7-11-2008

State v. Parmer Appellant's Brief Dckt. 33721

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO **Plaintiff-Respondent,** **v.** **JAMES ZANE PARMER,** **Defendant-Appellant.**	**Supreme Court Case No. 33721**

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
In and For the County of Ada

The Honorable Joel D. Horton
Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

James Zane Parmer appeals from the Fourth Judicial District Court's Judgment of Conviction and Sentence entered on October 23, 2006. Mr. Parmer asserts that the district court erred in several respects. First, the district court erred when it granted in part the State's motions *in limine* to permit prior bad acts testimony in the State's case-in-chief. Second, the district court erred by permitting a witness who sat through the first trial testimony to testify in the second trial, in violation of the court's prior exclusion order. Finally, the district court erred in prohibiting the defense from introducing any testimony in the second trial relating to the investigating officer's interrogation of Mr. Parmer.

B. Course of Proceedings

Mr. Parmer was charged by indictment on January 10, 2006, in the Fourth Judicial District Court, County of Ada, State of Idaho, with a single count of Lewd Conduct with a Minor Under Sixteen, a felony, pursuant to Idaho Code § 18-1508. (R., pp.8-9.) The Indictment accused Mr. Parmer of committing a lewd act on K.R., a 14-year-old female, "by manual to genital contact with the intent to appeal to the sexual desires of the Defendant and/or said minor child." (R., p.8.) The first trial resulted in a mistrial due to a deadlocked jury. (R., p.141.) The matter was tried to a second jury in August 2006, and a guilty verdict was returned. (R., p.271.) Mr. Parmer was sentenced to a unified 20-year's imprisonment, with seven years fixed. (R., pp.281-283.) The Judgment of Conviction was entered on October 23, 2006, and on December 4, 2006, Mr. Parmer filed a timely notice of appeal. (R., pp.281-289.)

C. Statement of the Facts

The charge against Mr. Parmer arose out of events taking place on or about December 29, 2005, at Mountain Land Physical Therapy in Boise, during a physical therapy appointment wherein Mr. Parmer was treating K.R. for leg pain. (Trial Tr., p.212, L.24 – p.214, L.8; p.216, Ls.4-8; p.974, L.6 – p.976, L.5.)[1] K.R.'s physical therapy services included massage and exercise training. (Trial Tr., p.966, L.17 – p.968, L.9.) K.R. had been referred to Mr. Parmer for physical therapy as a result of recurring migraine headaches. (Trial Tr., p.964, L.6 – p.965, L.8.) Mr. Parmer treated K.R. twice a week starting in the fall of 2005 and ending on December 29, 2005. (Trial Tr., p.965, Ls.4-8; p.966, Ls.17-19; p.977, Ls.20-23.) Throughout the period, Mr. Parmer provided K.R. massages as part of treatment, which K.R. testified helped her migraine headaches. (Trial Tr., p.974, Ls. 13-17.) During the December 29, 2005 visit, K.R. complained to Mr. Parmer that she was experiencing pain in her thighs and inner thighs. (Trial Tr., p.975, Ls.8-19; p.981, Ls.5-12.)

K.R. testified that she disrobed to a gown and underwear, and then got under a blanket on the massage table. (Trial Tr., p.979, Ls.3-9.) Before starting the massage, K.R. testified that Mr. Parmer told her about a new device for massaging the head, and placed it on her head so she could try it. (Trial Tr., p.979, L.22 – p.980, L.15.) K.R. testified that several people were in and out of the room during the session. (Trial Tr., p.982, L.8 – p.983, L.6.) She testified that at some

[1] The Reporter's Transcript in this case consists of four separate volumes. For ease of reference and clarity, the hearings will be identified by the proceeding which took place and the date of that proceeding. Because both the first and second trial transcripts are, with the exception of the first day of the second trial, consecutively numbered, the trial transcripts will be cited herein as "Trial Tr.", while the first day of the second trial will be cited to as "8/21/06 Trial Tr."

point during the session, Mr. Parmer placed a vibrator on her vaginal area and put his finger inside her vagina. (Trial Tr., p.983, Ls.15-17.) Specifically, K.R. testified that Mr. Parmer placed the vibrator on her clitoris, but at that time she thought it was over the top of her underwear. (Trial Tr., p.984, Ls.5-9.) According to K.R.'s testimony, Mr. Parmer then used the vibrator to move her underwear to the side in order to gain access to her vagina with his fingers. (Trial Tr., p.984, Ls.10-20.) She testified that Mr. Parmer placed the vibrator back and forth between her thigh and clitoris several times, but put his finger inside her vagina once. (Trial Tr., p.985, L.12 – p.987, L.13.) When the session was over, Mr. Parmer left the room and K.R. got dressed. (Trial Tr., p.989, Ls.7-14.) Mr. Parmer returned and showed her some stretches, and then gave her a hug before she left the office. (Trial Tr., p.989, L. 15 – p.990, L.15.) K.R. testified that during the period she was treated by Mr. Parmer, he would work with her full body, including her head, neck, shoulders, back and legs. (Trial Tr., p.1003, L.15 – p.1005, L.24.)

1. Confrontation Call and Police Interview

K.R.'s allegations were reported to the Boise City Police, and a confrontation call was placed by K.R. to Mr. Parmer on the morning of December 30, 2005, and recorded by Officer Gilbert. (Trial Tr., p.1109, L.9 – p.1114, L.9.) The confrontation call was offered by the State and received into evidence at both trials. (Trial Tr., p.379, Ls.2-18; p.1114, L.9 – p.1116, L.6.) During the confrontation call neither K.R. nor Mr. Parmer mentioned anything about Mr. Parmer putting his fingers inside her vagina. (Trial Tr., p.1118, L.20 – p.1119, L.13.) Upon completion of the confrontation call, Officer Gilbert made contact with Mr. Parmer at Mountain Land Physical Therapy and placed him under arrest. (Trial Tr., p.1116, L.13 – p.1121, L.24.)

Mr. Parmer was taken to the county jail where Officer Gilbert interviewed him. (Trial Tr., p.386, L.4 – p.390, L.2; p.1121, Ls.12-24.)

During the first trial, the defense established through Officer Gilbert that the interview took place shortly after the confrontation call and that it was recorded. (Trial Tr., p.386, L.4 – p.390, L.2.) When the defense asked whether Mr. Parmer made an admission during the interview, the State objected on hearsay grounds and the district court sustained the objection. (Trial Tr., p.386, Ls.9-18; p.450, L.14 – p.451, L.9.) During the defense case at the first trial, Mr. Parmer testified about the statements he made during the confrontation call and about his statements made to Officer Gilbert in the interview. (Trial Tr., p.711, L.4 – p.718, L.18; p.749, L.9 – p. 750, L.19; p.824, L.24 – p.826, L.17; p.843, L.9 – p.847, L.20.)

Prior to the second trial, the State filed a motion *in limine* seeking to exclude Officer Gilbert's recorded interview with Mr. Parmer. (R., p.315, Conf. Exs. 7-8.) The district court granted the motion on I.R.E. 412 grounds, precluding the defense from offering into evidence or even making reference to Mr. Parmer's statements during the interview with Officer Gilbert. (R., pp.148-152; 08/02/06 Motion *In Limine* Tr., p.37, L.14 – p.40, L.21.)

During the second trial, the defense attempted to establish that Officer Gilbert interviewed Mr. Parmer at the jail shortly after the confrontation call took place, but was not permitted to explore that area due to the district court's prior *in limine* ruling. (Trial Tr., p.1118, L.15 – p.1122, L.18; p.1816, L.4 – p.1817, L.24.) The district court also prevented the defense from explaining Mr. Parmer's statements during the confrontation call by reference to his statements to Officer Gilbert in the interview. (Trial Tr., p.1812, L.14 – p.1817, L.4.)

2. I.R.E. 404(b) Witnesses

On March 10, 2006, the State filed a Notice of Intent to Use 404(b) Evidence ("Notice of Intent"), summarizing the anticipated testimony of eight females of various ages who each alleged various prior bad acts committed by Mr. Parmer. (R., p.315, Conf. Ex. 2.) The State also submitted a motion *in limine* and supporting brief requesting a pretrial order allowing the use of the anticipated testimony outlined in the Notice of Intent. (R., p.315, Conf. Exs. 3-4.) A hearing was held on the State's motion *in limine* on March 28, 2006, where the court heard arguments from counsel but did not hear any evidence. (3/28/06 Motion *in Limine* Tr., pp.6-31 *passim.*) The district court decided the motion on the State's proffers contained in the Notice of Intent, the motion *in limine* and supporting brief, and the oral representations of the prosecutor at the hearing. (3/28/06 Motion *in Limine* Tr., pp.6-31 *passim.*)

At the hearing, the State argued that the 404(b) evidence should be allowed because the defense was anticipated to be a lack of intent, accident, or mistake, and the 404(b) evidence bolstered the credibility of the victim and showed a common scheme or plan. (3/28/06 Motion *in Limine* Tr., p.8, L.3 – p.9, L.24; p.18, Ls.9-21; p.22, Ls.15-25.) The district court found the State's offer of proof sufficient to allow the testimony to be admitted:

> I am satisfied that, based upon the State's offer that there's more than adequate showing that, under the guise of whether it was characterized as a massage or physical therapy, that the defendant is engaging in otherwise legitimate contact with the apparent purpose of engaging in inappropriate sexual contact.

(3/28/06 Motion *in Limine* Tr., p.25, Ls.3-10.) On the basis of the State's proffer, the district court granted the State's request, excluding only one of the eight witnesses identified to provide

I.R.E. 404(b) evidence. (3/10/06 Motion *in Limine* Tr., p.23, L.1 – p.26, L.13.) The proffered testimony and the actual trial testimony of each I.R.E. 404(b) witness is set forth below.[2]

Gigi Caleway – In its Notice of Intent, the State proffered that Ms. Caleway would testify that Mr. Parmer had inappropriately touched her breast during a massage in 1988 when she was 16 years old. (R., p.315, Conf. Ex. 2.) The facts underlying the proffer were that Ms. Caleway and two friends were invited to a local gym in Salmon, Idaho, where Mr. Parmer worked, to use the hot tub after hours. At some point, Mr. Parmer offered to give her a massage and she accepted. During the massage, Mr. Parmer attempted to massage her stomach, massaged her buttocks and shoulders, and when he was told to stop, Mr. Parmer told Ms. Caleway to roll over, which would expose her breasts as they were not covered. Ms. Caleway complied, at which point Mr. Parmer massaged her shoulders and then her bare breast.

