4-15-2015

State v. Bower Appellant's Brief 2 Dckt. 41336

SARA B. THOMAS
State Appellate Public Defender
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender
I.S.B. #6555
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. KYLE STEVEN BOWER, Defendant-Appellant.	NO. 41336 CANYON COUNTY NO. CR 2012-9274 APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Nature of the Case

Kyle Steven Bower asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2015, Unpublished Opinion No. 351 (Ct. App. February 13, 2015) (*hereinafter*, Opinion). He submits that the Opinion, which affirmed his Judgment of Conviction, is in conflict with previous decisions of the Court of Appeals and not likely in accord with applicable decisions of the Idaho Supreme Court where the Court of Appeals found that Mr. Bower's claim that the district court erred in denying his motion

to sever the charges related to two separate victims following after Mr. Bower was charged with three sex offenses.

Statement of the Facts & Course of Proceedings

Kyle Steven Bower was charged, by superseding indictment, with two counts of lewd conduct with a minor under sixteen and one count of sexual abuse of a child under sixteen. (R., pp.19-21.) The conduct charged in counts one and three was alleged to have occurred against K.B.[1] between 2011 and 2012, when she was between the ages of 13 and 14 years old; the conduct charged in count two was alleged to have occurred against J.B.[2] in 2004, when she was between the ages of 10 and 11 years old. (R., p.20.) Count one, involving K.B., alleged "manual to genital and/or genital to genital contact," while count two, involving J.B. alleged "manual to genital contact." (R., p.20.) Count three, involving K.B., alleged "manual to breast contact." (R., p.20.)

Mr. Bower filed a Motion to Sever count two from counts one and three, asserting that the facts and circumstances are "separate and apart from each other," the victims are different, the incidents were alleged to have occurred years apart, and "[h]aving these counts together will highly prejudice" Mr. Bower. (R., p.39.) The district court denied the Motion to Sever, concluding that "Defendant has failed to make a *prima facie* showing that any of the factors identified by the Idaho appellate courts as justifying severance are present in this case." (R., p.53.)

[1] K.B. is the biological daughter of Mr. Bower. (Tr., p.277, Ls.3-13.)
[2] J.B. considered Mr. Bower to be her main father figure, as her biological father was not involved in her early life, and although they never married, Mr. Bower and her mother spent nine years together. (Tr., p.485, L.19 – p.487, L.21.)

Following a jury trial, Mr. Bower was found guilty of all three counts. (Tr., p.750, L.6 – p.751, L.4.) Mr. Bower filed a timely Notice of Appeal. (R., p.295.) On appeal, Mr. Bower contended the district court erred in denying his motion to sever where it mistakenly considered the motion as one made under Idaho Criminal Rule 14, which it is in the district court's discretion to grant or deny, rather than Idaho Criminal Rule 8, which involves a legal determination of the propriety of joinder. (Appellant's Brief, pp.2-11.) The Idaho Court of Appeals found that Mr. Bower failed to present the motion to sever under I.C.R. 8, but rather that it was brought pursuant to I.C.R. 14 in the district court. (Opinion, pp.4-7.) As a result, the Court of Appeals concluded that the issue was not preserved for appellate review and affirmed the district court's order denying the motion to sever under I.C.R. 14 (Opinion, pp.6-7.)

ISSUE

Is the Idaho Court of Appeals' Opinion affirming Mr. Bower's Judgment of Conviction not likely in accord with applicable decisions of the Idaho Supreme Court and in conflict with previous decisions of the Idaho Court of Appeals?

ARGUMENT

The Idaho Court Of Appeals' Opinion Affirming Mr. Bower's Judgment Of Conviction Is Not Likely In Accord With Applicable Decisions Of The Idaho Supreme Court And Is In Conflict With Previous Decisions Of The Idaho Court Of Appeals

A. Introduction

Mr. Bower asserts that the district court committed legal error when it denied his motion to sever count two from counts one and three because they were improperly joined. In denying the motion, the district court considered the motion as one made under Idaho Criminal Rule 14, which it is in the district court's discretion to grant or deny, rather than Idaho Criminal Rule 8, which involves a legal determination of the propriety of joinder.

