2-12-2010

State v. Gomez Appellant's Brief Dckt. 35209

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ARISTEO GOMEZ, Defendant-Appellant.	)	NO. 35209 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CASSIA

HONORABLE MONTE CARLSON
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

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

Nature of the Case

Aristeo Gomez appeals from his judgment of conviction for lewd conduct with a minor under the age of sixteen. Mr. Gomez was found guilty following a jury trial and the district court imposed a unified sentence of twenty years, with ten years fixed. Mr. Gomez now appeals, and he asserts that the district court erred by admitting evidence of prior acts of sexual abuse pursuant to Idaho Rules of Evidence 404(b) and 403.

Statement of the Facts and Course of Proceedings

In 2006, Mr. Gomez was charged with one count of lewd conduct with a minor under the age of sixteen. (R., p.34.) Specifically, the Information alleged that Mr. Gomez "commit[ted] a lewd and lascivious act upon the body of a minor with the initials V.B., under the age of sixteen years, to-wit: of the age of fifteen (15) years, by touching and rubbing her breasts and vagina and offering her money to sleep with him, which incident occurred at 1843 Normal Avenue, Burley, Cassia County, Idaho, with the intent to gratify the sexual desire of the defendant." (R., p.34.) The State filed a notice of intent to introduce 404(b) evidence, and the district court held a hearing on this motion. (Augmentation.)

At the hearing, counsel for Mr. Gomez informed the court, "we have been made aware that there's several individuals who are going to testify about uncharged conduct involving Mr. Gomez." (10/6/06 Tr., p.24, Ls.15-18.) The court discussed its history of dealing with I.R.E. 404(b) evidence, stating:

> Mr. Jensen [counsel for Mr. Gomez], when I was practicing law, I represented an individual by the name of Tom Phillips, and let me quote from the Idaho Supreme Court's decision in *State v. Phillips* found at 123 Idaho 178:
>
> On February 14, 1991, Phillips filed a motion to prevent the State, quote, from mentioning, referring to, or otherwise suggesting Thomas G. Phillips had been accused of other sexual behavior, end of quote. The motion was based on I.R.E. 403 and 404(b). The court heard argument on the motion, and it issued an order partially granting Phillips' motion. In its order, the district court ruled that before the State could mention other accusations of sexual misbehavior, it must make an offer of proof outside the presence of the jury.
>
> I took that case to trial for Mr. Phillips. I was his trial counsel. Let me continue quoting from the Supreme Court case: 'During the trial, the court allowed three women to testify regarding Phillips' sexual acts with them when they were minors.'
>
> And the jury found Mr. Phillips guilty, and I appealed. And this was one of the issues on appeal, did the district court correctly apply rules of evidence when it allowed the three women who were not victims in this case to testify regarding their accusations of Phillips' sexual misbehavior with them when they were minors.
>
> Now, these cases were years old at the time of this trial. The Supreme Court in the case of *State versus Phillips* - and I don't think it's ever been overruled – simply says: 'After considering this testimony with the testimony of the minor victim and that of the defendant, we recognized that the jury was better able to compare patterns and methods, details and generalities, consistencies and discrepencies, and thereby made a ... meaningful and accurate assessment of the parties' credibility,' citing the case of *State versus Tolman*.

(10/6/06 Tr., p.29, L.5 – p.30, L.14.) The district court later continued, citing again from *Phillips*,

> testimony of prior sexual misconduct is admissible where the party's credibility is at issue. The testimony by the three women, when considered with the victim's testimony, demonstrated Phillips' plan to exploit and sexually abuse an identifiable group of young female victims; the identifiable group being minor females who were relatives or friends of Phillips' daughters and visited Phillips' home.

(10/6/06 Tr., p.30, L.23 – p.31, L.5.) The district court informed the parties that it was going to permit the State to introduce its proposed evidence,

> with some limitations. I will prohibit the State from mentioning any prior victim of any prior sexual misconduct unless they first proffer proof to the court so I can evaluate it, as Judge Meehl did in this case that was affirmed on appeal.
> I understand, very clearly, Mr. Jensen, your argument. I have made it myself. I made to the Supreme Court myself. But I also understand their decision, and I'm going to adhere to what they did in that case in this case. It may be that the State's proffered testimony doesn't convince me that there's enough similarity that this becomes a credibility and a jury question. I may prohibit it. And I am going to prohibit [it], until I get the proffered proof, the State from mentioning it to the jury in their opening statement.

