4-21-2009

Cooke v. State Appellant's Supplemental Brief Dckt. 32447

IN THE SUPREME COURT OF THE STATE OF IDAHO

MAX RITCHIE COOKE,	)	
	)	
Petitioner-Appellant,	)	NOS. 32447 & 34820
	)	
v.	)	
	)	
STATE OF IDAHO ,	)	SUPPLEMENTAL APPELLANT'S BRIEF
	)	
Respondent.	)	
	)	

SUPPLEMENTAL BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Supreme Court Case No. 32447, district court case number SP-OT-04-770D, (*hereinafter*, 32447) and Supreme Court Case No. 34820, district court case number H-03-279, (*hereinafter*, 34820) have been consolidated for appellate purposes. In 34820, Max Cooke was convicted of second degree kidnapping, aggravated battery, and assault, and appeals the judgment of conviction and his sentences for this offense. In 32447, Mr. Cooke filed a post-conviction action arising from his judgment of conviction in 34820.

In 34820, Mr. Cooke has asserted *inter alia*, that the district court abused its discretion in admitting prior bad acts evidence against Mr. Cooke in the form of prior threats that he had allegedly made against Alison Cooke in the course of several months prior to the alleged kidnapping, battery and assault. As a component of this argument, Mr. Cooke has asserted that the district court lacked the necessary factual basis from which to properly weigh the probativeness of these alleged statements against the potential for unfair prejudice because the district court did not know how many statements the State was seeking to introduce, who made these statements, and what the specific contents of the statements were. (Appellant's Brief, pp.17-20.)

The State responded that there was no legal support for the contention that the State was required to identify the number of statements it sought to admit, to whom the statement was made, or the content of the statements in order for the district court to properly engage in the analysis required under I.R.E. 404(b) and 403. (Respondent's Brief, pp.13-14.) In response, Mr. Cooke noted that case law in Idaho established the

gate-keeping function that is required of the district court with regard to the admission of I.R.E. 404(b) (*hereinafter*, 404(b)) prior bad acts evidence. He further cited to the holdings of other jurisdictions that indicated that part of this function was to determine the volume of the evidence presented and to ensure that the State did not "flood the courtroom" with prior bad acts evidence. (Reply Brief, pp.8-10.)

Six months after Mr. Cooke filed his Appellant's Brief, the Idaho Supreme Court in *State v. Grist*, 2009 Opinion No. 14, held that prior bad acts evidence is only relevant if a jury could reasonably conclude that the act occurred and that the defendant was the actor. *Grist*, ___ Idaho ___, ___P.3d ___, 2009 WL 198963, *3 (2009). Several months after the Opinion in *Grist*, this Court considered an issue very similar to the one raised in Mr. Cooke's appeal in *State v. Parmer*, 2009 Opinion No. 15, and applied the holding from *Grist* to the defendant's assertions of a lack of sufficient factual basis to conduct a proper analysis of the admissibility of prior bad acts evidence. *Parmer*, ___ Idaho ___, ___ P.3d ___, 2009 WL 605804, *3 (2009). In *Parmer*, this Court held that "a trial court must articulate a separate finding that sufficient evidence exists to support a reasonable conclusion that the act occurred." *Id.*

Given the substantial change in the state of Idaho law with regard to the analysis required for admissibility of 404(b) evidence, and the direct impact of this new law on Mr. Cooke's claims regarding the admission of prior bad acts evidence in this case, Mr. Cooke moved this Court for supplementary briefing as to the impact of *Grist* and *Parmer* on the underlying issues in this case. (Motion For Leave To File A Supplemental Brief And Statement In Support Thereof, filed on March 11, 2009.) This

Court granted Mr. Cooke's motion. (Order To Vacate Oral Argument And Allow Leave To File Supplemental Briefing, entered on March 17, 2009.)

This Supplemental Appellant's Brief addresses the recent decisions in *Grist* and *Parmer* as they apply to the district court's failure to make the necessary factual findings in order to determine the relevancy and admissibility of the prior bad acts evidence admitted against Mr. Cooke. As a component of his argument, Mr. Cooke also asks this Court to adopt either a clear and convincing evidence standard, or a preponderance of the evidence standard, to the initial determination of whether the State has presented sufficient proof to establish that the prior bad act occurred and the defendant was the actor.

