6-19-2018

State v. Woods Respondent's Brief Dckt. 45094

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45094**
Plaintiff-Respondent,	)	
	)	**Canyon County Case No.**
v.	)	**CR-2016-7911**
	)	
JAYSON L. WOODS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE GEORGE A. SOUTHWORTH
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR PLAINTIFF-RESPONDENT

JUSTIN M. CURTIS
BRIAN R. DICKSON
Deputy State Appellate Public Defenders
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712

ATTORNEYS FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature of the Case

Jayson L. Woods appeals from the judgment of the district court entered upon a jury verdict finding him guilty of first degree murder, conspiracy to commit robbery and accepting the earnings of a prostitute.

Statement of Facts and Course of Proceedings

Woods was running an escort service. (2/1/17 Tr., p. 1703, L. 3 – p. 1705, L. 18.) Abigail Williams would perform sexual acts with men for money and give the money to Woods. (1/30/17 Tr., p. 1482, L. 13 – p. 1495, L. 18; Ex. 104, 107, 107A.) They would post advertisements for sexual services on websites. (Id.) Woods would handle the communications with the clients. (Id.) Woods considered himself to be operating as a "manager." (Id.)

However, Woods decided that Ms. Williams was not bringing in enough money. (1/30/17 Tr., p. 1501, Ls. 1-3.) On the morning of April 27, 2016, Woods, Kelly Schneider and Daniel Henkel placed fake female escort advertisements. (2/1/17 Tr., p. 1712, L. 15 – p. 1715, L. 16.) The idea was to have people respond to the advertisements and then take their money. (Id.) When someone responded to a fake advertisement, Woods set up a meeting in an out of the way place near Lake Lowell. (Id.) The plan was when the client arrived, Mr. Schneider would "jump out of the woods, [and] grab the guy's money." (Id.) If need be Mr. Schneider would break the client's car window. (Id.)

However, when the client arrived, driving a white truck, he spotted Mr. Schneider and Mr. Henkel hiding in the woods, and drove off. (Id.)

The next night, Woods picked up Kevin Tracy, his half-brother. (1/23/17 Tr., p. 655, L. 10 – p. 669, L. 8.) Woods was driving and Mr. Schneider, Mr. Henkel and Ms. Williams were also in the car. (Id.) Woods and the others put up a fake female advertisement. (1/30/17 Tr., p. 1501, L. 19 – p. 1502, L. 2.) The idea was they would ambush whoever responded and take their money. (Id.)

In addition, Mr. Schneider, Mr. Tracy and Mr. Henkel all posted online advertisements using their own pictures and offering to perform sexual acts with men for money. (1/30/17 Tr., p. 1504, L. 23 – p. 1506, L. 5.) However, Mr. Schneider and Mr. Tracy were both straight and only Mr. Henkel, who was bisexual, was going to actually perform the sexual acts. (Id.) The plan was if anyone responded to Mr. Schneider's or Mr. Tracy's advertisements they would just take the money and go without performing the sexual act. (Id.)

After driving around for a while, Mr. Schneider informed the car that someone responded to his online advertisement on Backpage.com and they were going to meet at Walmart. (1/23/17 Tr., p. 669, L. 12 – p. 676, L. 20.) The person who responded was later identified as Steven Nelson. (1/23/17 Tr., p. 774, Ls. 2-14; 1/24/17 Tr., p. 843, L. 6 – p. 844, L. 6; 1/26/17 Tr., p. 1153, L. 10 – p. 1154, L. 7; Exs. 21-23.)

Woods dropped Mr. Schneider off at Walmart. (1/23/17 Tr., p. 676, L. 18 – p. 679, L. 19.) When Mr. Schneider got back into the car it looked like he had been running. (Id.) Mr. Schneider explained that he took the money from Mr. Nelson without performing the sexual act. (Id.) Mr. Schneider gave the money to Woods, and Woods gave some of it back to Mr. Schneider. (Id.)

After driving around some more, Mr. Nelson began texting Mr. Schneider again. (1/23/17 Tr., p. 685, L. 1 – p. 687, L. 23.) Mr. Nelson wanted to meet back up with Mr. Schneider. (Id.) Woods told Mr. Schneider what to text to Mr. Nelson. (Id.) Woods, Mr. Schneider, Mr. Tracy, Mr. Henkel and Ms. Williams went to a gas station. (1/30/17 Tr., p. 1511, L. 7 – p. 1512, L. 16.) Woods told Ms. Williams to take her time in the store because he needed to talk to the men without her presence. (Id.) Woods did not trust Ms. Williams because she had called the police on him before. (1/30/17 Tr., p. 1543, L. 14 – p.1544, L. 5, p. 1545, Ls. 7-23.)

After leaving the gas station, Woods drove Mr. Henkel and Mr. Tracy to Lake Lowell and dropped them off. (1/23/17 Tr., p. 693, L. 21 – p. 696, L. 18.) Woods asked them if they were in it "100 percent." (1/23/17 Tr., p. 693, L. 21 – p. 696, L. 18; 1/26/17 Tr., p. 1170, L. 22 – p. 1171, L. 11; 1/30/17 Tr., p. 1515, Ls. 12-19; 1/31/17 Tr., p. 1650, L. 15 – p. 1651, L. 3.)

Woods told Mr. Tracy and Mr. Henkel to hide in the bushes because it would be easier for them to run up and help Mr. Schneider. (1/30/17 Tr., p. 1513, L. 7 – p. 1514, L.

12.) Woods told them, "No matter what, get the money." (1/23/17 Tr., p. 693, L. 21 – p. 696, L. 18.) Woods then drove Mr. Schneider to Walmart to re-meet up with Mr. Nelson. (See 1/23/17 Tr., p. 689, Ls. 22-25.) The plan was Mr. Nelson would drive Mr. Schneider to Lake Lowell near Gott's Point, where Mr. Tracy and Mr. Henkel were hiding. (Id.) Woods texted Mr. Schneider and instructed Mr. Schneider to steal Mr. Nelson's car. (2/1/17 Tr., p. 1832, L. 18 – p. 1833, L. 19.)

Mr. Tracy and Mr. Henkel hid down by the lake, near Gott's Point. (1/23/17 Tr., p. 704, L. 21 – p. 706 L. 21; Ex. 179.) While he was hiding, Mr. Tracy texted back and forth with Woods. (1/23/17 Tr., p. 706, L. 22 – p. 708, L. 2.) Mr. Henkel informed Woods that he would use the pipe to get Mr. Nelson out of his car if he needed to. (Id.) Woods responded "Good. Do what you have to." (Id.) After about 30 minutes, Mr. Schneider texted and said he was on his way. (Id.) Mr. Tracy heard a car pull up and people get out. (1/23/17 Tr., p. 707, L. 25 – p. 711, L. 3; Ex 189.) After a couple of minutes Mr. Tracy heard a scuffle and Mr. Schneider yelled for Mr. Henkel. (Id.)

