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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 37584
)	
vs.)	
)	
RONALD L. COLEMAN,)	
)	
Defendant-Appellant.)	
)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

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Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of Facts And Course Of Proceedings	1
ISSUES	5
ARGUMENT	6
Coleman Has Failed To Show Error In The District Court's Evidentiary Rulings	6
A. Introduction.....	6
B. Standard Of Review	6
C. The District Court Was Not Required To Articulate On The Record The Bases For Its Admissibility Determinations	7
D. Coleman Has Failed To Establish That The District Court Abused Its Discretion By Admitting The I.R.E. 404(b) Evidence	11
1. Evidence That Coleman Upset T.P. By Pressuring Her To Discuss A Distressing Topic While Alone With Her At A Bonfire Was Relevant To The Issue Of Coleman's Intent And Plan To Commit The Charged Offense	13
2. The Probative Value Of The Challenged Evidence Was Not Substantially Outweighed By The Danger Of Unfair Prejudice	17
E. Coleman Has Failed To Establish That The District Court Abused Its Discretion By Admitting The Expert Testimony.....	19

F. Even If The District Court Erred In Its Evidentiary
Rulings, Such Error Is Harmless20

CONCLUSION.....22

CERTIFICATE OF SERVICE.....22

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Chapman v. California</u> , 386 U.S. 18 (1967)	20
<u>McKinney v. State</u> , 133 Idaho 695, 992 P.2d 144 (1999)	10
<u>Neder v. United States</u> , 527 U.S. 1 (1999)	20
<u>State v. Avelar</u> , 129 Idaho 700, 931 P.2d 1218 (1997).....	10
<u>State v. Blackstead</u> , 126 Idaho 14, 878 P.2d 188 (Ct. App. 1994) ...	13, 14, 16, 17
<u>State v. Crea</u> , 119 Idaho 352, 806 P.2d 445 (1991)	7
<u>State v. Cross</u> , 132 Idaho 667, 978 P.2d 227 (1999).....	12
<u>State v. Doe</u> , 136 Idaho 427, 34 P.3d 1110 (Ct. App. 2001)	10
<u>State v. Fisher</u> , 140 Idaho 365, 93 P.3d 696 (2004).....	10
<u>State v. Floyd</u> , 125 Idaho 651, 873 P.2d 905 (Ct. App. 1994)	17, 18
<u>State v. Gauna</u> , 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989).....	12
<u>State v. Gomez</u> , ___ Idaho ___, 254 P.3d 47 (Ct. App. 2011)	13, 17, 19
<u>State v. Grist</u> , 147 Idaho 49, 205 P.3d 1185 (2009)	6, 11
<u>State v. Johnson</u> , 148 Idaho 664, 227 P.3d 918 (2010)	20, 21
<u>State v. Joslin</u> , 145 Idaho 75, 175 P.3d 764 (2007).....	19
<u>State v. Kilby</u> , 130 Idaho 747, 947 P.2d 420 (Ct. App. 1997)	19
<u>State v. Konechny</u> , 134 Idaho 410, 3 P.3d 535 (Ct. App. 2000).....	7
<u>State v. Leavitt</u> , 116 Idaho 285, 775 P.2d 599 (1989)	18
<u>State v. Martin</u> , 118 Idaho 334, 796 P.2d 1007 (1990).....	18
<u>State v. Meister</u> , 148 Idaho 236, 220 P.3d 1055 (2009)	9

<u>State v. Merwin</u> , 131 Idaho 642, 962 P.2d 1026 (1998)	7
<u>State v. Nichols</u> , 124 Idaho 651, 862 P.2d 343 (Ct. App. 1993)	17
<u>State v. Perry</u> , 150 Idaho 209, 245 P.3d 961 (2010)	20
<u>State v. Phillips</u> , 123 Idaho 178, 845 P.2d 1211 (1993).....	12
<u>State v. Ruiz</u> , 150 Idaho 469, 248 P.3d 720 (2010).....	8, 9, 17
<u>State v. Schevers</u> , 132 Idaho 786, 979 P.2d 659 (Ct. App. 1999).....	10
<u>State v. Sheahan</u> , 139 Idaho 267, 77 P.3d 956 (2003)	12
<u>State v. Sima</u> , 98 Idaho 643, 570 P.2d 1333 (1977).....	11
<u>State v. Truman</u> , 150 Idaho 714, 249 P.3d 1169 (Ct. App. 2010)	13, 16, 17
<u>State v. Winn</u> , 121 Idaho 850, 828 P.2d 879 (1992).....	7

RULES

I.C.R. 52.....	20
I.R.E. 403.....	9
I.R.E. 404(b)	passim
I.R.E. 702.....	20

STATEMENT OF THE CASE

Nature of the Case

Ronald L. Coleman appeals from the judgment entered upon the jury verdict finding him guilty of sexual abuse of child under the age of 16.