At the first trial, however, Ms. Caleway testified that Mr. Parmer, while on the table straddling her, "started to kind of caress around the side, and when it got uncomfortable when he felt my breasts then I was annoyed and told him to stop." (Trial Tr., p.240, Ls.6-16.) She was asked how Mr. Parmer was positioned when he felt her breast:

> Q. Where was he when he was doing this [massaging her neck, shoulders and back].
> A. At first he was just kind of off to the side, but then at one point he was on the table. And I know it's kind of weird, and so I started to get increasingly uncomfortable.
> Q. How did he get on the table?
> A. I don't know, because I was laying there. You know how you are kind of unaware.

[2] All facts relating to the proposed testimony of each I.R.E. 404(b) witness are taken directly from the State's Notice of Intent, and accompanying motions and memoranda, unless otherwise specified.

Q. How was his body on the table?
A. He was straddling me. On my back.
Q. Where was he sitting?
A. Well, I think his knees were probably the pressure on the table. I don't recall if he was actually touching me or using my butt as a seat or anything like that.

(Trial Tr., p.239, L.22 – p.240, L.11.) During the second trial, Ms. Caleway was asked:

Q. How was he sitting on you?
A. As far as the massage?
Q. As far as his body?
A. Yeah, I think he was sitting on my buttocks. I was just really uncomfortable from that point on.

(Trial Tr., p.1156, Ls.5-14.) Ms. Caleway also testified that Mr. Parmer "did the normal massage things. And then at times he would creep around to the side, and try to fondle my breasts." (Trial Tr., p.1157, Ls.1-3.)

Carol Floyd-Hooper – In its Notice of Intent, the State proffered that Ms. Hooper would testify that she was treated at the Boise YMCA by Mr. Parmer in 1999 for neck pain. (R., p.315, Conf. Ex. 2.) She was 42 years old at that time. During her last session, she was receiving a massage when Mr. Parmer had her roll over. He massaged her neck and then her breasts. "The defendant then rubbed Carol's vagina with his hand and sucked on her toes. The defendant then took off his shirt and pulled her into a seated position and pressed his groin up against her bare groin. Carol could feel his penis through his pants." Ms. Hooper testified in both trials that she had three sessions with Mr. Parmer, and that during the third massage he pressed his mouth against her breast and put his hand inside her vagina. (Trial Tr., p.267, L.4 – p.269, L.25; p.1233, L.10 – p.1236, L.12.)

Kandy Moore – In its Notice of Intent, the State proffered that Ms. Moore would testify about events taking place in 2000 at the Boise YMCA when she was 28 years old. (R., p.315, Conf. Ex. 2.) Ms. Moore would testify that "during several sessions, the defendant would brush her vagina with his hand during the massages. Ms. Moore will testify that during one massage, when the defendant touched her vagina, she sexually climaxed." She "talked with the defendant about her marriage being strained and the stress of her daughter recently being diagnosed with cancer" and was told by Mr. Parmer that he and his wife lived "separate lives." In addition, Ms. Moore would testify that she was talking with Mr. Parmer when he took her face in his hand and French kissed her, and "that she was shocked and left very quickly." During another session, Mr. Parmer told her to roll over, and when she did, she saw him watching her through the reflection in a mirror. At her last session, Ms. Moore was receiving a massage when Mr. Parmer kissed her, brushed his hand against her labia "causing her to become aroused," started rubbing her vagina, and then got up onto the massage table next to her.

Ms. Moore testified at the first trial that during her first treatment session, she wore her underwear and Mr. Parmer's fingers bumped against her underwear while he massaged her leg. (Trial Tr., p.283, L.7 – p.284, L.13; p.286, Ls.1-10.) She testified that "[w]hen he was rubbing the leg and in the front, I am trying to explain this, just a few of his fingers would rub underneath the underwear in the front, in vaginal area, but I felt like it wasn't on purpose." (Trial Tr., p.286, Ls.1-10.) At every subsequent session, Ms. Moore decided to remove her underwear for the massage. (Trial Tr., p.285, Ls.13-20.) When asked how many sessions she had before the session "where it went beyond a massage," she testified: "I think there were two times." (Trial

Tr., p.285 L.21 – p.286, L.1.) She also testified that "the first one I felt it was, when I left there, it was all me. After that when I did not wear underwear the next time it got very – I – I am sorry, this is very embarrassing." (Trial Tr., p.286, Ls.14-18.) She stated "I had my underwear on the first time, the next time it happened I had nothing on." (Trial Tr., p.287, Ls.10-12.) Ms. Moore then described a massage session when Mr. Parmer masturbated her, got on the table and they kissed. (Trial Tr., p.288, L.4 – p.289, L.10.) She also testified that during her six months of treatment, she engaged Mr. Parmer in email conversations and that she wanted a relationship with Mr. Parmer. (Trial Tr., p.290, L.8 – p.292, L.16; p.296, Ls.7-25.) When asked on cross-examination whether the "alleged incident" took place during her last session with Mr. Parmer, Ms. Moore responded that "There were several incidences throughout my treatment. The last was the most sexual." (Trial Tr., p.294, Ls.2-10.)

In contrast, at the second trial, Ms. Moore testified that during her first sessions with Mr. Parmer, she did not receive massages: "A massage was later. It wasn't the very first visit, no." (Trial Tr., p.1066, Ls.16-23.) During the first massage, when Mr. Parmer's fingers were bumping up against her underwear, she testified that she was embarrassed because she had been sexually aroused to the point of orgasm by the incidental touching of her labia, and that when she returned to work, she joked about it with a coworker. (Trial Tr., p.1105, Ls.1-18.) She further testified that at a subsequent massage session, Mr. Parmer had gotten on the massage table next to her, but added new testimony that he was also engaging in "dry sex" with her while they were kissing. (Trial Tr., p.1081, Ls.11-17.) She was then asked if she went back to Mr. Parmer for

treatment after the massage she had just testified about, and she testified: "No, that was the last time I was treated." (Trial Tr., p.1083, Ls.7-10.)

Brooke Ourada – In its Notice of Intent, the State proffered that Ms. Ourada would testify she was 23 years old in 2000 when she worked at the Boise Downtown YWCA as a personal trainer. (R., p.315, Conf. Ex. 2.) She was a runner and had suffered a hamstring injury and was treated by Mr. Parmer as a professional courtesy on one occasion. During a massage, Mr. Parmer brushed against her vagina with his fingers several times, directed her to roll onto her back, and when she did, he looked at her nude body. He massaged her inner thigh and again brushed against her vaginal area. Ms. Ourada left and did not return for further treatment after that one session. At both trials, Ms. Ourada testified consistently with the information set forth in the State's proffer. (Trial Tr., p.308, L.11 – p.312, L.14; p.1292, L.9 – p.1298, L.19.)

Cindy Provence – In its Notice of Intent, the State proffered that Ms. Provence would testify that when she was 27 years old, in 2000 or 2001, she sought treatment from Mr. Parmer at the YMCA for a nerve problem located in her right buttock. (R., p.315, Conf. Ex. 2.) On her first visit, she kept her bra and underwear on and wore a gown; she laid down on her stomach while Mr. Parmer massaged her right buttock area. During one of the initial sessions, he "massaged her buttock and then moved his hand down between her legs in her vaginal area." He did not leave his hand there long, but it was long enough to make her uncomfortable. She returned to the Downtown Boise YMCA for approximately 20 sessions with Mr. Parmer after that incident and, thereafter, was never touched inappropriately by Mr. Parmer during those sessions.

At the first and second trials, Ms. Provence testified that all her treatment sessions with Mr. Parmer were at the YMCA in Meridian. (Trial Tr., p.251, Ls.22-24; p.1132, Ls.9-11.) When she was asked whether anything ever happened during her first session with Mr. Parmer that made her uncomfortable, she said yes. (Trial Tr., p.252, Ls.9-25; p.1133, L.6 – p.1135, L.7.) She testified that his hand moved down her lower buttock toward the inner thigh but that his hand did **not** touch her vaginal area. (Trial Tr., p.253, Ls.19-21; p.1134, L.24 – p.1135, L.2.) When she squirmed, he moved his hand back to the upper buttock area. (Trial Tr., p.253, L.3 – p.254, L.3; p.1134, Ls.17-23.) At the initial session, Ms. Provence testified that she was wearing thong underwear, but that at each of the almost 20 sessions to follow she wore underwear that "would cover my whole bottom." (Trial Tr., p.254, Ls.6-18; p.1135, Ls.8-12.) She testified that after the initial session, nothing ever occurred that made her uncomfortable or that she believed to be inappropriate. (Trial Tr., p.254, Ls.17-21; p.1137, L.14 – p.1138, L.2.) Notably, the State represented to the district court at the Motion *in Limine* hearing that Mr. Parmer put his hand in Ms. Provence's vaginal area. (3/28/06 Motion *in Limine* Tr., p.17, Ls.22-25.)

Jennifer Harris – In its Notice of Intent, the State proffered that Ms. Harris would testify that she was treated by Mr. Parmer in 2005 when she was 27 years old. (R., p.315, Conf. Ex. 2.) Ms. Harris would state that she was told to disrobe and put on a gown, but that she could leave her shorts on. She laid down on a massage table and Mr. Parmer massaged her neck and back muscles. Mr. Parmer would place his hand down the back side of her shorts and massage her buttocks, and up the leg opening of her "jean shorts" and massage her leg muscles. At the second to last of her sessions with Mr. Parmer, he massaged between her breasts.