Mr. Tracy saw Mr. Schneider on top of Mr. Nelson with a knee in his back, and pushing his face into the dirt. (1/23/17 Tr., p. 711, L. 4 – p. 714, L. 24; 1/26/17 Tr., p. 1153, L. 10 – p. 1154, L. 7.) Mr. Schneider repeatedly yelled different versions of "Why do you think I would do this again?" (Id.) Mr. Nelson screamed in pain, "Please don't hurt me. You can have whatever you want." (Id.) Mr. Nelson was on the ground and did not fight back. (Id.) Mr. Schneider threw Mr. Nelson's shoes. (Id.) Mr. Schneider

kicked Mr. Nelson 20 to 30 times. (Id.) Mr. Schneider was wearing tan army combat boots. (Id.) Mr. Schneider yelled at Mr. Tracy to get into the victim's car. (Id.)

Mr. Schneider kept beating Mr. Nelson and stripped him of all his clothes. (1/23/17 Tr., p. 713, L. 20 – p. 719, L. 10; Ex. 96.) Mr. Schneider threw the clothes in the back of Mr. Nelson's car. (Id.) Mr. Schneider drove off with Mr. Tracy and then picked up Mr. Henkel. (Id.) They drove around looking for a place to ditch Mr. Nelson's car. (1/23/17 Tr., p. 719, L. 2 – p. 726, L. 14.) They dropped Mr. Nelson's car off at some apartments, and then walked over to K-Mart where they were picked up by Woods and Ms. Williams. (Id.)

Woods asked Mr. Schneider if they left the victim breathing, and Mr. Schneider said "Yes. Bloody but breathing." (1/23/17 Tr. p. 726, Ls. 10-16.) Woods did not appear surprised and was calm. (1/23/17 Tr., p. 727, Ls. 5-23.) Woods did not show any remorse. (1/24/17 Tr., p. 776, Ls. 5-12.) They split the money taken from Mr. Nelson, but Mr. Henkel did not get any because he ran away. (1/31/17 Tr., p. 1651, L. 19 – 1652, L. 10.) Woods told them to keep their mouths shut. (1/30/17 Tr., p. 1546, L. 18 – p. 1547, L. 14.)

After he was beaten and stripped naked, Mr. Nelson started looking for help. (See 1/24/17 Tr., p. 831, L. 3 – p. 833, L. 7, p. 835, L. 5 – p. 839, L. 1, p. 861, L. 18 – p. 863, L. 25; Ex. 4.) After banging on doors, local resident called 911 and Deputy Odenborg responded. (1/24/17 Tr., p. 841, L. 24 – p. 844, L. 6.) Mr. Nelson told Deputy Odenborg

that he had responded to an advertisement from Backpage.com for a male escort. (1/24/17 Tr., p. 846, L. 8 – p. 848, L. 22.) He was beaten, stripped, and his car stolen. (Id.) Mr. Nelson explained that he had Hepatitis C, cirrhosis of the liver, and it felt like his ribs were broken and he was "fairly certain" he was dying. (Id.) An ambulance responded and took Mr. Nelson to a hospital. (1/24/17 Tr., p. 848, L. 16 – p. 849, L. 4.)

Mr. Nelson was bleeding from the lungs and went into cardiac arrest. (1/24/17 Tr., p. 906, L. 14 – p. 919, L. 13.) Mr. Nelson died because of a heart attack that was the result of the attack. (1/25/17 Tr., p. 919, Ls. 7-13, p. 963, L. 22 – p. 964, L. 3, p. 977, Ls. 7-13.)

After Ms. Williams went home and got cleaned up, she became concerned and called the police. (1/30/17 Tr., 1537, Ls. 1-19.) After an investigation, a grand jury indicted Woods on four counts: murder in the first degree, robbery, conspiracy to commit robbery and accepting the earnings of a prostitute. (R., pp. 32-35.)

Thirty-five days before trial, the state moved to continue the jury trial because it was still having difficulty accessing the data in Woods' cell phone. (See R., pp. 206-209; see also 1/27/17 Tr., p. 1420, L. 14 – p. 1424, L. 18.) Woods objected and the district court denied the motion to continue. (R., pp. 208-209.) The case proceeded to jury trial. (R., pp. 412-424, 428-433, 453-460, 463-480, 491-501.)

At trial, Mr. Tracy testified that Woods was the one who was "pimping people out." (1/23/17 Tr., p. 688, Ls. 15-19.)

> Q. Under your understanding, what was Jayson's [Woods'] role in all this?
>
> A. He was supposed to be the person that makes the ads. He's basically the one pimping people out.

(1/23/17 Tr., p. 688, Ls. 15-19.) Mr. Tracy testified that Mr. Schneider was kicking Mr. Nelson in the stomach and chest and Mr. Tracy "could hear how hard the kick was when the boot hit the victim." (1/23/17 Tr., p. 749, L. 13 – p. 750, L. 4.) He also testified that when they met up with Woods after the attack, Woods did not show remorse and appeared "okay that this just happened." (1/24/17 Tr., p. 776, Ls. 5-12.)

Ms. Williams testified about Woods and the others putting up fake female advertisements in order to rob people that responded. (1/30/17 Tr., p. 1500, L. 19 – p. 1502, L. 2.) She also testified that if anyone responded to Mr. Schneider's or Mr. Tracy's advertisements they would just take the money and not perform the sexual act. (1/30/17 Tr., p. 1504, L. 23 – p. 1506, L. 5.) She also testified Mr. Schneider was very adamant that he was not going to perform a sexual act with Mr. Nelson because he was not gay. (1/30/17 Tr., p. 1513, L. 7 – p. 1514, L. 12.) The plan was to rob Mr. Nelson. (Id.)

Detective Wilson testified regarding the communications on Mr. Nelson's phone. (1/26/17 Tr., p. 1243, L. 7 – p. 1259; L.23; Exs. 148.) The police were also able to recover communications from Mr. Schneider's phone. (See 1/27/17 Tr., p. 1262, L. 25 – p. 1273, L. 4; Exs. 103, 147, 149, 152.)

Detective Lukasik, a computer forensic examiner, testified how the police extracted data from the cell phones. (1/27/17 Tr., p. 1346, L. 1 – p. 1364, L. 10; Exs. 139,143, 144,145, 147, 301) However, Detective Lukasik was unable to extract data from Woods' phone. (1/27/17 Tr., p. 1359, L. 1 – p. 1364, L. 10.) He reached out to FBI examiners. (Id.) He contacted an examiner in Omaha, who contacted FBI headquarters in Quantico. (Id.) After some time, the phone was returned to Detective Lukasik. (Id.) Detective Lukasik was then able to get permission to send the phone to Quantico, Virginia. (Id.) Eventually, an engineer in Quantico was able to provide a forensic image of Woods' phone, which is a "bit-by-bit copy of the contents of the phone." (Id.) Using the forensic image Detective Lukasik was able to process the phone and provide a report. (Id.) Detective Lukasik received the forensic image on Monday, January 23, 2017, and provided a working copy of his report regarding the data extraction on Tuesday, January 24, 2017, and was able to provide a final report "last night" on Thursday, January 26, 2017. (Id.)

