11-12-2015

State v. Ruiz Appellant's Reply Brief Dckt. 42199

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ANTONIO RUIZ, JR., Defendant-Appellant.	)	NO. 42199 CANYON COUNTY NO. CR 2013-20096 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Antonio Ruiz appeals, alleging the district court erred in ruling on several pre- and post- trial motions. He also contends that there were two inappropriate comments made during his trial, one by the district court judge and one by the prosecutor, both of which constitute fundamental error. Finally, he asserts that, even if these errors are individually harmless, cumulatively, they show the deprivation of his right to a fair trial. The State raises various points in response to these arguments. None are persuasive.

Therefore, for any and all of those reasons, this Court should vacate Mr. Ruiz's conviction and remand the case for further proceedings.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Ruiz's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Whether the district court erred when it denied Mr. Ruiz's motion for new trial since Dr. McPherson had improperly been allowed to testify as a rebuttal expert witness even though the State did not comply with the discovery rules.

2. Whether the district court erred when it denied Mr. Ruiz's motion to dismiss the indictment even though the indictment omitted an essential element of the offense.

3. Whether the district court erroneously allowed the State to present evidence of other bad acts even though the State did not serve timely notice pursuant to I.R.E. 404(b).

4. Whether the district court made an impermissible comment on the evidence, that one of the elements of the offense would be "quite obvious" from the prosecutor's evidence.

5. Whether the prosecutor committed misconduct in both *voir dire* and closing argument by misstating the law and lowering the State's burden of proof by arguing that there was no *mens rea* requirement associated with a charge of injury to a child.

6. Whether the accumulated errors in this case require reversal even if this Court determines them to be individually harmless.

ARGUMENT

I.

The District Court Erred When It Denied Mr. Ruiz's Motion For New Trial Since Dr. McPherson Had Improperly Been Allowed To Testify As A Rebuttal Expert Witness Even Though The State Did Not Comply With The Discovery Rules

A. The State's Disclosure Was Not Sufficient Under The Rules

1. The State's Arguments, Which Do Not Address The Due Process Concerns At Issue In This Case, Effectively Concede That A Due Process Violation Occurred

As an initial matter, the State does not address the due process issue caused by its failure to disclose Dr. McPherson's report. (*See* App. Br., pp.7-9; *see generally* Resp. Br.) This is particularly problematic because the State admits the purpose of calling Dr. McPherson was specifically to rebut the opinions given by Dr. Friedman. (Resp. Br., p.13.) Because the State required Mr. Ruiz to disclose Dr. Friedman's opinions pretrial pursuant to I.C.R. 16(c)(4) (R., Vol.2, pp.251-52), due process required the State to disclose Dr. McPherson's responsive opinions pretrial. *Wardius v. Oregon*, 412 U.S. 470, 476 (1973).

The only disclosure the State made was that Dr. McPherson would rely on Ms. Guzman's report. (*See* R., Vol.2, pp.264-65.) However, Ms. Guzman's report does not identify any opinions in regard to Dr. Friedman's conclusions, nor does it cite any reports or data which would be used to contradict Dr. Friedman's opinions. (*See generally* PSI attachment, pp.68-79 (CARES interview summary report and

evaluation).)[1] That is not surprising because Ms. Guzman's report was prepared before Dr. Friedman had been retained on this case. (*Compare* PSI attachment, p.68 (Ms. Guzman's report dated August 22, 2013); *with* R., pp.81-82 (order appointing Dr. Friedman as a defense expert dated December 18, 2013).) As such, there is nothing in the State's pretrial disclosure of Ms. Guzman's report which would provide the necessary description of Dr. McPherson's opinions intended to refute Dr. Friedman's opinions, much less the facts and data upon which such opinions were based. *See* I.C.R. 16(b)(7) (requiring that, when the defendant requests it, the State is required to disclose "[a description of] the witness's opinions, the facts and data for those opinions, and the witness's qualifications").

Thus, by conceding Dr. McPherson was called to refute Dr. Friedman's testimony, and since there was no pretrial disclosure of Dr. McPherson's responsive opinions, the State has effectively conceded the *Wardius* due process violation occurred in this case. On that basis alone, this Court should vacate the conviction and remand the case. (*See* App. Br., pp.7-8.)

2. Disclosing Ms. Guzman's Report Was Not Sufficient Disclosure For The Opinions Dr. McPherson Ultimately Gave – The State Needed To Disclose Dr. McPherson's Own Report

All the State argues on the disclosure issue is that, by disclosing Ms. Guzman's report and asserting Dr. McPherson would rely on that report for his opinions, the State made a sufficient disclosure. (Resp. Br., pp.5-9.) However, beside the shortcoming discussed in Section A(1), *supra*, Mr. Guzman's report was not a sufficient basis for

[1] The page numbers on this attachment appear to be from another collation of information, not the PSI itself.

Dr. McPherson's opinions. Only he was competent to say what his opinions were and upon what facts and data he based his opinions. Thus, the State needed to disclose Dr. McPherson's own report of his opinions. Without such a report, the district court did not have sufficient information to conduct the necessary preliminary assessment of the purported expert testimony as required by I.R.E. 702. (*See* App. Br., p.8.) Furthermore, the State's other point in this regard – because Mr. Ruiz did not object to Ms. Guzman's testimony as an expert witness, there was no error in allowing Dr. McPherson to testify (Resp. Br., pp.9-10) – is a *non sequitur*, and so, erroneous. The fact that the State presented another expert's testimony does not reveal that the testimony of a second expert was proper. Thus, the State's contention on appeal that the pretrial disclosure was sufficient is shown to be erroneous.

