8-13-2009

State v. Pokorney Appellant's Brief Dckt. 34945

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 34945
	)	
v.	)	
	)	
RICHARD DAVID POKORNEY,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

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

HONORABLE MICHAEL R. MCLAUGHLIN
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

JUSTIN M. CURTIS
Deputy State Appellate Public Defender
I.S.B. # 6406
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

Nature of the Case

Richard David Pokorney appeals from his judgment of conviction for five counts of lewd conduct with a minor under the age of sixteen. Mr. Pokorney was found guilty of five out of seven charged counts of lead conduct following a jury trial and the district court imposed concurrent unified sentences of life, with thirty years fixed. Mr. Pokorney now appeals, and asserts that the district court erred by admitting evidence of prior bad acts because these acts were not relevant to any material and disputed issue, propensity to molest children. However, even if relevant, he asserts that the probative value of that evidence is substantially outweighed by the danger of unfair prejudice.

Statement of the Facts and Course of Proceedings

Mr. Pokorney was charged by Indictment with seven counts of lewd conduct with a minor under the age of sixteen. (R., p.8.) The Indictment alleged: 1) genital-to-genital contact with Randson P., age five, between May 2003 and May 2004; 2) genital-to-genital contact with Randson P., age six, between June 2004 and May 2006; 3) manual-to-genital contact with Jarek P., age four, in 2006; 4) oral-to-genital contact with Jarek P., age four, in 2006; 5) manual-to-genital contact with Wesley P., age ten to eleven, in 2005 to 2006; 6) manual-to-genital contact with Jason G., age twelve to thirteen, in 1995 to 1996; and 7) oral-to-genital contact with Jason G., age twelve to thirteen, in 1995 to 1996. (R., pp.8-10.)

Prior to trial, the State moved to admit evidence of prior bad acts under Idaho Rule of Evidence (*hereinafter*, I.R.E.), 404(b). (R., p.21.) The State sought to introduce

"a twelve page hand written letter from the defendant to his sixteen year-old-son, [redacted] discussing his prior contact with a male minor child and his personal belief's [sic] about male with male sexual contact, while the defendant was in the custody at the Ada County Jail on the charges of Lewd Conduct involving his sons." (R., pp.21-22.) The State then filed an Addendum, seeking to introduce the testimony of Billy Lynn W., Jr,, who had asserted that Mr. Pokorney sexually abused him in Montana on May 13, 1984. (Addendum Notice of 404B and ICR 16, p.1.) Mr. Pokorney was convicted of this act in 1984. (Addendum Notice of 404B and ICR 16, p.1.)

The district court permitted testimony regarding the prior Montana conviction. Specifically, the district court held:

> As far as the prior conviction coming in, the testimony of the prior acts of molestation, they are admissible. They will be allowed to be presented in the state's case in chief along with the prior conviction. I base that on *State v. Kremer*, the *Field* case that was cited, and appropriately cited by the defense, dealt primarily with an individual who talked a great deal about sexual acts; but again, there was no evidence of acts being perpetrated nor was there any similarity in gender, age, conduct between the prior bad act and the alleged crimes. In this case, the age group is similar in age. The circumstances are similar. It's more in line with *State v. Kremer*, . . . 144 Idaho 286.
>
> They will be admitted upon proper foundation, obviously, as well as the letters from the defendant that were attached to [the 404(b) notice], again, upon proper foundation.

(Tr., p.53, L.1 – p.54, L.17.) Regarding the prejudice resulting from this evidence, the court stated:

> The court in weighing the prior bad acts with the provisions of Idaho Rule 403 – obviously, these are prejudicial. The question is: Is the probative value outweighed by prejudicial effect? The court will find that the probative value – that being the defendant's prior conduct towards similar age groups, males – is highly probative of a – when we look at 404 subpart (b), 'plan,' 'motive,' preparation,' several of those factors outlined in that rule, clearly, it's highly, highly probative of that. And the court will

find that the probative value is not outweighed by the prejudicial effect. So, the state can present that evidence in their case in chief.