The state moved to allow the engineer from Quantico, Steve Berrios, to testify via a video teleconference system, Skype, regarding how the data was extracted from Woods' phone. (1/27/17 Tr., p. 1420, L. 14 – p. 1424, L. 18.) The state had previously asked for a continuance on this basis and Woods had objected. (Id.) The state explained it had sent the phones out in May, approximately 8 months prior to trial, and exercised due diligence in trying to get the phones processed, and had only now gotten the report. (Id.)

Woods objected to the expert appearing via two-way video teleconference, because he believed it violated his Sixth Amendment right to confront witnesses. (1/27/17 Tr., p. 1420, L. 14 – p. 1424, L. 18.) The district court explained that it had done some research and had found cases that had allowed for testimony via video "to establish chain of custody and foundation for the admission of these things, of this type of evidence." (1/27/17 Tr., p. 1423, L. 12 – p. 1424, L. 18.) The district court allowed Mr. Berrios to testify and be cross-examined via video teleconference, so long as his testimony was only for foundational purposes. (Id.)

Mr. Berrios, a digital acquisition, data acquisition and recovery technician, testified, via video teleconference from Virginia, that he copied data from the phone and sent it to Detective Lukasik. (1/30/17 Tr., p. 1426, L. 10 – p. 1431, L. 22.) Woods cross-examined Mr. Berrios in open court. (1/30/17 Tr., p. 1431, Ls. 4-22.) Detective Bailey testified regarding extractions from Woods' cell phone. (1/30/17 Tr., p. 1432, L. 24 – p. 1447, L. 1, p. 1467, L. 12 – p. 1479, L. 13; Exs. 200, 201, 206, 206A, 208, 215 301.)

Detective Gentry testified that he interviewed Woods. (1/31/17 Tr., p. 1601, Ls. 8-19; Exs. 5-8.) Woods admitted to Detective Gentry that Mr. Schneider was going to rob Mr. Nelson at the lake. (1/31/17 Tr., p. 1621, L. 21 – p. 1622, L. 5.) Woods admitted that Mr. Schneider was not going to perform the sexual act, and was just going to take Mr. Nelson's money. (1/31/17 Tr., p. 1645, Ls. 9-23.) Woods said they split the money afterwards. (1/31/17 Tr., p. 1651, L. 19 – 1652, L. 10.) Woods told Mr. Schneider that if

he can do it, to go ahead and rob Mr. Nelson. (1/31/17 Tr., p. 1661, L. 13 – p. 1662, L. 9.)

Woods testified and admitted that he had accepted the earnings of a prostitute. (2/1/17 Tr., p. 1790, Ls. 1-23.) He also testified that on the morning of April 27, 2016, Woods, Mr. Schneider and Mr. Henkel placed fake female escort advertisements. (2/1/17 Tr., p. 1712, L. 15 – p. 1715, L. 16.) The idea was to have people respond to the advertisements and then take their money. (Id.) Woods admitted that he lied several times regarding this case in an attempt to keep himself out of trouble. (2/1/17 Tr., p. 1781, L. 25 – p. 1784, L. 20.)

Woods testified that when he dropped Mr. Schneider off to meet Mr. Nelson the second time, Mr. Schneider said he was going to take Mr. Nelson's money. (2/1/17 Tr., p. 1821, L. 16 – p. 1823, L. 5.) Woods knew Mr. Schneider was an aggressive and violent guy. (2/1/17 Tr., p. 1824, L. 21 – p. 1825, L. 17.) Woods testified that he texted Mr. Schneider, and instructed Mr. Schneider to steal Mr. Nelson's car. (2/1/17 Tr., p. 1832, L. 18 – p. 1833, L. 19.)

The jury found Woods guilty of accepting the earnings of a prostitute, conspiracy to commit robbery, robbery, and first degree murder. (2/2/17 Tr., p. 2001, L. 19 – p. 2002, L. 19; R., pp. 510-511.) At sentencing the state recommended the robbery charge be merged into the murder charge because it was a felony murder charge based on a robbery. (4/11/17 Tr., p. 199, L. 16 – p. 200, L. 6.) The district court agreed and stated

"[t]he robbery charge and sentence is subsumed by the murder charge in Idaho." (4/11/17 Tr., p. 235, Ls. 17-18.) The district court entered convictions for accepting the earnings of a prostitute, conspiracy to commit robbery, and first degree murder (R., pp. 579-583, 585-587.)

The district court sentenced Woods to life with twenty-three years fixed on the first degree murder conviction, and life with ten years fixed on the conspiracy to commit robbery. (R., pp. 585-587.) The district court ordered these two sentences to run concurrently. (Id.) The district court also sentenced Woods to five years plus ten years fixed for accepting the earnings of a prostitute, to run consecutively to the other sentences. (R., pp. 585-587.) Woods timely appealed. (R., pp. 588-592.)

ISSUES

Woods states the issues on appeal as:

> I. Whether the district court erred by permitting Steve Barrios [sic] to testify via Skype?
>
> II. Whether the district court committed fundamental error by imposing sentences for both the conspiracy charge and the felony murder charge in violation of Mr. Woods's right to be free from double jeopardy?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Woods failed to show the district court erred when it permitted Steve Berrios to testify via two-way video teleconference?

2. Has Woods failed to show the district court committed fundamental error when it imposed sentences for both conspiracy to commit robbery and first degree murder, because conspiracy to commit robbery is not a lesser included offense of first degree murder?

ARGUMENT

I.
The District Court Did Not Err By Permitting Steve Berrios To Testify Via Two-Way Video Teleconference

A. Introduction

The district court permitted Steve Berrios to testify via two-way videoconference from Quantico, Virginia, about foundational issues regarding the extraction of data from Woods' cell phone. (1/27/17 Tr., p. 1423, L. 12 – p. 1424, L. 18.) Woods cross-examined Mr. Berrios in open court. (1/30/17 Tr., p. 1431, Ls. 4-22.) On appeal, Woods claims his Sixth Amendment right to confrontation was violated because Mr. Berrios was not physically present in the courtroom. (See Appellant's brief, pp. 6-13.) Woods argues the district court was required to make a "necessity" finding, that an important public policy was served by having Mr. Berrios testify via two-way video teleconference. (See id.)

Woods' argument on appeal fails because a two-way video conference is different than a one-way video conference, which requires an important public policy under Maryland v. Craig, 497 U.S. 836, 844 (1990). Further, the Idaho Criminal Rules allow for testimony, like Mr. Berrios', to be presented via video conference, without the need of a necessity finding. See I.C.R. 43.2. Woods' right to confront witnesses was not violated.

Further, even if a necessity finding was required, the timing of the report, coupled with the physical and logistical problems of flying an expert engineer across the country and the limited nature of the testimony, means any necessity requirement was met. Woods has failed to show his right to confront witnesses was violated and has failed to show the district court erred.

