STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK OF THE 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,*	)	Case No. **CRM 2007 13093**
vs.	)	**MEMORANDUM OPINION AND ORDER ON APPEAL AFFIRMING DECISION FROM MAGISTRATE DIVISION DENYING DEFENDANT'S MOTION TO DISMISS**
BENJAMIN FOX, *Defendant.*	)	

I. PROCEDURAL AND FACTUAL BACKGROUND.

A third party (Bodlander) contacted the Kootenai County sheriff's department (department) on March 23, 2007, alleging that someone had burglarized his home. On April 1, 2007, Bodlander provided the department with a compact disc holding approximately twenty-five messages left by defendant Benjamin Fox (Fox) for Bodlander on Bodlander's phone. The department determined that sufficient evidence existed with which to charge Fox with telephone harassment, but that there was insufficient evidence to charge Fox with burglary. Fox Defendant entered his not guilty plea on August 14, 2007.

At an I.R.E. 404(b) conference held on November 19, 2007, Magistrate Judge Robert Burton ruled the State could introduce the issue of the burglary on rebuttal (but not in its case in chief), only if the issue of the burglary was brought into play by the defense and only to show intent or prior bad acts.

At the hearing for the jury trial status call on February 11, 2008, Fox's attorney made an oral motion to dismiss, moving to dismiss pursuant to violation of Fox's right to a speedy

trial. The motion was brought on day 180 (measured from the entry of Fox's plea of not guilty), and Fox's counsel argued the prejudice he sustained was having to come to court seven times. "He has substained – sustained substantial prejudice in that he has had to come into court here no fewer than seven times with…" Tr. p. 23, Ll. 10-12. The State argued that the motion to dismiss should be denied, that there was good cause to extend beyond the deadline due to trial congestion due to an abundance of trials. After taking a recess to read *State v. Clark, infra,* cited to the trial court by Fox's attorney at the hearing, the trial court found trial congestion a neutral factor, that other matters were scheduled with a higher priority than Fox's trial, that the delay was extremely short and did not prejudice Fox, and that the State had not acted to delay the trial. The jury trial was held on February 14, 2008 (184 days from the entry of Defendant's plea). On February 12, 2008, Fox's counsel filed a Motion to Reconsider the decision and noticed it up for hearing on the first day of the jury trial. The trial court heard the motion to reconsider and denied the motion.

Following the trial, the jury found Fox guilty of the misdemeanor crime of using a telephone to annoy and/or harass and/or offend, Idaho Code § 18-6710. Fox was sentenced by Magistrate Judge James Stow on April 11, 2008, to ten days in jail and two years unsupervised probation. Fox filed his Notice of Appeal on May 23, 2008.

At issue on appeal is: (1) whether the trial Court erred in denying Fox's motion to dismiss based on a violation of his right to a speedy trial, and (2) whether the State committed prosecutorial misconduct during the trial (Fox alleges the State engaged in prosecutorial misconduct by referencing the alleged burglary in opening statement, during the direct examination of Bodlander, and during closing argument).

The parties filed brief regarding the issues on appeal, and the Court has reviewed those submissions. Oral argument was scheduled for January 22, 2009. On January 22,

2009, counsel for each side appeared for oral argument, and both counsel agreed the issues could be submitted to the Court on the briefs, with both parties waiving oral argument. Accordingly, the matter is now at issue.

II. ANALYSIS

A. Standard of Review.

Whether the right of a defendant to a speedy trial was violated present a mixed question of fact and law. *State v. Clark,* 135 Idaho 255, 257, 16 P.3d 931, 933 (2000). Idaho Appellate Courts defer to a trial court's findings of fact if they are supported by substantial and competent evidence and exercise free review of the trial court's conclusions of law. *Id.* The standard of review for prosecutorial misconduct during closing arguments is heightened where defendant's counsel does not object. *State v. Hairston,* 133 Idaho 496, 513, 988 P.2d 1170, 1187 (1999). Where defense counsel does not object during closing, reviewing courts review the propriety of comments made only where they constitute fundamental error. *State v. Smith,* 117 Idaho 891, 898, 792 P.2d 916, 923 (1990). Where an objection is made to prosecutorial conduct in the trial court, and error is found on appeal, a reviewing court will determine whether the error was harmless. *State v. Phillips,* 144 Idaho 82, 88, 156 P.3d 583, 589 (2007). Error will be deemed harmless where the appellate court is convinced beyond a reasonable doubt that the result of the trial would have been the same if the misconduct had not occurred. *State v. Hodges,* 105 Idaho 588, 591, 671 P.2d 1051, 1054 (1983).

