STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

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Deputy

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

STATE OF IDAHO,

Plaintiff,

vs.

BRIAN THOMAS NORDLOF,

Defendant.

Case No. **CRF 2016 23294**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On December 7, 2016, a Complaint was filed charging Brian Thomas Nordlof (Nordlof) with one count of Burglary and one count of Grand Theft, both felonies. A warrant of arrest was issued the same day. On December 15, 2016, the warrant of arrest was served on Nordlof and he posted the $50,000.00 bond the same day. A preliminary hearing was scheduled for February 3, 2017, but then vacated.

On January 18, 2017, a Superseding Indictment was filed, charging Nordlof with Count I Burglary, Count II Grand Theft, Count III Burglary, and Count IV Grand Theft. The Superseding Indictment charged Nordlof with one count of burglary for allegedly entering into Karen Jackson's home, another count of burglary for allegedly entering into Paris Antiques intending to commit the crime of theft, one count of grand theft for allegedly taking Karen Jackson's property, and another count of grand theft for allegedly taking money from Paris Antiques. On January 26, 2017, an Amended Superseding Indictment

was filed, charging Nordlof with Count I Grand Theft (for allegedly taking Karen Jackson's property) and Count II Burglary (for allegedly entering into Paris Antiques to commit the crime of theft). The Amended Superseding Indictment also added the habitual offender enhancement allegation of I.C. § 19-2514.

On May 17, 2017, counsel for Nordlof, under seal, filed a Motion to Dismiss Indictment. In that Motion to Dismiss Indictment, counsel for Nordlof states:

> This motion is based upon (1) the lack of sufficient evidence to establish probable cause as to Count II; (2) the lack of exculpatory evidence being given to the grand jurors as to both counts; (3) misconduct by the prosecutor in giving a closing argument to the jury as to both counts; (4) the lack of due process notice as to the specific items allegedly stolen (as to Count I; and (5) lack of due process as to the specific items allegedly pawned by Mr. Nordlof (as to Count II).
>
> This Motion is also based on Idaho Criminal Rules, Rule 6.1 *et seq.*
>
> A memorandum in Support of the motion to dismiss will be filed WITHIN TWO WEEKS.

Mot. to Dismiss 1-2. (emphasis in original). A memorandum in support of Nordlof's Motion to Dismiss has never been filed. On May 23, 2017, counsel for Nordlof filed a Notice of Hearing, scheduling the hearing on Nordlof's Motion to Dismiss for July 5, 2017. On June 14, 2017, counsel for the plaintiff, State of Idaho, filed a Brief in Opposition Motion to Dismiss Indictment. On June 29, 2017, counsel for Nordlof moved the hearing on the Motion to Dismiss Indictment from July 5, 2017, to August 3, 2017. On July 5, 2017, a Second Amended Superseding Indictment was allowed to be filed, counsel for Nordlof stating "no objection" to such. Hearing on Nordlof's Motion to Dismiss Indictment was held August 3, 2017, at the conclusion of which the matter was taken under advisement.

II. STANDARD OF REVIEW.

Idaho Rule Criminal Rule 6.6 provides the grounds for a motion to dismiss an indictment. Nordlof fails to discuss which of the four grounds he is pursuing. None of the first three apply to Nordlof's Motion (a valid challenge to the array of grand jurors, a valid

challenge to an individual grand juror, and where a charge in the indictment was previously submitted to a magistrate at preliminary hearing and dismissed for lack of probable cause). That leaves only the fourth ground "that the indictment was not properly found, endorsed and presented as required by these rules or by the statues of the state of Idaho." This Court notes there are no annotations to I.C.R. 6.6 citing any Idaho appellate court cases. However, the Idaho Supreme Court has held: "The decision to grant or deny a motion to dismiss an indictment based on irregularities in grand jury proceedings is reviewed for an abuse of discretion." *State v. Bujanda–Velazquez,* 129 Idaho 726, 728, 932 P.2d 354, 356 (1997). And in *State v. Marsalis,* 151 Idaho 872, 264 P.3d 979 (2011), the Idaho Supreme Court held:

> When conducting a review of the propriety of the grand jury proceeding, our inquiry is two-fold. *State v. Martinez,* 125 Idaho 445, 448, 872 P.2d 708, 711 (1994). First, we must determine whether, independent of any inadmissible evidence, the grand jury received legally sufficient evidence to support a finding of probable cause. *Id.; State v. Jones,* 125 Idaho 477, 483, 873 P.2d 122, 128 (1994); *State v. Edmonson,* 113 Idaho 230, 236, 743 P.2d 459, 465 (1987). In making this determination, every legitimate inference that may be drawn from the evidence must be drawn in favor of the indictment. *State v. Brandstetter,* 127 Idaho 885, 887, 908 P.2d 578, 580 (Ct. App.1995). Second, even if such legally sufficient evidence was presented, the indictment must be dismissed if prosecutorial misconduct in submitting illegal evidence was so egregious as to be prejudicial. *Martinez,* 125 Idaho at 448, 872 P.2d at 711; *Jones,* 125 Idaho at 483, 873 P.2d at 128; *Edmonson,* 113 Idaho at 237, 743 P.2d at 466. "Prejudicial effect" means "the defendant would not have been indicted but for the misconduct." *Martinez,* 125 Idaho at 448, 872 P.2d at 711; *Edmonson,* 113 Idaho at 237, 743 P.2d at 466. Absent a showing of prejudice by the defendant, we will not second guess the grand jury. *Martinez,* 125 Idaho at 448–49, 872 P.2d at 711–12. To determine whether misconduct is so grievous as to be prejudicial and thus to require dismissal, an appellate court must balance the gravity and seriousness of the misconduct against the extent of the evidence supporting the indictment. *Id.* at 449, 872 P.2d at 712; *Edmonson,* 113 Idaho at 237, 743 P.2d at 466. The *Edmonson* Court further elaborated on the applicable balancing test:
>
> > To determine whether misconduct gives rise to a dismissal, a reviewing court will have to balance the gravity and the seriousness of this misconduct with the sufficiency of the evidence supporting

> the probable cause finding. At one extreme, the misconduct can be so outrageous that regardless of the extent of probable cause evidence, dismissal will be required. At the other extreme, the misconduct may be so slight, that it becomes unnecessary to question the independent judgment of the grand jury. In the middle of these extremes, the court must examine the totality of the circumstances to determine whether the indictment should be dismissed. As stated above, the burden rests with the criminal defendant to make an initial showing that the misconduct rises to the level of prejudice. Absent the showing of prejudice, a reviewing court will not second guess the grand jury. However, once the defendant does affirmatively prove prejudice, the court must dismiss.

151 Idaho at 876-77, 264 P.3d at 984-85 (*citing Edmonson,* 113 Idaho at 237, 743 P.2d at 466).

III. ANALYSIS.

Each of Nordlof's four arguments will be discussed in the order Nordlof presented them in his Motion to Dismiss Indictment.

A. There is no "lack of sufficient evidence to establish probable cause as to Count II."

In Nordlof's Motion to Dismiss Indictment, Nordlof claims there is insufficient evidence that Nordlof sold the property on or about September 22, 2016. Mot. to Dismiss Indictment 2. Nordlof claims the shop owner who purchased the items from Nordlof did so, "I would estimate in July. Maybe towards August.", "could have been in June maybe even earlier…", or "It could have been into September even." *Id.* No citation is given by Nordlof as to the portion of the grand jury proceeding transcript. The plaintiff, in its briefing, provided that citation, pages 20-21. The last phrase alone, "It could have been into September even", is sufficient evidence to establish probable cause as to Count II, the burglary charge. Idaho Criminal Rule 6.6 states, "Probable cause exists when the grand jury has before it such evidence as would lead a reasonable person to believe an offense has been committed and that the accused party has probably committed the offense." As

noted above in *Marsalis,* the Idaho Supreme Court held that in determining whether the grand jury had sufficient evidence to support probable cause, **"**every legitimate inference that may be drawn from the evidence must be drawn in favor of the indictment." *Marsalis,* 151 Idaho at 876, 264 P.3d at 984 (*citing State v. Brandstetter,* 127 Idaho 885, 887, 908 P.2d 578, 580 (Ct.App.1995)).