Statement of Facts and Course of Proceedings

In May 2009, 35-year-old Coleman exposed his penis to seven-year-old T.P., the daughter of Coleman's close friend. (Tr., p.84, L.9 – p.85, L.25, p.200, L.23 – p.203, L.6, p.216, Ls.6-12, p.222, L.11 – p.223, L.21.¹) Coleman and T.P. were playing alone together in a junkyard when they found, among other things, a calendar containing pictures of topless women. (Tr., p.70, L.6 – p.74, L.7.) Coleman asked T.P. what she liked about the pictures, and he compared the stomach of one of the women in the calendar to T.P.'s stomach. (Tr., p.74, L.12 – p.76, L.18.) Coleman began talking to T.P. about sex and said, "I wish you were my age so I can just do it." (Tr., p.77, L.12 – p.78, L.21.) He talked to T.P. about her anatomy and told her she had a "s-e-x hole" and that "boys lick it." (Tr., p.79, Ls.3-25, p.81, Ls.19-20.) He also told T.P. that "the girl goes on top of him, and he pushes up and down" (Tr., p.81, Ls.23-25), and that women get pregnant by having sex (Tr., p.84, Ls.3-8). While talking to T.P. about sex,

¹ At Coleman's request, several transcripts were prepared and included in the record on appeal. All "Tr." references contained herein are to the bound volume containing transcripts of the jury trial held December 1-3, 2009, and the sentencing hearing held March 3, 2010. The transcript containing the parties' closing arguments is cited herein as "12/3/09 Tr."

Coleman pulled T.P.'s legs apart and touched her "private."² (Tr., p.80, L.1 – p.81, L.18.) He told T.P. "not to tell anyone what [they] talked about." (Tr., p.131, Ls.7-22.)

At the end of the conversation, Coleman announced, "It's time to go pee." (Tr., p.84, Ls.9-25.) He walked from the driver's side of the abandoned car in which he and T.P. were sitting to the passenger side where T.P. was still seated and urinated in front of her, exposing his penis to her in the process. (Tr., p.85, Ls.2-25.) Referring to his penis, Coleman asked T.P. if she "wanted to hold it." (Tr., p.85, Ls.22-25.) T.P. said, "No," and told Coleman she was going home. (Tr., p.87, Ls.9-12, p.89, Ls.14-24.) When T.P. got home she told her mother what had happened. (Tr., p.91, Ls.5-17.) Her mother, in turn, called T.P.'s father and the police. (Tr., p.91, Ls.18-25, p.216, L.21 – p.217, L.6, p.260, L.19 – p.261, L.8.)

The state charged Coleman with sexual abuse of a child under the age of 16.³ (R., pp.18-19.) Prior to trial, the state gave notice of its intent to offer expert testimony "concerning grooming behaviors of pedophiles as it pertains to child victims of sexual assaults." (R., pp.35-41b.) The state also gave notice of its intent to introduce evidence pursuant to I.R.E. 404(b) that, on two separate

² T.P. testified that she perceived the touching of her "private" to have been an accident because it happened very quickly and Coleman immediately apologized. (Tr., p.81, Ls.4-18, p.171, L.19 – p.173, L.13.)

³ The state subsequently amended the Information to include a lewd conduct charge that was originally alleged in the criminal complaint and on which Coleman was also bound over following a preliminary hearing. (R., pp.8-9, 16, 24-27.) The lewd conduct charge was ultimately dismissed, however, because Coleman was not arraigned on that charge before trial. (Tr., p.310, L.16 – p.312, L.7, p.317, L.10 – p.319, L.2, p.329, Ls.22-25.)

occasions approximately one year before the charged crime, Coleman engaged in inappropriate behavior with the victim. (R., pp.60-61.) Specifically, the state sought to present evidence that:

1. In the late summer or fall of 2008, at the home of the victim's father, the victim [T.P.], who was 6 years old at the time, woke her father and stepmother up in the middle of the night, sobbing. She was upset because she perceived that [Coleman], who was a guest in her father's house, was taking her pants off after she had fallen asleep while in [Coleman's] bedroom. [Coleman] indicated to her father that he was trying to help her put her pajamas on; however, [Coleman's] bedroom was on the other end of the house from [T.P.'s] bedroom, and [Coleman] did not have [T.P.'s] pajamas with him in his room. ...