B. Speedy Trial.

The Sixth Amendment to the United States Constitution and Article 1, § 13, of the Idaho Constitution guarantee criminal defendants the right to a speedy trial. The right to a speedy trial has been codified in I.C. § 19-3501. Speedy trial guarantees are designed to

minimize the possibility of lengthy incarceration before trial, to reduce the lesser impairment of liberty on an accused when released on bail, and to shorten the disruption of life caused by an arrest and the presence of unresolved criminal charges. *United States v. Loud Hawk,* 474 U.S. 302, 311, 106 S.Ct. 648, 654 (1986). In *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 2191 (1972), the Supreme Court of the United States adopted a four-part balancing test to determine if a defendant's speedy trial right had been violated. The factors to be balanced are: 1) the length of the delay; 2) the reason for the delay; 3) the assertion of the right to a speedy trial, and 4) the prejudice to the accused. *Id.* Idaho Code § 19-3501 states in relevant part:

> The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases… (4) If a defendant, charged with a misdemeanor offense, whose trial has not been postponed upon his application, is not brought to trial within six (6) months form the date that the defendant enters a plea of not guilty with the court.

I.C. § 19-3501(4).

The State contends this Court should balance these four factors as follows: 1) the delay was very short and amounted to either one or four days after the six month period expired, depending on whether the speedy trial clock began to run when Judge Friedlander entered a plea on behalf of Fox or when defense counsel appeared and entered the plea; 2) the trial had been continued due to court congestion and other cases having higher priority; 3) Fox asserted the right, but waited until February 11, 2008 to do so; and 4) the only prejudice identified by Fox's counsel was having to appear in court seven times, as Fox was not incarcerated before trial and never asserted his defense would be impaired. Respondent's Opening [and only] Brief, pp. 4-8. As stated above, Fox's counsel claimed at the February 11, 2007, hearing on his motion to dismiss: "He has substained – sustained substantial prejudice in that he has had to come into court here no fewer than seven times

with…" Tr. p. 23, Ll. 10-12. This Court has reviewed the file and the transcript, and as of that hearing it would appear that this was only Fox's **fourth** appearance in court on this charge: August 14, 2007, first appearance; November 2, 2007, pretrial conference and jury status conference; November 19, 204(b) hearing; and February 11, 2008 hearing on the motion to dismiss.

Fox argues the balancing test in *Barker* has been recognized by the Idaho Supreme Court as going further than the good cause standard in I.C. § 19-3501. Appellant's Brief, p. 6, citing *State v. Clark,* 135 Idaho 255, 258, 16, P.3d 931, 934 (2000). Fox argues *Clark* requires a substantial reason rising to the level of a legal excuse for the delay to be excused for good cause. *Id.* Fox states the burden of showing good cause under I.C. § 19-3501 "rests squarely on the government" and that Fox has been prejudiced by missing time at work and with his family to appear in court seven times in this matter. Appellant's Brief, p. 8.

