4-26-2012

State v. Tankovich Appellant's Brief 1 Dckt. 38813

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38801
	)	
v.	)	
	)	
WILLIAM M. TANKOVICH, JR.,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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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District Judge

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STATEMENT OF THE CASE

Nature of the Case

William Michael Tankovich, Jr., appeals from his judgment of conviction for malicious harassment and conspiracy to commit malicious harassment. Mr. Tankovich was found guilty and the district court imposed concurrent unified sentences of five years, with two years fixed, and suspended the sentences and placed Mr. Tankovich on probation. Mr. Tankovich now appeals, and he asserts that the district court erred by permitting an expert witness to testify regarding the meaning of Mr. Tankovich's tattoos because the testimony suggested that Mr. Tankovich was a member of a gang or had been to prison, which is both not relevant and unfairly prejudicial.

Statement of the Facts and Course of Proceedings

Mr. Tankovich was charged by Indictment with one count of malicious harassment and conspiracy to commit harassment. (R., p.1.) Specifically, with regard to count I, the Indictment alleged that, on August 16th, 2009, Mr. Tankovich,

> did maliciously and with specific intent to intimidate or harass another person because of that person's race and/or color and/or ancestry and/or national origin, threaten by word or act or cause physical injury to another person, to wit: Kenneth Requenta, giving said person reasonable cause to believe the action would occur, or did aid and abet in the commission of said offense.

(R., pp.1-2.) With regard to count II, the Indictment alleged that, on August 16th, 2009, Mr. Tankovich, "[d]id unlawfully, willfully and knowingly conspire and/or agree with Frank James Tankovich and/or Ira Gino Tankovich to commit the crime of Malicious Harassment, in violation of I.C. § 18-7902." (R., p.2.) The Indictment alleged three overt acts:

1. On or about the 16th day of August, 2009, Ira Gino Tankovich made contact with Kenneth Requenta and maliciously and with the specific intent to intimidate or harass Kenneth Requenta because of his race and/or color and/or ancestry and/or national origin, made disparaging racial remarks to Kenneth Requenta at Kenneth Requenta's home;

2. On or about the 16th day of August, 2009, after Ira Gino Tankovich had made contact with Kenneth Requenta, he returned to Kenneth Requenta's home with a firearm to cause physical injury to Kenneth Requenta and/or threaten by word or act to cause physical injury to Kenneth Requenta, giving said person reasonable cause to believe the action would occur;

3. On or about the 16th day of August, 2009, after Ira Gino Tankovich had made contact with Kenneth Requenta, William Michael Tankovich, Jr. and Frank James Tankovich returned to Kenneth Requenta's home and maliciously and with the specific intent to intimidate or harass Kenneth Requenta because of his race and/or color and/or ancestry and/or national origin, made disparaging racial remarks to Kenneth Requenta and did threaten by word or act to cause physical injury to Kenneth Requenta, giving said person reasonable cause to believe the action would occur.

(R., pp.1-2.) The State then moved for joinder of Mr. Tankovich's case with those of Frank and Ira Tankovich. (R., pp.35, 55-66.) The district court granted an initial joinder with the understanding that the defendants could seek relief from prejudicial joinder at a later time. (R., pp.69, 75.) Mr. Tankovich subsequently filed a motion for relief from improper/prejudicial joinder. (R., p.73.)

The State filed a notice of intent to introduce 404(b) evidence. (R., p.79.) The State asserted the following:

> The vehicle the defendants traveled together in at the onset of this incident and in which they arrived at the victim's home was a pickup truck with one or more swastikas draw on the vehicle as well as the words "born to kill." Ira Tankovich has tattoos on his legs that spell "Aryan Pride." William Tankovich has "SS" lightning bolts tattooed on his body. It is common knowledge that swastikas, Aryans and Nazi symbols are indicative of racial hostility. Thus, such evidence is probative in terms of whether the threat that was issued to the victim in this matter was done so because of the victim's race or color. Evidence that all three defendants traveled to the victim's house in a vehicle that had a swastika or swastikas

> on it and that two of the three defendants' [sic] have racially symbolic tattoos is certainly relevant to the issue of whether this matter was influenced by the victim's race. As such, said evidence should be admissible at trial.

(R., pp.80-81.) The State also sought to introduce co-conspirator statements. (R., p.84.)