Statement of the Facts and Course of Proceedings

The Statement of Facts and Course of Proceedings are set forth in the Appellant's Brief and are incorporated herein by reference.

ISSUES

1. Should this Court adopt either a clear and convincing evidence standard, or a preponderance of the evidence standard, to the threshold determination of whether a prior bad act has been proved by the State for purposes of Rule 404(b)?

2. Under any standard of proof, was there sufficient evidence presented to support the admissibility of the prior bad acts evidence introduced by the State at trial, and did the district court make the requisite factual findings in support of the admissibility of this evidence?

ARGUMENT

I.

This Court Should Adopt Either A Clear And Convincing Evidence Standard, Or A Preponderance Of The Evidence Standard, To The Threshold Determination Of Whether A Prior Bad Act Has Been Proved By The State For Purposes Of Rule 404(b)

A. Introduction

While the Idaho Supreme Court in *Grist*, and the Idaho Court of Appeals in *Parmer*, did not directly address whether a clear or convincing standard, or a preponderance of the evidence standard, applies to the district court's determination of whether the prior bad act had been established by the State, Mr. Cooke respectfully requests that this Court address this issue, as it will provide necessary guidance to the district courts charged with making admissibility determinations pursuant to I.R.E. 404(b) and because this guidance may also be necessary for the district court on remand in this case.

Because this Court has yet to speak on this issue, the holdings of other jurisdictions are useful to the determination of the proper standard to be employed. And a substantial number of jurisdictions employ either a clear and convincing evidence standard, or a preponderance of the evidence standard, to the threshold determination of whether a prior bad act has been proved by the State. While these standards have been held not to be strictly required under I.R.E. 404(b), there are good reasons for this Court to adopt at least a preponderance of the evidence standard. This standard is consistent with that imposed on other fact-finding of the district court with regard to issues of admissibility. Further, the modern trend appears to favor employing at least a preponderance of the evidence standard. Finally, in light of the special dangers of prior

bad act evidence, a preponderance standard would act as a check against admission of unreliable evidence that has the inherent tendency to prejudice a jury against a criminal defendant.

B. This Court Should Adopt Either A Clear And Convincing Evidence Standard, Or A Preponderance Of The Evidence Standard, To The Threshold Determination Of Whether A Prior Bad Act Has Been Proved By The State For Purposes Of Rule 404(b)

Twenty years ago, the United States Supreme Court was confronted with the question of the minimum standard of proof of a prior bad act for Rule 404(b) purposes. *See Huddleston v. U.S.*, 485 U.S. 681 (1988). The *Huddleston* Court held that a district court is not strictly required to employ a preponderance of the evidence standard to the determination of whether the State has presented sufficient evidence of a prior bad act under Rule 404(b).[1] *Id.* at 687. Instead, the Court held that the proper standard was whether a jury could reasonably conclude that the act occurred and that the defendant was the actor by a preponderance of the evidence. *Id.* at 689-690.

However, a substantial number of jurisdictions considering the issue in the aftermath of *Huddleston* mandate that the trial court's finding that the misconduct occurred be supported by at least a preponderance of the evidence standard. *See, e.g., U.S. v. Shoffner*, 71 F.3d 1429, 1432 (8th Cir. 1995); *Kinney v. People*, 187 P.3d 548, 554 (Colo. 2008); *Rugemer v. Rhea*, 957 P.2d 184, 189-190 (Or. Ct. App. 1998); *State v. Fisher*, 202 P.3d 937, 946 (Wash. 2009); *State v. Willett*, ___ S.E.2d ___, 2009

[1] This Court may wish to note that the *Huddleston* Court's holding was a non-constitutional construction of the federal rules of evidence, and therefore constitutes mere persuasive precedent for this Court. *See State v. Terrazas*, 944 P.2d 1194, 1196 (Ariz. 1997).

