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State v. Erickson Respondent's Brief Dckt. 35436

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

SCOTT ERICKSON,

Defendant-Appellant.

NO. 35436

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

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Nature Of The Case

Scott Erickson appeals from the judgment entered upon the jury verdicts finding him guilty of two counts of sexual abuse of a child.

Statement Of Facts And Course Of Proceedings

Erickson was charged with three counts of lewd conduct with a minor based on incidents involving his step-daughter and his biological daughter when each was around ten years old. (R., pp.53-54.) The jury found Erickson guilty of two counts of sexual abuse of a child. (R., pp.248-249.) The district court entered judgment upon the convictions, and Erickson timely appealed. (R., pp.286-288, 300-303, 307-312.)

ISSUES

Erickson states the issues on appeal as:

1. Did the State violate Mr. Erickson's and the jurors' right to equal protection when it used its preemptory challenges to only strike men from the jury?

2. Did the prosecutor's misconduct in this case violate Mr. Erickson's rights to due process and a fair trial?

3. Were Mr. Erickson's rights to due process and to be free from self incrimination violated when the State elicited testimony from Detective Vollmer that Mr. Erickson refused to come in for an interview?

4. Did the district court commit reversible error when it admitted evidence of prior bad acts of the defendant?

5. Did the repeated misconduct and the erroneous admission of evidence in this case result in cumulative error depriving Mr. Erickson of a fair trial?

(Appellant's brief, p.11.)

The state wishes to rephrase the issues on appeal as:

1. Has Erickson failed to establish clear error in the district court's rejection of his objection to the manner in which the state exercised its peremptory challenges?

2. Has Erickson failed to establish that the prosecutor engaged in misconduct, let alone misconduct so egregious as to rise to the level of fundamental error?

3. Has Erickson failed to establish that the introduction of testimony that he refused to participate in an interview with law enforcement is reversible error?

4. Has Erickson failed to establish that the admission of evidence that Tammy was not receiving child support is reversible error?

ARGUMENT

I.

Erickson Has Failed To Establish Clear Error In The District Court's Rejection Of His Objection To The State's Exercise Of Its Peremptory Challenges

A. Introduction

Erickson argued that the state improperly exercised all of its peremptory challenges to exclude men from the jury. (Trial Tr., p.39, L.14 – p.40, L.6.)[1] Following a hearing and after reviewing Batson v. Kentucky, 476 U.S. 79, 85 (1986) and J.E.B. v. Alabama, 511 U.S. 127, 141 (1994) the district court overruled Erickson's objection to the state's exercise of its peremptory challenges. Contrary to Doe's assertions on appeal, a review of the record and the applicable law supports the district court's ruling.

B. Standard Of Review

A trial court's finding regarding "the validity of the state's explanation for exercising peremptory challenges on minority jurors" is reviewed on appeal for clear error. State v. Araiza, 124 Idaho 82, 86, 856 P.2d 872, 876 (1993). "[T]he trial court's finding with regard to the state's explanation will be overturned on appeal only if it is clearly erroneous in light of the facts as a whole." State v. Owen, 129 Idaho 920, 933, 935 P.2d 183, 196 (Ct. App. 1997) (*citing* Araiza, 124 Idaho at 87, 856 P.2d at 877).

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[1] Although the record is slight, a fair reading does indicate that Erickson attempted to preserve his objection prior to the swearing of the jury, and did in fact put his objection on the record shortly thereafter. His objection appears, therefore, to be timely. State v. Hansen, 127 Idaho 675, 904 P.2d 945 (Ct. App. 1995) (*Batson* motion must be made before the jury is sworn, or it is waived.)

C. The District Court Rejected Erickson's Challenge To The State's Exercise Of It's Peremptory Challenges, Reaching The Correct Result Via An Incorrect Legal Theory

In Batson v. Kentucky, 476 U.S. 79, 85 (1986), the United States Supreme Court held that the discriminatory use of peremptory challenges to exclude racial minorities from jury service violates the Equal Protection Clause of the United States Constitution. In J.E.B. v. Alabama, 511 U.S. 127, 141 (1994), the court extended Batson to apply to exclusions based on gender. When faced with an assertion that a party has exercised a peremptory challenge in a discriminatory fashion the trial court must evaluate the Batson challenge under the following three-part test:

> First, the party objecting to the peremptory challenge must make a prima facie showing that the challenge was exercised on the basis of race. Second, if the prima facie showing is made, the burden shifts to the party attempting to exercise the peremptory challenge to articulate a race-neutral explanation for its decision. *Batson*, supra. Third, if a race-neutral explanation is tendered, the trial court must then determine whether the party attacking the peremptory challenge has met its burden of proving a purposeful discrimination based on race.

State v. Owen, 129 Idaho 920, 932, 935 P.2d 183, 195 (Ct. App. 1997) (citations omitted). *Accord* State v. Araiza, 124 Idaho 82, 87, 856 P.2d 872, 877 (1993).

Erickson did make a prima facie showing that the challenges were exercised on a prohibited basis. (Trial Tr., p.39, L.14 – p.40, L.6.) The state then articulated a gender-neutral explanation for its approach to the exercise of its peremptory challenges:

> We just simply exercise our prempts [sic] as we determine based upon the voir dires and based upon the questionnaire we felt best favored the State. ...

> We just felt we need a jury of parents and we kind of focused on getting parents. We wanted some grandparents on there, but we really didn't care whether they were fathers, mothers, grandmas, or grandfathers.

(Trial Tr., p.41, Ls.4-14.)

After reviewing Batson v. Kentucky, 476 U.S. 79, 85 (1986) and J.E.B. v. Alabama, 511 U.S. 127, 141 (1994), the district court overruled Erickson's objection based on its mistaken belief that those cases required relief only where the resulting jury excluded all of the protected class (i.e., was either all white or all female, respectively) and on its finding that white males are not a protected class. (Trial Tr., p.58, L.15 – p.61, L.15.) The trial court did not address the gender-neutral selection criteria articulated by the state or the standard for reviewing such a claim as set forth in Owen and Araiza.

The district court reached the right result, albeit under a different theory. Where the lower court reaches the correct result by relying on an incorrect legal theory, the appellate court will affirm the result under the correct legal theory. McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999); State v. Avelar, 129 Idaho 700, 704, 931 P.2d 1218, 1222 (1997); *see also* State v. Rhoades, 134 Idaho 862, 864, 11 P.3d 481, 483 (2000). In this case, the state did in fact articulate a credible, gender-neutral reason for the method by which it exercised its peremptory challenges. Guided by the potential jurors' answers to the questionnaires and in voir dire, and given the nature and circumstances of the alleged crimes, the state sought a jury of parents and grandparents. Given that Erickson never addressed the gender-neutral explanation, and that the gender-neutral explanation was credible and reasonable in light of the

circumstances and nature of the alleged crimes, the district court correctly rejected Erickson's objections, albeit based on an incorrect legal theory. The district court's decision should be upheld.

II.

Erickson Has Failed To Show Prejudicial Error Regarding Any Claim Of Prosecutorial Misconduct

A. Introduction

Erickson claims the prosecutor argued facts not in evidence with regard to the reasons for the nearly three-year delay between the crimes being reported and the charges being filed. (Appellant's brief, p.31.) Erickson also contends the prosecutor engaged in misconduct when he asked Erickson's father whether there were any illegal substances found in the truck, belonging to Erickson, that Erickson's father turned over to Erickson's estranged wife. (Appellant's brief, p.33.) Finally, Erickson contends the prosecutor committed misconduct in opening and closing arguments by vouching, misstating the burden of proof, appealing to the jurors' emotions and referring to the law regarding child custody disputes. (Appellant's brief, pp.41-46.)

In several of these instances, the prosecutor did nothing contrary to what he was entitled to do during the course of trial. Even assuming one or more comments or questions by the prosecutor may have been improper, such conduct by the prosecutor was not constitutionally harmful. *See* State v. Christiansen, 144 Idaho 463, 163 P.3d 1175, 1180-81 (2007).

B. Standard Of Review And General Legal Standards Governing Claims Of Prosecutorial Misconduct

A defendant is not entitled to relief based upon a claim of prosecutorial misconduct unless he can establish two things: (1) the complained of conduct was improper; and (2) the improper conduct prejudiced him. State v. Romero-Garcia, 139 Idaho 199, 202, 75 P.3d 1209, 1212 (Ct. App. 2003). Thus, a mere assertion or finding that a particular question or statement was objectionable or improper is insufficient to establish prosecutorial misconduct. As explained by the United States Supreme Court: "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations and citations omitted); *see also* Smith v. Phillips, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.")

In that regard, the Supreme Court has indicated prosecutorial misconduct may occur where the prosecutor "manipulate[s] or misstate[s] the evidence" or "implicate[s] other specific rights of the accused such as the right to counsel or the right to remain silent." Darden, 477 U.S. at 181-82. However, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11 (1985). Thus, the

Court must consider the probable effect that the prosecutor's argument "would have on the jury's ability to judge the evidence fairly." Id. at 11-12.

Consistent with Darden and Young, the Idaho Supreme Court has held that a conviction will be set aside for prosecutorial misconduct only when the conduct is sufficiently egregious as to result in fundamental error. State v. Hairston, 133 Idaho 496, 507, 988 P.2d 1170, 1181 (1999). Misconduct by a prosecutor is fundamental only if the alleged misconduct is so egregious or inflammatory that any prejudice arising from it was not, or could not have been, remedied by a ruling from the trial court informing the jury that it should be disregarded. State v. Porter, 130 Idaho 772, 785-786, 948 P.2d 127, 140-141 (1997); State v. Smith, 117 Idaho 891, 898, 792 P.2d 916, 923 (1990); State v. Missamore, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988); State v. Ames, 109 Idaho 373, 707 P.2d 484 (Ct. App. 1985).

With respect to prosecutorial misconduct in the context of closing argument the Supreme Court has stated:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions [as repeated mischaracterizations of an exhibit]. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974).

The Idaho Supreme Court has recently reiterated the importance of reviewing closing arguments in light of their improvisational nature, noting that "in reviewing allegations of prosecutorial misconduct [the appellate court] must keep in mind the realities of trial." State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007) (*quoting* State v. Estes, 111 Idaho 423, 427-28, 725 P.2d 128, 132-33 (1986)). The Idaho Court of Appeals has further recognized "[t]he right to due process does not guarantee a defendant an error-free trial but a fair one," and the function of appellate review is "not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial." State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991).

Absent a timely objection at trial, an appellate court will generally not consider an issue on appeal unless the error alleged is "fundamental error." State v. McAway, 127 Idaho 54, 896 P.2d 962 (1995). An error is fundamental if it "goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." State v. Christiansen, 144 Idaho 463, 470, 163 P.3d 1175, 1182 (2007). An error is not deemed fundamental and may not be reviewed for the first time on appeal if it could have been cured by a timely objection. State v. Brown, 131 Idaho 61, 68-71, 951 P.2d 1288, 1295-98 (Ct. App. 1998). In the context of closing arguments, the Idaho Supreme Court has stated:

> Prosecutorial misconduct rises to the level of fundamental error if it is calculated to inflame the minds of jurors and arouse passion or

> prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. More specifically, prosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded.

State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003) (citations, quotations, and brackets omitted).

Application of the foregoing standards to Erickson's claims of prosecutorial misconduct reveals he has failed to establish fundamental error.

C. Erickson Has Failed To Establish Prosecutorial Misconduct By The Prosecutor's Reference To The Circumstances Surrounding The Delayed Filing Of Charges

Erickson called his wife, Tammy, to testify in an effort to support his claim that the allegations against him were simply part of a very ugly separation. (Trial Tr., p.306, L.15 – p.318, L.4, p.374, Ls.17-23; p.498, Ls.3-15.) Erickson questioned why Tammy would allow their daughter and son to be around him after the allegations were made. (Trial Tr., p.457, L.22 – p.458, L.11.) Following this line of questioning, the state asked Tammy why she would allow him to have supervised visitation, and she explained that Erickson told her that law enforcement told him the charges had been dropped for lack of evidence. (Trial Tr., p.458, L.22 – p.459, L.1.) Tammy immediately said "[i]t was dropped, but it wasn't because there wasn't enough evidence." (Trial Tr., p.459, Ls.1-3.) The prosecutor asked "So you were unaware that the sheriff's office simply had lost that file and had not proceeded?" (Trial Tr., p.459, Ls.10-11.) Erickson objected as assuming facts not in evidence, the court overruled the objection and Tammy

answered "Yes, Scott told me that. That he was questioned and that that was it." (Trial Tr., p.459, Ls.12-18.) Erickson now claims that it was prosecutor misconduct to ask the question, and to briefly refer to the file being lost in opening and closing argument, even though the court overruled his objection and allowed the question and the testimony. The prosecutor did not commit misconduct.

Tammy's testimony that Erickson had told her the case was dropped for lack of evidence, and her testimony immediately thereafter that "it was dropped, but it wasn't because there wasn't enough evidence" gave rise to a reasonable question: if it was not dropped for lack of evidence, why was the case dropped? Tammy's testimony clearly evidences some knowledge, apparently gained after her communication with Erickson, that something happened to the case other than being dropped for lack of evidence. The prosecutor's follow-up question, while not a model of clarity, sought that answer. A more appropriate objection might have been that the question was leading. Asking a single, leading question in follow-up to a witness' testimony, however, does not amount to prosecutor misconduct, and certainly not fundamental error.

Further, the prosecutor's reference to the circumstances of the lost file in opening and closing do not amount to prosecutorial misconduct. Clearly, in discussing it in the opening, the prosecutor anticipated that the information about the lost file would be put into evidence. His question to Tammy was designed to do just that. Apparently, Erickson anticipated that it would be part of the evidence as well, because Erickson made no objection to the statement. Why

the prosecutor did not pursue the line of questioning after Tammy repeated what Erickson told her is not clear, and is unfortunate. It's clear from Tammy's immediately preceding remark that she is aware that different circumstances led to the delay in filing the charges. However, the prosecutor's obvious mistake in failing to follow-up when the answer sought was not immediately forthcoming is not so egregious as to constitute misconduct.

Likewise, no objection was made to the prosecutor's mention of the lost file in rebuttal closing arguments. Reading the comments in the context of the prosecutor's closing argument as well as in the context of Erickson's closing argument, and keeping in mind the realities of trial and the improvisational nature of closing arguments, the prosecutor's brief mention in his rebuttal closing of an item that he apparently believed had been entered into evidence, and one that ultimately mattered little to the jurors' deliberations, was not so egregious as to amount to fundamental error.

D. Erickson Has Failed To Establish Prosecutorial Misconduct By Violating The District Court's Ruling Regarding Erickson's Drug Use

Erickson claims the prosecutor committed misconduct when he "attempted to solicit testimony regarding Mr. Erickson's drug use ... without first obtaining a ruling." (Appellant's brief, p.33.) The district court ruled prior to trial that "any evidence of Defendant's criminal acts or bad acts pertaining to illegal drugs or controlled substances shall not be presented to the jury by an attorney or witness without the necessary hearing outside the presence of the jury." (R., p.184.)

After Erickson's father testified at length about the protracted dispute between Erickson and Tammy over possession of a truck from the marriage, he concluded his testimony by saying that the truck had been towed when Erickson was arrested in this case, he (Erickson's father) had paid to get it out of impound, and that shortly thereafter he called Tammy and told her to come get the truck. (Trial Tr., p.368, L.16 – p.369, L.9.) The prosecutor opened his cross-examination by asking Erickson's father "Do you know whether or not there were any illegal substances found in that truck?" (Trial Tr., p.369, Ls.13-14.) Erickson objected, and the jury was excused. (Trial Tr., p.369, Ls.15-20.) The prosecutor explained that the question was intended not to reference Erickson's pending drug case, but to lay the foundation for his theory that Erickson's father turned over the truck with drugs in it as a means of "trying to entrap her because they knew there was meth in that car that the police had not recovered." (Trial Tr., p.371, Ls.18-24.) The prosecutor conceded that he thought all of the testimony about the truck was "kind of irrelevant anyway" but that he pursued it based on Erickson's presentation of his father's testimony. (Trial Tr., p.372, L.1 – p.373, L.9.) Ultimately, the district court sustained the objection (Trial Tr., p.378, Ls.13-20, p.379, Ls.12-13), and the prosecutor moved on to a different line of questioning (Trial Tr., p.379, Ls.8-22).

While it is indeed misconduct for a prosecutor to intentionally disregard a district court's evidentiary ruling, State v. Field, 144 Idaho 559, 165 P.3d 273 (2007), that is not what occurred in this case. The prosecutor's question did not directly implicate Erickson in drug use, nor did the prosecutor apparently intend

to do so. The prosecutor's assessment that both his and Erickson's line of questioning about the conflict over the truck and its eventual return was "kind of irrelevant" is apt, but his pursuit of that line of questioning and his attempt to meet Erickson's evidence does not constitute misconduct.

E. Erickson Has Failed To Establish Prosecutorial Misconduct By Vouching, By Misstating The Burden Of Proof Or By Impermissibly Appealing To The Jurors' Emotions

Erickson claims that the prosecutor, in his opening and closing arguments, "vouched" for the credibility of the witnesses, misstated the burden of proof and impermissibly appealed to the juror's emotions. (Appellant's brief, pp.35-46.) At trial, Erickson objected only to statements that are now objected to as vouching, preserving only those arguments for appeal. Because none of the arguments, when read in the context of the trial and arguments and keeping in mind the realities of trial and the improvisational nature of opening and closing arguments, amount to misconduct, let alone fundamental error, Erickson has failed to establish fundamental error allowing review of his other claims or requiring reversal of his vouching claim.

First, Erickson claims the prosecutor engaged in "vouching" in comments made in his opening and closing statements. (Appellant's brief, pp.36-39.) However, when viewed in the context in which each offending argument is made, the bulk of the statements objected to on appeal are made in the context of the prosecutor simply delineating the circumstances which give rise to a reasonable finding by the jury that a particular witness's testimony is believable on a

particular point. The balance of the comments, while unfortunate, do not rise to the level of fundamental error.

For example, Erickson complains of the prosecutor's statement in opening that "What I'm going to tell you is I don't believe children under these circumstances are going to lie to you. I think you will find the truth." (Appellant's brief, p.365; Trial Tr., p.27, L.23 – p.28, L.6.) A review of the context in the whole of the opening argument reveals that the prosecutor is describing the expert's testimony about the effects on children who have been abused by family members and how that might lead to reluctance to report or testify, inconsistencies in reported details, etc. (Trial Tr., p.25, L.11 – p.28, L.11.) The statement in closing that "*I suggest to you* she's telling the truth" (Appellant's brief, p.37) is not, on its face, vouching, and the immediately following statements about the circumstances which show credibility bear that out. (Trial Tr., p.482, Ls.11-17.) The statement that "Does that mean she's not credible? Absolutely not" is likewise followed immediately by specific references to testimony by both parties' experts that explain why there might be inconsistencies in a victim's testimony. (Trial Tr., p.484, Ls.7-24.) The prosecutor, ultimately, repeatedly referred not to his own belief in the victims' credibility, but to the truth-finding function of the trial itself: "They are subject to cross-examination. They are subject to speculation" (Trial Tr., p.28, Ls.2-4.); "And they took a lot of shots at them, a lot of cross-examination" (Trial Tr., p.486, LS.9-11).

The prosecutor's comments regarding the victims' mother and the believability of the testimony of the defense witnesses likewise largely come in the context of evaluating the context and circumstances of the testimony and the relationships between the witnesses. (Trial Tr., p.492, L.13 – p.493, L.18.)

In the context of the entirety of the trial and the entirety of the closing arguments, the prosecutor's comments largely comply with the parameters of acceptable argument; what remains does not amount to egregious misconduct rising to the level of fundamental error.

Second, Erickson claims the prosecutor misstated the burden of proof. (Appellant's brief, p.41.) When read in their entirety, the prosecutor's statements ultimately pull the jury back to a reminder that the state's burden of proof is "beyond a reasonable doubt":

> I just think the bottom line is this, it's our communities and our families, our children. We have the legal, moral, ethic obligation to protect them. You set a standard for myself as prosecutor. You set the standard for law enforcement. We look at these cases very carefully. What is the standard in Bear Lake County by a jury on what they're going to accept as proof of child molestation? That's all it's about.
>
> And if you're saying Mr. Helm, Lorissa, Crystal, Officer Martinez, it's just not there, I've got to have more than this, we understand that, but there is also a downside to it. I can't bring you the perfect case. There will always be the possibility there. I bring you two people molested by their father at pretty much the same age. One gives credibility to the other. One collaborates the other. The pattern is similar. Circumstances are similar. You as a juror are saying I don't believe either one of them.
>
> **Ladies and gentleman, I tell you this is proof beyond a reasonable doubt.**

(Trial Tr., p.526, Ls.6-25.) (Emphasis supplied.) There is no misstatement of the burden of proof; it is argument to the jury that the state has met the burden of proof. Erickson has failed to establish fundamental error.

Finally, Erickson claims the prosecutor impermissibly appealed to the jurors' emotions by asking them to place themselves in the shoes of the victims. (Appellant's brief, p.43.) Again, these unobjected to statements, when read in their actual context, specifically link the victims' testimony and actions to the testimony of the state's expert:

> [The expert] told you that sometimes when kids are confronted by a total stranger, just clear out of the blue, that they will initially deny it. Isn't that Crystal? Had no idea that she's going to be confronted by a police officer and asked about her father.
>
> The initial reaction I think almost always in that case is not going to be all that unusual. You're going to deny. The officer is not somebody you know. It's not somebody you trust. I think she was – going to get her age right, I think she was about 13 or 14 when she was confronted with this. You just – what would you say? *You use your common sense*. Put yourself in that position. What would you say? ...

(Trial Tr., p.481, Ls.8-20.) The prosecutor did not ask the jury to put themselves in the shoes of the victim *as a victim*; the prosecutor asked the jury to do what Jury Instruction 5 tells them to do, namely, apply their common sense when evaluating whether the victims' actions and testimony are believable:

> There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

(R., p.198.) Erickson has failed to establish misconduct by the prosecutor rising to the level of fundamental error.

III.

The Introduction Of Evidence Of Erickson's Failure To Attend An Interview With Law Enforcement Is Harmless Error

On appeal, Erickson challenges the introduction of testimony by the original investigating officer, on cross-examination during Erickson's presentation of his defense, that Erickson "refused to come in" for an interview regarding the allegations. (Appellant's brief, p.54; Trial Tr., p.399, L.15 – p.400, L.13.) Erickson made no objection to the introduction of this testimony. While the introduction of such testimony, if not made for a permissible purpose, can be fundamental error subject to appellate review without objection, it still may be harmless.

"An error is harmless if the appellate court is able to say, beyond a reasonable doubt, that the jury would have reached the same result absent the error." State v. Lopez, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005) (*citing* State v. Boman, 123 Idaho 947, 950-51, 854 P.2d 290, 293-94 (Ct. App. 1993)). In light of the evidence presented, even if this Court finds error, any error was harmless.

Erickson's daughter testified that he touched "my boobs and my butt and asked me if I liked it how daddy touched me." (Trial Tr., p.84, Ls.20-22.) Erickson's step-daughter likewise testified that Erickson "touch[ed] my boobs and my butt." (Trial Tr., p.112, Ls.16-24, p.114, Ls.14-18.) While Erickson rightfully concludes that the case hinged on the credibility of Erickson's daughter and step-daughter, that does not preclude a finding that the jury would have reached the same result absent the introduction of the testimony. In fact, the jury's

verdicts demonstrated that its determination of the credibility of the victims had very little to do with information about the "family turmoil" or other extraneous information (such as whether Erickson spoke to police) when it determined that Erickson was not guilty of one count and found that he was guilty of included offenses on the other two counts based on the victims' testimony detailing the nature of the sexual contact. This Court can conclude, beyond a reasonable doubt, the jury would have reached the same result absent any error.

IV.

Erickson Has Failed To Establish The District Court Committed Reversible Error By Admitting Evidence That Tammy Erickson Was Not Receiving Child Support

A. Introduction

Erickson claims that the district court admitted impermissible character evidence, and did so without the state having given the notice required by I.R.E. 404(b). (Appellant's brief, p.59.) Specifically, Erickson objects to the admission of testimony by Tammy Erickson that she was not getting child support for her four children. Because the testimony was not evidence of "prior bad acts" by Erickson, its admission did not violate I.R.E. 404(b). Further, if the testimony is construed by this court to be evidence of "bad acts," the district court correctly admitted it for a permissible purpose.

B. Standard Of Review

The district court has broad discretion in the admission and exclusion of evidence and its decision to admit such evidence will be reversed only when there has been a clear abuse of that discretion. State v. Perry, 139 Idaho 520,

521-22, 81 P.3d 1230, 1231-32 (2003). Rule 404(b) of the Idaho Rules of Evidence provides that evidence of other "crimes, wrongs, or acts" is generally inadmissible to prove the character of a person or that the person acted in conformity with that character. I.R.E. 404(b). Such evidence is admissible, however, to prove matters other than propensity. I.R.E. 404(b).

C. Erickson Has Failed To Establish Reversible Error In The Admission Of Evidence That Tammy Did Not Receive Child Support For Her Four Children, Two Of Which Were Not Erickson's, At A Time When Erickson And Tammy Were Not Divorced

Erickson called his wife Tammy to testify about their relationship, specifically about the volatility of their separation, in an effort to support his claim that the allegations against him were simply part of a very ugly separation. Much of the testimony centered around a particularly heated dispute between Erickson and Tammy over who should have possession of a truck. (Trial Tr., p.303, L.15 – p.318, L.4, p.374, Ls.17-23; p.498, Ls.3-15.) Tammy had two children from a previous marriage and two children with Erickson. (Trial Tr., p.304, L.24 – p.305, L.17.) Erickson's counsel elicited testimony from Tammy that she was angry about the circumstances of the separation from Erickson: "He left me and the kids with nothing. He would come throughout the evening and steal the vehicle so the kids didn't have a ride to school or to the doctor or anything else." (Trial Tr., p.310, Ls.9-16.)

Tammy took the truck from Erickson's parents' house at a time when she was accompanied by three of her four children. (Trial Tr., p.310, Ls.9-22, p.315, L.7 – p.317, L.5, p.437, L.2 – p.439, L.8.) Erickson, his father and a sheriff's

deputy pursued Tammy and retrieved the truck. (Trial Tr., p.438, L.22 – p.439, L.8.)

On rebuttal, the state called Tammy as a witness and asked her to explain the circumstances of her taking the truck from Erickson's parents' house: "Now at that time were you getting any child support --." (Trial Tr., p.439, Ls.9-10.) Erickson objected on the grounds that this was improper character evidence. (Trial Tr., p.439, Ls.11-16.) The state explained that it was attempting to "show her desperate need for a vehicle." (Trial Tr., p.439, Ls.19-20.) The court overruled Erickson's objection, and Tammy answered the question with "No." (Trial Tr., p.439, Ls.21-25.)

Despite Erickson's claim that the court did not recognize this as character evidence, the court clearly did, allowing the admission of the testimony on the basis of the permissible purpose offered by the state. More to the point, the truly "bad" evidence of Erickson's character related to his support of his children had already been elicited by Erickson during the presentation of his defense when he elicited Tammy's testimony that Erickson "left me and the kids with nothing." (Trial Tr., p.310, L.9.) Further, the question was a broad one – "were you getting any child support" – put to a woman who was still legally married to Erickson but had two children from prior relationship, and did not directly implicate Erickson in any bad behavior. Finally, if the district court erred in admitting this testimony, it was harmless error, as the jury would have reached the same verdict absent the alleged error. Lopez, 141 Idaho at 578, 114 P.3d at 136.

CONCLUSION

The state respectfully requests this Court to affirm the judgment entered upon the jury's verdict finding Erickson guilty of two counts of sexual abuse of a child.

DATED this 17th day of June, 2009.

Rebekah A. Cudé
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June, 2009, I served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

HEATHER M. CARLSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defenders' basket located in the Idaho Supreme Court Clerk's office.

Rebekah A. Cudé
Deputy Attorney General

RAC/pm