(Tr., p.54, L.18 – p.55, L.5.)

At trial, Billy Willard testified regarding the Montana incident. He testified as follows Mr. Willard first met Mr. Pokorney when he was approximately seven or eight years old. (Tr., p.238, Ls.20-23.) When Mr. Willard was twelve years old, he was picked up by Mr. Pokorney, who was going to drive him home. (Tr., p.242, Ls.2-5.) They stopped at Mr. Pokorney's home because Mr. Pokorney said he needed to change clothes. (Tr., p.245, Ls.5-6.) He remembered Mr. Pokorney coming out of his room in underwear and offering him a beer. (Tr., p.245, Ls.18-23.) Mr. Pokorney then asked Mr. Willard if he wanted Mr. Pokorney to touch him. (Tr., p.246, Ls.16-25.) No touching occurred at the house. (Tr., p.247, Ls.14-16.)

Instead of driving Mr. Willard home, Mr. Pokorney turned off onto a dirt road and asked Mr. Willard if he wanted to drive. (Tr., p.248, Ls.6-9.) As Mr. Willard started to drive, Mr. Pokorney "slid over next to me and put his hand on my legs and my privates and asked me if I wanted him to touch me off." (Tr., p.248, Ls.9-11.) He then asked Mr. Willard to perform oral sex. (Tr., p.249, Ls.6-17.)

At this point, Mr. Willard jumped out of the truck and ran. (Tr., p.249, Ls.20-25.) Mr. Pokorney caught up with him and brought him back to the truck. (Tr., p.250, Ls.21-23.) At that point, Mr. Willard stated that Mr. Pokorney, "forced me to do oral sex on him." (Tr., p.252, L.19.) Afterward, Mr. Pokorney, "tried to make me feel like he was sorry," and said that "as long as I didn't say anything, that nothing would happen to my mom or my brother." (Tr., p.254, Ls.18-21.) Mr. Willard told his brother about the

incident that evening, and his brother informed their mother the next morning. (Tr., p.256, L.8 – p.257, L.15.)

In the letter to his son, Mr. Pokorney stated that, "while high on hallucinogenic mushrooms and wine I let a teenager perform oral sex on me. He offered to do it if I let him drive my truck while we were in the mountains in Montana. It wans't one of my proudest moments but it certainly isn't the crime of the century either." (R., p.27.) He continued, "he mentioned it to his mom, who knew, and later, when, ironically, I thwarted her advances, she told police. I probably could have beat the charge, but I told the truth." (R., p.27.) Mr. Pokorney stated that because the incident did not involve force it would not have been a crime in 95% of the countries of the world and was not a punishable offense in the neighboring state of Wyoming. (R., p.28.) He further stated that "my so-called 'victim' harbours no damages and harbours no hate towards me (nor I towards him)." (R., p.28.)

Mr. Pokorney then cited the author Desmond Morris, "a leading expert in zoology, anthropology, philosophy, and human behavior," who concluded that 12% of males have sexual contact with other animal species, and that "male lions masturbate – and no doubt would watch porn if they could." (R., p.28.) Mr. Pokorney continued, "there is nothing biologically unusual about male to male contact of pseudo-copulation and limited behavior does not have long-term sexual consequences – [it] is a useful outlet – and typically disappears when a member of the opposite sex appears on the scene." (R., p.28.) Later in the letter, Mr. Pokorney denied the allegations in the instant case and asserted that it must be a ploy by the boy's mother to get his children. (R., p.32.) At trial, the State introduced a redacted version of the letter that omitted

several pages, mostly discussions of other family members and alleged abuse by them. (State's Exhibit 1.) However, toward the end of trial, Mr. Pokorney decided that the entire letter, rather than a redacted version, should go to the jury. The jury saw the letter, with only a part that mentioned that the childrens' mother had been sexually abused redacted. (State's Exhibit 2.)