B. Standard Of Review

"Constitutional issues are purely questions of law over which [the appellate court] exercises free review." State v. Baeza, 161 Idaho 38, 40, 383 P.3d 1208, 1210 (2016) (citing Morgan v. New Sweden Irr. Dist., 160 Idaho 47, 51, 368 P.3d 990, 994 (2016)). If the defendant objected at trial, and a constitutional error is established on appeal, a reversal is not necessary if the State proves beyond a reasonable doubt that the verdict would have been the same had the error not occurred. State v. Almaraz, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013) (citing State v. Perry, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010)).

C. The District Court Did Not Err When It Permitted Mr. Berrios To Give Limited Testimony Via Two-Way Video Teleconference

"The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" Craig, 497 U.S. at 844. The Confrontation Clause guarantees the defendant a face-to-face

meeting with witnesses appearing before the trier of fact. Id. (citing Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (additional citations omitted)). The United States Supreme Court has "never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." Id. (emphasis original). The "preference" is for "face-to-face confrontation" at trial. Id. at 848 (citation omitted). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 845. The Confrontation Clause is generally satisfied when the defendant is given a full and fair opportunity for cross-examination at trial. See id. at 847 (citing Delaware v. Fensterer, 474 U.S. 15, 22 (1985); Ohio v. Roberts, 448 U.S. 56, 69 (1980); California v. Green, 399 U.S. 149, 166 (1970); Kentucky v. Stincer, 482 U.S. 730, 739-744 (1987); Davis v. Alaska, 415 U.S. 308, 315-316 (1974); Douglas v. Alabama, 380 U.S. 415, 418 (1965); Pointer v. Texas, 380 U.S. 400, 406-407 (1965); 5 J. Wigmore, Evidence § 1395, p. 150 (J. Chadbourn rev. 1974)). "The salutary effects of face-to-face confrontation include 1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence." United States v. Gigante, 166 F.3d 75, 80 (2nd Cir. 1999) (citing Craig, 497 U.S. at 845-

846). The Eleventh Circuit determined that where video testimony preserved these four characteristics of in-court testimony, the right to confront witnesses is not violated. Id.

> The closed-circuit television procedure utilized for [the witness'] testimony preserved all of these characteristics of in-court testimony: [The witness] was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and [the witness] gave this testimony under the eye of [the defendant] himself. [The defendant] forfeited none of the constitutional protections of confrontation.

Id.

Here, the central concern of the Confrontation Clause was addressed. Woods had a full and fair opportunity to cross-examine Mr. Berrios and did in fact cross-examine him. "Two-way video conference testimony in criminal trials is constitutional because it provides the necessary protections and upholds the goals intended by the Confrontation Clause. The procedure is also more protective of defendants' right to confrontation than other accepted methods of testimony, such as [Federal Criminal] Rule 15 depositions." Hadley Perry, Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony, 13 Roger Williams U. L. Rev. 565, 586–587 (2008). Two-way video testimony is also superior to one-way video testimony, which has been deemed constitutional. See id.

> Video conference testimony fulfills the requirements of the Confrontation Clause as intended throughout history. As exemplified by Paul's trial in biblical times, the prosecution of Christians under Roman Emperor Trajan, the trials of Sir Walter Raleigh and Freeborn John in seventeenth century England, and by the Salem witch trials in colonial America, the main goals of the right to confrontation were (1) to afford the defendant the opportunity to receive accusations directly from the mouth of his accuser,

> (2) to prevent false accusations against the defendant by those unwilling to state such allegations to the defendant's face, and (3) to allow the judge and jury to view the demeanor of the witnesses testifying. Each of these goals is safeguarded by the two-way video testimony procedure.

Id. Further, the use of video testimony is not inherently prejudicial to a defendant. See Baeza, 161 Idaho at 42, 383 P.3d at 1212.

Woods relies upon Craig, 497 U.S. at 844. (See Appellant's brief, pp. 9-13.) In Craig, the United States Supreme Court determined that, provided there is a finding of necessity, the Confrontation Clause was not violated when a child witness testified via a one-way closed-circuit television. See Craig, 497 U.S. at 857. This one-way television procedure prevented the child witness from seeing the defendant and prevented a "face-to-face" confrontation. See id. at 856-857. Woods argues that even though Craig dealt only with one-way video testimony, it should be applied to two-way video testimony as well and a court is required to make a finding of necessity prior to allowing two-way video testimony. (See Appellant's brief, pp. 10-13.) In support of his argument he cites to decisions out of Maryland and the Eleventh Circuit. (See id. (citing White v. State, 116 A.3d 520, 544 (Ct. App. Md. 2015); United States v. Yates, 438 F.3d 1307 (11th Cir. 2006).) "This Court should agree with the courts in *White* and *Yates* and hold that the State's concerns about convenience and efficiency are not important public policies that support the admission of testimony by two-way video conference." (Appellant's brief, p. 11.)

However, Idaho has already decided that a two-way video conference does not require a specific necessity finding. Idaho Criminal Rule 43.2 permits forensic testimony by video teleconference. Nothing in the rule requires a "necessity" finding. See I.C.R. 43.2. While Idaho Criminal Rule 43.2 was not invoked by either party, or the district court, the existence of the rule does show that Idaho has decided that the Maryland v. Craig standard for one-way video testimony does not apply to two-way video testimony, especially when that testimony is expert in nature. Thus, this Court need not look to other courts to determine how Idaho views two-way video testimony; this Court can look to Idaho's own rules.

For the first time on appeal Woods argues that Idaho Criminal Rule 43.2 is unconstitutional in light of Maryland v. Craig. (Appellant's brief, p. 13.) As an initial matter Woods' argument that Idaho Criminal Rule 43.2 is unconstitutional is not preserved. See State v. Garcia-Rodriguez, 162 Idaho 271, 275-276, 396 P.3d 700, 704-705 (2017). Woods argued below that allowing Mr. Berrios to testify via two-way videoconference violated his right to confront witnesses, because it may be possible to fly Mr. Berrios out to Idaho from Virginia. (1/27/17 Tr., p. 1422, Ls. 3-20.) The argument that Idaho Criminal Rule 43.2 is unconstitutional was not raised before the district court and should not be considered on appeal. Even if it were considered, there is nothing in Maryland v. Craig which would render Idaho Criminal Rue 43.2 unconstitutional. Maryland v. Craig dealt with vulnerable child witnesses testifying via one-way video in

order to avoid a face-to-face confrontation with the defendant. See Craig, 497 U.S. at 856-857. Idaho Criminal Rule 43.2 addresses forensic testimony via two-way video teleconference. See I.C.R. 43.2. The Rule explicitly requires that the forensic scientist be able to see the defendant. See I.C.R. 43.2(a)(2) ("The defendant, counsel from both sides, and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding."). The "face-to-face" concerns due to a one-way video teleconference as detailed in Craig, where the witness does not have to look at the defendant, are simply not present in Idaho Criminal Rule 43.2. Thus Idaho has determined that the Craig "necessity" standard does not apply to these types of video teleconferences.

