Ct. App. 1987).[7] Similarly, in 1989, the Court of Appeals noted, "Although there are exceptions not applicable here, generally, an officer without a warrant can lawfully arrest a person for a misdemeanor only when the offense is "committed or attempted in his presence." *State v. Rodriguez*, 115 Idaho 1096, 1098 (Ct. App. 1989) (citing I.C. § 19-603(1); *State v. Simpson,* 112 Idaho 644, (Ct. App. 1987)); *see also State v. Wren*, 115 Idaho 618, 620 (Ct. App. 1989) (recognizing that Idaho codified the common law allowing an officer to "make a warrantless arrest for any crime, whether a felony or a

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[6] The *Green* Court reasoned:

> Though the Court in *Hart* does not expressly mention Article I, Section 17 of the Idaho Constitution, an analysis under that authority is implied because the case discusses only the Idaho Constitution and not the Federal Constitution and because the remedy discussed in that case was suppression of evidence, which applies only to constitutional violations unless otherwise specified by statute. Therefore, when the *Hart* Court considered whether the arrest was unlawful, it was presumably doing so to determine whether there was a reasonable search and seizure under Article I, Section 17 of the Idaho Constitution.

Green, 158 Idaho at 888 n.5.

[7] The *Simpson* Court cited to I.C. § 19-603 for this proposition, which, at the time, allowed an officer to make a warrantless arrest

> [w]hen at the scene of a domestic disturbance there is reasonable cause to believe, based upon physical evidence observed by the officer or statements made in the presence of the officers upon immediate response to a report of a commission of such a crime, that the person arrested has committed an assault or battery.

1979 Idaho Sess. Laws Ch. 307, § 1, p.832. The misdemeanor offenses at issue in *Simpson* concerned the operation of boats. 112 Idaho at 646.

misdemeanor, committed in his presence"). In 1993, the Court of Appeals stated, "If the misdemeanor is not committed in the officer's presence, however, the officer must obtain a warrant before making the arrest." *State v. Bowman*, 124 Idaho 936, 940 (Ct. App. 1993). This case law confirms that the commission (or attempt) of the misdemeanor in the officer's presence is a well-established prerequisite in order for a warrantless misdemeanor arrest to be reasonable and thus lawful under the Idaho Constitution.

c. *The Legislature's statutory amendment allowing warrantless arrests for certain completed misdemeanors does not eliminate Idaho's constitutional protections*

To be sure, the Legislature has amended R.S. § 7540 since the Idaho Constitution's adoption in 1890. The current version of R.S. § 7540 is codified at I.C. § 19-603. Notably, the "traditional warrantless arrest standards" contained in provisions (1) through (5) of R.S. § 7540 have not been changed.[8] *Green*, 158 Idaho at 888 n.4. However, the Legislature added two other circumstances permitting warrantless arrests. I.C. § 19-603(6)–(7). Relevant here, the Legislature added that a police officer could arrest an individual, without a warrant, "[w]hen upon immediate response to a report of a commission of a crime there is probable cause to believe, that the person arrested has committed" specific misdemeanors against another person, such as assault, stalking, and battery (the alleged misdemeanor here).[9] I.C. § 19-603(6). But, although this statutory amendment gives police officers the limited statutory authority to arrest without a warrant for

[8] In fact, the first five circumstances in R.S. § 7540, including "[f]or a public offense committed or attempted in his presence," were in effect as early as 1864. Statutes of the Territory of Idaho, Criminal Practice Act, Part III (Complaint, and Proceedings Thereon to the Commitment, Inclusive) §§ 130, 133 (1864).

[9] The Legislature also added that a police officer could arrest a person without a warrant for crimes committed on an aircraft. I.C. § 19-603(7).

certain misdemeanors, the constitutional protections remain intact. This Court recognized the disparity between the statutory and constitutional standards for warrantless arrests in *Green*:

> [T]he enactments and amendments of these statutes were not required to be made through the same rigorous standard as an amendment to the Idaho Constitution. *See* IDAHO CONST. art. XX, § 1. Because these subsequently enacted arrest standards did not exist at the time the Idaho Constitution was adopted, and because they were not incorporated by constitutional amendment, they cannot be considered part of the *constitutional* standard for what constitutes a reasonable seizure of the person. To hold otherwise would essentially allow the Legislature to amend the Idaho Constitution by the process of a statutory enactment or amendment.

