1-22-2014

State v. Hileman Appellant's Brief Dckt. 40834

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. FREDERICK ALLEN HILEMAN, Defendant-Appellant.	NO. 40834 ADA COUNTY NO. CR 2012-10483 APPELLANT'S BRIEF

BRIEF OF APPELLANT

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

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Frederick Allen Hileman appeals from his judgment of conviction for lewd conduct with a minor under the age of sixteen. He asserts that the district court erred in admitting I.R.E. 404(b) evidence against him because the probative value of the evidence is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. Further, even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

Statement of the Facts and Course of Proceedings

Anne Pennell and Kenneth Pennell had two children together – S.P. who was 11 at the time of trial, and J.P., who was 9 at the time of trial. (Trial Tr., p.167, Ls.1-21.) Ms. Pennell also had three other children – S.S., age 32, J.E., age 20, and K.E., age 17. (Trial Tr., p.167, L.25 – p.168, L.2) S.S. had three children; Mr. Hileman was the father of two of them. (Trial Tr., p.169, Ls.10-25.) In 2010 Ms. Pennell and her children S.P., J.P., and J.E moved in with S.S. and Mr. Hileman for several months. (Trial Tr., p.172, Ls.1-13.)

S.S. and Mr. Hileman eventually divorced, but Ms. Pennell would still see him 2 to 3 times a week when he would pick up the children. (Trial Tr., p.175, Ls.4-7.)

On March 12, 2012, J.P. came home from school and reported that "something had happened to her and someone had touched her." (Trial Tr., p.176, Ls.3-7.) Ms. Pennell called the police and J.P. was taken to CARES. (Trial Tr., p.184, Ls.16-22.)

Joseph Even is the father of S.S., J.E., and K.E. (Trial Tr., p.186, Ls.1-18.) He remained friends with Mr. Hileman after Mr. Hileman divorced S.S. (Trial Tr., p.193,

Ls.10-18.) On April 2, 2012, Mr. Hileman contacted Mr. Even and informed him that he was under investigation "for ticking [J.P.]'s bottom." (Trial Tr., p.195, Ls.6-23.) Mr. Even also understood that Mr. Hileman was being investigated for touching J.E. (Trial Tr., p.196, Ls.2-4.) Mr. Even saw Mr. Hileman around children many times and never noticed any inappropriate behavior. (Trial Tr., p.197, Ls.15-22.)

After J.P.'s CARES interview, Ms. Pennell spoke with Detective Sean Stace, and expressed concern about Mr. Hileman's behavior toward her other daughters, K.E. and J.E. (Trial Tr., p.205, Ls.2-5.) Detective Stace then made arrangements to meet with Mr. Hileman, "to get his side of the story." (Trial Tr., p.206, Ls.11-13.)

Detective Stace spoke with Mr. Hileman on March 30, 2012; Mr. Hileman was aware that he was being investigated for touching the girls and he stated that he had no idea why they were making these allegations. (Trial Tr., p.209, Ls.1-4.) However, with regard to K.E., Mr. Hileman "admitted that there had been an exchange via text previously between he and her where she had asked him to buy some alcohol for her and her friends, ad he said no. He told me that she persisted, and so he told her that he would buy her the alcohol if he showed him her breasts." (Trial Tr., p.209, L.23 – p.210, L.4.) However, he said that he did not buy the alcohol and she never showed him her breasts. (Trial Tr., p.210, Ls.13-16.) He also stated that one time he had rubbed J.E.'s legs and feet but stopped when he believed he may have been "crossing the line." (Trial Tr., p.212, Ls.18-25.)

Detective Stace then scheduled another interview for April 3rd. (Trial Tr., p.215, Ls.1-5.) The recording of this interview was played for the jury. (Trial Tr., p.218, Ls.5-9; State's Exhibit 2.) During this interview, Mr. Hileman volunteered K.H. and S.G.'s names. (Trial Tr., p.222, Ls.2-12.) He also made incriminating statements regarding all

of the alleged victims. Detective Stace then asked Mr. Hileman to return on April 10th in order to discuss Mr. Hileman's sexual history. (Trial Tr., p.223, Ls.8-13.)

