6-21-2018

State v. Medina Respondent's Brief Dckt. 45117

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 45117 & 45118**
Plaintiff-Respondent,	)	
	)	**Bannock County Case Nos.**
v.	)	**CR-2016-5675 & CR-2016-6942**
	)	
JERSSON NEFTALY ROQUE MEDINA,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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STATEMENT OF THE CASE

Nature Of The Case

Jersson Neftaly Roque Medina appeals from the judgments of conviction entered by the district court after a jury found Medina guilty, in two separate cases tried simultaneously, of trafficking heroin and conspiracy to violate the Uniform Controlled Substances Act. Medina makes three arguments on appeal: (1) the state presented insufficient evidence to convict Medina on the conspiracy charge; (2) the district court committed fundamental error by allowing Medina to wear jail clothes and physical restraints at the jury trial; and (3) the district court committed fundamental error by including legally deficient overt acts in the jury instruction on the elements of a conspiracy.

Statement Of The Facts And Course Of The Proceedings

On May 19, 2016, the state charged Jersson Neftaly Roque Medina with trafficking heroin. (R., pp.62-63.) On June 16, 2016, the state charged Medina, in a separate case, with conspiracy to violate the Uniformed Controlled Substances Act. (R., pp.272-74.) The district court scheduled the cases to be tried together without objection from Medina. (1/9/2017 Tr., p.6, L.19 – p.7, L.14.) After a jury trial, the jury convicted Medina on both counts. (R., p.179.)

The evidence presented at trial showed the following: Starting at least as early as May 2015, Logan Joyce was "engaged in the trafficking or selling and purchasing of heroin." (Trial Tr., p.187, Ls.9-12.) In the beginning of his heroin trafficking career, he would go to a homeless shelter in Salt Lake City, purchase small amounts of heroin, and then return to Pocatello to sell it. (Trial Tr., p.187, Ls.13-18.) He purchased the heroin

from a "spitter"[1] he knew as Trouble. (Trial Tr., p.137, Ls.18-21.) At first, Joyce was "just getting smaller amounts for him and a couple of his close friends." (Trial Tr., p.137, Ls.22-24.) "After a while, [Joyce] was making too much money for the people . . . down in Salt Lake, [in] the homeless shelter." (Trial Tr., p.187, Ls.19-24.) Joyce "decided he wanted to move up and start to distribute more[,] [s]o Trouble introduced him to an individual that [Joyce] knew as Jeffrey." (Trial Tr., p.137, L.24 – p.138, L.1.)

By April 2016, Joyce would contact Jeffrey "give or take every two weeks . . . tell him how much money [Joyce] had . . . [a]nd [Jeffrey] would tell [Joyce] how much . . . heroin [Joyce] could get for that." (Trial Tr., p.188, L.17 – p.189, L.1.) They would meet face-to-face to make the exchange at Joyce's apartment in Pocatello. (Trial Tr., p.188, L.17 – p.190, L.3.) According to Joyce, "I would give him money, and he would give me however much heroin." (Trial Tr., p.188, L.17 – p.189, L.1.)

Joyce and Jeffrey's last transaction occurred two or three days before April 12, 2016. (Trial Tr., p.191, Ls.15-21.) Joyce contacted Jeffrey via text message and agreed to pay Jeffrey $8,000 for 130 grams of heroin. (Trial Tr., p.221, L.13 – p.222, L.9.) They met at Joyce's apartment complex in Pocatello. (Trial Tr., p.223, Ls.1-13.) Joyce walked away from the transaction with a package that contained "[a] lot of Saran wrap, dryer sheets, and then like an open sandwich bag with heroin in it." (Trial Tr., p.225, L.18 –

[1] Detective Edgley explained at trial that "[a] spitter is somebody that has rubber balloons in their mouth that will have heroin, meth, cocaine, whatever they're selling at this point. You'll walk up to them and say, 'I need five heroin.' They'll spit them out. You pay them, and they go on their way." (Trial Tr., p.135, Ls.10-15.) Once a reseller, like Joyce, "start[s] moving more weight than what the spitters can carry, then those individuals will introduce them to somebody that's higher up than them." (Trial Tr., p.135, Ls.22-24.)

p.226, L.16.) At trial, Joyce identified Medina as the individual he knew as "Jeffrey." (Trial Tr., p.224, L.12 – p.225, L.1.)

On April 12, 2016, police executed a search warrant on Joyce's apartment, arrested Joyce, and seized 153 grams of heroin. (Trial Tr., p.136, L.14 – p.137, L.11.) Joyce identified "Jeffrey" as the source of his heroin. (Trial Tr., p.137, L.12 – p.138, L.13.) He showed Detective Edgley how he communicated with "Jeffrey" on his phone using text messages. (Trial Tr., p.138, L.14 – p.139, L.9.) As an example, Joyce showed Detective Edgley text messages discussing $3,000 that Joyce wired to "Jeffrey" in the name of Sharon Michelle Bernal Valadez. (Trial Tr., p.138, Ls.14-24; p.142, L.20 – p.143, L.12.)

Using Joyce's phone and the number for "Jeffrey" provided by Joyce, Detective Edgley contacted "Jeffrey" to set up a heroin deal in order "to apprehend the source of . . . Joyce's supply." (Trial Tr., p.145, Ls.5-25.) Detective Edgley, posing as Joyce, agreed to pay "Jeffrey" $7,000 up front and owe him $1,000 later for 130 grams of heroin. (Id.) "Jeffrey" agreed to deliver the heroin to Joyce's apartment in Pocatello on April 14. (Trial Tr., p.145, L.5 – p.146, L.19.)

On April 14, Medina and Valadez, who lived together in Valadez's apartment in Salt Lake City, drove to Pocatello in Valadez's car. (Trial Tr., p.229, L.14 – p.230, L.18; p.232, Ls.19-22.) That morning, Medina had given Valadez a package and told Valadez that they were "coming to Pocatello to come see the guero, or white guy." (Trial Tr., p.230, L.19 – p.232, L.18.) Valadez knew the package contained drugs. (Trial Tr., p.232, Ls.11-18.) She had been involved in past transactions where "the guero, the white guy" (i.e., Joyce) had sent her money through an app called "Cash" or by wiring it to Wal-Mart in exchange for drugs from Medina. (Trial Tr., p.238, L.9 – p.239, L.1; p.240, L.10 – p.241,

L.23.) Valadez hid the heroin in her pants before they left for Pocatello. (Trial Tr., p.230, L.19 – p.231, L.9.)

When Medina and Valadez arrived at Joyce's apartment, the police were waiting. (Trial Tr., p.150, L.2 – p.151, L.24.) The police saw a white Nissan Pathfinder pull into Joyce's apartment complex. (Trial Tr., p.151, Ls.14-24.) A registration check on the Utah plates came back registered to Sharon Bernal Valadez. (Id.) The officers stopped the vehicle and removed Valadez and Medina from the car. (Trial Tr., p.152, Ls.3-24.) Detective Edgley called the phone number that he had been using to exchange text messages with "Jeffrey"; Medina's phone rang. (Id.)

The police separated Medina and Valadez and requested a drug dog to sniff the car. (Trial Tr., p.162, L.3 – p.163, L.14.) The drug dog alerted on the car. (Trial Tr., p.163, Ls.15-20.) Medina and Valadez were handcuffed and placed in a police car. (Trial Tr., p.167, Ls.11-22.) Medina asked Valadez if the police had found the heroin in her pants, and Valadez instructed Medina to be quiet. (Trial Tr., p.247, L.11 – p.248, L.2.) One of the officers asked Valadez whether she had any drugs on her, and she responded that she did not. (Trial Tr., p.262, Ls.4-6; p.277, L.9 – p.278, L.1.) According to Valadez, "I didn't say anything to them, because – well, I loved him." (Trial Tr., p.235, L.18 – p.236, L.2.)