158 Idaho at 888–89. Therefore, the Legislature's subsequent enactment of a statutory amendment allowing warrantless arrests for certain completed misdemeanors, including battery, does not and cannot diminish Idaho's constitutional protections.

d. *The district court should have granted Mr. Clarke's motion to suppress because the Idaho Constitution prohibited his warrantless arrest for a completed misdemeanor*

In light of this greater protection to Idaho citizens from warrantless arrests, Mr. Clarke's arrest was unreasonable under Article 1, Section 17 of Idaho Constitution. Officer Hanson arrested Mr. Clarke, without a warrant, for a completed misdemeanor hours after the offense allegedly occurred. (*See* Tr., p.18, L.14–p.19, L.7, p.25, Ls.7–9.) The offense was not committed or attempted in Officer Hanson's presence, which is required by the Idaho Constitution for a constitutionally reasonable warrantless misdemeanor arrest. (*See* Tr., p.19, Ls.8–10.) And, even though Mr. Clarke's arrest complied with the statutory amendment contained in I.C. § 19-603(6), Officer Hanson's statutory compliance has no bearing on "the *constitutional* standard for what constitutes a reasonable seizure of the person." *Green*, 158 Idaho at 889–89. Mr. Clarke's seizure was still unreasonable under Article 1, Section 17 and therefore violated his state constitutional rights.

Due to the unconstitutional arrest, all evidence obtained from Officer Hanson's search incident to Mr. Clarke's arrest and his later search at the jail must be suppressed. "The value of the exclusionary rule was recognized by this Court long before the United States Supreme Court required it for fourth amendment violations." *State v. Rauch*, 99 Idaho 586, 592 (1978). In 1992, this Court recognized, "Idaho has had an independent exclusionary rule based upon the state constitution for the past sixty-five years." *Guzman*, 122 Idaho at 991. "Idaho had clearly developed an exclusionary rule as a constitutionally mandated remedy for illegal searches and seizures in addition to other purposes behind the rule such as recognizing the exclusionary rule as a deterrent for police misconduct." *Donato*, 135 Idaho at 472. "The rule is well settled in this state that evidence, procured in violation of defendant's constitutional immunity from search and seizure, is inadmissible and will be excluded if request for its suppression be timely made." *Koivu*, 152 Idaho at 516 (quoting *State v. Conner*, 59 Idaho 695, 703 (1939)); *see also Rauch*, 99 Idaho at 592–93 (same). Accordingly, Idaho's independent exclusionary rule requires suppression of the evidence procured in violation of Mr. Clarke's state constitutional rights. Officer Hanson would not have found the evidence in Mr. Clarke's backpack and on his person but for the unlawful arrest. *See Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (discussing "the fruit of the poisonous tree" under the Fourth Amendment exclusionary rule); *State v. Bishop*, 146 Idaho 804, 810–11 (2009) (same). Therefore, the district court erred when it denied Mr. Clarke's motion to suppress. Mr. Clarke respectfully requests this Court reverse the district court's suppression ruling.

2. The Fourth Amendment Prohibits Warrantless Arrests For Misdemeanors Committed Outside The Police Officer's Presence

Although this Court can resolve this issue on state constitutional grounds, the Fourth Amendment of the U.S. Constitution also prohibits police officers from conducting warrantless

arrests for misdemeanors committed outside the officers' presence. Thus, in the alternative, Mr. Clarke argues his warrantless arrest for a completed misdemeanor violated his Fourth Amendment right to be free from unreasonable seizures.

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. "Warrantless searches and seizures are presumptively unreasonable under the Fourth Amendment." *State v. Wulff*, 157 Idaho 416, 419 (2014). "When seizure occurs without a warrant, the government bears the burden of proving facts necessary to establish an exception to the warrant requirement." *State v. Jenkins*, 143 Idaho 918, 920 (2007).