At the first and second trials, Ms. Harris testified that she started seeing Mr. Parmer at Mountain Land in 2005 after she suffered whiplash in a motor vehicle accident. (Trial Tr., p.331, Ls.4-11; p.1267, Ls.18-24.) She was asked in the first trial whether anything happened out of the ordinary during the first couple of treatments by Mr. Parmer, and she answered "No." (Trial Tr., p.332, Ls.3-6.) Ms. Harris testified in both trials that after the first few treatments, at one of the following sessions, Mr. Parmer massaged her buttocks by pushing his hands under her shorts and massaged her legs by putting his hands up the legs of the shorts. (Trial Tr., p.332, Ls.12-20; p.1269, Ls.8-10.) She also testified that while massaging her buttocks, his thumb came "really close to my crotch, between my thighs." (Trial Tr., p.335, Ls.6-11; p.1272, Ls.6-12; p.1276, Ls.8-13.) At one of the last sessions, while she was lying on her back, Mr. Parmer was massaging her neck when he ran his hand between her breasts. (Trial Tr., p.335, L.19 – p.336, L.1; p.1272, Ls.13-25.)

3. Decision on I.R.E. 404(b) Witnesses Identified In State's First Notice of Intent

On March 28, 2006, the State's Motion *in Limine* relating to the I.R.E. 404(b) witnesses was argued and the district court granted the motion with respect to all witnesses except Ms. Burley. (3/28/06 Motion *in Limine* Tr., p.26, Ls.1-13.) While the district court heard argument, no evidentiary hearing was held and no other evidence was presented. Defense counsel sought to continue the trial in order to permit him further time to investigate the witnesses, but that motion was denied, and Mr. Parmer's initial counsel, Mr. Hackney, withdrew shortly afterwards for health reasons. (R., pp.29-32.) Attorney Darren Carr took over the defense of Mr. Parmer. (R., pp.37-38.)

At a hearing on July 5, 2006, it was represented by attorneys for both parties that the State was made aware of additional I.R.E. 404(b) witnesses, but would not be calling them to testify. (07/05/06 Hrg. Tr., p.5, L.1 – p.6, L.6.) The district court granted the defendant's motion to exclude any witnesses that were not disclosed prior to trial. (07/05/06 Hrg. Tr., p.6, Ls.1-6.) At a July 19, 2006 hearing, the parties stipulated to the entry of an exclusionary order pursuant to I.R.E. 615, which the district court ordered. (07/19/06 Hrg. Tr., p.9, L.19 – p.10, L.9.)

4. The Second Notice of Intent to Call Additional I.R.E. 404(b) Witnesses

After the first trial resulted in a mistrial when the jury could not reach a verdict, the State filed a Second Motion *in Limine*, a supporting brief, and a Second Notice of Intent to Use 404(b) Evidence ("2nd Notice of Intent"). (R., p.315, Conf. Exs. 6-8.) In the 2nd Notice of Intent, the State identified Keri Burley, whom the district court previously ordered could not testify, and added the names of Patricia Fery and Trisha Cleveland as witnesses the State anticipated would testify to prior bad acts of the defendant. (R., p.315, Conf. Ex. 6.) The proffered and actual testimony of these witnesses is set forth below.[3]

Patricia Fery – In its 2nd Notice of Intent, the State proffered that Patricia Fery would testify that she received physical therapy from Mr. Parmer at the Boise YMCA, and that during her treatment, Mr. Parmer performed oral sex on her. (R., p. 315, Conf. Ex. 6.) At the second trial, Ms. Fery testified that she was 42 years old, married and had three children. (Trial Tr.,

[3] All facts relating to the proposed testimony of these witnesses is taken directly from the State's 2nd Notice of Intent, and all supporting motions and memoranda, unless otherwise specified. Because Keri Burley was not allowed to testify at either trial pursuant to the district court's order, her proffered testimony is not addressed.

p.1245, Ls.17-23.) She testified that she had served as a director on the YMCA board for nine years. (Trial Tr., p.1247, Ls.4-20.)

Ms. Fery testified she began physical therapy with Mr. Parmer in May of 2002 and that her last treatment was in July 2002, during which period she saw Mr. Parmer two times a week. (Trial Tr., p.1248, L.10 – p.1249, L.9.) She began seeing Mr. Parmer for a shoulder injury. (Trial Tr., p.1248, Ls.10-12.) During a massage session, she testified that Mr. Parmer brushed his hand across her breasts and then across her labia. (Trial Tr., p.1255, Ls.5-8.) She further testified that Mr. Parmer then moved to the end of the table and began performing oral and digital sex on her, and in response, she pulled away and questioned him as to what was going on. (Trial Tr., p.1255, L.13 – p.1256, L.5.) According to Ms. Fery, Mr. Parmer left the room at that point. (Trial Tr., p.1256, Ls.16-17.)

Trisha Cleveland – In its 2nd Notice of Intent, the State proffered that Ms. Cleveland would testify she was treated by Mr. Parmer at the Downtown Boise YMCA in 2002, and that in the first session, Mr. Parmer asked if he could check her chakras, or the energy fields of the body. (R., p.315, Conf. Ex. 6.) In doing so, Mr. Parmer moved his hand between her breasts, over her abdominal area and just above her pubic area, and then explained that "this area represented relationships, sex, and creativity. She will testify that the defendant spent a lot of time rubbing her groin." During the third session, Mr. Parmer rubbed her groin, fondled her breasts and kissed her. During the fourth session, Mr. Parmer ran his finger under Ms. Cleveland's underwear and made contact with her genitals. During the next session, Mr. Parmer pressed his penis against Ms. Cleveland while massaging her back, and then started

kissing her and fondling her breasts. He then removed her underwear and performed oral sex on her and digitally penetrated her. In the next session, Mr. Parmer disrobed and Ms Cleveland commented that he was not wearing LDS garments, to which Mr. Parmer stated he was not active in the LDS church. Ms. Cleveland then put her mouth up to Mr. Parmer's penis to engage in oral copulation, but Mr. Parmer's penis then lost its erection.

Ms. Cleveland left a note for Mr. Parmer on his car that read: "Dear J, I have given this a lot of though (sic) and don't think I can go on with this anymore. I am not good at being a rat and need to not see you anymore. I hope you understand. I thank you for what you have taught me and I wish you well. Signed T." She returned for another session the next morning due to a migraine headache, at which point they discussed the note she had left. At that session, she sought to "get to the bottom of his intentions." Thereafter, Ms. Cleveland "told her husband what she had done," and called Mr. Parmer to warn him of that fact. Ms. Cleveland's treatment ended in October 2002. Ms. Cleveland then submitted a written statement to the Idaho State Board of Medicine, reported the situation to the Boise City Police, and sued the defendant. (R., p.315, Conf. Ex. 6.)

During the second trial, Ms. Cleveland testified that she first saw Mr. Parmer at the Downtown Boise YMCA in August of 2002 for migraine headaches and continued seeing him several times per week until October 10, 2002. (Trial Tr., p.1174, L.6 – p.1176, L.17; p.1207, Ls.13-15.) At the first appointment, she testified Mr. Parmer discussed with her the concept of chakras or energy fields of the body, and explained three areas to her as he placed his hand on each of the three areas: between her breasts, on her abdomen, and on her pubic bone. (Trial Tr.,

p.1177, Ls.3-25.) She testified about another session where Mr. Parmer started running his fingers into her underwear and told her she needed to be woken up sexually. (Trial Tr., p.1180, Ls.20-23.) At that point, Mr. Parmer came around to the top of the table and started fondling her breasts. (Trial Tr., p.1181, Ls.16-19.) She then got dressed and left. (Trial Tr., p.1182, Ls.1-4.) She called him afterwards and asked why he had done what he had, to which he responded by stating that he felt a connection with her and "[he] wanted to be a good thing." (Trial Tr., p.1182, L.19 – p.1183, L.3.) She went back for another session where she discussed the prior situation with him again, told him she was not attracted to him, and saw him as merely a friend. (Trial Tr., p.1185, Ls.7-15.) That session took place in the treatment room, and at one point, she testified, Mr. Parmer was up on the table massaging her back and started rubbing his penis on her bottom. (Trial Tr., p.1188, Ls.10-25.) She testified that she was able to roll over, and that when she did, he started kissing her and fondling her breasts. (Trial Tr., p.1189, Ls.1-12.) He then pulled her underwear off and performed oral sex on her. (Trial Tr., p.1189, L.25 – p.1190, L.1.) Ms. Cleveland testified that Mr. Parmer's assistant, Janet, returned to the room at that point and Mr. Parmer stopped. (Trial Tr., p.1190, Ls.6-14.)

The next appointment took place in the massage room and Ms. Cleveland disrobed of everything but her underwear and got under the sheet on the table. (Trial Tr., p.1192, Ls.11-18.) Ms. Cleveland brought up the prior situation with Mr. Parmer, and at some point the two kissed. (Trial Tr., p.1192, L.19 – p.1193, L.10.) She then directed Mr. Parmer to remove his clothes and he did. (Trial Tr., p.1193, Ls.13-14.) She testified that she commented that he was not wearing LDS garments and he told her that he was not active in the church. (Trial Tr., p.1193, Ls.19-25.)

Once he completely disrobed, Mr. Parmer got on the table and Ms. Cleveland was kissing him while moving down toward his penis. (Trial Tr., p.1194, Ls.2-5.) She testified that as she did so, "what had been erect was now completely not." (Trial Tr., p.1194, Ls.2-5.) She asked him about it and he responded that it was about control. (Trial Tr., p.1194, Ls.9-10.) She testified that she brought up sex and he responded that that would not happen between them. (Trial Tr., p.1194, Ls.14-15.) At that point, she testified that Janet knocked on the door so she got up and got dressed. (Trial Tr., p.1194, L.21 – p.1195, L.9.)