However, even if the Craig "necessity" standard applies, that standard was met. Woods relies upon a Maryland case, which held that "Where considerations beyond mere convenience and expedience are involved, however, the factual setting of a case may support a finding of necessity to justify the absence of a witness's physical presence at trial." White, 116 A.3d at 545-546. Here, the physical limitations of attempting to get a last minute witness across the country before the trial ends justified the absence of Mr. Berrios' physical presence at trial. The state argued that it was a "necessity" to have Mr. Berrios testify via two-way video teleconference because just the "last day" they were able to provide a copy of the cell phone data recovery to defense counsel. (1/27/17 Tr., p. 1420, L. 14 – p. 1421, L. 6.) The state sent the phone out in Mary, approximately 8

months prior to trial, to be processed. (1/27/17 Tr., p. 1422, L. 21 – p. 1423, L. 11.) When the state knew it was having technical problems extracting data from Woods' phone, it moved, thirty-five days before trial, to continue the trial. (See R., pp. 206-209; see also 1/27/17 Tr., p. 1420, L. 14 – p. 1424, L. 18.) Woods objected and the district court denied the motion to continue. (R., pp. 208-209.) The forensic expert was finally able to extract the data from Woods' phone and the detective received the image file on Monday, January 23, 2017. (1/27/17 Tr., p. 1360, L. 2 – p. 1363, L. 9.) The detective was only able to provide a final report on Thursday, January 26, 2017. (Id.) The next day, Friday, January 27, 2017, the state moved to allow Mr. Berrios to provide foundational testimony from Virginia to provide more details on how the data was extracted from Woods' cell phone. (1/27/17 Tr., p. 1420, L. 14 – p. 1424, L. 18.) The district court considered the necessity of using a two-way video conference, including the costs and "time limits of flying somebody from Quantico, Virginia here to Idaho just to identify the process of getting into the phone[.]" (1/27/17 Tr., p. 1423, L. 12 – p. 1424, L. 18.) The district court properly analyzed the necessity of the situation and limited the testimony of Mr. Berrios to purely foundational issues. (Id.)

The district court properly found, that in these circumstances, it was necessary to permit Mr. Berrios provide limited testimony via two-way video teleconference. Thus, even if the Maryland v. Craig standard applies to two-way video teleconference testimony, it was met here.

D. Even If It Was Error To Permit Mr. Berrios To Testify Via Two-Way Video Teleconference, That Error Was Harmless Because The Verdict Would Have Been The Same Without His Testimony

Woods' Sixth Amendment right to confront witnesses against him was not violated because he had a full and fair opportunity to see and cross-examine Mr. Berrios. However, even if it was error to allow Mr. Berrios to testify via two-way video conference, that error was harmless. An error is harmless if the State proves beyond a reasonable doubt that the verdict would have been the same had the error not occurred. State v. Almaraz, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013) (citing State v. Perry, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010)). If the district court had denied the motion to permit Mr. Berrios to testify via two-way video teleconference, then it appears likely that Mr. Berrios would not have testified at all. However, the verdict would have been the same had this occurred. Mr. Berrios' testimony was limited to explaining how he extracted the data and made a copy, a forensic image, of the data from Woods' phone and provided it to Detective Lukasik. (See 1/30/17 Tr., p. 1426, L. 10 – p. 1431, L. 22.)

> Q. And you sent the data that you got off it to Don Lukasik?
>
> A. I did.
>
> Q. Other than just parsing to make sure there was actual data removed from the phone, did you do any analysis of the phone's contents?
>
> A. I did not.

(1/30/17 Tr., p. 1430, Ls. 17-23.) Mr. Berrios' testimony only related to the foundational procedure by which Detective Lukasik accessed the data in Woods' phone. However,

Detective Lukasik had already testified, without objection, that Mr. Berrios had extracted the data and provided him a forensic image of Woods' phone. (See 1/27/17 Tr. p. 1360, Ls. 17-20.) Detective Lukasik testified:

> And then just recently I talked to the engineer back there who sent me the extraction files from this phone, and he was able to do it doing the in circuit so the phone is still intact. But he was able to provide me a image, a physical image, a forensic physical image of the phone that I was able to process and provide a report for.

(1/27/17 Tr., p. 1360, Ls. 17-23.) Detective Lukasik explained how a forensic physical image is created and what it is. (See 1/27/17 Tr., p. 1360, L. 2 – p. 1362, L. 2.) He also testified that that image was "verified" and there were no changes made to the phone's data. (Id.) While the state was engaging in best practices by having Mr. Berrios testify as to copying the data from the phone, sufficient foundation had already been laid by Detective Lukasik to admit Woods' phone into evidence. Evidence from Woods' phone would still have been admitted into evidence, and the verdict would have been the same even without Mr. Berrios' limited testimony.

Even if Mr. Berrios' testimony was required to admit data from Woods' phone, the verdict would have still been the same. As cited in the factual section, there was testimony that Woods had planned to place advertisements and then have his co-conspirators rob people who responded. (See e.g. 1/30/17 Tr., p. 1501, L. 19 – p. 1502, L. 2.) Woods told Mr. Tracy and Mr. Henkel to hide in the bushes. (1/30/17 Tr., p. 1513, L. 7 – p. 1514, L. 12.) Before he dropped Mr. Henkel and Mr. Tracy off at Lake Lowell

to hide he asked if they were in it "100 percent." (See 1/23/17 Tr., p. 693, L. 21 – p. 696, L. 18; 1/26/17 Tr., p. 1170, L. 22 – p. 1171, L. 11; 1/30/17 Tr., p. 1515, Ls. 12-19; 1/31/17 Tr., p. 1650, L. 15 – p. 1651, L. 3.) The plan was to rob Mr. Nelson. (See 1/30/17 Tr., p. 1513, L. 22 – p. 1514, L. 12.) Woods admitted to Detective Gentry that Mr. Schneider was going to rob Mr. Nelson at the lake. (1/31/17 Tr., p. 1621, L. 21 – p. 1622, L. 5.)

> Q. What was his reaction when you would tell him details that didn't make sense?
>
> A. So whenever it all came down to it, you know, he was kind of telling me that the guys were just out playing at the lake. And I'm like, "Listen, that doesn't make any sense."
>
> And he stopped and he said, "Okay, okay, okay, fine. Kelly [Schneider] was going to rob the guy. They went out to the lake. Kelly [Schneider] was going to rob the guy."

(1/31/17 Tr., p. 1621, L. 21 – p. 1622, L. 5.)

In addition to his admissions to Detective Gentry, Woods also made admissions in his testimony. Woods testified and admitted that he had accepted the earnings of a prostitute. (2/1/17 Tr., p. 1790, Ls. 1-23.) Woods testified that he placed online advertisements with the goal of robbing people. (See 2/1/17 Tr., p. 1712, L. 15 – p. 1715, L. 16.) Even if Mr. Berrios' testimony had been required to admit the data from Woods' phone, and the data had not been admitted into evidence, the result of the trial would have been the same.

Finally, Woods suffered no appreciable prejudice from Mr. Berrios' lack of physical presence while testifying. His testimony is admissible. Although seeing a witness live may gave insight on credibility, there is no reason to believe jurors would view Mr. Berrios' credibility differently if they could observe his physical presence. Mr. Berrios was not a witness that was subject to credibility attacks. Especially considering the limited and technical nature of Mr. Berrios' testimony, it is difficult to ascertain any potential prejudice from his lack of physical presence. There was no error in permitting Mr. Berrios to testify via two-way video teleconference, but if it was error it was harmless.