On appeal, Mr. Bower contends that the district court should have considered his motion to sever pursuant to I.C.R. 8. The Idaho Court of Appeals held that Mr. Bower's argument under I.C.R. 8 was not preserved for appellate review. For the reasons stated below, Mr. Bower asserts his motion to sever pursuant to I.C.R. 8 is properly before the appellate court and the district court erred in denying his motion.

B. The Idaho Court Of Appeals' Opinion Affirming Mr. Bower's Judgment Of Conviction Is Not Likely In Accord With Applicable Decisions Of The Idaho Supreme Court And Is In Conflict With Previous Decisions Of The Idaho Court Of Appeals

The Idaho Appellate Rules provide that petitions for review may be granted only "when there are special and important reasons" for doing so, but, ultimately, the decision of whether to grant a given petition lies within the sound discretion of the Supreme Court. I.A.R. 118(b). This exercise of discretion is not completely unfettered

though. Rule 118(b) lists five factors which must serve as the starting point in evaluating any petition for review:

1) Whether the Court of Appeals has decided an issue of first impression;

2) Whether the Court of Appeals' decision is inconsistent with precedent from the Idaho Supreme Court or the United States Supreme Court;

3) Whether the Court of Appeals' decision is inconsistent with its own prior decisions;

4) Whether the Court of Appeals' actions are so unusual as to call for the Supreme Courts' exercise of its supervisory authority; and

5) Whether a majority of the Court of Appeals has certified that further appellate review is desirable.

I.A.R. 118(b).

As is set forth in detail below, the Court of Appeals' Opinion in this case is not likely in accord with applicable decisions of the Idaho Supreme Court and likely in conflict with decisions of the Idaho Court of Appeals where the Court of Appeals found that Mr. Bower's trial attorney filed his motion to sever under I.C.R. 14 and not I.C.R. 8, and therefore, Mr. Bower's claim under I.C.R. 8 was not preserved for appellate review. *See State v. Sheahan*, 139 Idaho 267, 277-278 (2003) (recognizing that an issue is preserved for appellate review where the claim raised on appeal is "substantially the same" or sufficiently overlaps with the issue raised in the trial court.); *State v. Voss*, 152 Idaho 148 (Ct. App. 2011) (same).

C. If This Court Grants Mr. Bower's Petition For Review, He Asserts That The Court Of Appeals Erred In Determining That Mr. Bower's Motion To Sever Two Charges Was Not Preserved For Review

On appeal, Mr. Bower argued that "the district court committed legal error when it denied his motion to sever count two from counts one and three because they were

improperly joined. In denying the motion, the district court mistakenly considered the motion as one made under Idaho Criminal Rule 14, which it is in the district court's discretion to grant or deny, rather than Idaho Criminal Rule 8, which involves a legal determination of the propriety of joinder." (Appellant's Brief, p.2.) Mr. Bower argued that if the district court had reviewed the motion to sever under I.C.R. 8, his conviction would have been reverse and case remanded back for separate, new trials. (Appellant's Brief, pp.4-11.) The Idaho Court of Appeals affirmed the district court's order denying Mr. Bower's motion to sever. (Opinion, p.1.) The Court of Appeals concluded that Mr. Bower had not preserved his claim that his motion to sever pursuant to I.C.R. 8 should have been granted for appellate review because that claim was not raised in the district court. (Opinion, pp.4-7.) Mr. Bower asserts that the district court erred in failing to address this merits of his claim on appeal.

As a general rule, issues not raised in the lower court may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195 (1992). "Where a party appeals the decision of an intermediate appellate court, the appellant may not raise issues that are different from issues presented to the intermediate appellate court." *State v. Voss*, 152 Idaho 148, 150 Ct. App. 2011) (citing *State v. Sheahan*, 139 Idaho 267, 275 (2003)). "An issue is different if it is not substantially same or does not sufficiently overlap with an issue before the trial court." *Id.*

Mr. Bower asserts that the Idaho Court of Appeals erred in failing to consider his claim that his motion to sever pursuant to I.C.R. 8(a) should have been granted because the issues raised in his motion to sever in the trial court are substantially the same and sufficiently overlap with the claims Mr. Bower raised on direct appeal.