At trial, Jason G. testified that, between the ages of eleven and thirteen, his father would drive him to a secluded area and would "have him masturbate me or give him oral sex." (Tr., p.111, Ls.6-7.) While this alleged behavior occurred in the mid-90's, Jason did not tell anyone until 2007. (Tr., p.117, Ls.2-7.)

Wesley P. testified that Mr. Pokorney would touch his penis in the hallway, usually while sitting at a computer. (Tr., p.150, Ls.1-20.) He believed that his brother Randson, and maybe his brother Jarek, saw the incidents occur. (Tr., p.155, Ls.12-14.) He also testified that he saw Mr. Pokorney do the same thing to his brothers, Jarek and Randsom. (Tr., p.157, Ls.1-2.)

Following Jason's testimony and the direct examination of Wesley, Mr. Pokorney decided to represent himself throughout the rest of the trial. (Tr., p.173, Ls.17-25.) Randson P. was the next witness. He testified that, when he was in bed with his parents, his father would rub against him so their "privates" would touch. (Tr., p.202, Ls.10-12.) He said his father would also kiss him on the mouth. (Tr., p.204, Ls.11-13.)

Jarek P., who was five-years-old at the time of the trial, was called to testify, but when asked if there was a time when someone "did something" to his penis, he stated, "no" and that he did not think anything happened." (Tr., p.269, Ls.9-17.)

Linda Gohn, the childrens' mother, testified next. She testified that she intercepted the letter Mr. Pokorney had written to their son, [redacted] (Tr., p.284, Ls.13-20.) The letter was admitted into evidence during her direct examination. (Tr., p.289, Ls.6-7.) She also testified about the Montana incident, saying that Mr. Pokorney told her that Mr. Willard "begged" Mr. Pokorney for oral sex in exchange for driving the truck. (Tr., p.293, Ls.2-12.)

Count four was dismissed by the State during the trial due to Jarek P.'s inability to testify to the alleged incident and the jury acquitted Mr. Pokorney of count three. (Tr., p.361, L.1-12; p.561, L.6-7.) Mr. Pokorney was convicted of the remaining counts. (Tr., p.561, Ls.2-13.) The district court imposed concurrent unified sentences of life, with thirty years fixed. (R., p.115.) Mr. Pokorney appealed. (R., p.119.) He asserts that the district court erred by admitting evidence of his prior bad acts.

ISSUE

Did the district court err by admitting highly prejudicial Rule 404(b) evidence that was not relevant to any issue other than propensity?

ARGUMENT

The District Court Erred Its Discretion By Admitting Highly Prejudicial Rule 404(b) Evidence That Was Not Relevant To Any Issue Other Than Propensity

A. Introduction

Mr. Pokorney asserts that the district court erred by admitting impermissible Rule 404(b) evidence in the form of the testimony of Billy Willard and the letter written by Mr. Pokorney to his son, [redacted] He asserts that this evidence was not relevant to a material and disputed issue, Mr. Pokorney's propensity to molest young boys. However, even if relevant, he asserts that the probative value of that evidence is substantially outweighed by the danger of unfair prejudice.

B. Standard Of Review

This Court reviews a trial court's decision to admit evidence for abuse of discretion. *State v. Grist*, 147 Idaho 49, ___, 205 P.3d 1185, 1187 (2009) (citing *State v. Field,* 144 Idaho 559, 564, 165 P.3d 273, 278 (2007) (citing *State v. Robinett,* 141 Idaho 110, 112, 106 P.3d 436, 438 (2005)). This Court must examine whether: (1) the trial court correctly perceived the issue as discretionary; (2) the trial court acted within the outer bounds of its discretion and with applicable legal standards; and (3) the trial court reached its decision through an exercise of reason. *Id.* (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991) (citing *State v. Hedger,* 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)). However, determinations of relevancy are reviewed *de novo*. *State v. Parmer*, 147 Idaho 210, __ 207 P.3d 186, 194 (Ct. App. 2009).