(10/6/06 Tr., p.31, L.14 – p.32, L.5.) Counsel for the State asked if the court could set a hearing on the offer of proof for the following week. (10/6/06 Tr., p.32, Ls.19-25.) The court set a hearing. (10/6/06 Tr., p.33, Ls.20-25.) The court then again informed the parties that it was basing its ruling on the opinion in *Phillips*, and then stated:

> *Counsel, they teach us in the evidentiary classes that they give new judges that there are no rules in sex abuse cases.* I don't believe that, but I recognize that it seems like lawyers that make your arguments are losing, Mr. Jensen, at this point in time. And I have been there.
>
> . . .
>
> It's a tough area of the law. It's just a tough area. I was –
>
> Mr. Jensen, you argued with fervor; but I can assure you, so did I. I put my heart into this argument. I thought it was grossly unfair in the Phillips trial that they could bring in witnesses that were molested years before, who made no criminal complaints. I just thought that was an outrage, but the Supreme Court shot me down; and I'm under a duty to follow the law.

(10/6/06 Tr., p.35, Ls.2-22.) (emphasis added.) Despite the fact that the court set a hearing on the offer of proof, and conditioned the admission of the evidence on the offer of proof, the court either did not have such a hearing, or if it did, it held it off the

record. Counsel has contacted the district court and learned pretrial hearings conducted in chambers are done without a court reporter and therefore it is impossible to name a court reporter or an estimated number of pages. (*See* motion to augment and suspend, filed 12/9/09.) It appears that there are three possibilities as to when the parties discussed the offer of proof: October 11, 2006, December 1, 2006, or May 11, 2007. These were done in chambers, and therefore, without a court reporter. According to the hearing held on October 6, 2006, the parties agreed to conduct the offer of proof on October 11, 2006. (10/6/06 Tr., p.33, Ls.3-25.) However, there is no indication that a hearing actually occurred that day as there are no court minutes in the record from that date. (R., p.15.) Rather, the only entry in the ROA for that date is that the pretrial conference was continued to December 1, 2006. (R., p.15.)

On October 12, 2006, an amended order re: notice of trial setting and jury instructions. (R., p.96.) Assuming the offer of proof was continued to December 1, 2006, the record indicates that a pretrial conference was held in chambers. (R., p.100.) The minutes only state that the "Court and Counsel discussed the case, and upon motion by the defendant, the Court continued the trial." (R., p.100.) There is no indication whether the offer of proof occurred.

The next possible hearing date is May 1, 2007. (R., p.106.) Again, this pretrial conference was held in chambers. (R., p.106.) The minutes only state that the "Court and Counsel discussed this case and the Court was advised it would go to trial as scheduled." (R., p.106.) There is no indication in the trial transcript that an offer of proof happened on the first day of trial.

Counsel attempted to augment the record with any possible transcripts after learning from the district court that court reporters were not present such hearings, but that motion was denied. (*See* motion to augment and suspend, filed 12/9/09; order denying motion, filed 12/30/09.) Therefore, no record of an offer of proof was preserved for appellate review.

The case proceeded to trial, where the State mentioned the 404(b) evidence in its opening statement: "You heard Judge Carlson read a long list of witnesses. I will call all of [V.B.'s] full sisters to the witness stand, and they will tell you about things that they observed or things that happened to them, things that they know about this case." (Tr., p.40, Ls.19-25.)

The alleged victim in this case, V.B, was the first witness. She testified that Mr. Gomez was her stepfather. (Tr., p.48, Ls.22-24.) She testified that, in 2004, while her mother was out of town, she woke up to find Mr. Gomez sitting next to her in her bed. (Tr., p.65, Ls.3-10.) She stated that Mr. Gomez touched her breasts and vagina over her clothing. (Tr., p.65, L.16 – p.66, L.8.) V.B.'s brother was also in the bed during this time, and, surprisingly, did not wake up at all, even when V.B. told Mr. Gomez to stop. (Tr., p.66, Ls.9-16.) According to V.B., Mr. Gomez told her he would give her $100 if she would sleep with him. (Tr., p.66, Ls.18-19.) After she told him to get out of the room, he gave her money for her and her brother and left. (Tr., p.67, Ls.17-23.) V.B. did not tell anyone about what allegedly happened, nor did she wake up her brother. (Tr., p.70, Ls.12-20.) However, she eventually told her boyfriend about what she says happened. (Tr., p.72, Ls.9-11.)