A female officer arrived on the scene to search Valadez. (Trial Tr., p.264, L.8 – p.265, L.1.) The female officer found the package hidden in Valadez's pants. (Trial Tr., p.266, Ls.4-15.) The state's forensic scientist testified that the package retrieved from Valadez's pants contained a substance that weighed 125.64 grams and tested positive for heroin. (Trial Tr., p.319, L.24 – p.320, L.8.)

The jury found Medina guilty of trafficking heroin and guilty of conspiracy to violate the Uniform Controlled Substances Act. (R., p.179.) The district court sentenced Medina on each charge to 20 years, with 15 years fixed, to run concurrently. (R., pp.197-200, 412-15.) Medina timely appealed. (R., pp.202-05, 417-21.)

ISSUES

Medina states the issues on appeal as:

1. Must the conspiracy conviction be reversed due to the absence of proof that Mr. Medina entered into an agreement with either of the named co-conspirators?

2. Was it fundamental error to permit Mr. Medina to appear before the jury shackled and in jail clothing?

3. Was it fundamental error for the court to instruct the jury that it could return a verdict of guilty if it found an overt act which was not committed by a charged member of the conspiracy and/or was not in furtherance of the conspiracy?

(Appellant's brief, p.4.)

The state rephrases the issues as:

I. Has Medina failed to show the state presented insufficient evidence of a conspiracy?

II. Has Medina failed to show that his wearing jail clothing and physical restraints at the trial constituted fundamental error?

III. Has Medina failed to show that the inclusion of the invalid overt acts in the jury instruction on the elements of a conspiracy constituted fundamental error?

ARGUMENT

I.
The State Presented Substantial Evidence To Prove A Conspiracy

A. Introduction

The jury's conviction of Medina for conspiracy to violate the Uniformed Controlled Substances Act was supported by substantial evidence. Medina unsuccessfully attacks two conclusions reached by the jury: (1) Medina made an agreement with Valadez to traffic heroin and (2) Medina made an agreement with Joyce to traffic heroin.

The state presented substantial evidence from which the jury could infer that Medina had an agreement with Valadez to traffic heroin. Valadez confessed that she had received money from Joyce as payment for Medina's heroin. She also confessed that she traveled to Pocatello with Medina while carrying heroin the duo intended to sell to Joyce. The state corroborated Valadez's testimony by presenting the jury with text messages discussing the drug money Joyce wired to Valadez, a video of Medina and Valadez discussing the heroin they intended to sell to Joyce, and testimony from police officers and a scientist proving that Valadez had 125.64 grams of heroin on her when she was arrested with Medina at Joyce's apartment. A reasonable juror could infer from Valadez's substantial participation in Medina's heroin trafficking that she had an agreement with Medina to traffic heroin.

The state presented substantial evidence from which the jury could infer that Medina had an agreement with Joyce to traffic heroin. Joyce confessed that he sold and distributed heroin. He also confessed that Medina was the source of his heroin and that Medina would sell him approximately 130 grams of heroin every two weeks in exchange for $8000. He also testified that, at times, Medina would front heroin to Joyce and Joyce

would pay Medina back at a later date. The state corroborated Joyce's testimony with text messages in which Joyce and Medina discussed a sale of heroin, Valadez's testimony that Joyce would wire the money he owed Medina for drugs to Valadez, and Detective Edgley's testimony that he, acting as Joyce, made a deal with Medina for 130 grams of heroin in exchange for $7,000 up front and $1,000 at a later time. A reasonable juror could infer from Medina's repeated sales to Joyce and willingness to front Joyce heroin that Joyce and Medina had an agreement to traffic heroin.

B. Standard Of Review

This Court reviews a claim that the state presented insufficient evidence for substantial evidence. State v. Adamcik, 152 Idaho 445, 460, 272 P.3d 417, 432 (2012). "Evidence is substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." State v. Eliasen, 158 Idaho 542, 546, 348 P.3d 157, 161 (2015). "In conducting this analysis, the Court is required to consider the evidence in the light most favorable to the State, and [does] not substitute [its] judgment for that of the jury on issues of witness credibility, weight of the evidence, or reasonable inferences to be drawn from the evidence." Adamcik, 152 Idaho at 460, 272 P.3d at 432. In other words, "[t]he relevant inquiry is not whether this Court would find the defendant guilty beyond a reasonable doubt, but whether 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Eliasen, 158 Idaho at 546, 348 P.3d at 161 (emphasis in original) (quoting Adamcik, 152 Idaho at 460, 272 P.3d at 432).

C. The State Presented Substantial Evidence To Prove A Conspiracy To Traffic Heroin Between Medina And The Two Named Co-Conspirators

The state presented sufficient evidence at trial to prove that Medina entered into a conspiracy to traffic heroin with Joyce and Valadez. "'[A] conspiracy is established upon proof beyond a reasonable doubt that there is an agreement between two or more individuals to accomplish an illegal objective, coupled with one or more overt acts in the furtherance of the illegal purpose accompanied by the requisite intent to commit the underlying substantive offense.'" State v. Smith, 161 Idaho 782, 787, 391 P.3d 1252, 1257 (2017) (alteration in original) (quoting State v. Garcia, 102 Idaho 378, 384, 630 P.2d 665, 671 (1981)). "[A]n agreement that is the foundation of a conspiracy charge need not be formal or express, and the evidence of the agreement need not be direct." State v. Rolon, 146 Idaho 684, 692, 201 P.3d 657, 665 (Ct. App. 2008). "Rather, the agreement may be inferred from the circumstances and proven by circumstantial evidence." Id. Medina claims that the state failed to present sufficient evidence of an agreement between Medina and his co-conspirators. (Appellant's brief, pp.6-9.) He is wrong.

The state presented substantial evidence at trial to show Medina and Valadez had an agreement to traffic heroin. Valadez confessed that, on April 14, 2016, she hid in her pants a plastic bag containing heroin that she received from Medina for their trip to Idaho. (Trial Tr., p.230, L.14 – p.231, L.9.) She confessed that she "knew what was in it, of course," and that she knew they were taking the heroin to Pocatello to sell it to the "white guy." (Trial Tr., p.231, Ls.16-22; p.232, Ls.11-18.) Medina and Valadez made the trip in Valdez's car, and Valadez drove part of the way. (Trial Tr., p.232, L.19 – p.234, L.6.) And, although Valadez claimed all of the money from their drug sales belonged to Medina (Trial Tr., p.240, Ls.13-23), she also admitted that when Joyce wired money to pay for

heroin he would send it *to her* (Trial Tr., p.241, Ls.7-16). That is more than sufficient evidence from which the jury could infer that Medina and Valadez had entered into an agreement to traffic heroin.

Relying on Valadez's testimony that she was afraid of Medina, Medina argues that Valadez did not agree to traffic heroin but was coerced into trafficking heroin by Medina. (Appellant's brief, pp.7-9.) Tellingly, he cites no legal authority for his I-made-my-co-conspirator-do-it defense to the conspiracy charge. (See id.) Even if such a defense exists in Idaho, Medina would have had to surmount a high evidentiary bar to enjoy its protection. See, e.g., United States v. Freeman, 208 F.3d 332, 342 (1st Cir. 2000) (observing that "a generalized fear of harm is no defense to a conspiracy charge" and that "[e]vidence precluding the inference of an agreement would have to show that the duress . . . was enough to overbear [the co-conspirator's] will and make [the co-conspirator's] participation in the conspiracy involuntary" (internal quotation marks and citations omitted)). Valadez's testimony that Medina gave her "his look when he didn't like what I was saying"; that Medina "would get upset with me, and he would tell me mean things, and then he would mistreat me"; and that Medina and Valadez's relationship had a history of physical abuse (Trial Tr., p.230, L.1 – p.231, L.9; p.242, Ls.22-25), falls far short of that bar. Cf. Slater v. United States, 562 F.2d 58, 62 (1st Cir. 1976) ("If appellant had secured the contractor's agreement by threatening to kill him, a conspiracy between the two might be less plausible, but that is not this case.").