C. The District Court Erred By Admitting Highly Prejudicial Rule 404(b) Evidence That Was Not Relevant To Any Issue Other Than Propensity

It is a fundamental tenet of the American legal system that an accused may only be convicted based upon proof that he committed the crime with which he is charged and not based upon poor character. *State v. Wood*, 126 Idaho 241, 244, 880 P.2d 771, 774 (Ct. App. 1994). Evidence of misconduct not charged in an underlying offense may have an unjust influence on the jurors and may lead them to determine guilt based upon either: (1) a presumption that if the defendant did it before, he must have done it this time; or (2) an opinion that it does not really matter whether the defendant committed the charged crime because he deserves to be punished anyhow for other bad acts. *Id.* at 244-45, 880 P.2d at 774-75. "The prejudicial effect of [character evidence] is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character." *Grist*, 147 Idaho at ___, 205 P.3d at 1188 (quoting *State v. Wrenn*, 99 Idaho 506, 510, 584 P.2d 1231, 1235 (1978)). Therefore, I.R.E. 404 precludes the use of character evidence or other misconduct evidence to imply that the defendant must have acted consistently with those past acts or traits. *Id.*

I.R.E. 404 provides in pertinent part:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall file and serve notice reasonably in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

I.R.E. 404. "Admissibility of evidence of other crimes, wrongs, or acts when offered for a permitted purpose is subject to a two-tiered analysis." *Grist*, 147 Idaho at __, 205 P.3d at 1188. "First, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact." *Id.* (citations omitted.) "The trial court must then determine whether the other crime or wrong is relevant to a material and disputed issue concerning the crime charged, other than propensity." *Id.* (citations omitted.) This evidence is only relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. *Id.* (citation omitted.)

While evidence of prior bad acts may be admitted to corroborate a victim's testimony or as evidence of a common scheme or plan, "trial courts must carefully scrutinize evidence offered as 'corroboration' or as demonstrating a 'common scheme or plan' in order to avoid the erroneous introduction of evidence that is merely probative of the defendant's propensity to engage in criminal behavior." *Grist*, 147 Idaho at __, 205 P.3d at 1189. While prior bad acts evidence may be offered to corroborate a victim's testimony, "evidence offered for the purpose of 'corroboration' must actually serve that purpose; the courts of this state must not permit the introduction of *impermissible propensity evidence merely by relabeling it as 'corroborative' or as* evidence of a 'common scheme or plan.'" *Grist*, 147 Idaho at__, 205 P.3d at 1189-90.

"Evidence of uncharged misconduct may not be admitted pursuant to I.R.E. 404(b) when its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." *Id.* In order to demonstrate that the proposed evidence demonstrates a "common scheme or plan," the State must demonstrate such a plan "embrac[es] the commission of two or more crimes so related

to each other that proof of one tends to establish the other . . ." *Grist*, 147 Idaho at __, 205 P.3d at 1190-91 (citations omitted.) Mr. Pokorney asserts that the district court erred in determining that Mr. Willard's testimony was relevant to a disputed issue other than propensity.

Regarding the first step of the analysis, determining whether a jury could reasonably conclude that the act occurred and that the defendant was the actor, Mr. Pokorney makes no claim of error, as Mr. Pokorney had previously pleaded guilty to the offense in Montana and admitted to the incident in the letter to his son. However, the evidence is not relevant to an issue other than propensity.

First, the district court erred by applying the wrong standard. The district court stated, "in this case, the age group is similar in age. The circumstances are similar." (Tr., p.54, Ls.10-11.) The court concluded, "when we look at 404 subpart (b), 'plan,' 'motive,' preparation,' several of those factors outlined in that rule, clearly, it's highly, highly probative of that." (Tr., p.54, L.23 – p.55, L.2.) The district court relied on *State v. Kremer*, 144 Idaho 286, 160 P.3d 443 (Ct. App. 2007). However, to the extent that *Kremer* stands for the proposition that simply because the age group and circumstances are similar, evidence can be admitted pursuant to I.R.E. 404(b), Mr. Pokorney submits that is no longer the law following *Grist*.

In *Kremer*, the Court of Appeals noted that the defendant relied on Justice Johnson's dissent in *State v. Moore,* 120 Idaho 743, 819 P.2d 1143 (1991), in asserting that the proposed evidence was inadmissible. *Id.* at 290, 160 P.3d at 447. In *Grist*, the defendant specifically argued that *Moore* was wrongfully decided and should be

overruled. *Grist*, 147 Idaho at __, 205 P.3d at 1187. And although the Idaho Supreme Court did not overrule *Moore* "completely," it did acknowledge that,

> our explanation in *Moore* could have just as easily been stated as follows: "If the defendant has committed another sex offense, it is more probable that he committed the offense for which he is charged, thus reducing the probability that the prosecuting witness is lying, while at the same time increasing the probability that the defendant committed the crime." The unstated premise in *Moore* is simply this: "If he did it before, he probably did it this time as well." This complete reliance upon propensity is not a permissible basis for the admission of evidence of uncharged misconduct.

Grist, 147 Idaho at __, 205 P.3d at 1190. The standard of "similar age and similar circumstances" is a standard that allows propensity evidence because it is no different than stating that if the defendant committed the act before, he probably did it this time as well. And in a post-*Grist* world, "this complete reliance upon propensity is not a permissible basis for the admission of evidence of uncharged misconduct." *Id.* After *Grist*, the evidence needs to be more than simply "similar age and similar circumstances." *In order to show a common scheme or a plan to commit multiple* offenses, the State must demonstrate such a plan "embrac[es] the commission of two or more crimes so related to each other that proof of one tends to establish the other ..." *Grist*, 147 Idaho at __, 205 P.3d at 1190-91 (citations omitted.) It must show more than a similar and age circumstance.

The district court specifically relied upon *Kremer*, which stated, "it is well settled in Idaho that when a defendant is charged with lewd conduct with or sexual abuse of a minor, testimony of the defendant's prior sexual misconduct may be admissible if it shows a 'general plan to exploit and sexually abuse an identifiable group of young female victims.'" *Kremer*, 144 Idaho at 290, 160 P.3d at 447. To the extent that this was "well-settled" prior to *Grist*, it is no longer the law. The State must demonstrate a

plan in which the crimes are so related to each other than one tends to prove the other, not a "general plan." The district court applied the wrong legal standard. To do so is an abuse of discretion. *See, e.g., Straub v. Smith*, 145 Idaho 65, 70, 175 P.3d 754, 759 (2007).

Further, when the proper standard is applied, it is clear that the proposed evidence in this case was inadmissible. The prior act in this case occurred in 1984. Mr. Pokorney was charged in 2007, twenty-three years later. During the hearing on the prior bad acts evidence, the State asserted that there was actually a continuous course of conduct:

> To answer the court's question about the distance in time for conduct, I will tell you this. That the defendant in 1984 when he committed this offense was placed on a period of probation and was actually with – hooked back up with the mother of the child, [Jason G.] who is the victim in this case. Jason was actually born, at that point in time, when he was convicted the case involving Mr. Willard. The defendant then absconded from Montana and came to Idaho and started to live with Jason and his mother and then, thereafter, began to not only sexually abuse Jason but also begat four other children who are – three of four are the victims in this case.
>
> So, there isn't an actual interruption in time. There is a continued course of conduct between the defendant – and it's an actually similar act – what he is accused of with Jason and with one other child, Jarek, is oral-to-genital contact which is what he is convicted of or is the basis for his conviction in Montana.

(Tr., p.13, L.13 – p.14, L.5..)

However, even by the State's own admission, there is an eleven year gap between the Montana incident and alleged misconduct with Jason G – Mr. Pokorney is not accused of any wrongdoing before Jason turned eleven. (R., pp.9-10.) The idea that Mr. Pokorney was engaged in a continuous course of conduct is meritless. Further, the fact that there is an eleven year gap demonstrates that Mr. Pokorney did not have a

"common scheme or plan." As noted above, a common scheme or plan must be one in which the crimes are so related to each other than one tends to prove the other. Mr. Pokorney submits that, when there is such a long gap in time as there is in this case, the offenses cannot demonstrate such a plan.

In *Kremer*, the Court of Appeals stated, "[n]otably, a lapse of time between incidents, standing alone, does not necessarily make the testimony inadmissible. In *Moore,* 120 Idaho at 746, 819 P.2d at 1146, our Supreme Court stated that the issue of remoteness generally goes to the weight of the evidence, as opposed to its admissibility." *Kremer*, 144 Idaho 286, 291, 160 P.3d 443, 448 (citation omitted.) Again, to the extent that this was true at the time *Kremer* was written, Mr. Pokorney submits that, after *Grist*, remoteness in time can be relevant to admissibility because it is an important factor in determining whether the crimes composing the alleged "plan" are so closely related to each other than one tends to prove the other. In this case, the fact that there was an eleven year gap from the *one* incident in Montana demonstrates that there was *not a common scheme or plan*. The only way such evidence would support a plan is if propensity evidence were allowed as evidence of a plan. And it is not. The one incident in Montana, occurring twenty-three years prior to the charges in this case, does not demonstrate a common scheme or plan in this case. Nor does it demonstrate any other of the 404(b) rationales – the only way it demonstrates motive, intent, or any other basis for admission is to show that if Mr. Pokorney did it before, he must have done it this time as well. The proposed evidence was not relevant under I.R.E. 404(b).

Further, the evidence does not corroborate any of the victims' testimony in this case. While prior bad acts evidence may be offered to corroborate a victim's testimony, "*evidence offered for the purpose of 'corroboration' must actually serve that purpose;* the courts of this state must not permit the introduction of impermissible propensity evidence merely by relabeling it as 'corroborative' or as evidence of a 'common scheme or plan.'" *Grist*, 147 Idaho at__, 205 P.3d at 1189-90. Evidence regarding the one Montana incident does not corroborate any of the testimony in this case. Mr. Willard has no independent knowledge of the facts of this case and no idea whether Mr. Pokorney's children were telling the truth. The only way that Mr. Willard's testimony 'corroborates' the testimony in this case is if were permissible to assume that Mr. Pokorney's children were truthful in this case because Mr. Pokorney had done a similar act before. It is propensity evidence served up under a different name, and it is not allowed pursuant to I.R.E. 404(b).

The district court erred in determining that the evidence was relevant. Evidence concerning the Montana incident should not have been permitted, either through Mr. Willard's testimony or through Mr. Pokorney's letter. Further, as the discussion in the letter concerning Mr. Pokorney's beliefs in sex generally were only written as an explanation for the Montana incident, it should also have been excluded. As the evidence only demonstrates propensity, it was not relevant pursuant to I.R.E. 404(b).

Finally, even if relevant, the evidence should have been excluded under I.R.E. 403. Under I.R.E. 403, relevant evidence can be excluded by the district court if, *inter alia*, the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, danger of misleading the jury, or if the

evidence would involve needless presentation of cumulative evidence. *State v. Tapia*, 127 Idaho 249, 254, 899 P.2d 959, 964 (1995). This Court reviews the issue of whether the probative value of prior bad acts evidence is substantially outweighed by the prejudice of such evidence for an abuse of the district court's discretion. *See, e.g., State v. Cannady*, 137 Idaho 67, 72, 44 P.3d 1122, 1127 (2002).

While the district court's calculus of whether the probative value of evidence is substantially outweighed by its prejudice is reviewed for an abuse of discretion, this discretion is not without limits. As noted by the court in *Stoddard*:

> This is not a discretion to depart from the principle that evidence of other crimes, having no substantial relevancy except to ground the inference that [the] accused is a bad man and hence probably committed the crime, must be excluded. *The leeway of discretion lies rather in the opposite direction, empowering the judge to exclude other-crimes evidence, even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial.* Discretion implies not only leeway but responsibility. A decision clearly wrong on this question of balancing probative value against danger of prejudice will be corrected on appeal as an abuse of discretion.

State v. Stoddard, 105 Idaho 533, 537, 670 P.2d 1318, 1322 (Ct. App. 1983) (quoting MCCORMICK, HANDBOOK OF THE LAW ON EVIDENCE § 190 (Cleary ed. 1972).

Additionally, as with all matters of discretion on the part of the district court, the court's determination of whether the probative value of the evidence is outweighed by its potential prejudice must comport with applicable legal standards. *See, e.g., Straub v. Smith*, 145 Idaho 65, 70, 175 P.3d 754, 759 (2007) (finding an abuse of discretion when the district court's action was not consistent with applicable legal standards).

In this case, the district court specifically stated that the evidence was prejudicial. (Tr., p., Ls..) Prior sexual misconduct evidence is indeed highly prejudicial. As Justice Bistline wrote in *Moore*:

> Balancing the prejudice against the probative value is **especially vital in sex abuse cases where the possibility for unfair prejudice is at its highest**.
>
> > Once the accused has been characterized as a person of *abnormal bent, driven by biological inclination*, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

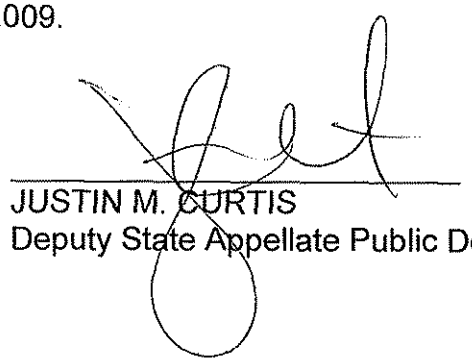
Moore, 120 Idaho at 748, 819 P.2d at 1148 (Bistline, J., dissenting) (emphasis added) (quoting Slough and Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 333-34 (1956)). In this case, even assuming that the evidence is relevant, it is not very probative. Considering that there is an eleven year gap between the Montana incident and the allegations in this case, the evidence is attenuated. Remoteness is a factor in determining the weight of the evidence. *Kremer*, 144 Idaho 286, 291, 160 P.3d 443, 448 (citation omitted.)

Mr. Pokorney submits that evidence of one prior act occurring eleven years prior to any allegation in the instant case is not very probative of guilt in the instant case. Further, evidence of prior sexual misconduct is inherently prejudicial. In this case, Mr. Pokorney submits that, even assuming that the State's proposed evidence was relevant, its probative value was substantially outweighed by the danger of unfair prejudice and the district court abused its discretion by permitting the State introduce Mr. Willard's testimony and Mr. Pokorney's letter to his son.

CONCLUSION

Mr. Pokorney requests that his convictions for lewd conduct be vacated and his case remanded for further proceedings.

DATED this 13th day of August, 2009.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of August, 2007, 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:

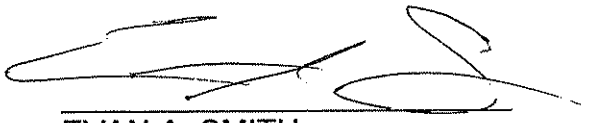
RICHARD DAVID POKORNEY
INMATE # 24948
ISCI
PO BOX 14
BOISE ID 83707

MICHAEL R MCLAUGHLIN
DISTRICT COURT JUDGE
E-MAILED COPY OF BRIEF

ADA COUNTY PUBLIC DEFENDER'S OFFICE
200 W FRONT ST
BOISE ID 83702

STATEHOUSE MAIL

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH
Administrative Assistant

JMC/eas