Mr. Tankovich moved to dismiss the Indictment, but did not identify a specific ground; the request was based upon grounds to be established upon completion of the grand jury transcript. (R., p.53.) He supplemented this motion with a brief. (R., p.91.) Mr. Tankovich alleged several grounds for dismissal: 1) the State failed to preserve the record and exhibits from the grand jury proceeding; 2) the prosecutor committed misconduct; 3) the State failed to prevent inadmissible evidence from being presented to the jurors; and 4) the State failed to excuse Juror 38. (R., pp.91-100).

The State filed a motion in limine, seeking to exclude a reference to the charged offenses as felonies or misdemeanors, and objecting to any reference of a domestic dispute between Mr. and Mrs. Requena that occurred on March 3, 2010, or to Mr. Requena's prior felony convictions. (R., pp.145-46.) Mr. Tankovich objected, asserting that the motion was untimely and that the evidence the State sought to exclude was relevant and admissible. (R., p.153.) He then filed a motion to compel evidence relating to a disturbing the peace charge, where, according to Mr. Tankovich, the Tankovich's were the victims of Mr. Requena's conduct. (R., p.155.)

Mr. Tankovich then filed a second motion to dismiss, asserting that the State had failed to disclose timely: 1) police reports regarding an aggravated assault committed by Mrs. Requena against her husband, in which he stated exculpatory evidence regarding the present case; 2) police reports from the disturbing the peace case; 3) Mr. Requena's criminal history; 4) the information in the State's supplemental discovery

response; and 5) photographs purported to be taken of the Tankovich's residence disclosed by the State on March 12, 2010. (R., p.159.)

The district court addressed the pretrial motions on March 25, 2010. The district court denied the motion to dismiss the indictment, and held that evidence of the tattoos was admissible. (Tr., p.174, Ls.1-12.) The court also kept the trials joined. (Tr., p.176, Ls.1-3.) The court, did, however, strike the first overt act from the information. (Tr., p.161, Ls.11-16.)

The case went to trial on March 29, 2010. On March 30, after just one witness had testified, the district court granted a mistrial due to the fact that the prosecutor misrepresented the reason for seeking admission of a 911 call. (Tr., p.456, Ls.14-17.) The defendants then moved to dismiss the case with prejudice, asserting that the prosecutor deliberatively triggered a mistrial and, therefore, double jeopardy should preclude another trial. (Tr., p.459, Ls.21-25.) The district court denied the motion and the case proceeded to trial for the second time.

At the second trial, Ira Tankovich was found guilty of conspiracy to disturb the peace, and the jury hung on the counts regarding Frank and William Tankovich. (Tr., p.1467, Ls.1-20.) The case proceeded to trial for a third time.

Rolaine Brunelle was the first witness. She was a neighbor of Kenneth and Kimberly Requena. (Tr., p.1721, Ls.1-6.) She testified that on August 16, 2009, she saw a truck parked by a stop sign, and she saw three men jump out of the truck and approach the Requena house. (Tr., p.1723, Ls.1-7.) She stated that the men got to the edge of the driveway; she believed that the men from the vehicle and Mr. Requene were shouting at each other. (Tr., p.1726, Ls.12-15.) She believed this went on for about 10 minutes before the men got in the truck and left. (Tr., p.1726, Ls.17-25.)

Police officers then came to the Requena house and eventually left; Ms. Brunelle then saw two of the men return with a pit bull on a chain. (Tr., p.1727, Ls.10-17.) She called 911 when she saw the two men approaching. (Tr., p.1728, Ls.10-14.) The police then returned to the Requena house. (Tr., p.1730, Ls.18-20.) She then saw another man approaching the house from another direction. (Tr., p.1731, Ls.1-20.) She reported a "lot of arguing with the police and with the Requenas and back and forth bantering." (Tr., p.1732, Ls.23-25.) She stated that, while she could not make out any words, the two men who approached the Requena house were yelling. (Tr., p.1733, Ls.1-12.)

Kenneth Requena testified next. Mr. Requena had a business, A.K. Electric, and he parked his vehicle outside the garage. (Tr., p.1753, Ls.20-25.) He testified that at approximately 4 pm on August 16, 2009, he and his wife were standing in front the garage smoking when a green pickup truck drove by. (Tr., p.1756, Ls.9-13.) The vehicle had a swastika on it and the individuals in the vehicle were staring at him. (Tr., p.1756, Ls.16-21.) Because they kept staring at him, Mr. Requena looked at his wife and lifted his hands and gestured, "what the fuck?" (Tr., p.1757, Ls.5-7.) The vehicle was at the stop sign when Mr. Requena made the gesture; according to Mr. Requena, "they stopped, threw it in reverse, I heard skidding a little, and they stopped in front of my house." (Tr., p.1757, Ls.9-12.)

Mr. Requena heard one of the men yell, "hey, come over here," and three of the men "charged out." (Tr., p.1758, Ls.1-3.) He did not approach the vehicle because he was afraid. (Tr., p.1758, Ls.8-9.) Mr. Requena stated that the men began to charge him, and he told his wife to go inside, call 911, and get the gun. (Tr., p.1758, Ls.12-14.) Mr. Requena acknowledged that this gesture could be taken as a sign of aggression.

(Tr., p.1774, Ls.16-20.) His wife handed him the gun and he cocked it so that they could see it. (Tr., p.1758, Ls.16-18.) Mr. Requena stated that the men stopped when they saw the gun; Mr. Requena kept the gun at his right side. (Tr., p.1759, Ls.9-13.) According to Mr. Requena, the men began to yell that he had "fucked up and that they were gonna come back, and they started to go back to their vehicle." (Tr., p.1759, Ls.19-21.) Mr. Requena identified Frank Tankovich and William Tankovich; Frank was the driver and William was a passenger. (Tr., p.1760, Ls.1-17.) Ira Tankovich was also identified as one of the men. (Tr., p.1761, Ls.5-6.)

After the individuals left in the pickup truck, the police arrived. (Tr., p.1761, Ls.22-25.) Mr. Requena gave them a report and they left. (Tr., p.1762, Ls.4-6.) However, about 20 minutes later, Mr. Requena saw Frank and William Tankovich coming toward his house with a pit bull; he told his wife to call 911 again and to get the gun. (Tr., p.1762, Ls.20-24.) Mr. Requena testified that they came to the tip of the driveway and "told me that I had fucked up and they were gonna fuck me up." (Tr., p.1764, Ls.7-10.) He also saw Ira Tankovich approach from another direction, but after the police approached he turned and threw the gun into the grass. (Tr., p.1766, Ls.18-24.)

The police arrived and questioned William and Frank. (Tr., p.1768, Ls.20-22.) Mr. Requena testified that they began calling him a "fuckin' beaner and a fuckin' terrorist." (Tr., p.1769, Ls.6-7.) He said that they kept saying, "we're gonna get that fuckin' beaner. Don't worry. We'll take care of him." (Tr., p.1769, Ls.13-17.) William Tankovich told the officers that he was upset that Mr. Requena had pulled a gun on him and asked that Mr. Requena be arrested. (Tr., p.1784, Ls.2-14.) Eventually, the police made the Tankoviches leave. (Tr., p.1770, Ls.5-12.) Despite everything that

happened, no arrests were made that day. (Tr., p.1924, Ls.17-18.) Mr. Requena had never met the Tankoviches prior to this incident. (Tr., p.1772, Ls.20-21.)

Julie Oliver, another neighbor, testified next. She testified that she called 911 when she saw the men get out of the pickup truck. (Tr., p.1819, Ls.11-17.) According to Ms. Oliver, the truck had the phrase, "Born 2 Kill" written on it. (Tr., p.1818, Ls.12-15.) She also observed both confrontations at the Requena house. (Tr., p.1819, Ls.21-25.)

William Tankovich's daughter, Tiffany, testified and identified tattoos on William and Ira Tankovich. (Tr., p.2025, L.1 – p.2029, L.22.) She also testified that the reason that the pickup stopped in front of Mr. Requena's residence was to ask Mr. Requena if he had some cable wire because they saw the A.K. Electric sign on Mr. Requena's truck. (Tr., p.2033, Ls.9-10; 2039, Ls.17-18.) Also, she testified that before William and Frank Tankovich returned to the Requena residence, she heard William Tankovich say he was going to call 911. (Tr., p.2034, Ls.10-12.)

At the third trial, unlike the first two, the State sought to introduce expert witness testimony regarding William and Ira Tankovich's tattoos. (Tr., p.2063, Ls.2-11.) The court first conducted an offer of proof to determine whether this witness, Tim Higgins of the Idaho Department of Correction, could testify. (Tr., p.2063, Ls.17-25.) In the offer of proof, Mr. Higgins testified that he was the investigation and intelligence coordinator for the Idaho Department of Correction and had been employed in that position since 2007. (Tr., p.2064, Ls.1-7.) His position was created, "due to our problems with threat groups and gangs in our prison system becoming severe." (Tr., p.2066, Ls.11-16.)

Because most of the violence inside the prison system involved gangs, he had been educated about gangs since 1993. (Tr., p.2067, Ls.17-22.) Part of his training

was "identifying symbols, signs, tattoos and such on people who move through our prison system." (Tr., p.2068, Ls.19-24.) Mr. Higgins identified evidence of gang activity based on those symbols. (Tr., p.2069, Ls.1-3.) Because, "the white supremacists are the second largest security threat group in our prison system," about "a third of my screen and activity involves looking at white supremacy groups of various sorts." (Tr., p.2071, Ls.17-21.)

Mr. Higgins testified that the white supremacy groups fell into three basic categories: Aryan neo-Nazi, Aryan neo-Confederate, and Christian identity religious groups. (Tr., p.2077, Ls.1-3.) "Each one has its own set of tattoos and identifiers that allows you to be able to tell the difference between the two of them." (Tr., p.2077, Ls.3-6.) He testified that State's Exhibit 6, a photo of a tattoo of an inverted star with the words, "Aryan Pride" written over the top, was commonly known as a pentagram and was associated with satanic groups; combined with the Aryan Pride language, Mr. Higgins concluded that this was an Aryan neo-Nazi-type symbol. (Tr., p.2079, Ls.3-9.) Regarding State's Exhibit 7, he stated that it was a Nazi war eagle and would typically be associated with an Aryan neo-Nazi. (Tr., p.2079, Ls.16-18.) Regarding State's exhibit 8, he stated that they were "bolts," which were "SS symbols," and were associated with "Aryan white supremacy neo-Nazis." (Tr., p.2080, Ls.3-6.) Regarding State's Exhibit 9, he testified that the words, "Chris forever," were not gang-related, but that a three-leaf clover was, "a very traditional Aryan symbol that's been used since 1960 in various Aryan groups." (Tr., p.2080, Ls.8-16.) He also identified the "three dots," which, to a gang member, represented the hospital, the morgue, and the prison. (Tr., p.2080, Ls.17-22.) Mr. Higgins believed all of the tattoos denoted Aryan neo-Nazis. (Tr., p.2081, Ls.1-8.)

During cross-examination, Mr. Higgins acknowledged that a three-leaf clover was also a symbol of Ireland and he had not studied the history of the clover. (Tr., p.2084, Ls.6-8.) He did not have a degree in history. (Tr., p.2084, Ls.16-17.) He also acknowledged that the "three dots" had its origins in an Hispanic gang. (Tr., p.2085, Ls.23-25.)

The district court permitted Mr. Higgins to testify, but not without reservations, calling the issue, "a very problematic question for the Court." (Tr., p.2102, Ls.4-7.) The court did not permit him to testify regarding all the tattoos – the court felt that the "Aryan Pride" tattoo spoke for itself, and the court did not feel that the "three dots" necessarily had white supremacist connections. (Tr., p.2108, Ls.6-12, p.2112, Ls.12-23.) The district court gave a long ruling on Mr. Higgins' testimony (Tr., p.2102, L.3 – p.2117, L.7), but summed up its ruling as following:

> I don't think that Mr. Higgins needs to lay an extensive foundation to be able to identify these two tattoos in question.
>
> Now, if his job with the prison system includes screening of symbols, signs, tattoos, to identify whether or not they are associated with certain groups, that could be problematic in the prison setting, then I think that that certainly would be sufficient.
>
> And then he can go on to testify that he's seen tattoos like the ones on the two exhibits that we've discussed and characterize them as I've limited.
>
> I think the State does not need to go into great detail to lay their foundation to testify to what I've allowed them to testify to. If you go into it any further than you need to, you might get yourself into come problems in terms of unduly prejudicing the jury in this matter.

(Tr., p.2117, L. 7 –p.2118, L.5.)

Mr. Higgins then proceeded to testify in front of the jury. He began by explaining that he worked for the Department of Correction as the investigation and intelligence coordinator, identifying and categorizing symbols and tattoos. (Tr., p.2128, Ls.1-22.)

He was asked to identify Exhibit 8 and stated, "what I see here are Nazi SS bolts commonly worn by – ." (Tr., p.2129, Ls.5-6.) Counsel for Mr. Tankovich objected, stating, "he's just said that there's no other possible meaning; that this is a Nazi SS tattoo." (Tr., p.2131, Ls.4-5.) Counsel moved for a mistrial; the court felt that the testimony did not "in any way" justify a mistrial, but sustained the objection on foundational grounds. (Tr., p.2131, Ls.6-21.) Counsel had understood the court's ruling to be that Mr. Higgins could not testify to the tattoo's meaning to Mr. Tankovich and believed that such testimony had violated the court's order. (Tr., p.2132, Ls.2-13.) The court believed that Mr. Higgins had only testified to "what it means to Mr. Higgins so far." (Tr., p.2133, Ls.5-9.)

Mr. Higgins then testified that he had seen this specific symbol, "as part of [his] duties" about 100 times in the past year. (Tr., p.2137, Ls.1-3.) Mr. Higgens had, "seen symbols of this tattoo on people associated with Aryan neo-Nazi belief systems or white supremacy belief systems." (Tr., p.2137, Ls.9-11.)

Mr. Higgens was then asked to examine Exhibit 9, and he explained, "the three-leaf clover that are embedded in the word is what comes to my attention." (Tr., p.2138, Ls.3-4.) Mr. Higgens asserted, "these are common symbols worn by Aryan white supremacists inside." (Tr., p.2139, Ls.12-13.) Counsel for Mr. Tankovich objected to the last part of the answer but the objection was overruled. (Tr., p.2139, Ls.14-17.) Counsel for the Tankoviches declined to cross-examine Mr. Higgins and the State rested. (Tr., p.2140, Ls.1-12.)

Mr. Tankovich then presented the testimony of Linda Lane, who was working at the Kootenai County 911 dispatch center on the date of the incident. (Tr., p.2150, Ls.9-22.) She testified that she received a call from Mr. Tankovich's cell phone about

approximately a block away from Mr. Requena's residence on the date in question. (Tr., p.2153, Ls.6 p .2154, L.13.)

Mr. Tankovich was convicted of the two charges. The district court imposed concurrent sentences of five years, with two years determinate, and the court suspended the sentences and placed Mr. Tankovich on probation. (R., p.715.) Mr. Tankovich appealed, and he asserts that the district court erred by permitting Mr. Higgins to testify.

ISSUE

Did the district court err by permitting Mr. Higgins to testify because part of his testimony was not relevant and unfairly prejudiced Mr. Tankovich?

ARGUMENT

The District Court Erred By Permitting Mr. Higgins To Testify Because Part of His Testimony Was Not Relevant And Unfairly Prejudiced Mr. Tankovich

A. Introduction

Mr. Tankovich asserts that the district court erred by permitting an expert witness to testify regarding the meaning of Mr. Tankovich's tattoos because the testimony suggested that Mr. Tankovich was a member of a gang or had been to prison, which is both not relevant and unfairly prejudicial.

B. The District Court Erred By Permitting Mr. Higgins To Testify Because Part of His Testimony Was Not Relevant And Unfairly Prejudiced Mr. Tankovich

Mr. Tankovich first asserts that suggestions that Mr. Tankovich had been in a gang or to prison were not relevant. Whether evidence is relevant is an issue of law. *State v. Atkinson,* 124 Idaho 816, 819 (Ct. App. 1993). The district court permitted Mr. Higgins to testify more than just his understanding of the meaning of the tattoos. For example, when asked about the lightning bolt tattoos, Mr. Higgins testified that he had seen this specific symbol, "as part of [his] duties" about 100 times in the past year. (Tr., p.2137, Ls.1-3.) Mr. Higgens had, "seen symbols of this tattoo on people associated with Aryan neo-Nazi belief systems or white supremacy belief systems." (Tr., p.2137, Ls.9-11.) Mr. Higgens, therefore, explained that people with the tattoo harbor more than mere prejudice, but that they were part of a "belief system" which is widespread in prison, as he had seen the tattoo over 100 times as part of his official duties, which the jury knew were with the Department of Correction. And while Mr. Tankovich's motive to commit was relevant to the instant charges, his association

with a gang was not, nor was the frequency with which Mr. Higgins saw this tattoo in the prison system.

Mr. Higgens was then asked to examine Exhibit 9, and he explained, "the three-leaf clover that are embedded in the word is what comes to my attention." (Tr., p.2138, Ls.3-4.) Mr. Higgens asserted, "these are common symbols worn by Aryan white supremacists *inside*." (Tr., p.2139, Ls.12-13) (emphasis added). Counsel for Mr. Tankovich objected to the last part of the answer but the objection was overruled. (Tr., p.2139, Ls.14-17.) By permitting Mr. Higgins to testify that the symbol is common "inside," the jury was left with the impression that the tattoo was a prison tattoo, and the unmistakable inference the jury would draw was that Mr. Tankovich had been to prison. Again, this is not relevant. Mr. Higgins could simply have testified to his understanding of the tattoo without these references.

Further, even if relevant, the evidence was unfairly prejudicial. 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 (1995). In order for prejudice to be "unfair," it must suggest a decision on an improper basis. *See, e.g., State v. Moore*, 131 Idaho 814, 819 (1998); *State v. Pokorney*, 149 Idaho 459, 465 (Ct. App. 2010); *State v. Carlson*, 134 Idaho 389, 398 (Ct. App. 2000); *State v. Floyd*, 125 Idaho 651, 654 (Ct. App. 1994). 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 (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, Mr. Higgins' testimony was unfairly prejudicial by suggesting a decision on an improper basis – whether Mr. Tankovich was part of a white supremacist gang or had been in prison. Evidence of a person's incarceration is prejudicial. In *Estelle v. Williams,* 425 U.S. 501, 512 (1976), the United States Supreme Court held that constitutional protections are violated when a defendant is compelled to wear jail clothing during trial. The Supreme Court noted that the practice may impair the presumption of innocence and, "the defendant's clothing is so likely to be a continuing

influence throughout the trial that ... an unacceptable risk is presented of impermissible factors coming into play." *Id.* at 505.

Many jurisdictions have likewise held or implied that informing the jury that a defendant is in jail is improper because it may raise an inference of guilt. *See State v. Tucker,* 226 Conn. 618, 629 A.2d 1067 (1993); *Haywood v. State,* 107 Nev. 285, 809 P.2d 1272, 1273 (1991); *State v. Martini,* 131 N.J. 176, 619 A.2d 1208 (1993); *State v. Childs,* 204 N.J.Super. 639, 499 A.2d 1041 (1985); *State v. Martinez,* 624 A.2d 291 (R.I.1993). Idaho has recognized the same. *See State v. Harrison*, 136 Idaho 504, 506 (Ct. App. 2001).

Evidence of prior incarceration is likely even more prejudicial, as it suggests that the defendant is a person of bad character because he has been incarcerated before. It is a fundamental tenet of the American legal system that a defendant 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 (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." *State v. Grist*, 147 Idaho 49, 52 (2009) (quoting *State v. Wrenn*, 99 Idaho 506, 510 (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.*

In this case, Mr. Higgins testified that, as an employee with the Department of Correction, that he had seen one specific symbol, the lightning bolts, "as part of [his] duties" about 100 times in the past year. (Tr., p.2137, Ls.1-3.) Mr. Higgens had, "seen symbols of this tattoo on people associated with Aryan neo-Nazi belief systems or white supremacy belief systems." (Tr., p.2137, Ls.9-11.)

With regard to the clover tattoo, Mr. Higgins asserted, "these are common symbols worn by Aryan white supremacists *inside*." (Tr., p.2139, Ls.12-13 (emphasis added)). The only inference to be drawn by the jury by Mr. Higgins' testimony was that Mr. Tankovich had tattoos worn by member of white supremacist gangs *in prison*. The inescapable conclusion is that Mr. Tankovich had previously been in incarcerated.

Because Mr. Higgins' testimony left the jury with the impression that Mr. Tankovich was a member of a gang and/or had been to prison, his testimony was unfairly prejudicial and the district court erred by permitting him to testify in this regard.

CONCLUSION

Mr. Tankovich respectfully requests that his convictions be vacated and his case remanded for further proceedings.

DATED this 26th day of April, 2012.

Diane M. Weatherby for

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of April, 2012, 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:

WILLIAM M TANKOVICH JR
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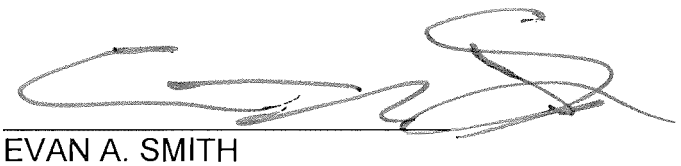

EVAN A. SMITH
Administrative Assistant

JMC/eas