In any event, Medina was free to emphasize to the jury Valadez's testimony that she was afraid of Medina, but the jurors were free to disbelieve the self-serving details of Valadez's story—and they had good reason to do so. The evidence of what happened when

the police arrested Valadez and Medina paints the picture of a willing co-conspirator rather than an otherwise unwilling participant acting under threat of physical harm. Even after Valadez was in the safety of police custody, she lied to the police officer who asked if she had any drugs (Trial Tr., p.262, Ls.4-6; p.277, L.9 – p.278, L.1), and she did so not because she was afraid of harm from Medina but, in her own words, "because – well, I loved him" (Trial Tr., p.235, L.18 – p.236, L.2). Moreover, it was Valadez who instructed Medina to "[b]e quiet, be quiet" so the police would not find the heroin. (Trial Tr., p.247, L.22 – p.248, L.2.) "'[V]iewing the evidence in the light most favorable to the prosecution," a rational trier of fact could have found, beyond a reasonable doubt, that Valadez and Medina had an agreement to traffic heroin. Eliasen, 158 Idaho at 546, 348 P.3d at 161 (quoting Adamcik, 152 Idaho at 460, 272 P.3d at 432).

The state also presented substantial evidence at trial to show Medina and Joyce had an agreement to traffic heroin. Joyce confessed that he was "engaged in the trafficking or selling and purchasing of heroin." (Trial Tr., p.187, Ls.9-12.) He started his heroin trafficking career purchasing heroin from the "spitters" in Salt Lake City. (Trial Tr., p.137, Ls.18-21.) When Joyce started moving too much product to use the spitter as his supplier, he had the spitter introduce him to Medina. (Trial Tr., p.137, L.24 – p.138, L.1; p.187, Ls.19-24.) By April 2016, Joyce was purchasing from Medina as much as 130 grams of heroin for $8,000 every two weeks. (Trial Tr., p.138, Ls.2-8; p.188, L.17 – p.189, L.16; p.195, L.18 – p.196, L.13.) Although their exchanges were at times straight cash-for-drug deals (Trial Tr., p.188, L.17 – p.189, L.1.), there were also times when Medina would front the heroin and Joyce would wire Medina money at a later time (Trial Tr., p.154, L.12 – p.156, L.9; p.196, L.24 – p.197, L.5; p.241, Ls.7-23). The jury could infer from this

evidence that Medina and Joyce were in an agreement to traffic heroin—namely, Medina would supply Joyce with heroin in exchange for money or "credit," Joyce would sell the heroin to others, and Joyce would then use the proceeds to purchase additional heroin or pay off the "credit" from Medina.

Medina erroneously argues that the state's evidence was insufficient because it proved only a buyer-seller relationship between Medina and Joyce rather than an agreement to traffic in heroin. (Appellant's brief, pp.6-7.) Although a mere buyer-seller relationship may not be sufficient to show a conspiracy to traffic a controlled substance, as the cases Medina relies on make clear, evidence of the seller "'fronting' drugs or supplying them on consignment" is sufficient. United States v. Loveland, 825 F.3d 555, 561 (9th Cir. 2016). The problem with the government's evidence in Loveland was the strict "cash-on-the-barrelhead" nature of the transactions; "[c]redit and consignment were absent." Id. at 562. The Loveland court held that such transactions are not sufficient to prove a conspiracy to traffic because the seller has "no stake in what the buyer does with the goods." Id. ("Though the [suppliers] might assume that [the defendant] was reselling the methamphetamine that he bought from them, he could have flushed it down the toilet for all they cared, since they already had his money."). Those circumstances are readily distinguishable from the case at hand.

The evidence the state presented here was sufficient to prove a conspiracy between Medina and Joyce because it went beyond a mere buyer-seller relationship and showed a heroin-trafficking agreement in which both Medina and Joyce shared an interest. Specifically, the jury heard that Medina agreed to front drugs to Joyce on multiple occasions. At the end of March 2016, Medina sold Joyce $8,000 worth of heroin for $5,000

and a promise that Joyce would pay for the rest of the drugs later.[2] (Trial Tr., p.154, Ls.9-23.) And on April 13, 2016, Medina agreed to sell an individual he believed was Joyce $8,000 of heroin for $7,000 and a promise to pay the $1,000 at a later time. (Trial Tr., p.148, L.14 – p.149, L.11.) Medina's willingness to front Joyce drugs "is 'strong evidence' of membership in a conspiracy because it indicates a strong level of trust and an ongoing, mutually dependent relationship." United States v. Posada-Rios, 158 F.3d 832, 860 (5th Cir. 1998). Thus, "viewing the evidence in the light most favorable to the prosecution," a rational trier of fact could have found, beyond a reasonable doubt, that Medina and Joyce had an agreement to traffic heroin. Eliasen, 158 Idaho at 546, 348 P.3d at 161 (quoting Adamcik, 152 Idaho at 460, 272 P.3d at 432).

II.
Medina Wearing Jail Clothes And Restraints At Trial Was Not Fundamental Error

A. Introduction

Medina's failure to object to the jail clothes and physical restraints places on him the burden of showing fundamental error, which requires him to show the alleged error (1)

[2] Although the transaction at the end of March 2016 falls outside the dates listed in the conspiracy charge (R., p.272), Joyce paid off the $3,000 on April 2, 2016 (Trial Tr., p.154, Ls.19-23), which does fall within the dates listed in the conspiracy charge (R., p.272). Moreover, the transaction at the end of March 2016—immediately prior to the charged conspiracy—is still relevant to the nature of the relationship between Medina and Joyce during the charged conspiracy. Nothing in the record suggests that the nature of their relationship changed between the end of March 2016 and April 14, 2016. On the contrary, their relationship was consistent throughout: Medina agreed to front drugs at the end of March (Trial Tr., p.154, Ls.9-23), he sold drugs to Joyce around April 9 (Trial Tr., p.222, L.3 – p.226, L.16), and then he again agreed to front more drugs to an individual he believed to be Joyce on April 13 (Trial Tr., p.148, L.14 – p.149, L.11).

violated an unwaived constitutional right, (2) plainly exists, and (3) was not harmless.[3] Medina cannot carry his burden.

First, Medina has failed to show a constitutional violation. The United States Supreme Court has expressly held that "the failure to make an objection to the court as to being tried in [jail] clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." Estelle v. Williams, 425 U.S. 501, 512-13 (1976). The rule from Estelle logically extends to physical restraints: without an objection in the record to the physical restraints—or at least a request from the state or order from the district court that the defendant be placed in physical restraints—a defendant cannot prove the compulsion necessary to establish a constitutional violation. Medina's claim thus fails on the merits because no evidence of compulsion exists in the record.

Second, the shackling error Medina alleges does not plainly exist legally or factually. As a legal matter, the error cannot be plain because neither the United States Supreme Court nor any Idaho appellate court has held that Estelle does not apply to physical restraints, and at least some courts outside of Idaho have held that it does. As a factual matter, the record is too sparse on the issue of physical restraints for this Court to conduct an appropriate analysis. Medina's entire shackling claim rests on a single word in the record (i.e., "chains") spoken once by a single witness in identifying the defendant.

