STATE OF IDAHO)
County of KOOTENAI)ss

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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.)
CHRISTOPHER HUCKABY,)
Defendant.)

Case No. **CRM 2008 20224**

MEMORANDUM DECISION AND ORDER ON APPEAL

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

Following a jury trial on May 6, 2009, before the Honorable Judge Scott Wayman, in Magistrate's Division, defendant Christopher Huckaby (Huckaby) was found guilty of resisting and obstructing an officer. Following trial, Judge Wayman immediately imposed sentence, waived costs and imposed a 145 day jail sentence but gave Huckaby credit for the 145 days he had already served up to that point in time.

The day before trial, Huckaby filed a motion to dismiss pursuant to I.C.R. 48 on the grounds the language of the Uniform Citation Form was deficient. Huckaby's motion was denied and the case proceeded to trial.

The morning of trial, Huckaby's attorney orally moved for a continuance because a witness, Huckaby's son, Tobias, was absent from trial despite a subpoena *duces tecum* being faxed to the Sheriff's Department for service on May 4, 2009. Judge Wayman denied

the motion and trial was held May 6, 2009. The day after trial and sentencing, even though Huckaby had already served his entire sentence, Huckaby filed his Notice of Appeal. In his appeal, Huckaby raises six issues:

1. Whether the language contained in the charging document meets the requirements of due process;
2. Whether the trial court improperly admitted evidence of uncharged misconduct;
3. Whether the prosecutor committed misconduct in his opening statement and closing argument;
4. Whether the trial Court erred in not granting a continuance;
5. Whether the trial court erred in not granting the defense motion for a mistrial; and
6. Whether Huckaby's conviction should be reversed pursuant to the cumulative error doctrine.

II. STANDARDS OF REVIEW.

Whether a charging document conforms to the requirements of the law and whether a court has jurisdiction are questions of law over which reviewing courts exercise free review. *State v. Jones,* 140 Idaho 755, 757, 101 P.23d 699, 701 (2004). A defect in a charging document raised for the first time on appeal is liberally construed in favor of validity. *Jones,* 140 Idaho 755, 759, 101 P.3d 699, 703. Reviewing courts have considerable leeway to imply the necessary allegations from the language of the charging document. *State v. Robran,* 119 Idaho 285, 287, 805 P.2d 491, 493 (Ct.App. 1991).

Admission of I.R.E. 404(b) evidence is reviewed first by considering the trial court's legal determination that the evidence is relevant for a purpose other than proof of bad

character and conforming conduct. *State v. Tapia,* 127 Idaho 249, 254, 899 P.2d 959, 964 (1995). Then, if such relevance is found, reviewing court's apply the abuse of discretion standard of review to the trial court's determination that the probative value of such evidence was not outweighed by unfair prejudice. *State v. Dragoman,* 130 Idaho 537, 544-45, 944 P.2d 143, 141-42 (Ct.App. 1997).

In reviewing allegations of prosecutorial misconduct, reviewing courts must distinguish between cases where an objection to prosecutorial misconduct is raised for the first time on appeal or not. *State v. Severson,* 147 Idaho 694, ___, 215 P.3d 414, 435-36 (2009). When an objection to a prosecutor's act is made at trial, reviewing courts determine whether there was error in the trial court's ruling, and, if so, whether that error was harmless. *State v. Phillips,* 144 Idaho 82, 88, 156 P.3d 583, 589 (Ct.App. 2007).

The issue of the trial court's denying a continuance is governed by the abuse of discretion standard on review. The decision to grant or deny a continuance is vested in the sound discretion of the trial court. *State v. Ward,* 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). "Trial Judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *State v. Carman,* 114 Idaho 791, 793, 760 P.2d 1207, 1209 (Ct.App. 1988), quoting *Morris v. Slappy,* 461 U.S. 1, 11, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983).

The standard of review on a trial court's refusal to grant a mistrial is well established:

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of the circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the 'abuse of discretion'

> standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Shepherd, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct.App. 1993) (citing *State v. Urqhart,* 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct.App. 1983)).

III. ANALYSIS.

A. The Uniform Citation Charging Huckaby Contained Language Sufficient to Meet Due Process Requirements.

Judge Wayman denied Huckaby's motion to dismiss pursuant to I.C.R. 48 (alleging the language of the Uniform Citation Form was deficient), which was made the day before trial. As set forth above, whether a charging document conforms to the requirements of the law and whether a court has jurisdiction are questions of law over which reviewing courts exercise free review. *State v. Jones,* 140 Idaho 755, 757, 101 P.23d 699, 701 (2004). A defect in a charging document raised for the first time on appeal is liberally construed in favor of validity. *Jones,* 140 Idaho 755, 759, 101 P.3d 699, 703. Reviewing courts have considerable leeway to imply the necessary allegations from the language of the charging document. *State v. Robran,* 119 Idaho 285, 287, 805 P.2d 491, 493 (Ct.App. 1991).

Huckaby argues the charging document in this case, an Idaho Uniform Citation, did not meet due process requirements because it merely states "resisting/obstructing an officer" and refers to I.C. § 18-705, but fails to state the facts giving rise to the offense, thereby "depriving Huckaby of a meaningful opportunity to present his defense." Appellant's Brief, p. 9. Because Huckaby objected by motion prior to trial, he argues naming the applicable code section on the citation does not result in its language being read into the text of the charge. *Id.,* citing *State v. Jones,* 140 Idaho 755, 759, 101 P.3d 699, 703. In response, the State cites to numerous traffic citation cases and argues the Idaho Criminal

Rules and Idaho Misdemeanor Criminal Rules allow misdemeanors to be charged by Uniform Citation. Respondent's Brief, pp. 5-6. Huckaby's reading of *Jones* is not supported given the facts of this case. What *Jones* states is that when a defendant is charged with a felony by an Information, and an objection to a charging document is not made until after entry of judgment, "…if the applicable code section is named in the charging document its language may be read into the text of the charge." 140 Idaho 755, 759, 101 P.3d 699, 703. *Jones* specifically dealt with a felony and an Information, and nothing about *Jones* overrules those on-point cases dealing with the sufficiency of a uniform citation: *State v. Ritchie,* 114 Idaho 528, 529, 757 P.2d 1247, 1248 (Ct.App. 1988), *State v. Denton,* 115 Idaho 402, 403, 766 P.2d 1283, 1284 (Ct.App. 1989); *State V. Fanning,* 117 Idaho 6545, 657, 791 P.2d 36, 28 (Ct.App. 1990), *State v. Cahoon,* 116 Idaho 399, 400, 775 P.2d 1241, 1242 (1989). *See,* Respondent's Brief, pp. 7-9.

The Idaho Supreme Court in *Jones* noted two standards to consider in evaluating the legal sufficiency of a charging document: (1) whether the document is sufficient for the purpose of due process and (2) whether the charging document is sufficient to impart jurisdiction. 140 Idaho 755, 758, 101 P.3d 699, 702. As to due process concerns, [the only issue before the Court in this regard, as Huckaby claimed in his Notice of Appeal that the Court below lacked jurisdiction, (Notice of Appeal, p. 2), yet Huckaby has not argued this issue on appeal], courts consider whether the document gave adequate notice to the defendant to apprise him of the charges against him and consider whether the charging document prejudiced the defendant. *State v. Murray,* 143 Idaho 532, 535, 148 P.3d 1278, 1281. "There are a host of due process requirements that must be met by a charging document, such as factual specificity adequate to 'enable a person of common understanding to know what is intended' and to shield against double jeopardy." *Jones,*

140 Idaho 755, 758, 101 P.3d 699, 702 (quoting *State v. Grady,* 89 Idaho 204, 208-09, 404 P.2d 347, 349-50 (1965)).

In *State v Murray,* 143 Idaho 532, 148 P.3d 1278 (Ct.App. 2006) (finding jurisdictional issues dispositive and not discussing the due process concerns raised by the parties), the *pro se* defendant objected to the uniform citation used to charge him where the statutory designation written in next to "Violate Forest Service Road Closure" referred to an Idaho Code Subsection that was not in existence. 143 Idaho 532, 533, 148 P.3d 1278, 1279. The Magistrate permitted the prosecutor to amend the charge to another Idaho Code subsection (which was also not in existence) and found Murray guilty. *Id.* On appeal to the District Court, Murray retained counsel and argued due process concerns. 143 Idaho 532, 534, 148 P.3d 1278, 1280. The District Court held Murray's mid-trial due process objection to the citation as timely, held Murray's due process rights had been violated, and reversed the conviction. *Id.* (The State thereafter appealed, and the Court of Appeals upheld the District Court.) The Court of Appeals noted the charging documents in *Murray* do not cite the code section Murray was apparently found guilty at trial of violating and reasoned the statute the State contended Murray violated is not titled "Violate Forest Service Road Closure" and the terms "Forest Service" and "closure" do not appear anywhere in the subsection; therefore, the "words used on the citation are simply not sufficient to identify the crime that the State now submits is that for which Murray was convicted." 143 Idaho 532, 537, 148 P.3d 1278, 1283.

In the present case, Huckaby argues the State's reliance on traffic citation cases is misplaced. Appellant's Reply Brief, pp. 1-4. Huckaby argues without specific facts being recited, he cannot have known what part of I.C. § 18-705 he was accused of committing: (a) the willfully resisting, delaying or obstructing portion versus (b) the knowingly giving a

false report portion. Huckaby then appears to concede only the former is at issue, stating:

> Moreover, unlike traffic offenses such as driving under the influence, it is not clear what acts on the part of a defendant constitute resisting, delaying or obstructing an officer, without a statement of *facts.* Merely charging in the uniform citation "resisting/obstructing an officer" (the charging language in the present case), is a *conclusion*, not a statement of facts.

Appellant's Reply Brief, p. 3 (emphasis in original). Huckaby argues that in traffic offense cases essential facts are clear from the name of the offense, but the same cannot be said for resisting and obstructing. However, unlike the facts of *Murray,* the statute written on the citation (I.C. § 18-705) actually exists. That statute, Idaho Code § 18-705, contains the language Huckaby was accused of violating on the citation: "resisting and obstructing". Finally, "resisting and obstructing" is no more a legal conclusion than the word "driving".

For purposes of due process, Huckaby had notice of the charges against him, and, most importantly, Huckaby *has set forth no evidence of how the charging document purportedly prejudiced him*. Courts must consider whether the document gave adequate notice to the defendant to apprise him of the charges against him and consider whether the charging document prejudiced the defendant. *State v. Murray,* 143 Idaho 532, 535, 148 P.3d 1278, 1281. Huckaby was notified of what he violated, and Huckaby has set forth no facts from which to find prejudice. This Court cannot presume prejudice on Huckaby's part. Further, although the defendant in *State v. Cahoon,* 116 Idaho 399, 775 P.2d 1241 (1989) objected six days after the verdict to the uniform citation used to charge him with the misdemeanor of resisting or obstructing an officer, the Court quoted and followed the reasoning of a Ninth Circuit case, in which the Ninth Circuit stated:

> For example, this Court held that when an indictment is not challenged before the verdict, it is to be upheld on appeal if "the necessary facts appear in any form or by fair construction can be found in within the terms of the indictment." [Citations omitted]. In our view, the same standard should apply here, where the challenge came in a motion for acquittal after all the evidence has been received. Such a long delay in raising the

> issue suggests a purely tactical motivation for incorporating a convenient ground if appeal in the event the jury verdict went against the defendants. Furthermore, the fact of the delay tends to negate the possibility of prejudice in the preparation of the defense.

United States v. Pheaster, 544 F.2d 353, 360-61 (9th Cir. 1976) *cert. denied,* 429 U.S. 1099, 97 S.Ct. 1118 (1977). While Huckaby's motion was certainly more timely than that in *Pheaster,* Huckaby's motion being made the day *before* trial and heard the morning *of* trial negates the possibility of prejudice in preparation of his defense. The citation made clear what Huckaby was accused of, and the I.C.R. 48 motion made by Huckaby the day before trial and heard just before trial was a technical motion which alleged no prejudice. The written motion filed by Huckaby's counsel alleges not one single fact that would support a claim of prejudice, and indeed, fails to even mention the word "prejudice". The focus of that motion is on the *jurisdictional* defect, which Huckaby has waived by failing to brief the issue.

In Huckaby's brief on appeal, after lengthy discussion of the applicable law, Huckaby fails to mention any facts that would show prejudice. Appellant's Brief, pp. 8-10. The same holds true for Huckaby's reply brief. Appellant's Reply Brief, pp. 1-4. Perhaps that is because it is *impossible* for Huckaby to claim prejudice. Two days before trial, at a status conference on May 4, 2009, where Huckaby's counsel [on that day Lynn Nelson] was present, the deputy prosecutor stated in response to Judge Wayman's question "What's the nature of the resisting or obstruction charge?":

> MR. STUDOR: The State's alleging that the defendant was um, obstructing the officers from investigating another domestic battery charge. There was a domestic disturbance at his home they went to investigate. The State's alleging that he stood in the way of the officers, took a fighting stance. Therefore, blocking the officers from being able to investigate the um, alleged domestic dispute.

Transcript, First Appearance and Status Hearings, p. 24, Ll. 1-12. Judge Wayman then

asked: "And it was at his house?", to which *Huckaby's counsel* responded: "It was." After that discussion, it is difficult to understand how the next day Huckaby's attorney could in good faith file a motion under I.C.R. 48. Perhaps that is why Huckaby's written motion made on May 5, 2009, was simply limited to jurisdictional grounds and did not mention any due process violation. However, on appeal, Huckaby's complaints have clearly morphed into a due process argument. In light of such discussion with Judge Wayman on May 4, 2009, the conclusion of which was provided by Huckaby's counsel, for due process purposes, this Court finds there is no good faith basis for Huckaby in his appeal to claim prejudice due to the language in the citation.

Finally, Huckaby states there is no requirement that he demand a sworn complaint under Misdemeanor Criminal Rule 3(d) as a condition precedent to his motion to dismiss. Appellant's Reply Brief, p. 4. The State notes Huckaby did not demand a sworn complaint prior to the initiation of trial, as is Huckaby's right under Idaho Misdemeanor Criminal Rule 3(d). Respondent's Brief, pp. 5-6. While it is not a condition precedent, to the extent Huckaby was in any doubt as to the nature of the charged offense, despite the Uniform Citation listing the applicable code section and the time and date of occurrence, he did have the right to demand a sworn complaint under I.M.C.R. 3(d), and failed to do so.

No prejudice being alleged, let alone proven, Huckaby's claims of due process denial under the language of the uniform citation are without merit.

B. The Admission of Other Crimes or Wrongs Was an Appropriate Exercise of the Trial Court's Discretion.

Huckaby argues Judge Wayman improperly permitted evidence of other crimes or wrongs to be admitted and presumably show Huckaby's criminal propensity. Appellant's Brief, p. 10. Huckaby claims the State was permitted, over defense objection:

…to introduce evidence that the deputies were called to the scene of

> Huckaby's home pursuant to a report that there had been a domestic dispute, in which a male was threatening a female with a baseball bat, and that the deputies made contact with Huckaby while investigating that report.

Id., p. 11. The State responds that Huckaby improperly characterizes the evidence as other crimes or wrongs and, in fact, the State and its witness never stated Huckaby was the man with the bat or was involved in the domestic dispute that resulted in the officers contacting him. Respondent's Brief, pp. 14-15. In response to one of Huckaby's I.R.E. 404(b) objections, Judge Wayman stated:

> Overrule the objection. This information that you're about to hear is not being admitted for the truth of the matter asserted. It's simply being offered to explain why the officer was doing what the officer did.

Tr., p. 24, Ll. 24-25; p. 25, Ll. 1-2.

As stated above, admission of I.R.E. 404(b) evidence is reviewed first by considering the trial court's legal determination that the evidence is relevant for a purpose other than proof of bad character and conforming conduct. *State v. Tapia,* 127 Idaho 249, 254, 899 P.2d 959, 964 (1995). Then, if such relevance is found, reviewing courts apply the abuse of discretion standard of review to the trial court's determination that the probative value of such evidence was not outweighed by unfair prejudice. *State v. Dragoman,* 130 Idaho 537, 544-45, 944 P.2d 143, 141-42 (Ct.App. 1997).

Idaho Rule of Evidence 404(b) prohibits the presentation of other crimes, wrongs or acts to prove the character of a person to show the person acted in conformity therewith. I.R.E. 404(b). Such evidence may be admitted for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident so long as the prosecution served notice of the intent to use such evidence before trial. *Id.* In his reply brief, Huckaby continues to argue the evidence presented was I.R.E. 404(b) evidence and Judge Wayman improperly failed to address its relevance or whether its prejudice was

outweighed by its probative value. Appellant's Reply Brief, p. 4. Explicit in Judge Wayman's statement to the jury, *supra,* is his finding that the statements by the officer were relevant to the officers' presence. The statement made by the officer regarding his presence in light of a domestic violence call was:

> We at that point started to approach, and we started issuing commands to show us his hands, you know, to step away from the gate towards us because, you know, we were investigating—had a male and a possible female involved in this, so basically here was a male. At that time I was trying to give him commands to come out to us, and he failed to obey any of our commands.

Tr., p. 29, Ll. 18-24. Judge Wayman found the evidence relevant: "…to explain why the officer was doing what the officer did." Tr., p. 24, Ll. 24-25; p. 25, Ll. 1-2. That is not I.R.E. 404(b) evidence, and Judge Wayman so found: "Moreover, I don't believe the officer accused the defendant of being the male threatening anyone with a baseball bat, so I don't find that Rule 404(b) is implicated in any way, shape or form…" Tr. p. 55, Ll. 7-10. In other words, there is no "other bad acts" evidence in this case because **no testimony** by any witness ever linked the other bad act (a potential domestic violence situation involving a baseball bat) with Huckaby.

Even if this Court were to ignore that reality and find there *was* I.R.E. 404(b) evidence admitted, Huckaby is simply wrong in making the claim that Judge Wayman didn't balance the probative value with the danger of unfair prejudice: "The trial court did not conduct the two-part analysis pursuant to I.R.E. 404(b), first determining relevance, and then, if the alleged facts were relevant, determining whether the probative value of the evidence was outweighed by unfair prejudice." Appellant's Brief, p. 11. Huckaby later compounds that false claim when in briefing he argues: "The State completely leaves out the first prong of the analysis, the determination of relevance." Appellant's Reply Brief, p. 4. Perhaps Huckaby's counsel failed to read the portion of the transcript where Judge

Wayman stated: "It's simply being offered to explain why the officer was doing what the officer did". Tr., p. 24, Ll. 24-25; p. 25, Ll. 1-2. Perhaps Huckaby's counsel failed to read the portion of the transcript where Judge Wayman stated:

> Only on cross-examination [by Huckaby's own attorney] was it brought out that there were firearms. *At that point it becomes very relevant to the charge of resisting and obstructing an officer to have the jury get a more complete picture as to why those firearms were being drawn*, and the explanation by the officer related to the information that he possessed before he arrived at the scene, and I find that that is relevant information. *I don't find that it is unduly prejudicial.* It is the kind of information that a jury can, as they have been advised, can consider for the limited purpose it would be admitted for.

Tr. p. 54, Ll. 20 – p. 55, L. 6. (emphasis added). The first italicized portion shows Judge Wayman's stated relevance finding, the second italicized portion shows Judge Wayman's balancing and weighing. Huckaby's arguments to the contrary are simply unsupported by the record.

Getting beyond the fact that Huckaby is simply wrong in arguing Judge Wayman neither determined relevance nor conducted the appropriate weighing, Huckaby makes the argument that Judge Wayman abused his discretion in admitting this evidence. Huckaby must demonstrate the probative value of the testimony was outweighed by its prejudicial effect to the point where Judge Wayman abused his discretion in admitting it. In this regard Huckabby argues the evidence was "highly prejudicial" because "the jury could only assume that if the alleged acts were being brought up in Huckaby's trial, it was because the State was accusing Huckaby of committing those acts." Appellant's Reply Brief, p. 5.

Huckaby has not made a showing of abuse of discretion for several reasons. **First,** such argument ignores the limiting instruction given by Judge Wayman that: "This information that you're about to hear is not being admitted for the truth of the matter asserted. It's simply being offered to explain why the officer was doing what the officer did."

Tr., p. 24, Ll. 24-25; p. 25, Ll. 1-2. This Court cannot *ignore* that limiting instruction. To the contrary, this Court must *presume* the jury *followed* that instruction. *State v. Kilby,* 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct.App. 1997); citing *State v. Hedger,* 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989); *State v. Rolfe,* 92 Idaho 467, 471, 444 P.2d 428, 432 (1968); *State v. Boothe,* 103 Idaho 187, 192, 646 P.2d 429, 434 (Ct.App.1982). **Second,** and most important, the jury *only* heard testimony that in response to a domestic dispute call, the officers came upon Huckaby, a male, who failed to comply with commands to show his hands and step away from the gate. Tr., p. 29, Ll. 18-20. Huckaby's failure to do so gave rise to the charge of resisting and obstructing, as the officer testified to his concern about not seeing Huckaby's hands. Tr. p. 32, Ll. 11-22. The jury never heard *any* evidence that the domestic dispute involved Huckaby. Essentially, Huckaby asks this Court on appeal to *assume* that the jury *assumed* that the domestic call which brought the officers to the trailer park was related specifically to Huckaby, even though there is no evidence of such, and then *assume* that the jury ignored Judge Wayman's limiting instruction.

Huckaby next makes the following argument: "Furthermore, if in fact the State was *not* asserting that Huckaby was the one who was allegedly threatening a female with a bat, then such evidence does not satisfy the relevance prong, and the admission of the evidence was error." Appellant's Reply Brief, p. 5. Huckaby's circular argument ignores the relevance finding made by Judge Wayman.

Huckaby's unsupported, conclusory and circular claims under I.R.E. 404 ignore Judge Wayman's stated limited relevance purpose. Had there been any evidence that Huckaby was in fact the person who was threatening a female with a bat, balancing would have been necessary. Here, there was no such evidence.

Even if there *was* such evidence, it would be relevant. Where the uncharged

conduct was part of the crime charged, the evidence is relevant. If there were evidence that Huckaby was the person threatening a female with the bat (there wasn't), then the police were there to investigate that offense when Huckaby in turn obstructed the officer. *State v. Blackstead,* 126 Idaho 14, 878 P.2d 188 (Ct.App. 1994) (where the uncharged criminal act was in furtherance of an underlying plan to commit the charged crime); *State v. Wallmuller,* 125 Idaho 196, 868 P.2d 524 (Ct.App. 1994) (where uncharged criminal acts were "part of the whole scheme" in addition to the charged acts). A jury is entitled to a full and complete description of the events surrounding the commission of a crime regardless of whether this complete description may implicate a defendant in the commission of other crimes not charged. 125 Idaho 196, 199, 868 P.2d 524, 537, *citing State v. Crawford,* 99 Idaho 87, 105, 577 P.2d 1135, 1153 (1978), citing *State v. Izatt,* 96 Idaho 667, 534 P.2d 1107 (1975). Thus, the probative value of why the officers were present would be high, and any unfair prejudice was remedied by the limiting instruction given by Judge Wayman. Judge Wayman did not abuse his discretion.

C. The State Did Not Commit Prosecutorial Misconduct in Opening Statement and Closing Arguments.

Huckaby next argues the State committed prosecutorial misconduct by making two separate statements. Appellant's Brief, p. 14.

The **first**, during opening statements was: "The reason we're here today is that they weren't able to do their job." *Id.,* quoting Tr., p. 11, Ll. 4-6. Huckaby states this statement constitutes argument on the ultimate issue to be decided by the jury. *Id.* The State replies its statement during opening statement was not argument and did not convey any real information. Respondent's Brief, pp. 18-19. Huckaby responds by arguing the State does not address why this Court should determine the jury would have reached the same result regardless of the complained-of statement beyond a reasonable doubt. Appellant's Reply

Brief, p. 6.

The **second** statement, made during closing argument, was that the officers are trained and have experience, "[t]hey know what they're doing. They know what they're doing on a call, and they know how to-." Appellant's Brief, p. 14, quoting Tr., p. 107, Ll. 23-25; p. 108, Ll. 1-2. This statement, Huckaby argues, amounts to the prosecutor vouching for the credibility of a state witness. The State replies, as to the second statement made during closing argument, it was merely drawing conclusions from the record and not vouching for the officer. Respondent's Brief, p. 20. Huckaby responds the statements, "they know what they're doing. They know what they're doing on a call…" crossed the line into vouching for the witnesses because that statement cannot be based on inferences from the evidence presented. Appellant's Reply Brief, pp. 6-7.

Huckaby argues these statements were not harmless error because his credibility was "directly pitted against the credibility of two law enforcement officers who testified." Appellant's Brief, p. 14. There was no "harmless" error because there was *no* error.

As stated above, reviewing courts must distinguish between cases where an objection to prosecutorial misconduct is raised for the first time on appeal or not. *State v. Severson,* 147 Idaho 694, ___, 215 P.3d 414, 435-36. In the present case, Huckaby's counsel objected. When an objection to a prosecutor's act is made at trial, reviewing courts determine whether there was error in the trial court's ruling, and, if so, whether that error was harmless. *State v. Phillips,* 144 Idaho 82, 88, 156 P.3d 583, 589 (Ct.App. 2007). Here, the statements made during openings, to the effect that the officers were not able to do their jobs, were timely objected to. "A timely objection enables the trial judge to rule on the alleged error, provide a curative admonition to the jury if appropriate, and prevent the continuation of the alleged misconduct." *State v. Priest,* 128 Idaho 6, 13, 909 P.2d 624,

631 (Ct.App. 1995). Given that no curative instruction was requested and evidence was presented to the jury to the effect that Huckaby *in fact* resisted and obstructed the officers from performing their duties, it is unclear how the opening statement was egregious or had an inflammatory impact on the jury that would be substantially different from the jury's hearing substantially the same evidence at trial.

As to the State's vouching for the credibility of its own witnesses, Huckaby is correct is asserting it is improper for a prosecutor to express a personal opinion or belief as to truth or falsity of any testimony. *State v. Pizzuto,* 119 Idaho 742, 753, 810 P.2d 680, 691 (1991), *cert. denied,* 503 U.S. 908, 112 S.Ct. 1268 (1992). *Phillips,* 144 Idaho 82, 86, 156 P.3d 583, 587, 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).

Here, the State argues it did not improperly vouch for its witnesses, but only made clear "that it is in the province of the jury to determine which witnesses to believe." Respondent's Brief, p. 21. On appeal the State argues it did not imply it had any additional evidence the jury was not privy to, and the statement, "they know what they are doing" is a conclusion to be drawn from the evidence presented. *Id.* In response, Huckaby argues the statement goes beyond the scope of the officers' testimony and "in a case in which the jury's decision turns solely on their assessment of the credibility of the witnesses on each

side, it cannot be said that this misconduct on the part of the State could not have made a difference in the jury's decision-making. " Appellant's Reply Brief, p. 7. The State argued in closings that three witnesses told two stories and it was up to the jury to determine the credibility of the witnesses. Tr., p. 107, Ll. 19-22. The State then compares the "detailed and reasonable recitation of the facts" by the officers with Huckaby's claim "he wasn't doing anything wrong and that the deputies acted as random bullies and came up and just threw him on the hood of a car." Tr, p. 107, Ll. 24, p. 108, Ll. 13-15. A prosecutor has considerable latitude in a closing argument in discussing the evidence and the inferences and deductions arising therefrom. *State v. LaMere,* 103 Idaho 839, 655 P.2d 46 (1982). Considerable latitude is allowed in closing arguments and counsel are allowed to fully discuss the evidence and inferences to be drawn from the evidence, from their respective standpoints. *Pizzuto,* 119 Idaho 742, 752, 810 P.2d 680, 690. "This includes the right to express how, from the party's perspective, the evidence confirms or calls into the [sic] doubt the credibility of particular witnesses." *State v. Priest,* 128 Idaho 6, 14, 909 P.2d 624, 632. (Ct.app. 1995). Here, evidence was presented via testimony regarding both officers' training, experience, and number of years in the field. Tr. p. 19, L. 17 - p. 23, L. 23; p. 68, L. 13 - p. 70, L. 24. The prosecutor simply stating: "they [the officers] know what they're doing" reflects that uncontradicted evidence. By simply stating: "they [the officers] know what they're doing" the deputy prosecutor did not go beyond expressing how the evidence confirms the credibility of the witness. In no way did such comment arise to the level of prosecutorial misconduct by implying he was privy to information corroborating the witness' testimony unknown to the jury or personally vouching for the credibility of his witness. *See Priest,* 128 Idaho 6, 14, 909 P.2d 624, 632. The prosecutor's statement only went to the issue of their police work…that "they know what they're doing". Such comment was not in

any way a comment on their credibility.

D. The Trial Court Properly Denied Huckaby's Motion to Continue.

Huckaby argues he was denied the right to compulsory process for obtaining witnesses in his favor. Appellant's Brief, pp. 15-18. The defense had a subpoena issued on May 4, 2009, but the witness, Huckaby's son, was not present for trial. Judge Wayman denied the defense request for a continuance. Appellant's Brief, p. 17. Huckaby argues his substantial rights were prejudiced by the failure of the trial court to continue his trial. *Id.*

The State replies Huckaby had adequate time to prepare his defense and was not unfairly prejudiced by the denial of his motion to continue. Respondent's Brief, p. 25. The State also notes there is no basis upon which the Court can now determine Huckaby's son would have been a witness favorable to the defense. *Id.* Finally, the State argues there has been no showing that the State or its agents acted unreasonably in being unable to serve Huckaby's wife and son. *Id.,* p. 26.

As set forth above, the issue of the trial court's denying a continuance is governed by the abuse of discretion standard on review. The decision to grant or deny a continuance is vested in the sound discretion of the trial court. *State v. Ward,* 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). "Trial Judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *State v. Carman,* 114 Idaho 791, 793, 760 P.2d 1207, 1209 (Ct.App. 1988), quoting *Morris v. Slappy,* 461 U.S. 1, 11, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983).

Compulsory process is "the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide

where the truth lies." *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967). The right of the accused to present witnesses in his own defense is fundamental, but not without limitation. *Taylor v. Illinois,* 484 U.S. 400, 408-10, 108 S.Ct. 646, 652-54 (1988). In this respect, a defendant must make at least a plausible showing of how the witness' testimony would have been both material and favorable to his defense. *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446 (1982). Materiality and favorableness are judged in the context of the whole record. *Id.,* 458 U.S. 858-868, 102 S.Ct. 3440, 3447. The Court minutes (part of the record under I.C.R. 54.8) in this matter indicate that Judge Wayman refused the State's motion to *exclude* the witness, Huckaby's son Tobias, based on a failure by Huckaby's counsel to timely disclose him, because Judge Wayman would give counsel for the State an opportunity to speak with Tobias before he testified. Regarding Huckaby's motion to continue, the court minutes show Judge Wayman noted the trial had been pending for a long time, and that it was possible to arrange to have Amanda Huckaby bring Tobias, Huckaby's son, into court to testify. No transcript of this portion of the trial was prepared. The transcript of the rest of the trial was filed on June 10, 2009, and on June 11, 2009, the office of the Kootenai County Public Defender signed as receiving its copy of the transcript. Receipt of Transcript, p. 1. No objection to any omissions from the transcript and no objections of any kind were filed by Huckaby's counsel, within the twenty-one days as is required by I.C.R. 54.9, or at any time thereafter. There is **no** evidence before this Court that the State or its agents acted in any way unreasonably or failed to make a good faith effort to procure the attendance of a witness favorable to the defense. *See State v. Garza,* 109 Idaho 40, 44, 704 P.2d 944, 948 (Ct.App. 1985). As in the case *State v. Wagonner,* 124 Idaho 716, 864 P.2d 162 (Ct.App. 1993), in the present case there is no evidence that the State acted in any way to keep the

witness from trial; nor is there any evidence of due diligence on counsel's part in exercising the defendant's Sixth Amendment rights. 124 Idaho 716, 723, 864 P.2d 132, 169. There is **no** record of any affirmative acts taken by Huckaby or his attorney other than the subpoena being faxed to the Sheriff's Department on May 4, 2009. at 10:15 a.m., *less than forty-eight hours before trial*. Nothing kept Huckaby's attorneys from obtaining a subpoena at an earlier date. Nothing kept Huckaby's attorneys and their investigators from tracking down Tobias and personally effectuating service through the agents of the Kootenai County Public Defender. Anyone in the Public Defender's office could have served Tobias. Anyone over age eighteen other than Huckaby himself, could have served Tobias. I.C.R. 17(c). Importantly, and incredibly, it appears **no** effort was made by Huckaby's counsel or the agents of the Kootenai County Public Defender to serve Huckaby's son Tobias at any point after the Court's denial of the motion to continue (made the day before trial) and before the close of the defense case. Huckaby has made absolutely **no** showing as to what Tobias' testimony would have been, and it is Huckaby's burden to make at least a plausible showing of how the witness' testimony would have been both material and favorable to his defense. *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446 (1982).

The burden of showing prejudice resulting from denial of his motion to continue rests with Huckaby. Huckaby has not demonstrated that the State acted unreasonably or improperly. Instead, Huckaby asks this Court to *assume* that the State conspired to keep Tobias away from the trial, through the actions of the Kootenai County Sheriff deputies, in failing to serve Tobias in the forty-eight hours that *Huckaby's attorney* limited those deputies to.

Huckaby further asks this Court to *assume* that Tobais' testimony would have been

favorable when no offer of proof was ever made at trial and no affidavit was ever subsequently filed. The *only* thing Huckaby has offered on appeal is the statement by Huckaby's counsel in briefing that Huckaby's son's testimony would have been favorable. Huckaby's attorney writes: "The testimony of Tobias, the absent witness in this case, was expected to be favorable to the defense." Appellant's Brief, p. 18. This incredible "expectation" is supported not by any *evidence*, but by the following:

> Tobias is Huckaby's son, and had witnessed the events of the alleged crime. The witness' expected testimony was relevant, because it related to Huckaby's contact with the Sheriff's Department deputies, and Huckaby's response to the deputies during the incident.

Id. The basis for this circular argument is, "Tobias is Huckaby's son…", and therefore, this Court must *assume*, without ever meeting Huckaby's son, that Huckaby's son would testify in his father's favor, because, and for the only reason, that he is Huckaby's son. *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, does not allow this Court to make that assumption. The fact that Huckaby and his agents did nothing to effectuate service on Huckaby's own son makes such assumption not only impermissible, but absurd.

E. The Trial Court Properly Denied Huckaby's Motion for a Mistrial.

In this matter, defense counsel moved for a mistrial on two occasions. Once during the opening statement of the prosecutor, wherein he mentioned a domestic dispute (Tr. p. 11, Ll. 1-22), and for a second time when the Officer Petersen stated the dispatch call was for a "domestic dispute involving a male and a female, and the male was threatening to hit the female with a bat." Appellant's Brief, p. 19, citing Tr., p. 48, Ll. 12-19. Huckaby argues on appeal:

> Hearing that information, the jury was more likely to find Huckaby to be guilty of the charged offense, than the jury would have been if it had not heard any references to a domestic dispute or threats with a baseball bat.

Id., p. 20. The State replies simply that no I.R.E. 404(b) evidence came into evidence and denial of the mistrial motion was proper. Respondent's Brief, p. 27.

As set forth above, reviewing courts' focus is on the continuing impact on the trial of the incident that triggered the mistrial motion, and the trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error. *State v. Shepherd,* 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct.App. 1993). The Idaho Court of Appeals in *Shepherd* held:

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of the circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the 'abuse of discretion' standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Shepherd, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct.App. 1993) (citing *State v. Urqhart,* 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct.App. 1983)).

In the present case, when ruling on the **first** request for a mistrial, Judge Wayman reasoned the State's opening statements:

> …were indicating the reasons why the officers—or why they believe the evidence will support the officers going to encounter the defendant, and there was no evidence of the nature of that other than explaining why the officers were there in the first place, which I think is something that the jury is entitled to hear when evaluating the evidence.

Tr., p. 15, Ll. 6-12. Argument on this first defense motion for a mistrial was taken up, appropriately by Judge Wayman, outside the presence of the jury. Tr. p. 11, L. 1 – p. 16, L. 25. Huckaby has never made clear in his appeal what continuing impact the officer's reason for being in Huckaby's vicinity (responding to a domestic dispute involving a male

with a baseball bat) would have on the remainder of the trial. In fact, this Court finds the reasons given for being in Huckaby's vicinity (responding to a domestic dispute involving a male with a baseball bat) do not implicate Huckaby with a prior bad act because when the officers arrived and found Huckaby, *Huckaby had no baseball bat*! At no point in direct examination was a baseball bat ever discussed. Tr. p. 26, L. 26 – p. 36, L. 17. At no point was a baseball bat ever discussed on cross examination or on redirect examination. The jury had no evidence that Huckaby had a baseball bat in his hands or that a baseball bat was ever located anywhere on the scene. Not only was the baseball bat not discussed, but, appropriately (since Huckaby was charged with resisting and obstructing an officer and not domestic battery), there was no testimony as to a female being present anywhere near where Huckaby was found. There was no testimony regarding a discussion with Huckaby about a domestic violence report. Thus, *the jury was presented with no evidence from which it could have connected the dispatch call with Huckaby*. This point was specifically noted by Judge Wayman: "Moreover, I don't believe the officer accused the defendant of being the male threatening anyone with a baseball bat, so I don't find that Rule 404(b) is implicated in any way, shape or form…" Tr. p. 55, Ll. 7-10. This Court finds beyond a reasonable doubt that there was no reasonable possibility that the mention of a domestic dispute call, which in turn brought the officers to the scene, which in turn led to the encounter with Huckaby, contributed to Huckaby's conviction for obstructing and resisting resulting from his failure to comply with police commands. There was no evidence linking the dispatch report of a domestic dispute involving a baseball bat with any of the testimony involving Huckaby. The only "evidence" was the reference to the dispatch call itself, which was appropriately and adequately covered by Judge Wayman's limiting instructions to the jury.

Huckaby's counsel moved for a mistrial a **second** time when Officer Petersen discussed the dispatch call he'd received. Tr. p. 48, Ll. 17-10. Judge Wayman, outside of the presence of the jury, denied the motion and ruled:

> In this case, circumstances were such relating to this charge of resisting/obstructing an officer that the officer was allowed to testify as to why he responded to the scene, and when the State presented their direct examination, there was no mention of any firearm. Only on cross-examination was it brought out that there were firearms. At that point, it becomes very relevant to the charge of resisting and obstructing an officer to have the jury get a more complete picture as to why those firearms were being drawn, and the explanation by the officer related to the information that he possessed before he arrived at the scene, and I find that that is relevant information. I don't find it unduly prejudicial. It is the kind of information that a jury can, as they have been advised, can consider it for the limited purpose it would be admitted for.
>
> Moreover, I don't believe the officer accused the defendant of being the male threatening anyone with a baseball bat, so I don't find that Rule 404(b) is implicated in any way, shape or form, and that this type of evidence can be admitted for a limited purpose without prejudicing the defendant's right to a fair trial.

Tr. p. 54, Ll. 15-25, p. 55, Ll. 1-12. A review of the transcript (Tr. p. 19, L. 13 - p. 36, L. 17) shows Judge Wayman correctly noted that: "…when the State presented their direct examination, there was no mention of any firearm." Tr. p. 54, Ll. 19-20. A review of the transcript also shows Judge Wayman was correct in stating: "Only on cross-examination was it brought out that there were firearms." Tr. p. 54, Ll. 20-22. Early on in cross-examination, Huckaby's attorney asked the following line of questions:

> Q. [Brad Chapman] You and Deputy Nelson approached this gentleman that you said was here with drawn firearms, did you not, sir?
> A. [Officer Lamont Peterson] Yes, sir.
> Q. What kind of a firearm were you wearing – were you utilizing that night?
> A. It's an H&K USP 45 caliber.
> Q. It's a large caliber handgun, would that be a fair thing to say?
> A. If it was pointed [at] me it'd be a large caliber handgun.
> Q. I'll agree with you there, sir. Dirty Harry? No. I'm kidding. How about Deputy Nelson? Did he approach with a handgun as well?
> A. He did.

Tr. p. 39, Ll. 10–24. It was this discussion about the handguns being drawn, which was *brought about by Huckaby's own attorney*, that made relevant the *reasons* for the officer's having their handguns drawn (that from the dispatch call there was a domestic dispute, with a female being threatened by a male with a baseball bat, Tr. p. 46, L. 15 – p. 47, L. 20; p. 48, Ll. 11-15). Just prior to Huckaby's attorney moving for a mistrial, Judge Wayman again cautioned the jury:

> THE COURT: All right. Well, I'm gong to overrule the objection, and I will advise the jury that the information that you've heard and may hear a little bit more of is being admitted not for the truth of the mater asserted. It's simply being admitted to explain why the officer did what the officer apparently did. You may proceed.

Tr. p. 48, Ll. 4-10. It is disingenuous for Huckaby on appeal to argue for a mistrial when his own attorney opened the door as to use of firearms in the first place, which then created the relevance in explaining why firearms were drawn. As to this second motion for a mistrial, this Court finds beyond a reasonable doubt that there was no reasonable possibility the mention of the dispatch call and reference to a baseball bat which brought the officers to encounter Huckaby contributed to the conviction for obstructing and resisting resulting from his failure to comply with police commands.

What Huckaby complains of was a situation of his attorney's own making, about which the jury had been appropriately and timely instructed by Judge Wayman. Appellate courts: "…will presume that the jury followed the instructions given by the district court." *State v. Kilby,* 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct.App. 1997); citing *State v. Hedger,* 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989); *State v. Rolfe,* 92 Idaho 467, 471, 444 P.2d 428, 432 (1968); *State v. Boothe,* 103 Idaho 187, 192, 646 P.2d 429, 434 (Ct.App.1982). On appeal, Huckaby asks this Court to do just the opposite and assume every juror disregarded those two instructions. At oral argument on appeal, counsel for

Huckaby asked the Court to do just that, to assume that the jury would not understand Judge Wayman's limiting instruction as to why the officers were present was relevant. This Court is not allowed to make such an assumption under this well established line of cases.

F. There is No *Cumulative* Error Because There Was No Error.

Huckaby argues the accumulation of irregularities in this trial amounted to unfairness and violated his right to due process, even if each individual claimed error were not sufficient to require reversal of his conviction. Appellant's Brief, p. 20. Here, having found no merit in any of Huckaby's individual assignments of error, the Court cannot conclude that the "errors" cumulatively denied Huckaby a fair trial. *State v. Sheahan,* 139 Idaho 267, 286, 77 P.3d 956, 975 (2003) ("In order to find cumulative error, this Court must first conclude that there is merit to *more than one* of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial."). This Court has already found that of Huckaby's five alleged errors, not one of them has any merit.

IV. CONCLUSION.

For the reasons stated above, the decisions of Judge Wayman must be affirmed.

IT IS HEREBY ORDERED the decisions of Judge Wayman: denying defendant's Motion to Dismiss filed the day before trial; admission of evidence regarding the reason why the officers responded to the scene where they found defendant; overruling defendant's objections made during the plaintiff's opening statements and closing arguments; denying defendant's motions for mistrial; and denying defendant's motion for a continuance are all AFFIRMED. Accordingly, there is no cumulative error. The jury verdict and judgment of conviction are AFFIRMED.

IT IS FURTHER ORDRED THAT defendant reimburse Kootenai County the amount of $500.00 for the cost of his Court appointed attorney (time spent by his Court appointed

attorney) on this appeal. *See State v. Maloney,* Kootenai County Case No. CRM 2008 7594, (March 27, 2009).

DATED this 19th day of November, 2009

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of November, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – J. Lynn Brooks/J. Bradford Chapman
Prosecuting Attorney – Josh Studor

Honorable Scott Wayman

Christopher Huckaby
1719 N. Spokane St.
Post Falls, ID 83854

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy