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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/Respondent,* )  
 )  
 vs. )  
 )  
 **MICHAEL LEE SOUTHERN,** )  
 )  
 )  
 )  
 *Defendant/Appellant.* )  
 )  
 \_\_\_\_\_ )

Case No. **CRM 2008 9095**

**MEMORANDUM DECISION AND  
ORDER ON APPEAL**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND.**

This is an appeal from a jury trial presided over by Magistrate James Stow. At the conclusion of the October 21, 2008, jury trial, the jury found Michael Lee Southern (Southern) guilty of two counts of misdemeanor battery, I.C. § 18-903. Judge Stow sentenced Southern on May 8, 2009. Southern appeals from the Judgment and Sentence entered May 8, 2009, claiming prosecutorial misconduct.

On May 2, 2008, Post Falls Police Officer C. Thompson (Thompson) responded to a call in the area of 111 E. 13<sup>th</sup> Avenue in Post Falls, Idaho. Thompson had been advised a battery may have occurred on the 300 block of E. 10<sup>th</sup> Avenue. Thompson was met by the reporting party, Michelle Marshall (Marshall), who informed him that her two sons, D.B.M. and A.C.M., and their friend D.G.M., all minors, had been playing at D.G.M.'s backyard at

303 E. 10<sup>th</sup> Avenue in Post Falls when they were confronted by defendant, Michael Southern (Southern). Thompson was told that Southern came out of his residence at 303 ½ E. 10<sup>th</sup> Avenue, directly behind D.G.M.'s home, and yelled at all three juveniles. It was alleged that Southern then grabbed both A.C.M. and D.B.M. by the neck and picked them up off the ground, but that Southern did not touch D.G.M. All three got away from Southern and ran to the Marshalls' residence.

On October 21, 2008, Southern was tried and convicted of two counts of battery by a jury. On May 8, 2009, the Honorable James D. Stow entered the final Judgment and Sentence. On June 15, 2009, Southern timely filed his Notice of Appeal. Southern's Notice of Appeal listed his single issue on appeal as: "Whether the Court erred in denying Defendant's motion for a mistrial." Notice of Appeal, p. 1, ¶ 3. Southern's "Brief of Appellant" identifies his two issues on appeal as:

1. The Prosecution's statements during the jury selection process and closing argument were an improper appeal to the passions and prejudices of the jury.
2. The Prosecutor's inflammatory statements amounted to fundamental error and deprived Mr. Southern of his right to a fair trial.

Brief of Appellant, p. 4. The State filed "Respondent's Brief" on January 7, 2010.

Southern's "Reply Brief" was filed February 1, 2010. This matter was set for oral argument on February 25, 2010. On February 18, 2010, the parties stipulated to submit the issues on the briefing. On February 23, 2010, this Court issued its Order permitting the matter to be submitted on the briefing and vacating oral argument on February 25, 2010.

## **II. STANDARD OF REVIEW.**

Appeals from the magistrate's division shall be heard by the district court as an appellate proceeding unless the district court orders a trial *de novo*. Idaho Criminal Rule

54.2. Where a district court acts in an appellate capacity on an appeal taken from the magistrate's division, and a further appeal is taken, appellate courts review the record independently of, but with due regard for, the decision of the district court. *State v. Bailey*, 117 Idaho 941, 942, 792 P.2d 966, 967 (Ct.App. 1990).

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, 715-16, 215 P.3d 414, 435-36 (2009).

When an objection is not raised at trial, the misconduct will only serve as a basis for setting aside the conviction where the "conduct is sufficiently egregious to result in fundamental error." *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997). Misconduct constitutes fundamental error when "it goes to the foundation or basis of a defendant's rights or...to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989) (quoting *State v. Garcia*, 46 N.M. 302, 128 P.2d 459, 462 (2007)). But, even where prosecutorial misconduct results in fundamental error, a conviction is not overturned when such error is harmless; i.e. where the court is convinced beyond a reasonable doubt the same result would have been reached by a jury had the prosecutorial misconduct not occurred. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. LaMere*, 103 Idaho 839, 844, 655 P.2d 46, 51 (1982).

On the other hand, when an objection is made at trial, and on appeal the appellate court finds error, the "harmless error" test applies. *State v. Phillips*, 143, 80, 88, 156 P.3d 583, 589 (Ct.App. 2007).

And 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. Prosecutor's Statements During *Voir Dire*.

During *voir dire*, the prosecution made statements which Southern's attorney characterized as inflammatory and as a personalization of the issue of child abuse reporting:

How many of you have experience raising small children? Okay. Quite a number of you. How many of you think that small children tell the truth all the time? How many of you would agree that children, say between five [and] ten years old, on important matter, will tell the truth? Does anyone seriously disagree with that? Of you who have that experience, if a small child, say between five and ten years old, came to you and said something happened to me, something bad, how many of you would believe it? Okay. How many of you would take action, if it was something that the police needed to be involved in? So, is it fair to say that if a small child, between five [and] ten years old, comes to you and says something happened to me, and you recognized that the police or the authorities should be involved, it's a fair thing to do is [sic] to call the authorities?

Tr., p. 16, L. 13 - p. 17, L. 6. Following jury selection, the Court heard argument on

Southern's attorney's objection to the State's statements outside the presence of the jury.

Tr. p. 52, L. 19 – p. 54, L. 19. Southern's attorney moved for a mistrial and the Court found

the statements did not impact Southern's ability to have a fair trial, denying the motion for mistrial. Tr., p. 54, Ll. 13-19.

In criminal cases, motions for mistrial are governed by Idaho Criminal Rule 29.1(a):

A mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or the conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial.

The decision to grant or deny a motion for mistrial is discretionary and will not be disturbed absent an abuse of discretion. *State v. Wachholtz*, 131 Idaho 74, 77, 952 P.2d 396, 399 (Ct.App. 1998) (citing *State v. Tolman*, 121 Idaho 899, 902, 828 P.2d 1304, 1307 (1992); *State v. Talmadge*, 104 Idaho 249, 254, 658 P.2d 920, 925 (1983); *State v. Ramsbottom*, 89 Idaho 1, 10, 402 P.2d 384, 389 (1965)). "On appellate review our inquiry is whether the event which brought about the motion for mistrial constitutes reversible error when viewed in the context of the entire record." *Wachholtz*, 131 Idaho 74, 77, 952 P.2d 396, 399 (citing *State v. Urqhart*, 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct.App. 1983)).

In *Wachholtz*, the Court of Appeals found no error, holding that the defense had not demonstrated evidence the jurors were aware of or prejudiced by Wachholtz's stun belt accidentally shocking him, causing him to scream while he was waiting in the courthouse law library for potential jurors to assemble in the courtroom so that *voir dire* could begin. 131 Idaho 74, 76-77, 952 P.2d 396, 398-99. The Court of Appeals upheld the District Court's denial of the motion for mistrial and noted that subsequent questioning of the panel disclosed no evidence that the jurors heard or were influenced by the event; "in sum, the defense provided no evidence of prejudice or deprivation of a fair trial." *Id.* Wachholtz moved for a mistrial a second time during opening statements, arguing he was unable to assist in his own defense because of back pain; the District Court again denied his motion. *Id.* The Court of Appeals again upheld the District Court because Wachholtz presented no

evidence to counter the Court's observation that he did not appear to be in pain, and did not identify how his back pain would impair his ability to assist in his defense. *Id.*

In the instant matter, Southern argues the State's questions during *voir dire* were posed to inflame the jury and cause them to personalize the issue of child abuse reporting. Brief of Appellant, p. 2. At trial, no evidence was presented by Southern's attorney to Judge Stow at trial in support of this argument. All Southern's attorney claimed was:

The State had asked several times if the jurors personally would report child abuse. If they personally would take action. If they personally would call law enforcement. And, your Honor, that is not appropriate questioning. It's inflamed the jury.

Tr. p. 53, Ll. 11-16. Simply making the statement: "It's inflamed the jury", does not make it so. No further logic or argument was given in support of this bald claim. This objection was made but no reasoning was given by Southern's attorney to flesh out the objection. Furthermore, Southern's attorney's claims that the prosecutor "asked several times if the jurors personally would report child abuse...personally would take action...personally would call law enforcement" is taken out of context. What the prosecutor in fact asked was *if a prospective juror were given indication by a child that should be reported, would they report it?* The prosecutor did not particularize the question to any facts of this case. The prosecutor asked:

Of you who have that experience, if a small child, say between five and ten years old, came to you and said something happened to me, something bad, how many of you would believe it? Okay. How many of you would take action, if it was something that the police needed to be involved in? So, is it fair to say that if a small child, between five [and] ten years old, comes to you and says something happened to me, and you recognized that the police or the authorities should be involved, it's a fair thing to do is [sic] to call the authorities?

Tr., p. 16, L. 13 - p. 17, L. 6.

Southern on appeal has not provided any evidence before this Court demonstrating

that the jurors who were eventually selected were influenced improperly by the prosecutor's questions. In the context of the entire trial record, it cannot be said that the prosecutor's questions during *voir dire* on whether the panel believed young children tell the truth, whether the panel believed the statements of young children, and whether the panel would act upon something young children told them by notifying the authorities, were improper, or that the Court's overruling Southern's counsel's objection and motion for mistrial *constituted error at all*, much less reversible error. This Court finds the prosecutor's comments were not improper. There was no error in Judge Stow's overruling the objections made in *voir dire*, and no error in denying the corresponding motion for mistrial.

#### **B. Prosecutor's Statements During Closing Argument.**

During closing argument the prosecutor made statements which Southern's attorney on appeal characterizes as prejudicial and inflammatory. Brief of Appellant, pp. 2-3. The prosecutor argued in his closing:

Now, keep in mind in our society that we tell children if something happens tell an adult. Tell your teacher. Tell the police. That's what these boys did. That's what they're suppose [sic] to do.

Tr., p. 152, Ll. 22-25.

They did as they were suppose [sic] to do. They brought it to an adult, to their mother, who called the police. And now, it's in front of you. These two boys they come to you. Not like those stories you see on TV with the yellow tape up and the big investigations and the test tubes and that sort of thing. What they bring you in a story of two children. And they speak in the voices of children. From the prospective [sic] of two young boys. And in the language of children. And this is how children communicate. This happened to us. We were there. This happened to us. It was wrong. And we have to tell you. We have to tell someone, so we can be protected. We want justice. That's what they were suppose [sic] to do, as all children are suppose [sic] to do. And this is the end result. Ladies and gentlemen, battery has occurred on both Andrew and Dorian.

...

Theories, absolutely no reason for these two children to have made this up. None whatsoever. It has been presented to you. Ladies and gentlemen, you have to believe that, because this is what these boys have

been raised to do this is what children are suppose [sic] to do. Tell an adult who takes it to the authorities. And in the end you are that ultimate authority. You have to validate what these children did. You have to validate what they have said. You have to invalidate the violence that was done to them. That's why you are here. And that's why I'm asking you to find him guilty of two counts of battery.

Tr., p. 153, Ll. 4-23, p. 155, Ll. 3-14.

What we're talking about here is the safety of the children in a neighborhood. The issue's been brought to you by two children. And it's very important to them they knew [sic] the system works for them. That they know that they will be listened to when something happens. This is what children are told in our culture. And that's how we respond to it.

Tr. p. 161, L. 25 - p. 162, L. 6. Following this statement, Southern's attorney objected, arguing the jury was being inflamed. Tr., p. 162, Ll. 7-8. Judge Stow sustained the objection. Tr., p. 162, l. 9. In response to Southern's attorney's motion for a mistrial based on these statements, made outside the presence of the jury which had begun deliberations, Judge Stow noted the statements made were "at least close to that line in terms of a command...to convict in relation to the conduct of the children, or children essentially doing what they're taught." Tr., p. 165, Ll. 10-14. Judge Stow recognized the jury would feel it has a certain duty in reaction to the statements, but ultimately, he stated the jury instructions and entirety of the evidence before the jury would lead them to properly apply the law to the facts and "reach a fair decision in this matter." Tr., p. 165, Ll. 14-20. Southern's argument is that the State overtly and expressly appealed to the jurors' emotions. Brief of Appellant's, p. 7. Southern implicitly appears to argue he was denied a fair trial because the jury's passions and prejudices were inflamed via an argument being presented to them *two separate times* by the State. *Id.*, pp. 7-8. Because this Court finds no error at all in what was discussed by the State in voir dire, only the comments made during closing arguments need to be analyzed in detail. Southern's argument about improprieties by the prosecutor on *two separate times*, if intended to invoke the "cumulative

error doctrine” (discussed in *State v. Timmons*, 145 Idaho 279, 292, 178 P.3d 644, 657 (2007)), has no merit. There is no other error (other than that made in closing), with which to aggregate.

Southern, on appeal, argues:

The Prosecution unmistakably [implied] that the jurors would be failing in their societal duty to support children who report instances of child abuse in general, and the children in this case in particular, had they not convicted Mr. Southern. In such an atmosphere it was impossible for the jurors to effectively assess the credibility of the child witnesses in this case. The Trial Court never instructed the jury to disregard the Prosecutions [sic] inflammatory statements, nor did it admonish the Prosecutor to discontinue his line of argument. Therefore, it is Mr. Southern’s contention that the verdict would have been different absent the Prosecutor’s improper voir dire and closing arguments. Furthermore, the State’s case rested entirely on the credibility of the child witnesses.

Brief of Appellant, pp. 8-9. Here, Southern’s counsel objected only to the State’s statements made during rebuttal closing. Tr., p. 162, Ll. 7-9. “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). The transcript reveals that *no curative instruction was ever requested by Southern’s attorney*, and, despite noting the State’s argument was getting “close to the line in terms of a command”, the Court gave no curative instruction on its own volition.

Fundamental error results where comments made are so egregious or inflammatory that any consequent prejudice could not have been remedied by a trial court informing the jury that such comment should be disregarded. *State v. Smith*, 117 Idaho 891, 898, 792 P.2d 916, 923 (1990).

The inquiry by this Court must be: (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. 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, 715-16, 215 P.3d 414, 435-36. A claim of prosecutorial misconduct made without a contemporaneous objection results in reversal only where the conduct is so egregious as to amount to fundamental error. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). Even if fundamental error exists, a conviction will not be overturned where prosecutorial misconduct constitutes harmless error. 144 Idaho 559, 571, 165 P.2d 273, 285. As set forth above, when an objection is made at trial, and on appeal the appellate court finds error, the “harmless error” test applies. *State v. Phillips*, 143, 80, 88, 156 P.3d 583, 589 (Ct.App. 2007). The test for whether prosecutorial misconduct constitutes harmless error is whether an appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *State v. Pecor*, 132 Idaho 359, 368, 972 P.2d 737, 746 (Ct.App. 1998).

As just mentioned above, the first inquiry by this Court must be whether prosecutorial misconduct occurred. *Phillips*, 144 Idaho 82, 88, 156 P.3d 583, 589. Ultimately, the State engaged in misconduct in stating to the jury that they are the ultimate authority and must “validate” the child witnesses having sought help. Tr., p. 153, Ll. 4-23, p. 155, Ll. 3-14. Judge Stow stated the prosecutor came close to “the line.” Tr., p. 165, Ll. 10-14. This Court finds the prosecutor crossed the line. Arguing that the jury must “validate” the child witnesses is improper. Doing so is quite similar to telling the jury they would face public disapproval if they freed the defendant, a practice that was specifically found to be improper. *State v. Spencer*, 74 Idaho 173, 183-84, 258 P.2d 1147 (1953). There are a variety of other cases which discuss improper argument, but *Spencer* is closest

to being on point. By arguing the jury “validate” the child witnesses, the State is asking the jury to make a decision on something that is not in evidence before them. By making that argument, the State is making a statement that focuses the jury on their passions.

While Southern’s counsel failed at any time to request a limiting instruction as to the request of the State that the jury “validate” the child witnesses, Judge Stow could have given a curative instruction on his own. Judge Stow obviously felt there was no misconduct (a decision with which this Court disagrees), and, accordingly, did not give a limiting instruction on his own volition. However, that does not create reversible error.

Next, the Court needs to address the impact of those urgings by the State to “validate” the child witnesses.

The State argues the fact that the jury was instructed that attorney arguments are not evidence in effect immunizes them in regards to any arguably inflammatory statements made. Respondent’s Brief, p. 8. “Nothing presented by Appellant indicates that any statements by the state’s attorney were of sufficient impact that had they not been made, then the verdict would have been different.” *Id.* No case law or any other authority has been cited by the State for this proposition that being instructed that arguments by the attorneys are not evidence immunizes inflammatory statements. However, the following discussion in *State v. Campbell*, 104 Idaho 705, 718, 662 P.2d 1149, 1162 (Ct.App. 1983), shows the fact that the jury was instructed that “arguments by the attorneys are not evidence, is *at least a factor* in analyzing whether fundamental error occurred:

We believe that the statements made by the prosecutor in this case fall within the *Sharp* rule applied by our Supreme Court to the first prosecutorial remark examined in *LaMere*. Here, the comments of the prosecutor were not so inherently prejudicial that an objection, and accompanying instruction, would not have cured the defect. Although objections were, in fact, made and sustained, no immediate request was made at that time for a specific instruction to the jury to disregard either of the prosecutor’s remarks. Moreover, the jury had been generally

instructed-before opening arguments and again at the close of the evidence, but before counsels' summations-that statements and remarks of counsel were not evidence and that any such statements or remarks which did not conform to the evidence were to be disregarded. We hold, under these circumstances, that no reversible error occurred.

Indeed Southern's jury was instructed at the beginning of trial that: "Just as the opening statements are not evidence, neither are the closing arguments." Tr. p. 69, L 25 – p. 70, L. 1. Southern's jury was also instructed at the end of the trial that: "Certain things you have heard or seen are not evidence, including: 1. Arguments and statements by lawyers. The lawyers are not witnesses. What they say in their opening statements, closing remarks and at other times is included to help you interpret the evidence, but is not evidence." Tr. p. 143, L. 23 – p. 144, L. 4.

The State claims there was no fundamental reversible error because the statements made were "brief" and "in the context of explaining as to why child witnesses had reported a crime and testified to its occurrence." *Id.*, p. 9. The State cites no authority, and this Court can think of no good reason why the brevity of any inappropriate remark would be a factor.

The State continues:

No presentation has been made by the Appellant to lead an appellate court to conclude that but for the comments made the two convictions for misdemeanor battery would not have resulted.

*Id.* This is an accurate statement by the State. In his appeal, Southern gives this Court absolutely no argument as to why this error was not harmless. In both briefs submitted on behalf of Southern on appeal, Southern's counsel has engaged in not one shred of analysis of the evidence adduced at Southern's trial. In both briefs submitted on behalf of Southern on appeal, Southern's counsel not once mentioned the standard Southern must be held to on appeal; that is, convincing this Court beyond a reasonable doubt a *different* result would

have been reached by a jury had the prosecutorial misconduct not occurred. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Campbell*, 104 Idaho 705, 718, 662 P.2d 1149, 1162 (1983); *State v. LaMere*, 103 Idaho 839, 844, 655 P.2d 46, 51 (1982). In his briefing on appeal, Southern only discussed the prosecutor's comments at trial in his case. However, Southern has engaged in no comparison of those comments as they relate to the facts of Southern's case, nor is there any comparison of the facts of Southern's case to the facts of all the other cases Southern cites, where improper arguments and harmless error are discussed.

This Court has read the transcript of the trial, and has read other cases which discuss whether or not improper arguments were harmless.

First, the evidence before the jury was overwhelming. The testimony of D.M., an eight-year-old boy, who positively identified Southern at the trial as the person who yelled and swore at D.M. and his brother and who choked D.M. and D.M.'s brother, merely because they were killing ants in a friend's back yard near Southern, and how they immediately ran off and told their friend's grandparents after the choking. Tr. p. 84, Ll. 16-17; p. 89, L. 6 – p. 94, L. 12. D.M.'s brother, A.M., was the next to testify. A.M. was eleven- years old, and at trial he also positively identified Southern in the courtroom as the person who yelled and swore at A.M. and his brother and who also choked or "strangled" A.M. and D.M.'s brother, again, merely because they were killing ants near Southern, and how they immediately ran off and told their grandparents after the choking. Tr. p. 97, Ll. 6-7; p. 99, L. 8 – p. 106, L. 20. No points were scored in Southern's favor on the very brief cross-examination of these two minor witnesses. Tr. p. 94, L. 14 – p. 95, L. 7; p. 107, L. 5 – p. 109, L. 5. The minor children's mother testified about their reaction to what had happened and to their injuries. Tr. p. 114, L. 13 – p. 119, L. 6. The investigating officer

Christopher Thompson, of the Post Falls Police Department, testified, about his investigation with the children and with Southern, and that Southern appeared intoxicated shortly after the event and gave inconsistent stories as to his whereabouts. Tr. p. 119, L. 20 – p. 138, L. 24. The defense rested without calling Southern and without presenting any evidence. Tr. p. 139, L. 25 – p. 140, L. 1. Certainly this is Southern's right at trial, but on appeal it is Southern's duty to explain how the outcome at trial would have been different had these statements not been made by the prosecution, and how the outcome would have been different had Judge Stow properly given a limiting instruction. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Campbell*, 104 Idaho 705, 718, 662 P.2d 1149, 1162 (1983); *State v. LaMere*, 103 Idaho 839, 844, 655 P.2d 46, 51 (1982).

Where, as here, it is alleged that 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 indispensable 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.

In *State v. Hairston*, 133 Idaho 496, 507, 988 P.2d 1170, 1181 (1999), the prosecution referred to Mr. Hairston as a “murdering dog” during its closing and argued he had never denied the murders he had been charged with; nevertheless, the Idaho Supreme Court held “[a]lthough we agree that the prosecution made improper arguments during its summation, we do not believe that the misconduct rose to the level of a fundamental error requiring a retrial.” *Id.* Where statements made are so inflammatory as to influence jurors to determine guilt based on factors outside the evidence, prosecutorial misconduct rises to the level of fundamental error. *State v. Porter*, 130 Idaho 772, 785, 948 P.2d 127, 140 (1997). Here, in addition to no curative instruction having been requested, there *is* evidence in the record upon which the jury could have based (and did base) its decision, and no statements made by the State can be said to have been as inflammatory as calling a defendant a “murderous dog”, as was the case in *Hairston*. The jury was in the best position to evaluate the credibility of both Appellant and the child witnesses testifying against him. *Severson*, 147 Idaho 694, 712, 215 P.3d 414, 432. (“We will not substitute our own judgment for that of the jury on matters such as the credibility of witnesses, the weight to be given to certain evidence, and the ‘reasonable inferences to be drawn from the evidence.’”)

There are a plethora of cases where error is discussed. It is pointless to engage in a lengthy discussion of the type of conduct engaged in that was found or not found by the Idaho appellate courts to be error. Some quite frightening comments have been found to be improper, but not error. Always, what these cases turn on is the strength of the evidence before the jury...that is, whether the outcome would have been different absent the inappropriate comment by the prosecuting attorney. The strength of the evidence in the

present case has been discussed above.

There is no evidence before this Court to indicate that the jury's passions and prejudices were inflamed so as to have caused them to determine Southern's guilt based on factors not in evidence. The jury was in fact instructed that the attorney's remarks are not evidence. Because Southern has put forth absolutely no evidence that the jury's passions and prejudices were inflamed so as to cause them to determine Southern's guilt based on factors not in evidence, this Court can come to no other conclusion other than such error to give a limiting instruction was harmless beyond a reasonable doubt. The facts of this case vary from those in *Phillips* where the Court of Appeals noted the prosecutor's allegations regarding the defendant's conduct were in fact controverted by the testimony of several persons who were present at the event. "In his rebuttal closing argument, the prosecutor, not once but six times, invited the jury to be irritated and upset by the exculpatory testimony of [persons present at the event], testimony that was injected into the trial largely by the State itself." 144 Idaho 82, 89, 156 P.3d 583, 590. In the present case this Court can say beyond a reasonable doubt that the jury verdict would have been the same even absent the State's improper questions during *voir dire* and improper statements during closing.

#### **IV. CONCLUSION.**

**IT IS HEREBY ORDERED** the final Judgment and Sentence appealed from (Notice of Appeal, p. 1, ¶ 1) is **AFFIRMED**. This matter is **REMANDED** to Judge Stow for any further proceedings.

DATED this 12<sup>th</sup> day of March, 2010.

JOHN T. MITCHELL District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of March, 2010 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – SEAN WALSH  
Prosecuting Attorney – JOEL RYAN

Honorable James Stow

**CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY**

BY: \_\_\_\_\_  
Deputy