[3] It is unclear to the state whether Medina's claim includes the jail clothes. At times, he refers only to the purported "shackling." (Appellant's brief, p.11 ("It was Fundamental Error to Permit Mr. Medina to Appear Before the Jury Shackled.").) Elsewhere he includes references to the jail clothing. (Appellant's brief, p.4) (listing as issue presented on appeal: "Was it fundamental error to permit Mr. Medina to appear before the jury shackled *and in jail clothing*?") (emphasis added).) Even if Medina intended to raise the issue of jail clothes, as explained below, such a claim is squarely foreclosed by the U.S. Supreme Court's holding in Estelle v. Williams, 425 U.S. 501 (1976).

Completely absent from the record are critical facts such as the type of the restraints, the visibility of the restraints, the length of time Medina wore the restraints, whether the district court required Medina to wear the restraints, and whether the restraints had any effect on Medina's ability to present a defense. The sparse record also means this Court cannot discern whether Medina's failure to object was a tactical decision either to garner sympathy from the jury or to convey a message that Medina was dangerous in support of Medina's defense to the conspiracy charge that he forced Valadez to participate in the sale of heroin by threat of violence.

Third, Medina has failed to show the alleged error was not harmless. There is no evidence in the record that any juror actually saw the physical restraints or that the physical restraints had any effect on Medina's ability to present a defense. Moreover, the physical restraints were harmless as to the trafficking heroin charge because the state presented overwhelming evidence of Medina's guilt. Specifically, the state presented eye-witness testimony that Medina trafficked in heroin from Joyce, an individual who repeatedly purchased heroin from Medina, and Valadez, Medina's girlfriend and accomplice. The state also presented video evidence of text messages between Joyce and Medina discussing the sale of heroin and of Medina and Valadez discussing the heroin the two transported to Pocatello to sell to Joyce. And the state presented testimony from multiple police officers and a forensic scientist showing that, after Medina agreed to sell Detective Edgley 130 grams of heroin, Medina and Valadez were arrested at the location where the sale was supposed to take place while Valadez was carrying 125.64 grams of heroin. Furthermore, the use of physical restraints was harmless as to the conspiracy charge because any inference the jury drew from the physical restraints that Medina was a violent or dangerous

individual supported Medina's defense theory that he forced Valadez to participate in the sale of heroin by threat of violence.

B. Standard Of Review

Medina concedes that he did not object to the jail clothing or the physical restraints. (Appellant's brief, p.12.) "If [an] alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine." State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

C. Medina Has Failed To Show Fundamental Error In His Wearing Jail Clothes And Physical Restraints During The Trial

Medina cannot carry his burden on fundamental error review. Fundamental error review requires Medina to show that any error in his wearing jail clothes and restraints during trial (1) violated an unwaived constitutional right; (2) plainly exists, *and* (3) was not harmless. See Perry, 150 Idaho at 228, 245 P.3d at 980. He cannot make any of these showings.

1. Medina Cannot Show That His Wearing Jail Clothes And Restraints During Trial Violated An Unwaived Constitutional Right

Medina has failed to show that his wearing jail clothes and a restraint during trial violated an unwaived constitutional right. The U.S. Supreme Court has held that a "State cannot, consistently with the Fourteenth Amendment, *compel* an accused to stand trial before a jury while dressed in identifiable prison clothes." Estelle v. Williams, 425 U.S. 501, 512 (1976) (emphasis added). The Court noted that "[t]he particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire." Id. at 507. This means, to establish a constitutional violation, the defendant must prove the state actually *compelled* the defendant to stand trial in prison clothes. Id. at 507-10. "The reason for this judicial

focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments." Id. at 508. For example, "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." Id. at 508. Thus, a defendant who wears prison clothes at trial can only establish a constitutional violation by showing the state compelled him to wear the prison clothes, and he can only make that showing by objecting at trial. See Estelle, 425 U.S. at 512-13 ("[T]he failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation."); see State v. Alvarez, 138 Idaho 747, 750, 69 P.3d 167, 169-70 (Ct. App. 2003) (finding failure to object to wearing jail clothes meant defendant "failed to demonstrate that he was compelled to stand trial in identifiable jailhouse attire and, therefore, no violation of [a] constitutional right to a fair trial has been shown").

The rule articulated by the U.S. Supreme Court in Estelle logically extends to the use of physical restraints. In Estelle, "the judicial focus upon compulsion" was based on the fact that some defendants prefer to appear in jail clothing. Estelle, 425 U.S. at 507. The use of physical restraints warrants the same judicial focus upon compulsion because, just like the decision to wear jail clothing, the decision to wear physical restraints has been recognized as a legitimate strategy employed by defense attorneys to invite the jury's sympathy. See, e.g., Harrison v. Mule Creek State Prison, No. CV F 03-4122, 2009 WL 453113, at *25 (E.D. Cal. 2009) ("[T]rial counsel reasonably concluded that the jurors might have sympathy for Petitioner if they knew that he was shackled and was not attempting to hide that fact."); State v. Colon, 864 A.2d 666, 808 (Conn. 2004) ("[T]he

defendant wanted to remain in shackles and handcuffs to appeal to the jurors' emotions and sympathy."); State v. Scott, No. 92 C.A. 161, 1994 WL 10632, at *2 (Ohio Ct. App. 1994) (describing defense counsel's decision not to object to shackling because he "was hoping that the jury would have sympathy" as "a reasonable attempt at trial strategy"); Dickson v. State, 822 P.2d 1122, 1124 (Nev. 1992) ("Other jurors indicated that they felt sympathy for appellant because of seeing him in chains."); State v. Correra, 430 A.2d 1251, 1257 (R.I. 1981) ("An objection is necessary because it is not an uncommon defense tactic to produce the defendant or witness in handcuffs with the hope of eliciting sympathy from the jury."). Accordingly, a defendant can only establish a constitutional violation in the use of physical restraints if he can prove that he was compelled to wear them. Accord Coleman v. Mitchell, No. 1:02-cv-06282-JKS, 2007 WL 963287, at *15 (E.D. Cal. 2007) ("This Court can discern no principled reason not to apply *Estelle* to restraints as well."); People v. Allen, 856 N.E.2d 349, 357 (Ill. 2006) (applying rule from Estelle to physical restraints); State v. Tolley, 226 S.E.2d 353, 372 (N.C. 1976) (applying rule from Estelle to "analogous issue" of physical restraints).

Proof of compulsion must come from an objection made at or before the trial. See Alvarez, 138 Idaho at 749, 69 P.3d at 169 ("In order to establish the presence of compulsion, a defendant is required to object to being tried in jail garments."). Without an objection to the physical restraints in the record—or, at the very least, a memorialized request from the state or mandate from the district court that the defendant be physically restrained—the defendant simply cannot prove the requisite state compulsion. The mere fact that physical restraints were used is insufficient to prove state compulsion because the use of physical restraints, like the wearing of jail clothing, could be the product of a defense

strategy or indifference. See Estelle, 425 U.S. at 512 n.9 ("It is not necessary, if indeed it were possible, for us to decide whether this was a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion.").[4]

Here, Medina cannot establish a constitutional violation because the record is completely devoid of any indication of state compulsion. Medina concedes that he did not object to the use of the physical restraints. (Appellant's brief, p.12 ("There was no objection to the shackling.").) And nothing in the record suggests the state requested the use of physical restraints or that the district court ordered the use of physical restraints. Without any evidence that the state compelled Medina to wear the physical restraints, he cannot establish a constitutional violation. See Estelle, 425 U.S. at 512-13.

