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# State v. Tankovich Appellant's Reply Brief 2 Dckt. 38813

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38813-2011
	)	
v.	)	
	)	
FRANK J. TANKOVICH,	)	APPELLANT'S REPLY BRIEF
	)	
Defendant-Appellant.	)	

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REPLY BRIEF OF APPELLANT

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APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

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HONORABLE JOHN P. LUSTER  
District Judge

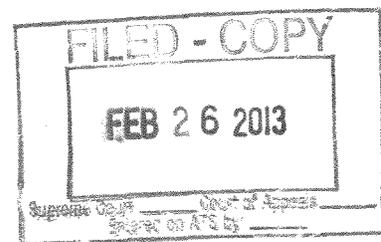
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**TABLE OF CONTENTS**

	<u>PG.</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case.....	1
Statement of the Facts and Course of Proceedings .....	1
ISSUES PRESENTED ON APPEAL .....	2
ARGUMENT .....	2
A. The District Court erred by denying the Appellant's Motions to Sever Trials.....	2
B. The District Court erred by allowing testimony and evidence of the tattoos borne by Frank Tankovich's codefendants. .....	5
C. The District Court erred by allowing expert testimony regarding the same tattoos borne by Frank Tankovich's codefendants.....	7
D. The District Court erred by failing to dismiss the case against Frank Tankovich pursuant to motion for acquittal due to insufficient evidence....	8
CONCLUSION.....	9
CERTIFICATE OF MAILING .....	10

**I. TABLE OF AUTHORITIES**

**STATE CASES**

*State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007).....2  
*State v. Eguilior*, 137 Idaho 903, 908, 55 P.3d 896, 901 (Ct. App. 2002).....2

**RULES**

*Idaho Rule of Evidence 401*.....6,7  
*Idaho Rule of Evidence 402*.....7  
*Idaho Rule of Evidence 403*.....6,7,8  
*Idaho Rule of Evidence 404(b)*.....7  
*Idaho Rule of Evidence 701*.....7  
*Idaho Rule of Evidence 702*.....7

I.

STATEMENT OF THE CASE

Nature of the Case

Frank J. Tankovich, appellant herein, appeals from judgment and sentence against him for Malicious Harassment, a felony, I.C. §§ 18-7902, 18-204, and Conspiracy to Commit Malicious Harassment, a felony, I.C. §§ 18-7902, 18-7901 pursuant to the District Court's Order Suspending Execution of Judgment and Sentence thereon. (R. 715-719).

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Tankovich's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

II.

ISSUES

- A. Did the District Court err by denying the Appellant's Motion to Sever trials?
- B. Did the District Court err by allowing testimony and evidence of the tattoos borne by Frank Tankovich's codefendants?
- C. Did the District Court err by allowing expert testimony regarding the same tattoos borne by Frank Tankovich's codefendants?
- D. Did the District Court err by failing to dismiss the case against Frank Tankovich?

### III.

#### ARGUMENT

##### A. The District Court erred by denying the Appellant's Motions to Sever Trials.

As stated in Mr. Tankovich's Appellant's Brief, an abuse of discretion standard is applied when reviewing the denial of a motion to sever pursuant to Idaho Criminal Rule 14; however, that rule presumes joinder was proper in the first place. *State v. Field*, 144 Idaho 559, 165 P.3d 273 (2007). Idaho Criminal Rule 14 provides the mechanism for relief from prejudicial joinder of trials. That rule states that if it appears that a defendant is prejudiced by the joinder of offenses or defendants for trial together, the court may, among other remedies, grant separate trials.

When reviewing an order denying a motion to sever, the inquiry on appeal is whether the defendant has presented facts demonstrating that unfair prejudice resulted from a joint trial, which denied the defendant a fair trial. *State v. Egullior*, 137 Idaho 903, 908, 55 P.3d 896, 901 (Ct. App. 2002). In cases such as this, Idaho appellate courts review the trial proceeding to determine whether one or more of the following "potential sources of prejudice" appeared: (a) the possibility that the jury may confuse and cumulate the evidence, rather than keeping the evidence properly segregated; (b) the potential that the defendant may be confounded in presenting defenses; and (c) the possibility that the jury may conclude the defendant is guilty of one crime and then find him or her guilty of the other simply because of his or her criminal disposition, i.e. he or she is a bad person. *Id.*

As stated in his Appellant's Brief, and as is apparent even from the Respondent's Brief, the joinder of Mr. Tankovich's trial with the trials of his codefendants, Ira and William Tankovich, was unfairly prejudicial to his case, due to the evidence of tattoos borne by the codefendants, and the expert witness testimony offered by the State regarding those tattoos because of the risk that the jury would confuse and/or cumulate the evidence, despite instruction, and/or the risk that Mr. Tankovich would be confounded in presenting his defense.