Idaho Criminal Rule 8(a) provides:

> Two (2) or more offenses may be charged on the same complaint, indictment or information and a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

I.C.R. 8(a). Claims brought under I.C.R. 8(a) are subject to free review by the Court. *State v. Field*, 144 Idaho 559, 565 (2007) ("Whether a court improperly joined offenses pursuant to I.C.R. 8 is a question of law, over which this Court exercises free review.") (citations omitted). Contrarily, "[p]arties properly joined under I.C.R. 8(b) may be severed under I.C.R. 14 if it appears that joint trial would be prejudicial, and the defendant has the burden of showing such prejudice." *State v. Caudill*, 109 Idaho 222, 226 (1985). Motions to sever brought pursuant to I.C.R. 14 are subjected to an abuse is discretion standard.

In his motion to sever, Mr. Bower sought to sever count two from counts one and three, asserting that the facts and circumstances are "separate and apart from each other," the victims are different, the incidents were alleged to have occurred years apart, and "[h]aving these counts together will highly prejudice" Mr. Bower. (R., p.39.) Mr. Bower acknowledges that of the four reasons for the motion to sever, one of those reasons is not subject to Rule 8 analysis, namely, "Having these counts together will highly prejudice defendant." Rather, the determination of prejudices is relevant to the review of a motion to sever brought under I.C.R. 14. However, the other three reasons for granting the motion to sever are relevant to a determination on whether to grant a motion to sever pursuant to I.C.R. 8(a), which looks to whether the offenses charged, "whether felonies or misdemeanors or both, are based on the same act or transaction or

on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan." *See* I.C.R. 8(a). Moreover, during the hearing on the motion to sever, the State cited directly cited to I.C.R. 8(a), arguing,

> Obviously, Idaho Criminal Rule 8 provides for the State to join multiple offenses in one indictment. There are - - according to Idaho Rule 8, there are a couple of different situations that must be present in order to meet that criteria. Specifically, that being that they arise from the same act or transactions, they're connected together, or they constitute part of a common scheme or plan
>
> It's the State's position in this case that, in fact, this constitutes part of a common scheme or plan and hence the reason that they were joined together.

(Tr., p.2, L.16 – p.3, L.2.) Then, in response, defense counsel for Mr. Bower distinguished the cases cited by the State. (Tr., p.8, L.10 – p.9, L.9.)

Accordingly, based on the foregoing, it is apparent that Mr. Bower's motion to sever pursuant to I.C.R. 8(a) was raised in the district court and preserved for appellate review. Alternatively, at the very least, there is substantial overlap between arguments made in support of I.C.R. 8 and I.C.R. 14 such that this Court should review the merits of Mr. Bower's I.C.R. 8 motion to sever.

D. If This Court Grants Mr. Bower's Petition For Review, He Asserts District Court Erred When It Denied Mr. Bower's Motion To Sever Because The Conduct Alleged In Count Two Was Not Based On The Same Act Or Transaction Or Part Of A "Common Scheme Or Plan" To Commit The Conduct Alleged In Counts One And Three

In *Field*, this Court explained, "Cases discussing common plans have focused on whether the offenses were one continuing action or whether the offenses have sufficient common elements including the type of sexual abuse, the circumstances under which the abuse occurred, and the age of the victims." *Field*, 144 Idaho at 565. The

defendant in *Field* was charged with having manual-to-genital contact with a seven year old girl in 2003, and having rubbed the buttocks of a 17 year old girl in 2001. *Id.* at 566. Before the district court, the State argued that joinder was appropriate because "the offenses constitute a common scheme because Field asked the individual girls to come near him, began to 'innocently' touch them and then put his hand down their pants." *Id.* On appeal, the State added an additional reason that joinder was appropriate: "that Field had a plan to take advantage of underage girls that come into his home to babysit or be babysat." *Id.*

In rejecting the State's argument and finding joinder improper under Rule 8, this Court reasoned, "the incidents occurred at different times, under different circumstances, and involved different parties with significantly different ages." *Id.* This Court further explained, "These separate acts did not constitute part of a common scheme or plan. There is nothing to show that at the time Field committed the offense against T.B. he had a plan to also commit an offense against H.P. . . . [or] against someone he would be 'babysitting' two years later." *Id.* This Court noted that while both victims were minors, they "had different ages (one was a young child, the other was almost an adult), the type of sexual contact was different (digital vaginal penetration and the rubbing of buttocks), and the incidents occurred two years apart," while the similarities, "that both girls were only temporarily in the household, that the acts occurred in Field's home, and that the abuse began with 'innocent' touching" were "insufficient to prove a common scheme or plan." *Id.* at 566-67.

Interpreting the similar Federal Criminal Rule of Procedure 8,[3] the Ninth Circuit has explained that its "common scheme or plan" language requires an examination of "whether '[c]omission of one of the offenses [ ]either depended upon [ ]or necessarily led to the commission of the other; proof of the one act [ ]either constituted [ ]or depended upon proof of the other.'" *United States v. Jawara*, 474 F.3d 565, 574 (9th Cir. 2006) (quoting *United States v. Halper*, 590 F.2d 422, 429 (2d Cir. 1978)) (brackets in original).

In *State v. Johnson*, 148 Idaho 664 (2010), interpreting the term "common scheme or plan" in assessing the admissibility of other acts evidence under Rule 404(b) in a lewd conduct prosecution, this Court provided guidance as to the meaning and scope of the term "common scheme or plan." Johnson was charged with three counts of lewd conduct, alleged to have been committed against his daughter when she was six to seven years old. *Johnson*, 148 Idaho at 666. The charges concerned allegations that Johnson had engaged the victim in manual-to-genital contact, oral-to-genital contact, and attempted sexual intercourse through genital-to-genital contact. *Id.* Over Johnson's objection, the State was allowed to introduce evidence that Johnson "had molested his younger sister when she was approximately eight years old and he was between fifteen and sixteen," with such abuse consisting mainly of "Johnson exposing himself to his sister and requesting that she expose herself to him," with one instance of manual-to-genital contact. *Id.* at 667.

---

[3] The key difference between Idaho's Rule 8 and the federal version is that the plain language of the federal rule is far more liberal, allowing for joinder when the offenses "are of the same or similar character" even if they are not based on the same act or transaction or part of a common scheme or plan. *Compare* F.R.Cr.P. 8(a) *with* I.C.R. 8(a).

This Court first acknowledged its recent decision in *Grist*, noting, "It reiterated that bad acts may only be admitted 'if relevant to prove . . . a common scheme or plan embracing the commission of two or more crimes *so related to each other* that proof of one tends to establish the other, knowledge, identity, or absence of mistake or accident.'" *Id.* at 668 (quoting *Grist*, 147 Idaho at 54-55) (emphasis in original). Summarizing its holding, this Court explained, "In other words, at a minimum, there must be evidence of a common scheme or plan beyond the bare fact that sexual misconduct has occurred with children in the past." *Id.*

In allowing the evidence to be presented, the district court had found three characteristics that provided a link between the prior acts and the pending charges: "(1) both victims were about seven to eight years old; (2) both victims viewed Johnson as an 'authority figure' because he was an older brother or father; [and] (3) both courses of conduct involved Johnson requesting the victim to touch his penis." *Id.* at 669. In finding admission of the prior acts improper, this Court explained, "These similarities, however, are sadly far too unremarkable to demonstrate a 'common scheme or plan' in Johnson's behavior. The facts that the two victims in this case are juvenile females and that Johnson is a family member are precisely what make these incidents unfortunately quite ordinary." *Id.*

In *State v. Joy*, 155 Idaho 1 (2013), this Court summarized the rule it clarified in *Grist* and affirmed in *Johnson* as follows:

> [T]o be admissible under Rule 404(b), evidence of prior misconduct must show more than a superficial similarity to the nature and details of the charged conduct, but *must instead show that the defendant's charged and uncharged conduct is linked in a way that permits the inference that the prior conduct was planned as part of a course of conduct leading up to the charged offense*.

Joy, 155 Idaho at 10 (emphasis added).

No evidence was offered that the alleged abuse of J.B. in 2004 "was planned as part of a course of conduct leading up to" the alleged abuse of K.B. in 2011 and 2012. It would be illogical to conclude that the alleged abuse in 2004 of a different victim of a different age in a different manner and with a different relationship to Mr. Bower was perpetrated in order to commit the later alleged abuse in 2011 and 2012. *See Field*, 144 Idaho at 566 ("There is nothing to show that at the time Field committed the offense against T.B. he had a plan to also commit an offense against H.P. . . . [or] against someone he would be 'babysitting' two years later").

Assuming that it is appropriate to go beyond the interpretation of the "common scheme or plan" language from Rule 8 provided by this Court in *Field*, or the similar interpretation of "common scheme or plan" for purposes of Idaho Rule of Evidence 404(b) provided by this Court in *Joy*, the factual differences and the number of years between the conduct alleged in count two and that alleged in counts one and three make it clear that joinder was legally improper. Aside from the large amount of time between the incident involving J.B. and K.B. (seven to eight years), the difference in relationships between Mr. Bower and the alleged victims (K.B. is Mr. Bower's daughter, while J.B. is the daughter of Mr. Bower's former long-term girlfriend), and the difference in the conduct alleged (one proceeded to full-blown intercourse, while the other involved manual-to-genital contact), Mr. Bower notes that the age differences between the two

alleged victims, approximately three years, especially in light of the ages that they were, compels a finding that count two was improperly joined with counts one and three.[4]

Regardless of whether it is the factual differences themselves or the lack of any evidence that the conduct alleged to have been committed against J.B. in 2004 was part of a plan to commit the charged offenses against K.B. in 2011 and 2012, the denial of Mr. Bower's motion to sever was erroneous. Mr. Bower maintains that, in light of the nature of the charges and the testimony given by both alleged victims, it will be impossible for the State to establish, beyond a reasonable doubt, that no prejudice occurred as a result of the improper joinder.[5] As such, the only appropriate remedy is for this Court to vacate the judgment of conviction, and remand this matter for new, separate trials.

---

[4] One of the victims in this case, J.B., was 10 or 11 years old, whereas the more recent victim, K.B., was 13 or 14 years old. (R., p.20.) In short, one victim was a teenager, while the other was not.

[5] The prejudice inherent in this type of case, with charges involving multiple victims improperly joined, is summed up by a review of the transcript of a portion of the examination of one member of the jury panel in *voir dire*:

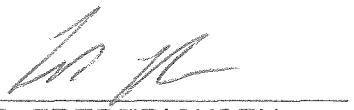
> Q. And so in a case like this, you wouldn't give Kyle a presumption of innocence?
> A. There's two victims?
> Q. Well, that's what they say.
> A. I'd have a hard time, yeah . . .
> . . .
> A. I'd just have a hard time believing somebody when two people made the same accusation.

(Tr., p.232, L.14 – p.233, L.9.)

CONCLUSION

Mr. Bower respectfully requests that this Court grant his Petition for Review. If granted, Mr. Bower respectfully requests that this Court vacate the judgment of conviction, and remand this matter for separate trials.

DATED this 15th day of April, 2015.



ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of April, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KYLE STEVEN BOWER
INMATE #107697
ISCC
PO BOX 70010
BOISE ID 83707

JUNEAL C KERRICK
DISTRICT COURT JUDGE
E-MAILED BRIEF

SCOTT FOUSER
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court

EVAN A. SMITH
Administrative Assistant

EDF/eas