Even if Medina is correct that "this right was not waived by Mr. Medina" (Appellant's brief, p.14) see Perry, 150 Idaho at 228, 245 P.3d at 980, that is not sufficient to show the requisite state compulsion. Without having made an affirmative objection to the use of the physical restraints at trial, he cannot prove the merits of his claim. Specifically, "the failure to make an objection" to the use of the physical restraints "negate[s] the presence of compulsion necessary to establish a constitutional violation." Estelle, 425 U.S. at 512-13.

[4] Applying the rule from Estelle to physical restraints is consistent with Deck v. Missouri, 544 U.S. 622 (2005), the case on which Medina relies for his shackling claim, as well as with every Idaho appellate court decision finding that the shackling of a defendant violated due process. In each of these cases, the defendant made clear that the state compelled his or her appearance by objecting to the use of shackles. See Deck, 544 U.S. at 625 (noting Deck objected multiple times to the shackling); State v. Doe, 157 Idaho 43, 45, 333 P.3d 858, 860 (Ct. App. 2014) (noting Doe filed a motion asking he not be shackled); State v. Wright, 153 Idaho 478, 483-84, 283 P.3d 795, 800-01 (Ct. App. 2012) (finding the defendant objected to the use of restraints).

2. Medina Cannot Show That Any Error In His Wearing A Restraint Plainly Exists

The second prong of the Perry fundamental error test requires Medina to show the alleged error plainly exists. 150 Idaho at 228, 245 P.3d at 980. Demonstrating an error plainly exists "necessitates a showing by the appellant that existing authorities have *unequivocally* resolved the issue in the appellant's favor." State v. Hadden, 152 Idaho 371, 375, 271 P.3d 1227, 1231 (Ct. App. 2012) (emphasis in original). It also requires a showing that the error is clear as a factual matter, "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." Perry, 150 Idaho at 228, 245 P.3d at 980.

Medina cannot show the alleged error plainly exists because he cannot show existing authorities have unequivocally resolved the issue in his favor. Estelle squarely forecloses his claim based on jail clothes, and neither the U.S. Supreme Court nor any Idaho appellate court has addressed whether the rule from Estelle applies to physical restraints, which means the error Medina alleges here cannot possibly be plain. See Hadden, 152 Idaho at 376, 271 P.3d at 1232 (holding alleged error not plain where "there remains some doubt as to the outcome of the issue"); State v. Corbus, 151 Idaho 368, 375, 256 P.3d 776, 783 (Ct. App. 2011) (finding defendant failed second prong of Perry where "the available authority does not provide a clear answer to the question of which analytical theory should be applied"). Although courts outside of Idaho have addressed the issue, a review of those decisions only muddies the water. Compare Coleman, 2007 WL 963287, at *15 ("This Court can discern no principled reason not to apply *Estelle* to restraints as well."), and Allen, 856 N.E.2d at 357 (applying rule from Estelle to physical restraints), with United States v. Cooper, 591 F.3d 582, 588 (7th Cir. 2010) (suggesting, in dicta, that

Estelle may not apply to physical restraints but ultimately refusing to address the issue because "the government made no effort to equate shackling to prison garb").

Even if this Court could conclude that Estelle does not legally foreclose Medina's claim, the factual record on this issue is too sparse to conduct the requisite legal analysis. Indeed, Medina hangs his hat on a single word in the record: "He's wearing a white long sleeve shirt, orange Crocs, *chains*, and a tan jumpsuit." (Appellant's brief, p.12 (emphasis added) (quoting Trial Tr., p.193, Ls.4-11).) Completely absent from the record are facts essential to the analysis under Deck, such as the type of restraints used at trial, see Cole v. Roper, 579 F. Supp.2d 1246, 1273 (E.D. Mo. 2008) (rejecting Deck claim, in part, because "[a] knee immobilizer worn under the Petitioner's clothing . . . is far different from the visible leg irons, handcuffs, and belly chain in *Deck*"); whether the jury could see the restraints, see Hoang v. People, 323 P.3d 780, 786 (Colo. 2014) ("We agree with the majority of courts that Deck's heightened constitutional standard is applicable only when there is evidence that jurors observed the restraints or that they were plainly visible."); how long Medina was in the physical restraints, see Keys v. Booker, 798 F.3d 442, 455 (6th Cir. 2015) (finding Deck inapplicable, in part, because the "shackling was relatively brief (less than 90 minutes) as compared to Deck's"); whether the district court required Medina to appear in physical restraints, see id. (finding Deck inapplicable, in part, because "unlike the defendant in *Deck*, Keys appeared before the jury in shackles due to an inadvertent mistake rather than by court order"); or whether the restraints prevented Medina from consulting his attorney or actively participating in his defense, see Williams v. United States, 52 A.3d 25, 34-35 (D.C. Ct. App. 2012) (rejecting Deck claim where "[t]here is not even a hint here that appellant could not confer productively with counsel and participate

actively in his defense"). A timely objection at trial could have revealed all of these essential facts. Medina's failure to lodge that objection, however, means there "is insufficient evidence in the appellate record to show clear error, [and] the matter would be better handled in post-conviction proceedings." Perry, 150 Idaho at 226, 245 P.3d at 978.

In all events, Medina cannot show plain error because the record does not reveal whether the failure to object to the physical restraints was a tactical decision. Multiple cases have recognized the use of physical restraints as a legitimate defense tactic used to evoke sympathy in the jury. See Harrison, 2009 WL 453113, at *25 ("[T]rial counsel reasonably concluded that the jurors might have sympathy for Petitioner if they knew that he was shackled and was not attempting to hide that fact."); Scott, 1994 WL 10632, at *2 (describing defense counsel's decision not to object to shackling because he "was hoping that the jury would have sympathy" as "a reasonable attempt at trial strategy"); Correra, 430 A.2d at 1257 ("[I]t is not an uncommon defense tactic to produce the defendant or witness in handcuffs with the hope of eliciting sympathy from the jury."); see also Estelle, 425 U.S. at 508 ("[I]t is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury."). Because Medina is unable to cite anything in the record showing his trial counsel's failure to object was not a tactical decision, he cannot show the error plainly exists. See State v. Thumm, 153 Idaho 533, 543, 285 P.3d 348, 358 (Ct. App. 2012) (finding "the error does not 'plainly exist' because counsel's failure to object very well could have been a tactical decision").

Medina argues that the physical restraints could serve "[n]o possible defense tactical or strategic purpose" because they conveyed to the jury that Medina was a "dangerous person." (Appellant's brief, p.15.) But even if Medina's counsel believed the

physical restraints would convey to the jury that Medina was dangerous, that message fits perfectly with Medina's defense strategy on the conspiracy charge. Medina's counsel tried to convince the jury that Medina was not guilty of conspiring with Valadez by painting a picture of a coercive, threatening Medina who forced an unwilling Valadez to do what he said by threat of violence. Specifically, in closing argument, defense counsel emphasized to the jury that in order "to have a conspiracy, you have to have an agreement." (Trial Tr., p.362, Ls.14-19.) He then argued that Medina could not have made an agreement with Valadez because "[s]he was here involuntary [sic]": "[s]he did what she was told to do" because "[i]f not, she got beaten." (Trial Tr., p.362, Ls.20-22; p.363, Ls.17-18.) "That doesn't sound like an agreement," Medina's counsel continued, "[t]hat sounds like a violation of the 13th Amendment in the Constitution of the United States against involuntary servitude, absolutely."[5] (Trial Tr., p.362, L.20 – p.363, L.1.) Given that Medina's strategy at trial was to convince the jury that he "forced" Valadez into "involuntary servitude" on threat of being "beaten" (id.), any inference of dangerousness from the use of the physical restraints supports, rather than rules out, that Medina's failure to object to the physical restraints was a tactical decision.