The tattoo evidence and expert testimony opining thereon was offered by the state to show motive or intent. As noted previously, Frank Tankovich does not have any such tattoos. Yet, much of the evidence presented in the trial was based on the tattoos borne by the codefendants. Therefore, it is Mr. Tankovich's position that neither the evidence of the tattoos, nor the expert testimony regarding the tattoos, should have been admitted in his case.

The difficulty in keeping the tattoo evidence distinct and separate in this case is evident from the discussion of the issue in the hearing held on August 10, 2010, regarding the State's motion in limine to allow the expert witness testimony regarding the tattoos. (Tr. 8/10/10). In that hearing, the District Court acknowledged that Frank Tankovich did not have any such tattoos and that expert testimony would not be allowed as against him. (Tr. 8/10/10, Pg. 19, Lines 1-9). However, only minutes later in the same hearing, the District Court stated: "But I don't think the expert can tell us what Mr. Frank Tankovich or Mr. William Tankovich were thinking when they got their tattoos or when they wore these tattoos when this incident occurred." (Tr. 8/10/10, Pg. 22 Lines 19-19). This quote shows the danger of confusing the evidence or cumulating the

evidence as against Frank Tankovich when there was no showing he wore or displayed any tattoos. Mr. Tankovich submits that if the District Court was at risk of confusing the issue, so was the jury at risk of confusion or cumulation.

Moreover, despite that fact that the District Court had just noted Frank Tankovich had no such tattoos, essentially giving itself an "instruction" by way of its finding, the District Court went on to confuse the evidence. This demonstrates that the limiting instruction was insufficient to cure the unfair prejudice caused by trying the three defendants together when one of the primary methods for establishing motive as against at least two of the defendants was the existence of their tattoos. The risk for adjudicating "guilt by association", rather than based on the facts, was too great, and was not cured by the instructions.

Further as noted in the Appellant's brief, the District Court itself recognized the problems in the case, noting that he had some serious reservations regarding whether the case was about race, or really about traditional malicious harassment. (Tr. Pg. 2330, Line 17 – Pg. 2332, Line 2). The District Court there noted that in its view it would be just as reasonable to conclude that the statements uttered were uttered in anger over a gun having been pointed at the defendants as about race. The District Court further noted that if the case had been tried to him, the result would have been different. (Tr. Pg. 2334, Lines 16 – 14).

As argued previously, given that the state's case was so weak that it drew comment from the district judge, the prejudice suffered by Frank Tankovich having evidence of tattoos belonging to other individuals, including expert testimony emphasizing those tattoos, is quite evident. Leaving Frank Tankovich's case joined

joined with the other codefendants leads to the danger that the jury would cumulate or confuse the evidence, including that of the tattoos, against Frank Tankovich, and that Frank Tankovich would be confounded in presenting his defenses, given that his case was filled with testimony and evidence regarding allegedly racist tattoos that he did not own or bear.

Further given that the District Court noted that the case was problematic and that had the case been tried to him he would not have convicted, that one jury hung 11 to 1 regarding Count 1 favoring acquittal, and 8 to 4 regarding Count 2 favoring acquittal, (Tr. Pg. 1470, Line 22 – Pg. 1471, Line 19), the record is strong that Frank Tankovich was unfairly prejudiced by failing to sever his case in a manner that prevented him from having a fair trial. Thus, the District Court erred by denying severance.

B. The District Court erred by allowing testimony and evidence of the tattoos borne by Frank Tankovich's codefendants.

In its response, the State argues that Mr. Tankovich cannot complain of evidence that was not admitted as against him. (Respondent's Brief, pgs. 12-15). However, the record demonstrates that the tattoo evidence was admitted in Mr. Frank Tankovich's trial as against him, and even if it was not admitted as against him directly, the presence of that evidence in his trial, despite any instructions, was unfairly prejudicial as against him.

In fact, the District Court noted, in its oral ruling allowing the tattoo evidence prior to the March 29, 2010 trial, that despite the fact that Frank Tankovich did not have such a tattoo, the State should be free to offer the evidence, and that the fact he did not have such a tattoo goes to the weight of the evidence but did not lead to the evidence being barred. (Tr. 3/25/10, Pg. 180, Line 24 – Pg. 181, Line 10).

As noted in his Appellant's brief, Mr. Frank Tankovich moved to exclude evidence of the tattoos borne by Ira Tankovich and William Tankovich. (R. 386 – 388). Ira Tankovich had a tattoo that included the words "Aryan Pride", and an eagle on his back. (R. 100, 386). William Tankovich had a tattoo that included lightning bolt "SS" markings that were alleged to be Nazi type symbols. (R. 100, 386). The State sought to introduce the evidence of the above symbols, borne by codefendants, as evidence of state of mind, motive and intent concerning Mr. Frank Tankovich, and or concerning a conspiracy between the three codefendants (R. 73-74). Mr. Frank Tankovich does not have any such tattoos.

Frank Tankovich reaffirms his contention that the fact that two other individuals whom he was with have tattoos of whatever kind is in no way probative regarding his state of mind, whether it be for proving his state of mind, or the existence of a conspiracy. Frank Tankovich cannot be held responsible for the tattoos borne by other individuals.

Therefore, because the existence of tattoos on the bodies of codefendants does not have any tendency to make anything concerning the mind of Frank Tankovich state more or less probable, said evidence was not relevant in Frank Tankovich's case. I.R.E. 401.

Moreover, even if the District Court did not abuse its discretion under I.R.E 401 in allowing the evidence of the tattoos, such evidence is legally irrelevant as against Frank Tankovich because its probative value regarding his state of mind and/or the existence of a conspiracy was outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. I.R.E. 403. To the extent the fact that other individuals

have tattoos that have Nazi or white supremacist associations bears any remote relationship to the state of mind of Frank Tankovich, or the existence of a conspiracy between the three defendants, such evidence is unfairly prejudicial against a man who does not have such tattoos on his body. Frank Tankovich did not put such symbols on his body. That others did does not say anything useful that is not dangerously outweighed by the prejudice or confusion risked by allowing such evidence.

C. The District Court erred by allowing expert testimony regarding the same tattoos borne by Frank Tankovich's codefendants.

First, the record contradicts the State's contention in its Respondent's Brief that objection under I.R.E. 701 and 702 was not preserved. The issue of this evidence was discussed fully under those rules in the August 10, 2010 hearing on the subject. (Tr. 8/10/10 Pg. 9, Line 11 – Pg. 15, Line 1). I.R.E. 701, 702, 401, 402, 40~~2~~<sup>3</sup>, and 404(b) were all argued. Additionally, the District Court ruled on the evidence considering all of those rules. (Tr. 8/10/10 Pg. 17, Line 3 – Pg. 24, Line 11). The issue was preserved for appeal.

Therefore, Frank Tankovich reaffirms his contention that admission of the purported expert testimony in the trial involving him, despite the presence of a limiting instruction, added to the prejudice of allowing evidence regarding tattoos borne by others into the case against him, and further invaded the province of the jury with regard to what those tattoos meant or how they were significant, especially as concerning him, who had no tattoos.

In addition to the argument set forth previously in Mr. Tankovich's Appellant's Brief, Mr. Tankovich argues again that the said testimony does not illuminate or assist

the jury with regard to Frank Tankovich's beliefs, mindset, associations or any other material fact in question. Instead, said testimony only added to the prejudice of allowing the evidence of the tattoos borne by other individuals into Frank Tankovich's case in the first place. Although the District Court instructed the jury not to consider the expert testimony as against Frank Tankovich, (Tr. Pg. 2124, Lines 12 – 23), the prejudice was nonetheless compounded. Instead of aiding the jury, the testimony added to the unfair prejudice and confusion created by allowing the evidence of the tattoos borne by the other charged individuals in the case against Frank Tankovich. I.R.E. 403.

D. The District Court erred by failing to dismiss the case against Frank Tankovich pursuant to motion for acquittal due to insufficient evidence.

The case against Frank Tankovich did not contain sufficient evidence upon which the jury could convict. Where the evidence at trial is insufficient to support a jury's finding of guilt, the court must overturn the verdict. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P2d 1099, 1101 (Ct. App. 1998).

The facts in evidence as against Frank Tankovich demonstrate an angry confrontation during which the alleged victim pulled a gun and pointed it at the defendants. Though Frank Tankovich may have yelled some angry statements, the evidence of racial intent is extremely deficient, especially when considered without the tattoo evidence, which should not have been allowed.

The evidence otherwise in the case was not sufficient for the jury to convict. Therefore, Frank Tankovich respectfully requests that the Court overturn the jury's verdict against him.

**CONCLUSION**

Mr. Tankovich respectfully requests that this Court reverse the trial court's denial of his motion to sever, and reverse his objections to evidence about other individuals' tattoos, including the expert testimony allowed, that his conviction also be reversed, and the matter remanded for further proceedings.

DATED this 24th day of February, 2013.

  
\_\_\_\_\_  
STEPHEN D. THOMPSON  
Conflict Appellate Public Defender

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 24th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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DEPUTY ATTORNEY GENERAL  
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STEPHEN D. THOMPSON  
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SDT/