In *State v. Young,* 136 Idaho 113, 117, 29 P.3d. 949, 953 (2001) the Idaho Supreme Court identified the first *Barker* factor, the "length of delay" as a "triggering mechanism." The Idaho Supreme Court reasoned that until there a delay is presumptively prejudicial, it is unnecessary for a Court to inquire into the other three factors in a time computation under the United States and Idaho Constitutions. *Id.* In *Barker,* the United States Supreme Court held that the four-part test did not create bright line boundaries, but because of the imprecision of the right to a speedy trial, the length of delay would trigger inquiry into whether the right had been violated in the peculiar circumstances of each case. 407 U.S. 514, 530-31, 92 S.Ct. 2182, 2191-92. Fox admits his right to a speedy trial was violated on February 12, 2008, and that trial commenced in this action on February 14, 2008. This length of delay is so short that it likely does not provoke inquiry into whether Fox's speedy

trial rights were violated. However, *Barker* and *Young* dealt with felony cases in which the period of delay is measured from the formal indictment or information date. When dealing with misdemeanor crimes such as Fox's charge, Idaho Code § 19-3501(4) is more on point that either the Idaho or United States Constitution.

Regarding the other the factors to be balanced, Fox did assert his speedy trial right, but did not do so until the hearing on February 11, 2008. In *State v. Lopez,* 144 Idaho 349, 160 P.3d 1284 (2007), the Idaho Court of Appeals stated that where Lopez filed his motion to dismiss two days before the trial and never requested a more expeditious trial, the lateness of the assertion of his speedy trial right weighed against his contention that the right had been violated. 144 Idaho 349, 353, 160 P.3d 1284, 1288; *see also State v. Rodriguez-Perez,* 129 Idaho 29, 37, 921 P.2d 206, 214 (Ct.App. 1996). The reason for the delay in Fox's matter was alleged to be court congestion and other cases having higher priority. However, as *Barker* makes clear, the duty to bring a defendant to trial lies with the State, not the defendant. 407 U.S. 514, 527, 92 S.Ct. 2182, 2190. Thus, the trial court and the prosecution have the primary burden to ensure cases are timely brought to trial. 407 U.S. 514, 528, 92 S.Ct. 2182, 2191. In *Lopez,* the District Court found that the parties shared responsibility for the delay, Lopez had acquiesced in low-priority settings rather than demanding a speedy trial early in the proceeding. 144 Idaho 349, 354, 160 P.2d 1284, 1289. Finally, the *only* prejudice indentified by Fox was that he has missed time at work and with family to attend court dates. Tr. p. 23, Ll. 10-12. Later in that hearing, Fox's counsel claimed Fox wanted to join the military and was waiting for this case to resolve to do so. Tr. p. 32, Ll. 22-23. The trial court listened to these stated incidents of prejudice (coming to court seven times and wanting to join the military), and correctly assessed both of these reasons as follows:

> THE COURT: I don't think that's the prejudice that's contemplated. The uh, prejudice is whether he's been able to present his case and get a fair trial, and I don't see that that's a factor in this case uh, whether it's today or Thursday.

Tr. p. 33, Ll. 2-6. The nature and extent of prejudice is the most important of the *Barker* factors. *State v. McNew,* 131 Idaho 268, 273, 954 P.2d 686, 691 (Ct.App. 1998). And in considering prejudice, the Court looks at prevention of oppressive pretrial incarceration, minimization of the accused's anxiety and concern, and limiting the possibility of the defense being impaired. *Barker,* 407 U.S. 514, 532, 92 S.Ct. 2182, 2193. In the instant matter, there was no pretrial incarceration and Fox has alleged no impairment of his defense caused by the several day delay.

In sum, none of the factors ultimately weigh in favor of Fox. The delay amounted to between one and four days; Fox did not assert his speedy right until three days before trial; the delay was not caused by either party, but Fox never requested a higher-priority setting; and there was no prejudice to Fox in light of the interests the right to a speedy trial is intended to protect. As mentioned above, speedy trial guarantees are designed to minimize the possibility of lengthy incarceration before trial, to reduce the lesser impairment of liberty on an accused when released on bail, and to shorten the disruption of life caused by an arrest and the presence of unresolved criminal charges. *United States v. Loud Hawk,* 474 U.S. 302, 311, 106 S.Ct. 648, 654 (1986). None of those are at play here. Fox was not in custody pending trial. Fox did not make a record of any impairment of liberty while released on bail or shortening of the disruption of life due to the presence of unresolved charges, other than the desire to join the military and having to come to court seven (four) times. From the day his desire to join the military was articulated to the Court, to the time of his trial, four days elapsed. Coming to court seven (four) times is not an unexpected disruption given the charge. Further, there has been no showing by Fox that

the trial court did not base its decision on substantial evidence in determining that good cause existed under I.C. § 19-3501(4) and allowing the trial to commence on February 14, 2008. The trial court evaluated the reason for the delay and any resulting prejudice to Fox, and where such a decision is based upon substantial evidence, that decision must be upheld.