"In the context of the Federal Constitution and its interpreting case law, an arrest is 'lawful' if 'officers have probable cause to believe that a person has committed a crime in their presence' even if such an arrest does not comply with state statutes governing arrests." *Green*, 158 Idaho at 887 (quoting *Virginia v. Moore*, 553 U.S. 164, 174–78 (2008)). However, the U.S. Supreme Court has explicitly declined to "speculate whether the Fourth Amendment entails an 'in the presence' requirement for purposes of misdemeanor arrests." *Atwater v. City of Lago Vista*, 532 U.S. 318, 341 n.11 (2001).[10] Even though it is an open question, the U.S. Supreme

[10] In this footnote, the U.S. Supreme Court cited to and quoted parenthetically from Justice White's dissent in *Welsh v. Wisconsin*, 466 U.S. 740 (1984): "[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." *Atwater*, 532 U.S. at 341 n.11 (quoting *Welsh*, 466 U.S. at 756 (White, J., dissenting)). *But see Davis v. United States*, 328 U.S. 582, 614 (1946) (Frankfurter, J., dissenting) ("That crime, like the others, was only a misdemeanor, and no arrest can be made for a misdemeanor without a warrant unless it be committed in the presence of officers."). A majority of federal circuit courts have held the Fourth Amendment does not mandate the "in-the-presence" condition; however, all but one of these cases are federal civil

Court's dicta since 1885, history from the Framing era, and traditional standards of reasonableness all lead to the conclusion that the Fourth Amendment entails an in-the-presence requirement for warrantless misdemeanor arrests.

a. *Dicta from the U.S. Supreme Court strongly suggests the U.S. Supreme Court would hold the Fourth Amendment prohibits warrantless arrests for completed misdemeanors*

For over a century, U.S. Supreme Court dicta has supported the position that warrantless arrests for misdemeanors are only reasonable under the Fourth Amendment if the misdemeanor was committed in the police officer's presence. As early at 1885, the U.S. Supreme Court noted:

> By the common law of England, neither a civil officer nor a private citizen had the right, without a warrant, to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate.

Kurtz v. Moffitt, 115 U.S. 487, 498–99 (1885). Fifteen years later, the U.S. Supreme Court recognized, "So an officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence." *Bad Elk v. United States*, 177 U.S. 529, 534 (1900). In *Carroll v. United States*, the U.S. Supreme Court again noted, "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence." 267 U.S. 132, 156–575 (1925) (citing *Kurtz*, 115 U.S. 487; *Bad Elk*, 177 U.S. 529). About fifty years later, in *United States v. Watson*, the U.S. Supreme Court stated:

> The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a

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rights actions under 42 U.S.C. § 1983. *See Graves v. Mahoning Cnty.*, 821 F.3d 772, 778–80 (6th Cir. 2016) (collecting cases, discussing arguments on both sides, and indicating a willingness to revisit its precedent).

> misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.

423 U.S. 411, 418 (1976); *accord Payton v. New York*, 445 U.S. 573, 590 n.30 (1980). More recently, in *Atwater*, 532 U.S. 318 (2001), the U.S. Supreme Court reasoned, "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Id.* at 354. A couple of years later, in *Maryland v. Pringle*, 540 U.S. 366 (2003), the U.S. Supreme Court reiterated, "A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Id.* at 370. The U.S. Supreme Court repeated this principle in *Virginia v. Moore*, 553 U.S. 164 (2008): "In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable." *Id.* at 171. Therefore, while the U.S. Supreme Court has not squarely addressed the issue, the U.S. Supreme Court has said time and time again that a lawful warrantless arrest for a misdemeanor requires that the offense occurs in the officer's presence.

b. *History proves the Fourth Amendment was meant to preserve the norm prohibiting warrantless arrests for completed misdemeanors*

Along with the U.S. Supreme Court's continued reference to this principle, Framing-era common law supports this Fourth Amendment interpretation. The U.S. Supreme Court "begin[s] with history" to determine reasonableness under the Fourth Amendment. *Moore*, 553 U.S. at 168. The U.S. Supreme Court looks "to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Id.* (citing *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995)). If history

"yields no answer," then the U.S. Supreme Court "must evaluate the search or seizure under traditional standards of reasonableness . . . ." *Houghton*, 526 U.S. at 299–300; *accord Moore*, 553 U.S. at 171.