Ms. Cleveland continued to go to Mr. Parmer for treatment, and during those sessions the two kissed and discussed their relationship. (Trial Tr., p.1195, L.25 – p.1198, L.4.) She testified that she left him a note on his car that told him she could not continue seeing him. (Trial Tr., p.1198, Ls.19-24.) She called his home, she testified, but could not recall when it was. (Trial Tr., p.1199, Ls.4-6.) Sometime after leaving the note on his car, Ms. Cleveland had a severe migraine and called Mr. Parmer's office to be seen on an emergency basis. (Trial Tr., p.1199, L.10 – p.1200, L.7.) During that session, she testified that Mr. Parmer apologized and stated that he had intended to be a good thing for her but it had gone wrong. (Trial Tr., p.1200, L.22 – p.1201, L.5.) She testified that the following Monday she called and invited Mr. Parmer to lunch so they could talk about what was happening between them. (Trial Tr., p.1202, Ls.10-19.) Mr. Parmer declined the lunch invitation, invited her to Yoga, and at some point in the conversation, after Ms. Cleveland explained that she needed clarification, Mr. Parmer said "What is your problem? Didn't we kind of already . . . Didn't we already talk about this. [sic]" (Trial Tr., p.1203, L.15 – p.1204, L.1.) She testified that she felt he had brushed her off. (Trial Tr.,

p.1204, L.1.) When she arrived at the next appointment she brought up the situation with him again and the two had a discussion. (Trial Tr., p.1204, L.2 – p.1205, L.7.) Thereafter, she called the State Board of Medicine and put together an eight to ten page statement which she dated November 7, 2002, and submitted it to the Board. (Trial Tr., p.1206, L.22 – p.1206, L.9.) On cross-examination, Ms. Cleveland testified that she had approximately 13 sessions with Mr. Parmer and when asked about the first time Mr. Parmer touched her inappropriately, she responded: "I believe it occurred on September 10th when he had violated me for the first time, yes." (Trial Tr., p.1210, Ls.2-7.) She also testified that she joined the downtown "Y" after "all the abuse." (Trial Tr., p.1225, Ls.3-12.)

A hearing was held on August 2, 2006, on the State's Second Motion *in Limine* relating to the I.R.E. 404(b) witnesses, but no sworn testimony was taken. (08/02/06 Motion *in Limine* Tr., pp.1-41 *passim.*) The district court ruled on the basis of the State's proffer contained in the pleadings and 2nd Notice of Intent. (08/02/06 Motion *in Limine* Tr., pp.1-41 *passim;* R., p.315, Conf. Exs. 6-8.) Defense counsel argued that allowing additional 404(b) witnesses just 18 days before the second trial was scheduled to begin (August 21, 2006) was prejudicial because he did not have sufficient time to investigate the claims being made by Ms. Cleveland and Ms. Fery. (08/02/06 Motion *in Limine* Tr., p.19, Ls.3-13.) Defense counsel explained that while he received some information relating to Ms. Cleveland prior to the first trial, because the State had not included her on its witness list, he did not concentrate his efforts on her testimony. (08/02/06 Motion *in Limine* Tr., p.18, L.6 – p.23, L.16.) The State acknowledged that it had not included her on its witness list. (08/02/06 Motion *in Limine* Tr., p.20, Ls.14-17.) Defense counsel

informed the court that if it were to grant the State's 2nd Motion, the defense would need more time to prepare for trial. (8/02/06 Motion *in Limine* Tr., p.19, Ls.10-13.) Similarly, the defense explained, and the State confirmed, Ms. Fery was not previously identified on the witness list, and therefore defense counsel would be required to investigate and prepare for her testimony within the remaining days before trial. (08/02/06 Motion *in Limine* Tr., p.18, L.11 – p.20, L.13.) Defense counsel asked for additional time, but the district court did not address the request except as it related to Ms. Cleveland, denying a continuance. (08/02/06 Motion *in Limine* Tr., p.28, L.20 – p.29, L.4.)

The district court denied the State's motion *in limine* as it related to Keri Burley on the grounds that, in the district court's view, it was an "extramarital relationship with a minor child outside of the context [of] providing massage therapy, massage techniques or physical therapy." (08/02/06 Motion *in Limine* Tr., p.25, L.24 – p.26, L.1.) The district court granted the State's second motion as it related to Ms. Cleveland and Ms. Fery, on the same grounds as it had the other 404(b) witnesses in the first motion: to demonstrate motive, opportunity, intent and absence of mistake. (08/02/06 Motion *in Limine* Tr., p.27, L.11 – p.28, L.5.)

5. I.R.E. 615 Exclusion Order

During the August 2, 2006 hearing, defense counsel informed the district court that Ms. Cleveland had sat through several days of the first trial. (08/02/06 Motion *in Limine* Tr., p.23, Ls.13-16.) The court had previously entered its exclusionary order on July 19, 2006. (07/19/06 Hrg. Tr., p.9, L.22 – p.10, L.9.) The district court took no action with regard to Ms. Cleveland having sat through several days of the first trial.

II. ISSUES ON APPEAL

A. Did The District Court Commit Reversible Error By Allowing Eight Prior Bad Act Witnesses To Testify In The State's Case-In-Chief?

1. Was It Reversible Error To Relieve The State Of Its Burden To Present Some Evidence That The Defendant Had In Fact Committed Prior Bad Acts?

2. Was It Reversible Error To Allow The State To Present Prior Acts Testimony In Its Case-In-Chief When The Testimony Was Irrelevant, Not Presented For A Proper 404(b) Purpose, And Was More Prejudicial Than Probative?

3. Did The District Court Abuse Its Discretion By Permitting Ms. Cleveland To Testify Even Though She Attended Several Days Of The First Trial Testimony?

4. Was The Error Of The District Court In Granting The State's Motions *In Limine* Harmless Or Does It Require Vacating Mr. Parmer's Conviction?

B. Was It Reversible Error To Preclude The Defense From Eliciting Testimony Regarding Officer Gilbert's Interview With Mr. Parmer?

III. ARGUMENT

A. The District Court Committed Reversible Error By Allowing Eight Prior Bad Acts Witnesses To Testify In The State's Case-In-Chief

1. It was Reversible Error to Relieve the State of its Burden to Present Some Evidence that the Defendant in Fact Committed Prior Bad Acts

Mr. Parmer asserts that it was reversible error for the district court to grant the State's first and second motions *in limine*, thereby allowing the presentation of prior bad acts testimony in the State's case-in-chief in the absence of any evidentiary basis for doing so. Without some evidence, the district court had no evidentiary basis for its conclusions of law other than the State's summary of the witnesses' testimony. (3/28/06 Motion *in Limine* Tr., p.25, Ls.4-5.) In the absence of some evidence, the district court abused its discretion by relieving the State of its

burden to demonstrate that the evidence met the I.R.E. 404(b) criteria for admissibility. The same is true as to the State's second motion *in limine*. In each instance, the district court granted the State's motion even though the State failed to carry its burden.

Evidence of other crimes, wrongs, or acts is inadmissible to prove a person's character or propensity for the purpose of showing he committed the charged offense. *State v. Field*, 144 Idaho 559, 569, 165 P.3d 273, 283 (2007); I.R.E. 404(b). Prior crimes, wrongs, or acts may be admissible, however, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." I.R.E. 404(b); *Field*, 144 Idaho at 559, 165 P.3d at 273. A two-tiered analysis is used to determine such evidence's admissibility. *Field*, 144 Idaho at 559, 165 P.3d at 273. The court must first find that the evidence is relevant to a material and disputed issue concerning the charged offense. *Id.* Relevance is a matter of law and reviewed *de novo*. *Id.* If the evidence is relevant, the trial court must then determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant. *Id.* Such balancing is reviewed on appeal for an abuse of discretion. *Id.* When this Court reviews a district court's discretionary decision, it conducts a multi-tiered inquiry: first, whether the lower court rightly perceived the issue as one of discretion; second, whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and third, whether the court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

This Court has yet to explicitly state that which is implicit to the I.R.E. 404(b) analysis: there must be a factual basis for the trial court's determination. *See* I.R.E. 101(e)(1)

(inapplicability of rules to issues of fact preliminary to admissibility heard by the court); I.R.E. 104(a) (preliminary questions of fact determined by the court). Other states have expressly required a factual basis for 404(b) evidence and identified the standard of proof by which the proponent must show a factual predicate. *See Admissibility in criminal prosecution of evidence to prove other crime as affected by degree or sufficiency of the evidence*, 3 A.L.R. 784 (1919 and Supp.). The majority of states have adopted a clear and convincing standard, but others have adopted a preponderance, a sufficient evidence, or a beyond a reasonable doubt standard. *Id.* See *State v. Terrazas,* 944 P.2d 1194, 1197-98 (Ariz. 1997), for a survey of states adopting the several standards mentioned above. For example, in the federal system, such evidence is admissible on a showing that a reasonable jury could find the defendant committed the act by a preponderance of the evidence. *Huddleton v. United States*, 485 U.S. 681, 690 (1988). While no pretrial factual finding is required in the federal system, if the proponent of the evidence fails to meet the standard of proof at trial, "the trial court must instruct the jury to disregard the evidence." *Id.*

Which standard of proof should be adopted is not central to this appeal. Rather, the pertinent point is that an evidentiary foundation must be developed on the record to support the district court's legal conclusions as to admissibility. It is well-established that this Court reviews relevancy determinations, such as those in 404(b) cases, *de novo* because such determinations are questions of law, not of fact. *White v. Mock*, 140 Idaho 882, 891, 104 P.3d 356, 365 (2004) (*citing State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993)). It follows, however, that a determination of relevancy cannot be made unless there is some evidence before the court.

Where the very nature of 404(b) evidence creates a substantial risk of distorting the judicial function, *see State v. Abel*, 104 Idaho 865, 664 P.2d 772 (1983), it is particularly important that the trial court make its decision based on evidence, and not the mere offer of proof. The importance of the presentation of evidence is further heightened by the need for the trial court to determine whether the offered evidence fits the factual patterns required before 404(b) evidence may be deemed relevant. For example, whether there is a specific subgroup of identifiable individuals targeted, whether striking similarities exist, or whether the offenses were part of one continuous action against an individual. *See, e.g., Field*, 144 Idaho at 567, 165 P.3d at 281.