3. Medina Cannot Show That Any Error Was Not Harmless

The third prong of the Perry fundamental error test requires Medina to show the alleged error was not harmless. 150 Idaho at 228, 245 P.3d at 980. Medina attempts to short circuit this prong by arguing that the erroneous use of physical restraints is "structural

[5] Medina picked up on appeal right where he left off at trial, arguing in his opening brief that there could have been no agreement between Medina and Valadez because "[s]he testified about her abusive relationship with Mr. Medina, saying that . . . he hit her" and, according to Medina,"[s]he didn't want to put on the pants or hide the drugs but he gave her a look like he was going to hit her so she complied." (Appellant's brief, pp.8-9.)

error." (Appellant's brief, pp.15-16.) In doing so, he conflates the concepts of structural error and inherently prejudicial error. The erroneous use of physical restraints is inherently prejudicial but is not structural error. See Deck, 544 U.S. at 635.

"[A]s a general rule, most constitutional violations will be subject to harmless error review." Perry, 150 Idaho at 223, 245 P.3d at 975. Under a harmless error analysis, a constitutional error does not necessitate reversal where "the State proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Perry, 150 Idaho at 221, 345 P.3d at 973. Structural errors or "structural defects" are the exception to the general rule that constitutional errors are subject to harmless error review. Perry, 150 Idaho at 222-23, 245 P.3d at 974-75. The U.S. Supreme Court has "found structural errors only in a very limited class of cases." Johnson v. United States, 520 U.S. 461, 468 (1997).

A structural error can never be harmless because it "'affects the framework within which the trial proceeds.'" Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). This means that proof of a structural error renders any harmless error analysis unnecessary. Id. ("[A] structural error 'def[ies] analysis by harmless error standards.'" (alteration in original) (quoting Fulminante, 499 U.S. at 309)). Put differently, the defendant need only prove the structural error occurred to obtain a reversal. See Neder v. United States, 527 U.S. 1, 8 (1999) (observing structural errors are "subject to automatic reversal").

An "inherently prejudicial" error, on the other hand, can be harmless. See Deck, 544 U.S. at 635. In fact, the U.S. Supreme Court has expressly held that a shackling error can be harmless where, like other non-structural constitutional violations, the state proves

"'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" Id. (alteration in original) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).[6] And, because Medina failed to object to the use of the physical restraints at trial, he bears the burden of proving that the alleged error "was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980. He cannot do so.

First, there is no evidence in the record that any juror actually saw the physical restraints. See Larson v. Palmateer, 515 F.3d 1057, 1064 (9th Cir. 2008) ("To determine whether the imposition of physical restraints constitutes prejudicial error, we have considered the appearance and visibility of the restraining device . . . ."). The record reflects only that the jury *heard* Medina was in physical restraints—specifically, one fleeting word as part of a physical description. Cf. Wilson v. McCarthy, 770 F.2d 1482, 1486 (9th Cir. 1985) (holding brief view of defendant's shackles as he left the witness stand not prejudicial). The jury hearing that Medina was in physical restraints on that single occasion was far less prejudicial than, for example, the defendant in Deck who stood in plain view of the jury throughout the proceeding "shackled with leg irons, handcuffs, and a belly chain." 544 U.S. at 624; see Larson, 515 F.3d at 1064 (holding two-day shackling of defendant in six-day trial harmless, in part, because "a security leg brace is not as visually obtrusive or prejudicial a restraining device as handcuffs, leg irons, waist chains or gags"); Rhoden v. Rowland, 172 F.3d 633, 636 (9th Cir. 1999) ("[W]hen the defendant's shackling was not actually seen by the jury during the trial, we have held that the shackling was harmless error.").

[6] Numerous post-Deck decisions have, in fact, found shackling errors harmless. See, e.g., Lakin v. Stine, 431 F.3d 959, 966 (6th Cir. 2005); State v. Dixon, 250 P.3d 1174, 1181 (Az. 2011); People v. Robinson, 872 N.E.2d 1061, 1074 (Ill. App. Ct. 2007).

Second, there is no evidence in the record that the physical restraints prevented Medina from working with his counsel or presenting his defense. See Williams, 52 A.3d at 34-35 (observing the court "cannot find harmful constitutional error" because "[t]here is not even a hint here that appellant could not confer productively with counsel and participate actively in his defense"). In fact, on appeal, Medina fails even to attempt to articulate how the physical restraints prevented him from presenting a defense. (Appellant's brief, p.17.)

Third, as to the trafficking heroin charge, any error in using the physical restraints was harmless given the overwhelming evidence of Medina's guilt. See Lakin, 431 F.3d at 966 ("Despite the substantial risk of prejudice that shackles pose, we are compelled to conclude that the error was harmless in this case due to the overwhelming evidence against Lakin."). Detective Edgley testified that he had a text-message conversation with Medina using Joyce's phone on April 13-14, 2016, and Medina agreed to sell Detective Edgley 130 grams of heroin for $8,000. (Trial Tr., p.145, L.2 – p.147, L.7.) The state corroborated that testimony with a video showing the text messages between Detective Edgley and Medina. (Trial Tr., p.147, L.8 – p.152, L.2; Exhibit 1.) The state further corroborated Detective Edgley's testimony with testimony from Valadez that on April 14 Medina gave her drugs to hide in her pants and told her they were going to Pocatello to sell drugs to Joyce. (Trial Tr., p.230, L.14 – p.232, L.18; p.234, Ls.3-6.) Detective Edgley also testified that, when Medina and Valadez were arrested, he called the number he had been texting and Medina's phone rang. (Trial Tr., p.152, Ls.16-24.)

The state also presented evidence that, when Medina and Valadez were arrested, Valadez had 125.64 grams of heroin hidden in her pants. (Trial Tr., p.266, Ls.4-15; p.319,

L.24 – p.320, L.8.) The overwhelming weight of the evidence showed the heroin belonged to Medina. As explained above, Medina set up the sale of the heroin with Detective Edgley, and the amount of heroin found on Valadez (125.64 grams) was consistent with the amount of heroin Medina agreed to sell Detective Edgley (130 grams). Valadez testified that Medina gave her the heroin and instructed her to hide it in her pants. (Trial Tr., p.230, L.19 – p.231, L.12.) And the police captured a video of Medina and Valadez in the police car after their arrest and before the police found the heroin in which Medina makes numerous incriminating statements, including asking Valadez "[t]hey can't find it on you? Can they?"; asking Valadez "where she hid the drugs"; and stating that "[i]f he [God] helps us we are done, we are getting out of doing this." (State's Exhibit 4A.)

Medina's counsel conceded in closing argument that, given the evidence presented at trial, all that he could argue was that no one had seen Medina in physical possession of the heroin: "The trafficking charge, I heard the evidence; you heard the evidence. I hope you take a look at it. *The only thing I can hang hope on is the officer said he never saw my client traffic or any illegal drugs on him.*" (Trial Tr., p.365, Ls.17-24 (emphasis added).) He tried to convince the jury to acquit unless they found Medina had physical possession: "There's an argument what this possession means. You actually have it physically." (Trial Tr., p.361, Ls.22-23.) But, as even Medina's counsel ultimately had to concede, physical possession is not required. (R., p.380 ("A person has possession of something if the person knows of its presence and has physical control of it, *or has the power and intention to control it*." (emphasis added); Trial Tr., p.365, Ls.21-22 ("And I will acknowledge that you don't have to have drugs on you for constructive possession.").)