Here, it is unnecessary to evaluate the traditional reasonableness standards because history is conclusive. Under the common law, warrantless arrests for misdemeanors were prohibited unless the misdemeanor occurred in the officer's presence. *See Watson*, 423 U.S. at 418 ("ancient common-law rule") (citing 10 HALSBURY'S LAWS OF ENGLAND 344–45 (3d ed. 1955); 4 W. BLACKSTONE, COMMENTARIES *292; 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883); 2 M. HALE, PLEAS OF THE CROWN *72–74; Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 547–50, 686–88 (1924); *Samuel v. Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K.B. 1780); *Beckwith v. Philby*, 6 Barn. & Cress. 635, 108 Eng. Rep. 585 (K.B. 1827)); *see also Kurtz* 115 U.S. at 498–99 ("the common law of England"); *Bad Elk*, 177 U.S. at 534 ("at common law"); *Carroll*, 267 U.S. at 156–575 ("usual rule"). "This has also been the prevailing rule under state constitutions and statutes." *Watson*, 423 U.S. at 419. "The rule barring warrantless misdemeanor arrests originated in England. In 1710, in *Regina v. Tooley*, [2 Lord Raymond 1296, 92 Eng. Rep. 349 (1710),] Lord Holt summarized the English rule with the statement that 'a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest.'" William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 788 (1993) (quoting *Regina*, 2 Lord Raymond at 1301, 92 Eng. Rep. at 352) (footnotes omitted). Similar to the English common law, early American common law barred warrantless misdemeanor arrests unless the misdemeanor was committed in the police officer's presence. During the Framing era, the common law justifications for any warrantless arrest were very limited. Thomas Y. Davies, *Recovering the*

Original Fourth Amendment, 98 MICH. L. REV. 547, 627–34 (1999). Warrantless misdemeanor arrests in the presence of the police officer, or "on view," was one of these narrow justifications:

> The "on view" justification . . . was the *only* justification for a warrantless misdemeanor arrest. Common law did not provide any justification for making a warrantless misdemeanor arrest after-the-fact; in that case, only a judicial arrest warrant could justify the arrest. This limitation was significant because many serious crimes (that are now felonies) were misdemeanors at common law.
>
> The restriction against making warrantless misdemeanor arrests after-the-fact meant that even a person guilty of a completed misdemeanor could lawfully resist a constable's attempt to make a warrantless arrest for that offense. Likewise, even a convicted misdemeanant could bring a trespass action against an officer who had arrested him after-the-fact without a valid arrest warrant. Because it was more important to apprehend felons than misdemeanants, the common law provided somewhat broader justifications for felony arrests. . . .

Id. at 630–31 (emphasis added) (footnotes omitted). As shown by these authorities, history provides a definitive answer: the Fourth Amendment preserved the common law "norm" barring warrantless misdemeanor arrests unless the misdemeanor was committed in the police officer's presence. *See Moore*, 553 U.S. at 168.

c. *Traditional standards of reasonableness render warrantless arrests for completed misdemeanors unreasonable because the severe intrusion on an individual's privacy outweighs the State's interests*

Even if history was inconclusive, the traditional standards of reasonableness would prohibit warrantless arrests for completed misdemeanors. "When history has not provided a conclusive answer," the U.S. Supreme Court analyzes "a search or seizure in light of traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Moore*, 553 U.S. at 171 (quoting *Houghton*, 526 U.S. at 300). On the reasonableness of misdemeanor arrests generally, the U.S. Supreme Court has recognized, "When the government's interest is only to arrest for a minor offense, that

presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate." *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (footnote omitted) (holding warrantless, nighttime arrest in defendant's home for traffic infraction unconstitutional). Here, a warrantless arrest for a completed misdemeanor is unreasonable in light of the invasiveness of the arrest upon an individual's privacy and the minimal necessity of these types of arrests to promote the State's interests.

On the one hand, the State's interest in arresting an individual suspected of committing a completed misdemeanor is low. "[T]he penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." *Id.* at 754 n.14. In Idaho, the default penalty for a misdemeanor is, at most, six months in county jail or a $1,000 fine.[11] I.C. § 18-113. This lesser penalty provides the "clearest and most consistent" indication of the State's level of interest. Moreover, the State's interest in the protection of society is greatly reduced in these situations. By its very nature, a completed misdemeanor has already occurred. The individual is no longer committing the crime; the danger to the public has dissipated. The police officer, upon receiving the report of the crime after-the-fact, can immediately apply for a warrant and, if granted, arrest the individual. This procedure ensures the State can investigate the crime and protect the public from future harm, while also diminishing the risk of an erroneous arrest. Thus, the degree to which a warrantless arrest for a completed misdemeanor is needed for the promotion of the State's legitimate interests is low.

[11] The penalty for the misdemeanor battery charged here is the same: a maximum of six months in jail or a $1,000 fine. I.C. § 18-904.

On the other hand, the degree to which a warrantless arrest for a completed misdemeanor intrudes on an individual's privacy is high. A full custodial arrest is a "severe intrusion on an individual's liberty." *Atwater*, 532 U.S. at 365 (O'Connor, J., dissenting). An arrest is far more invasive than a stop-and-frisk or a traffic stop. "An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons," and "it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." *Terry v. Ohio*, 392 U.S. 1, 26 (1968).

> A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. Although an arrestee cannot be held for a significant period without some neutral determination that there are grounds to do so, . . . no decision that he should go free can come quickly enough to erase the invasion of his privacy that already will have occurred.

Watson, 423 U.S. at 428 (Powell, J., concurring) (citation omitted). "[T]he custodial arrest itself represents a significant intrusion into the privacy of the person." *United States v. Robinson*, 414 U.S. 218, 256 (1973) (Powell, J., concurring).

Even a brief period of custody "exacts an obvious toll on an individual's liberty and privacy." *Atwater*, 532 U.S. at 364 (O'Connor, J., dissenting). The individual and his or her possessions can be searched by the police. *State v. LaMay*, 140 Idaho 835, 838 (2004) (search incident to arrest exception). If the individual was in a vehicle, the police may be able to search the vehicle as well. *State v. Frederick*, 149 Idaho 509, 513–16 (2010) (search of vehicle incident to arrest exception). The individual is handcuffed, put in the back of a locked police car, and taken to jail. Booking procedures can include fingerprinting, a mug shot,[12] and potentially a more

[12] For example, the Ada County Sheriff's Office maintains a website where anyone can view the name, age, charge, and mug shot of any arrestee from the last five days. *See* Current Arrests, *available at* https://adasheriff.org/webapps/sheriff/reports/.

invasive body search. *See* I.C. § 67-3004 (requiring fingerprinting upon arrest). In Idaho, an individual can be held up to twenty-four hours (excluding weekends and holidays) before his or her first appearance before a magistrate. I.C. § 19-615; Idaho Criminal Rule 5(b). All of these components of a custodial arrest—physical restraint, multiples searches, fingerprinting, photographs, and pre-trial detention—demonstrate the immense degree to which an arrest intrudes upon an individual's privacy.

On balance, the intrusion upon an individual's privacy from an arrest substantially outweighs the State's interest in foregoing a warrant and arresting an individual after-the-fact for a completed misdemeanor. Accordingly, the traditional standards of reasonableness support a determination that the Fourth Amendment prohibits warrantless arrests for misdemeanors committed outside the police officer's presence.

d. *In the alternative, the district court should have granted Mr. Clarke's motion to suppress because the Fourth Amendment prohibited his warrantless arrest for a completed misdemeanor*

The Fourth Amendment includes an in-the presence requirement for the warrantless arrest of a misdemeanor. Century-old U.S. Supreme Court dicta, applicable history from the Framing era, and traditional standards of reasonableness all stand for this constitutional protection. Therefore, if this Court should address this issue, Mr. Clarke asserts the district court erred by denying his motion to suppress on Fourth Amendment grounds. Officer Hanson's warrantless arrest for a completed misdemeanor violated Mr. Clarke's Fourth Amendment rights. All evidence obtained from the search incident to Mr. Clarke's arrest and his search at the jail was the fruit of the unlawful arrest. *See Wong Sun*, 371 U.S. at 487–88 ("the fruit of the poisonous tree"); *Bishop*, 146 Idaho at 810–11 (same). The district court should have suppressed

this evidence. Therefore, Mr. Clarke respectfully requests this Court reverse the district court's order denying his motion to suppress.

II.

The Prosecutor Committed Misconduct And Thereby Violated Mr. Clarke's Right To A Fair Trial By Misstating The Evidence In Her Closing Argument

A. Introduction

Mr. Clarke contends the prosecutor committed misconduct by misstating the evidence in her closing argument on the key, contested element at trial: whether Mr. Clarke had knowledge of the trace amount of methamphetamine in the syringe in his shoe. The prosecutor misstated the evidence twice—once in her initial closing argument and once on rebuttal. Mr. Clarke objected to the second misrepresentation, but not the first. He contends these misrepresentations violated his constitutional right to a fair trial, and these errors were not harmless.

B. Standard Of Review

> If the alleged error was followed by a contemporaneous objection at trial, appellate courts shall employ the harmless error test articulated in *Chapman* [*v. California*, 386 U.S. 18 (1967)]. Where the defendant meets his initial burden of showing that a violation occurred, the State then has the burden of demonstrating to the appellate court beyond a reasonable doubt that the constitutional violation did not contribute to the jury's verdict.

State v. Perry, 150 Idaho 209, 227 (2010). If the error was unpreserved, this Court reviews the error under the fundamental error standard. *Id.* at 228. Under this standard, the defendant has the burden to show the error "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." *Id.*

C. The Prosecutor Committed Misconduct Because She Misstated The Evidence On The Dispositive, Contested Element Of The Felony Charge Two Separate Times In Her Closing Argument

"[E]very defendant has a Fourteenth Amendment right to due process and '[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Perry*, 150 Idaho at 224 (second and third alterations in original) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009)). "Prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process under the Fourteenth Amendment to the United States Constitution." *State v. Jimenez*, 159 Idaho 466, 472 (Ct. App. 2015) (citing *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Perry*, 150 Idaho at 227; *State v. Gamble*, 146 Idaho 331, 344 (Ct. App. 2008)). "As public officers, prosecutors have a duty to ensure that defendants receive fair trials." *State v. Severson*, 147 Idaho 694, 715 (2009) (citing *State v. Irwin*, 9 Idaho 35, 43–44 (1903)). "They should not 'exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused.'" *State v. Parker*, 157 Idaho 132, 144 (2014) (quoting *State v. Christiansen*, 144 Idaho 463, 469 (2007) (alteration in original)). "Where 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, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227.

> Closing argument is an opportunity for the attorneys on each side to clarify the issues that must be resolved by the jury; to review the evidence and discuss, from the parties' respective standpoints, the inferences that jurors should draw therefrom; and to discuss the law set forth in the jury instructions as it applies to the trial evidence.

State v. Erickson, 148 Idaho 679, 685 (Ct. App. 2010) (citing *State v. Beebe*, 145 Idaho 570, 576 (Ct. App. 2007)). "Both sides have traditionally been afforded considerable latitude in closing

argument to the jury . . . ." *State v. Sheahan*, 139 Idaho 267, 280 (2003). "Considerable latitude, however, has its limits, both in matters expressly stated and those implied." *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). "Urgings, explicit or implied, for the jury to render a verdict based on factors other than the evidence admitted at trial and the law contained in the jury instructions have no place in closing arguments." *Erickson*, 148 Idaho at 685 (quoting *Beebe*, 145 Idaho at 576)).

"It is plainly improper for a party to present closing argument that misrepresents or mischaracterizes the evidence." *Beebe*, 145 Idaho at 575; *see also State v. Lankford*, 162 Idaho 477, ___, 399 P.3d 804, 829 (2017) (same). "Indeed, the prosecutor has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics." *Lankford*, 162 Idaho at ___, 399 P.3d at 829 (quoting *State v. Moses*, 156 Idaho 855, 871 (2014)).