WL 230694, *4 (W.Va. 2009). Other jurisdictions have required even stronger proof – that the State's allegations of prior bad acts be established by clear and convincing evidence – as a prerequisite to admissibility under Rule 404(b). *See, e.g., State v. Terrazas*, 944 P.2d 1194, 1196 (Ariz. 1997); *Getz v. State*, 538 A.2d 726, 734 (Del. 1988); *State v. Brooks*, 541 So.2d 801, 814 (La. 1989) (citing, *inter alia*, *State v. Moore*, 440 So.2d 134, 137 (La. 1983)); *State v. Clark*, 755 N.W.2d 241, 260-261 (Minn. 2008); *State v. Alvarado*, 757 N.W.2d 570, 577 (N.D. 2008); *State v. Stokes*, 673 S.E.2d 434, 441 (S.C. 2009); *State v. McCary*, 922 S.W.2d 511, 514 (Tenn. 1996). And at least one jurisdiction requires that prior bad acts evidence be proved beyond a reasonable doubt as a prerequisite to their admissibility. *Harrell v. State*, 884 S.W.2d 154, 158-159 (Tex. Crim. App. 1994).

Idaho Rule of Evidence 404(b) does not explicitly provide guidance on the proper evidentiary standard for proof of prior bad acts. *See* I.R.E. 404(b). In light of this, guidance from other areas of Idaho case law is appropriate. *See State v. McGinnis*, 455 S.E.2d 516, 526 (W.Va. 1994). The preponderance standard is consistently applied in Idaho to other preliminary factual determinations made by the district court with regard to the admissibility of evidence. *See, e.g., State v. Culbertson*, 105 Idaho 128, 130, 666 P.2d 1139, 1141 (1983) (facts in a suppression hearing are to be determined by a preponderance of the evidence); *State v. Mitchell*, 104 Idaho 493, 495 n.1, 660 P.2d 1336, 1338 (1983) (noting that finding of voluntariness of defendant's waiver of *Miranda* rights prior to finding of admissibility of defendant's statements is governed by preponderance of evidence standard); *State v. Gibson*, 141 Idaho 277, 287 n.4, 108 P.3d 424, 433 (Ct. App. 2005) (applying preponderance of the evidence

standard to facts presented in support of inevitable discovery doctrine); *State v. Byington*, 132 Idaho 597, 600-601, 977 P.2d 211, 214-215 (Ct. App. 1998) (applying preponderance of the evidence standard to defendant's challenge to a search warrant); *State v. Abeyta*, 131 Idaho 704, 708, 963 P.2d 387, 391 (Ct. App. 1998) (in order to prove consent exception to the warrant requirement, the State must establish by preponderance of the evidence that defendant voluntarily consented to a warrantless search in order for evidence of that search to be admissible). To apply a lower evidentiary standard to the initial fact-finding required for admissibility of prior bad acts evidence would be anomalous to the standard of evidence consistently applied to other admissibility determinations.

Additionally, there are strong policy reasons for this Court to adopt either a clear and convincing evidence standard, or a preponderance of the evidence standard, to the initial factual determination that the prior bad act occurred and that the defendant committed it. This Court has long recognized the special danger posed by prior bad acts evidence. "Evidence of prior bad acts may pose a danger that the jury will find the defendant guilty because he is a bad person rather than because he is guilty of the offense with which he is charged." *State v. Buzzard*, 110 Idaho 800, 802, 718 P.2d 1238, 1240 (Ct. App. 1986). This is precisely the reason why many other jurisdictions apply at least a preponderance of the evidence standard to the determination of whether the prior bad act that the State seeks to introduce has been proven. *See, e.g., Terrazas*, 944 P.2d at 1198; *Rugemer*, 957 P.2d at 189-190; *McGinnis*, 455 S.E.2d at 527. As noted by the West Virginia Supreme Court, "To expose the jury to Rule 404(b) evidence before the trial court has determined by a preponderance of the evidence that

the acts were committed and that the defendant committed them would in our view subject the defendant to an unfair risk of conviction regardless of the jury's ultimate determination of these facts." *McGinnis*, 455 S.E.2d at 527.