2. Between May 2008 and September, 2008, at Mike Gavia's home in Custer County, Idaho, [Coleman], [T.P.], and [T.P.'s] father and stepmother had a bonfire. As the bonfire subsided, [T.P.'s] father and stepmother took [T.P.'s] younger step siblings into the house to prepare them for bed, leaving [Coleman] and [T.P.] at the fire. [T.P.] soon came into the house, very upset, because [Coleman] was pressing her to talk about [her] stepfather, a topic she did not like discussing. [T.P.'s] father confronted [Coleman], informing him that pressing [T.P.] on this topic was causing her distress, and that, when [T.P.] told [Coleman] she did not want to talk about, or do certain things, [Coleman] should immediately stop.

...

(R., pp.60-61.) The state asserted that the proffered I.R.E. 404(b) evidence was relevant to show that Coleman "groomed" T.P. – *i.e.*, that he "created opportunities to be alone with T.P. at night, as he did in the charged offense," that "he engaged in behavior calculated to make [T.P.] feel uncomfortable," and that he had the intent to touch T.P. sexually. (R., pp.60-61; Tr., p.5, Ls.2-23.)

Coleman filed a motion in limine to exclude both the proffered I.R.E. 404(b) evidence and the expert testimony concerning grooming behaviors. (R., pp.62-63.) At the hearing on his motion, Coleman argued that the 404(b) acts

were too remote in time to the charged offense to be relevant and that they were more prejudicial than probative. (Tr., p.2, L.14 – p.3, L.25.) He argued that the proffered expert testimony regarding grooming behaviors was not relevant, would not assist the jury and would invade the province of the jury as to T.P.'s credibility. (Tr., p.4, Ls.1-9, p.8, L.21 – p.9, L.9.)

The district court ultimately denied Coleman's motion in limine and allowed the state to present the I.R.E. 404(b) evidence and expert testimony in its case-in-chief. (Tr., p.24, L.8 – p.25, L.10, p.59, Ls.18-25, p.114, Ls.16-24.) At the conclusion of the trial, the jury found Coleman guilty of sexual abuse of a child under the age of 16. (R., p.87.) The district court entered a judgment of conviction (R., pp.115-16), from which Coleman timely appealed (R., pp.120-22).

ISSUES

Coleman states the issues on appeal as:

1. Did the district court violate Idaho Rules of Evidence 401 and 403?
2. Did the district court err in allowing the State to present 404(b) grooming evidence that was either not relevant or overly prejudicial and, if so, in allowing an expert to testify regarding grooming practices?

(Appellant's brief, p.6.)

The state rephrases the issues on appeal as:

Has Coleman failed to show error in the district court's evidentiary rulings?

ARGUMENT

Coleman Has Failed To Show Error In The District Court's Evidentiary Rulings

A. Introduction

Coleman challenges the district court's evidentiary rulings on a number of bases. First, he contends that the district court violated I.R.E. 401 and 403 and committed reversible error by failing to articulate on the record the bases for its decision to admit the state's proffered I.R.E. 404(b) evidence. (Appellant's brief, pp.7-8.) Alternatively, he argues that the district court erred in admitting the state's I.R.E. 404(b) evidence, contending the evidence was "either not relevant or overly prejudicial." (Appellant's brief, pp.9-14.) Finally, he argues that the district court erred by admitting the expert testimony on grooming behaviors because that testimony was relevant only to the I.R.E. 404(b) evidence, which Coleman contends was improperly admitted. (Appellant's brief, pp.14-16.) Coleman's arguments fail. The district court was not required to articulate on the record the bases for its admissibility determinations, and a review of the record and the applicable law supports the district court's implicit determinations that the proffered evidence was both relevant and not unfairly prejudicial.

B. Standard Of Review

Rulings under I.R.E. 404(b) are reviewed under a bifurcated standard: whether the evidence is admissible for a purpose other than propensity is given free review while the determination of whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice is reviewed for an abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d

1185, 1187 (2009). A trial court's decision to admit or exclude expert testimony will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Merwin, 131 Idaho 642, 645, 962 P.2d 1026, 1029 (1998); State v. Winn, 121 Idaho 850, 855, 828 P.2d 879, 884 (1992); State v. Crea, 119 Idaho 352, 355, 806 P.2d 445, 448 (1991); State v. Konechny, 134 Idaho 410, 414, 3 P.3d 535, 539 (Ct. App. 2000).