II.
The District Court Did Not Commit Fundamental Error When It Sentenced Woods Because Conspiracy To Commit Robbery Is Not A Lesser Included Offense Of First Degree Murder

A. Introduction

The jury found Woods guilty of accepting the earnings of a prostitute, conspiracy to commit robbery, robbery, and first degree murder. (2/2/17 Tr., p. 2001, L. 19 – p. 2002, L. 19; R., pp. 510-511.) At the sentencing, the state recommended, and the district court agreed to merge the robbery charge into the first degree murder charge. (4/11/17 Tr., p. 199, L. 16 – p. 200, L. 6, p. 235, Ls. 17-18.) The district court entered convictions for accepting the earnings of a prostitute, conspiracy to commit robbery, and first degree murder. (R., pp. 579-583, 585-587.) Woods now argues, for the first time, that

conspiracy to commit robbery is a lesser included offense of first degree murder under Idaho's "pleading theory" because an element of the felony murder charge was robbery. (See Appellant's brief, p. 13-20.) Woods fails to show these two convictions violate Idaho's double jeopardy protections and fails to show fundamental error because conspiracy to commit robbery is not a lesser included offense of robbery.

Woods' argument focuses upon cases which relied upon Idaho Code § 18-301. (See Appellant's brief, pp. 13-20 (citing State v. Gallatin, 106 Idaho 564, 567-568, 682 P.2d 105, 108-109 (Ct. App. 1984); State v. Sterely, 112 Idaho 1097, 739 P.2d 396 (1987).) Idaho Code § 18-301 was repealed by Senate Law 1995, chapter 16, § 1, effective February 13, 1995. Idaho Code § 18-301 was repealed in 1995.

The proper test is not Idaho Code § 18-301, but Idaho's pleading theory, which requires an examination of the charging document. See State v. Sepulveda, 161 Idaho 79, 87, 383 P.3d 1249, 1257 (2016). From the face of the indictment, conspiracy to commit robbery is not a lesser included offense of robbery and thus not an element of first degree murder. (See R., pp. 32-35.) In Idaho a defendant can be convicted of a conspiracy and the offense which was the ultimate purpose of the conspiracy. See, e.g., State v. Sanchez-Castro, 157 Idaho 647, 649, 339 P.3d 372, 374 (2014). Woods has failed to show fundamental error because convictions for both conspiracy to commit robbery and first degree murder do not violate double jeopardy.

B. Standard Of Review

A double jeopardy challenge made for the first time on appeal will be considered under the fundamental error analysis. State v. Moad, 156 Idaho 654, 657, 330 P.3d 400, 403 (Ct. App. 2014). "In order to obtain relief on appeal, a defendant claiming fundamental error must demonstrate that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings." Id. (citing State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010)).

C. Woods Has Failed To Show That The Entry Of Judgments Finding Him Guilty Of First Degree Murder And Conspiracy To Commit Robbery Violated Double Jeopardy And Constituted Fundamental Error

A conspiracy to commit robbery is not a lesser included offense of robbery. Thus, it is not a lesser included offense of the element of robbery in a felony first degree murder charge. Woods has failed to show fundamental error.

1. Conspiracy To Commit Robbery Is Not A Lesser Included Offense Of Robbery And Thus It Is Not A Lesser Included Offense Of First Degree Murder And Woods Convictions Do Not Violate The Idaho Constitution's Protections Against Double Jeopardy

Woods argues, for the first time on appeal, that conspiracy to commit robbery is a lesser included offense of robbery and thus is an element of felony first degree murder and as a result his convictions for both violate the Idaho Constitution's protection against

double jeopardy. (See Appellant's brief, pp. 13-30.) Contrary to Woods' argument, based upon the face of the information, conspiracy to commit robbery is not a lesser included offense of robbery, and thus is not the means or an element by which the felony first degree murder was charged.

"Under both the federal and Idaho double jeopardy clauses, 'a defendant may not be convicted of both a greater and lesser included offense.'" State v. McKinney, 153 Idaho 837, 841, 291 P.3d 1036, 1040 (2013) (quoting State v. Pizzuto, 119 Idaho 742, 756, 810 P.2d 680, 694 (1991), overruled on other grounds by State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991)). Determining whether a defendant's prosecution or conviction and punishment for two offenses violates the Fifth Amendment under the federal constitution requires application of the Blockburger test. Moad, 156 Idaho at 658, 330 P.3d at 404 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)). Under the Blockburger test, the court looks to the statutory elements of the offenses and, if the statutory definition of each crime requires proof of an additional element that the other does not, they constitute separate offenses. Id. (citing Blockburger, 284 U.S. at 304.) Idaho has adopted a "pleading theory" test. See id. "Under the pleading theory, a lesser included offense is one "alleged in the information as a means or element of the commission of the higher offense." McKinney, 153 Idaho at 841, 291 P.3d at 1040 (citing State v. Thompson, 101 Idaho 430, 434, 614 P.2d 970, 974 (1980)). "Under Idaho's pleading theory, whether one crime is a lesser included offense of another crime can be

determined from the face of the record simply by reading the information charging each crime." Sepulveda, 161 Idaho at 87, 383 P.3d at 1257 (citing McKinney, 153 Idaho at 841, 291 P.3d at 1040).

Woods does not argue that his convictions for conspiracy to commit robbery and first degree murder violate the federal constitution's protections against double jeopardy. (See Appellant's brief, pp. 13-19.) Wood focuses solely on the Idaho Constitution and the "pleading theory." (See id.) Woods argues that "the acts by which Mr. Woods was alleged to have furthered the conspiracy were the means or method by which he aided and abetted the robbery, and thus, the murder." (Appellant's brief, p. 13.)

From the face of the information, conspiracy to commit robbery is not a lesser included offense of first degree murder. As an initial matter, Woods' implication that a conspiracy is incorporated in, or part of, aiding and abetting is without merit. Idaho has done away with the distinction between those who "aid and abet" in the commission of the crime and those who are "principals." See I.C. §§ 18-204, 19-1430. "In Idaho there is no distinction between principals and aiders and abettors, and it is unnecessary the charging document allege any facts other than what is necessary to convict a principal." State v. Johnson, 145 Idaho 970, 976, 188 P.3d 912, 918 (2008) (citing I.C. § 19–1430).

In contrast, "a conspiracy consists of an agreement between two or more persons to accomplish an illegal objective, coupled with one or more overt acts in furtherance of that objective, as well as the intent necessary to commit the underlying substantive

crime." State v. Rolon, 146 Idaho 684, 690, 201 P.3d 657, 663 (Ct. App. 2008) (citing State v. Lopez, 140 Idaho 197, 199, 90 P.3d 1279, 1281 (Ct. App. 2004); State v. Munhall, 118 Idaho 602, 606, 798 P.2d 61, 65 (Ct.App.1990)). Criminal conspiracy is an entirely separate crime that is completed when two or more persons combine or conspire to commit any crime:

> If two (2) or more persons combine or conspire to commit any crime or offense prescribed by the laws of the state of Idaho, and one (1) or more of such persons does any act to effect the object of the combination or conspiracy, each shall be punishable upon conviction in the same manner and to the same extent as is provided under the laws of the state of Idaho for the punishment of the crime or offenses that each combined to commit.

