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, v. JONATHAN WADE ELLINGTON, Defendant.	)	**CASE NO. CR- 06-1497** MEMORANDUM DECISION AND ORDER RE: DEFENDANT'S MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL

Barry McHugh and Arthur W. Verharen, Kootenai County Prosecuting Attorney's Office, for Plaintiff State of Idaho.

John Adams and Anne C. Taylor, Law Office of the Kootenai County Public Defender, for Defendant Jonathan Wade Ellington.

I. SUMMARY OF PROCEDURE

This case came before this Court for a second jury trial commencing on January 18, 2012. Over the next ten days, the State sought to prove that the Defendant was guilty of one count of second degree murder (I.C. §§ 18-4001, 4002, and 4003) for the death of Vonette Larsen, and two counts of aggravated battery (I.C. § 18-907) against Jovon Larsen and Jolene Larsen. On January 31, 2012, the jury returned a verdict of guilty on all counts.

The Defendant filed two post-trial motions on February 13, 2012: Defendant's "Motion for New Trial" and "Defendant's Motion for Judgment of Acquittal." The Defendant did not file any supporting documentation at that time. The Defendant

noticed the post-trial motions for hearing on March 16, 2012. On March 13, 2012, the Defendant filed a "Motion to Continue," seeking to continue the hearing on the Defendant's post-trial motions. The Defendant also filed two binders containing the following: "Briefing in Support of Motion for Judgment of Acquittal," "Briefing in Support of Motion for New Trial," Exhibits A through J, "Citations in Support" (including copies of in excess of 40 cases and statutes and constitutional provisions).

On March 14, 2012, this Court signed an order to continue the March 16, 2012, post-trial motions hearing. This Court sentenced the Defendant on March 26, 2012, and scheduled the hearing on Defendant's post-trial motions for April 24, 2012, in order to allow the State additional time to respond. This Court issued a "Judgment and Sentence" on April 3, 2012.

On April 16, 2012, the State filed its "Memorandum in Opposition to Defendant's Post-Trial Motions" ("State's Opposition") and "Plaintiff's Exhibit List for Defendant's Post-Trial Motions" ("Plaintiff's Exhibits"). The day before the hearing, on April 23, 2012, the Defendant filed a "Reply Brief," and the day of the hearing the Defendant filed a "Notice of Filing in Support of Defendant's Motion for New Trial" with an affidavit attached, and a "Notice of Filing in Support of Defendant's Post-Verdict Motions," with three transcripts attached.

This Court heard from the parties and their witnesses on April 24, 2012. After the extensive testimony concluded, this Court took both of the Defendant's post-trial motions under advisement. This Court now issues its decision and order.

II. MOTION FOR JUDGMENT OF ACQUITTAL

A. APPLICABLE LAW

Idaho Criminal Rule 29(c) provides:

> *If the jury returns a verdict of guilty . . . a motion for judgment of acquittal may be made or renewed within fourteen (14) days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned the court may, on such motion, set aside the verdict and enter judgment of acquittal . . . . It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.*

The best statement of the standard applied to a motion for judgment of acquittal is set forth in State v. Hoyle, 140 Idaho 679, 683-84, 99 P.3d 1069, 1073-74 (2004):

> *"On review of the denial of a motion for judgment of acquittal, the appellate court ... determine[s] whether there is substantial evidence to support the challenged conviction." State v. Merwin, 131 Idaho 642, 644, 962 P.2d 1026, 1029 (1998); State v. Rhode, 133 Idaho 459, 461, 988 P.2d 685, 687 (1999). Substantial evidence to support the challenged conviction is present when "a reasonable mind could conclude that the defendant's guilt as to such material evidence of the offense was proven beyond a reasonable doubt."*

(Internal Citations Omitted.)

B. ANALYSIS

1. The State Provided Substantial Evidence Such that a Reasonable Mind Could Conclude that the Defendant Was Guilty of Second Degree Murder Beyond a Reasonable Doubt.

The Defendant's Motion for Judgment of Acquittal challenges the sufficiency of the evidence presented by the State in regards to the "intent" element of Count I. Thus, a discussion of the intent required to be found guilty of second degree murder and the jury instructions given is necessary before this Court can address the substance of the Defendant's arguments.

Upon retrial, the Defendant remained charged as per the Information filed on February 21, 2012. This Information charges the Defendant with "Murder in the Second Degree, Idaho Code 18-4001, 02, 03," in the opening paragraph, and Count I reads:

> *That the defendant, JONATHAN WADE ELLINGTON, on or about the 1st day of January, 2006, in the County of Kootenai, State of Idaho, did* ***willfully, unlawfully, deliberately, and with malice aforethought****, but without premeditation, kill and murder Vonette L. Larsen, a human being, by striking and driving over Vonette L. Larsen with a vehicle inflicting injuries from which she died.*

(Information, February 21, 2006). The exact language from the Information is repeated in the charging instruction, Jury Instruction No. 7.

As per Idaho Code § 18-4001, "murder" is defined as "the **unlawful** killing of a human being, . . . , **with malice aforethought**." Idaho Code § 18-4003 distinguishes between first and second degree murder. The statutory definitions of first degree murder and second degree murder are reflected in Idaho Criminal Jury Instruction 701 ("ICJI"). This Court gave ICJI 701 in Jury Instruction No. 16:

> *Second degree murder is the killing of a human being* ***without legal justification or excuse and with malice aforethought****.*
>
> *The killing of a human being is* ***legally justified*** *when done in defense of self, another or property. You will be instructed on the elements of* ***legal justification*** *in a later instruction.*

Malice is defined in I.C. § 18-4002: "Such malice may be express or implied. It is express when there is manifested a **deliberate intention unlawfully** to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Idaho Criminal Jury Instruction 702, given by this Court in this case as Instruction No. 18, provides as follows:

YOU ARE INSTRUCTED that for Mr. Ellington to be guilty of Murder in the Second Degree, the state must prove that the killing of Vonette Larsen occurred ***with malice aforethought****.*

Malice may be express or implied. Malice is express when there is manifested a ***deliberate intention unlawfully*** *to kill a human being.*

Malice is implied when:

1. *The killing resulted from an intentional act.*
2. *The natural consequences of the act are dangerous to human life, and*
3. *The act was* ***deliberately*** *performed with knowledge of the danger to, and with conscious disregard for, human life.'*

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of ***malice aforethought****. The mental state constituting* ***malice aforethought*** *does not necessarily require any ill will or hatred of the person killed.*

*The word "****aforethought****" does not imply* ***deliberation*** *or the lapse of time. It only means that the malice must precede rather than follow the act."*

This Court also defined when a homicide is "excusable" in Jury Instruction No. 19, an exact restatement of ICJI 1516. This Court also instructed the jury as to "self-defense," in Jury Instruction Nos. 36 and 37, both of which are identical to ICJI 1518 and 1519.

The Information, and as a result the charging instruction Jury Instruction No. 7, include one additional element of intent that is not reflected in either the statutes or the approved Idaho Criminal Jury Instructions: "willful." The Defendant objected to the use of ICJI 701 (Jury Instruction 16) and 702 (Jury Instruction 18), and instead proposed Defendant's Requested Jury Instruction No.1 which includes "willfully" as an element. The Defendant also submitted to this Court Defendant's Requested Jury Instruction No. 2, which reads:

Before you may find Mr. Ellington guilty of Murder in the Second Degree as charged in Count I, the State must prove to you that Mr. Ellington

willfully, unlawfully and deliberately *caused the death of Vonette L. Larsen.*

Deliberately, as charged by the State in Count I of the Information is defined as:

An intent to kill executed in a cool state of blood, not in sudden passion engendered by lawful or some just cause or provocation; done with reflection; a dispassionate weighing process and consideration of consequences before acting.

Unlawfully, as charged by the State in Count I of the Information, is defined as acting without legal justification or excuse.

Willfully as charged by the State in Count I of the Information, means a purpose or willingness to commit the act in the Information.

The Defendant supported his requested jury instructions with case law, but this Court denied the Defendant's Requested Jury Instructions Nos. 1 and 2.[1]

a. The State presented sufficient evidence in regards to the intent element that is required by statute.

Defendant challenges the sufficiency of the evidence in regards to the requisite intent element for second degree murder. As discussed above, second degree murder requires that the State prove that the Defendant acted with malice aforethought when he killed Mrs. Larsen. Certainly, the question presented to the jury was whether the Defendant's acted with malice, whether the malice was express or implied, and whether the act occurred in defense of one's self. This Court has extensively reviewed the testimonial and physical evidence presented by the State. Specifically, the State provided physical evidence and expert testimony that the Defendant drove his vehicle in

[1] This Court notes that Count I in the charging document filed February 21, 2006, was certainly ripe for a due process challenge prior to either the first trial or the retrial because it included an element of intent that is not required by Idaho Code: "willfully." *See* State v. Jones, 140 Idaho 755, 101 P.3d 699 (2004) and State v. Quintero, 141 Idaho 619, 115 P.3d 710 (2005). However, because no challenge was made prior to either trial, and it appears that the Defendant made a strategic decision to include the additional element and put the State to its burden on this additional element, this Court cannot find error or prejudice.

the wrong lane of traffic, continued into the open eastbound lane, and did not attempt to brake or otherwise take any evasive action to avoid Mrs. Larsen. In fact, the State provided evidence that a reasonable mind could conclude that the Defendant maneuvered his vehicle in the very direction of Ms. Larsen. The Defendant did not submit any expert testimony and the State's evidence is corroborated in large part by the testimony of Jolene Larsen's and Joel Larsen's testimony. While the Defendant made significant efforts to reveal the inconsistencies and bias in the eyewitnesses' testimony and to deconstruct the State's expert's opinion, this Court cannot say that the Defendant successfully diminished the weight and credibility of the State's evidence such that a reasonable juror could not find that the Defendant acted with express or implied malice.

This Court concludes that based on the testimony of the eyewitnesses and the State's expert, as well as the physical evidence regarding the acceleration and path of the Defendant's vehicle, the State submitted substantial evidence that a reasonable mind could conclude that the Defendant acted with malice aforethought when he accelerated his vehicle and struck Mrs. Larsen. The Defendant's Motion for Judgment of Acquittal, therefore, must be denied.

b. The Defendant did not request, and the facts as presented do not require, an instruction regarding whether the Defendant acted in the heat of passion.

It is markedly unusual that the Defendant has alleged that there is insufficient evidence that the Defendant acted "with a lack of passion as required for malice to be found," because, as discussed above, Idaho Code does not contain such a requirement. Regardless, the Defendant makes a twofold argument: 1) the State was required to

prove that the Defendant "did not act in the heat of passion on sudden provocation," and 2) that this Court was required to sua sponte give an instruction regarding a defense of "heat of passion on sudden provocation."

The Defendant did not submit a request for a jury instruction regarding a defense of "heat of passion on sudden provocation." A defendant "may not assert as error the trial court's failure to give an instruction [he] did not request." State v. Pearce, 2007 WL 1544152 (Ct. App. 2007), aff'd, 146 Idaho 241, 192 P.3d 1065 (2008), *citing* State v. Eastman, 122 Idaho 87, 90 831 P.2d 555, 558 (1992) (determining that "[t]he defendant's argument would mandate the trial court to instruct the jury upon any defense theory possible.") It is well settled that:

> while a defendant is entitled to an instruction where there is a reasonable view of the evidence presented in the case that would support the theory, it is incumbent upon the defendant to submit a requested instruction or in some other manner apprise the district court of the specific instructions requested as 'the trial court is not obligated to determine on its own what theories to instruct the jury on.'

Pearce, 2007 WL 1544152, at 8, *citing* Eastman, 122 Idaho at 90–91, 831 P.2d at 558–59. The Idaho Supreme Court clarified the distinction between omission of a proposed jury instruction and failure to request the instruction in State v. Gomez:

> We further note that [not requesting a specific jury instruction] is distinguishable from the situation in which the Court has held that a defendant does not waive the right to a jury instruction by the failure to object to that instruction at trial. *State v. Smith,* 117 Idaho 225, 786 P.2d 1127 (1990). *Smith* does not stand for the proposition that a defendant can fail to request a jury instruction and later allege error in the failure to give it.

126 Idaho 83, 86 n. 2, 878 P.2d 782, 785 n. 2 (1994).

Because the Defendant failed to request the instruction of "heat of passion upon sudden provocation" at trial, this Court cannot find error in not giving the instruction.

Regardless, even if this Court omitted the instruction improperly or was required to sua sponte provide an instruction regarding the "heat of passion upon sudden provocation," whether a person acts "unlawfully upon a sudden quarrel or heat of passion and without malice aforethought" is the intent element of the lesser included offense of voluntary manslaughter. I.C. § 18-4006; ICJI 708. This Court instructed the jury in regards to the elements of voluntary manslaughter in Jury Instruction Nos. 27 and 28. As a result, no error occurred. While the Defendant seems to focus on the fact that the burden is on the State to prove "heat of passion upon sudden quarrel defense," and the burden would be on the State to do so as per Mullaney v. Wilbur, 421 U.S. 684, 690 (1975), the facts of this case show that the Defendant really seeks a ruling that that the State must "disprove" the lesser included offense of manslaughter in order to sustain a conviction on the charged offense of second degree murder. The Defendant provides no legal authority for such a proposition, and it is a basic premise of criminal law that the jury must first consider the charged offense and make a determination before the lesser offense can be considered.

Moreover, this Court notes the State's response that "[s]elf-defense and heat of passion are two different theories that cannot logically coexist in the same case: 'The affirmative defenses of self-defense is, of course, inconsistent with the claim that the defendant killed in the heat of passion.'" (State's Opposition, p.7, *citing* Mathews v. U.S., 485 U.S. 58, 64, 108 S.Ct. 883, 887 (1988)). In this case, a reasonable view of the evidence presented by the State and the Defendant shows only that the Defendant was acting in defense of self, not lashing out due to the heat of passion resulting from a sudden quarrel. At no time did the Defendant show that he was acting in response to a

sudden quarrel, but instead attempted to show that he was in fear of his life as a result of the day's cumulative events. The Defendant's Motion for Judgment of Acquittal must therefore be denied.

2. The State Provided Substantial Evidence that the Defendant Possessed the Requisite Intent Such that a Reasonable Mind Could Conclude that the Defendant was Guilty of Aggravated Battery Beyond a Reasonable Doubt.

The Defendant argues that the State failed to provide sufficient evidence to sustain the convictions for aggravated battery as alleged in Counts II and III of the Information. The Information charges the Defendant with committing aggravated battery against Jovon Larsen and Jolene Larsen in Counts II and III, in violation of I.C. § 18-903(a)(c); 18-907(b). These counts require that the State prove one of the following: "willfully and unlawfully uses force or violence upon the person of another; or 2) actually intentionally and unlawfully touches or strikes another person against the will of the other; or 3) unlawfully and intentionally causes bodily harm to an individual." (I.C. § 18-903; ICJI 1203; Jury Instruction No. 23). "Willfully" means that the act is "done on purpose. On can act willfully without intending to violate the law, to injure another, or acquire any advantage." (ICJI 340; Jury Instruction No. 24.)

The Defendant claims that the State failed to prove that he acted "willfully" when he hit the Honda driven by Jovon and Jolene Larsen. The State's eyewitness testimony, as well as the expert testimony by the State's expert, showed that the Defendant made a sharp left turn, accelerated, hit the Honda, and pushed the vehicle off the road. A reasonable jury could conclude, based on the evidence provided, that the Defendant "acted on purpose" when he hit Honda, given the acceleration, the alternate route and open lane of traffic available, and violence of the impact between

the vehicles. The Defendant has not persuaded this Court that a reasonable juror could not conclude that the Defendant acted willfully when he hit the Larsen sister's vehicle. As a result, the Defendant's Motion for Acquittal must be denied.

3. This Court Declines to Reduce the Charge of Second Degree Murder to a Manslaughter Charge or Otherwise Alter the Verdict.

The Defendant requests that this Court unilaterally reduce the charge from second degree murder to voluntary manslaughter, or otherwise alter the verdict. While this Court believes that the evidence presented would support a conviction for manslaughter, as discussed above, this Court cannot unilaterally reduce the charge or otherwise alter the verdict because this Court is not a "reviewing" court, and cannot "vacate the conviction and sentence for the greater offense and enter a judgment of conviction on the lesser offense," as the Defendant requests. As a result, the Defendant's Motion for Judgment of Acquittal must be denied.

III. DEFENDANT'S MOTION FOR NEW TRIAL

A. APPLICABLE LAW

Idaho Criminal Rule 34 provides:

> *the court, on motion of a defendant may grant a new trial to the defendant if required in the interest of justice . . . . A motion for a new trial based upon the ground of newly discovered evidence may be made only before or within two (2) years after final judgment. A motion for a new trial based on any other ground may be made at any time within fourteen (14) days after verdict, finding of guilt or imposition of sentence, or within such further time as the court may fix during the fourteen day period.*

Granting or denying a motion for a new trial because it is in the interest of justice is discretionary. State v. Olin, 103 Idaho 391, 648 P.2d 203 (1982). Idaho Code § 19-2406 limits the instances in which the trial court's discretion may be exercised:

2. When the jury has received any evidence out of court other than that resulting from a view of the premises.

3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.

4. When the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors.

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.

6. When the verdict is contrary to law or evidence.

7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly-discovered evidence, the defendant must produce at the hearing in support thereof the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.

B. ANALYSIS

1. The Verdict is Not Contrary to Law or the Evidence Presented

a. A reasonable jury could conclude that the Defendant killed Mrs. Larsen with malice aforethought.

This Court adopts its analysis set forth above in Part II.B.1, and concludes that the verdict as rendered by the jury was not contrary to the law or the evidence presented. The Defendant's Motion for New Trial must be denied.

b. A reasonable jury could conclude that the Defendant had the requisite intent to be found guilty of aggravated battery.

The Court adopts its analysis set forth above in Part II.B.2, and concludes that the verdict as rendered by the jury was not contrary to the law or the evidence presented. The Defendant's Motion for New Trial Must be denied.

2. This Court Properly Denied the Defendant's Requested Jury Instructions

a. The Defendant's requested jury instructions substantially differ from the jury instructions approved by the Idaho Supreme Court and do not accurately reflect the required elements of the charge.

As set forth in Schaefer v. Ready:

> Use of the [Idaho Criminal Jury Instructions] is not mandatory, only recommended. Needs v. Hebener, 118 Idaho 438, 442, 797 P.2d 146, 150 (Ct.App.1990). However, any court that chooses to vary from a jury instruction previously approved by the Idaho Supreme Court, does so with the risk that the verdict rendered may be overturned on appeal. *See* State v. Merwin, 131 Idaho 642, 647, 962 P.2d 1026, 1031 (1998). While it clearly is not error to modify an [ICJI] instruction, such modification will constitute error if the modified instruction does not conform to the state of the law or omits elements basic to the case. Ramco v. H-K Contractors, Inc., 118 Idaho 108, 111, 794 P.2d 1381, 1384 (1990).

134 Idaho 378, 381-82, 3 P.3d 56, 59-60 (Ct. App. 2000). This Court hereby adopts its analysis set forth above in Part II.B.1, and concludes that it properly rejected Defendant's Requested Jury Instructions Nos. 1 and 2 because, even though the proposed instructions reflected the elements as charged in the Information, the proposed instructions would, in this Court's opinion, create confusion amongst the jurors and varied too greatly from the jury instructions approved by the Idaho Supreme Court. The Defendant's Motion for a New Trial, then, must be denied.

b. The Defendant did not request an instruction regarding a "lack of passion." Regardless, the facts as presented do not entitle the Defendant to such an instruction.

This Court hereby adopts its analysis set forth in Part II.B.1.b and concludes that it was not required to sua sponte give an instruction regarding a "heat of passion upon sudden quarrel defense." Moreover, the facts as presented to not entitle the Defendant to such an instruction because it would have been inconsistent with the Defendant's

presented defense of self-defense, a defense that this Court instructed the jury on. The Defendant's Motion for a New Trial, then must be denied.

3. This Court Properly Denied the Defendant's Motion for New Trial / Motion to Dismiss.

a. The Brady Information Was Provided to the Defendant in Time for Trial.

Prior to trial, the Defendant moved to dismiss the case based on an alleged Brady violation by the State. According to the information this Court received from the parties at the hearing on the Defendant's motion, the State disclosed evidence from a forensic examiner on January 12, 2012. The State had not previously disclosed the information, and apparently, the new information amounted to a finding that a Mrs. Larsen was excluded as the source of fingerprints on the hood of the Defendant's vehicle. The Defendant sought dismissal of the case for a violation of the Defendant's due process rights.

This Court applied the standard of Brady at the hearing on the Defendant's motion on January 17, 2012, and concluded that the material and exculpatory information was turned over prior to the retrial when it came into possession of the prosecution and that the Defense could make effective use of the information in time for the retrial. The Defendant has not persuaded this Court that the ruling was in error. As a result, this Court must deny the Defendant's Motion for New Trial.

b. While Mr. Verharen improperly commented on the existence of the fingerprints on the hood of the Defendant's vehicle, the Defendant properly objected, the Prosecutor was admonished, and a curative instruction given.

The Defendant also seeks to revisit this Court's ruling in regards to an issue of possible prosecutorial misconduct committed by Mr. Verharen during the trial

proceedings. During the proceedings, the prosecutor, even though he had been instructed by this Court not to reference anything about fingerprints found on the hood of the Defendant's vehicle, did so on two occasions. The Defendant objected to the references and moved for a mistrial based on the comments. This Court, in accordance with the analysis required by State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010) and other applicable law, denied the motion for a mistrial, admonished Mr. Verharen for disobeying this Court's order, and instructed the jury as follows in Jury Instruction No. 42: "You are instructed that Vonette L. Larsen's prints were not found on the hood of the Blazer."

This Court is aware of the prior instances of prosecutorial misconduct committed by Mr. Verharen and noted in State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011) and other decisions. This Court addressed the Defendant's desire for dismissal based on Mr. Verharen's prior misconduct in this Court's "Memorandum Opinion and Order Re: Defendant's Motion to Dismiss" issued September 14, 2011. This Court reiterates that the intent required by Oregon v. Kennedy, 456 U.S. 667, 671-672, 102 S.Ct. 2083, 2087-2088 (1982), that the prosecutor goad the Defendant into moving for a mistrial in order to avoid acquittal, is not met by Mr. Verharen's statements about the fingerprints or palm prints on the Defendant's vehicle. Because the intent required by Kennedy was not present in this matter, this Court is reluctant to revisit its ruling. The Defendant's Motion for New Trial must be denied.

c. Juror Misconduct Did Not Occur

The Defendant also desires that this Court revisit its ruling in regards to the type written note submitted to this Court. The jury ceased deliberations for the weekend, but

upon their return one juror brought a type written question and submitted it to the other jurors. The jury then submitted the type written question to this Court. The Defendant alleged then, and realleges now, that the juror committed misconduct by typing a question outside of the jury room.

This Court cannot see how any misconduct occurred and the Defendant failed to show any prejudice he suffered as a result of the typewritten question. There is no evidence that the juror considered extraneous information or improperly communicated or deliberated out of the jury room. It appears that the juror simply thought of a question, typed the question, and submitted it to the other jurors in the jury room when deliberations recommenced. The Defendant has merely asked this Court to revisit its ruling, and this Court is reluctant to do so based on the information and argument provided. This Court, then, must deny the Defendant's Motion for new Trial.

4. The Defendant is Not Entitled to a New Trial Based on "New Evidence."

The Defendant asserts that based on new evidence he is entitled to a new trial. As stated by the Idaho Supreme Court in State v. Ellington:

> A defendant who has been found guilty of a crime may seek a new trial under I.C. § 19–2406 "[w]hen new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial." I.C. § 19–2406(7). "Newly discovered evidence warrants a new trial only if the defendant demonstrates: (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the evidence is material, not merely cumulative or impeaching; (3) it will probably produce an acquittal; and (4) failure to learn of the evidence was not due to a lack of diligence on the part of the defendant." Stevens, 146 Idaho at 144, 191 P.3d at 222 (citing State v. Drapeau, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976)). "[A] defendant wishing to gain a new trial based on newly discovered evidence must show that the evidence meets all four of the requirements set out in Idaho law." Stevens, 146 Idaho at 146, 191 P.3d at 224. "Motions for a new trial based on newly discovered evidence are disfavored and should be granted with caution, reflecting the importance accorded to

considerations of repose, regularity of decision making, and conservation of scarce judicial resources." *Id.* at 144, 191 P.3d at 222 (citing State v. Hayes, 144 Idaho 574, 577, 165 P.3d 288, 291 (Ct.App.2007)).

151 Idaho at 72, 252 P.3d at 753.

The Defendant claims that the State's expert John Daily testified falsely that the "impact between the Subaru and Blazer could not have spun the Blazer in a counterclockwise direction." (Defendant's Motion for New Trial, p.36.) According to the Defendant, he could not have discovered that Mr. Daily's testimony was based on the incorrect theory of "rotational mechanics," prior to trial and that the testimony is inconsistent with the text books used by Mr. Daily: "Fundamentals of Crash Reconstruction" and "Fundamentals of Applied Physics for Traffic Accident Investigators."

The State is correct that the Defendant's "new evidence" fails the Drapeau test. First, the State disclosed Mr. Daily and his opinions and the texts that Mr. Daily used prior to trial. The Defendant also disclosed Mr. Rochford and his materials as a potential expert for the Defendant prior to trial. Notably, the Collision Reconstruction Report prepared by Mr. Rochford prior to trial states "The Blazer was rotated counter clockwise by the impact from the Subaru." (Inland NW Traffic Investigation Collision Reconstruction Report, p.9.) However, the Defendant chose not to put Mr. Rochford on the stand or submit his report as an exhibit during the trial to rebut, impeach, or otherwise contradict Mr. Daily's testimony. Thus, the information was known to the Defendant at the time of trial and is therefore not "newly discovered."

Next, the evidence offered by Mr. Rochford as set forth during the April 24, 2012, hearing on the Defendant's Motion for New Trial, is at best impeachment evidence that

the Defendant could have used during trial to impeach Mr. Daily's use of the "rotational mechanics" theory. However, the Defendant chose not to call Mr. Rochford.

Third, the testimony of Mr. Rochford would not have produced an acquittal in regards to the second degree murder charge because his testimony did not address the events between when the Defendant's vehicle struck the Larsen sister's vehicle and when the Defendant's vehicle struck Mrs. Larsen. Instead, Mr. Rochford's testimony addressed the events between when the Defendant turned around at the snow bank and when the Defendant struck the Honda. Thus, only the juror's decision in regards to the charges of aggravated battery would be impacted.

The Defendant seems to argue that the jury would not have convicted the Defendant of the aggravated battery counts because Mr. Rochford's testimony would have shown that the Defendant did not act "willfully" when he struck the Honda with his vehicle. Mr. Rochford's expert opinion was simply that if the Subaru was moving when the Defendant's vehicle struck it, then the Defendant's vehicle would have involuntarily spun counterclockwise towards the Honda. In contrast, Mr. Daily testified that when the Defendant's vehicle struck the Subaru, the Subaru was at rest and, applying the theory of rotational mechanics, in his opinion that the Defendant purposefully turned to the left, accelerated, and hit the Honda driven by the Larsen sisters. Notably, the Defendant cross-examined Mr. Daily and the eyewitnesses on this very point: whether the Subaru was at rest or moving when the Defendant's vehicle struck the Subaru and its impact on the direction of travel. Given the physical evidence, the evidence of acceleration, and the corroborating testimony from the eyewitnesses, it is this Court's opinion that Mr.

Rochford's testimony would not have produced an acquittal on the aggravated battery charges.

Finally, because the Defendant had Mr. Daily's opinion, the exhibits, and his materials available prior to and during trial, as well as Mr. Rochford available to analyze Mr. Daily's materials and opinions prior to and during trial (which Mr. Rochford did), the Defendant actually discovered the inconsistent statements and/or incorrect application of the rotational mechanics theory prior to and during trial. Thus, the Defendant fails the fourth prong of the Drapeau test. The Defendant's Motion for New Trial, then, must be denied.

IV. CONCLUSION

The Defendant's Motion for Judgment Not Withstanding the Verdict is hereby DENIED. The Defendant's Motion for New Trial is hereby DENIED.

DATED this 15th day of June, 2012.

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER RE: DEFENDANT'S MOTION FOR NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the _____ day of June, 2012 to the following:

KOOTENAI COUNTY PROSECUTING ATTORNEY'S OFFICE
Barry McHugh and Arthur Verharen
Hand Delivery

LAW OFFICE OF THE PUBLIC DEFENDER OF KOOTENAI COUNTY
Anne C. Taylor and J. Bradford Chapman
Hand Delivery

CLIFFORD T. HAYES
Clerk of the District Court

By: _____
Deputy Clerk