Here, the only contested element for the possession of methamphetamine charge was Mr. Clarke's knowledge. In defense counsel's opening statement, he informed the jury that they would not "hear much argument" about the marijuana, paraphernalia, and the syringe in Mr. Clark's shoe. (Tr., p.127, Ls.11–20.) Instead, defense counsel challenged Mr. Clarke's knowledge of the methamphetamine and questioned whether the State would meet its burden of proof. (Tr., p.127, L.20–p.129, L.4.) After the presentation of evidence, the prosecutor addressed the knowledge element in her closing argument. She stated:

> 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.

(Tr., p.183, Ls.10–18 (emphasis added).) Defense counsel did not object at this time. Next, in defense counsel's closing argument, he conceded that Mr. Clarke knew he had a syringe in his

shoe, but he disputed whether Mr. Clarke had knowledge of the trace amount of methamphetamine inside the syringe. (*See* Tr., p.184, Ls.9–21, p.185, L.24–p.1, p.188, Ls.17–19.) He argued the State did not prove this essential element beyond a reasonable doubt. (*See* Tr., p.184, L.21–p.189, L.3.) The prosecutor then began her rebuttal by stating, "Did Mr. Clarke know this was methamphetamine?" (Tr., p.189, Ls.6–7.) She discussed defense counsel's "version" of how Mr. Clarke came to have the syringe in his shoe. (Tr., p.189, Ls.8–17.) After that, she argued:

> He kept it hidden in his shoe because he didn't want the deputy to find it. He was already being arrested. He had – the deputy had already found marijuana.[13] . . . 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, asks about controlled substances, asks 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.
>
> [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. That's not what I can do. We don't know what's running through someone's mind, but what we do know 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.

(Tr., p.189, L.14–p.190, L.18 (emphasis added).) Thus, the prosecutor first told the jury that Officer Hanson told Mr. Clarke he could not have "drugs" in the jail. Second, she told the jury that Mr. Clarke elected to tell Officer Hanson there was a syringe in his shoe *after* Officer Hanson asked him about "controlled substances" and "drugs specifically" on his person. This

[13] Immediately after this statement, defense counsel made a separate objection, which is not at issue here.

evidence, according to the prosecutor, satisfied her burden to prove Mr. Clarke's knowledge of the methamphetamine beyond a reasonable doubt.

Both of these statements—that Officer Hanson told Mr. Clark "can't bring drugs in here" and asked Mr. Clarke about "controlled substances" and "drugs specifically"—were misrepresentations of the evidence. Officer Hanson did not tell or ask Mr. Clarke about drugs or controlled substances. When asked by the prosecutor to describe "generally what happens when someone's brought to jail," Officer Hanson testified:

> 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 it into a 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.

(Tr., p.138, Ls.7–15 (emphasis added).) The prosecutor followed up on this procedure by asking Officer Hanson:

> Q. So as you're walking Mr. Clarke in did you ask him any questions?
>
> A. I did.
>
> Q. What did 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.

(Tr., p.138, L.23–p.139, L.3 (emphasis added).) "Anything illegal" is not "controlled substances" and "drugs specifically." Anything illegal means any unlawful item, such as paraphernalia or a weapon. It is certainly not limited to drugs. The prosecutor had a duty to avoid a

misrepresentation of the evidence, and she failed that duty twice. *Lankford*, 162 Idaho at ___, 399 P.3d at 829. Under the fundamental error standard for the first misstatement and the harmless error standard for the second, Mr. Clarke has meet his burden to show a violation of his constitutional right to due process and a fair trial because the prosecutor committed misconduct by misrepresenting Officer Hanson's testimony to the jury.

For the first, unobjected-to misstatement ("can't bring drugs in here"), this constitutional violation is clear and plain from the record. This Court recently reaffirmed, "It is improper to misrepresent or mischaracterize the evidence in closing argument." *Lankford*, 162 Idaho at ___, 399 P.3d at 829 (2017) (quoting *State v. Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)). This Court has identified the prosecutor's "duty to avoid a misrepresentation of the facts" for over thirty years. *State v. Griffiths*, 101 Idaho 163, 166 (1980) (holding that a prosecutor's closing statements were improper because they were "unsustained by the record"), *overruled on other grounds by State v. LePage*, 102 Idaho 387 (1981). There is no tactical or strategic reason for defense counsel to fail to object to the prosecutor's misstatement of the evidence on the only contested element at trial, especially considering that defense counsel did object later on to a similar misstatement in the prosecutor's rebuttal. Defense counsel gains no benefit or advantage by allowing the prosecutor—who occupies an official position that necessarily leads jurors to give more credence to her statements—to misrepresent evidence to the jury. *See State v. Irwin*, 9 Idaho 35, 43–44 (1903). Mr. Clarke has met his burden to show a violation of his unwaived constitutional right to a fair trial plainly exists from the first misstatement.

Moreover, each of the prosecutor's misrepresentations prejudiced Mr. Clarke. For the first misstatement, Mr. Clarke has the burden to show "there is a reasonable possibility that the error affected the outcome of the trial." *Perry*, 150 Idaho at 226. Here, the prosecutor's

misrepresentation was highly relevant, if not dispositive, on the contested issue of Mr. Clarke's knowledge of the methamphetamine inside the syringe. According to the prosecutor, Mr. Clarke did not say anything about the syringe until Officer Hanson told him that he "can't bring drugs" in the jail. The prosecutor argued Mr. Clarke's admission at that very moment, precipitated by Officer Hanson's "drugs" statement, proved Mr. Clarke's knowledge of the methamphetamine. This misrepresentation plainly bolsters the State's case. It supports a finding by the jury that Mr. Clarke had knowledge of the specific substance inside his shoe. On the other hand, the actual evidence at trial showed only that Mr. Clarke admitted to having "a rock" in his shoe after Officer Hanson asked him if he had "anything illegal" on him. (Tr., p.138, L.23–p.139, L.3.) This evidence supports a finding that Mr. Clarke had knowledge of the syringe, but not necessarily what was inside. Mr. Clark's admission to knowledge of the syringe only is entirely reasonable because, at this point, Mr. Clarke had already been arrested for possession of drug paraphernalia. He was aware that paraphernalia qualified as "anything illegal." As such, the jury could have reasonably inferred Mr. Clarke made the admission not because he knew of the substance inside the syringe but because he understood the syringe itself to be illegal. Therefore, Mr. Clarke has shown there is a reasonable possibility that the prosecutor's misrepresentation on the only contested element at trial affected the outcome.

Moreover, the prosecutor's second misstatement had a similar prejudicial effect, and the State cannot meet its burden to show this error did not contribute to the jury's verdict. *Perry*, 150 Idaho at 227. Again, according to the prosecutor's misstatement, Mr. Clarke was asked if he had "controlled substances" or "drugs specifically" on him, and "[t]hat is when Mr. Clarke decided to say there's something in there, I remember now, there's a syringe in my shoe." (Tr., p.190, Ls.8–

10.) This too bolsters the State's case with misrepresented evidence. The State cannot show this error was harmless.

In summary, the prosecutor committed misconduct in her closing argument by misrepresenting the evidence two separate times to the jury. This misconduct violated Mr. Clarke's unwaived constitutional right to a fair trial. For the first misstatement, which was not objected-to, the error is obvious from the record and was not harmless. For the second misstatement, the State cannot prove beyond a reasonable doubt that this error was harmless. Based on either or both instance of prosecutorial misconduct, Mr. Clarke respectfully requests this Court vacate his judgment of conviction and remand his case for a new trial.

CONCLUSION

On the motion to suppress issue, Mr. Clarke respectfully requests this Court reverse or vacate the district court's order denying his motion to suppress, vacate the judgment of conviction, and remand this case for further proceedings. Alternatively, on the prosecutorial misconduct issue, Mr. Clarke respectfully requests this Court vacate the judgment of conviction and remand this case for a new trial.

DATED this 14th day of November, 2017.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of November, 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:

PETER O'DONALD CLARKE
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APT 221
COEUR D'ALENE ID 83814

JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

BENJAMIN M ONOSKO
KOOTENAI COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCS/eas