I.C. § 18-1701. Conspiracy does not require a completed crime. State v. Nevarez, 142 Idaho 616, 620-21, 130 P.3d 1154, 1158-59 (Ct. App. 2005).

> Section 18–1701 defines only the crime of criminal conspiracy and provides a penalty for that crime of conspiring. It says nothing at all about who may be deemed guilty of the crime to which the conspiracy is directed if that crime is in fact completed. Section 18–204 is the statute that identifies who may be convicted for a completed crime committed by a third party.

Id.

Woods' initial implication, that somehow a conspiracy is incorporated into aiding and abetting, is simply not correct. Since there is no difference between someone who "aids and abets" and someone who is a "principal" then Woods has to be treated as a principal defendant for both the robbery and the first degree murder charge. In Idaho a defendant can be convicted for a crime and the conspiracy to commit that crime. See e.g.

State v. Sanchez-Castro, 157 Idaho 647, 649, 339 P.3d 372, 374 (2014) (convicted of trafficking in methamphetamine and in conspiracy to traffic methamphetamine); State v. Adamcik, 152 Idaho 445, 465-66, 272 P.3d 417, 437-38 (2012) (convicted of first degree murder and conspiracy to commit first degree murder); McKinney v. State, 162 Idaho 286, 289, 396 P.3d 1168, 1171 (2017) (convicted of first degree murder, conspiracy to commit murder, robbery, and conspiracy to commit robbery); State v. Harris, 141 Idaho 721, 727, 117 P.3d 135, 141 (Ct. App. 2005) (convicted of trafficking in methamphetamine and conspiracy to traffic in methamphetamine); State v. Lemmons, 161 Idaho 652, 653, 389 P.3d 197, 198 (Ct. App. 2017), review denied (Feb. 28, 2017) (convicted of two counts of conspiracy to traffic in methamphetamine and two counts of trafficking in methamphetamine).

Turning to the face of the information in this case, the conspiracy to commit a robbery is not a lesser included offense of robbery and thus was not an element or means by which Woods committed first degree murder. (See R., pp. 32-35.) Count I – Murder alleged:

> That the Defendant, Jayson L. Woods, on or about the 29th day of April, 2016, in the County of Canyon, State of Idaho, did aid, abet, assist, facilitate and/or encourage Kelly Schneider to perpetrate a robbery of Steven Nelson, during which Kelly Schneider did kill and murder Steven Nelson.

(R., p. 32.) Count II – Robbery alleged:

> That the defendant, Jayson L. Woods, on or about the 29th day of April, 2016, in the County of Canyon, State of Idaho, did aid, abet, assist,

facilitate and/or encourage Kelly Schneider to feloniously, intentionally and by means of force or fear take from the person and or/immediate presence of Steven Nelson certain personal property, to-wit: case money and/or clothing and/or a wallet with credit cards inside and/or car keys and/or a car, the property of Steven Nelson, which was accomplished against the will of Steven Nelson, in that [] Kelly Schneider choked Steven Nelson and/or forced Steven Nelson[]to the ground and/or kicked Steven Nelson and demanded and/or forcibly took Steven Nelson's personal property.

(R., p. 33.) Count III: Conspiracy to Commit Robbery alleged:

That the Defendant, Jayson L. Woods, on or about April 28th, 2016 through April 29th, 2016 within Canyon County, State of Idaho, and elsewhere, the Defendant, Jayson L. Woods, did willfully and knowingly combine or conspire with Kelly Schneider and/or Daniel Henkel and/or Kevin Tracy and/or any other person to commit the crime of robbery upon Steven Nelson, and that in furtherance of the conspiracy and to effect the objects thereof, one or more of the conspirator did the following overt acts within Canyon County, Idaho:

1. On or about April 29th 2016, Jayson Woods drove Kelly Schneider or Daniel Henkel in a Chevy HHR to meet Steven Nelson at a Walmart in Nampa, Idaho.
2. On or about April 29th 2016, Jayson Woods drove Daniel Henkel and Kevin Tracy in a Chevy HHR to Gott's Point to wait for Kelly Schneider to rob Steven Nelson at that location.
3. On or about April 29th 2016, Daniel Henkel, armed with a pipe, waited for the arrival of Kelly Schneider with Steven Nelson at Gott's Point.
4. On or about April 29th 2016, Kevin Tracy also waited for the arrival of Kelly Schneider with Steven Nelson at Gott's Point.
5. On or about April 29th 2016, Jayson Woods returned with Kelly Schneider to a Walmart in Nampa Idaho to meet with Steven Nelson.
6. On or about April 29th 2016 Kelly Schneider met Steven Nelson at a Walmart in Nampa Idaho.

7. On or about April 29th 2016 Kelly Schneider rode with Steven Nelson to the prearranged location at Gott's Point in Canyon County Idaho.
8. On or about April 29th 2016, Kelly Schneider robbed Steven Nelson at Gott's Point.
9. On or about April 29th 2016, Kelly Schneider drove away from Gott's Point in Steven Nelson's car with Kevin Tracy and Daniel Henkel.
10. On or about April 29th 2016, Kelly Schneider, Kevin Tracy, and Daniel Henkel met back in the Chevy HHR to divide the proceeds of the robbery.
11. On or about April 29th 2016, Kelly Schneider gave Kevin Tracy twenty-five dollars from the proceeds of the robbery.
12. On or about April 29th 2016, Kelly Schneider gave Jayson Woods forty dollars from the proceeds of the robbery.

(R., pp. 33-34.)

From the face of this indictment, conspiracy to commit robbery is not a lesser included offense of robbery. The means or method by which Woods committed robbery was not through the conspiracy. The references to the robbery in the conspiracy charge are the object of the conspiracy, and it does not merge with the robbery. See State v. Sanchez-Castro, 157 Idaho 647, 649, 339 P.3d 372, 374 (2014).

In Sanchez-Castro, the defendant was charged, and convicted, of "one count of conspiracy to traffic in 400 grams or more of methamphetamine" and "one count of trafficking in 400 grams or more of methamphetamine[.] Id. at 648, 339 P.3d at 373. On appeal, Sanchez-Castro argued, in part, that his convictions violated the Idaho Constitution's protection against double jeopardy, because under the pleading theory trafficking and conspiracy are the same offense. See id. at 649, 339 P.3d at 374.

Sanchez-Castro argued that because both the conspiracy and the trafficking count alleged that he possessed 400 grams or more of methamphetamine, that they were the same offense. See id. The Idaho Supreme Court rejected Sanchez-Castro's argument because the methamphetamine was the "object of the conspiracy," not the means by which Sanchez-Castro and his co-conspirators trafficked in methamphetamine. See id.

