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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|----------------------------------|
| STATE OF IDAHO, |) | |
| |) | |
| Plaintiff-Respondent, |) | NO. 39203 |
| |) | |
| v. |) | KOOTENAI COUNTY NO. CR 2010-6509 |
| |) | |
| CODY WILLIAM PARMER, |) | REPLY BRIEF |
| |) | |
| Defendant-Appellant. |) | |

REPLY BRIEF OF APPELLANT

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

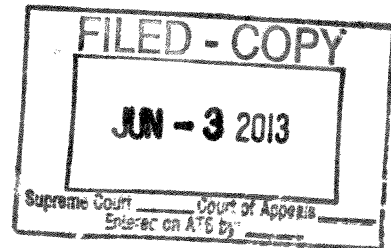
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TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE CASE | 1 |
| Nature of the Case | 1 |
| Statement of the Facts and Course of Proceedings | 1 |
| ISSUE PRESENTED ON APPEAL..... | 2 |
| ARGUMENT | 3 |
| The Prosecutor Engaged In A Pattern Of Misconduct In Cross-Examination That Requires Reversal In This Case | 3 |
| A. Because Mr. Parmer Objected To The Misconduct At Issue In This Appeal, The Fundamental Error Doctrine Does Not Govern This Court's Standard Of Review | 3 |
| B. Because The Misconduct In This Case, Both Individually And As A Cumulative Pattern Of Misconduct, Deprived Mr. Parmer Of His Right To A Fair Trial And Was Not Harmless, It Requires Reversal Of Mr. Parmer's Conviction For Battery With The Intent To Commit Rape..... | 5 |
| CONCLUSION..... | 6 |
| CERTIFICATE OF MAILING | 7 |

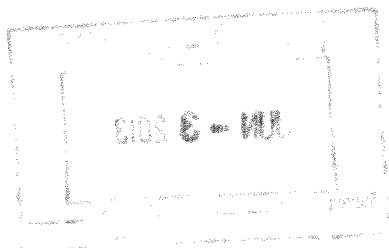


TABLE OF AUTHORITIES

Cases

| | |
|---|------|
| <i>Berger v. U.S.</i> , 295 U.S. 78 (1935)..... | 5 |
| <i>Greer v. Miller</i> , 483 U.S. 756 (1987)..... | 4 |
| <i>State v. Almaraz</i> , ___ Idaho ___, ___ P.3d ___, 2013 WL 1285940, *12 (2013) .. | 4 |
| <i>State v. Christiansen</i> , 144 Idaho 463 (Ct. App. 2007) | 5 |
| <i>State v. Ellington</i> , 151 Idaho 53 (2011) | 5, 6 |
| <i>State v. Erickson</i> , 148 Idaho 679 (Ct. App. 2010)..... | 5 |
| <i>State v. Marmantini</i> , 152 Idaho 269 (Ct. App. 2011)..... | 3, 4 |
| <i>State v. Martinez</i> , 136 Idaho 521 (Ct. App. 2001)..... | 5 |
| <i>State v. Perry</i> , 150 Idaho 209 (2010)..... | 4, 5 |
| <i>State v. Phillips</i> , 144 Idaho 82 (Ct. App. 2007)..... | 5 |

STATEMENT OF THE CASE

Nature of the Case

Cody Parmer has asserted on appeal that the prosecutor in this case engaged in repeated instances of prosecutorial misconduct that, both singly and in the aggregate, deprived him of his right to a fair trial and therefore require reversal of his conviction for battery with the intent to commit rape. This Reply Brief is necessary in order to clarify this Court's standard of review for this claim and, further, to address why the misconduct in this case cannot be established by the State to be harmless beyond a reasonable doubt.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Parmer's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the prosecutor engage in a pattern of misconduct in cross-examination that requires reversal in this case?

ARGUMENT

The Prosecutor Engaged In A Pattern Of Misconduct In Cross-Examination That Requires Reversal In This Case

A. Because Mr. Parmer Objected To The Misconduct At Issue In This Appeal, The Fundamental Error Doctrine Does Not Govern This Court's Standard Of Review

As an initial matter, it is necessary to clarify the standard of review that this Court must apply to Mr. Parmer's claims of prosecutorial misconduct in light of the State's argument within its Respondent's Brief. Although acknowledging that all of the alleged instances of misconduct were objected to at trial by Mr. Parmer, the State claims in this appeal that this Court should nonetheless apply the standard for non-objected to error, also known as fundamental error. (Respondent's Brief, pp.6-7.) The State asserts that this standard should apply because Mr. Parmer did not request a mistrial following the district court sustaining his multiple objections to the improper questioning directed at Ms. Seeling at various points during her testimony.¹ However, a review of pertinent case law on this issue reveals this assertion to be without legal support.

It is generally true that, where a defendant's objection is sustained by the court at trial, there is no ruling unfavorable to the defendant for this Court's review and therefore the issue cannot be presented on appeal. See, e.g., *State v. Marmontini*, 152 Idaho 269, 271 (Ct. App. 2011). However, an exception to this rule may exist in cases of prosecutorial misconduct. In such cases, the defendant must demonstrate that the misconduct gave rise to a due process violation that was significant enough to have infected the fairness of the trial process, despite the district court having sustained an

¹ Notably, the State cites to no legal authority for this assertion. (Respondent's Brief, pp.6-7.)

objection to the misconduct. *Id.* at 271-272; *see also Greer v. Miller*, 483 U.S. 756, 765-766 (1987). The *Marmentini* Court explained:

Thus, when prosecutorial misconduct may have resulted in a violation of due process, the trial court's decision to sustain or overrule a contemporaneous defense objection to the prosecutor's comment is not determinative of whether this Court will review the issue. Instead, "[w]hether the trial court sustains an objection to an impermissible question, or whether the prosecutor is allowed to refer to [impermissible information] in his or her closing arguments, are questions that are relevant to the harmless error inquiry, or to deciding whether the error made the trial fundamentally unfair." "Where a defendant demonstrates that prosecutorial misconduct has occurred, and such misconduct was followed by a contemporaneous objection by defense counsel, such error shall be reviewed for harmless error in accordance with *Chapman [v. California]*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)]."

Marmentini, 152 Idaho at 272 (internal citations omitted) (alterations in the original).

Under the *Chapman* standard, it is the **State's** burden to establish that any error demonstrated by the defendant was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24, *State v. Perry*, 150 Idaho 209, 221-222 (2010). The fact that it is the State that bears the burden of establishing harmless error has been recently reiterated by the Idaho Supreme Court in *State v. Almaraz*, ___ Idaho ___, ___ P.3d___, 2013 WL 1285940, *12 (2013).² In *Almaraz*, the Court reversed the defendant's conviction specifically because the State failed to make any argument that the error was harmless, and therefore the Court found that, "the State failed to meet its burden of proving that the error was harmless." *Id.*

In this case, the repeated pattern of prosecutorial misconduct in this case rose to the level of a due process violation, and therefore this misconduct is reviewable by this

² As of the writing of this Reply Brief, the Court's Opinion in *Almaraz* has not yet been released for publication in the permanent law reports, and therefore is subject to revision or withdrawal.

Court despite the fact that Mr. Parmer's objections were repeatedly sustained. Accordingly, the State's argument that this issue should be reviewed under the standards established for non-objected to error is without merit.

B. Because The Misconduct In This Case, Both Individually And As A Cumulative Pattern Of Misconduct, Deprived Mr. Parmer Of His Right To A Fair Trial And Was Not Harmless, It Requires Reversal Of Mr. Parmer's Conviction For Battery With The Intent To Commit Rape

"[E]very defendant has a Fourteenth Amendment right to due process and '[i]t is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process.'" *Perry*, 152 Idaho at 224 (quoting *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009)). As public officers, prosecutors have an independent duty to ensure that defendants receive fair trials. See, e.g., *State v. Erickson*, 148 Idaho 679, 682-683 (Ct. App. 2010). Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial. *Perry*, 150 Idaho at 227.

Idaho cases have repeatedly recognized that such misconduct may arise where a prosecutor persists in asking questions in violation of a prior court ruling, where the prosecutor mischaracterizes the testimony of a witness, or where the prosecutor uses inflammatory or overly argumentative language calculated to inflame the emotions of the jurors. See, e.g., *Berger v. U.S.*, 295 U.S. 78, 82 (1935); *State v. Ellington*, 151 Idaho 53, 63 (2011); *State v. Erickson*, 148 Idaho 679, 684 (Ct. App. 2010); *State v. Christiansen*, 144 Idaho 463, 469 (Ct. App. 2007); *State v. Phillips*, 144 Idaho 82, 86-88 (Ct. App. 2007); *State v. Martinez*, 136 Idaho 521, 525-526 (Ct. App. 2001).

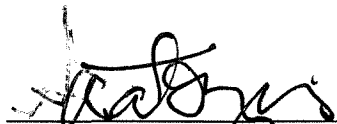
In each of the identified instances of alleged misconduct in this appeal, the prosecutor repeated inflammatory and impermissible questions in the face of an adverse ruling by the district court. (See Appellant's Brief, pp.15-19.) This misconduct became so extensive that the district court had to admonish the prosecutor during the course of the State's cross-examination of Amanda Seeling. (Trial Tr., p.626, Ls.14-20; p.638, Ls.18-24.) This misconduct is virtually identical to that found to be prosecutorial misconduct by the Court in *Ellington*. See *Ellington*, 151 Idaho at 63. And, as was noted by the *Ellington* Court, the trial court "should not have to lecture the prosecutor in front of the jury in order to get it's point across," due to a prosecutor's repetition of an inflammatory question on the heels of a sustained objection. *Id.*

Finally, Mr. Parmer asserts that this misconduct cannot be established by the State to have been harmless based upon the reasons stated more fully in his Appellant's Brief. (See Appellant's Brief, pp.20-21.)

CONCLUSION

Mr. Parmer respectfully requests that this Court vacate his judgment of conviction and sentence for battery with the intent to commit rape, and remand his case for further proceedings.

DATED this 3rd day of June, 2013.



SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of June, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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