4-14-2014

State v. Houser Appellant's Brief Dckt. 41540

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. ERIC LAGRANDE HOUSER Defendant/Appellant.	CORRECTED APPELLANT'S BRIEF SUPREME COURT NO. 41540 CR-12-0019216

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN STEGNER
District Judge

JOHN M. ADAMS
Kootenai County Public Defender

JAY LOGSDON
Deputy Public Defender
400 Northwest Blvd.
P.O. Box 9000

Coeur d'Alene, ID 83816

ATTORNEY FOR APPELLANT

LAWRENCE G. WASDEN
Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. ERIC LAGRANDE HOUSER Defendant/Appellant.	)	CORRECTED APPELLANT'S BRIEF SUPREME COURT NO. 41540 CR-12-0019216

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN STEGNER
District Judge

JOHN M. ADAMS
Kootenai County Public Defender

JAY LOGSDON
Deputy Public Defender
400 Northwest Blvd.
P.O. Box 9000

Coeur d'Alene, ID 83816

ATTORNEY FOR APPELLANT

LAWRENCE G. WASDEN
Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a District Court decision affirming a judgment of guilty that resulted from a jury trial. The state alleged that the defendant had violated I.C. § 18-903 by committing a battery upon Gregory Manning. The Magistrate Court heard argument and found that the defendant's drug use recent to the time of the incident was relevant and admissible. Further, the Court heard argument and found that the fact that Mr. Manning had previously been disciplined and almost fired by his employer and that his actions during the incident may have violated his employer's policies irrelevant and inadmissible even in the form of impeachment evidence. At trial, the state mischaracterized its burden during *voir dire*. During trial, the issue of drug use became a focus of the state's case, although it was never tied to the actual incident. During closing, the state once again mischaracterized its burden, attacked the defendant's credibility because he was the accused, vouched for Mr. Manning's credibility, and focused his argument on irrelevant facts in order to show that the defendant had a propensity for violence. The jury found the defendant guilty. The defendant appealed the judgment. After a hearing on August 28, 2013, District Judge John Stegner affirmed the judgment of the Magistrate Court on October 3, 2013. The defendant now appeals the District Court's ruling.

B. Course of Proceedings & Statement of Facts

Officer Kelly of the Coeur d'Alene Police Department arrested Eric Houser for battery upon Greg Manning on October 8, 2012. Tr. Vol. II, p. 169, L. 24-25, p. 170, L. 24-25, p. 171, L. 1-3, p. 197, L. 16-25, p. 198, L. 1. At the jury trial status hearing on February 25, 2013, the defendant moved the Magistrate Court for a pretrial evidentiary order excluding references to the

defendant's drug use due to irrelevance and the fact that drug use was more prejudicial than probative of the battery charge. Tr. Vol. I, p. 3, L. 20-25, p. 4. The prosecutor argued that the use of methamphetamine and marijuana would help the jury understand why the defendant was lethargic, incomprehensible, and delayed. *Id.* at p. 5, L. 6-13. The Court held that because the drugs had an effect on the defendant's behavior, it would be relevant, and denied the exclusion of evidence showing recent drug use, while excluding evidence of a history of drug use. *Id.* at p. 7, L. 14-25, p. 8, L. 1-5. The defendant also moved to have his felony convictions excluded, and the Court reserved ruling. *Id.* at p. 8-10.

A trial was conducted before a jury on February 28, 2013. During voir dire, two jurors expressed a prejudice in favor of medical personnel. *Id.* at L. 20-21, p. 35, L. 22-24. The prosecutor asked the jury whether they would be willing to find the defendant guilty if they found the evidence more convincing for the state even if there was evidence supporting the defendant. *Id.* at p. 30, L. 1-23. A juror asked if he was asking if they would find the defendant guilty even if there was proof he was not. *Id.* at p. 31, L. 2-4. The prosecutor clarified that the proper thing to do if the evidence in favor of guilt was more convincing than the evidence showing the defendant was not guilty would be to find the defendant guilty. *Id.* at p. 31, L. 13-17. Four jurors stated a prejudice against those who use illegal drugs. *Id.* at p. 43-44, p. 47, L. 1-10.

The jury was excused and the prosecutor moved the Court for an order excluding evidence of disciplinary actions taken by Mr. Manning's employer against him and the employer's policies for dealing with aggressive patients. *Id.* at p. 51, L. 5-8, p. 56, L. 15-25. The prosecutor argued that neither had any relevance to the case or Mr. Manning's credibility. *Id.* The defendant argued that the fact that Mr. Manning may have violated policy again could create

an incentive for him to lie. *Id.* at p. 58-59. The Court held that no evidence would be allowed on the issue of Mr. Manning's employment. *Id.* at p. 62, L. 13-20.

After preliminary instructions, the prosecutor opened by immediately telling the jury that the defendant used methamphetamine *Id.* at p. 74, L. 14-15.

The first witness the prosecutor called was Mr. Manning. Mr. Manning appeared in a sling. *Id.* at p. 105, L. 24-25. Mr. Manning testified that when he met Mr. Houser he was being restrained. *Id.* at p. 83, L. 3-5. He testified about the restraints. *Id.* at L. 10-19. Mr. Manning stated that the defendant was verbally aggressive. *Id.* at p. 84, L. 10-25. Mr. Manning testified that the defendant verbally attacked him and called his competency into question on multiple occasions. *Id.* at p. 86, L. 5-21, p. 87, L. 6-9, p. 90, L. 12-21.

Mr. Manning testified that at around 5:30 AM the day after the defendant arrived at the hospital, it was determined that he had no injuries or ailments. *Id.* at p. 93, L. 1-9. He testified that he then went with Craig Spoon to rouse Mr. Houser at 5:30 AM. *Id.* at p. 94, L. 8-18. He further testified that at that time the defendant had no medical conditions. *Id.* at p. 95, L. 1-2. He testified the defendant was groggy and drowsy. *Id.* at L. 14-16. Mr. Manning testified he put on the defendant's socks and did not notice anything wrong with his feet. *Id.* at p. 96, L. 18-24, p. 97, L. 2-7. He then testified he put on one of the defendant's shoes. *Id.* at 97, L. 18-19. Mr. Manning testified that halfway through putting on the shoe, the defendant kicked up at him, grabbed his other shoe and threw it at him, shouting about his blisters. *Id.* at L. 20-22. Mr. Manning testified he stood and apologized, and that the defendant slid off the bed and struck him in the face. *Id.* at L. 22-25. Mr. Manning then stated that he told the defendant to calm down and the defendant lay back on the bed and kicked at him. *Id.* at p. 98, L. 1-3. He testified that when

he was struck in the face it left a mark. *Id.* at L. 7-10. Mr. Manning testified he then called for help per policy. *Id.* at p. 100, L. 15-25. He testified that he then attempted to physically restrain the defendant, and as he did so, Mr. Spoon came and assisted. *Id.* at p. 102, L. 8-17. Mr. Manning testified that during this he injured his shoulder. *Id.* at L. 24-25, p. 103, L. 1-3. He then testified that Ken Dunlap joined in restraining the defendant, and the defendant stopped and apologized. *Id.* at p. 103, L. 15-23. Security arrived and took control of the situation. *Id.* at 109, L. 23-25.