Following V.B.'s testimony, a parade of witnesses testified about uncharged conduct. V.B.'s sister, E.B.T., testified next. (Tr., p.129, Ls.4-6.) She testified that when she was twelve, Mr. Gomez "grabbed me and hugged me really tight, and told me that he wanted to be with me." (Tr., p.135, Ls.13-15.) She understood that to mean that "he wanted to sleep with me." (Tr., p.135, Ls.22-24.) She stated that Mr. Gomez would get into bed with her while she was sleeping and touch her breasts. (Tr., p.138, Ls.2-13.) He apparently would do this even though her mother was in the same room in another bed. (Tr., p.139, Ls.13-18.) She testified that such behavior occurred until she was eighteen. (Tr., p.137, Ls.4-5.) She also testified that these types of incidents happened with her sister, S.B. (Tr., p.232, Ls.13-18.) However, she never told any of her sisters to avoid Mr. Gomez. (Tr., p.248, Ls.2-11.)

Another sister, M.A.R.B., testified next. (Tr., p.252, Ls.2-6.) She stated that Mr. Gomez "grabbed me by my breasts, and he was behind me grabbing me, and I was scratching him and kicking him." (Tr., p.260, Ls.18-23.) She also testified that at times, she would wake up to find Mr. Gomez touching her. (Tr., p.266, Ls.4-10.) Like her previous sisters, she also testified that Mr. Gomez would walk in on her while she was taking a shower. (Tr., p.263, Ls.1-6.) She also testified that she observed Mr. Gomez touching E.B.T.'s breasts. (Tr., p.272, Ls.8-23.)

Another sister, S.B.T., then testified. (Tr., p.296, Ls.9-16.) She testified that on one occasion, in the kitchen, "when I was passing, he had like moved his hand towards me and just touch – grabbed me touched me" on her vagina. (Tr., p.300, L.21 – p.301, L.7.) She also testified that she would wake up to find Mr. Gomez in bed with her touching her. (Tr., p.304, Ls.5-16.) She said that he would offer her money to sleep

with her. (Tr., p.304, Ls.17-25.) She also stated that his penis would touch her vagina but did not go inside. (Tr., p.306, Ls.1-15.)

Another sister, M.B, also testified. (Tr., p.337, Ls.2-7.) She testified that on one occasion, while watching television, Mr. Gomez grabbed her breasts. (Tr., p.342, Ls.9-13.) She said he tried to touch her between her legs but did not. (Tr., p.343, Ls.8-11.) Mr. Gomez also allegedly offered her money to sleep with him. (Tr., p.346, Ls.16-25.) She also testified that at times she would wake up to find Mr. Gomez touching her between her legs and on her breasts. (Tr., p.352, Ls.1-17.)

V.B.'s friend, C.G., testified next. (Tr., p.373, Ls.11-17.) She testified that one night, while spending the night at V.B.'s residence, she woke up to find Mr. Gomez touching her vagina; when he saw that he was awake, he said, "oy" and ran away. (Tr., p.379, L.22 – p.380, L.5.) C.G. testified that she told V.B. what happened, but V.B. told her she was only dreaming and to go back to sleep. (Tr., p.382, Ls.4-9.)

The childrens' mother, and Mr. Gomez's wife, Francesca Barajas, then testified. (Tr., p.406, Ls.21-25.) She testified that her daughters told her about Mr. Gomez's alleged behavior, and that she did not believe them then and did not believe them at trial. (Tr., p.429, Ls.11-23.) She believed that her son-in-law, E.B.T.'s husband, was behind the allegations. (Tr., p.478, Ls.4-7.)

Mr. Gomez was found guilty, and the district court imposed a unified sentence of twenty years, with ten years fixed. (R., p.224.) Mr. Gomez appealed. (R., p.229.) He asserts that the district court erred by permitting the State to introduce evidence of uncharged conduct.

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 By Admitting Highly Prejudicial Rule 404(b) Evidence That Was Not Relevant To Any Issue Other Than Propensity

A. Introduction

Mr. Gomez asserts that the district court erred by admitting impermissible Rule 404(b) evidence in the form of the testimony of E.B.T., S.B.T., M.A.R.B, M.B., and C.G. He asserts that this evidence was not relevant to a material and disputed issue other than propensity. 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 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, 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.)

Building on the holding in *Grist*, the Idaho Supreme Court recently held that, in order to demonstrate a common scheme or plan,

> at a minimum, there must be evidence of a common scheme or plan beyond the bare fact that sexual misconduct has occurred with children in the past. The events must be linked by common characteristics that go beyond merely showing a criminal propensity and instead must objectively tend to establish that the same person committed all the acts.

State v. Johnson, Idaho P.3d 2010 WL 337993 at *3 (February 1, 2010) (not yet final).

In *Johnson*, the district court identified the following characteristics that linked the current charged conduct to the prior bad acts to which the alleged victim testified: (1) both victims were about seven to eight years old; (2) both victims viewed Johnson as an authority figure because he was an older brother or father; (3) both courses of conduct involved Johnson requesting the victim to touch his penis. *Id.* at *4. The Supreme Court concluded:

> These similarities, however, are sadly far too unremarkable to demonstrate a common scheme or plan in Johnson's behavior. The facts that the two victims in this case are juvenile females and that Johnson is a family member are precisely what make these incidents unfortunately quite ordinary. The prior acts are irrelevant and therefore inadmissible.

Id.

In light of *Grist* and *Johnson,* Mr. Gomez asserts that the district court erred in determining that V.B.'s sisters' and friend's testimony was relevant for an issue other than propensity.

1. Offer Of Proof

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. Gomez asserts that the district court never made this finding, or, at least, never made it on the record. The district court specifically conditioned its order permitting the State to use the evidence on the State submitting an offer of proof. *Grist* requires, [f]irst, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact." *Grist*, 147 Idaho at __, 205 P.3d at 1188. "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.)

The court scheduled a hearing, but the offer of proof, if it occurred, is not, and cannot be made, part of the record on appeal. The district court, therefore, never made the first required finding in a way that this Court can review. The district court recognized that it first needed an offer of proof from the State before it could rule on the evidence. Despite this, it was either never held, or held off the record.

Mr. Gomez acknowledges that the State did, in its notice of intent to introduce the 404(b) evidence, supply written statements from the individuals it called at trial. (Augmentation.) However, these statements were filed before the hearing on the admissibility of the 404(b) evidence. As such, they were before the district court at the time of the hearing, and were apparently either not considered by the district court (it never mentioned the statements at the hearing), or considered to be insufficient

because the court still required the State to submit a further offer of proof. In any event, the district court never made any factual finding that the events occurred and that Mr. Gomez was actor, and by requiring an additional offer of proof, impliedly determined that the written offer of proof was insufficient. Because the district court did not make this first required finding, at least not on the record, the district court erred.

2. Relevance For A Non-Propensity Purpose

Second, the district court erred by applying the wrong standard. Admittedly, this is understandable, as the district court did not have the benefit of *Grist* and *Johnson* at the time of trial in this case. In deciding that the evidence could come in assuming an offer of proof was provided, the district court relied on *State v. Phillips*, 123 Idaho 178, 845 P.2d 1211 (1993), for the proposition that such evidence constitutes a "plan to exploit and sexually abuse an identifiable group of young female victims." (10/6/06 Tr., p.31, Ls.1-3.) To the extent this was the law at the time of trial in this case, it no longer is following *Grist* and *Johnson*, and *Phillips* has been implicitly overruled by the Idaho Supreme Court.

Phillips relied exclusively on *State v. Moore*, 120 Idaho 743, 819 P.2d 1143 (1991), and *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992), in its analysis. The testimony at issue revealed that, "when they were minors, they were friends of Phillips' daughters, that Phillips invited them into his garage to view pornographic materials, and that Phillips touched them in inappropriate areas." *Phillips*, 123 Idaho at 180, 845 P.2d at 1213. The Idaho Supreme Court held that, despite the fact that the alleged events took place sixteen years prior,

> the testimony by the three women, when considered along with the victim's testimony, demonstrated Phillips' "general plan to exploit and sexually abuse an identifiable group of young female victims," *Moore,* 120 Idaho at 745, 819 P.2d at 1145, the identifiable group being minor females who were relatives or friends of Phillips' daughters and visited Phillips' home.

Id., 123 Idaho at 181, 845 P.2d at 1214. Justice Bistline took issue with the majority's holding that the prior sexual misconduct evidence was part of a common scheme or plan:

> This case[,] following in the tradition of *State v. Moore*, and *State v. Tolman*, is **yet another example of the Court putting its judicial stamp of approval on the all too common practice of putting a defendant on trial for uncharged crimes**. This practice is nothing more than an obvious **attempt to persuade the jury that "if he did it once, he did it this time too."** That is exactly the kind of argument that I.R.E. 404(b) is supposed to prevent, and I dissent from this Court's continuing emasculation of the rule.
>
> . . . .
>
> In this case, the alleged common scheme or plan started *sixteen years* before the charged events. **To say events separated by such a long period of time constitute anything except evidence tending to show a general propensity to commit sex offenses simply strains credibility**.
>
> . . . .
>
> While *Moore* may at one time have been palatable, its immediate demise would better serve the administration of justice in the Idaho system of criminal law.

Philips, 123 Idaho at 182-83, 845 P.2d at 1215-16 (Bistline, J., dissenting) (citations omitted) (italics in original) (bold text added).

In *Grist*, the defendant specifically argued that *Moore* and *Tolman* were 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. *Phillips* relies on this "unstated premise" as well. The standard applied by the district court in this case, that the evidence demonstrated a "plan to exploit and sexually abuse an identifiable group of young female victims" may have been supported by *Phillips*, but *Phillips* is no longer good law. *Johnson* makes this clear:

> at a minimum, there must be evidence of a common scheme or plan beyond the bare fact that sexual misconduct has occurred with children in the past. The events must be linked by common characteristics that go beyond merely showing a criminal propensity and instead must objectively tend to establish that the same person committed all the acts.

Johnson, at *3. Further,

> [the] similarities [in *Johnson*], however, are sadly far too unremarkable to demonstrate a common scheme or plan in Johnson's behavior. The facts that the two victims in this case are juvenile females and that Johnson is a family member are precisely what make these incidents unfortunately quite ordinary. The prior acts are irrelevant and therefore inadmissible.

Id. at *4. In *Johnson*, the court noted that its holding was in conflict with prior decisions. *Id.* at *4 n.5. The court specifically cited *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1995), which "relied heavily on *Moore*." *Id.* *Phillips* is just as incompatible with *Johnson*, and also relies heavily on *Moore*. In this case, just as in *Johnson*, the allegation is that Mr. Gomez, a family member, abused juvenile females. Pursuant to *Johnson*, such acts are "unfortunately quite ordinary," irrelevant, and inadmissible.

A standard of a "general plan" to abuse an "identifiable group" 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).

To the extent that the law relied upon by the district court 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." Pursuant to *Grist* and *Johnson*, the evidence in this case, that a family member allegedly abused juvenile females, is irrelevant and inadmissible. Further, in *Johnson*, the State asserted that the evidence corroborated the victim and was therefore admissible. *Johnson*, at *3. The Idaho Supreme Court rejected the argument. The same result is demanded here.

3. Prejudice

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).

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 was highly prejudicial and it was extremely cumulative. Mr. Gomez was charged with one crime only – yet the jury heard evidence from six witnesses regarding alleged abuse. This trial was more about uncharged acts than was about the charged act. The jury was overwhelmed with evidence of uncharged conduct; undoubtedly, it considered Mr. Gomez to be a man of bad character. In a case where the danger of unfair prejudice is very high, and the jury heard witness after witness describe uncharged conduct, the district court abused its discretion by failing to exclude the evidence pursuant to I.R.E. 403.

CONCLUSION

Mr. Gomez requests that his judgment of conviction be vacated and his case remanded for further proceedings.

DATED this 12th day of February, 2010.

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

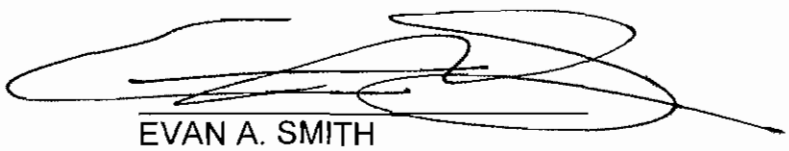
I HEREBY CERTIFY that on this 12th day of February, 2010, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

ARISTEO GOMEZ
INMATE # 86227
ICC
PO BOX 70010
BOISE ID 83707

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

KENT D JENSEN
ATTORNEY AT LAW
PO BOX 276
BURLEY ID 83318

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