The evidence of Medina's power and intent to control the heroin was not only overwhelming, it was Medina's defense to the conspiracy charge. Medina's counsel repeatedly argued that Medina and Valadez could not have entered into an agreement to traffic heroin because Medina forced Valadez to participate in the sale of heroin:

> She did what she was told to do. If not, she got beaten, quote, from the state. He believed that my client forced Ms. Valadez. That doesn't sound like an agreement. That sounds like a violation of the 13th Amendment in the Constitution of the United States against involuntary servitude, absolutely.

(Trial Tr., p.362, L.20 – p.363, L.1.)

> In fact, it was easy when Ms. Bernal, Sharon Bernal-Valadez, indicated that he did his thing, I went to work and did my thing. Again, there was no testimony from her that she conspiracy [sic] to do anything. She was here involuntary [sic]. She got the look. You'll do what I tell you. And she said she did.

(Trial Tr., p.363, Ls.14-19.) "And again, made it real clear that it wasn't something she wanted to do, which doesn't sound like a conspiracy. I hope you review that." (Trial Tr., p.365, Ls.14-16.) Regardless of whether Medina and Valadez agreed to traffic in heroin (as the state suggested) or Medina forced Valadez to traffic in heroin (as Medina suggested), Medina had the power and intent to control the 125.64 grams of heroin found on Valadez on April 14, 2016, which made him guilty of trafficking heroin. See I.C. § 37-2732B(6). Given the overwhelming evidence that Medina trafficked in heroin, which Medina embraced as his defense to the conspiracy charge, the use of the physical restraints was harmless with respect to the trafficking heroin charge. See Lakin, 431 F.3d at 966.

Fourth, as to the conspiracy charge, the prejudice that Medina alleges from the use of the physical restraints supported Medina's defense. See State v. Johnson, 126 Idaho 892, 895, 894 P.2d 125, 128 (1995) (holding error harmless because "[i]f anything, the trial

court's error benefitted [the defendant]"); State v. Thomas, 94 Idaho 430, 436, 489 P.2d 1310, 1316 (1971) (holding error harmless because "the benefits, if any, from the introduction of the statements obviously flowed to [the defendant]"). On appeal, Medina claims the use of the physical restraints conveyed a message to the jury that he was a "dangerous person" and that "Mr. Medina was a threat to the state's informants." (Appellant's brief, p.15.) But that was the message that *Medina* was *trying* to convey to the jury to defend himself against the conspiracy charge. As explained above, Medina's defense against the allegation that he conspired with Valadez was that there could be no agreement between Medina and Valadez because Medina forced Valadez to participate in the sale of the heroin by threat of violence. Because any inference the jury drew that Medina was dangerous supported Medina's defense on the conspiracy charge, any error in the use of the physical restraints was harmless as to that charge. See Johnson, 126 Idaho at 895, 894 P.2d at 128; Thomas 94 Idaho at 436, 489 P.2d at 1316.[7]

[7] Medina also alleges that the use of physical restraints would have conveyed to the jury that he was "guilty of the charges." (Appellant's brief, p.15.) Although that message would not benefit Medina, there are at least three reasons why the risk of that particular prejudice was at least minimized in this case: (1) Medina was not on trial for a violent crime, see Stephenson v. Wilson, 619 F.3d 664, 668 (7th Cir. 2010) (observing shackling "might lead [jury] to prejudge [the defendant's] guilt, particularly in a trial for violent crimes"); (2) the physical restraints would not have done any more damage to the presumption of innocence than had already been done by the jail clothing, Estelle, 425 U.S. at 504 ("[A]n accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption" of innocence), which Medina presumably—under Estelle—had chosen to wear; and (3) the district court repeatedly instructed the jury that Medina was entitled to a presumption of innocence (Trial Tr., p.24, L.22 – p.25, L.1; p.40, Ls.1-10; p.71, Ls.10-11; p.102, Ls.2-18).

III.
Any Error In The Jury Instruction Did Not Rise To The Level Of Fundamental Error

A. Introduction

Medina must show fundamental error in the jury instructions because he did not object to the instructions at trial. He claims that five of the nine overt acts included in the conspiracy jury instruction could not, as a matter of law, qualify as overt acts for purposes of proving a conspiracy. But Medina cannot carry his burden on fundamental error review because he cannot show the alleged error was not harmless.

The error in the jury instructions was harmless because the state presented overwhelming evidence of two valid overt acts that were included in the list of nine potential overt acts in the conspiracy instruction—namely, that Medina and Valadez traveled to Joyce's apartment complex on April 16, 2016, in furtherance of their heroin trafficking conspiracy. Valadez testified that she traveled to Joyce's apartment complex on that date with Medina and 125.64 grams of cocaine that Medina had given to her to hide in her pants so that they could sell it to Joyce. Two police officers testified they saw Medina and Valadez arrive at Joyce's apartment complex on that date. Another police officer testified that a search of Valadez at Joyce's apartment complex on that date produced a package. The state's forensic scientist testified that the package contained 125.64 grams of heroin. The evidence that Medina and Valadez drove to Joyce's apartment on April 16, 2016, was not only overwhelming, Medina did not contest those facts at trial. Any error in the overt-act portion of the conspiracy instruction was thus harmless.

B. Standard Of Review

Medina concedes that he did not object to the jury instructions at trial. (Appellant's brief, p.19.) "If [an] alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine." Perry, 150 Idaho at 228, 245 P.3d at 980.

C. Medina Has Failed To Show The Inclusion Of The Invalid Overt Acts In The Conspiracy Jury Instruction Constituted Fundamental Error

Medina cannot show that the conspiracy instruction given to the jury constituted fundamental error. In order to prove fundamental error, Medina must show that the alleged error (1) violated an unwaived constitutional right; (2) plainly exists, *and* (3) was not harmless. See Perry, 150 Idaho at 228, 245 P.3d at 980. Medina's claim fails under fundamental error review because he cannot show the erroneous inclusion of invalid overt acts in the jury instruction was not harmless.

1. The Conspiracy Instruction Contained Improper "Overt Acts"

Under Idaho law, proof of a conspiracy requires more than just an agreement between two or more individuals to accomplish an illegal objective. Smith, 161 Idaho at 787, 391 P.3d at 1257. The state must also prove "'one or more overt acts in the furtherance of the illegal purpose accompanied by the requisite intent to commit the underlying substantive offense.'" Id. (quoting State v. Garcia, 102 Idaho 378, 384, 630 P.2d 665, 671 (1981)). This means, as a separate element of a conspiracy offense, the jury must find that one of the conspirators committed an overt act in furtherance of the conspiracy. See id.

Here, the conspiracy jury instruction properly informed the jury that it had to find "one of the parties to the agreement performed at least one . . . act" and "such act was done

for the purpose of carrying out the agreement." (R., pp.383-84.) The instruction provided the jurors with a list of nine options to satisfy the overt act requirement and made clear that the jury could convict only if it found one of the conspirators performed "at least one" of the nine overt acts on the list. (R., p.383.)

Medina claims that five of the nine acts "could not be an 'overt act' as a matter of law." (Appellant's brief, pp.19-21.) The state agrees that at least some of these acts should not have been included in the jury instruction.[8] But the error was harmless.