Mr. Manning then testified that as a result of the altercation he had torn his rotator cuff and had a labrum tear in his shoulder that he had surgery on on February 6, 2013. *Id.* at p. 105-106. He had reported a number of injuries to the police, but this was not among them. *Id.* at p. 105.

During cross-examination, Mr. Manning stated that it was not unusual for patients to yell when in pain. *Id.* at p. 115, L. 1-8. Mr. Manning then testified that the defendant was on marijuana and methamphetamine:

> MEGAN MARSHALL: Um, what were the medications he was on?
>
> GREG MANNING: Uh, marijuana and methamphetamine.
>
> *Id.* at p. 123, L. 3-11.

Defense counsel objected and had the response stricken. After a few more questions from defense counsel, the Court called a recess for lunch.

Returning from lunch, defense counsel continued questioning Mr. Manning about the incident. The Court sustained an objection to defense counsel's question as to whether Mr. Manning had claimed worker's compensation for injuries he claimed to have sustained during the

incident. Tr. Vol. II, p. 135, L. 18-21. The Court sustained another objection against a question as to whether Mr. Manning could be reprimanded for violating procedures dictating how to deal with an aggressive patient. *Id.* at p. 136-137.

On redirect, the prosecutor began by asking about the restraints on the defendant. *Id.* at p. 137, L. 15-25, p. 138, L. 1-4.

After Mr. Manning was finished testifying, the prosecutor called Mr. Spoon. Mr. Spoon testified that the defendant himself had asked to be restrained. *Id.* at p. 144, L. 22-25. The prosecutor then asked more questions about the restraints. *Id.* at p. 145, L. 11-25. Mr. Spoon testified that after Mr. Manning shouted for help he heard the defendant shouting "stop." *Id.* at p. 147-148, L. 3-7. Mr. Spoon testified that he became involved in the struggle to restrain the defendant. *Id.* at p. 149-150. He testified that during the struggle the defendant was repeating "get off me." *Id.* at p. 151, L. 7-8. He then testified that security put the defendant back in restraints. *Id.* at p. 152, L. 19-24. The prosecutor then asked him to describe Mr. Manning by something "standing out about his appearance." *Id.* at p. 153, L. 22-24. Mr. Spoon stated that Mr. Manning had an arm injury and that his arm was in a sling. *Id.* at p. 153-154, L. 1-4. Defense counsel objected and moved to strike and the Court overruled the objection. *Id.* at L. 5-7.

On cross, Mr. Spoon testified that occasionally he deals with violent or aggressive patients. *Id.* at p. 157, L. 6-11.

After the attorneys were finished, the Court asked Mr. Spoon to describe the restraints used on the defendant. *Id.* at p. 168, L. 1-18.

The prosecutor then called Officer John Kelly of the Coeur d'Alene Police Department. The officer testified to talking with the defendant while he was restrained. *Id.* at p. 173-174. The officer testified to noticing large blisters on the defendant's feet. *Id.* at p. 175, L. 6-20. The prosecutor then had the officer testify in detail about the defendant's drug use. *Id.* at p. 181, L. 12-25, p. 182, L. 1-9. The prosecutor then played a short video of the defendant strapped to a gurney telling the officer what happened which became Plaintiff's Exhibit 1. *Id.* at 185-189. The prosecutor then had the officer testify that he had spoken to the defendant to ascertain the truth of what had happened and on that basis chose to charge the defendant with battery. *Id.* at p. 191-193, p. 197. The officer testified that after he arrested the defendant the defendant became upset and called Mr. Manning a liar. *Id.* at p. 198-199. The prosecutor then asked about the restraints again. *Id.* at p. 199, L. 20-25, p. 200, L. 4-8. After a few questions about a shoe on the other side of the room, the restraints were discussed again. *Id.* at 202, L. 8-18.

On cross-examination, much of the testimony was focused on the defendant's restraints. *Id.* at p. 207-208. The defendant then introduced Exhibits A, B, and C, pictures of the defendant's feet. *Id.* at p. 213.

On redirect, the officer testified as to Mr. Manning's injuries again over the defendant's objection that it was beyond the scope of the cross-examination. *Id.* at p. 220.

The prosecutor then rested. *Id.* at 221. The defendant moved for an acquittal. *Id.* at 222. The Court found that there was evidence that the defendant had kicked at Mr. Manning, thrown a shoe, sat up and struck Mr. Manning in the face, and then lay back and kicked at him. *Id.* at 225-226. The Court characterized the incident as "lashing out." *Id.* at p. 226, L. 24-25.

The defense called Carrie Ruddell. Ms. Ruddel testified that the defendant was in restraints and was agitated. *Id.* at p. 233-234. She further testified that at the time of the incident the defendant was "more than ready to go." *Id.* at p. 240, L. 6-8. On cross-examination, Ms. Ruddell testified that the defendant was trying to get loose of the men restraining him when she saw him. *Id.* at p. 241, L. 19-25.

The Court then excused the jury and held that the defendant's conviction and the nature of the conviction could be used if he testified. *Id.* at p. 245-250.

The defense called the defendant. The defendant testified that he was in the hospital due to overdosing on methamphetamine. *Id.* at p. 251, L. 21-23. He testified that he had blisters on his feet. *Id.* at p. 253. He testified that when he arrived at the hospital he was restrained because he twitches in his sleep. *Id.* at p. 253-254. He testified he was in and out of consciousness, having delusions, and yelling when he arrived in the ER room. *Id.* at p. 255. He testified that he wanted Mr. Manning removed as his nurse. *Id.* The defendant testified that at the time of the incident, he was very sleepy. *Id.* at p. 259. He testified that when Mr. Manning put on his shoe it hurt and he kicked up and away from Mr. Manning. *Id.* at p. 260. The defendant testified that Mr. Manning said "that's it," made fists and charged him. *Id.* at p. 261-262. The defendant stated he caught Mr. Manning. *Id.* at p. 262. He testified that he did not slap, kick, punch or hit Mr. Manning. *Id.* at p. 263.