> The crime of trafficking in methamphetamine is committed when a person "knowingly delivers, or brings into this state, or [ ] is knowingly in actual or constructive possession of, twenty-eight (28) grams or more of methamphetamine or amphetamine or of any mixture or substance containing a detectable amount of methamphetamine or amphetamine." I.C. § 2732B(a)(4). Knowingly possessing a specified quantity of methamphetamine is one manner of committing the crime of trafficking. The language upon which Defendant apparently relies states that he and others conspired "to traffic in a controlled substance, by knowingly possessing methamphetamine." The words "by knowingly possessing methamphetamine" were not alleged as the means by which the Defendant and others were alleged to have committed the conspiracy. The words obviously referred to the object of the conspiracy—they conspired to traffic in a controlled substance by knowingly possessing methamphetamine.

Id. Thus, if Sanchez-Castro's convictions for conspiracy to traffic 400 grams of methamphetamine and trafficking in 400 grams of methamphetamine pass the "pleading theory" test, then Woods' conviction for conspiracy to commit robbery and first degree murder should likewise pass.

The "pleading theory" requires more than related conduct. In Sepulveda, Sepulveda was charged with intimidating a witness and two violations of a no contact order. Sepulveda, 161 Idaho at 88, 383 P.3d at 1258. The witness, L.M., was the same

person who was protected by the no contact order. Id. The Idaho Supreme Court determined there was no double jeopardy violation under the "pleading theory" because "from the face of the information, not all the elements of intimidating a witness are pled in the counts charging the attempted violations of the no contact order." Id. Count I, the intimidating a witness charge, alleged that Sepulveda asked a third party to tell L.M. to lie to the court. See id. Counts II and III, the violations of the no contact order, alleged that Sepulveda violated the no contact order by asking two third parties to contact L.M. See id.

> Neither Count II [Violation of a No Contact Order] nor Count III [Violation of a No Contact Order] makes reference to whether L.M. was a witness or whether Sepulveda "did ... or did attempt to intimidate, influence, impede, deter, obstruct, or prevent [L.M.] ... from testifying." Thus, felony intimidating a witness was not pled as a means or element of the commission of either of the attempted violations of a no contact order.

Id. The same is true here. The charging language for conspiracy to commit robbery and robbery involve related events, like in Sepulveda, but also like in Sepulveda, not all of the elements in conspiracy to commit robbery are pled in robbery. For example, conspiracy to commit robbery requires an agreement. (See R., pp. 32-35.) Robbery does not require an agreement. (See id.) The conspiracy charge also includes Mr. Henkel and Mr. Tracy. (See id.) The robbery charge does not. (Id.) Since the conspiracy to commit robbery is not a lesser included offense of robbery, then it is not a lesser included offense of the robbery element of first degree murder.

The cases relied upon by Woods are inapplicable. (See Appellant's brief, pp. 13-20 (citing Gallatin, 106 Idaho at 567-568, 682 P.2d at 108-109; Sterely, 112 Idaho at 1099, 739 P.2d at 398.) The decision in Gallatin is based upon Idaho Code § 18-301, which has been repealed. See Gallatin, 106 Idaho at 569, 682 P.2d at 110 ("We hold therefore that, under I.C. § 18-301, Gallatin can be convicted and sentenced of only one crime but not both."). Gallatin is also inapplicable to the "pleading theory" analysis because, as described above, the "pleading theory" requires the court to look only at the charging instrument, whereas Gallatin explicitly considered the evidence at trial. See Gallatin, 106 Idaho at 568-569, 682 P.2d at 109-110. Woods' reliance on Sterely is likewise misplaced. (See Appellant's brief, pp. 14-19 (citing Sterely, 112 Idaho at 1099, 739 P.2d at 398).) Sterely also analyzed whether a conviction violated the repealed statute, Idaho Code § 18-301. See Sterely, 112 Idaho at 1099, 739 P.2d at 398 ("We next address the issue of whether the conviction and sentencing of Sterley for the crimes of conspiracy to deliver a controlled substance and delivery of a controlled substance was violative of the statutory prohibition against multiple punishment under I.C. § 18–301."). Even the more recent case, McKinney, is based upon Idaho Code § 18-301. See McKinney, 153 Idaho at 841-842, 291 P.3d at 1040-1041 (analyzing McKinney's claim under Idaho Code § 18-301). As a result, these cases are inapplicable, especially in light of the "pleading theory" as recently articulated by the Idaho Supreme Court. See Sepulveda, 161 Idaho at 87, 383 P.3d at 1257. Pursuant to the pleading theory,

conspiracy to commit robbery is not a lesser included offense of robbery. As a result, a conspiracy was not the means by which the first degree murder was charged. There was no violation of Woods' unwaived constitutional rights. Woods fails to meet the first prong of the fundamental error analysis.

2. There Is No Clear Error On The Record

There is no clear error on the record. The pleading theory requires this Court to review the face of the indictment. See Sepulveda, 161 Idaho at 87, 383 P.3d at 1257. It is not clear from the face of the indictment that conspiracy to commit robbery is a lesser included offense of robbery, let alone a lesser included offense of first degree murder. Woods has failed to show the second prong of the fundamental error analysis.

3. Even If There Was Clear Error From The Record That Error Is Harmless Because Of Woods' Proposed Remedy

There was no clear error in this case, but even if there were, Woods is still required to show the error affected the outcome of the trial proceedings. See Moad, 156 Idaho at 657, 330 P.3d at 403 (citing Perry, 150 Idaho at 226, 245 P.3d at 978). Here, Woods argues that the error is not harmless because he has two convictions instead of one. (See Appellant's brief, pp. 19-20.) However, Woods goes on to argue that the appropriate remedy is to "simply vacate Mr. Woods's conviction and sentence on the murder charge." (Appellant's brief, pp. 19-20.)

Thus Woods apparently claims it is the murder conviction that violated his unwaived constitutional right. This remedy simply does not follow from Woods' argument, which is predicated on the conspiracy charge being a lesser included offense of the murder charge. (See Appellant's brief, pp. 13-20.) Nowhere does Woods argue that the charge of first degree murder was the means by which he committed conspiracy to commit robbery. (See id.) Thus the harm claimed by Woods (the murder conviction) does not flow from the unwavied constitutional right he alleges (that conspiracy to commit robbery is a lesser included offense of first degree murder). As a result Woods has failed to show the third prong of the fundamental error analysis. See Perry, 150 Idaho at 226, 245 P.3d at 978.

However, in the event this Court determines that Woods' proposed remedy does not control his harmless error analysis, then the appropriate remedy would be to merge Woods' claimed lesser included charge, the conspiracy to commit robbery charge, into the murder charge. However, since Woods has failed to actually show that conspiracy to commit robbery is a lesser included offense of robbery and thus an element of murder, Woods' fundamental error claims fail and this Court need not address harmless error.

CONCLUSION

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

DATED this 19th day of June, 2018.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of June, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JUSTIN M. CURTIS
BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDERS

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

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

TST/dd