2. Medina Cannot Show That The Error In The Jury Instruction Was Not Harmless

Medina cannot show that the inclusion of the five invalid overt acts in the jury instruction was not harmless. Where "the jury was instructed on alternative theories of guilt and may have relied on an invalid one," the instructional error is subject to harmless error analysis. Hedgpeth v. Pulido, 555 U.S. 57, 58, 61 (2008). In the context of an alternative-theory instructional error, the error is harmless where (1) the state presented "overwhelming" evidence for a conviction under a valid theory or (2) "if the jury, in

[8] The state agrees, for example, that act one is not legally sufficient because it describes only an act of law enforcement. (R., p.383.) The state disagrees, however, that all five of the challenged overt acts were legally deficient. For example, act nine states: "[Valadez] was searched and approximately 127 grams of Heroin were discovered on her person." (R., p.384.) Although the wording of act nine is not perfect (a simple issue that an objection could have fixed), the clear implication of act nine, especially when read together with the instruction that the overt act had to be committed by "one of the parties to the agreement" (R., p.383), is that Valadez committed the overt act of carrying 127 grams of heroin on her person. See State v. Draper, 151 Idaho 576, 590, 261 P.3d 853, 867 (2011) ("[I]t will be assumed that the jury gave due consideration to the whole charge contained in all the instructions and was not mislead by any isolated portion thereof."). That is a legally sufficient overt act to support the conspiracy charge. See, e.g., Byrd v. Phoenix Police Dep't, 885 F.3d 639, 644 n.6 (9th Cir. 2018) ("The only overt act was Byrd's possession of the drugs."); State v. Straub, 877 A.2d 866, 871 (Conn. Ct. App. 2005) ("As to the overt act, possession of the drugs is sufficient for proof of the overt act in a conspiracy." (internal quotation marks, brackets, and citation omitted)).

convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory." United States v. Skilling, 638 F.3d 480, 481-84 (5th Cir. 2011); see United States v. Turner, 674 F.3d 420, 443 (5th Cir. 2012) (holding erroneous aiding and abetting instruction harmless because "[t]he evidence that Turner was the shooter and carjacker was overwhelming"); United States v. Andrews, 681 F.3d 509, 522 (3d Cir. 2012) ("Where there is a clear alternative theory of guilt, supported by overwhelming evidence, a defendant likely cannot show that an instruction permitting the jury to convict on an improper basis was not harmless error."); cf. Perry, 150 Idaho at 224, 245 P.3d at 976 (holding jury instruction omitting element of crime and other "partially erroneous" jury instructions can be harmless "where the evidence supporting a finding on the omitted element is overwhelming and uncontroverted, so that no rational jury could have found that the state failed to prove that element").[9] Because Medina did not object to including the five acts as overt acts in the jury instructions, he bears the burden of showing the error was not harmless. See Perry, 150 Idaho at 228, 245 P.3d at 980.

Here, the erroneous inclusion of invalid overt acts in the jury instruction was harmless because the state presented overwhelming evidence of at least two of the valid overt acts. Specifically, the state presented overwhelming evidence that Valadez and Medina traveled to Joyce's apartment complex on April 14, 2016, to complete a heroin

[9] As the U.S. Supreme Court has recognized, drawing a distinction between alternative-theory errors and omitted-element errors in jury instructions for purposes of harmless error review "would be 'patently illogical,' given that such a distinction 'reduces to the strange claim that, because the jury . . . received both a 'good' charge and a 'bad' charge on the issue, the error was somehow more pernicious than . . . where the *only* charge on the critical issue was a mistaken one.'" Hedgpeth, 555 U.S. at 61 (ellipses and emphasis in original) (quoting Pulido v. Chrones, 487 F.3d 669, 677 (9th Cir. 2007) (O'Scannlain, J., concurring specially)).

deal with Joyce in furtherance of their conspiracy to traffic heroin.[10] Valadez testified that, on April 14, 2016, Medina gave her drugs and told her that they were traveling to Pocatello to sell the drugs to Joyce. (Trial Tr., p.230, L.14 – p.232, L.18.) She testified that Medina drove the vehicle until they arrived in Idaho, and then she "drove to Pocatello, to the apartments where Joyce lived, the white guy." (Trial Tr., p.233, L.3 – p.234, L.6.)

Valadez's testimony that Valadez and Medina traveled to Joyce's apartment to sell heroin on April 14, 2016, was corroborated by the testimony of multiple police officers and a forensic scientist as well as video evidence. Detective Edgley testified that he used Joyce's phone to set up a heroin transaction with Medina, which they scheduled to take place on April 14 at Joyce's apartment. (Trial Tr., p.145, L.5 – p.147, L.7.) And the state presented the jury with video proving that conversation took place. (Trial Tr., p.147, L.8 – p.151, L.24.) Detective Edgley and Detective Olsen both testified that they saw Medina and Valadez arrive at Joyce's apartment complex in a Nissan Pathfinder on April 14, 2016. (Trial Tr., p.151, L.14 – p.152, L.15; p.160, L.22 – p.163, L.4; p.256, L.16 – p.258, L.5.) After Medina and Valadez were taken into custody, they both discussed the drugs they had brought to Joyce's apartment to sell—as demonstrated by a video of the conversation played to the jury. (See State's Exhibit 4A.) Detective Vollmer testified that she arrived on the scene on April 14, conducted a search of Valadez, and found "a Ziploc baggie containing an item wrapped in tin foil." (Trial Tr., p.264, L.3 – p.266, L.15.) And the

[10] Act number five in the jury instructions states: "On or about April 14, 2016, [Valadez] drove a vehicle to 4170 Hawthorne in Chubbuck, Idaho and parked." (R., p.383.) Act number six in the jury instructions states: "MEDINA, aka 'Jeffrey,' was a passenger in the vehicle." (R., p.383.) Medina has not contested the propriety of including act five or act six in the jury instructions. (Appellant's brief, pp.19-21.)

state's forensic scientist testified that the item retrieved weighed 125.64 grams and tested positive for heroin. (Trial Tr., p.319, L.24 – p.320, L.8.)

This eye-witness testimony, video evidence, and scientific evidence showing that Medina arranged a sale of 130 grams of heroin to take place on April 14, 2016, and traveled to Joyce's apartment on April 14, 2016, with Valadez and 125 grams of heroin constitutes overwhelming evidence that Medina and Valadez committed at least two of the valid overt acts listed in the jury instructions—namely, that "[o]n or about April 14, 2016, [Valadez] drove a vehicle to 4170 Hawthorne in Chubbuck, Idaho and parked" and "MEDINA . . . was a passenger in the vehicle"—and that "such act was done for the purpose of carrying out the [heroin trafficking] agreement." (R., pp.383-84.) Because the evidence of these valid overt acts was overwhelming, the erroneous inclusion of the invalid overt acts was harmless. See Hedgpeth, 555 U.S. at 58; Skilling, 638 F.3d at 481-84; Andrews, 681 F.3d at 522.

Medina argues that the jury could not have relied on these valid overt acts because "Ms. Bernal-Valadez never agreed with Mr. Medina to deliver drugs" and "there was no agreement between Mr. Medina and Mr. Joyce." (Appellant's brief, pp.22-23.) But the guilty verdict means the jury necessarily disagreed with those factual assertions because the presence of an agreement was an independent element of the crime separate from the overt-act element. (R., pp.383-84.) Regardless of the overt act the jury relied on when it convicted Medina of conspiracy to traffic heroin, the jury could not have convicted Medina unless it also found that "the defendant, Jersson Neftaly Roque Medina, *and* Sharon Bernal Valadez *and* Logan Joyce . . . agreed . . . to commit the crime of trafficking a controlled substance, heroin." (R., p.383 (emphases added).) Medina's interpretation of the evidence,

which the jury necessarily disagreed with in convicting Medina, fails to prove the error in the conspiracy instruction was not harmless. See Skilling, 638 F.3d at 481-84 ("[A]n alternative-theory error is harmless if the jury, in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory.").

CONCLUSION

The state respectfully requests this Court affirm the district court's judgments of conviction entered upon a jury finding Medina guilty of trafficking heroin and conspiracy to violate the Uniform Controlled Substances Act.

DATED this 21st day of June, 2018.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of June, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

DENNIS BENJAMIN
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/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

JN/dd