It should not be surprising that a good prosecutor may frame the offer of proof to meet the factual patterns this Court has determined are necessary to the relevancy determination. In that event, if the evidence is deemed relevant at pretrial, but at trial falls short of meeting the necessary elements for admissibility, a curative instruction to the jury will have little impact in terms of "un-ringing the bell." The trial court will also be hesitant to waste judicial resources by declaring a mistrial, and most often will simply give the curative instruction. Once 404(b) evidence is before the jury, however, it is particularly persuasive, prejudicial, and hard to ignore. *See Judicial Remedies for the Exposure of the Jury to "Irrelevant" Evidence*, 34 HOU. L. REV. 73, 85 n.76 (Spr. 1997) ("most lay persons realize that a person's past conduct has at least some value in predicting subsequent behavior.") (*citing State v. Wood*, 126 Idaho 241, 245, 800 P.2d 771, 775 (Ct. App. 1994) ("a leopard doesn't change its spots" reasoning is antithetical to

American law.")); *see generally,* E. Imwinkelried, 1 UNCHARGED MISCONDUCT EVIDENCE § 2: 19.

Even though the procedure used in the federal system may not be particularly effective, if the proponent of 404(b) evidence fails to meet the standard for admissibility, the judge must nevertheless instruct the jury to disregard the evidence. *Huddleton,* 485 U.S. at 690. While I.R.E. 404(b) is silent as to the procedure to be employed, it is the duty of the trial judge "to devise appropriate techniques to prevent abuse." 22 Fed. Prac. & Proc. Evid. § 5249 (2008). The district court here abandoned that duty by admitting the testimony proffered without any factual basis for doing so under I.R.E. 404(b). It was further incumbent on the district court, once the witnesses testified, to instruct the jury to disregard the testimony that did not satisfy the 404(b) criteria. The district court's abandonment of this essential duty occurred at both the March 28 and August 2, 2006 hearings when the district court permitted admission of the 404(b) witnesses and reaffirmed its earlier ruling.

It is likely the State will argue that the defendant was free to present testimony or other evidence to rebut the testimony of the 404(b) witnesses. It should be noted that it was the State's motion, and therefore its burden, to demonstrate the relevance and admissibility of the evidence it sought to admit. Furthermore, the record demonstrates the defense did not have sufficient notice to investigate and prepare for either hearing. Though the State provided notice of its intent to use 404(b) evidence, given the number of witnesses and the extensive time period over which the events were alleged to have taken place, the earliest being in 1988 (R., p.315, Conf. Ex. 2, p.1), the defense did not have a sufficient opportunity to investigate before the March 28,

2006 hearing. The Notice of Intent was filed on March 10, 2006, and the reports supporting the witnesses' allegations were provided on March 9, 2006. (R., p.315, Conf. Ex. 2, p.7.) At a March 23, 2006 hearing, defense counsel informed the district court that substantial investigation into the 404(b) witness issues would be required, and that investigation had yet to be accomplished. (3/23/06 Motion *in Limine* Tr., p.2, L.5 – p.3, L.3.) The matter was continued five days, at which time defense counsel informed the district court that contact information for all of the 404(b) witnesses had been provided by the State *that day*. (3/28/06 Motion *in Limine* Tr., p.16, Ls.14-23.) Notably, the State had redacted all contact information for each witness from the reports provided to defense counsel on March 9, 2006. (3/28/06 Motion *in Limine* Tr., p.16, Ls.14-23.)

Nevertheless, the district court proceeded with the hearing, without the benefit of a factual record upon which to base its legal conclusions, and determined that seven of the eight witnesses could testify in the State's case-in-chief. (3/28/06 Motion *in Limine* Tr., p.23, L.1 – p.25, L.13.) After the district court rendered its ruling, the defense sought to vacate and reset the trial to allow time to prepare to meet the proffered trial testimony of the seven witnesses. (3/28/06 Motion *in Limine* Tr., p.26, L.19 – p.30, L.25.) Defense counsel explained to the district court that each of the 404(b) witnesses presented a situation that required "a separate kind of minitrial within a trial," which would involve substantial investigation. (3/28/06 Motion *in Limine* Tr., p.27, Ls.1-13.) Defense counsel then clarified that it had just received the Notice of Intent on March 10, 2006, just 18 days prior to the hearing and 48 days before trial, which was insufficient time to investigate and prepare to meet the allegations of the seven 404(b) witnesses.

(3/28/06 Motion *in Limine* Tr., p.26, L.19 – p.30, L.25.) The district court, nevertheless, denied the motion to vacate the trial date then set for April 27, 2006. (3/28/06 Motion *in Limine* Tr., p.30, Ls.5-25.) After a change in counsel, the trial was reset for July 20, 2006. (R., pp.121-22.)

As to the initial 404(b) witnesses identified in the State's Notice of Intent, six testified at the first trial: Gigi Caleway, Cindy Provence, Carol Hooper, Kandy Moore, Brooke Ourada, and Jennifer Harris. (Trial Tr., pp.233-248; pp.249-260; pp.261-278, pp.279-299.) Significant variances existed between the representations in the Notice of Intent and what several of the witnesses testified to at trial.

As to Ms. Caleway, her testimony varied from the Notice of Intent in several respects: The Notice of Intent represented that Mr. Parmer told her to roll over and expose her bare breasts and, when she complied, Mr. Parmer fondled her breasts. (R., p.315, Conf. Ex. 2, p.2.) Her testimony at trial was that she was face down on the massage table when Mr. Parmer "felt my breasts" from the side. (Trial Tr., p.239, Ls.10-11; p.240, Ls.13-16.) In the second trial, her testimony varied further in that she never testified that Mr. Parmer actually touched her breasts but instead that he only tried to do so. (Trial Tr., p.1157, Ls.1-3.) Had a pretrial evidentiary hearing taken place, it is likely that it would have been revealed that Mr. Parmer did not fondle Ms. Caleway's breast as stated in the Notice of Intent. It would have also been revealed that Mr. Parmer did not massage her buttocks, but "was kinda around my buttocks too." (Trial Tr., p.241, Ls.19-20.)

As to Ms. Provence, her testimony also varied substantially from the Notice of Intent. While the Notice of Intent stated that Mr. Parmer put his hand in her vaginal area, she testified

that that never occurred. (R., p. 315, Conf. Ex. 2, p.6; Trial Tr., p.253, Ls.19-21; p.1134, L.24 – p.1135, L.2.) At the March 28, 2006 hearing, the prosecutor made the same representation to the district court as it did in its Notice of Intent. (3/28/06 Motion *in Limine* Tr., p.17, Ls.22-25.) Ms. Provence testified that Mr. Parmer massaged her buttocks area, the area being treated, and that as he massaged her, his hands moved toward her inner thigh area. (Trial Tr., p.253, Ls.19-21; p.1134, L.24 – p.1135, L.2.) While she said that made her uncomfortable, Ms. Provence testified that it was the only time she felt uncomfortable during the almost 20 treatments she had with Mr. Parmer. (Trial Tr., p.254, Ls.17-21; p.1137, L.14 – p.1138, L.2.)

As to Ms. Hooper, her testimony varied from what was stated in the Notice of Intent by the absence of any testimony regarding her toes being sucked on, or Mr. Parmer massaging her breasts. (R., p.315, Conf. Ex. 2, pp.3-4; Trial Tr., p.267, L.4 – p.269, L.25; p.1233, L.10 – p.1236, L.12.)

As to Ms. Moore, her testimony in the first and the second trial varied substantially from what was stated in the Notice of Intent. (R., p.315, Conf. Ex. 2, pp.4-5; Trial Tr., p.283, L.7 – p.294, L.10; p.1066, L.16 – p.1105, L.18.) Taken as a whole, Ms. Moore's testimony described a consensual sexual relationship in which she was an active participant. While it may have been unprofessional of Mr. Parmer to engage in such a relationship with one of his patients, it was neither criminal nor similar to the charged offense. The variance of Ms. Moore's testimony from the Notice of Intent was so extensive as to be misleading.

As to Ms. Ourada, she testified fairly consistently with what was stated in the Notice of Intent. The one exception was that she testified about a second event where her breasts were

exposed to Mr. Parmer, and that event was not disclosed in the Notice of Intent. (R., p.315, Conf. Ex. 2, p.5; Trial Tr., p.311, Ls.13-23.)

As to Jennifer Harris, like Ms. Ourada, she testified fairly consistently with what was stated in the Notice of Intent. The one exception was that she testified about Mr. Parmer's thumb getting "really close to my crotch" during the massage, which was not disclosed in the Notice of Intent. (R., p.315, Conf. Ex. 2, p.5; Trial Tr., p.335, Ls.6-11; p.1272, Ls.6-12; p.1276, Ls.8-13.)

With regard to the testimony of Ms. Caleway, Ms. Provence, and Ms. Moore, the variance between their testimony and the Notice of Intent was so substantial as to render their testimony inadmissible under I.R.E. 404(b). Nevertheless, the district court abandoned its gatekeeper function and instructed the jury that it could consider each of these witnesses' testimony. (Trial Tr., p.1062, L.21 – p.1063, L.7.) Once the district court heard the testimony and was aware that it did not satisfy the 404(b) criteria, it was plain error to not instruct the jury to disregard the testimony.

The State's Second Notice of Intent identified two additional 404(b) witnesses: Patricia Fery and Trish Cleveland. (R., p.315, Conf. Ex. 6, pp.3-5.) A hearing was held on August 2, 2006, where the State again presented no evidence. (08/02/06 Motion *in Limine* Tr., pp.1-41 *passim*.) The district court granted the State's second motion *in limine* as to these two witnesses on the same grounds as it had with the first group. (08/02/06 Motion *in Limine* Tr., p.27, L.11 – p.28, L.5.) At that point, the defense sought to vacate the trial in order to have time to prepare to meet the new 404(b) evidence, but the district court denied the motion. (08/02/06 Motion *in*

Limine Tr., p.28, L.20 – p.29, L.4.) Denial of the motion to vacate significantly prejudiced the defense's ability to investigate and prepare to meet the testimony of Ms. Cleveland and Ms. Fery, and amounted to an abuse of discretion. For that reason alone, this Court should reverse and remand for a new trial.