B. There is no "lack of exculpatory evidence being given to the grand jurors as to both counts."

In Nordlof's Motion to Dismiss Indictment, Nordlof argues, "Evidence existed which implicated other people, the information coming from both the victim and Mr. Nordlof. These other people had access to the victim's property and this information was not presented to the grand jury." Mot. to Dismiss Indictment 2. Counsel for plaintiff cited I.C.R. 6.2(a), correct when her brief was written, but currently it is Idaho Criminal Rule 6.1(b)(1) which requires the prosecuting attorney to present to the grand jury "substantial evidence which directly negates the guilt of the subject of the investigation." I.C.R. 6.1(b)(1). In any event, factually, Nordlof's argument is flawed. Counsel for the plaintiff points out that:

> …the State *did* present evidence that others could enter Jackson's home. On page 11 lines 1-3, Karen described her roommate who was also permitted to enter her home. On page 12 lines 5-12, Karen was asked if anyone else had permission to enter her home. She then stated that her granddaughter was permitted to enter her home, and that the defendant was able to enter to let the dogs in and out.

Mem. and Br. In Opp'n to Def's Mot. to Dismiss Indictment 4. Legally, Nordlof's argument is flawed as it essentially ignores the fact that Nordlof is charged with not only the grand theft (stealing the items from Karen Jackson), but also burglary, for entering Paris Antiques with the intent to commit the crime of theft by selling the same various items to Paris Antiques, knowing they didn't belong to Nordlof. Second Am. Superseding Indictment 1-2. In other words, even if the fact that other people beside Nordlof had access to Karen

Jackson's home, that would only be relevant to the crime of grand theft, and as to that crime, that evidence, even if exculpatory, was made known to the grand jury. But as to the crime of burglary, the *only* evidence is that Nordlof himself entered into Paris Antiques to sell these items to its owner, Jeff P. Gagnon. Grand Jury Tr. 17-22. The fact that people other than Nordlof had access to Karen Jackson's home has no legal moment, absolutely no evidentiary relevance, to the alleged crime of burglary.

C. There is no "misconduct by the prosecutor in giving a closing argument to the jury as to both counts"

Nordlof argues,

> ICR 6.2(f) permits the prosecutor to present opening statements and/or instruct jury on applicable law. But this rule does not support a prosecutor giving a closing argument. The most that can be done by the prosecutor is to instruct on the law at the end of testimony.

Mot. to Dismiss Indictment 2. Counsel for the plaintiff argues that the language of I.C.R 6.2 (now I.C.R. 6.1(b)(7)), that allows the prosecutor to "present opening statements and/or instruct [the grand] jury on applicable law." Mem. and Br. In Opp'n to Def's Mot. to Dismiss Indictment 5. Plaintiff argues the ability to instruct the grand jury on applicable law allows a closing argument. *Id.* First, the Court notes that the Idaho Criminal Rules specifically allow the prosecuting attorney to make an opening statement (I.C.R. 6.1(b)(6)), that the Idaho Criminal Rules do not specifically allow a closing argument, and the Idaho Criminal Rules are silent on the issue of a closing argument. This Court finds that I.C.R. 6.1(b) delineates the power of the prosecuting attorney in grand jury proceedings, and since the Idaho Supreme Court in its rule making capacity did not allow the prosecutor to have the "power" to present closing argument in that rule which delineates the prosecutor's power, the prosecuting attorney lacks that power, and closing argument is improper. However, that does not end the analysis. The Court assumes (no portion of the transcript has been cited

to by Nordlof) Nordlof objects to the following portions of the grand jury proceedings:

> Ms. Perez: Okay. So ladies and gentlemen, that's all the evidence I have for you today, so I'm just going to – some brief argument and then I'll let you deliberate on this.
>
> So I provided the superceding (sic) indictment to the presiding grand juror, so there are four counts here: Burglary, grand theft from the house, Karen's house; then a burglary, grand theft from Paris Antiques, Mr. – or Jeff's store.
>
> So essentially, you've heard evidence that Brian Nordlof was permitted to enter Karen's home for some limited purposes, to let the dogs out. However, Karen described to you that it was only for that purpose.
>
> Now, these pictures, these exhibits that have been admitted depict furniture, a large picture frame, some – a very large mirror, that sort of thing. That could not have been taken from Karen's home in the limited time it takes to let the dogs out.
>
> He couldn't have gone in for a legal purpose and then decided to carry all of that stuff out in one trip. He had to have reentered to take those things. Jeff told you that he had purchased those for $1800, so there's your value. This is property exceeding $1,000 in value. So that's the burglary and grand theft from Karen's home.
>
> Now, there's also burglary, grand theft from Paris Antique store, Jeff's store. So the theft there comes from, as the superceding (sic) indictment, states when Brian obtained that about $1,800 under false pretenses. He walked in, gave Jeff property that Mr. Nordlof didn't really own, and then took from Paris Antiques $1800, the $1,800 that he stole from Jeff. So that's where the theft comes in there. He obviously went into that store with the intent to do so. And that's the burglary.
>
> * * *
>
> Juror No. 9: Yes. Nothing was ever said about the two safes that were stole. Did they recover that?
> Ms. Perez: So we didn't present any evidence on that.
> Juror No. 9: That's what –
> Ms. Perez: Yeah, the evidence we have is just what was stolen in these pictures.
> Juror No. 9: This is two counts and you got two other counts?
> Ms. Perez: So there's a count of grand theft and burglary for what he stole from the house. He stole from the house, and he went into the house with the intent to the theft, and then he stole $1800 from Paris Antiques, and he went into that store with the intent to steal that money. That's where the two counts come from.
> Juror No. 9: So nothing about the safes then?
> Ms. Perez: Right. Correct.
> Juror No. 9: Nothing about the safe, okay.
> Ms. Perez: Yup.

Grand Jury Tr. 25-28. The deputy prosecutor called her remarks "argument," and, the

remarks are "argument" in its broadest sense. However, this Court finds the remarks provide a fair representation of the evidence in light of the elements of the crimes.

Even if this Court were to find counsel for plaintiff's remarks to be impermissible closing argument, Nordlof has cited no prejudice. Nordlof claimed no prejudice at all in his Motion to Dismiss Indictment. Mot. to Dismiss Indictment 1-3. At oral argument, the closest counsel for Nordlof came to claiming prejudice was to state, "The prosecutor should have let the grand jury decide this on their own." However, that claim does not articulate what prejudice occurred from the deputy prosecuting attorney's comments. As noted above, the Idaho Supreme Court in *Marsalis,* reiterating its hold in *Edmonson,* held:

> To determine whether misconduct gives rise to a dismissal, a reviewing court will have to balance the gravity and the seriousness of this misconduct with the sufficiency of the evidence supporting the probable cause finding. At one extreme, the misconduct can be so outrageous that regardless of the extent of probable cause evidence, dismissal will be required. At the other extreme, the misconduct may be so slight, that it becomes unnecessary to question the independent judgment of the grand jury. In the middle of these extremes, the court must examine the totality of the circumstances to determine whether the indictment should be dismissed. As stated above, the burden rests with the criminal defendant to make an initial showing that the misconduct rises to the level of prejudice. Absent the showing of prejudice, a reviewing court will not second guess the grand jury. However, once the defendant does affirmatively prove prejudice, the court must dismiss.

Marsalis, 151 Idaho at 877, 264 P.3d at 985 (*citing Edmonson,* 113 Idaho at 237, 743 P.2d at 466). This Court specifically finds Nordlof has not demonstrated any prejudice. Even if Nordlof had demonstrated prejudice, this Court simply could not find the deputy prosecuting attorney's comments to be "so outrageous that regardless of the extent of probable cause evidence, dismissal will be required." That is one extreme. The other extreme is where a Court finds "the misconduct may be so slight, that it becomes unnecessary to question the independent judgment of the grand jury." This Court finds the deputy prosecuting attorney's comments to be at or near this extreme. Assuming,

arguendo, that the deputy prosecuting remarks are in between those extremes, then, "the court must examine the totality of the circumstances to determine whether the indictment should be dismissed." In the totality of the circumstances analysis, this Court finds the indictment should not be dismissed. The Court finds the deputy prosecuting attorney made no false claim; she did not misstate the evidence. The Court finds the deputy prosecuting attorney in this case simply paired the evidence with the elements of the crimes. She explained what she felt the evidence was, and how that fit in with the elements of the crimes, the language of the indictment. The Court finds the deputy prosecuting attorney did not "shape the testimony", as claimed by Nordlof's counsel at oral argument.

The Court finds that under a strict interpretation of I.C.R. 6.1(b), closing argument is prohibited. However, Nordlof has not articulated any prejudice. Finally, even if Nordlof had articulated prejudice, the Court finds Nordlof did not prove any prejudice, and thus, the Court finds the indictment should not be dismissed.