On cross-examination, the defendant testified that he had taken methamphetamine the morning of the day the ambulance picked him up and took him to the hospital. *Id.* at p. 266. He testified that he does not recall how he came to be in a field where he was found. *Id.* at p. 267. He testified that he was taken out of restraints during the incident. *Id.* at p. 269. He testified that

his twitching in his sleep gets worse when he is on methamphetamines. *Id.* at p. 271. He testified that he had kicked off one shoe but that he had allowed the other to be put on his foot. *Id.* at p. 276. He testified that his kick was a reflex, but that he was conscious of doing it and could have prevented it. *Id.* at p. 277-278. He testified that he may have kicked Mr. Manning, but was confident that he had not. *Id.* at p. 278-279. He testified he was still affected by the methamphetamine at the time of the incident and while testifying at that moment. *Id.* at p. 279. He testified that he was confused as to whether he kicked Mr. Manning when he was talking to Officer Kelly. *Id.* at p. 281-282.

On redirect, the defendant clarified that by delusions he meant that he was sleepy but not actually hallucinating. *Id.* at 293.

The following day the trial resumed with the testimony of Dr. Paul Paschall. The doctor testified that the defendant was restrained when he met them but that he had the restraints removed. Tr. Vol. III, p. 305, L. 6-22. The doctor testified that the defendant was agitated but not aggressive, and seemed upset about something he had done. *Id.* at p. 310.

On cross-examination, the doctor testified that the defendant's confusion likely stemmed from his use of marijuana and methamphetamine. *Id.* at p. 313-314.

The prosecutor requested and received jury instruction Six on the intoxication defense based on ICJI 1503 over the defense's objection. *Id.* at p. 321.

After the jury heard the instructions, the prosecutor made his closing argument. *Id.* at p. 330. The prosecutor argued that the case came down to who the jury believed, Mr. Manning or the defendant. *Id.* at p. 333, L. 8-23. The prosecutor stated:

ROY GOWEY: If you think the evidence is more convincing that he didn't do it, certainly you should find him not guilty. If you feel that the evidence, however, is compelling that he did it, then even in spite of evidence to the contrary, the proper verdict would be to find him guilty.

Id. at p. 334, L. 4-9.

The prosecutor spoke for a while describing the scene after the incident where the nurses were attempting to restrain the defendant. *Id.* at p. 335-336. The prosecutor described the incident. *Id.* at p. 337. The prosecutor argued that even if the mark on Mr. Manning's knee was from bumping against the gurney during the fray, it was the defendant's fault. *Id.* at p. 337, L. 12-21. The prosecutor referred to the sling as proof of injury. *Id.* at p. 337, L. 22-25. The prosecutor described the discrepancies between the defendant and Mr. Manning's accounts of the incident. *Id.* at p. 338. The prosecutor focused for a while on whether the defendant was delusional. *Id.* at p. 339, L. 1-14. The prosecutor argued that the blisters on the defendant's feet were not obvious. *Id.* at p. 339-340. The prosecutor then told the jury that since the defendant had admitted to voluntary injecting himself methamphetamines he could not avail himself of the intoxication defense. *Id.* at p. 340, L. 13-19. The prosecutor discussed with the jury whether the kick was intentional or a reflex. *Id.* at p. 341. The prosecutor raised the issue of the defendant's dislike for Mr. Manning. *Id.* at p. 342. The prosecutor then returned to the issue of drug abuse, essentially stating that the drugs may have caused the incident. *Id.* at p. 342, L. 24-25, p. 343, L. 1-12.

The defense argued in closing that Mr. Manning's testimony was suspect. *Id.* at p. 345. The Court sustained an objection to her raising the lack of pictures of Mr. Manning's alleged injuries. *Id.* at p. 346, L. 11-17. The defense pointed out that Mr. Manning had not mentioned

his shoulder to anyone at the time of the incident. *Id.* at p. 346. The defense argued that perhaps Mr. Manning was too quick to resort to force when he might have left the room. *Id.* at p. 347. The defense stated Dr. Paschall, Nurse Ruddell, and Nurse Spoon had no problems with the defendant. *Id.* at p. 347-348. The defense ended by arguing that the only thing that occurred was the defendant's kick and that if it hit Mr. Manning it was accidental. *Id.* at p. 352.

On rebuttal, the prosecutor argued that the only reason no one else found the defendant violent was the fact that he was restrained. *Id.* at p. 352-353. The prosecutor argued that the defendant refused to talk to nurses because he thought he needed to speak to someone higher up in authority. *Id.* at p. 354, L. 12-17. The prosecutor argued that if the defendant was merely responding to Mr. Manning's restraint, he should have ceased fighting when the other nurses arrived. *Id.* at p. 355. The prosecutor argued that after being kicked, Mr. Manning was just trying to protect himself when he tried to restrain the defendant. *Id.* at p. 356. The prosecutor told the jury to try to decide who was more credible and suggested that the defendant's drug use had affected his memory. *Id.* at p. 356. The prosecutor then stated:

> ROY GOWEY: Why would the defendant say it didn't happen? Because he's charged with an offense and he doesn't wanna be convicted of it? Why would the nurse say it did happen if in fact it didn't? What would be the motivation for Greg Manning to tell you that it happened the way he testified it happened?
>
> *Id.* at p. 356, L. 24-25, p. 357, L. 1-4.

The prosecutor went on to argue "should a healthcare provider be subjected to that violence?" *Id.* at p. 357, L. 13-14. The prosecutor went on to argue again that there was no reason whatsoever for Mr. Manning to lie. *Id.* at p. 357, L. 22-25, p. 358, L. 1-18.

The jury found the defendant guilty. *Id.* at p. 361, L. 14-21. The Court then sentenced the defendant. *Id.* at p. 377-382. The defendant timely filed a notice of appeal under I.C.R. 54.1(a), *et.seq.* from the judgment of the Court.

The defendant's appeal was argued before Judge John Stegner in the District Court on August 28, 2013. On October 3, 2013, the District Court entered a Memorandum Decision affirming the judgment of the Magistrate Court. The defendant timely appealed the District Court's decision.

ISSUES ON APPEAL

I. Whether the defendant's drug use was relevant and not unfairly prejudicial to the fight that occurred with the male nurse over putting on his shoes.

II. Whether the fact that the male nurse violated hospital policy by fighting with the defendant and had previously been disciplined by the hospital was admissible impeachment evidence to show the male nurse's motive to lie about how the incident occurred.

III. Whether the prosecutor committed misconduct by unduly emphasizing irrelevant evidence and incorrectly stating the burden of proof.

IV. Whether *Perry* should be modified such that in cases involving multiple incidents of prosecutorial misconduct that went without an objection from defense counsel, an appellate court should review all the alleged misconduct to determine whether a fair trial was provided.

V. Whether the cumulative error doctrine requires the reversal of the defendant's conviction.

ARGUMENT

I.

A. Introduction

"The Due Process Clause guarantees every defendant the right to a trial comporting with basic tenets of fundamental fairness." *State v. Pearce*, 146 Idaho 241, 248 (2008). One fundamental safeguard against an unfair trial is the prohibition against propensity evidence. *State v. Pizzuto*, 119 Idaho 742 (1991), *overruled on other grounds*, *State v. Card*, 121 Idaho 425 (1991). In this case, the Magistrate Court failed to ensure the defendant a fair trial when it denied his motion to prevent evidence of drug use to become an irrelevant and prejudicial focus of the trial. This error was so fundamental as to require the reversal of the defendant's conviction.

B. Standard for Review

On review of a decision of the district court, rendered in its appellate capacity, this Court reviews that decision directly and examines the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Losser v. Bradstreet*, 145 Idaho 670, 672 (2008); *State v. DeWitt*, 145 Idaho 709, 711 (Ct. App. 2008). An appellate court exercises free review over questions of law. *Powell v. Sellers*, 130 Idaho 122, 125 (Ct. App. 1997).

The admissibility of prior bad acts is subject to a two-pronged analysis. *State v. Field*, 144 Idaho 559, 569 (2007). First, the court must determine whether the prior wrong or bad act is relevant to a material issue other than the defendant's character or propensity to commit the crime charged. *Id.* Second, the court must perform a balancing test to determine whether the probative value of the bad act is substantially outweighed by the danger of unfair prejudice. *Id.*; see also I.R.E. 403. Whether evidence is relevant is an issue of law. *State v. Johnson*, 148 Idaho 664, 667

(2010); *State v. Parmer*, 147 Idaho 210, 214 (Ct.App.2009). Therefore, when considering admission of evidence of other acts, this Court exercises free review of the trial court's relevancy determination. *Parmer*, 147 Idaho at 214. The trial court's determination regarding the danger of unfair prejudice is discretionary and will not be disturbed on appeal unless it is shown to be an abuse of discretion. *Id.*; *State v. Enno*, 119 Idaho 392, 406 (1991).

C. Drug use was not relevant to the case.

The introduction of other crimes, wrongs or bad acts is forbidden to show propensity or guilt of the crime charged. *See* I.R.E. 404(b); *Pizzuto*, 119 Idaho at 751; *State v. Winkler*, 112 Idaho 917 (Ct.App.1987).

> This exclusion is based upon the theory that such evidence induces the jury to believe the accused is more likely to have committed the charged crime because he or she is a person of bad character. It thus takes the jury away from its primary consideration, which is the defendant's guilt or innocence of the particular crime for which he or she is on trial.

State v. Shepherd, 124 Idaho 54, 55 (Ct.App. 1993) *citing Winkler*, 112 Idaho at 919.

However, evidence of unrelated bad acts may be admitted if offered for some other, permissible purpose. *See* I.R.E. 404(b); *State v. Arledge*, 119 Idaho 584 (Ct.App.1991); *Winkler*, 112 Idaho at 919-20. "To be admissible, such evidence first must be relevant to a material issue in the case." *Sheperd*, 124 Idaho at 55, *citing* I.R.E. 104(a).

In *State v. Boman*, 123 Idaho 947, 950 (Ct.App.1993) the state introduced evidence that the defendant was a drug addict to show motive for the crimes of burglary and robbery. The Court found:

> [w]e are not persuaded Anderson's testimony that Boman admitted to being a "dope addict" was relevant to a material issue or fact of consequence in the action.

> There was no other proof offered by the prosecution that Boman needed drugs or that he did not have money at the time to buy drugs. "Viewed in best light, what the prosecution was attempting here was to show that the uncharged bad acts—drug [addiction]—provided the" motive for the attempted robbery. However, a bare allegation that Boman's drug addiction is relevant to prove motive is nothing more than speculation. We believe that the court erred by admitting detective Anderson's testimony that Boman was a drug addict.

Id. citing State v. Brazzell, 118 Idaho 431, 434 (Ct.App.1990). Idaho's Courts have again and again rejected the idea that drug use is relevant in cases where drug use was not part and parcel of the incident. *See State v. Coleman*, 152 Idaho 872, 875-76 (Ct.App.2012) (drug use irrelevant to show grooming in child molestation case); *State v. Erickson*, 148 Idaho 679, 683-84 (Ct.App.2010) (drug use properly held irrelevant by district court in pretrial order, prosecutorial misconduct for state to ask question that introduced the issue in child molestation case).

In this case, the defendant's drug use was never tied to the incident. In fact, the witnesses for the state testified that at the time of the incident, the defendant was medically sound. Tr. Vol. I, p. 95, L. 1-2. The defendant testified that he was still under the influence of the methamphetamine. Tr. Vol. II, p. 279. Dr. Paschall testified that this may have been a source of the defendant's confusion. Tr. Vol. III, p. 313-314. The prosecutor, despite this, stated in his closing that the defendant was intoxicated during the incident and the drugs may have caused the defendant to attack Mr. Manning. *Id.* at p. 340, L. 13-19, p. 342, L. 24-25, p. 343, L. 1-12. The District Court agreed, and went a step further by purporting that the drugs in the defendant's system went to establishing his intent. Memorandum Decision at *6. The District Court makes the valid assertion that drugs change behavior, but then makes an unjustified leap to the conclusion that the drugs in this particular defendant in this particular case were evidence of his intent to strike the nurse. *Id.* at *7. The evidence, however, did not establish any connection

between the battery and the defendant's drug use. No one testified that the defendant was more likely to be violent due to drug use, or more likely to wish to touch people without their consent. Drug use was not relevant to this case.

D. The Magistrate Court abused its discretion in finding that drug use was more probative than prejudicial in this case.

If relevant, then evidence may be admitted if its probative value is determined to outweigh its prejudicial effect. I.R.E. 403; *Arledge*, 119 Idaho at 588; *Winkler*, 112 Idaho at 920; *State v. Roach*, 109 Idaho 973 (Ct.App.1985).

Even if somehow relevant, evidence of drug use "'certainly presents a danger of unfair prejudice' because a jury could decide a case based on its judgment that a party is a bad person rather than on the merits of the case." *Jones v. Bowie Industries, Inc.*, 282 P.3d 316, 329 (Alaska 2012) *quoting Liimatta v. Vest*, 45 P.3d 310, 315 (Alaska 2002).

In this case, the prejudicial value of drug use was demonstrated by the number of jurors who stated during voir dire that they would find this fact distracting and that they do not approve of drug use. Tr. Vol. I, p. 43-44, p. 47, L. 1-10. The fact that the prosecution then referred to drug use multiple times and requested an unnecessary instruction on the intoxication defense shows that the state was aware of its prejudicial value. The District Court's conclusion that the evidence was not used for propensity purposes is squarely contradicted by the record. *Cf.* Memorandum Decision at *7 *with* Tr. Vol. I, p. 43-44, p. 47, L. 1-10, Vol. III, p. 340, L. 13-19, p. 342, L. 24-25, p. 343, L. 1-12.

E. The defendant was denied a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution and Art. I § 13 of the Idaho Constitution.

Error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171

(Ct.App.1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* To hold an error harmless, this Court must conclude, beyond a reasonable doubt, that the jury's finding of guilt "would surely not have been different absent the constitutional error." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

Injecting a trial with irrelevant, highly prejudicial evidence as to drug use has been found to be fundamental error. In *Erickson*, the Court of Appeals found that

> The State's case rested almost entirely on the child's testimony. Furthermore, the heart of Coleman's defense, and the only real issue in the case, was the intent behind his actions. Without the Rule 404(b) evidence, the only evidence of Coleman's intent was the child's testimony regarding Coleman's actions on a single occasion. As we noted above, evidence of prior misconduct in sexual abuse cases is especially prejudicial. The State argues that any prejudice was removed by the limiting instruction given to the jury. But in such cases, even with limiting instructions, there exists a high risk that a jury could convict on the deviant character of the defendant. The child's testimony at trial was sufficient to support a guilty verdict. However, given the emphasis on the other acts evidence, and particularly coupled with the expert testimony, we cannot say that it is beyond a reasonable doubt that the jury's finding would not have been different absent the error. Therefore, the district court's error was not harmless.

148 Idaho at 879, *citing Johnson*, 148 Idaho at 670; *State v. Pokorney*, 149 Idaho 459, 466 (Ct.App.2010) (finding in a lewd conduct case that, despite the district court's limiting instruction, "there was a high risk that the jury would convict Pokorney based upon propensity and sexual deviancy"). As in *Erickson*, this case came down to the credibility of Mr. Manning and the defendant. Tr. Vol. III, p. 333, L. 8-23. Rather than having the focus on the enmity between the two and the credibility of their testimony, the trial was a referendum on drug use. Tr. Vol. I, p. 43-44, p. 47, L. 1-10, p. 123, L. 3-11, Vol. II, p. 181, L. 12-25, p. 182, L. 1-9, p. 251, L. 21-23, p. 271, p. 279, Vol. III, p. 313-314, p. 340, L. 13-19, p. 340, L. 13-19, p. 342, L. 24-25, p. 343, L. 1-12, p. 356. And yet, not once was it stated that drug use had any relation to the incident

itself. The state's witnesses testified to the contrary that the defendant was well enough at the time to leave the hospital. The state went so far as to request an instruction on voluntary intoxication to ensure their ability to focus on this irrelevant and highly prejudicial evidence in their closing, in spite of the fact that nothing in the case had ever indicated that the defendant was intoxicated at the time of the incident nor had he testified to being so intoxicated as to not be in control of what he was doing. The erroneous decision to allow the focus of this battery trial to become the defendant's drug use was a direct and fundamental violation of his right to a fair trial. Without the constant emphasis on methamphetamine, there is a strong likelihood that the jury would not have convicted. Therefore, the conviction in this case must be reversed.

II.

A. Introduction

The Magistrate Court erred in finding that Mr. Manning's troubled record with his employer and the fact that he had violated policy during the incident was irrelevant as impeachment evidence. In preventing the defendant from effectively confront Mr. Manning as to his reasons for lying, the Magistrate Court denied the defendant his fundamental right to confront witnesses and to having a full and fair trial.

B. Standard of Review

On review of a decision of the district court, rendered in its appellate capacity, this Court reviews that decision directly and examines the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Losser*, 145 Idaho at 672; *DeWitt*, 145 Idaho at 711. An appellate court exercises free review over questions of law. *Powell*, 130 Idaho at 125.

Whether evidence is relevant is an issue of law. *Johnson*, 148 Idaho at 667; *Parmer*, 147 Idaho at 214. Therefore, when considering admission of evidence of other acts, an appellate court exercises free review of the trial court's relevancy determination. *Parmer*, 147 Idaho at 214.

C. Mr. Manning's previous trouble with his employer and the possibility that he had violated policy once again was proper impeachment evidence.

The Sixth Amendment confrontation clause guarantees a defendant "an opportunity for effective cross-examination." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

The accused is constitutionally entitled to explore a witness' motivation to testify against him under the Sixth Amendment of the Constitution of the United States. *Maryland v. Craig*, 497 U.S. 836 (1990). Effectively, a defendant's right of confrontation is violated when he is prohibited from pursuing areas of cross-examination that may undermine the credibility of the witness. *Olden v. Kentucky*, 488 U.S. 227 (1988).

The simple concept that a person has an interest in maintaining their employment and will have a bias or interest in the outcome of a case where the incident may effect that continued employment is well-settled in Idaho. *See Giraney v. Oregon Short Line R. Co.*, 54 Idaho 535, 33 P.2d 359, 363 (1934) (holding that it was error for court to prevent questioning as to the discharge from employment by the appellant). The issue is regularly raised for witnesses who are being paid for their testimony. *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 925 (1985). Similarly, it is constitutional error for a court to prevent the defendant from revealing a witness'

interest in procuring employment through their testimony. *Evans v. State*, 550 P.2d 830, 835-40 (Ala. 1976) (holding reversible error to prevent examination of informant's interest in having felony conviction not stand in way of his hoped for employment with police). The state often uses the defendant's interest in continuing employment as proof of motive. *See People v. Buckley*, 202 Cal.App.2d 142, 153 (Cal.App.1962). In fact, it is generally held that "the jury was entitled to know what interest, if any, the witness had in the outcome of the case." *Officer v. Cummings*, 272 P. 273, 274 (Or.1928).

> Evidence irrelevant to the issue may be material, as affecting the credibility of the witness, when it tends to show interest, prejudice, bias, or the relationship and feelings of the witness toward the party. It is the right of a party to show the state of feeling of an opposing witness, and this may be done by cross-examination or by independent testimony. For this purpose it is competent to inquire of the witness concerning acts, declarations, and circumstances showing the existence of hostile feelings or prejudice, and the latitude of cross-examination is not restricted by the fact that the witness is a party testifying in his own behalf.

Watson v. Twombly, 60 N.H. 491 at *2 (N.H. 1881).

Therefore, the Magistrate Court erred in preventing the defendant from exploring Mr. Manning's material financial interest in his version of the event and the outcome of the case. Mr. Manning's interest in his continued employment, the fact that according to the defendant's version of the events he would have violated the hospital's policies, and the fact that only two years before he had almost been fired for a violation of the hospital's policies, were all highly relevant to how credible Mr. Manning's testimony was. The Court further kept the defense from inquiring as to whether Mr. Manning had received worker's comp based on the incident, something that he would very likely lose should his employer determine based on the trial that he had in fact been in the wrong. Tr. Vol. II, p. 135, L. 18-21. The jury was denied the opportunity

to learn of these issues, and the defendant was denied the opportunity to confront the main witness against him. As a result, as the prosecutor noted and emphasized during his closing, the jury had no reason to think that Mr. Manning's testimony was suspect. Tr. Vol. III, p. 357, L. 1-4., p. 357, L. 22-25, p. 358, L. 1-18.

The District Court's finding that Mr. Manning's previously issue with his employer was too confusing for the jury is in error. Memorandum Decision at *8. The facts of Mr. Manning's incident are relatively simple, and the point they are intended to make is plain. Certainly, from a confusion perspective, the cases cited above were far more complex. The District Court's finding that the previous issue was not comparable misses the mark entirely. The issue is whether Mr. Manning would lie to save his job, and further, whether that job was in peril. The District Court's conclusion ignores the purpose of the elicitation of the incident and seems to essentially require a defendant to show that what he is eliciting is propensity evidence. The defendant was not seeking propensity evidence; he intended to show that Mr. Manning was not trustworthy. And he had a right to do so.

Similarly, the District Court's findings as to the Code Gray policy simply reject the defendant's right to question the biases and motive to lie of the complaining witness. Memorandum Decision at *8-9. Rather than recognizing that Mr. Manning had every reason to portray the incident in a way that would not show him to have lost patience with and attacked a patient, the District Court concludes that such issues are "speculative." Perhaps they are, but so long as speculation drives men to lie, that speculation may be elicited as a motive to provide dishonest testimony. That has been the purpose of cross examination since at least 1881. Counsel for the defendant can find no case law that would cause him to think it has changed

since then.

D. The defendant was denied his right to fully present a defense and cross-examine witnesses guaranteed by the Sixth Amendment to the United States Constitution and Art. I § 13 of the Idaho Constitution.

Error is not reversible unless it is prejudicial. *Stoddard*, 105 Idaho at 171. With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* To hold an error harmless, this Court must conclude, beyond a reasonable doubt, that the jury's finding of guilt "would surely not have been different absent the constitutional error." *Sullivan*, 508 U.S. at 280.

The Court in *Evans* held:

> that the restrictions on Evans' right to cross-examine Grant were too severe. Fear of criminal prosecution has been recognized as a possible source of witness bias at least since *Alford v. United States*, 282 U.S. 687 (1931), and *Whitton v. State*, 479 P.2d 302 (Alaska 1970), establishes that the mere possibility of future criminal charges is sufficient to open the area. Thus, Evans had the right to explore Grant's apprehension of possible criminal charges stemming from continued narcotics use or from admittedly illegal conduct in his undercover work. Moreover, if one accepts Evans' contention that Grant was striving to get on the regular police force, his position is not unlike that of the discharged agent in *Hutchings v. State*, 518 P.2d 767 (Alaska 1974). Our decision there demonstrates that, in a case built upon the testimony of a single undercover state operative, the prospect of future employment by the police can operate as a source for potentially conscious or unconscious bias in that witness. In such circumstances the accused has the right to fully explore that possibility of bias. In order to inform the jury of possible improper motivation, the accused is entitled to examine the witness' employment expectations and those circumstances which might otherwise substantially frustrate achievement of those aspirations. While this does not give the accused license to ferret out every shortcoming and misstep by such a witness since early childhood, the accused does have the right to explore those circumstances which might give rise to a compulsion to curry special favor with the authorities.
>
> In the case at bar we conclude that Evans was not afforded that opportunity. The matter of the 1969 felony conviction would seem to be controlled by the reasoning of *Davis v. Alaska*, 415 U.S. 308 (1974). A jury could reasonably infer, in light of Grant's professed ambition, that this serious blot on his credentials was a source of motivation to secure Evans' conviction. The state interest in the confidentiality of Grant's rehabilitated conviction is not appreciably stronger than the state's interest in Davis, which was required to yield to the accused's constitutional right to a full cross-examination. The other

> criminal charges also should have been available as evidence of possible bias. Rules of procedure governing evidence admissible for general impeachment of a witness are not barriers to that evidence when it is sought for the specific purpose of showing bias. Further, this is a case where evidence of an extensive history of narcotics use was sought to establish bias rather than to bring the witness into general disrepute. In *Fields v. State*, 487 P.2d 831, 845-47 (Alaska 1971), we approved the introduction of drug addiction evidence for that particular purpose. Therefore, Evans should have been allowed to develop more fully his theory that Grant repeatedly used narcotics and that the police were fully aware of this use, which Evans contends began even before Grant commenced his undercover work in 1969.

Evans, 550 P.2d at 840.

As in *Evans*, this case involves a credibility battle between the defendant and Mr. Manning. Tr. Vol. III, p. 333, L. 8-23. In denying the defendant his Sixth Amendment right to confront Mr. Manning as to his motive to lie, the Court also denied the jury the ability to infer that Mr. Manning may have a very strong interest in the outcome of the case. Tr. Vol. III, p. 357, L. 1-4., p. 357, L. 22-25, p. 358, L. 1-18. Just as the jury in *Evans* had no way of knowing that the main witness had a strong motive to twist the truth to eventually get into the police force in spite of his felony conviction, the jury in this case had no way of knowing that Mr. Manning had a strong interest in lying to protect his already troubled relationship with his employer by portraying his actions as necessary and unavoidable. The Court not only prevented the defendant from raising Mr. Manning's past issues with his employer, but even blocked all testimony and argument that Mr. Manning may have violated policy and that his job would be in jeopardy if he had overreacted, even if that overreaction was lawful. The fact that the prosecutor then hammered on the total lack of evidence as to Mr. Manning's motive to lie in his closing also shows how important it would have been to allow such evidence. *Id.* The Court's ruling crippled the defendant's ability to defend himself and robbed him of his fundamental right to a fair trial.

Therefore, the conviction in this matter must be reversed.

III.

A. Introduction

The prosecutor's misconduct in this case so thoroughly saturates the record as to require a reversal although much of it went without objection and does not rise to fundamental error.

B. Standard of Review

On review of a decision of the district court, rendered in its appellate capacity, this Court reviews that decision directly and examines the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Losser*, 145 Idaho at 672; *DeWitt*, 145 Idaho at 711. An appellate court exercises free review over questions of law. *Powell*, 130 Idaho at 125.

Whether evidence is relevant is an issue of law. *Johnson*, 148 Idaho at 667; *Parmer*, 147 Idaho at 214. Therefore, when considering admission of evidence of other acts, we exercise free review of the trial court's relevancy determination. *Parmer*, 147 Idaho at 214. The trial court's determination regarding the danger of unfair prejudice is discretionary and will not be disturbed on appeal unless it is shown to be an abuse of discretion. *Id.*; *Enno*, 119 Idaho at 406. "Where a Appellant alleges error at trial that he had contemporaneously objected to, [the reviewing court] reviews the error on appeal under the harmless error test." *State v. Ellington*, 151 Idaho 53 (2011). "When the alleged error is prosecutorial misconduct, first the Appellant must demonstrate that prosecutorial misconduct occurred, and then the Court must declare a belief beyond a reasonable doubt that the misconduct did not contribute to the jury's verdict, in order to find that the error was harmless and not reversible." *Id.* When a party fails to preserve an issue

for appeal via a timely objection, the issue will only be reviewed and reversed on appeal if it constitutes fundamental error. *State v. MacDonald*, 131 Idaho 367, 371-72 (Ct.App.1998). Prosecutorial misconduct rises to the level of fundamental error only if the acts or comments constituting the misconduct are so egregious or inflammatory that any ensuing prejudice cannot be remedied by a curative jury instruction. *State v. Smith*, 117 Idaho 891, 898 (1990).

C. The prosecutor committed misconduct in soliciting Mr. Spoon's testimony as to Mr. Manning's appearance which was both irrelevant and prejudicial.

Evidence is relevant if it has a tendency to make the existence of any fact of consequence more probable or less probable. I.R.E. 401. The prosecutor may not appeal to the sympathies of the jury in order to secure a criminal conviction. *State v. Severson*, 147 Idaho 694, 719-20 (2009) *citing State v. Watlington*, 579 A.2d 490, 493 (Conn.1990). It is true that a "prosecutor may not appeal to the emotions, passions and prejudices of the jurors "because such appeals 'have the effect of diverting the jury's attention from their duty to decide the case on the evidence. '" *State v. Williams*, 529 A.2d 653 (Conn.1987) *quoting State v. Couture*, 482 A.2d 300 (Conn.1984). It is also improper for a prosecutor to inject extraneous issues into the case by encouraging the jury to identify with the victim. *Id.*

The prosecutor asked Mr. Spoon to describe something "standing out about [Mr. Manning's] appearance." Tr. Vol. II, p. 153, L. 22-24. Mr. Spoon stated that Mr. Manning had an arm injury, prompting the prosecutor, who was clearly looking for a reference to the sling, to ask again about Mr. Manning's appearance, and at least Mr. Spoon stated that Mr. Manning's arm was in a sling. *Id.* at p. 153-154, L. 1-4. Mr. Manning's appearance on February 28, 2013, was not relevant to what happened on October 8, 2012. Further, as self defense was not at issue,

and this was not an aggravated battery charge, the extent of or even existence of injuries had no probative value in this case. The prosecutor's question was clearly meant to seek the sympathies of the jury by reminding them that Mr. Manning's arm was in a sling, ostensibly due to the defendant's conduct, although more accurately it was due to surgery Mr. Manning had had a few weeks before. The reminder may have been unnecessary as the jury had just seen Mr. Manning in the sling. The prosecution repeated its determination to focus undue emphasis on this aspect when it solicited more testimony about Mr. Manning's injuries on redirect with Officer Kelly despite it being beyond the scope of the defense's cross. Tr. Vol. II, p. 220. The defense objected at that time as well, to no avail. *Id.* The prosecutor's only possible motivation for eliciting this testimony was to emphasize the injury to the jury in order to arouse sympathy and have the jury identify with Mr. Manning. The District Court's finding that the testimony was merely a restatement of a fact as in *State v. LaMere*, 103 Idaho 839, 844 (1982), is erroneous. Memorandum Decision at *10. Colorblindness in *LaMere* was not alleged to have been caused by LaMere. The sling was alleged to have been caused by the defendant. There is a vast chasm between these cases and the intent of the prosecutor involved.

D. The prosecutor's misconduct, due to its constant and unrelenting nature, denied the defendant a fair trial.

The case before this Court is saturated with prosecutorial misconduct, but almost all of it went without an objection. See Tr. Vol. I, p. 31, L. 2-17 (mischaracterizing state's burden during voir dire), Tr. Vol. I, *Id.* at L. 10-19, Vol. II, p. 145, L. 11-25, p. 173-174, p. 199, L. 20-25, p. 200, L. 4-8, p. 233-234, Vol. III, p. 352-353 (prejudicial focus on irrelevant restraint of defendant prior to incident), Vol. III, p. 334, L. 4-9 (mischaracterizing state's burden during closing

argument), Vol. III, p. 335-336, 355 (focusing on irrelevant struggle after the incident during closing), Vol. III, p. 337, L. 12-21 (misstating the law by asking jury to find guilt based on whose fault it was that Mr. Manning bumped against the gurney), Vol. III, p. 354, L. 12-17 (irrelevant focus on defendant's attitude toward nurses), Vol. III, p. 356, L. 24-25 (arguing jury should not find defendant credible because he is the accused and may be convicted), Vol. III, p. 357, L. 13-14 (rhetorical question calculated to evoke sympathy with Mr. Manning), Vol. III, p. 357, L. 22-25, p. 358, L. 1-18 (improper argument based on lack of evidence of Mr. Manning's interest in outcome of case which prosecution had prevented from being presented to jury). This particular instance did raise an objection which was overruled. This case was, as the prosecutor acknowledged, entirely about the credibility of two people. Tr. Vol. III, p. 333, L. 8-23. As such, it was extremely important to refrain from injecting the case with irrelevant details that were only intended to cause the jury to dislike one witness or sympathize with the other. That is exactly what the prosecutor did here.

The Court should hold in a case where a long string of uninterrupted misconduct has deprived the defendant of a fair trial the case should be reversed regardless of whether his counsel objected. When a party fails to preserve an issue for appeal via a timely objection, the issue will only be reviewed and reversed on appeal if it constitutes fundamental error. *MacDonald*, 131 Idaho at 371-72. Prosecutorial misconduct rises to the level of fundamental error only if the acts or comments constituting the misconduct are so egregious or inflammatory that any ensuing prejudice cannot be remedied by a curative jury instruction. *Smith*, 117 Idaho at 898. This reflects a policy position that it is best to leave to defense counsel the job of making sure that the state's prosecuting attorney is following the rules of professional conduct and

respecting the constitutional rights of his client. *See generally State v. Perry*, 150 Idaho 209 (2010). This policy leads to a situation where defense counsel is left wondering if the objection will be worth it, as an objection will likely only draw attention to whatever unconstitutional and unprofessional conduct has just transpired and further jeopardize their client's right to a fair trial. Further, prosecutors have no real incentive to behave ethically, after all, even if an objection occurs, the appellate court will only reverse where the misconduct affected a fundamental right and the error was not harmless from the perspective of an appellate court reading a transcript that does not contain the gestures, facial expressions, and other nonverbal conduct that make up the majority of human communication.

The Idaho Supreme Court and United States Supreme Court have recognized that prosecutorial misconduct when it occurs violates the rules of ethics and violates due process by leading the jury to believe that the prosecutor is aware of other information that should ensure conviction, and carries the imprimatur of the government. *See United States v. Young*, 470 U.S. 1, 18–19 (1985); *State v. Carson*, 151 Idaho 713, 721 (2011). While the Idaho Supreme Court was limiting its finding to prosecutorial vouching, both Idaho Rule of Professional Conduct 3.4 and the holding in *Young* clearly extend to other kinds of misconduct.

In a case such as this, where the record reveals a long string of abuses, an unrelenting effort to turn the trial from its purpose and turn it into a contest of whether the nurse or the drug addict is the more likeable, appellate courts should and must reverse the conviction. It is difficult if not impossible to square the wisdom of Judge Jerome Frank of the Second Circuit in this passage:

> "This Court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court-recalling the bitter tear shed by the Walrus as he ate the oysters-breeds a deplorably cynical attitude towards the judiciary." (footnote omitted).

United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2nd Cir. 1946) (Frank, J., dissenting), with the courts' standard of review for prosecutorial misconduct. Indeed, the standard of review for prosecutorial misconduct is actually lower for the trial judge who has the benefit of beholding the entire spectacle when a mistrial is requested. *See Ellington*, 151 Idaho at 71 (judge to take into consideration pattern of misconduct). That same standard should apply here, and this Court should reverse the conviction on the basis of the misconduct in this case that started at *voir dire* and did not end till the last paragraphs of the prosecutor's closing.

IV.

A. Even if no individual error in the trial was fundamental, the cumulative effect of the errors requires the reversal of the defendant's conviction

Even if each of the errors of which the Appellant complains is harmless when looked at individually, the cumulative error doctrine mandates reversal in this case because the Appellant was deprived of a fair trial. "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial." *Perry*, 150 Idaho at 230. Because the errors as a whole show that the Appellant was deprived of a fair trial, the Court

should reverse his conviction under the cumulative error doctrine.

Due to the many instances of prosecutorial misconduct, the irrelevant and highly prejudicial introduction of and emphasis on the defendant's drug use, and the Court's prohibition on the introduction of evidence of the complaining witness's financial interest in the outcome of the case, the totality of circumstances suggests that the defendant did not receive a fair trial. Even if each of the issues raised were individually harmless, the aggregation of these errors certainly shows the absence of a fair trial. This trial should have been about two men, one of whom was behaving in an irritable and agitated fashion and the other who had plenty of reason to be fed up with the former. The jury needed to be able to decide whether there was no reasonable doubt that the defendant battered the complaining witness. Instead, a trial was held on whether a meth addict who needed to be restrained to prevent him from violently attacking hospital staff whom he held in low esteem was more or less convincing than a the nurse that showed up in a sling and accused the defendant of attacking him. Even if each of these errors could individually be considered harmless, cumulatively they demonstrate that the defendant did not receive a fair trial. This Court should, therefore, reverse the defendant's conviction under the cumulative error doctrine.

CONCLUSION

The case before this Court requires it to review a trial that was destined to be unfair from the start. This Court should reverse the conviction and order the lower court to prevent the new trial from being sidetracked by methamphetamine use, to allow the defendant to show the complaining witness's interest in the outcome of the case to the jury, and prevent the prosecutor from turning the case into a popularity contest.

DATED this 9 day of April, 2014.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: Jay Logsdon
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 9 day of April, 2014, served a true and correct copy of the attached BRIEF SUPPORTING APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

X	Lawrence G. Wasden Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	[X] [ ] [ ]	First Class Mail Certified Mail Facsimile (208) 854-8071
X	Stephen W Kenyon Clerk of the Courts Idaho Supreme Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	[X]	First Class Mail