2-17-2010

State v. Truman Appellant's Brief Dckt. 36194

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 36194
	)	
v.	)	
	)	
JEFFREY ALAN TRUMAN,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

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

Following a jury trial, Jeffrey Truman was convicted of one count of lewd conduct with a minor and one count of sexual abuse of a minor. He timely appeals and asserts that, because the statute defining the offense of sexual abuse that existed at the time he was alleged to have committed this offense did not criminalize the behavior that he was charged with, there was insufficient evidence presented in support of this charge. Additionally, the invalidity of this charge rendered the indictment in this case legally insufficient to confer subject matter jurisdiction to the district court for the charge of sexual abuse, as the offense as charged did not establish or allege the essential element of solicitation of a minor to directly participate in sexual conduct.

Moreover, the district court erred in this case when it admitted prior bad acts evidence against Mr. Truman under I.R.E. 404(b). The district court erroneously applied a reduced standard of admissibility for this evidence under the belief that a different standard applied to the admission of other acts evidence in child sexual abuse cases. In addition, some of the I.R.E. 404(b) evidence in this case should not have been admitted because it was only relevant to the charge of sexual abuse, which was an invalid charge.

Mr. Truman further asserts that the prosecutor committed misconduct, rising to the level of a fundamental error, when the prosecutor intentionally elicited highly inflammatory evidence that was expressly deemed inadmissible by the district court's prior ruling. Finally, Mr. Truman asserts that, even if the trial errors in his case are

deemed harmless individually, the cumulative effect of these errors warrants reversal in his case.

Statement of the Facts and Course of Proceedings

Mr. Truman was charged with one count of lewd conduct with a minor and one count of sexual abuse of a child under sixteen years of age. (R., pp.17-19.) The alleged victim, T.S., was Mr. Truman's step-daughter who was between the ages of 13 and 14 years old during the time period when these charges were alleged to have arisen. (R., p.18.) While the lewd conduct charge was based on an allegation of direct sexual contact between Mr. Truman and the alleged victim, the sexual abuse charge stemmed from the allegation that Mr. Truman solicited T.S. to participate in a sexual act, "by asking T.S. to film a sexual act between himself and [J.R.][1] and/or by having T.S. watch a sexual act between himself and [J.R.]." (9/2/08 Tr.[2], p.6, Ls.2-13; R., p.18.) The State conceded that the basis for its charge of sexual abuse was the allegation that Mr. Truman merely asked the alleged victim to film or view the sexual activity, not that the alleged victim actually filmed any sexual activity between Mr. Truman and another individual. (9/2/08 Tr., p.8, L.20 – p.9, L.2.) The indictment against Mr. Truman alleged that this activity took place, "between August 2006 and December 2006." (R., p.18.)

The State filed a motion in limine seeking to admit evidence of prior bad acts allegedly committed by Mr. Truman against T.S. (R., pp.42-43.) Mr. Truman likewise

[1] J.R. appears to be an adult female. However, due to the State's allegation that J.R. may have suffered from some form of mental incapacity or condition, references to her are made herein in accordance with her initials rather than her full name.

[2] Because there are multiple volumes of transcripts of proceedings in this case, for ease of reference, citations to the transcripts are made herein in accordance with the date of the proceeding transcribed.

filed a motion in limine. (R., pp.61-62.) In this motion, Mr. Truman sought an order from the district court limiting the testimony and evidence at trial to the allegations actually set forth in the superseding indictment, and further sought an order precluding the State from eliciting testimony regarding any mental capacity or mental condition of J.R. (R., pp.61-62.)

Two days before trial, the district court held a hearing on the evidentiary motions that were filed by the State and Mr. Truman. (9/8/08 Tr., p.14, L.4 – p.52, L.15.) Mr. Truman argued that the evidence proffered by the State in support of its request to admit prior bad acts evidence did not provide a sufficient factual basis to give notice as to what acts the State was seeking to admit into evidence. (9/8/08 Tr., p.20, Ls.10-14; p.22, L.8 – p.23, L.11.) Specifically, Mr. Truman challenged the lack of specificity as to when these acts were alleged to have occurred. (9/8/08 Tr., p.19, L.16 – p.20, L.20.) The State responded that it had provided defense counsel with the approximate time frame in question, and that this was sufficient to provide notice. (9/8/08 Tr., p.22, Ls.1-7.)

At this hearing, the district court determined that the State had provided a sufficient factual basis to provide notice to Mr. Truman as to the general nature of the prior bad acts evidence that the State was seeking to admit. (9/8/08 Tr., p.32, Ls.12-23.) However, in finding that some of this evidence was relevant and admissible, the district court relied largely on precedent from the Idaho Court of Appeals that treated cases involving allegations of sexual abuse towards minors as having different standards for admissibility of prior bad acts evidence. (9/8/08 Tr., p.30, L.10 – p.33, L.16.) The evidence regarding alleged sexual activity between Mr. Truman and J.R.

was deemed relevant specifically to the charge of sexual abuse of a minor as corroboration of the alleged victim's account. (9/8/08 Tr., p.34, L.17 – p.35, L.17; p.50, Ls.5-10.) And the district court again rooted its evidentiary ruling as part of "the unusual nature of child sex abuse cases," with regard to the admissibility of prior bad acts evidence. (9/8/08 Tr., p.47, L.21 – p.48, L.1.)

The district court thereafter entered an order regarding the motions in limine. (R., pp.70-71.) In this order, the court ruled that evidence of prior sexual contacts between Mr. Truman and the alleged victim occurring between August, 2006 and December, 2007 were admissible. (R., p.71.) The district court also ruled that evidence regarding alleged sexual contact between Mr. Truman and J.R. that occurred in the presence of T.S. would be admissible as corroboration of T.S., or to otherwise demonstrate "a motive, plan, intent, [or] lack of accident or mistake for the sexual acts between Defendant and T.S." (R., p.71.) But the court also concluded that evidence of the mental capacity or status of J.R. was irrelevant, as Mr. Truman was not charged with any crime in relation to the alleged sexual contact between himself and J.R. (R., p.71.)

The State's first witness at trial was Liz LaFranier, who was employed with the Nampa School District to work with special education students. (Trial Tr., p.167, Ls.7-15.) Ms. LaFranier testified that J.R. was one of her students in this capacity. (Trial Tr., p.167, Ls.21-23.) Despite the district court's prior ruling that the mental condition of J.R. was inadmissible, the prosecutor elicited testimony from Ms. LaFranier that her "legal relationship" with J.R. arose because J.R., "used to live in the state school, Idaho

State School and Hospital, and we have a PCS[3] home, and she resides with us." (Trial Tr., p.168, Ls.1-5.) While Ms. LaFranier was taking college courses, Mr. Truman and his wife would take care of J.R. at their home. (Trial Tr., p.170, L.10 – p.172, L.3.) Ms. LaFranier testified that this arrangement was because J.R. "can't be left alone." (Trial Tr., p.170, L.24 – p.171, L.1.)

After Ms. LaFranier's testimony, the State called J.R. to testify. (Trial Tr., p.199, Ls.11-15.) J.R. testified that, when she was present at Mr. Truman's house, there would sometimes be "people naked" on the television and that Mr. Truman put his "thing" in her mouth and on her chest. (Trial Tr., p.206, Ls.2-19.) On cross-examination, J.R. also testified that she and T.S. had used a computer together, and that T.S. had shown her things on a computer before. (Trial Tr., p.212, L.21 – p.213, L.11.)

T.S. testified at Mr. Truman's trial. (Trial Tr., p.245, Ls.18-21.) According to her testimony, she decided to come forward and tell her father and some people from her church about the alleged sexual abuse after learning about sexually transmitted diseases in her health class at school. (Trial Tr., p.250, L.14 – p.252, L.23.) Although Mr. Truman was only charged with lewd conduct for acts occurring "on or about the 5th day of December , 2007," T.S. testified that she had been sexually abused for the past year to year and one-half. (Trial Tr., p.252, L.20 – p.253, L.9.)

T.S. further testified that, on the afternoon of December 5, 2007, she was sexually abused by Mr. Truman prior to going to her afternoon job selling subscriptions

[3] Although not expressly stated to the jury, a "PCS home" is a personal care services home that is funded by the state. *See* I.C. § 39-5601 *et seq.*

to a local paper. (Trial Tr., p.253, L.10 – p.266, L.11.) According to her testimony, her step-father had asked T.S. to come to his bedroom before he drove her to work and she complied. (Trial Tr., p.262, Ls.2-10.) When she entered the bedroom, Mr. Truman was positioned on the bed wearing his work clothes with his genitalia exposed. (Trial Tr., p.262, L.20 – p.263, L.7.) She further testified that Mr. Truman requested that T.S. perform oral sex on him. (Trial Tr., p.263, Ls.3-10.) T.S. testified that she complied. (Trial Tr., p.264, L.23 – p.265, L.12.)

The prosecutor then questioned T.S. about the allegation that Mr. Truman had asked her to film him engaging in sexual activity with J.R. (Trial Tr., p.267, L.10 – p.273, L.9.) T.S. testified that she and J.R. had entered Mr. Truman's bedroom while he was watching a pornographic video. (Trial Tr., p.267, L.10 – p.269, L.12.) J.R. then began touching Mr. Truman's penis. (Trial Tr., p.269, L.23 – p.270, L.4.) At this point, according to T.S., Mr. Truman requested that T.S. film him engaging in oral sex with J.R. (Trial Tr., p.270, Ls.5-10.) While T.S. refused to do so and initially left the room, according to her testimony, she then returned and observed J.R. perform oral sex on Mr. Truman. (Trial Tr., p.270, Ls.7-24.)

T.S. testified that, later that evening, she and J.R. took turns performing oral sex on Mr. Truman. (Trial Tr., p.272, Ls.1-19.) She further testified that she and J.R. had sexual contact with Mr. Truman on subsequent occasions, but eventually J.R. stopped coming over to their home and the sexual activity was limited to T.S. and Mr. Truman. (Trial Tr., p.272, L.24 – p.273, L.9.) Additionally, T.S. testified that the sexual activity between herself and Mr. Truman occurred with increasing frequency over the intervening months leading up to December 5, 2007. (Trial Tr., p.273, Ls.1-9.)

According to her testimony, Mr. Truman would buy T.S. things or accord her privileges in exchange for her performing sexual acts with him, and would withhold things from her if she refused to do so. (Trial Tr., p.276, L.25 – p.278, L.16.)

On cross-examination, T.S. admitted that she had never disclosed any of her allegations of sexual abuse for three years, even to those people that she was closest to. (Trial Tr., p.313, L.10 – p.315, L.16.) T.S. also acknowledged that she and a friend had looked up pornographic materials on the computer while her mother and Mr. Truman were in another room. (Trial Tr., p.347, L.13 – p.352, L.6.) During cross-examination, T.S. further admitted that she had taken a vibrator from her parents' room in order for her personal use. (Trial Tr., p.353, L.8 – p.357, L.12.) T.S. admitted that she lied to various people when she told them that Mr. Truman had bought the vibrator for her use, and that she made this up "to look cool or whatever." (Trial Tr., p.357, L.13 – p.359, L.7.)

The State next called T.S.'s father, Barry Stimpson, to the stand. (Trial Tr., p.403, Ls.21-23.) Mr. Stimpson testified as to the events surrounding T.S.'s disclosure of the allegations of sexual abuse against Mr. Truman. (Trial Tr., p.406, L.8 – p.411, L.17.) Specifically, he testified that T.S. had called him and asked him to pick her up at church. (Trial Tr., p.406, L.8 – p.408, L.16.) When he arrived, Mr. Stimpson went inside the church at the behest of his daughter and two other church members, and was told that T.S. had told the church members that she had been molested by Mr. Truman. (Trial Tr., p.408, Ls.11-25.) Immediately thereafter, Mr. Stimpson left with T.S. and went to his home. (Trial Tr., p.409, Ls.3-9.) He called the police department from his home. (Trial Tr., p.409, Ls.3-9.)

After Mr. Stimpson's testimony, the State called Susan Stimpson to the stand. (Trial Tr., p.423, Ls.21-23.) Ms. Stimpson is T.S.'s mother. (Trial Tr., p.427, Ls.11-14.) During the time that T.S. alleged that she was molested, Ms. Stimpson was a student working towards her teaching certification. (Trial Tr., p.424, L.3 – p.425, L.23.) Ms. Stimpson testified that she was informed of T.S.'s allegations from Mr. Stimpson, her former husband, when he came over to her house to tell her why T.S. would not be returning to her home. (Trial Tr., p.428, L.21 – p.429, L.21.) Right after Mr. Stimpson left, Ms. Stimpson called Mr. Truman and told him that he needed to come home right away. (Trial Tr., p.429, Ls.22-24.)

According to Ms. Stimpson's testimony, Mr. Truman denied these allegations. (Trial Tr., p.430, Ls.5-12.) Mr. Truman was shocked and upset by T.S.'s accusations. (Trial Tr., p.455, Ls.1-11.) Then Ms. Stimpson left to have drinks with a friend. (Trial Tr., p.430, Ls.9-13.) The following day, Ms. Stimpson testified that she told Mr. Truman to take her vibrator and other sexual items out of the house because she thought that the police may search their home based upon T.S's allegations. (Trial Tr., p.430, L.17 – p.431, L.14.) When Ms. Stimpson spoke to police, she told them that she could not think of any events or occurrences that would substantiate T.S.'s claims regarding Mr. Truman. (Trial Tr., p.455, Ls.15-23.) While being questioned by police, Ms. Stimpson told the officer that T.S. had lied in the past in order to gain attention. (Trial Tr., p.467, Ls.7-10.) She also admitted on cross-examination to having made false representations to police officers the night they came to investigate T.S.'s allegations of molestations. (Trial Tr., p.459, L.18 – p.462, L.11.)

The last witness presented by the State was Detective Mark Palfreyman, who is a Nampa city police officer. (Trial Tr., p.482, Ls.11-19.) Detective Palfreyman conducted the investigation into T.S.'s accusations, and interrogated Mr. Truman during the course of this investigation. (Trial Tr., p.495, Ls.2-21.) Mr. Truman denied ever having any sexual contact with T.S. (Trial Tr., p.497, L.20 – p.498, L.1.) But he admitted to the detective that he had disposed of the vibrator, pornographic tapes, and lubricants that had previously been kept in his house. (Trial Tr., p.498, L.2 – p.499, L.5.) When asked about J.R., Mr. Truman admitted that he had engaged in sexual intercourse with her. (Trial Tr., p.499, Ls.6-21.)

During closing arguments, the State again made clear that the sexual abuse charge levied against Mr. Truman was based solely upon the allegation that Mr. Truman had asked T.S. to videotape him engaging in a sexual act with J.R. (Trial Tr., p.549, L.6 – p.550, L.1.) Specifically, the State asserted that the basis of this charge was the following:

> "On or about that date in the State of Idaho the defendant solicited [T.S.] to participate in a sexual act." Watch, videotape us having oral sex is soliciting. It's asking somebody to participate in a sexual act by videotaping. You're asking them to do that.

(Trial Tr., p.549, Ls.13-18.)

Mr. Truman was convicted of lewd conduct with a minor and sexual abuse of a child. (Trial Tr., p.605, L.25 – p.606, L.10; R., pp.119-120.) He was sentenced to 30 years, with 10 years fixed, for his conviction for lewd conduct, and was further sentenced to 15 years, with 10 years fixed, for his conviction for sexual abuse of a minor. (1/21/09 Tr., p.62, L.21 – p.63, L.14; R., pp.141-142.) These sentences were

ordered to run concurrently. (1/21/09 Tr., p.63, L.15; R., pp.141-142.) Mr. Truman timely appeals from his judgment of conviction and sentence. (R., pp.135, 137.)

ISSUES

1. Was there insufficient evidence to support Mr. Truman's conviction for sexual abuse of a minor?

2. Did the district court lack jurisdiction over the subject matter of the charge of sexual abuse of a minor because the facts alleged in the indictment failed to allege a valid charge under the version of the statute that applies to Mr. Truman's case?

3. Did the district court err when it admitted prior bad acts evidence against Mr. Truman?

4. Did the prosecutor commit misconduct when the prosecutor elicited testimony in violation of the district court's order that deemed testimony regarding J.R.'s mental condition inadmissible because it was irrelevant?

5. Did the cumulative effect of the trial errors in this case deprive Mr. Truman of his constitutional right to a fair trial?

ARGUMENT

I.

There Was Insufficient Evidence To Support Mr. Truman's Conviction For Sexual Abuse Of A Minor

A. Introduction

The charge of sexual abuse of a minor in this case was based solely on the allegation that Mr. Truman had solicited T.S. to videotape him while engaging in a sexual act with a third party, J.R. Under the version of I.C. § 18-1506 that was in effect at the time that Mr. Truman was alleged to have committed the sexual abuse in this case, a solicitation conviction under the statute required proof that the defendant communicated a desire for the minor child to participate in a sexual act that involved physical contact between the minor child and another person or the minor's self-contact. Because the charge against Mr. Truman of sexual abuse was solely based on the allegation that he solicited T.S. to film him engaging in sexual activity with someone other than T.S., this charge was insufficient as a matter of law.

B. There Was Insufficient Evidence To Support Mr. Truman's Conviction For Sexual Abuse Of A Minor As This Crime Was Charged

Upon review of a claim of insufficiency of the State's evidence to support a conviction, this Court looks to whether there was substantial and competent evidence to support a guilty verdict of the crime charged. *State v. Hollon*, 136 Idaho 499, 501, 36 P.3d 1287, 1289 (Ct. App. 2001). The evidence is sufficient where there is substantial, competent evidence from which a reasonable juror could find all elements of the crime proven beyond a reasonable doubt. *Id.* This Court does not substitute its own view of the evidence for that of the fact-finder as to the credibility of the witnesses, the weight to

be given to the testimony, or the reasonable inferences to be drawn from the evidence. *State v. Stricklin*, 136 Idaho 264, 269, 32 P.3d 158, 163 (Ct. App. 2001). And this Court reviews the evidence in the light most favorable to the State. *Id.* The sufficiency of the State's evidence to support a conviction may be raised for the first time on appeal. *State v. Faught*, 127 Idaho 873, 877-878, 908 P.2d 566, 570-571 (1995).

From the outset, it is important to clarify the law that applies to Mr. Truman's case with regard to the charge of sexual abuse of a minor. Although the pertinent statute, I.C. § 18-1506, was amended subsequent to the time that Mr. Truman was alleged to have committed sexual abuse, it is the version of the statute that existed at the time that he was alleged to have committed the offense that defines and controls the issues regarding this charge. *See, e.g., State v. Lovelace,* 140 Idaho 73, 77, 90 P.3d 298, 302 (2004); *State v. Hernandez*, 122 Idaho 227, 229, 832 P.2d 1162, 1164 (Ct. App. 1992). To apply the revised version of the statute, which expands the grounds of potential criminal liability under I.C. § 18-1506, would violate the State and federal constitutional prohibition against ex post facto laws. As noted by the U.S. Supreme Court, an ex post facto violation occurs when the State seeks to apply retroactively a change in the definition of a crime. *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

While I.C. § 18-1506 has subsequently been amended to provide that it constitutes sexual abuse of a child to "induce, cause or permit a minor child to witness an act of sexual conduct," this portion of the statute was not in effect until July 1, 2008.[4]

[4] In the Statement of Purpose for this amendment to I.C. § 18-1506, the Idaho State Legislature indicated that its amendment was intended to address the deficiency in the prior version of the statute that was identified by the *Mintun* court. S.L. 2008, ch.240, § 1.

I.C. § 18-1506(1)(d); S.L. 2008, ch.240, § 1. Because this amendment was not in effect at the time that Mr. Truman was alleged to have committed sexual abuse in this case, this portion of the statute cannot be retroactively applied in this case. Therefore, for purposes of measuring the sufficiency of the State's evidence in this case, the version of the sexual abuse statute that applies is the version that was in place between August and December of 2006.

Mr. Truman was charged with sexual abuse by solicitation pursuant to I.C. § 18-1506(1)(a). (R., pp.17-18.) This charge requires proof that the defendant solicited a minor to participate in a sexual act. *See* I.C. §§ 18-1506(1)(a), (2); *Mintun v. State*, 144 Idaho 656, 663-664, 168 P.3d 40, 47-48 (Ct. App. 2007). And the solicitation must be a request for the minor to be a direct participant in a sexual act as that term is defined by the statute. *Mintun*, 144 Idaho 663-664, 168 P.3d at 47-48; *State v. Harvey*, 142 Idaho 527, 535, 129 P.3d 1276, 1284 (Ct. App. 2006). At the time Mr. Truman was alleged to have committed sexual abuse, I.C. § 18-1506(3) defined "sexual contact" as "any physical contact between such minor child and any person, which is caused by the actor, or the actor causing such minor child to have self contact." *See* S.L. 2006, ch. 178, § 3.

Under this statutory scheme, a conviction for sexual abuse by solicitation requires proof that the defendant requested that the minor participate directly in the sexual contact, either with another person or as self-contact. *Mintun*, 144 Idaho at 664, 168 P.3d at 48. A conviction that is predicated merely on the allegation that the defendant solicited the minor to witness or photograph another engaged in sexual activity is insufficient as a matter of law. *Id.*

Here, the State's charge against Mr. Truman of sexual abuse of a minor was predicated solely on the allegation that he had solicited T.S. to observe or to film himself having sex with a third person, J.R. (R., pp.17-18.) The State never charged Mr. Truman with sexual abuse for any act involving T.S.'s direct participation in any sexual contact. This was re-affirmed by the prosecutor during closing arguments when he asserted to the jury that the entire basis for the sexual abuse charge was the request that T.S. watch and/or film Mr. Truman engaging in a sexual act with another person. (Trial Tr., p.549, Ls.13-18.) In light of the basis alleged of the State's charge in this case, there was insufficient evidence as a matter of law to support the charge that Mr. Truman committed sexual abuse by requesting that T.S. film him having sex with another person.

II.

The District Court Lacked Jurisdiction Over The Subject Matter Of The Charge Of Sexual Abuse Of A Minor Because The Facts Alleged In The Indictment Failed To Allege A Valid Charge Under The Version Of The Statute That Applies To Mr. Truman's Case

A. Introduction

As has been previously noted, under the version of the statute defining sexual abuse by solicitation that was under effect at the time Mr. Truman was alleged to have committed this offense, it was not a crime merely to solicit a minor to view or videotape other persons engaging in sexual conduct. Because the indictment in this case failed to allege facts that constituted a crime with regard to the charge of sexual abuse, the district court lacked subject matter jurisdiction over this charge.

B. The District Court Lacked Jurisdiction Over The Subject Matter Of The Charge Of Sexual Abuse Of A Minor Because The Facts Alleged In The Indictment Failed To Allege A Valid Charge Under The Version Of The Statute That Applies To Mr. Truman's Case

Mr. Truman asserts that, because the indictment in this case fails to allege that Mr. Truman actually committed the offense of sexual abuse as this crime was defined at the time he was alleged to have committed it, the district court lacked subject matter jurisdiction over this charge and his conviction for sexual abuse should be reversed.

The question of whether the district court lacked subject matter jurisdiction is a question of law that this Court reviews de novo. *See, e.g., State v. Jones*, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004). Whether an information or indictment conforms to legal requirements is also a question of law that this Court reviews de novo. *Id.* The issue of whether the district court had subject matter jurisdiction over a case can be raised at any time, including for the first time on appeal. *Id.* at 758, 101 P.3d at 702.

"The indictment or information filed by the prosecutor is the jurisdictional instrument upon which a defendant stands trial." *Id.* at 757, 101 P.3d at 701. And it is the filing of an indictment or information that confers subject matter jurisdiction on the district court with regard to the charges contained therein. *Id.* In light of this, the district court's subject matter jurisdiction over the charges brought against the defendant is dependent upon the legal sufficiency of the indictment or information containing those charges. *Id.* at 758, 101 P.3d at 702.

However, when the challenge to the sufficiency of the indictment to confer jurisdiction is raised for the first time on appeal, this Court applies a more liberal standard of review in favor of the indictment's validity. Specifically, the indictment or information will "be upheld unless it is so defective that it does not, by any fair and

reasonable construction, charge an offense for which the defendant is convicted." *Id* at 759, 101 P.3d at 703 (quoting *State v. Cahoon*, 116 Idaho 399, 400, 775 P.2d 1241, 1242 (1989)).

Under this more liberal standard of review, appellate courts are entitled to construe the factual elements alleged in an indictment or information to include elements that were otherwise omitted from the indictment or information. *State v. Murray*, 143 Idaho 532, 536, 148 P.3d 1278, 1282 (Ct. App. 2006). However, the reviewing court must construe the charging document as written, and if essential elements of the charge are nowhere present in the indictment or information, the charging document fails to confer jurisdiction. *Id.* at 536-537, 148 P.3d at 1282-1283.

Under the version of the statute defining sexual abuse that applies in this case, the State was required to allege that Mr. Truman had solicited a minor to actually participate directly in a sexual act in order to make out a valid claim of sexual abuse of a minor by solicitation. *See Mintun*, 144 Idaho at 664, 168 P.3d at 48. The allegation that the defendant had merely requested that a minor view or videotape the sexual acts of other persons does not make out a valid charge under the operative elements of this offense. *Id.*

In light of this, the indictment that alleged Mr. Truman had committed sexual abuse of a minor failed to actually allege an offense, as nothing in the State's indictment alleges any direct participation by T.S. in sexual contact, which was required to make out a proper charge. The most this indictment alleges is that Mr. Truman committed this offense by "asking T.S. to film a sexual act between himself and [J.R.] and/or by having T.S. watch a sexual act between himself and [J.R.]." (R., p.18.) Because, under the

applicable statute defining this offense at the time Mr. Truman was alleged to have committed sexual abuse, it did not constitute the crime of sexual abuse to solicit a minor to observe or film other persons engaging in sexual contact, the indictment in this case failed to properly allege that Mr. Truman's behavior constituted sexual abuse by solicitation. As such, the indictment failed to confer subject matter jurisdiction upon the district court for this charge.

III.

The District Court Erred When It Admitted Prior Bad Acts Evidence Against Mr. Truman

A. Introduction

Mr. Truman asserts that the district court erred in admitting I.R.E. 404(b) evidence against him because the district court's determination was predicated on an erroneous understanding that there were relaxed standards of admissibility for this evidence in cases where the defendant is charged with a sexual offense against a minor. Additionally, some of the prior bad acts evidence was relevant only to an invalid charge. Because there was no relevance of this evidence to the sole charge that was validly brought in this case, and because the potential for prejudice of this evidence was very high, the district court's decision to admit this evidence was erroneous.

B. Standard Of Review

This Court reviews a district court's determination to admit evidence for an abuse of discretion. *State v. Grist*, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009). The review for an abuse of discretion involves resolution of three issues: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court

acted within the outer bounds of its discretion and consistently with applicable legal standards; and (3) whether the district court reached its decision through an exercise of reason. *Id.* Upon review of the district court's determination to admit prior bad acts evidence pursuant to I.R.E. 404(b), this Court reviews the district court's relevancy determination de novo. *See State v. Rossignol*, 147 Idaho 818, 824, 215 P.3d 538, 544 (Ct. App. 2009). The district court's balancing of the potential for prejudice against the probative value of the evidence is reviewed for an abuse of discretion. *Grist*, 147 Idaho at 52, 205 P.3d at 1188.

C. The District Court Abused Its Discretion When It Deemed The Allegations Of Prior Bad Acts Against Mr. Truman To Be Admissible Because The District Court Was Relying On An Erroneous Understanding Of The Legal Standards Attendant On Its Determination Of The Admissibility Of I.R.E. 404(B) Evidence In Child Sex Cases

Mr. Truman asserts that, because the district court's decision to admit all of the State's allegations of uncharged prior acts was predicated on an erroneous understanding of the law regarding I.R.E. 404(b) evidence standards in child sex cases, the district court abused its discretion.

As has been noted, a district court abuses its discretion when it exercises discretion in a manner inconsistent with applicable legal standards. *Grist*, 147 Idaho at 51, 205 P.3d at 1187. The district court in this case predicated its decision regarding the admissibility of the other acts evidence submitted by the State on an erroneous understanding of the standards for I.R.E. 404(b) evidence in child sex cases.

Prior to the recent *Grist* Opinion, several cases from the Idaho Court of Appeals indicated that there was a reduced standard of admissibility for prior bad acts evidence where the defendant was accused of a sexual offense against a minor. *See, e.g.,*

State v. Wood, 126 Idaho 241, 247, 880 P.2d 771, 777 (Ct. App. 1994). Some commentators went so far as to interpret this case law as creating "a special exception to the character evidence prohibition." *Grist*, 147 Idaho at 51, 205 P.3d at 1187 (quoting D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK 2D ED., § 13:1 (2005)).

This erroneous understanding formed the foundation of the district court's ruling in this case.[5] At the hearing on the State's motion seeking to admit prior bad acts evidence, the district court noted that there was a "separate line of cases and authority" that governed the admissibility of prior bad acts evidence in "child victimization cases." (9/8/08 Tr., p.30, Ls.10-25.) At a later point in this hearing, the district court again reiterated its understanding that it was making its determination regarding the admissibility of this evidence in light of "the unusual nature of child sex abuse cases." (9/8/08 Tr., p.47, L.21 – p.48, L.1.) The district court also expressly relied on the Idaho Court of Appeals' Opinion in *State v. Wood*, which held that Idaho case law recognizes special standards for admission of prior bad acts evidence in child sexual abuse cases that are not applicable to other types of charges. (9/8/08 Tr., p.33, Ls.11-16.) *See also Woods*, 126 Idaho at 247, 880 P.2d at 777.

It was this exact holding of *Woods* that was overruled by the *Grist* Court. The Court in *Grist* expressly noted the interpretation set forth by the opinion in *Woods*, but overturned this opinion and held that "the admission of I.R.E. 404(b) evidence in child sex cases is subject to the same analysis as the admission of such evidence in any other case." *Grist*, 147 Idaho at 51-52, 205 P.3d at 1187-1188. The *Grist* Court further

[5] This Court may wish to note that the district court judge who entered the order regarding the admissibility of other acts evidence in this case was a different judge than presided over Mr. Truman's trial.

concluded that, "there is no principled basis for relaxing application of these rules to facilitate prosecution of a single class of criminal offenses." *Id.* at 55, 205 P.3d at 1191.

Although perhaps understandable given the state of the case law prior to *Grist*, it is nevertheless error for the district court to admit evidence of uncharged sexual conduct against a defendant when that ruling is predicated on the erroneous belief that there is a lesser standard for admissibility of this evidence in cases where the defendant is accused of a sexual offense involving a minor. *State v. Johnson*, ___ Idaho ___, ___ P.3d ___, 2010 WL 337993 at *3-4.[6]

Additionally, this evidence was admitted, in part, as "corroboration" of T.S.'s version of events. (9/8/08 Tr., p.33, Ls.1-16.) However, even prior to *Grist*, Idaho case law has recognized that the need for corroboration is a negligible concern when the alleged victim who is testifying is in her late teens. *See Field*, 144 Idaho at 570, 165 P.3d at 273. T.S. was 15 years old at the time she testified at trial, and she was demonstrably capable of expressing herself, of understanding the questions put before her, and of conveying her responses to the jury. Given that there was no discernible need for corroboration based solely on T.S.'s status as a minor, the district court abused its discretion in deeming the State's evidence admissible.

Moreover, all of the district court's findings with regard to the admissibility of this evidence relied on grounds which merely tended to demonstrate Mr. Truman's propensity to commit the charged offenses, which is an impermissible basis for the admission of prior bad acts evidence. While the district court listed several grounds for admissibility – corroboration, motive, intent, preparation, and "other aspects of 404(b)" –

there is no discernible connection to the prior bad acts alleged and the charge of lewd conduct that does not subsume an inference of mere criminal propensity. As cautioned by the *Grist* Court:

> ... we wish to emphasize that evidence offered for the purpose of "corroboration" must actually serve that purpose; the courts of this state must not permit the introduction of impermissible propensity evidence merely by relabeling it as "corroborative" or as evidence of a "common scheme or plan."

Grist, 147 Idaho at 53-54; 205 P.3d at 1189-1190.

In this case, the only possible theories set forth of the relevance of this evidence would necessarily have to embrace the forbidden propensity inference. Beyond this, a remand is necessary on the issue of prior bad acts evidence because the district court engaged in a relevance determination that was fatally flawed from the outset – the belief that Idaho case law recognized a blanket exception for prior bad acts evidence in child sexual abuse cases. The district court failed to engage in the careful scrutiny required in making determinations of the admissibility of I.R.E. 404(b) evidence, and therefore the district court abused its discretion in admitting all of the State's proffered evidence of uncharged acts.

D. The District Court Abused Its Discretion When It Admitted Allegations Of Prior Bad Acts Against Mr. Truman That Involved Claims That He Had Engaged In Sexual Acts With J.R. Because These Allegations Were Found To Be Relevant Only To An Invalid Charge And Because The Prejudice Of This Evidence Outweighed Any Potential Probative Value

Mr. Truman asserts that the admission of uncharged acts evidence regarding allegations of sexual conduct between himself and J.R. was error because these acts

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[6] The Idaho Supreme Court Opinion in *Johnson* is not yet final, and may be subject to revision or withdrawal.

were only relevant to an invalid charge and because the potential for unfair prejudice of these acts substantially outweighed any probative value.

The district court in this case found that evidence of Mr. Truman's prior uncharged sexual conduct with J.R. was relevant and admissible exclusively in support of the State's allegation of sexual abuse. (9/8/08 Tr., p.34, L.10 – p.35, L.17; p.36, L.21 – p.37, L.14; p.50, Ls.5-10.) Specifically, the district court ruled that the alleged sexual activity between J.R. and Mr. Truman was "part and parcel" of the sexual abuse by solicitation allegation. (9/8/08 Tr., p.36, Ls.16-20.) Additionally, the district court noted that, in absence of the type of allegations made in conjunction with the sexual abuse charge, this evidence "wouldn't be admissible normally." (9/8/08 Tr., p.38, Ls.7-13.)

In order to be relevant, and therefore potentially admissible, prior bad acts evidence must have relevance to the charged act itself. *See, e.g., Grist*, 147 Idaho at 51, 205 P.3d at 1187; *State v. Field*, 144 Idaho 559, 570, 165 P.3d 273, 284 (2007). As has been noted, the charge of sexual abuse in this case was invalid under the statutory scheme in place at the time Mr. Truman was alleged to have committed this offense. Given this, the evidentiary rulings finding that evidence of sexual conduct between Mr. Truman and J.R. were relevant solely to this charge are invalid and this evidence should not have been admitted at trial. *See, e.g., Vuagniaux v. Dep't. of Professional Regulation*, 802 N.E.2d 1156, 1166 (Ill. 2003) (evidentiary rulings made pursuant to a statutorily invalid charge are likewise invalid). Because there is no valid charge that this evidence was relevant to, the admission of this evidence was error.

The district court is also required, when confronted with the admissibility of prior acts evidence, to weigh the potential for unfair prejudice of this evidence against its

probative value. *Grist*, 147 Idaho at 52, 205 P.3d at 1188; I.R.E. 403. This determination is made on a case-by-case basis and this Court reviews the district court's balancing for an abuse of discretion. *Id.*

As has been noted, the district court's determination regarding the relevance of the evidence regarding any allegations of sexual conduct between J.R. and Mr. Truman was tied specifically to the allegation of sexual abuse in this case. There has never been any finding that this evidence is relevant to the charge of lewd conduct. As such, it is not clear that this evidence had any probative value at all with regard to the sole valid charge in this case. Nor does it appear that there could be any such finding, as there was no evidence that J.R. was present or involved on the date of the alleged act of lewd conduct. (Trial Tr., p.273, Ls.1-9.)

In contrast, the prejudicial effect of this evidence was incredibly high, and was not limited solely to the State's allegation of sexual battery, but presented the potential to prejudice Mr. Truman with regard to the jury's verdict as to both counts. As noted by the Idaho Supreme Court in *Grist*, the "prejudicial effect [of character evidence] is that it induces the jury to believe that the accused is more likely to have committed the crime on trial *because he is a man of criminal character*." *Grist*, 147 Idaho at 52, 205 P.3d at 1188 (quoting *State v. Wrenn*, 99 Idaho 506, 510, 584 P.2d 1231, 1235 (1978)) (emphasis added). By its very nature, character or prior bad acts evidence "takes the jury away from their primary consideration of the guilt or innocence of the particular crime on trial." *Id.* In light of this, the improperly admitted evidence of Mr. Truman's sexual activities with J.R., who appears to be a developmentally disabled adult, would tend to prejudice the jury against Mr. Truman as a person, and therefore increase the

likelihood that the jury would seek to impose punishment against Mr. Truman on the basis of his perceived character.

E. The Admission Of The Prior Bad Acts Evidence Against Mr. Truman Was Not Harmless

The admission of the prior bad acts evidence in this case was not harmless. The test for whether improper admission of uncharged acts evidence was harmless is whether the reviewing court is able to say, beyond a reasonable doubt, that the evidence that was improperly admitted did not contribute to the verdict. *State v. Bussard*, 114 Idaho 781, 786, 760 P.2d 1197, 1202 (Ct. App. 1988). If this Court cannot so conclude beyond a reasonable doubt, then the error is not harmless and a remand is necessary. *Id.*

A critical factor in the determination of whether the improper admission of prior bad acts evidence is harmless is whether the State's case presented the jury with merely a credibility contest. *Id.* Where the State presents no physical evidence or other corroborating testimony regarding the charged offense, it is far less likely that the improper admission of I.R.E. 404(b) evidence against the defendant will be harmless. *Johnson*, 2010 WL 337993 at *4.

Moreover, even the provision of a limiting instruction, such as occurred in this case, regarding the limited purpose of prior bad acts evidence does not preclude a finding that the error in admitting this evidence was not harmless. As noted by the *Johnson* Court:

> As this Court has observed, admitting such propensity evidence may reflect "the unstated belief that sexual deviancy is a character trait of especially powerful probative value for predicting a defendant's behavior." The danger is too great in this sex-abuse case that the jury may have

> believed the prior misconduct demonstrated [the defendant's] deviant character traits.

Johnson, 2010 WL 337993 at *4.

Here, the jury heard more evidence in this case regarding uncharged allegations of Mr. Truman's past sexual conduct than the jury received regarding the charged offenses themselves. There was no physical evidence presented that would tend to substantiate T.S.'s allegations. In addition, T.S. admitted under oath that at least one of the claims she had made about Mr. Truman was false, and that she had lied, "to look cool or whatever." (Trial Tr., p.357, L.13 – p.359, L.7.) Given this, it cannot be said beyond a reasonable doubt in this case that the improperly admitted uncharged acts evidence in this case did not contribute to the jury's verdict against Mr. Truman.

IV.

The Prosecutor Committed Misconduct When He Elicited Testimony In Violation Of The District Court's Order That Deemed Testimony Regarding J.R.'S Mental Condition Inadmissible Because It Was Irrelevant

A. Introduction

The prosecutor in this case deliberately elicited testimony regarding J.R.'s competency and her mental conditions despite the district court's order that plainly indicated that these matters were not relevant and were not admissible. Because the prosecutor deliberately elicited prejudicial information in contravention of the order of the district court, Mr. Truman asserts that the prosecutor committed misconduct rising to the level of a fundamental error.

B. The Prosecutor Committed Misconduct Rising To The Level Of A Fundamental Error When He Elicited Testimony In Violation Of The District Court's Order That Deemed Testimony Regarding J.R.'S Mental Condition Inadmissible Because It Was Irrelevant

As an initial matter, Mr. Truman concedes that there was no objection at trial to the prosecutor's elicitation of evidence regarding J.R.'s mental condition. But he asserts that the prosecutor's direct disregard of the order and instructions of the district court regarding this evidence constituted prosecutorial misconduct rising to the level of a fundamental error that is reviewable by this Court for the first time on appeal.

In absence of a timely objection at trial, a conviction will be reversed for prosecutorial misconduct only if the conduct was sufficiently egregious so as to result in fundamental error. *See, e.g., State v. Barnes*, 147 Idaho 587, 212 P.3d 1017 (Ct. App. 2009). "Prosecutorial misconduct rises to the level of a fundamental error when it is calculated to inflame the minds of the jurors and arouse the passion or prejudice of the jury against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside of the evidence." *Id.* However, even prosecutorial misconduct rising to the level of a fundamental error is not reversible where the record shows that the misconduct was harmless. *Id.* The test for whether prosecutorial misconduct constitutes harmless error is whether this Court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *Id.*

Idaho has recognized that it constitutes prosecutorial misconduct for a prosecutor to intentionally elicit testimony in violation of a district court ruling that such testimony is inadmissible. *See State v. Agundis*, 127 Idaho 587, 596, 903 P.2d 752, 761 (Ct. App. 1995); *see also People v. Wallace*, 189 P.3d 911, 939 (Cal. 2008) (prosecutor commits

reversible misconduct by eliciting or attempting to elicit inadmissible evidence in defiance of a court order); *Valdez v. State*, 196 P.3d 465, 480 (Nev. 2008) (it is misconduct for a prosecutor to flagrantly disobey a court's evidentiary ruling). In fact, it is not even necessary to show deliberate disregard of the district court's ruling to establish that misconduct occurred. Whether the act is intentional or inadvertent, a prosecutor who effectively disregards the substance of a district court's evidentiary ruling crosses the line of permissible conduct. *Id.* at 597, 903 P.2d at 762. It is likewise prosecutorial misconduct for a prosecutor to elicit evidence at trial where the district court has instructed the State that it would need to seek a ruling by the court on admissibility, out of the presence of the jury, in order to place that evidence before the jury and the State fails to do so. *State v. Field*, 144 Idaho 559, 571-572, 165 P.3d 273, 285-286 (2007).

From the outset, Mr. Truman objected to the State attempting to introduce evidence regarding the mental capacity and/or mental condition of J.R. during trial. (R., pp.61-62.) The district court agreed, and ruled that "the state is not going to be allowed to attempt to establish the developmental disability of [J.R.] in the testimony of the case." (9/8/08 Tr., p.50, Ls.16-19.) The district court further admonished the State that, should evidence regarding J.R.'s mental condition be deemed "inescapable" by the prosecutor at trial, the prosecutor at that point would need to make an offer of proof outside of the presence of the jury so that the district court could do the balancing test required under I.R.E. 403 to determine if the evidence would be admissible. (9/8/08 Tr., p.50, L.20 – p.51, L.2.)

The court then entered an order, granting in part Mr. Truman's motion in limine, that:

> As to the mental capacity of [J.R.] *her mental status is not a relevant factor to the charges in this case* as Defendant is not charged with any crime at this time for the sexual contact with J.R.

(R., p.71.)

Despite this ruling, the prosecutor's very first witness, Ms. LaFranier, testified as to various facts that all related directly to J.S.'s alleged mental disability: that she was J.R.'s teacher in special education classes, that J.R. used to live in a personal care services home run by the state, and that J.R.'s mental disabilities were such that she couldn't be left alone but rather had to have constant adult supervision during the day. (Trial Tr., p.167, L.13 – p.171, L.1.) Contrary to the instructions of the district court, the State made no attempt to provide any offer of proof outside of the presence of the jury prior to eliciting this testimony. (Trial Tr., p.167, L.13 – p.171, L.1.)

This misconduct rose to the level of a fundamental error because evidence regarding J.R.'s disabilities, in conjunction with evidence that Mr. Truman engaged in sexual acts with J.R., had the inherent potential to inflame the passions and prejudice of the jury and induce the jurors to decide Mr. Truman's guilt or innocence of the charged offenses on bases outside of evidence that was actually relevant to his charges. It is presumably this inherent and very real potential for prejudice that led the district court to caution the State that, should it appear necessary to introduce any evidence regarding J.R.'s mental disabilities, the prosecutor would first be required to make an offer of proof outside of the presence of the jury so that the district court could properly evaluate

whether this potential for prejudice substantially outweighed whatever probative value the State would assert. (9/8/08 Tr., p.50, L.20 – p.51, L.2.)

Moreover, this misconduct was not harmless. Given the nature of the State's evidence regarding J.R. – specifically, the allegations regarding Mr. Truman engaging in sexual acts with her – any evidence that would tend to show that J.R. lacked mental capacity or otherwise suffered from mental disabilities is inherently prejudicial to Mr. Truman. Moreover, evidence regarding J.R.'s mental disabilities is not relevant to the charges against Mr. Truman in this case, as T.S. is the only alleged victim. Simply put, the district court found that this evidence was inadmissible for a reason – it was irrelevant and had the potential to greatly prejudice the jury against Mr. Truman. The reasons why this evidence was deemed inadmissible from the start are the same reasons why the prosecutor's elicitation of this evidence was not harmless.

V.

The Cumulative Effect Of The Errors In This Case Deprived Mr. Truman Of His Right To A Fair Trial

Should this Court determine that none of the errors at trial individually rose to the level requiring reversal of both of Mr. Truman's convictions in this case, Mr. Truman asserts that the aggregate effect of these errors requires reversal. The cumulative error doctrine requires reversal of a conviction when there is "an accumulation of irregularities, each of which itself might be harmless, but when aggregated, the errors show the absence of a fair trial in contravention of the defendant's right to due process." *Field*, 144 Idaho at 572-573, 165 P.3d at 286-287 (quoting *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998)). In this case, the cumulative effect of the errors at

Mr. Truman's trial deprived him of his due process right to a fair trial, and therefore this Court should reverse his judgment of conviction and sentence and remand this case to the district court for further proceedings.

CONCLUSION

Mr. Truman respectfully requests that this Court reverse his judgment of conviction and sentence and remand this case to the district court for further proceedings.

DATED this 17th day of February, 2009.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of February, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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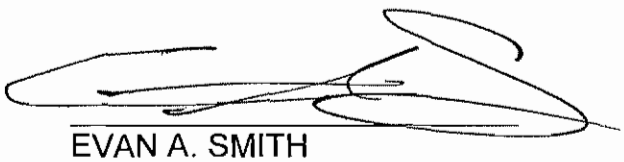

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