In fact, the State's concession about the State's intent to call Dr. McPherson to rebut Dr. Friedman's testimony (Resp. Br., p.7) actually shows the error under the plain language of I.C.R. 16(b)(7). The State contends that the rebuttal provision of I.C.R. 16(b)(7)[2] means it did not need to provide a more comprehensive disclosure because Dr. Friedman's ultimate testimony went beyond the scope of the defense's pretrial disclosers. (Resp. Br., pp.8-9.) Since by the State's own admission (Resp. Br., p.7), the prosecutor was intending to use Dr. McPherson's opinions to rebut the opinions Dr. Friedman's *had disclosed* pretrial, the rebuttal provision of I.C.R. 16(b)(7) is

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[2] The rebuttal provision of I.C.R. 16(b)(7) provides: "This subsection does not require disclosure of expert witnesses, their opinions, the facts and data for those opinions, or the witness's qualifications, intended only to rebut evidence or theories that have not been disclosed under this Rule prior to trial."

inapplicable in this case. Thus, the State was required to disclose Dr. McPherson's opinions under the primary provision of I.C.R. 16(b)(7).

The fact that the State's concession clearly shows the error also means, regardless of whether the disclosure in this case was more like the insufficient disclosure in *State v. Morin*, 158 Idaho 622, 626 (Ct. App. 2015), *rev. denied* June 22, 2015, or more like the sufficient disclosure in *State v. Koch*, 157 Idaho 89, 93-94 (2014), this Court should still vacate Mr. Ruiz's conviction. Nevertheless, the State's argument regarding the applicability of *Morin* to this case – because there were more specific subtopics identified in the disclosure, the disclosure was sufficient (*see* Resp. Br., p.8) – is erroneous.

Although the prosecutor's disclosure in this case, unlike the disclosure in *Morin*, identified specific subtopics upon which the State anticipated Dr. McPherson to testify, it still did not provide the same sort of specifics about *the opinion* the prosecutor expected Dr. McPherson to give, as was the case in *Koch*. (*See* App. Br., pp.10-13 (discussing the distinction between *Koch* and *Morin* in depth).) Thus, the disclosure still failed to disclose what Dr. McPherson's opinion would actually be; all it did was identify the general issues and subtopics to which he might speak during his testimony. That is the same shortcoming which rendered the disclosures in *Morin* insufficient. *See Morin*, 158 Idaho at 626. It certainly did not serve the goals of the discovery rules – "to 'promote fairness and candor,' 'facilitate fair and expedient pretrial fact gathering,' and 'prevent surprise at trial.'" *Id.* (quoting *Edmunds v. Kraner*, 142 Idaho 867, 873-78 (2006)). That means, despite identifying specific subtopics potentially up for discussion, the disclosure was still insufficient under the rules.

Ultimately, the State was required to make a full, sufficient disclosure of Dr. McPherson's opinions and the facts and data upon which those opinions were based prior to trial. I.C.R. 16(b)(7). Since Dr. McPherson was the only person competent to say what his opinions were and how he came to those opinions, the State needed to disclose a report by Dr. McPherson with that information. However, the State failed to present any such information, particularly regarding Dr. McPherson's proposed testimony to rebut Dr. Friedman's opinions. Therefore, for all the foregoing reasons, but particularly because of the State's concession of the due process violation, allowing Dr. McPherson to testify as an expert witness in rebuttal was error.

B. The State Has Failed To Prove This Error Harmless Beyond A Reasonable Doubt

When there is objected-to error, the State bears the burden of proving that error harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967) (establishing the harmless error test); *State v. Perry*, 150 Idaho 209, 227 (2010) (reaffirming that Idaho applies the *Chapman* test when assessing objected-to error). This means the State must show there is not a reasonable possibility that the error contributed to the verdict actually rendered. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *State v. Thomas*, 157 Idaho 916, 919 (2015) (reaffirming that *Sullivan*'s interpretation of *Chapman* is proper in Idaho). Since Mr. Ruiz objected to Dr. McPherson's testimony (*see, e.g.,* Tr., p.666, Ls.14-19), the State must meet this standard. However, the State simply asserts the error was harmless without any analysis in that regard. (*See* Resp. Br., p.10.) That is insufficient to meet its burden

under the harmless error test. *Compare State v. Almaraz*, 154 Idaho 584, 598-99 (2013).

At any rate, the State admits that Dr. McPherson's testimony was simply to emphasize the significance of J.A.'s injuries, and so, "was largely cumulative with the previously unchallenged testimony of Ann Guzman." (Resp. Br., p.9.) Idaho Rule of Evidence 403 specifically prohibits the "needless presentation of cumulative evidence," precisely because it creates a danger of unfair prejudice. The reason for such a rule has been succinctly summarized by the Minnesota Court of Appeals: it "tends to highlight and isolate one portion of the trial evidence, thus inviting, perhaps encouraging, undue emphasis on that portion" of the evidence. *State v. Wembley*, 712 N.W.2d 783, 790 (Minn. Ct. App. 2006). In essence, it tends to vouch for the credibility of the already-presented evidence, encouraging the jury to decide on only that evidence, rather than considering all the evidence presented. *See id.* The Idaho Supreme Court has repeatedly held that such evidence is not properly presented to the jury: "we have held that 'expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore, does not 'assist the trier of fact' as required by [I.R.E.] 702'". *Perry*, 150 Idaho at 229 (quoting *State v. Perry*, 139 Idaho 520, 525 (2003) (quoting *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999))). Thus, the State's concession that Dr. McPherson's testimony was merely cumulative to Ms. Guzman's testimony affirmatively disproves its unsupported assertion that the error in admitting Dr. McPherson's testimony was harmless.

Furthermore, the failure to provide an expert's report as required by the discovery rules presents a separate and distinct harm that is not related to the actual, substantive testimony the expert gives. Instead, it centers on the defense's ability to meet the expert's testimony, and it constitutes a separate violation of the defendant's right to due process. *See, e.g., Wardius*, 412 U.S. at 474. Specifically, when a party does not comply with I.C.R. 16(b)(7), opposing counsel is deprived of the ability to prepare for and adequately challenge the expert's testimony on cross examination. *See Wardius*, 412 U.S. at 474 (explaining that "the ends of justice will be best served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.") Defense counsel actually invoked this rationale before the district court, arguing that without the adequate discovery, he would not be able to adequately challenge Dr. McPherson's testimony at trial. (R., Vol.2, p.215.) That means there is a reasonable possibility the jury convicted Mr. Ruiz based on Dr. McPherson's testimony, which the defense was unable to adequately challenge at trial because of the discovery violation. As discussed in depth in Section I(A)(1), *supra*, the State does not challenge Mr. Ruiz's analysis on the due process issue. Thus, by not offering any argument against this independent harm, the State has failed to carry its burden to prove the discovery error harmless beyond a reasonable doubt.

Since the State has not met its burden under the harmless error test, this Court should vacate the conviction because of the erroneously-admitted testimony of Dr. McPherson.

II.

The District Court Erred When It Denied Mr. Ruiz's Motion To Dismiss The Indictment Even Though The Indictment Omitted An Essential Element Of The Offense

The State concedes that the indictment failed to allege an essential element of the crime charged – the *mens rea* element of "willfully." (Resp. Br., p.13.) However, it disputes the applicable standard of review in this case, arguing that the challenges defense counsel addressed in his motion to dismiss the indictment did not raise this particular jurisdictional challenge, and so, the more liberal standard of review should apply.[3] (Resp. Br., pp.11-14.) Arguing under the more liberal standard, the State contends the district court's decision to not dismiss the indictment was appropriate. (Resp. Br. pp.11-14.) The State is mistaken in all respects, but particularly regarding the applicable standard of review. Mr. Ruiz raised his jurisdictional challenge pretrial, and so, this case should be analyzed under the stricter standard of review, though the district court's decision is erroneous under the more liberal standard, too.

A. This Claim Is Properly Analyzed Under The Stricter Standard Of Review

The State's argument for the more liberal standard of review hinges on the idea that, because defense counsel did not expressly state that he was making a

[3] The Court of Appeals has identified the relevant standards of review as follows:

> A charging document will be deemed so flawed that it fails to confer jurisdiction on the court . . . if the document fails to state facts essential to establish the offense charged. If an alleged deficiency is raised by a defendant before trial or the entry of a guilty plea, the charging document must state all facts essential to establish the charged offense, but if the information is not challenged until after a verdict or guilty plea, it will be liberally construed in favor of validity . . . .

jurisdictional challenge, his pretrial challenges to the indictment were not sufficient to preserve a jurisdiction challenge for appeal. (Resp. Br., p.13.) However, the State acknowledges that Mr. Ruiz challenged the indictment as insufficient because it failed to allege the essential elements of the charge with sufficient particularity and did not charge the commission of an actual crime under the statute. (Resp. Br., p.13 n.4.) That concession, which the State attempts to downplay in a footnote, is actually critical, given the way the courts have interpreted the scope of jurisdictional challenges.

For example, the Idaho Court of Appeals has held that "an indictment is "*jurisdictionally defective*" when it "fail[s] to allege a material fact essential to establish the offense for which [the defendant] was charged." *State v. Byington*, 135 Idaho 621, 624 (Ct. App. 2001) (emphasis from original). Thus, by arguing "the indictment . . . fails to set forth properly and with the requisite definiteness and particularity *all the essential elements of the crimes* attempted to be charged," (R., Vol.1, p.55 (emphasis added)), defense counsel, *ipso facto*, raised a jurisdictional challenge. *See Byington*, 135 Idaho 624; *McNair*, 141 Idaho at 268. The State's argument to the contrary, demanding that the defendant must expressly state that his challenge is jurisdictional, only serves to improperly promote form over substance. *See, e.g., State v. Jakoski*, 139 Idaho 352, 355 (2003) (quoting *Dionne v. State*, 93 Idaho 235, 237 (1969) (reiterating that "'[s]ubstance not form governs.'") As a result, this case is properly assessed under the stricter standard of review because Mr. Ruiz raised his jurisdictional challenge to the indictment pretrial.

State v. McNair, 141 Idaho 263, 268 (Ct. App. 2005) (internal quotations and citations omitted).

B. Under The Stricter Standard Of Review, The Indictment In Mr. Ruiz's Case Was Jurisdictionally Defective

The State's concession that the *mens rea* element "willfully" was not in the indictment (Resp. Br., p.13) is sufficient to show the indictment failed to convey jurisdiction under the stricter standard of review, since that means the indictment failed to allege a material fact essential to establish the offense charged. *See, Byington*, 135 Idaho at 624. However, the State asserts in a footnote that, under the stricter standard of review, the indictment should be deemed sufficient because there is no requirement for willfulness when the injury to child charge alleges actual infliction of injury. (Resp. Br., p.14 n.5.) That assertion flies in the face of clear Idaho Supreme Court precedent, which holds, "[a] plain reading of section 18-1501(1) indicates that its purpose is to punish conduct or inaction that *intentionally* causes a child to suffer." *State v. Young*, 138 Idaho 370, 373 (2002) (emphasis added). Thus, according to the Supreme Court, "Section 18-1501(1) tells the jury that the State must prove that [the defendant] *willfully* caused or permitted the child to suffer or *inflicted unjustifiable physical pain*." *Id.* (emphasis added). Thus, by the Supreme Court's clear explanation, the "willfully" *mens rea* element applies to all the different articulations of how a person might violate I.C. § 18-1501(1).

Reading the statute as the State does in footnote 5 results in precisely what the Supreme Court determined the plain language of that statute does not allow: it subjects parents and guardians "to criminal penalties for good faith decisions that turn out poorly—innocent mistakes in judgment." *Young*, 138 Idaho at 373. Under the State's reading of the statute, a parent or guardian who uses certain disciplinary tactics, even though not intending to injure the child, could be prosecuted simply because an injury

occurred and regardless of whether they were aware those tactics could be harmful the child. That position has already been expressly rejected: "This definition [of willfully] encompasses more than performing some act or omissions purposefully. . . . [T]he fact that a child is ultimately injured or endangered is, by itself, insufficient to convict." *State v. Gonzales*, 158 Idaho 112, 119 (Ct. App. 2015); *cf. Young*, 138 Idaho at 373. The State's reading of the statute is particularly problematic in cases like this one, where the parent had used those tactics on prior occasions without the disastrous consequences, and so, would be even less likely to have the requisite *mens rea*. (*See* App. Br., p.31.) As the Supreme Court noted: "Idaho Code section 18-1501(1) is a criminal statute not a barometer for stupidity." *Id.* Therefore, the State's contention that the willfulness element does not apply to the particular mechanism by which the offense was charged in this case is meritless.

Thus, the grand jury needed to be instructed on, and subsequently find probable cause of, the specific statutory element of "willfully," applicable to all the iterations of how that statute might be violated. When the State failed to ensure that happened, (*see* R., pp.20-21 (the complaint presented to the grand jury failing to include the willfulness element); Tr., p.19, L.22 - p.21, L.6 (the prosecutor's discussion of the elements with the grand jury failing in the same regard)), the resulting indictment did not include all the essential elements of the charge under the plain, unambiguous language of the controlling statute. *See Young*, 138 Idaho at 373. As the State has not argued that there is good reason (and there is none) to ignore *stare decisis* and overrule *Young*, *Young* controls.

Ultimately, under the stricter standard of review, the *mens rea* element of "willful" is an essential element of the offense regardless of which articulation of the violation is charged under I.C. § 18-1501(1). As a result, the indictment's failure to include that essential element, based on the fact that the prosecutor did not instruct the grand jury on that element, means the indictment is jurisdictionally defective under the stricter standard of review.

C. Even Under The More Liberal Standard Of Review, The Indictment Should Have Been Vacated

Even if the State is correct and the more liberal standard of review applies in this case, this Court should still vacate the conviction. Pursuant to the Idaho Supreme Court's decision in *State v. Edmonson*, 113 Idaho 230, 237 (1987), a defendant may challenge the validity of *a grand jury's indictment* even after jury trial if the defendant is able to show prejudice flowing from that error in the grand jury proceedings. *Compare State v. Quintero*, 141 Idaho 619, 620 (2005) (considering only a notice issue vis-à-vis *a prosecutor's Information* following the opportunity for a preliminary hearing); *State v. Jones*, 140 Idaho 755, 756 (2004) (same). Such prejudice exists in this case because the grand jury was not asked to find probable cause on one of the essential elements of the offense. (*See* R., pp.20-21; Tr., p.19, L.22 - p.21, L.6.) As discussed in depth in the Appellant's Brief, pp.16-18, this means prejudice resulted from this error in the grand jury proceedings. The State has not responded to Mr. Ruiz's argument in that regard. (*See generally* Resp. Br.)

Since this case is controlled by *Edmonson*, and thus, is distinguishable from *Jones* and *Quintero*, even if this case is assessed under the more liberal standard of

review, Mr. Ruiz is still entitled to relief for the prejudice resulting from the tainted grand jury proceedings.

III.

The District Court Erroneously Allowed The State To Present Evidence Of Other Bad Acts Even Though The State Did Not Serve Timely Notice Pursuant To I.R.E. 404(b)

A. Mr. Ruiz's Challenge To The Timeliness Of The Disclosure Is Not Moot

The State contends that, because the district court did not expressly rule on the admissibility of the evidence of prior bad acts, Mr. Ruiz's challenge to the State's late notice of its intent to introduce evidence of other bad acts is moot. (Resp. Br., pp.15-17.) The State is mistaken. The district court ultimately allowed the State to present various evidence of other bad acts, and so, it implicitly found that evidence to be admissible. *See, e.g., State v. Kirkwood*, 111 Idaho 623, 627 (1986) (acknowledging that the district court can make implicitly rulings); *see also City of Meridian v. Petra Inc.*, 154 Idaho 425, 444 (2013) (holding that, when the district court does not make express findings of fact, "we consider whether the district court made implicit factual findings"). This is particularly problematic since the prosecutor subsequently argued that evidence solely for propensity purposes: "This isn't an isolated event. This isn't a one-time event. Ladies and gentlemen, when it happens over and over, it becomes routine. It becomes a pattern. It becomes routine child abuse." (Tr., p.781, Ls.7-11.) As such, the record demonstrates the evidence of other bad acts was admitted against Mr. Ruiz.

That is problematic because the notice requirement of I.R.E. 404(b) is a "*condition precedent to admission* of other acts evidence." *State v. Sheldon*, 145 Idaho 225, 227-28 (2008). Since the State failed to comply with the mandatory requirements

of I.R.E. 404(b) – namely to file notice of its intent to use that information reasonably in advance of trial – it should have been precluded from presenting that evidence at all. *Sheldon*, 145 Idaho at 230 ("Because the State failed to comply with the notice provisions of I.R.E. 404(b), Sheldon's statements were inadmissible.").

Since the evidence of the other bad acts should not have been admitted because the State failed to meet that requirement, Mr. Ruiz's challenge to the timeliness of the State's notice was well-founded. Relief, namely the conviction being vacated because of the improper presentation of, and argument on, that evidence, is available. *Compare id.* Since relief for an error by the district court is available, this issue is not moot. *See, e.g., State v. Hoyle*, 140 Idaho 679, 682 (2004) ("Justiciable issues are controversies that are real and substantial and can be concluded through the grant of relief by a court.")

B. Since The Relevant Question Is Whether The Defendant Knew Of The State's Intent *To Introduce* The Evidence Of Other Bad Acts, Not Simply Whether The Defendant Knew That Evidence Existed, The Late Notice Prejudiced Mr. Ruiz

On appeal, the State makes no attempt to justify why the prosecutor waited until the day before trial to file her notice pursuant to I.R.E. 404(b). (*See generally* Resp. Br.) Nor does it address the fact that the prosecutor below relied on the evidence of other bad acts it was allowed to present expressly for propensity purposes in her closing argument. (*See generally* Resp. Br.) Instead, it simply argues that, because Mr. Ruiz was aware evidence of other bad acts existed, he was not prejudiced by the State's late notice of its intent to use that evidence at his trial. (Resp. Br., pp.17-19.) In making that argument, the State does not address the fact that the information the prosecutor presented to the district court disproves that argument. (*See* App. Br., p.22 (discussing

the unpublished decision in *State v. McHale*, which the prosecutor submitted for the district court's consideration)[4]; *see generally* Resp. Br.)

The State's argument on appeal, like the prosecutor's argument before it, is erroneous. Besides the Idaho Supreme Court and Court of Appeals precedent to the contrary, the plain language of the rule itself disproves the State's argument: "the prosecution in a criminal case shall file and serve notice . . . of the general nature of any such evidence *it intends to introduce* at trial." I.R.E. 404(b) (emphasis added). Thus, the prejudice caused by a late notice does not arise from defendant's lack of knowledge about the existence of the evidence the State wants to use; it arises from the defendant's lack of knowledge of the State's intent to present that otherwise-inadmissible evidence at trial. *See* I.R.E. 404(b); *Sheldon*, 145 Idaho at 230 (reaffirming that the purpose of the notice requirement is "to reduce surprise and promote early resolution on the issue of admissibility."). For example, when the defendant is deprived of adequate notice of the State's intent *to introduce* that evidence at trial, he cannot adequately prepare a challenge to the admissibility of that evidence nor can he adequately formulate a trial strategy to address that evidence. *State v. Naranjo*, 152 Idaho 134, 142 (Ct. App. 2011) (vacating a conviction that was based on evidence of

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[4] Mr. Ruiz recognizes that unpublished decisions do not constitute precedent, and he does not cite *McHale* as authority for a particular decision in this case. Rather, he, like the prosecutor below, merely references the *McHale* decision as a historical example of how a learned court has analyzed the question of adequate notice under I.R.E. 404(b). *Compare Staff of Idaho Real Estate Comm'n v. Nordling*, 135 Idaho 630, 634 (2001) (quoting *Bourgeois v. Murphy*, 119 Idaho 611, 617 (1991)) ("When this Court had cause to consider unpublished opinions from other jurisdictions because an appellant had discussed the cases in his petition, we found the presentation of the unpublished opinions as 'quite appropriat[e].' Likewise, we find the hearing officer's consideration of the unpublished opinion, not as binding precedent but as an example, was appropriate.").

other bad acts admitted without proper notice under I.R.E. 404(b) because the defendant "was prejudiced in his ability to prepare and defendant against the prior drug purchase evidence"). Therefore, the State's late disclosure in this case was just as problematic as it was in *Naranjo*.

The State's closing argument actually highlights the prejudice allowing this evidence to be admitted on the late notice caused in Mr. Ruiz's case. The prosecutor, Erica Kallin, argued the evidence of other bad acts solely as propensity evidence: "This isn't an isolated event. This isn't a one-time event. Ladies and gentlemen, when it happens over and over, it becomes routine. It becomes a pattern. It becomes routine child abuse." (Tr., p.781, Ls.7-11.) The Idaho Supreme Court has expressly condemned precisely this sort of argument: "The unstated premise in *Moore*[5] is simply this: 'if he did it before, he probably did it this time as well.' This complete reliance upon propensity is not a permissible basis for the admission of evidence of uncharged misconduct." *State v. Grist*, 147 Idaho 49, 54 (2009). Thus, the fact that the State was allowed to present the evidence of other bad acts, and then expressly argue it for propensity, based on its late notice shows that Mr. Ruiz was, indeed, prejudiced by the late notice. *Compare Sheldon*, 145 Idaho at 230 ("Because the State failed to comply with the notice provisions of I.R.E. 404(b), Sheldon's statements were inadmissible.").

Therefore, the State's contention that the notice was sufficient, which is contrary to Idaho Supreme Court precedent, Court of Appeals precedent, and the plain language of the rule itself, should be rejected.

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[5] *State v. Moore*, 120 Idaho 743 (1991).

C. The Error Was Not Harmless

The State contends the erroneous admission of the evidence of other bad acts on the late notice was harmless because it was "relatively sparse and insignificant compared to evidence [of guilt]". (Resp. Br., p.20.) Essentially, the State is asking this Court to sit a thirteenth juror and weigh all the other evidence in this case absent the error, so as to reach its own conclusion about Mr. Ruiz's guilt or innocence. (*See* Resp. Br., p.20.) "It is well established that appellate courts in Idaho do not reweigh evidence." *State v. Doe*, 144 Idaho 839, 842 (2007). "'[N]or are we concerned with what decision we would have made had we been the trier of fact.'" *Fife v. Home Depot, Inc.*, 151 Idaho 509, 514 (2011) (quoting *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 81 (2001)) (specifically discussing the proper standard for appellate review of a decision by the Industrial Commission). Thus, the State's invitation for this Court to reweigh the evidence absent the error as its harmless error analysis is improper.

The United States Supreme Court has made this point eminently clear: "the question [the harmless error test] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather, what effect it had upon the guilty verdict in the case at hand." *Sullivan*, 508 U.S. at 279; *cf. Thomas*, 157 Idaho at 919 (reaffirming *Sullivan*'s interpretation is the proper analysis in Idaho). Thus, the harmless error analysis must focus on "the basis on which 'the jury *actually rested* its verdict.'" *Id.* (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (emphasis from *Sullivan*). "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely

unattributable to the error." *Id.* (emphasis from original). "That must be so," the Supreme Court concluded, "because to hypothesize a guilty verdict that was never in fact rendered—*no matter how inescapable the findings to support that verdict might be*—would violate the jury-trial guarantee." *Id.* (emphasis added). The proper question, then, is whether the State has proven, beyond a reasonable doubt, that the erroneous admission of the other bad acts evidence did not contribute to the verdict. *Id.*; *Perry*, 150 Idaho at 222 (reaffirming this as the standard for addressing objected-to error).

It is not actually possible for the State to meet that burden on this issue, given the facts of this case. The prosecutor actually argued the other bad acts evidence solely for propensity purposes, not one of the permissible alternative uses. (*See* Tr., p.781, Ls.7-11.) Since the prosecutor expressly asked the jury to draw exactly the sort of conclusion which is prohibited by the rule, there is far more than the necessary reasonable possibility that the introduction of the evidence of other bad acts contributed to the verdict in this case. Therefore, the State has failed to meet its burden to prove the error harmless beyond a reasonable doubt.

IV.

The District Court Made An Impermissible Comment On The Evidence, That One Of The Elements Of The Offense Would Be "Quite Obvious" From The Prosecutor's Evidence

The State acknowledges that, under the first prong of the fundamental error analysis, if the district court improperly commented on the evidence, that would violate Mr. Ruiz's constitutional rights. (*See* Resp. Br., p.27.) As such, its arguments on this issue focus on the second and third prongs of the fundamental error analysis. Its arguments in both respects are meritless.

A. The Error From District Court's Improper Comment Is Clear From The Record

On the second prong of the fundamental error analysis, the State contends the error is not clear from the record because it believes the district court judge was just ruling on a foundational objection when it said, "I think from everything, it's going to be quite obvious." (Resp. Br., p.23.) In fact, based on that conclusion, it asserts the judge's comment was not an error at all. (Resp. Br., p.23.) The State's argument is erroneous for several reasons.

The first premise of the State's argument – that the objection was merely foundational – is erroneous because the actual objection defense counsel made was substantive. It asserted the prosecutor's question – whether Mr. Ruiz's alleged actions were "extremely painful for [J.A.]" – improperly "calls for a conclusion from this -- [prosecutor talking over defense counsel] -- of a nonexpert witness." (Tr., p.335, Ls.2-9.) Regardless of whether the prosecutor could have laid more foundation, defense counsel's objection contended the witness could not ever give a proper opinion as to whether J.A. was experiencing extreme pain at that time; it would always be an improper lay opinion. Therefore, the record is clear that defense counsel raised a substantive objection to the evidence called for by the question the prosecutor asked. And since defense counsel's objection was not foundational, the district court's ruling on that objection could not properly be merely foundational.

The context of the question objected to also disproves the second premise of the State's argument – that, when the district court said "it's going to be quite obvious," the term "it" referred to the foundation for the witness's answer. The question the judge was considering dealt with whether J.A. was experiencing extreme pain, and to that point, it

said: "I'm sure that Ms. Kallin will describe everything [J.A.] said. I think from everything it's going to be quite obvious." (Tr., p.335, Ls.2-13.) Since the district court was referring to the contents of J.A.'s anticipated testimony about the alleged pain, the record is clear the term "it" is referring to the topic being discussed – whether, as a matter of fact, J.A. experienced extreme pain.

Thus, the State's interpretation of the context of the objection and the district court's ensuing statement is not reasonable and is disproved by the record. As such, Mr. Ruiz is not arguing the most damaging of several different interpretations of that statement (*see* Resp. Br., p.23); he is arguing the only reasonable interpretation of the judge's comments, given the actual question asked and objection raised, is improper under established precedent. (*See* App. Br., pp.25-26.) Assessing the district court's comment under the proper standards, the error remains clear from the face of the record

And even if the State were correct and the district court was simply ruling that the testimony could be admissible with more foundation, that would mean the district court made a separate and distinct error by improperly overruling a valid objection to the inadmissible lay witness opinion to come in. *See, e.g.,* I.R.E. 701. "[W]hen the question is one which can be decided by persons of ordinary experience and knowledge, it is for the trier of fact to decide[;]" lay witness opinions on such questions are inadmissible. *State v. Turner*, 136 Idaho 629, 632-33 (Ct. App. 2001). The question to which defense counsel objected – whether Mr. Ruiz's alleged actions caused J.A. extreme pain – is a question which can be answered by persons of ordinary experience and knowledge looking at the surrounding facts. Therefore, it was for the jury to weigh "the truth of the

facts presented by the witnesses and draw its conclusions by the exercise of independent judgment and reasoning powers, without hearing the opinions of the witnesses." *State v. Johnson*, 119 Idaho 852, 855 (Ct. App. 1991). Thus, if the district court were ruling that the lay opinion could come in if more foundation were laid, that would constitute a separate, objected-to error, which would demand relief either by itself or when accumulated with the other errors in this case. In either case, this Court should vacate Mr. Ruiz's conviction.

B. Mr. Ruiz Has Shown The A Reasonable Possibility That The District Court's Improper Comment Affected The Verdict In This Case

As to the third prong of the fundamental error analysis, the State contends that there is no harm from the district court's comment on the evidence because the generic pre-proof instruction given by the district court some hours before the improper comment was sufficient to cure all the harm caused by the judge's improper comment on the evidence. (Resp. Br., p.23.) Indeed, taken to its logical conclusion, the State's argument would preclude the appellate courts from reviewing any improper comment made by the district court during trial. The State's argument is mistaken.

Rather, while there may be a presumption that the jurors follow instructions given, Idaho's courts have recognized that "application of th[at] presumption does not always end the inquiry." *State v. Watkins*, 152 Idaho 764, 767 (Ct. App. 2012); *cf. State v. Wrenn*, 99 Idaho 506, 510 (1978) (finding that, given the prejudicial nature of the error, "the presumption of the efficaciousness of cautionary warnings" was overcome). The *Watkins* Court explained the reasoning behind this rule: "although we normally presume that a jury will follow an instruction to disregard inadmissible

evidence, this presumption cannot shield all errors from appellate review, regardless of the severity of the error or the forcefulness and effectiveness of the instruction." *Id.* That conclusion is consistent with United States Supreme Court precedent, which provides: "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968); *cf. Simmons v. South Carolina*, 512 U.S. 154, 171 (1994) (reaffirming *Bruton* on this point).

To that end, the *Watkins* Court identified factors which can show the presumption should not apply: whether the error is particularly prejudicial, and whether the instruction would sufficiently nullify that prejudice. *Id.* As to the first of those factors, the error in this case is particularly problematic. As the Idaho Supreme Court has explained, "[r]emarks or comments by a trial judge which would tend to prejudice either of the parties to a jury trial are proscribed because of the great possibility that such an expression will influence the jurors." *State v. White*, 97 Idaho 708, 711-12 (1976). Precisely because it is the judge who is making the comment, there is a great possibility that the comment will influence jurors regardless of an instruction to the contrary. *See id.* As such, the first factor identified in *Watkins* indicates the presumption should not apply in this case.

Similarly, the nature of the instruction itself reveals it to be insufficient to cure that particularly problematic harm. For example, "where improper testimony is inadvertently introduced into a trial and the trial court *promptly instructs* the jury it disregard such evidence, it is ordinarily presumed that the jury obeyed the court's instruction entirely."

State v. Keyes, 150 Idaho 543, 545 (Ct. App. 2011) (emphasis added); *cf. State v. Grantham*, 146 Idaho 490, 498 (Ct. App. 2008) (same). The instruction upon which the State would rely preceded the improper comment by several hours. (R., Vol.1, pp.170-71 (minutes of the trial noting the reading of the preliminary instructions and the testimony of the witness in question); R., Vol.2, p.189 (the instruction to disregard in the pre-proof instructions).) Thus, the fact that there was no *prompt* instruction *following* the error indicates the presumption does not apply. *Compare Keyes*, 150 Idaho at 545 (holding no mistrial was necessary due in part to the fact that "the district court gave the jury an immediate and forceful curative instruction."); *Grantham*, 146 Idaho at 498-99 (holding such an error harmless because immediately after ruling upon the issue, the district court gave a sufficient curative instruction).

Furthermore, there are some cases where even a prompt instruction might not be enough: "a corrective instruction, even one that is forceful, might be insufficient to cure the prejudicial effect of the improper opinion [or statement]." *Keyes*, 150 Idaho at 545; *cf. Watkins*, 152 Idaho at 768 (reaffirming *Keyes* on this point). The instruction upon which the State would rely is generic: "if any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it." (R., p.189.) As such, it is not nearly forceful enough to repel the "great possibility" of prejudice which flowed from the judge's improper comment that two of the essential elements of the charge would be "quite obvious" from all the evidence the prosecutor would subsequently present. *See White*, 97 Idaho at 711-12. As such, the second factor identified in *Watkins* – the ability of the instruction given to actually nullify the prejudice

from the improper comment – also demonstrates why the presumption does not apply in this case.

Thus, as in *Watkins*, the facts reveal the presumption is not properly applied in this case. Therefore, this Court should evaluate whether there is a reasonable possibility that the error affected the verdict in this case. *Compare, e.g. Watkins*, 152 Idaho at 768 (explaining that, when the presumption does not apply, the proper approach is to evaluate the case for harmless error).[6]

The State does not offer any additional argument in on the merits of Mr. Ruiz's prejudice argument as it ignores the Idaho Supreme Court's holding in *White* entirely. (*See generally* Resp. Br., pp.23-24.) Since the Supreme Court held in *White* that a judge's improper comments on elements of the offense charged presents "the great possibility that such an expression will influence the jurors," *White*, 97 Idaho at 711-12, there is a reasonable possibility that the judge's comment affected the verdict in this case. (*See* App. Br., pp.26-27 (detailing the information which shows Mr. Ruiz met the third prong of the *Perry* test on this issue).) Therefore, Mr. Ruiz has met his burden under the third prong of the fundamental error analysis.

As such, this Court should vacate the conviction based on the fundamental error caused by the district court's improper comment on the evidence.

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[6] Of course, since Mr. Ruiz has raised this claim as fundamental error, he bears the burden of proving prejudice in the harmless error analysis on this issue. *See Perry*, 150 Idaho at 226.

V.

The Prosecutor Committed Misconduct In Both *Voir Dire* And Closing Argument By Misstating The Law And Lowering The State's Burden Of Proof By Arguing That There Was No *Mens Rea* Requirement Associated With A Charge Of Injury To A Child

As with the district court's improper comment, the State acknowledges that, if the prosecutor did commit misconduct, that would violate Mr. Ruiz's constitutional rights. (Resp. Br., pp.25-26.) As such, its arguments on this issue also focus on the second and third prongs of the fundamental error analysis. None of its arguments are persuasive.

A. The Prosecutor's Misconduct Is Clear From The Record

On the second prong of the fundamental error analysis, the State's argument that the error is not clear from the record fails to acknowledge, much less appreciate, the fact that the "willfully" element the State must prove in a prosecution for injury to child is different than in other prosecutions involving that *mens rea* element. (*See generally* Resp. Br., pp.24-30.) As a result of that failure, both in regard to the prosecutor's statements in *voir dire* and in closing argument, the State contends there is no clear error based on its belief that the prosecutor could properly argue that, while the defendant did not intend the injury, he did intend the act, and that is sufficient to justify the conviction. (*See generally* Resp. Br., pp.24-30.) The State's contention is erroneous.

Both the Idaho Supreme Court and the Court of Appeals have made it eminently clear that the plain language of I.C. § 18-1501(1) sets a different level of proof for the State than other, similar statutes – merely performing some act or omission purposefully is not enough to convict under I.C. § 18-1501(1), nor is the mere fact that the child is

injured. *State v. Gonzales*, 158 Idaho 112, 119 (Ct. App. 2015). Rather, the State must prove that the defendant intended to act while aware of the possibility that his actions would result in injury to or endangerment of the child. *Id.*; *cf. Young*, 138 Idaho at 373; *State v. Halbesleben*, 139 Idaho 165, 169 (Ct. App. 2003). The prosecutor's statements, as the State argues them on appeal, falls short of that standard.

That is because the State's argument on appeal – while he did not intend to injury, he intended to act, and that is sufficient – still fails to incorporate the *mens rea* element the State must prove – that he acted while aware of the dangerousness of his actions. *See, e.g., Young*, 138 Idaho at 373. Thus, the State's argument on appeal is erroneous because, as discussed in Section II(B), *supra*, it would allow a parent or guardian who uses certain disciplinary tactics, even though not intending to injure the child, to be prosecuted regardless of whether they were aware those tactics could be harmful the child. That is particularly problematic in cases like this one, where the parent had used those tactics on prior occasions without the disastrous consequences, and so, would be even less likely to have the requisite *mens rea*. (*See* App. Br., p.31.) As the Supreme Court explained: "Idaho Code section 18-1501(1) is a criminal statute not a barometer for stupidity." *Young*, 138 Idaho at 373. Thus, the statute cannot be argued so broadly as to criminalize "good faith decisions that turn out poorly—innocent mistakes of judgment." *Id.*

Yet that is precisely what the State is arguing for on appeal. It contends the prosecutor can convince jurors in *voir dire* to set aside concerns about regulating discipline because that's not what is required under the law; it is just the act itself which is criminalized. (*See* Resp. Br., p.27.) It contends that the prosecutor can argue it was

enough for the State to prove that, even though the defendant did not intend for the child "to be injured like that," he intended the act and that is enough to convict. (Resp. Br., p.29.) Mr. Ruiz's argument against those statements is not calling for this Court to adopt the most damaging of several reasonable views of those statements (*see* Resp. Br., p.29); it is calling for this Court to reject those statements, as *Young* and its progeny have already held such statements to be improper under the plain language of the controlling statute.

Since the State's arguments on the second prong of the fundamental error analysis fail to comport with clear, established precedent, this Court should reject the State's arguments. Thus, the prosecutor's comments in *voir dire* and closing, subjected to evaluation under the prosper standard, "misled the jury about the mental element of the offense of injury to a child," *Halbesleben*, 139 Idaho at 169, and so, constituted error clear from the face of the record. (App. Br., pp.28-31.)

B. Mr. Ruiz Has Shown A Reasonable Possibility The Prosecutor's Misconduct Affected The Verdict In This Case

In arguing under the third prong of *Perry* on this issue, the State does not acknowledge the fact that one of the jurors who actually deliberated on this case had been persuaded to the prosecutor's erroneous view of the burden of proof. (*See generally* Resp. Br., pp.24-30.) After being subjected to the prosecutor's improper *voir dire* on this point, Juror 390 affirmed that "the fact that it was done, if you could prove that it was done, then that would be enough." (Tr., p.190, Ls.1-2.) However, Idaho's courts have held that is not the case: "This definition [of willfully] encompasses more than performing some act or omissions purposefully. . . . [T]he fact that a child is

ultimately injured or endangered is, by itself, insufficient to convict." *Gonzales*, 158 Idaho at 119; *cf. Young*, 138 Idaho at 373. Therefore, the fact that one of the twelve jurors who deliberated on this case expressly felt that "the fact that it was done," would be sufficient to convict Mr. Ruiz, shows the reasonable possibility the prosecutor's misstatement of the burden of proof contributed to the verdict – a conviction based on less than the required level of proof. Therefore, Mr. Ruiz has met his burden under the third prong of *Perry*.

Rather than address Juror 390's statement, the State simply argues that, "[i]n light of the strength of the state's evidence of [Mr.] Ruiz's guilt," it was the State's belief that Mr. Ruiz did not meet his burden under *Perry*. (Resp. Br., p.30.) However, *Perry* makes it clear that the relevant analysis to this prong of the fundamental error test is the harmless error test: "an appellate court shall review the error *under the harmless error test*, with the defendant bearing the burden of [proof] . . . ." *Perry*, 150 Idaho at 226 (emphasis added). As has been discussed in depth in Section III(C), *supra*, the State's argument, based on the purported strength of the other evidence in the record, is asking the appellate court to reweigh the evidence, and such an argument has no place in the harmless error analysis. Since *Perry* applies the harmless error analysis (with a flipped burden of proof), the State's arguments have no place under the *Perry* analysis either.

Therefore, the State's argument on the third prong of the *Perry* test, which is contrary to both the facts of the case and the relevant law, should be disregarded. Applying the proper standards, Mr. Ruiz has shown there is a reasonable possibility the prosecutor's misstatement of the State's burden of proof contributed to the verdict, and so, constitutes fundamental error.

VI.

The Accumulated Errors In This Case Require Reversal Even If This Court Determines Them To Be Individually Harmless

The State makes two brief points in regard to the application of the cumulative error doctrine in this case. First, it reasserts its belief that there were no errors in this case. (Resp. Br., p.31.) However, as demonstrated *supra*, the State is mistaken in that belief. There were at least five errors, at least three of which were objected to. Therefore, there are more than enough errors to accumulate, and when assessed together, they show Mr. Ruiz was denied his right to a fair trial. (*See* App. Br., pp.31-33 (discussing the application of the cumulative error doctrine in detail).)

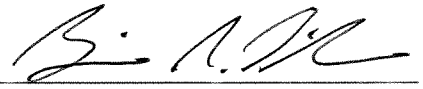
The other contention the State makes is that, "given the weight of the evidence presented that [Mr.] Ruiz was guilty of felony injury to child, any errors [were harmless]." (Resp. Br., p.31.) That argument is erroneous because it fails to appreciate the fact that the cumulative error doctrine applies the harmless error analysis. *See, e.g., State v. Whitaker*, 152 Idaho 945, 953 (Ct. App. 2012) (applying the harmless error test's rationale while evaluating a case for cumulative error). Therefore, the State bears the burden to prove the accumulation of errors harmless beyond a reasonable doubt. *See, e.g., Chapman*, 386 U.S. at 24; *Perry*, 150 Idaho at 226. As discussed in depth in Section III(C), *supra*, the State's argument, based on the purported strength of the other evidence in the record, is asking the appellate court to reweigh the evidence, and such an argument has no place in the proper application of the harmless error analysis. Since the cumulative error analysis applies the harmless error analysis, the State's argument has no place in the cumulative error analysis either. Therefore, this Court should disregard the State's improper argument to that effect.

Thus, even if all the errors discussed *supra* are independently harmless, the accumulation of those errors (at least those followed by a contemporaneous objection) reveal this Court should vacate Mr. Ruiz's convictions.

CONCLUSION

For any and all of the foregoing reasons, Mr. Ruiz respectfully requests that this Court vacate his conviction and remand this case for further proceedings.

DATED this 12th day of November, 2015.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of November, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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