C. The District Court Was Not Required To Articulate On The Record The Bases For Its Admissibility Determinations

Prior to trial, the state gave notice of its intent to introduce evidence, pursuant to I.R.E. 404(b), of two specific incidents, each of which occurred approximately one year before the charged crime, in which Coleman had engaged in inappropriate behavior with the victim, T.P. (R., pp.60-61.) In the first incident, Coleman removed T.P.'s pants after T.P. had fallen asleep in Coleman's bedroom (the "pants incident"). (R., pp.60-61.) In the second incident, Coleman upset T.P. by "pressing her to talk about [her] stepfather, a topic she did not like discussing," while Coleman was alone with T.P. at a bonfire (the "bonfire incident"). (R., p.61.)

Coleman moved in limine to exclude the proffered I.R.E. 404(b) evidence, arguing that it was irrelevant and unduly prejudicial. (R., pp.62-63; Tr., p.2, L.14 – p.3, L.25, p.56, Ls.6-24.) After an offer of proof, during which T.P. testified regarding the uncharged incidents (Tr., p.24, L.7 – p.52, L.1), and after hearing the arguments of the parties (Tr., p.52, L.5 – p.59, L.4), the district court ruled, "I'm going to deny the motion in limine with regard to the pants incident" (Tr.,

p.59, Ls.18-20.) The court took the admissibility of the bonfire incident under advisement “for the evening” and advised the parties, “I will announce that decision first thing in the morning.” (Tr., p.59, Ls.20-25.)

The next day, the trial commenced with T.P. taking the stand and testifying both about the charged conduct and about the uncharged pants and bonfire incidents that were the subject of the State’s I.R.E. 404(b) notice and Coleman’s motion in limine. (Tr., p.61, L.1 – p.113, L.21.) After T.P. testified about the uncharged incidents, the district court took a recess and noted for the record: “I had indicated to both counsel this morning before testimony began that I would allow [T.P.] to testify about the incidents that were the subject of the motion in limine that I had not ruled on last evening.” (Tr., p.114, Ls.13-24.)

On appeal, Coleman argues that the district court erred by admitting the proffered I.R.E. 404(b) evidence without conducting an analysis of the “evidence’s relevance or potential prejudicial effect” on the record. (Appellant’s brief, pp.7-8.) To support his claim, Coleman relies primarily on State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010), wherein the Idaho Supreme Court held it was error for a trial court to exclude relevant evidence, without first conducting an I.R.E. 403 analysis of whether the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. However, Coleman’s reliance on Ruiz is misplaced for at least two reasons.

First, contrary to Coleman’s suggestion, Ruiz does not stand for the broad proposition that a trial court errs as a matter of law by failing to articulate for the record the bases for its evidentiary rulings. The district court in Ruiz prohibited

the defense from cross-examining a state's witness regarding the mandatory minimum prison sentence the witness avoided by agreeing to testify against Ruiz at trial. Ruiz, 150 Idaho at 471, 248 P.3d at 722. The district court acknowledged that the evidence was relevant but, without any further analysis, categorically excluded the evidence, stating: "You can't talk about minimum mandatories." Id. Noting that the Idaho Rules of Evidence expressly provide that "[a]ll relevant evidence is admissible except as otherwise provided" by rule, the Idaho Supreme Court held the trial court erred by excluding the admittedly relevant evidence without first conducting an I.R.E. 403 analysis. Specifically, the Court stated:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Idaho R. Evid. 403. To exclude evidence under Rule 403, the trial court must address whether the probative value is substantially outweighed by one of the considerations listed in the Rule. [*State v. Meister*, 148 Idaho 236, 241, 220 P.3d 1055, 1060 (2009)]. The district court here did not conduct that analysis. It merely said, "You can't talk about minimum mandatories." After Ruiz's counsel objected, the court added, "I think that the court has a delicate line to walk between what you are allowed to do in terms of credibility and the fact that the jury is not to be advised of the penalties that the defendant might face, if convicted." Because it excluded the evidence without conducting the analysis required by Rule 403, the district court erred. *Id.*

Ruiz, 150 Idaho at 471, 248 P.3d at 722.