When Detective Stace obtained the history, he scheduled another meeting for the following day. (Trial Tr., p.227, Ls.11-16.) Recordings of this interview were played for the jury. (Trial Tr., p.230, Ls.4-6; State's Exhibits 4 and 5.) Mr. Hileman made incriminating statements during this interview.

J.P. testified that Mr. Hileman had touched her inappropriately. (Trial Tr., p.254, Ls.8-17.) She testified that when she was nine years old, Mr. Hileman tickled her on her bottom, "kind of where" she peed. (Trial Tr., p.258, Ls.9-21.) She initially did not tell anyone but decided to tell her mother after watching a video at school. (Trial Tr., p.260, Ls.4-24.)

S.G. testified that she used to babysit for Mr. Hileman and S.S. (Trial Tr., p.270, Ls.4-24.) She was around 10 years old at the time. (Trial Tr., p.273, Ls.4-7.) She testified that one time, after Mr. Hileman had returned home, he asked her to come sleep in his room; according to S.G., Mr. Hileman touched her genitals for about 15 minutes. (Trial Tr., p.277, L.4 – p.278, L. 5.) She never reported the incident and never told anyone until after the police contacted her mother. (Trial Tr., p.279, Ls.8-22.)

J.E. testified that on one night, after going to the movies, Mr. Hileman began rubbing her while she was on the couch; she got uncomfortable and went upstairs. (Trial Tr., p.293, L.12 – p.294, L.19.) He followed her upstairs where, according to J.E., he pulled up the blanket and starting touching her butt. (Trial Tr., p.296, Ls.1-3.)

K.H. testified that Mr. Hileman was a family friend; her mother and his wife had known each other for a long time. (Trial Tr., p.304, Ls.1-5.) She testified that Mr. Hileman touched her breasts every time he would babysit her when she was

between 7 and 11. (Trial Tr., p.307, Ls.14-22.) She never reported the incidents and never reported it to anyone until after the police contacted her mother. (Trial Tr., p.309, Ls.16-29.)

K.E. testified that she had indeed asked Mr. Hileman to buy alcohol for her and her friends and that he said he would if she showed him her breasts. (Trial Tr., p.318, L.5 – p.319, L.25.) She agreed that he never bought the alcohol and she never showed him her breasts. (Trial Tr., p.320, Ls.1-20.)

Mr. Hileman was charged with three counts of lewd conduct with a minor under the age of sixteen and two counts of sex abuse of a child under the age of sixteen. (R., p.9.)

Prior to trial, the State filed a notice of intent to use I.R.E. 404(b) evidence. (R., p.64.) The State sought to introduce the following evidence: Mr. Hileman's statements that 1) "he does not trust himself around girls so he keeps his distance;" 2) "his trouble with girls began when he was a juvenile and used to inappropriately touch his younger sister;" 3) "he has had inappropriate thoughts about little girls;" 4) "he was ashamed of the things has done and thought of [re: little girls];" and 5) "when he wrestled with girls he has had to say 'no' [due] to the sexual thoughts he has had because 'that's not right.'" (R., pp.64-65.) Further, the State sought to introduce evidence that Mr. Hileman admitted to trying to have intercourse with his sister, digitally penetrating his sister's vagina, placing his mouth on her vagina, and to sexually touching his cousin. (R., p.65.) Finally, the State sought to introduce evidence that Mr. Hileman said that he was "fascinated with girls going through the change to become women." (R., p.65.)

At the hearing on the motion in limine, the State acknowledged that the incidents regarding Mr. Hileman's sister and cousin were likely inadmissible and withdrew them from the motion. (Tr., p.32, Ls.1-8.) Regarding the other statements, however, the State asserted that these, "were relevant to show [Mr.] Hileman's intent at time that he was committing these acts; that they do have probative value that is not substantially outweighed by any prejudicial value." (Tr., p.32, Ls.20-25.)

Counsel for Mr. Hileman, while acknowledging that "intent is certainly relevant and at issue," asserted that, "these comments are kind of general, and I think they come down to more propensity." (Tr., p.33, Ls.9-16.) Counsel acknowledged that, "specific statements of what his intent was with the actual victims, certainly that becomes relevant because the intent is certainly relevant. But when it gets this general, it's more propensity." (Tr., p.33, Ls.17-25.)