Because there is a heightened danger of unfair prejudice to the defendant that inheres in the introduction of prior bad acts evidence, a showing of at least the probability that the alleged bad acts occurred and were committed by the defendant is necessary to prevent the erroneous admission of unfounded accusations that are unrelated to the charged offense. As such, Mr. Cooke respectfully requests that this Court clarify that the standard of proof attendant on the threshold determination of whether the alleged prior bad acts have been established is either clear and convincing evidence or a preponderance of the evidence.

II.

Under Any Standard Of Proof, Was There Sufficient Evidence Presented To Support The Admissibility Of The Prior Bad Acts Evidence Introduced By The State At Trial, And Did The District Court Make The Requisite Factual Findings In Support Of The Admissibility Of This Evidence

A. Introduction

The district court in this case lacked a sufficient factual basis to determine that the prior bad acts that the State was seeking to admit pursuant to I.R.E. 404(b) against Mr. Cooke occurred and that Mr. Cooke was the individual who committed them. Not only was the proof presented by the State insufficient to establish these bad acts, but the district court failed to make the requisite finding regarding the sufficiency of the State's proof. Additionally, the district court, by its own admission, was unaware of the volume of the evidence that the State was seeking to present, and also had not been

presented with the substance of these statements. As such, the district court was unable to properly weigh probativeness against the potential for undue prejudice of these statements and fulfill its proper gate-keeping function pursuant to I.R.E. 403.

B. Under Any Standard Of Proof, There Was Not Sufficient Evidence Presented To Support The Admissibility Of The Prior Bad Acts Evidence Introduced By The State At Trial, And The District Court Failed To Make The Requisite Factual Findings In Support Of The Admissibility Of This Evidence

This Court reviews relevance determinations *de novo*. *See, e.g., State v. Karpach*, 146 Idaho 736, 739, 202 P.2d 1282, 1285 (Ct. App. 2009). The Idaho Supreme Court in *Grist* has recently clarified that prior bad acts evidence admitted pursuant to I.R.E. 404(b) "is only relevant if the jury can reasonably conclude[[2]] that the act occurred and the defendant was the actor." *Grist*, 2009 WL 198963 at *3. Therefore, in order for a district court's ruling admitting prior bad acts evidence to be admitted to be sustained, the district court must have made a determination, "that there is sufficient evidence to support a reasonable conclusion that the act occurred and that the defendant was the actor." *Parmer*, 2009 WL 605804 at *3.

In doing so, the district court may rely on the offer of proof tendered by the State. *Id.* However, "a trial court must articulate a separate finding that sufficient evidence exists to support a reasonable conclusion that the act occurred." *Id.*

In this case, the proffer made by the State was insufficient to meet any evidentiary standard with regard to the proof of prior bad acts evidence. And, by the district court's own admission, it had no idea what evidence exactly the court was

[2] It is unclear whether the Court in *Grist* intended the requirement of evidence sufficient to support a *reasonable* conclusion on the part of the jury to be roughly the equivalent of a preponderance of the evidence standard.

allowing to come before the jury, and therefore the court could not have made a finding that sufficient evidence was presented in support of this unknown evidence.

In the State's Brief In Support of Idaho Rule 404(b) Evidence, the State asserted that it's "evidence would show that the defendant made several threats to Alison Cooke in the approximately six weeks prior to the crash." (34820 Tr., p.14.) The State then continued:

> The defendant was suspicious that his wife was calling or seeing another man. The threats made to Alison were that he would kill her if he found out that she was talking to another man or seeing another man. The defendant not only made these threats directly to Alison Cooke, but he also told *other people* that he would kill Alison if he found out that she was speaking to another man. He also threatened to kill himself.

(34820 R., p.14.)

Nothing in the State's brief or argument on the motion indicates how many witnesses, how many statements, or the specific contents of the alleged statements made by Mr. Cooke it was seeking to introduce. (34820 Tr., p.7, Ls.1-3; 34820 R., p.14.) The State appears to have limited its initial briefing in support of the admission of prior bad acts specifically to death threats allegedly made against Ms. Cooke by Mr. Cooke. (34820 R., p.18.) At the hearing on the 404(b) motion, the State asserted that Mr. Cooke made threats to, "a couple of her friends and a couple of her relatives, her brother and sister." (34820 Tr., p.7, Ls.1-3.) According to the State, it intended on presenting the evidence in order to show intent, as well as absence of mistake. (34820 Tr., p.8, Ls.20-24.)