Nothing in the Ruiz opinion mandates the conclusion, suggested by Coleman, that a trial court errs as a matter of law by failing to articulate the bases of its evidentiary rulings on the record. Rather, Ruiz stands only for the proposition that a trial court errs by *excluding* relevant evidence without first

determining that such evidence is inadmissible pursuant to I.R.E. 403. In this case, the district court *admitted* the state's proffered I.R.E. 404(b) evidence and, in so doing, implicitly determined that the evidence was relevant and not made inadmissible by the provisions of I.R.E. 403. It is well settled that this Court will uphold the implicit determinations of the trial court if they are supported by the record and the applicable law. E.g., State v. Doe, 136 Idaho 427, 432, 34 P.3d 1110, 1115 (Ct. App. 2001); State v. Schevers, 132 Idaho 786, 788, 979 P.2d 659, 661 (Ct. App. 1999) (appellate court will review "implicit" findings where trial court does not articulate findings on record). It is equally well settled that, "[i]f a district court reaches the correct result by an erroneous theory, this Court will affirm the order upon the correct theory." State v. Fisher, 140 Idaho 365, 373, 93 P.3d 696, 704 (2004) (citing 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)). Because this Court is capable of reviewing the trial court's admissibility determination without knowing the specifics of the district court's thought process, and because nothing in the Ruiz opinion compels the conclusion that the court was required to expressly articulate the bases of its evidentiary rulings for the record, Coleman has failed to establish any basis for reversal.

In addition to being legally inapposite, Ruiz is also factually distinguishable. As discussed above, the district court in Ruiz failed to conduct *any* I.R.E. 403 analysis before excluding otherwise relevant evidence. Coleman argues that the district court in this case "totally failed to analyze the evidence as required under either Idaho Rule of Evidence 401 or 403" (Appellant's brief, p.8),

but this assertion finds no support in the record. Before admitting the proffered evidence, the district court required the state to make an offer of proof and entertained extensive argument regarding the probative value and potential prejudicial effect of the evidence. Although the court did not expressly state on the record that it found the evidence relevant and not unduly prejudicial, it is clear from the context of the entire record that the court actually engaged in that analysis. This is evidenced, in part, by the fact that the court ultimately gave a limiting instruction cautioning the jury that it could only consider the proffered evidence as proof of Coleman's opportunity, intent and plan to commit the charged crime. (See R., p.77.) Presumably, had the court not analyzed the probative value and potential prejudicial effect of the evidence, no such instruction would have been given. Moreover, it is apparent from court's own statements that it announced its ruling regarding the admissibility of a portion of the proffered I.R.E. 404(b) evidence off the record. Because it did so, it is impossible to know whether the court articulated the bases for its ruling at that time. However, in the absence of an affirmative showing to the contrary, this Court must not presume that the district court erred. E.g., State v. Sima, 98 Idaho 643, 644, 570 P.2d 1333, 1334 (1977).

D. Coleman Has Failed To Establish That The District Court Abused Its Discretion By Admitting The I.R.E. 404(b) Evidence

Evidence of other crimes, wrongs or acts is not admissible to prove the character of the defendant in an attempt to show he or she committed the crime for which he or she is on trial. State v. Grist, 147 Idaho 49, 52, 205 P.3d 1185,

1188 (2009). However, such evidence is admissible for other purposes, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993); State v. Gauna, 117 Idaho 83, 87, 785 P.2d 647, 651 (Ct. App. 1989). Evidence of prior bad acts is admissible if (a) it is relevant to prove some issue other than the defendant's character, and (b) its probative value for the proper purpose is not substantially outweighed by the probability of unfair prejudice. State v. Cross, 132 Idaho 667, 670, 978 P.2d 227, 230 (1999). The second prong of this test only excludes evidence if the danger of unfair prejudice substantially outweighs its probative value. State v. Sheahan, 139 Idaho 267, 275-76, 77 P.3d 956, 964-65 (2003).

The district court denied Coleman's motion in limine and permitted the state to present evidence that, approximately one year before the charged crime, Coleman pulled down T.P.'s pants after she fell asleep in his room and, on a separate occasion, upset T.P. by "pressing her to talk about [her] stepfather, a topic she did not like discussing," while Coleman was alone with T.P. at a bonfire. (R., pp.60-61; Tr., p.59, Ls.18-25, p.114, Ls.16-24.) On appeal, Coleman does not challenge the relevancy of the pants incident, but he argues "[e]vidence of Mr. Coleman's alleged behavior of upsetting T.P. during a bonfire a year prior to the date of the charged crime did not make it more or less probable that he had committed the charged crime." (Appellant's brief, p.12.) He also contends that, even if "evidence that Mr. Coleman had pulled down T.P.'s pants and upset her at a bonfire was relevant, the evidence was not

admissible because the evidence was more prejudicial than probative.” (Appellant’s brief, p.13 (capitalization altered, underlining omitted).) Coleman’s arguments fail. Application of the law to the facts of this case shows that the challenged evidence was relevant to prove Coleman’s intent and plan to commit the charged crime and supports the district court’s implicit determination that the evidence was not unfairly prejudicial.

1. Evidence That Coleman Upset T.P. By Pressuring Her To Discuss A Distressing Topic While Alone With Her At A Bonfire Was Relevant To The Issue Of Coleman’s Intent And Plan To Commit The Charged Offense

Pursuant to I.R.E. 404(b), evidence of prior wrongs or acts may be admitted when relevant to show the defendant’s intent and/or plan to commit the charged offense. I.R.E. 404(b); State v. Gomez, ___ Idaho ___, 254 P.3d 47, 53 (Ct. App. 2011) (review denied 7/7/11); State v. Truman, 150 Idaho 714, 722, 249 P.3d 1169, 1177 (Ct. App. 2010); State v. Blackstead, 126 Idaho 14, 19-20, 878 P.2d 188, 193-94 (Ct. App. 1994). In sex abuse cases, evidence that the defendant has engaged in prior sexual misconduct with the victim, or has otherwise engaged in conduct designed to “groom” the victim for sexual exploitation “is particularly relevant where it demonstrates a progression of abuse, as the conduct actually charged may be only a part of the process.” Gomez, ___ Idaho at ___ n.3, 254 P.3d at 54 n.3; see also Truman, 150 Idaho at 722, 249 P.3d at 1177 (holding evidence of Truman’s uncharged behaviors toward the victim, “including his first sexual comments towards her when she was twelve years old, showing her pornography, the use of rewards and

punishments depending on whether she gave in to his sexual demands, as well as the sexual acts the two engaged in was admissible evidence establishing Truman's continuing criminal design to cultivate a relationship with T.S. such that she would concede to his sexual demands, also known as 'grooming'" and constituted "evidence of steps allegedly effectuating a plan to accomplish the charged offenses"); Blackstead, 126 Idaho at 19, 878 P.2d at 193 (holding evidence of Blackstead's drug use with the victim, in the interval between sexual assaults, "was probative of a continuing criminal design by Blackstead to cultivate a relationship with [the victim], induce her submission to his sexual demands and procure her silence through use of drugs – a process which the district court referred to as 'grooming'"). "Therefore, in cases where the uncharged criminal acts of the defendant were in furtherance of an underlying plan to commit the charged crime, those acts are ... admissible to show the accomplishment of the criminal goal." Blackstead, 126 Idaho at 19, 878 P.2d at 193.

Although Coleman argues otherwise (Appellant's brief, p.12), evidence that, approximately one year before the charged offense, Coleman upset T.P. by pressing her to talk about her stepfather while alone with her at a bonfire was relevant to show Coleman's intent and plan to commit the charged crime. The evidence was not admitted in isolation. Rather, it was admitted together with evidence that, during the same general timeframe, Coleman attempted to remove T.P.'s pants while she was alone with him in his room. Coleman does not challenge the relevancy of the pants incident. Viewed together, that incident

and the challenged bonfire incident show a pattern of grooming and an ongoing criminal design to accomplish the charged offense.

As noted by the state's expert in this case, an individual may groom a victim for sexual exploitation in a variety of ways. "Grooming might entail things that are in and of themselves fairly innocuous, such as treats, prizes, going to get an ice cream cone, spending special time together." (Tr., p.244, Ls.16-19.) However, the grooming process generally "progresses from the innocuous to things that violate a child's boundary, that a child may be uncomfortable with, that a child normally would not expect from [an] adult who doesn't have an intimate relationship with them." (Tr., p.244, Ls.20-24.) "Desensitizing a child to violated boundaries ... [is] a significant part of grooming." (Tr., p.245, Ls.1-11.) Such "boundary violations can be topical, discussing things that are not appropriate to discuss with a child. They can also be the special relationship, treats type of behavior." (Tr., p.245, Ls.12-15.) Generally speaking, an increase in physical contact is also part of the grooming process. (Tr., p.245, Ls.19-20.) Individuals who groom children for sexual exploitation look for children to whom they have access, often because the individual has a trusting relationship with the child's caregiver. (Tr., p.246, Ls.2-20, p.247, L.19 – p.248, L.9.) Grooming behaviors generally cease when the sexual contact is discovered or when the individual who is engaging in the grooming behavior no longer has access to the child. (Tr., p.248, L.24 – p.249, L.10.) Discussion of inappropriate topics, isolation from caregivers and a large age difference may together be indicators of grooming. (Tr., p.249, L.11 – p.251, L.13.)

Based on the foregoing, there can be little question that evidence of the bonfire incident, together with evidence of the pants incident, was relevant to show the process by which Coleman was attempting to groom T.P. for sexual contact. The testimony at trial established that Coleman knew before he talked to T.P. at the bonfire that she did not like discussing her stepfather. (Tr., p.204, L.13 – p.206, L.22.) In fact, T.P.'s father had told Coleman on "multiple" prior occasions "not to discuss anything to do with [T.P.'s stepfather] or anything that she's uncomfortable talking about." (Tr., p.206, Ls.6-22.) Nevertheless, when left alone with T.P. at the bonfire, Coleman initiated a conversation about T.P.'s stepfather, ultimately causing T.P. to become upset and retreat to her house to seek comfort from her father and stepmother. (Tr., p.103, L.3 – p.105, L.13, p.193, L.23 – p.196, L.18, p.208, L.12 – p.210, L.3.) During the same general timeframe, Coleman attempted to remove T.P.'s pants after she fell asleep in his room. (Tr., p.105, L.21 – p.109, L.23, p.210, L.21 – p.211, L.7.) Following this incident, T.P.'s father and stepmother made the decision to no longer leave T.P. alone with Coleman. (Tr., p.212, L.22 – p.213, L.10.) Approximately one year later, when T.P.'s father was out of town and T.P. was staying with her mother, Coleman was permitted to be alone with T.P. and committed the charged offense. (Tr., p.213, Ls.11-14.)

Viewed in context, evidence of the bonfire incident was probative of Coleman's intent and "continuing criminal design to cultivate a relationship with [T.P.] such that she would concede to his sexual demands." Truman, 150 Idaho at 722, 249 P.3d at 1177; see also Blackstead, 126 Idaho at 19, 878 P.2d at

193. Evidence that Coleman seized an opportunity while alone with T.P. to talk to her about a topic he knew made her uncomfortable showed a willingness by Coleman to violate T.P.'s "topical" boundaries. This evidence was especially probative when considered in light of the evidence, that during the same general time period, Coleman violated T.P.'s physical and personal boundaries by attempting to remove her pants and, at the next opportunity to be alone with her, committed the charged offense by exposing his penis to T.P. and asking her if she wanted to hold it. Because the bonfire incident was part of a pattern of conduct that showed escalating boundary violations and, ultimately, a progression of abuse, the evidence was relevant to show the steps Coleman took accomplish the charged offense. Gomez, ___ Idaho at ___ n.3, 254 P.3d at 54 n.3; Truman, 150 Idaho at 722, 249 P.3d at 1171; Blackstead, 126 Idaho at 19-20, 878 P.2d at 193-94.

2. The Probative Value Of The Challenged Evidence Was Not Substantially Outweighed By The Danger Of Unfair Prejudice

Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice -- which is the tendency to suggest a decision on an improper basis -- substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 907 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993). As previously explained by the Idaho Supreme Court:

Under the rule, the evidence is only excluded if the probative value is *substantially* outweighed by the danger of unfair prejudice. The

rule suggests a strong preference for admissibility of relevant evidence.

State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. See State v. Leavitt, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989) ("Certainly that evidence was prejudicial to the defendant, however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant."). Rather, the rule protects only against evidence that is unfairly prejudicial, that is, evidence that tends to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908.

Coleman contends that the district court abused its discretion in admitting the state's proffered I.R.E. 404(b) evidence, arguing that, even if relevant, evidence of the bonfire incident and pants incident was more prejudicial than probative and, as such, should have been excluded under I.R.E. 403. (Appellant's brief, pp.13-14.) Specifically, Coleman argues that evidence of the bonfire incident was unduly prejudicial because it "worked to poison the minds of the jury against" him by "paint[ing] him in an unfavorable light, as a cruel person who likes to upset children." (Appellant's brief, pp.13-14.) He argues that evidence of the pants incident was "highly prejudicial and inflammatory" because it portrayed him "as an individual who has struggled with improper sexual urges in the past." (Appellant's brief, p.14.) The record demonstrates, however, that Coleman's claims of unfair prejudice are unfounded.

As previously discussed, evidence of the bonfire incident and pants incident was particularly probative because it showed a progression of abuse and demonstrated Coleman's intent and plan to groom T.P. for sexual contact.

See Section D.1., *supra*. Although Coleman argues that the evidence was inflammatory, there is no reasonable possibility that the jury construed it as such, or that admission of the evidence caused the jury to render its verdict on an improper basis. Neither the bonfire incident nor the pants incident involved any sexual contact and, as such, did not carry the risk attendant in many other sex abuse cases that the jury might convict based solely on the defendant's propensity to engage in conduct like that charged. Rather, the evidence in this case was offered solely for the purpose of establishing that Coleman groomed the victim for ultimate sexual contact (R., pp.60-61), and that is the only purpose for which the state argued the relevance of that evidence to the jury (12/3/09 Tr., p.225, L.22 – p.227, L.21, p.243, L.17 – p.244, L.9). To the extent there still existed any potential for unfair prejudice resulting from the admission of the evidence, such was ameliorated by the court's limiting instruction that expressly directed the jury it could only consider the evidence as proof of Coleman's opportunity, intent and plan to commit the charged crime. (See R., p.77.) Presuming as this Court must that the jury followed this instruction, e.g., Gomez, ___ Idaho at ___, 254 P.3d at 57; State v. Kilby, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997), there is no reasonable possibility that the admission of the evidence caused the jury to convict Coleman on an improper basis.

Because the proffered I.R.E. 404(b) evidence was relevant to matters other than propensity and not unfairly prejudicial, Coleman has failed to establish that the district court abused its discretion by admitting it.

E. Coleman Has Failed To Establish That The District Court Abused Its Discretion By Admitting The Expert Testimony

Expert testimony is admissible if it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." State v. Joslin, 145 Idaho 75, 81,

175 P.3d 764, 770 (2007) (quotations omitted); see also I.R.E. 702. Coleman argues on appeal that the district court abused its discretion by admitting the expert testimony on grooming behaviors because that testimony was relevant only to the I.R.E. 404(b) evidence, which Coleman contends was improperly admitted. (Appellant's brief, pp.14-16.) For the reasons set forth in Section D, *supra*, the I.R.E. 404(b) evidence was properly admitted. Because Coleman concedes that the expert's testimony was relevant to help the jury understand that evidence, he has failed to show any abuse of discretion in the admission of that testimony.

F. Even If The District Court Erred In Its Evidentiary Rulings, Such Error Is Harmless

Idaho Criminal Rule 52 provides that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” I.C.R. 52. “The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence.” State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)); see also State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Even if the district court erred in permitting the introduction of the state's proffered I.R.E. 404(b) evidence and expert testimony, such error is harmless. The state relies, in part, on the arguments set forth in Section D.2., *supra*, and incorporates those arguments herein by reference. In addition, the state notes

that the facts of this case stand in contrast to those in Johnson, 148 Idaho 664, 227 P.3d 918. As in this case, the state's case in Johnson hinged on the credibility of the victim. Id. at 669, 227 P.3d at 923. However, in Johnson the I.R.E. 404(b) evidence consisted of a separate victim testifying about sexual abuse inflicted upon her by Johnson many years earlier. Id. In concluding that the admission of that evidence was not harmless, the Court held, "Evidence of prior sexual misconduct with young children is so prejudicial that there is a reasonable possibility this error contributed to Johnson's conviction." Id. Here, the case also hinged on T.P.'s credibility. However, unlike Johnson, the challenged evidence did not show any acts of prior sexual abuse, but instead was evidence that Coleman had on prior occasions pushed T.P.'s physical and personal boundaries. There was no testimony concerning prior sexual misconduct with T.P., much less with any other children. Even if the I.R.E. 404(b) evidence "painted Mr. Coleman in a very unfavorable light" (Appellant's brief, p.17), there is no reasonable possibility that the jury convicted Coleman of the charged sex offense merely because he violated T.P.'s boundaries on two prior occasions. For these reasons, even if the district court erred in admitting the state's proffered I.R.E. 404(b) evidence and expert testimony, such error was harmless.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Coleman guilty of sexual abuse of a child under the age of 16.

DATED this 9th day of August 2011.

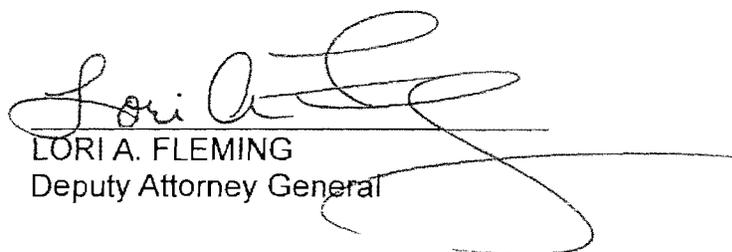

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of August 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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


LORI A. FLEMING
Deputy Attorney General

LAF/pm