The district court granted the State's motion with regarding to the remaining statements, holding,

> It appears to me that these statements, as amended, are relevant to the issue of intent, and I think they are potentially probative. Well, not potentially. They would be probative of the defendant's state of mind in taking whatever actions he took as reflected by the evidence at the time.
>
> So while they do have an element of propensity about them, with almost anything going towards intent or which might tend to prove intent, you have that same issue.
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> Here I don't believe that that potential confusion is very high. I think it does clearly go to intent. If requested by the state – or by – I'm sorry – by the defense, I would give a limiting instruction essentially advising the jury that it is limited to determining intent, not to be used to show the defendant's propensity to commit any illegal acts or something of that nature. I would like to see the defendant's proposed instruction, if the defense wants one.

(Tr., p.37, L.25 – p.38, L.21.) At trial, Detective Stace testified to Mr. Hileman's statements, stating,

> He mentioned that he didn't trust his judgment, that for sometime he had done his best to keep his distance from girls. He – when it was clarified about potentially having some issues with women, he clarified and said, no, girls.
>
> When I asked what kind of scenarios, he talked about wrestling, that he had had thoughts about possibly grabbing breasts because that was an issue for him but, because of that, he keep[s] his distance and tries to stay out of those scenarios.

(Trial Tr., p.212, Ls.2-11.)

Mr. Hileman was convicted following a jury trial. (R., pp.155-59.) The district court imposed concurrent unified sentences of twelve years, with five years fixed. (R., p.167.) Mr. Hileman appealed. (R., p.171.) He asserts that the district court erred by admitting improper 404(b) evidence.

ISSUE

Did the district court err by admitting improper 404(b) evidence against Mr. Hileman?

ARGUMENT

The District Court Erred When It Admitted Improper 404(b) Against Mr. Hileman

A. Introduction

Mr. Hileman asserts that the district court erred in admitting I.R.E. 404(b) evidence against him because the probative value of the evidence was entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior. Further, even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

B. Standard Of Review

This Court reviews a district court's determination to admit evidence for an abuse of discretion. *State v. Grist*, 147 Idaho 49, 51 (2009). The review for an abuse of discretion involves resolution of three issues: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the outer bounds of its discretion and consistently with applicable legal standards; and (3) whether the district court reached its decision through an exercise of reason. *Id.* Upon review of the district court's determination to admit prior bad acts evidence pursuant to I.R.E. 404(b), this Court reviews the district court's relevancy determination de novo. *See State v. Rossignol*, 147 Idaho 818, 824 (Ct. App. 2009). The district court's balancing of the potential for prejudice against the probative value of the evidence is reviewed for an abuse of discretion. *Grist*, 147 Idaho at 52.

Further, "[w]here a defendant alleges error at trial that he contemporaneously objected to, this Court reviews the error on appeal under the harmless error test. *State v. Perry,* 150 Idaho 209, 222 (2010). "A defendant appealing from an objected-

to, non-constitutionally-based error shall have the duty establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." *Id.* (emphasis added).

C. The District Court Erred When It Admitted Improper 404(b) Against Mr. Hileman

The Idaho Rules of Evidence provide that, generally speaking, 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." I.R.E. 404(b). However, such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." *Id.*

Under I.R.E. 404(b), there is a two-tiered analysis for determining the admissibility of "prior bad act" evidence. *Grist*, 147 Idaho at 52. The court must first "determine whether there is sufficient evidence to establish the other crime or wrong as fact" and "whether the fact of another crime or wrong, if established, would be relevant . . . to a material and disputed issue concerning the crime charged, *other than propensity*." *Id.* (emphasis added). If the evidence is insufficient to establish the other crime or wrong as fact, or if the other crime or wrong, even if proven, is not relevant to an issue other than character or propensity, it is inadmissible and the inquiry ends. *See id.* However, if the evidence is sufficient to prove the other crime or wrong, and that crime or wrong is relevant to some valid issue, the court must then "engage in a balancing under I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence." *Id.*

In *Grist*, the Idaho Supreme Court criticized the rationale from *State v. Moore*, 120 Idaho 743 (1991), stating that the Court's explanation in that case 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." *Id.* at 54. The unstated premise in *Moore* was that "[i]f he did it before, he probably did it this time as well." *Id.* *Grist* held that "[t]his complete reliance upon propensity is not a permissible basis for the admission of evidence of uncharged misconduct." *Id.* Thus, the admissibility of evidence of prior bad acts hinges on the question of whether "its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." *Id.*