The variance between the State's proffers and what the witnesses actually testified to exemplifies the prejudicial impact of a district court relying upon an unsupported offer of proof to determine the admissibility of 404(b) evidence. Mr. Parmer's defense was highly prejudiced by the granting of the State's motions *in limine* without the presentation of some evidence of what the witnesses would actually say at trial, as opposed to an investigator's or the prosecutor's unsupported interpretations of what the witnesses would say. The district court's error and abuse of discretion in admitting the 404(b) witnesses without knowing what the witnesses would say was compounded at trial by the district court's failure to exclude, strike or properly instruct the jury when the witnesses' testimony failed to meet the 404(b) criteria for admissibility.

It was therefore reversible error for the district court to grant the State's motions *in limine* and allow prior bad acts evidence to be presented in the State's case-in-chief without a factual basis for its legal conclusion that the evidence was admissible. For this reason, this Court should reverse and remand for a new trial.

2. It was Reversible Error to Allow the State to Present Prior Acts Testimony in its Case-In-Chief when the Testimony was Irrelevant, Not Presented for a Proper 404(b) Purpose, and was More Prejudicial Than Probative

The district court committed reversible error by permitting the State to present prior acts testimony through eight witnesses during its case-in-chief "for the purposes of showing a common scheme or plan, or absence of mistake, or absence of accident" and intent. (3/28/06 Motion *in Limine* Tr., p.26, Ls.1-13; 8/02/06 Motion *in Limine* Tr., p.27, L.11 – p.28, L.5.) While "[e]vidence of other acts to prove character of a person is generally inadmissible to show that person committed the crime for which he is charged[,]" *State v. Cardell*, 132 Idaho 217, 218, 970 P.2d 10, 11 (1999), it may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* I.R.E. 404(b). This Court has previously held that corroboration of a minor victim's testimony in a sex case may be a permissible purpose under I.R.E. 404(b) for admitting prior acts evidence. *See, e.g., State v. Cross*, 132 Idaho 667, 670-71, 978 P.2d 227, 230-31 (1999). Most recently, however, this Court acknowledged that there are limits to the use of such evidence, even in sex crime prosecutions involving minors:

> In sex crime prosecutions involving minors, the admission of uncharged deviant sexual misconduct has in many cases been "difficult to square ... with the character evidence prohibition." D. Craig Lewis, *Idaho Trial Handbook*, § 13.9 (1995). The explanation may "be found in the unstated belief that sexual deviancy is a character trait of especially powerful probative value for predicting a defendant's behavior, and that relaxation of the propensity evidence ban is warranted in these cases." *Id.* Nonetheless, there must be limits to the use of bad acts evidence to show a common scheme or plan in sexual abuse cases.

State v. Field, 144 Idaho 559, 569-70, 165 P.3d 273, 283-84 (2007).

(i) Common Scheme or Plan

The district court erred in this case when it determined the prior acts testimony tended to demonstrate a common scheme or plan. (3/28/06 Motion *in Limine* Tr., p.24, L.25 – p.25, L.18; 8/2/06 Motion *in Limine* Tr., p.27, L.11 – p.28, L.5.) In *Field*, 144 Idaho at 559, 165 P.3d at 273, this Court discussed what elements were necessary to find a common scheme or plan, pursuant to Rule 8 of the Idaho Criminal Rules, to justify the joinder of offenses. This Court held that the district court erred in joining two charges under I.C.R. 8 that involved different victims. *Id.* The Court noted that the facts that both girls resided in the same home temporarily, the abuse occurred in the defendant's home, and the abuse began as innocent touching, were insufficient to demonstrate a common plan or scheme. *Id.* In fact, the Court observed that there was an absence of striking similarities to connect the two offenses: the two girls were different ages, the sexual contact was different, and two years separated the two incidents. *Id.* In analyzing the joinder issue, this Court informed the analysis by reference to its 404(b) cases involving common scheme or plan. *Id.*

> Idaho cases affirming the use of bad acts evidence in sexual misconduct cases focus on prior conduct that was actual sexual abuse and that was either similar abuse or involved victims of similar ages to those abused.

Field, 144 Idaho at 569, 165 P.3d at 283. "There must be a causal relation or logical and natural connection between the two acts, or they must form parts of but one transaction." *State v. Stoddard*, 105 Idaho 533, 536, 670 P.2d 1318, 1321 (Ct. App. 1983) (*quoting State v. Garney*, 45

Idaho 768, 775, 265 P. 668, 670 (1928); *citing State v. Jones*, 62 Idaho 552, 561, 113 P.2d 1106, 1109 (1941)). Prior act evidence can only be admitted to show a common scheme or plan when two acts are so related to each other that the proof of one tends to prove the other. *Id.* (*citing State v. Abel*, 104 Idaho 865, 664 P.2d 772 (1983); *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979); *State v. Wrenn*, 99 Idaho 506, 584 P.2d 1231 (1978); *State v. Boothe*, 103 Idaho 187, 646 P.2d 429 (Ct. App. 1982)).

Here, the 404(b) testimony failed to satisfy the criteria for admissibility to prove a common scheme or plan. There were at least three witnesses who testified that their relationship with Mr. Parmer, and the contact between them, was consensual—though it may have been professionally untenable in the situations of Ms. Cleveland and Ms. Moore. Ms. Provence's testimony is particularly troubling in this regard, because she testified that although she was made uncomfortable on one occasion, Mr. Parmer never sexually abused her in any way. (Trial Tr., p.252, Ls.9-25; p.1133, L.6 – p.1135, L.7; p.254, Ls.17-21; p.1137, L.14 – p.1138, L.2.)

The absence of sexual abuse in the testimony of Ms. Cleveland, Ms. Provence, and Ms. Moore rendered the evidence inadmissible for the purpose of demonstrating a common scheme or plan. To be relevant, the prior act must be a wrong similar to that charged. *Field*, 144 Idaho at 569, 165 P.3d at 283. Here, both the State and the district court equated Mr. Parmer engaging in unprofessional conduct with consenting adult women, with the charged criminal activity. On this basis alone, it was error to admit their testimony.

Additionally, of all the 404(b) witnesses, only Ms. Caleway was similar in age to K.R. at the time of the alleged event in 1988. Her testimony, however, was not similar to that alleged by

K.R. Ms. Caleway testified that while Mr. Parmer tried to touch her breasts, he never actually made contact with them. The only commonality between the two appears to be that each act took place while Mr. Parmer was giving them a massage. However, even on this point, Ms. Caleway acknowledged she had not sought treatment from Mr. Parmer because he was not a therapist at the time. (Trial Tr., p.239, Ls.15-18; p.1152, Ls.10-19; p.1153, Ls.7-11.)

There is also a substantial disparity among the ages of the various 404(b) witnesses and K.R. at the time of the alleged acts. Ms. Hooper was 42 years old in 1999. Ms. Moore was 28 years old in 2000. Ms. Ourada was 23 years old in 2000. Ms. Provence was 27 years old in 2000 or 2001. Ms. Harris was 27 years old in 2005. Ms. Fery was 42 years old in 2002. Ms. Cleveland did not testify to her age but she had been married for 16 years in 2002. The disparity in the ages of these women compared to 14-year-old K.R. strongly suggests that, if anything, the targeted group did not include K.R. The district court stated as much: "Indeed, the type of 404(b) evidence that the Court permitted in the first trial of this case very much undercuts the theory that the defendant is a pedophile attracted to adolescent females." (08/02/06 Motion *in Limine* Tr., p. 25, Ls.9-13.)

There is also substantial variance between the witnesses' testimony as to where they were inappropriately touched. Ms. Galloway testified Mr. Parmer massaged around her buttocks and tried to touch her breasts. Ms. Hooper testified that Mr. Parmer put his mouth on her breast and his hand inside her vagina. Ms. Moore described Mr. Parmer bumping up against her underwear, touching her vagina, kissing her, and engaging in other consensual sexual contact. Ms. Ourada testified that Mr. Parmer's fingers brushed against her vagina during the massage. Ms. Provence

testified that Mr. Parmer's hands focused on her buttocks and were moving toward her inner thigh, but did not touch her vaginal area. Ms. Harris testified that Mr. Parmer's hands would go under her shorts and underwear while he was massaging her buttocks and legs, but that his thumb was the only part of him to ever come close to touching her vaginal area. Ms. Fery testified that during her massage, Mr. Parmer's hand brushed against her breasts and labia. Ms. Cleveland testified that she had an extramarital affair with Mr. Parmer that included multiple sexualized and romantic contacts. Of these witnesses, only Ms. Hooper, Ms. Moore, Ms. Ourada, and Ms. Fery testified to contact in an area similar to that alleged by K.R. Any similarity between K.R.'s allegations and those of Ms. Moore, however, is minimal since Ms. Moore was engaged in adult consensual sexual conduct with Mr. Parmer. Thus, the 404(b) witnesses' testimony fails to demonstrate a common scheme or plan, and should have been excluded.

(ii) Absence of Mistake or Accident, and Intent

The 404(b) criteria for admitting prior acts evidence for the purpose of showing absence of mistake or accident, or intent, were also not proven or met by the State and should not have been admitted into evidence during its case-in-chief. Before prior acts evidence can be admitted to demonstrate absence of mistake or accident, or intent, it must be shown that the evidence is relevant to a material and disputed issue. *Field*, 144 Idaho at 569-70, 165 P.3d at 283-84. Here, the district court's pretrial ruling permitted the State to present all eight 404(b) witnesses in its case-in-chief, before either absence of mistake or accident, or intent, were material and disputed issues. Mistake or accident did not become an issue until Mr. Parmer testified on the last day of

the trial. It might be argued that Mr. Parmer's confrontation call statements put mistake or accident at issue, but it was the State that introduced that evidence through Officer Gilbert, who testified immediately after Ms. Moore, the State's first 404(b) witness. When Ms. Moore testified, neither mistake nor accident was substantially at issue.