C. Prosecutorial Misconduct.

State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct.App. 2007), sets forth a thorough analysis of when, in closing argument, a prosecutor engages in misconduct. Closing arguments should not include personal opinions or beliefs about witness credibility or the accused's guilt or innocence; should not include disparaging comments about opposing counsel; should not include inflammatory words in describing a witness or the accused; may not misrepresent or mischaracterize the evidence; may not unduly emphasize irrelevant evidence or evidence not admitted at trial; cannot refer to facts not in evidence; and cannot argue as substantive evidence things admitted for a limited evidentiary purpose, *inter alia. Id.* (citations omitted).

Fox argues the State overtly and expressly appealed to the jurors' emotions. Appellant's Brief, p. 10. Fox also argues the State improperly referred to evidence because the Court had previously ruled the burglary issue could only be raised to show intent or prior bad acts if the defense raised it first. *Id.,* p. 11. Fox claims the State improperly referred to the burglary on three separate occasions and, although the Court sustained Fox's objection to the impermissible reference to the burglary, he was denied a fair trial because the evidence was presented to the jurors three separate times by the State. *Id.,* at pp. 11-12.

The State argues that reference to an unlawful entry in its opening was permissible

because the telephone message the prosecutor was speaking about contained references to the unlawful entry into Bodlander's home. Respondent's Opening Brief, pp. 10-11. The State argues its questioning of a witness about the burglary was brought on by the defense's questioning, which allegedly went beyond the scope. *Id.,* p. 15. The State also notes that the burglary came up in the Fox's defense case-in-chief during questioning of Fox's father and the clarification on cross-examination by the State was not objected to. *Id.,* p. 17. The State also argues its closing argument contained no reference to the burglary, but upon hearing Fox's closing argument emphasize reference to not having broken into Bodlander's home, the State addressed those statements in its rebuttal closing. *Id.,* p. 18. It is the State's contention that errors invited by the defendant cannot be reversible. *Id.,* p. 19. Finally, the State argues that it merely responded to attacks on the prosecutor's office by defense counsel in its rebuttal closing. *Id.,* pp. 20-22.

The file contains no Notice of Intent to Use 404(b) evidence as is required under I.R.E. 404(b). Judge Burton told the deputy prosecutor for the State handling this case, Shane Greenbank, that there was no 404(b) motion in the file. Tr. P. 16, Ll. 8-10. Thus, this evidence should not have been allowed in the first place. I.R.E. 404(b). Having no written motion filed places this Court at a disadvantage on appeal, because it is unknown what exactly the State wanted to get into evidence under their I.R.E. 404(b) motion. The motion was argued to Judge Burton, and it is impossible to tell from the transcript what it is the deputy prosecutor wanted to get into evidence. Tr. p. 16, L. 2 – p. 22, L. 9. Due to the interruption of Judge Burton by defense counsel, it is impossible to tell what exactly what Judge Burton was prohibiting. The following is as close as this Court can get to discerning the ruling by Judge Burton:

> THE COURT: Well, yeah, I don't think there's any um, issue that – I mean I'm not gonna allow anything about a burglary or potential burglary

(inaudible)…I mean that's a separate issue. If there was a prior phone call making a threat to come into the home or making a threat to do bodily harm or make a threat in general, that could show uh, lack of – or that could show it as intent to make a threat on this also or ---

Ms. ANDERSON: But –

THE COURT: -- threaten or intent to harass.

Tr. p. 212, Ll. 9-18. Thus, Judge Burton apparently ruled he would not allow anything about a prior burglary or potential burglary.

Deputy prosecuting attorney Shane Greenbank clearly violated that I.R.E. 404(b) ruling by stating in opening statements:

"* * * Youre gonna hear that uh, Mr. uh, uh, Bodlander's house, uh, had been burglarized, he'd reported the burglary uh, right in conjunction with—
Ms. Anderson: Objection, your Honor. Approach?

Tr. p. 80, Ll. 8-11. That is a violation of Judge Burton's ruling and Fox's attorney objected. In examining Bodlander on re-direct examination, the State asked Bodlander:

Q. [Shane Greenbank] Okay. And did you tell him anything about this case?
A. [Bodlander] I mentioned to him what had happened, um, that I had given Ben the opportunity to work with him. Uh, I just mentioned that my house has been burglarized, uh, you know, that maybe if anything of mine might show up –
MS. ANDERSON: Objection, your Honor.

Tr. p. 121, Ll. 12-18. The objection was sustained. The motion to strike was not ruled upon by the trial court. Tr. p. 121, Ll. 18-21. That testimony is a violation of Judge Burton's ruling, and the State should have had its victim prepared and aware not to discuss this issue. Finally, during the State's rebuttal closing argument the deputy prosecutor argued:

He goes on to explain its because a burglary had occurred. Then…Then he says a couple weeks later…well, this is well beyond uh, what we're dealin' with here in this charging language or anything else.

Tr., p. 173, Ll. 10-18. Aside from the non-sequitur of the statement, the deputy prosecutor violated Judge Burton's I.R.E. 404(b) ruling. No objection was voiced by Fox's counsel to this statement. This Court finds the deputy prosecutor committed prosecutorial misconduct

in violating Judge Burton's I.R.E. 404(b) ruing on these three occasions.

Where, as here, the alleged error is predicated upon allegations of prosecutorial misconduct, a reviewing Court must inquire whether the error was harmless beyond a reasonable doubt. *State v. Harrison,* 136 Idaho 504, 506, 37 P.3d 1, 3 (2001); *State v. Stoddard,* 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct.App.1983). The general rule that constitutional error is not necessarily prejudicial error has exceptions; some constitutional rights are so indispensible to a fair trial that errors are presumed prejudicial. *Stoddard,* 105 Idaho 169, 171, 667 P.2d 272, 274. These rights include the right to counsel, coerced confessions, and the right to an impartial judge. *Id.* (citations omitted). The Idaho Supreme Court had stated:

> Error in the abstract does not necessarily rise to the level of constitutional dimensions unless and until a defendant properly presents a specific prejudice resulting from such error.

State v. Wright, 97 Idaho 229, 231, 542 P.2d 63, 65 (1975). Therefore, if no specific constitutional right has been violated, and no specific prejudice has infringed upon due process, appellate review is subject to the harmless error test. *Stoddard,* 105 Idaho 169, 171, 667 P.2d 272, 274.

The inquiry by this Court is (1) whether prosecutorial misconduct occurred, (2) whether error can be found on appeal, and (3) whether this error is harmless beyond a reasonable doubt. *Phillips,* 144 Idaho 82, 88, 156 P.3d 583, 589. Here, Fox's counsel objected to mention of the 404(b) evidence regarding the burglary during opening statements and witness testimony. Fox's counsel did not object to the brief mention by the deputy prosecutor in the rebuttal closing.

It appears from the record that both counsel engaged in conduct that could arguably be construed as including disparaging comments about opposing counsel and unduly

emphasizing irrelevant evidence or evidence not admitted at trial. Fox's counsel: Tr. p. 164, Ll. 9-12; p. 264, Ll. 17-21; p. 165, Ll. 22-24; p. 166, Ll. 6-9 ("The prosecutor had full awareness of what was on this tape before he brought this case to you here today. And now he's trying to use you to help protect a drug dealer. I would encourage you not to do that."); p. 169, Ll. 9-12 ("This case should have never found its way in front of a court of law to pull people out of their daily lives to come in here and hear this. It's an injustice."); p. 170, Ll. 3-5 ("But what I would ask you is tell the State that it is not okay to bring a case like this into court of law and sully it the way it has been done today."); and the deputy prosecutor: Tr. p. 170, Ll. 8-25; p. 172, Ll. 13-24. On appeal, Fox argues:

> In that case [*State v. Phillips*] as in the case at hand, the State's appeal to the jurors' emotions was overt and express. The State told jurors that he was personally "offended" at any accusations tha the State was "protecting druggies," asked the jurors to perform their "civic duty" and "return a verdict of guilty," and told the jurors tha they were here to administer justice and hold the defendant accountable. (Tr. p. 172, ll. 18-24; p. 174, ll. 19-21). This Closing argument was an attempt to appeal to the emotions of the jurors and as such was improper.

Brief of Appellant, pp. 9-10. This is an interesting argument by Fox. Essentially, counsel for Fox made the improper remarks in her closing arguments (noted above by this Court), then allowed the deputy prosecutor to respond to Fox's counsel's improper remarks with his own improper remarks **without objection** by Fox's counsel, and now contends that apparently only the deputy prosecutor's remarks were improper.

Most importantly, other than a conclusory statement that Fox suffered prejudice, Fox has set forth no specific evidence that if any prejudice resulted from the jury hearing reference to the burglary from the State (especially where Fox's own counsel upon question of Fox himself *also* made at least one such reference, Tr., p. 137, Ll. 13-25), that any such prejudice is anything other than harmless error. All Fox has argued is this:

However, Mr. Fox was deprived of the right to a fair trial where prejudicial

> evidence that had been ruled inadmissible by the Trial Court was disclosed to the jurors on three separate occasions by the State.
>
> The State's conduct during opening and closing arguments and during questioning of the witnesses was such that Mr. Fox was denied a fair trial and amounted to fundamental error.

Brief of Appellant, p. 12. Claiming prejudice in Fox's opening brief does not make it so. The State has only obliquely made passing reference to the harmless error issue. Respondent's Opening Brief, p. 9, 15. While counsel for the State mentioned the concept of harmless error, counsel for the state failed to give any reason why these references to items prohibited in the I.R.E. 404(b) hearing are harmless error. While the State failed to make any argument as to why the State's violation of the I.R.E. 404(b) ruling by Judge Burton would be harmless error, it is Fox's burden on appeal to demonstrate prejudice. Fox's counsel apparently admits Fox can show no prejudice, as the issue of prejudice is not mentioned one time in Fox's "Response Brief of Appellant." As noted above, as stated by the Idaho Supreme Court:

> Error in the abstract does not necessarily rise to the level of constitutional dimensions unless and until a defendant properly presents a specific prejudice resulting from such error.

State v. Wright, 97 Idaho 229, 231, 542 P.2d 63, 65 (1975). All Fox has done is claim error in the abstract. The jury convicted Fox of the misdemeanor crime of using a telephone to annoy and/or harass and/or offend, Idaho Code § 18-6710. A review of the transcript shows the evidence of that crime at trial was overwhelming. Regarding the references to a burglary, it is unclear who committed any prior burglary, Fox, Bodlander or someone else. Even if it were Fox, and even if an actual burglary were being stated, such a burglary would have nothing to do with the elements of the crime before the jury, telephone harassment. This Court cannot say the improper argument by the deputy prosecutor or the reference to any burglary was anything other than harmless given that quantum of evidence on the

underlying charge submitted to the jury.

In summary, there was prosecutorial misconduct. There were objections made and sustained, but no motion to strike on one instance and no ruling on a motion to strike in another instance. To that extent only, there is error. However, any error is harmless. Fox has simply shown no prejudice whatsoever.

III. ORDER

IT IS ORDERED that the Magistrate's decision Denying Defendant Fox's Motion to Dismiss is AFFIRMED. This matter is remanded back to Magistrate Division for any further action.

Dated this 26th day of January, 2009.

_____
John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of January, 2009 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by facsimile or interoffice mail to:

David Whipple, Deputy Kootenai Co. Prosecutor

Staci Anderson, Deputy Kootenai Co. Public Defender

Judge James D. Stow
Judge Robert Burton

By _____
Jeanne Clausen, Secretary