As set forth above, prior to trial the State filed a notice of intent to use I.R.E. 404(b) evidence. (R., p.64.) The State sought to introduce the following evidence: Mr. Hileman's statements that 1) "he does not trust himself around girls so he keeps his distance;" 2) "his trouble with girls began when he was a juvenile and used to inappropriately touch his younger sister;" 3) "he has had inappropriate thoughts about little girls;" 4) "he was ashamed of the things has done and thought of [re: little girls];" and 5) "when he wrestled with girls he has had to say 'no' [due] to the sexual thoughts he has had because 'that's not right.'" (R., pp.64-65.) Further, the State sought to introduce evidence that Mr. Hileman admitted to trying to have intercourse with his sister, digitally penetrating his sister's vagina, placing his mouth on her vagina, and to sexually touching his cousin. (R., p.65.) Finally, the State sought to introduce evidence that Mr. Hileman said that he was "fascinated with girls going through the change to become women." (R., p.65.)

At the hearing on the motion in limine, the State acknowledged that the incidents regarding Mr. Hileman's sister and cousin were likely inadmissible and withdrew them from the motion. (Tr., p.32, Ls.1-8.) Regarding the other statements, however, the State asserted that these, "were relevant to show [Mr.] Hileman's intent at time that he was committing these acts; that they do have probative value that is not substantially outweighed by any prejudicial value." (Tr., p.32, Ls.20-25.)

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(Tr., p.37, L.25 – p.38, L.21.) At trial, Detective Sean Stace testified to Mr. Hileman's statements, stating,

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> When I asked what kind of scenarios, he talked about wrestling, that he had had thoughts about possibly grabbing breasts because that was an issue for him but, because of that, he keep[s] his distance and tries to stay out of those scenarios.

(Trial Tr., p.212, Ls.2-11.) A recording of the interview was also admitted into evidence. (Trial Tr., p.218, Ls.8-9; State's Exhibit 2.)

Mr. Hileman submits that the district court erred because, while intent is relevant, the probative value of this evidence is entirely dependent upon its tendency to demonstrate the his propensity to engage in such behavior. *See Grist*, 147 Idaho at 54. The State did not assert, and there is no evidence, that Mr. Hileman was referring to any of the alleged victims in this case when he discussed the inappropriate thoughts he had had earlier. This evidence only demonstrates intent with regard to the current charges if the fact that Mr. Hileman had inappropriate thoughts in the past meant that he had inappropriate thoughts with regard to the alleged victims in this case. This is the definition of propensity and nothing more than the disapproved-of unstated premise of Moore - "[i]f he did it before, he probably did it this time as well." *Id.* at 52. In this case, the premise is, "if he had intent before, he probably did this time as well." This is, therefore, evidence whose probative value is entirely dependent upon propensity, and the district court erred by admitting the State's proposed evidence.

D. Even If Relevant, The Prejudice Of This Evidence Substantially Outweighed Any Potential Probative Value

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 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). 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).

Evidence of 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 (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 as it did nothing more than to demonstrate that Mr. Hileman was a person of bad character. Evidence is unfairly prejudicial when it suggests a decision on an improper basis. *See State v. Pokorney*, 149 Idaho 459, 465 (Ct. App. 2010). Deciding a case based upon the defendant's character, as opposed to the conduct that gives rise to the charges, is what I.R.E. 404(b) is designed to prevent. Mr. Hileman therefore asserts that the district court erred by concluding that the probative value of the evidence was not substantially outweighed by unfair prejudice.

CONCLUSION

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

DATED this 22nd day of January, 2014.

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT COURT JUDGE
E-MAILED BRIEF

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ADA COUNTY PUBLIC DEFENDER'S OFFICE
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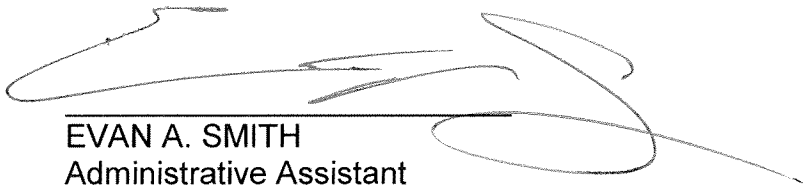

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