Unlike the notice provided in *Parmer*, the State never identified by name the individuals that it was intending to call to present these prior threats, the number of individuals or threats that it was seeking to introduce, or the substantive content of the

threats that were actually presented at trial. *Parmer*, 2009 WL 605804, *4. (34820 Tr., p.6, L.16 – p.9, L.14.) Also in contrast with the district court in *Parmer*, the district court in this case never made any factual findings that the statements were established by a sufficient quantum proof in holding that the alleged prior threats made by Mr. Cooke towards Ms. Cooke were admissible. *Id.* (34820 Tr., p.12, L.12 – p.13, L.8.) The district court merely held that any threats made to Ms. Cooke were relevant as to intent, and the prejudicial effect did not outweigh the probative value. (34820 Tr., p.12, L.12 – p.13, L.8.)

Particularly telling in the district court's holding is its acknowledgement that the court didn't know how many statements the State was seeking to admit. (34820 Tr., p.13, Ls.3-5.) Additionally, as previously noted, the evidence presented by the State did not identify how many witnesses would be introduced at trial or the substantive content of the statements themselves. As such, the district court did not make *any* express or implied factual findings regarding whether admission of the prior bad acts evidence by the State was supported by a sufficient quantum of proof. Under any evidentiary standard, the district court improperly determined that these unidentified statements of an unknown quantity were relevant without first determining whether the State had presented sufficient proof in support of their admission. *See Grist*, 2009 WL 198963, *3.

In addition, this Court in *Parmer*, relying on the Opinion in *Grist*, also made clear that findings with regard to the number of witnesses testifying to prior bad acts, and the volume of such evidence presented, is essential in order to properly weigh the danger of

unfair prejudice against the probative value of such evidence under I.R.E. 403. *Parmer*, 2009 WL 605804, *11. According to this Court:

> The question of the number of witnesses testifying to prior bad acts is a matter of concern under Rule 403 analysis. Since the testimony is inherently prejudicial, at some point the number of such witnesses can become excessive and overwhelm the probative value of the evidence. This determination is left to the discretion of the trial court.

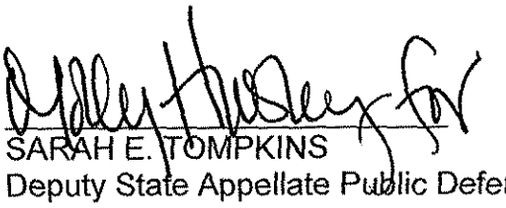
Id.

Mr. Cooke has previously asserted to this Court that the district court lacked the essential factual basis in order to adequately conduct a proper weighing pursuant to I.R.E. 403, and further could not perform the gate-keeping function that is part of the responsibility of the courts in determining what prior bad acts evidence to admit at trial. (Appellant's Brief, pp.17-20, Reply Brief, pp.8-10.) While he has previously relied largely on persuasive precedent in support of his contentions, he asks that this Court consider the relevant language in *Parmer* regarding the duty of the district court to adequately consider the volume of the evidence to be presented as part of its analysis pursuant to I.R.E. 403. The volume of the evidence to be presented has material bearing on the overall determination of whether the probative value of the evidence is outweighed by the potential for prejudice. Here, the district court by its own admission did not know the scope and volume of this evidence prior to determining its admissibility under I.R.E. 403. In light of this, Mr. Cooke asserts that the district court abused its discretion when it determined that the probative value of the prior bad act evidence sought to be admitted by the State was not substantially outweighed by the danger of unfair prejudice.

CONCLUSION

Mr. Cooke respectfully requests that this Court vacate his judgment of conviction and sentence and remand his case for a new trial. Alternatively, he asks that this Court vacate the district court's order denying him post-conviction relief.

DATED this 21st day of April, 2009.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of April, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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