In *State v. Cardell*, 132 Idaho 217, 219-20, 970 P.2d 10, 11-12 (1999), this Court upheld the use of prior acts testimony in the prosecution of a *masseuse* for sexual battery on a 16- or 17-year-old to show absences of mistake or accident. However, in that case, the prior acts evidence was excluded from the State's case-in-chief and was only allowed into evidence after the defendant testified and placed accident, mistake and lack of intent at issue. *Id.* Here, the prior acts testimony came in during the case-in-chief before mistake, accident, and intent became material issues in dispute.

Accordingly, the district court erred in permitting admission of the 404(b) witnesses' testimony to show the absence of mistake or accident, or lack of intent, when Mr. Parmer did not put these matters at issue.

(iii) I.R.E 403

The second prong of the 404(b) analysis is that if the evidence is relevant, it may only be admitted if it is more probative than prejudicial. *Field*, 144 Idaho at 569, 165 P.3d at 283.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

I.R.E. 403. Here, the probative value of the prior acts testimony was substantially outweighed by the dangers set forth in I.R.E 403. Thus, the district court abused its discretion by allowing eight witnesses to testify to prior acts that bore only slight similarity to the charged allegations.

Defense counsel objected to testimony being allowed at trial from Ms. Fery and Ms. Cleveland, stating that it was just more icing on the cake for the State. (8/2/06 Motion *in Limine* Tr., p.18, Ls.14-17.) The State's case consisted of five fact witnesses, one expert witness, and eight prior bad acts witnesses. This piling on not only resulted in a needless presentation of cumulative evidence, but also unfairly prejudiced Mr. Parmer's right to a fair trial. The testimony of Ms. Moore, Ms. Provence, Ms. Caleway, Ms. Cleveland, Ms. Hooper, Ms. Fery, Ms. Harris and Ms. Ourada, presented consecutively, could do nothing but overwhelm the jury, confuse the issues to be tried, and unfairly prejudice Mr. Parmer.

The probative value of the testimony of Ms. Cleveland, Ms. Moore, and Ms. Provence, as already discussed, was slight. Ms. Cleveland and Ms. Moore testified to consensual adult behavior. Though morally and professionally questionable on Mr. Parmer's part, the acts were not criminal, and bore little similarity to the charged offense. Doubly so for the testimony of Ms. Provence. She testified that she was seeing Mr. Parmer for treatment of pain in the right buttocks. Mr. Parmer massaged that area and, on one occasion, his hands moved toward her inner thigh but never touched her vaginal area. She testified that nothing else ever happened to make her uncomfortable. A juror would have to have been quite astute and hyper aware, given the litany of prior bad acts testimony, to hear Ms. Provence's testimony and not conclude that

Mr. Parmer had touched her inappropriately, too. It is precisely this concern that requires courts to exercise extreme caution when allowing 404(b) evidence to be presented.

The problem, as illustrated in this case, is not that the evidence is not probative; it is that it is too probative and overwhelms the trier of fact, causing him to grab for that which is most useful, most available and most dangerously common: "A leopard does not change its spots" approach is, however, antithetical to our system of justice, *see Wood*, 126 Idaho at 245, 800 P.2d at 775, and undercuts the due process right of the defendant to require that the charged offense be proven beyond a reasonable doubt.

Given the highly prejudicial nature of the 404(b) testimony, in both its nature and volume, it is evident that the district court abused its discretion by not excluding some, if not all, of the 404(b) witnesses. "Discretion implies not only leeway but responsibility." MCCORMICK, HANDBOOK OF LAW OF EVIDENCE, § 190 (E. Cleary ed. 1972). Here, allowing overwhelming amounts of prior act evidence to be presented was not a responsible exercise of the judicial function. Rather, it was outside the bounds of discretion and was inconsistent with the legal standards set forth by this Court for evaluating the admissibility of 404(b) evidence. Such an abuse of discretion requires that this Court reverse Mr. Parmer's conviction and remand his case for a new trial free of inadmissible 404(b) evidence.

3. The District Court Abused its Discretion by Permitting Ms. Cleveland to Testify Even Though She Attended Several Days of the First Trial

The district court abused its discretion by allowing Ms. Cleveland to testify at the second trial even though she previously attended the first trial, listening to several days of testimony.

Furthermore, the district court abused its discretion when it failed to consider Ms. Cleveland's attendance at the first trial as an important factor weighing on the I.R.E. 403 determination of whether the probative value of her testimony outweighed the danger of unfair prejudice.

On July 19, 2006, immediately before the first trial, the district court issued an order excluding all prospective witnesses from the courtroom and precluding prospective witnesses from receiving any information of any nature regarding other witnesses' testimony. The court then directed all counsel to "notify their prospective witnesses of the order of exclusion and that violation of the order will be punished by contempt." (7/19/06 Hrg. Tr., p.9, L.22 – p.10, L.9.)

Then, during the August 2, 2006 hearing on the State's second motion *in limine*, the defense objected to the State's motion *in limine* as it related to the testimony of Ms. Cleveland on the grounds that she had sat through several days of testimony during the first trial. (8/2/06 Hrg. Tr., p.23, Ls.14-16.) Despite defense counsel having raised the issue, the district court took no action and did not address the matter in any way. At a minimum, once aware of the information, the court had a duty to diligently inquire into whether Ms. Cleveland's attendance at the first trial might taint her offered testimony in the second trial. *See* AM. JUR. TRIAL § 182 (court has duty to diligently inquire into allegations of sequestration order violation). It was additionally an abuse of discretion for the district court to not consider in its I.R.E. 403 analysis that the probative value of Ms. Cleveland's testimony and the danger of unfair prejudice may have been impacted by the possible tainting of her testimony. The district court's failure to either make inquiry or consider this information demonstrates that it failed to perceive the issue before it as one of discretion. *See McDaniel v. Inland Northwest Renal Care Group*, 144 Idaho 219, 221-22,

159 P.3d 856, 858-59 (2007) (consideration in abuse of discretion analysis is whether the issue was perceived as one of discretion).

It does not appear that the district court properly perceived the violation of the exclusionary order as bearing upon the I.R.E. 403 discretionary determination of whether the probative value of Ms. Cleveland's testimony outweighed the danger of unfair prejudice. Her exposure to the testimony presented in the first trial likely diminished the probative value of her offered testimony, and should have been one of the factors considered by the court. The heightened risk that, consciously or unconsciously, her testimony could be tainted to conform to the other witnesses' testimony was a factor that should have entered into the court's assessment of the danger of unfair prejudice. *Slaathaug v. Allstate*, 132 Idaho 705, 709, 979 P.2d 107, 111 (1999) (purpose of rule is to avoid witnesses shaping their testimony intentionally or unintentionally). Evidentiary rules like I.R.E. 615(a) are an acknowledgement "that exclusion is one means to reduce the possibility of a witness shaping his testimony to conform with or to rebut prior testimony of others." *State v. Ralls,* 111 Idaho 485, 487, 725 P.2d 190, 192 (Ct. App. 1986), citing *United States v. Ell,* 718 F.2d 291 (9th Cir. 1983).

A court's failure to perceive an issue before it as one of discretion, and whether a decision was reached in an exercise of reason, are factors this Court considers in determining whether a trial court has abused its discretion. *McDaniel*, 144 Idaho at 221-22, 159 P.3d at 858-59. Here, the district court was informed by defense counsel of the issue involving Ms. Cleveland's testimony and it appears to have failed to perceive this information as relating to both the exclusionary order and the I.R.E. 403 determination before it. The fact that the court

did not address the issue in any manner strongly suggests that it failed to consider the issue in its I.R.E. 403 determination as to whether her prior acts testimony should be allowed in the State's case-in-chief.

Normally, it would be the defendant's burden to demonstrate how the presence of a witness in violation of an exclusionary order "may have been tainted by the witness's exposure in the courtroom to other testimony." *State v. Cardell*, 132 Idaho 217, 221, 970 P.2d 10, 14 (1999). However, in this case, where defense counsel apprised the court of the situation in the context of the court's I.R.E. 403 discretionary determination, it is a sufficient showing of prejudice that the court failed to consider that this witness may pose a greater danger of unfair prejudice due to the fact that she had sat through days of witness testimony during the first trial.

Furthermore, it is just this type of issue that underscores the importance of conducting a pretrial evidentiary hearing when a trial court is called upon to rule on the admissibility of prior acts testimony. Where the district court in this case ruled on the State's motions *in limine* without first requiring the State to present any evidence, whether in the form of live testimony or sworn affidavits or other comparable evidence, defense counsel had no opportunity to develop the record in a manner that would reveal whether Ms. Cleveland's testimony was tainted by her observations of other witnesses' testimony.

For these reasons, it was an abuse of discretion for the district court to grant the State's motion *in limine* allowing Ms. Cleveland's prior acts testimony. The district court's abuse of discretion requires the reversal of Mr. Parmer's conviction, and remand for further proceedings.

4. The Error of the District Court in Granting the State's Motions *In Limine* Was Not Harmless

The error of allowing the State to present inadmissible I.R.E. 404(b) evidence in its case-in-chief was not harmless. The jury in the first trial was unable to reach a verdict, while the jury in the second trial reached a guilty verdict only after the district court allowed additional I.R.E. 404(b) testimony. To find harmless the error of admitting the I.R.E. 404(b) testimony of eight witnesses in the State's case-in-chief would ignore everything appellate courts have said, in opinion after opinion, warning of the danger of prior bad acts testimony in criminal trials. "To hold an error harmless, this Court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of contributed to the conviction." *State v. Sheldon*, --- P.3d ---, 2008 WL 216302, *5 (Idaho Supreme Court, January 28, 2008). Here, where the evidence complained of was highly prejudicial 404(b) testimony in a case where there was not overwhelming evidence of guilt, this Court cannot say beyond a reasonable doubt that there is no reasonable possibility that the 404(b) testimony contributed to Mr. Parmer's conviction. Accordingly, Mr. Parmer's conviction should be vacated and the case remanded for a new trial.

(i) Fundamental Error

Should this Court find that defense counsel failed to preserve the issues argued on appeal, a fundamental error analysis should be undertaken. Under the fundamental error analysis, Mr. Parmer's conviction should be vacated and the case remanded for a new trial since the volume and nature of the I.R.E. 404(b) evidence allowed at trial was extensive. The district

court permitted eight prior act witnesses to testify. By comparison, there were only six witnesses who testified in the State's case-in-chief about matters involving the alleged victim. The district court's ruling, allowing all eight 404(b) witnesses to testify in the State's case-in-chief, was so far out of synch with basic reason, fairness and fundamental justice as to deny Mr. Parmer his due process right to a fair trial. The 404(b) evidence presented at trial simply overwhelmed all other evidence presented. The district court's admission of prior acts in such volume and variable nature so profoundly distorted the trial that it produced manifest injustice and deprived Mr. Parmer of his fundamental right to due process. *See State v. Hickman*, --- P.3d ----, 2008 WL 1837505, *3 (Idaho Supreme Court, April 25, 2008) ("Error is fundamental if it 'so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process.'") (*State v. Anderson*, 144 Idaho 743, ---, 170 P.3d 886, 891 (2007)).

(ii) Cumulative Error

While Mr. Parmer asserts that his conviction should be vacated if this Court finds in his favor on any of the issues argued on appeal, if this Court finds any one or more errors of the district court was harmless, a cumulative error analysis should be undertaken. The "cumulative error doctrine requires reversal when there is 'an accumulation of irregularities, each of which itself might be harmless, but when aggregated, the errors show the absence of a fair trial, in contravention of the defendant's constitutional right to due process.'" *State v. Field*, 144 Idaho 559, 572-73, 165 P.3d 273, 286-87 (2007) (*quoting State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998)).

For all the reasons stated herein, Mr. Parmer was denied a fair trial and this Court should vacate his conviction and remand for a new trial.

B. It Was Reversible Error To Preclude The Defense From Eliciting Testimony Regarding Officer Gilbert's Interview With Mr. Parmer

The district court erred by precluding the defense from eliciting testimony regarding Officer Gilbert's interview with Mr. Parmer, or otherwise publishing the recording of the interview to the jury. (R., p.315, Conf. Ex. 7; 08/02/06 Tr., p.37, L.14 – p.38, L.7.)[4] The district court erred in sustaining the State's hearsay objections to questions relating to Mr. Parmer's statements to Officer Gilbert, made during the interview, that defense counsel sought to elicit in order to explain the context of statements Mr. Parmer made during the confrontation call with K.R. Pursuant to I.R.E. 106, the interview was not barred by the hearsay rules:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Id. Here, the statements Mr. Parmer gave during his interview with Officer Gilbert were in response to the contents of the confrontation call with K.R. The confrontation call immediately preceded the interview with Officer Gilbert. Because Mr. Parmer's statements to Officer Gilbert were recorded and provided an essential background and context for Mr. Parmer's statements during the confrontation call, they are statements which were so closely related that, in fairness, they should have been considered contemporaneously with the confrontation call statements.

[4] While Mr. Parmer believes the transcript provides a sufficient record on which this issue may be decided, he has moved by motion to augment to include in the record the audiotape of the confrontation call, (Ex.2, Tr. p.1115), and the video recording of the interview with Officer Gilbert.

The Idaho Supreme Court has addressed the scope of I.R.E. 106 in the criminal context in two cases. First, in *State v. Fain,* 116 Idaho 82, 86, 774 P.2d 252, 256 (1989), *cert. denied*, 493 US 917 (1989), this Court considered whether the district court erred in denying the defendant's request to admit the entire transcribed interview between himself and a police officer who testified at trial. The State did not seek to admit the interview at trial, but simply asked the officer to recount his recollection of part of the interview. *Id.* In seeking admission of the entire interview, the defendant did not limit his request to those portions of the transcribed interview "which explained, qualified or were relevant to that part of the conversation regarding which [the officer] testified." *Id.* Had the defendant done so, the Court concluded that "[s]uch limited portions would have been admissible under then existing Idaho evidentiary practice, which practice is now articulated in Idaho Rule of Evidence 106[.]" *Id.* Because defense counsel had not limited his request for admission to only those statements "which might be relevant in the context of [the officer's] testimony," this Court found no error in the district court's refusal to admit the entirety of the taped interview or the tapes themselves. *Id.*

Later, in *State v. Bingham*, 124 Idaho 698, 699, 864 P.2d 144, 145 (1993), this Court considered whether the district court erred in admitting at trial the entirety of the alleged victim's CARES (Children At Risk Evaluation Services) interview, at the prosecution's request. The prosecution sought introduction of the entire CARES interview on the basis that the interview provided context to the alleged victim's inconsistent statements during cross-examination and that admission of the entire interview would show the statements were not actually inconsistent. *Id.* This Court concluded that I.R.E. 106 governed the admissibility of the CARES interview, as

opposed to I.R.E. 801(d)(1)(B), which governs prior consistent statements. *Id.* In applying I.R.E. 106 to the CARES interview, this Court held that "the entire videotape should not have been admitted under I.R.E. 106." *Id.* Specifically, this Court cited to its prior decision in *Fain,* 116 Idaho at 86, 774 P.2d at 256, and held that the State's failure to tailor its request for admission of particular portions of the CARES interview that were relevant in the context of the cross-examination statements made by the alleged victim at trial "resulted in the admission of patently prejudicial and irrelevant evidence which accompanied the jury even into deliberations. Thus, the videotape's admission cannot be justified under I.R.E. 106." *Bingham,* 124 Idaho at 700, 864 P.2d at 146.

Here, defense counsel limited its request for the admission of statements Mr. Parmer made to Officer Gilbert which provided context to and the necessary background for understanding the statements Mr. Parmer made during the confrontation call with K.R. Because the entirety of the confrontation call was admitted as evidence during the second trial, which resulted in Mr. Parmer's conviction, the statements sought to be admitted by the defense were broad. Nevertheless, Mr. Parmer's statements to Officer Gilbert were based almost entirely upon the confrontation call with K.R. and were necessary to give context to the confrontation call statements Mr. Parmer made. Moreover, it was vitally important for the jury to know that Mr. Parmer's statements during the interview with Officer Gilbert were immediately preceded by the confrontation call. This information was necessary to explain and qualify Mr. Parmer's confrontation call statements, and was relevant to the entirety of the confrontation call. The

statements excluded by the district court are precisely the type of statements this Court deemed admissible under I.R.E. 106 in both *Fain* and *Bingham*.

In fairness, Mr. Parmer's statements during the interview with Officer Gilbert should have been admitted contemporaneously to the confrontation call tape being admitted, pursuant to I.R.E. 106. The district court's refusal to allow admission of Mr. Parmer's interview statements was highly prejudicial, particularly where those statements provided explanations for and qualifications of statements Mr. Parmer made during the confrontation call. In essence, Mr. Parmer's statements during the confrontation call and during his interview with Officer Gilbert were so intertwined and interrelated, one could not be fairly considered without reference to the other. The refusal to permit defense counsel to delve into the interview statements allowed the confrontation call statements to go unchallenged and unexplained, thereby precluding the jury from having any legitimate basis to assess Mr. Parmer's credibility and determine the proper weight to give to the confrontation call evidence. Given the fact that Mr. Parmer's conviction hinged on the jury's determination of credibility, where there was no physical evidence, such an error was devastating to Mr. Parmer's defense.

Furthermore, it was err to sustain the State's hearsay objection when the plain language of I.R.E. 801(d)(1)(B) renders Mr. Parmer's statements to Officer Gilbert during the interview non-hearsay. When Mr. Parmer testified, his prior statements were not hearsay because I.R.E. 801(d)(1)(B) permits the introduction of such statements when they are "consistent with declarant's testimony and [are] offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, ..." *Id.* Throughout the trial the State

repeatedly suggested Mr. Parmer's testimony and explanations for the events of December 29, 2005 were recently fabricated by him for the purposes of trial. Had the district not incorrectly perceived the testimony of Mr. Parmer relating to his prior statements as hearsay, the jury would have been in a position to assess Mr. Parmer's credibility. Without the prior consistent statements, however, the jury would have been, and likely was, left with the distinct impression that Mr. Parmer was not credible because he was saying at trial what he had not said on the confrontation call. Without the context of the interview with Officer Gilbert, Mr. Parmer's statements in the confrontation call and at trial appeared inconsistent. It was therefore prejudicial error for the district court to sustain the State's hearsay objections once the State had made the implicit and explicit charge of recent fabrication.

For these reasons, the district court's error in refusing to admit Mr. Parmer's statements to Officer Gilbert under I.R.E. 106 was so prejudicial that it denied Mr. Parmer his Sixth Amendment right to confront and cross examine witnesses against him; it denied him of his Sixth Amendment right to present a defense; and it denied him his Sixth Amendment right to a fair trial. As a result, Mr. Parmer is entitled to a new trial.

IV. CONCLUSION

Based on the above argument and authority, Mr. Parmer respectfully requests that this Court vacate his Judgment of Conviction and reverse the district court's orders that permitted the presentation in the State's case-in-chief of prior bad act testimony; and reverse the district court's order that excluded any inquiry into the interview of Mr. Parmer by law enforcement.

RESPECTFULLY SUBMITTED this 11th day of July, 2008.

JONES & SWARTZ PLLC.

By
DARWIN L. OVERSON
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July, 2008, two (2) true and correct copies of the foregoing **APPELLANT'S BRIEF** were served by the method indicated, addressed as follows:

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