D. There is no "lack of due process notice as to the specific items allegedly stolen (as to Count I)."

The original Superseding Indictment filed on January 18, 2017, did not list the items stolen or sold to another. The Amended Superseding Indictment filed on January 26, 2017, did not correct that defect. Nordlof filed his Motion to Dismiss Indictment on May 17, 2017, exposing those deficits. On July 5, 2017, this Court, with no objection by counsel for Nordlof, granted the State's motion and allowed the State of Idaho to file its Second Amended Superseding Indictment, which made those corrections as to Count I. Thus, Nordlof's Motion to Dismiss Indictment in this regard is now moot.

E. There is no "lack of due process as to the specific items allegedly pawned by Mr. Nordlof (as to Count II)."

The original Superseding Indictment filed on January 18, 2017, did not list the items

stolen or sold to another. The Amended Superseding Indictment filed on January 26, 2017, did not correct that defect. Nordlof filed his Motion to Dismiss Indictment on May 17, 2017, exposing those deficits. On July 5, 2017, this Court, with no objection by counsel for Nordlof, granted the State's motion and allowed the State of Idaho to file its Second Amended Superseding Indictment, which made those corrections as to Count II. Thus, Nordlof's Motion to Dismiss Indictment in this regard is moot.

F. Miscellaneous: the "missing safes."

The issue of the " missing safes" that were noticed missing by Karen Jackson were not referenced in Nordlof's Motion to Dismiss Indictment, but the issue of the missing safes was discussed by counsel for Nordlof at oral argument. Doing so without notice, places counsel for the State, and the Court, at a disadvantage. Counsel for the State did not object and made her argument in response at oral argument.

Essentially, this is a different "exculpatory" evidence argument. At hearing, counsel for Nordlof argued that it was the fact that her safes were missing which alerted Karen Jackson to the fact that a lot of items of her property in her home were missing and that is why she called the police. Apparently, the safes have not been recovered. The Court has reviewed the transcript of the grand jury proceedings and determines that while the issue of the safes were discussed by Karen Jackson in her testimony (below) and by Rebecca Perez (above), there was no evidence given to the grand jury as to whether the safes have or have not been recovered. Counsel for the State at hearing argued that the fact that the safes were not recovered is not exculpatory. The Court agrees. Exculpatory evidence is "evidence tending to establish a criminal defendant's innocence." *Exculpatory Evidence,* Black's Law Dictionary, 577 (7th ed. 1999).

> Q. [by Ms. Perez] So, Karen, after you returned from vacation, how did you notice they were missing?

A. [Karen Jackson] I got back late on – I believe it was a Friday the 23rd and was pretty late, so I went to bed.

The next morning, as I was putting things away in my closet, I went to move something and saw – I noticed that my small safe was gone, and I turned around and looked an realized that where I had hidden the other safes, they had – it had been moved and the back was gone and both safes were missing from – yes.

Q. Okay. And so did that lead you to see if other things in your home were missing?

A. Yeah. I called the police right away. They asked me to do some – look when they got there. I had gone downstairs and went out in the garage and realized that all of my antique boxes, except for two, were missing because there were holes in the brackets that they were sitting on.

Q. Okay. So, Karen—

A. And then later that afternoon is when I realized after – I just kept finding more and more missing.

Grand Jury Tr. 14-15. The fact that the safes were apparently not found is not evidence "tending to establish Nordlof's innocence." The fact that the safes were not found only serves to prove that for some reason, if Nordlof took them, he did not see fit to then allegedly try to sell them to Paris Antiques. The rest of the items Nordlof allegedly took from Karen Jackson were antiques. There is no evidence that the safes were antique safes, thus, if Nordlof allegedly took the safes there would be no reason for Nordlof to take them to Paris Antiques to try to sell them. Nordlof is not charged with grand theft of the safes, and he is not charged with burglary for entering into Paris Antiques trying to sell the safes.

IV. ORDER.

IT IS HEREBY ORDERED that BRIAN THOMAS NORDLOF's Motion to Dismiss Indictment is **DENIED**.

DATED this 8th day of August, 2017

_____

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2017 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Ann Taylor
Prosecuting Attorney – Rebecca Perez

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy