4-20-2017

# State v. Taylor Appellant's Brief Dckt. 44225

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| **STATE OF IDAHO,** | ) | |
| | ) | **NO. 44225** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **KOOTENAI COUNTY** |
| **v.** | ) | **NO. CR 2013-24363** |
| | ) | |
| **DANIEL ABRAM TAYLOR,** | ) | **APPELLANT'S BRIEF** |
| | ) | |
| **Defendant-Appellant.** | ) | |
| _____ | ) | |

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# BRIEF OF APPELLANT

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

_____

**HONORABLE SCOTT WAYMAN**
**District Judge**

_____


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## STATEMENT OF THE CASE

### Nature of the Case

Following a jury trial, the jury found Daniel Abram Taylor guilty of felony lewd conduct with a minor under sixteen. The district court imposed a unified sentence of fifteen years, with five years fixed. After Mr. Taylor filed an Idaho Criminal Rule 35 (Rule 35) motion for a reduction of sentence, the district court granted the motion in part and reduced the sentence to a unified term of fifteen years, with four years fixed.

On appeal, Mr. Taylor asserts the district court erred when it admitted into evidence a photograph of the alleged victim, because the photograph was not relevant and the risk of unfair prejudice substantially outweighed any probative value the photograph might have had. Mr. Taylor also asserts the district court abused its discretion when it failed to place him on probation.

### Statement of the Facts and Course of Proceedings

The State charged Mr. Taylor by Information with one count of lewd conduct with a minor under sixteen, felony, I.C. § 18-1508, for alleged conduct with his five-year-old daughter, A.B.T. (*See* R., pp.45-46; R., pp.110-11 (Amended Information).) Mr. Taylor entered a not guilty plea. (R., p.47.)

Mr. Taylor's first jury trial ended with a hung jury. (*See* R., pp.177-222.) The district court reset the case for trial. (*See* R., pp.260-61.) Unlike at the first trial (*see* R., pp.187-88), A.B.T. did not testify during the second trial. (*See generally* Tr., pp.5-7 (list of witnesses at the second trial).)[1]

[1] All citations to "Tr." refer to the 962-page volume of the Transcript on Appeal, which includes transcripts from the Motion Hearing held on August 25, 2014, the Jury Trial

During the second trial, the jury heard testimony from Mr. Taylor and his ex-wife, Ashley Felder, on A.B.T. being Mr. Taylor's only biological child of their three children. (*See* Tr., p.150, Ls.10-25, p.173, L.21 – p.174, L.8, p.753, L.17 – p.754, L.21, p.757, L.6 – p.758, L.6.) Mr. Taylor testified that one day in Colorado, when he was talking to Ms. Felder while he was holding her younger son, she tried to rip the child out of his arms. (*See* Tr., p.758, L.16 – p.759, L.4.) He testified he pushed her away from him, and she fell down the stairs and was injured.[2] (Tr., p.759, Ls.4-5.) Mr. Taylor ultimately was convicted for misdemeanor domestic violence and child abuse in Colorado. (*See* Sealed Exs., p.150.)[3]

Mr. Taylor testified that he filed for divorce in Colorado. (Tr., p.759, Ls.22-24.) Ms. Felder filed a restraining order after the domestic violence, and he dismissed the divorce case and reconciled to make sure the children had at least one stable parent. (*See* Tr., p.759, L.25 – p.760, L.11.) Afterwards, the family moved to Coeur d'Alene. (Tr., p.760, L.12 – p.761, L.6.) There, Mr. Taylor primarily worked as a teacher. (*See* Tr., p.158, L.23 – p.159, L.11.) Mr. Taylor testified he later told Ms. Felder he was likely going to file for divorce again, and Ms. Felder kicked him out of the house and got a no contact order. (Tr., p.761, Ls.7-20.) Mr. Taylor then filed for divorce. (*See* Tr., p.760, L.12 – p.761, L.18, p.764, Ls.2-11.)

Mr. Taylor testified Ms. Felder filed a restraining order against him after he filed for divorce. (Tr., p.764, Ls.12-18.) On cross-examination, Ms. Felder testified that after

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held on November 30 through December 4, 2015, and the Hearing on Motion for New Trial held on January 4, 2016.

[2] Ms. Felder had told the police that Mr. Taylor hit her several times. (*See* Sealed Exs., pp.153, 210-11.)

Mr. Taylor filed for divorce, she told the Department of Health and Welfare that A.B.T. had stated she would take baths with him. (*See* Tr., p.181, L.17 – p.182, L.11; Sealed Exs., pp.529-33 (Plaintiff's Ex. 3-H, Report of Investigation).) The Department of Health and Welfare conducted a sexual abuse investigation, and no charges were filed. (*See* Tr., p.182, Ls.15-23, p.767, Ls.18-19.)

A couple months after the divorce, Mr. Taylor filed a modification request. (*See* Tr., p.163, L.14 – p.165, L.3.) He sought to reduce his child support and alimony payments. (*See* Tr., p.166, Ls.17-22, p.768, Ls.2-13.) Mr. Taylor and Ms. Felder went into mediation. (*See* Tr., p.166, Ls.11-16, Tr., p.767, L.25 – p.768, L.13.)

Meanwhile, A.B.T. had been seeing a psychologist, Dr. Sara Morrow. (*See* Tr., p.168, Ls.16-23.) A.B.T. had been having problems with her bodily functions since she was three or four years old. (*See* Tr., p.169, L.19 – p.170, L.14, p.780, L.25 – p.781, L.11.) However, Mr. Taylor and Ms. Felder decided to send A.B.T. to Dr. Morrow because she had been displaying oversexualized behavior at school. (*See* Tr., p.168, L.24 – p.169, L.8, p.783, L.10 – p.784, L.12.)

Ms. Felder testified that, a few days after the divorce mediator prepared a modification agreement, she had a conversation with A.B.T. (*See* Tr., p.167, Ls.7-12, p.170, Ls.15-17; Sealed Exs., pp.498-500 (Plaintiff's Ex. 3-C, the modification agreement).) Ms. Felder told A.B.T.'s psychologist about the conversation a couple days later, and then the police contacted her. (*See* Tr., p.170, L.18 – p.171, L.11.) She indicated, on cross-examination, that she knew Dr. Morrow was a mandatory reporter at

[3] All citations to "Sealed Exs." refer to the 617-page electronic PDF document, which includes the Presentence Report and attachments.

the time she called the psychologist. (*See* Tr., p.187, Ls.8-22.)

On direct examination, Mr. Taylor testified Ms. Felder met with him in person about the allegation. (Tr., p.770, Ls.5-23.) He testified Ms. Felder told him A.B.T. had disclosed an inappropriate sexual event with him during a counseling session with Dr. Morrow. (*See* Tr., p.770, L.24 – p.771, L.7.) When Mr. Taylor called Dr. Morrow, Dr. Morrow instead stated Ms. Felder had told her what A.B.T. reportedly said. (*See* Tr., p.771, Ls.11-21.)

Ms. Felder testified she took A.B.T. to the Child Advocacy Center, for A.B.T. to participate in an interview with Detective Shaw of the Coeur d'Alene Police Department. (*See* Tr., p.171, Ls.8-19; Tr., p.242, Ls.9-14.) On cross-examination, Detective Shaw testified that in her initial contact, Ms. Felder told her that Mr. Taylor had inappropriate intimacy with A.B.T. (Tr., p.263, Ls.16-25.) On direct examination, Detective Shaw did not go into what A.B.T. told her, because that would have been hearsay. (*See* Tr., p.250, L.16 – p.251, L.4.) Over Mr. Taylor's objection, the district court admitted a photograph, Plaintiff's Exhibit 9, depicting Detective Shaw's interview with A.B.T. (*See* Tr., p.250, L.11 – p.254, L.8; Sealed Exs., p.579 (Plaintiff's Ex. 9).)

Dr. Morrow testified A.B.T.'s violations of space boundaries, toileting problems, emotional meltdowns, and sleep disturbances were consistent with sexual abuse. (*See* Tr., p.365, L.7 – p.366, L.25.) Dr. Morrow did not speak with A.B.T. directly about sexual abuse. (Tr., p.367, Ls.6-11.) Another psychologist, Dr. Mary Dietzen, testified for the State that, based on her review of the transcript of Detective Shaw's interview of A.B.T., the answers were consistent with someone who had not been coached. (*See* Tr., p.397, Ls.5-10.)

On cross-examination, Ms. Felder testified that at the time A.B.T. reported the sexual conduct at issue here, A.B.T. also stated she was mad at Mr. Taylor for giving her gluten, which she was not supposed to have, and for saying something negative about Dr. Morrow. (*See* Tr., p.196, L.17 – p.197, L.6.) Additionally, Ms. Felder testified A.B.T. would sometimes tell big lies and not back down from her lies, even in the face of punishment. (Tr., p.189, Ls.9-17.) On redirect examination, Ms. Felder testified she delayed reporting her discussion with A.B.T. to Dr. Morrow because she was afraid A.B.T. was not telling the truth. (*See* Tr., p.227, Ls.3-9.) Mr. Taylor testified A.B.T. was "very, very elaborate and creative in telling stories," she would sometimes be punished for her lies, and she would, for the most part, maintain those lies. (Tr., p.788, L.4 – p.789, L.5.)

Detective Shaw testified she contacted Mr. Taylor after the interview with A.B.T., and had him come to the police department for an interview. (Tr., p.255, L.4 – p.267, L.5.) She testified she told Mr. Taylor at the beginning of the interview he was free to go at any time. (Tr., p.257, Ls.3-8.) The detective testified, on cross-examination, that it "started out as an interview, and halfway through it turned into an interrogation when I made the statement that I believe this has happened. And then it turned into an interrogation." (Tr., p.268, Ls.10-17.)

The State published a redacted version of the audio/video recording of Detective Shaw's interrogation of Mr. Taylor. (Plaintiff's Ex. 1-A; *see* Tr., p.257, L.12 – p.261, L.1.) The recording showed that Mr. Taylor initially denied being in the shower with or sexually touching A.B.T., and he stated he did not remember anything happening in the shower. (*See* Plaintiff's Ex. 1-A, 17:45-18:00, 19:40-19:50, 31:35-31:55, 32:50-33:00,

33:40-33:55, 36:55-37:10.) Detective Shaw stated something inappropriate had happened (*see* Plaintiff's Ex. 1-A, 30:20-30:40, 31:45-31:50, 33:50-34:05), and that Mr. Taylor was not being honest (*see* Plaintiff's Ex. 1-A, 33:20-33:40, 34:45-35:00). She told Mr. Taylor, "[w]e need to make sure that you get the help that you need . . . or whatever is required before you have your kids again." (Plaintiff's Ex. 1-A, 31:15-31:25.) The detective stated the concern was making sure it did not happen again and that Mr. Taylor was safe to have his three kids. (*See* Plaintiff's Ex. 1-A, 34:30-34:45.)

Mr. Taylor stated he thought A.B.T. had created this situation, and it did not happen. (*See* Plaintiff's Ex. 1-A, 41:50-42:05.) He stated he could not imagine doing it. (*See* Plaintiff's Ex. 1-A, 52:00-53:20.) However, about an hour into the interrogation, Mr. Taylor stated he touched A.B.T.'s vagina with his penis, including slight penetration, while they were in the shower at their house in Coeur d'Alene. (*See* Plaintiff's Ex. 1-A, 54:15-1:01:45.) After Detective Shaw told Mr. Taylor he was not being completely honest (*see* Plaintiff's Ex. 1-A, 1:07:05-1:07:55), Mr. Taylor again described the genital-genital contact (*see* Plaintiff's Ex. 1-A, 1:08:20-1:19:00). Later, Mr. Taylor described the sexual contact a third time, also stating that he touched A.B.T.'s vagina with his hands as well as his penis. (*See* Plaintiff's Ex. 1-A, 1:28:35-1:35:00.)

At the second trial, Mr. Taylor testified he never had any sexual contact with A.B.T. (*See* Tr., p.779, Ls.14-16.) He testified he felt fine when he entered the interview room, but left feeling like he was insane. (Tr., p.778, Ls.13-21.) His emotions started to change during the interrogation when Detective Shaw let him know he would maybe never see his kids again. (Tr., p.778, L.22 – p.779, L.4.) Mr. Taylor testified, on

cross-examination, that the statements he made during the interrogation about sexual contact with A.B.T. were not true. (*See* Tr., p.808, Ls.4-11, p.808, L.22 – p.809, L.25.)

On cross-examination, Detective Shaw testified she had used some of the "Reid technique" in interrogating Mr. Taylor. (Tr., p.269, Ls.4-6.) Dr. Bruce Frumkin, a forensic and clinical psychologist (*see* Tr., p.422, L.21 – p.423, L.17), testified for the State that Mr. Taylor was not more vulnerable to Reid technique interrogation tactics compared with others, because the two-hour interrogation was within the normal time range for interrogations, it did not appear Mr. Taylor was sleep-deprived, Mr. Taylor was not of low intelligence, and nothing on the video recording indicated Mr. Taylor's memory was impaired. (*See* Tr., p.442, L.15 – p.444, L.17.) Dr. Frumkin testified the interrogation did not cross a threshold that would have made it no longer legal to use the techniques or tactics on display. (*See* Tr., p.454, L.21 – p.455, L.7.)

However, Dr. Charles Honts, a professor of psychology (*see* Tr., p.545, L.3 – p.548, L.18), testified for the defense that the interrogation displayed several Reid technique risk factors for false confessions. (*See* Tr., p.568, L.23 – p.569, L.4.) Specifically, the interrogation featured a "false evidence ploy," where Detective Shaw stated she knew with certainty that the complaining witness was telling the truth, while there was no way to know with certainty that any alleged victim was telling the truth without a video recording of the alleged abuse. (*See* Tr., p.569, L.6 – p.570, L.7.) The interrogation also had numerous instances of "minimization and justification ploys," where an interrogator would suggest there were explainable reasons for an act that would minimize the seriousness of the act and justify it. (*See* Tr., p.570, L.8 – p.571, L.17.) Dr. Honts further testified there were "false memory induction" activities in the

interrogation, whereby people are convinced by the interrogation that they committed the crime, and they come to believe they committed the crime. (*See* Tr., p.572, L.3 – p.575, L.18.)

The jury at the second trial found Mr. Taylor guilty of lewd conduct. (R., p.423; Tr., p.938, L.23 – p.939, L.3.)

Mr. Taylor filed a timely Motion for New Trial pursuant to I.C. §19-2406(4), (5) and (6). (R., pp.426-27.) Among the grounds raised, Mr. Taylor asserted, "[a] photograph of the alleged victim was admitted contrary to the Rules of Evidence." (R., p.426.) After conducting a hearing, the district court denied the motion for a new trial on all grounds. (R., pp.433-36.)

At Mr. Taylor's sentencing hearing, the State recommended the district court impose a unified sentence of twenty-five years, with ten years fixed. (Sentencing Tr., p.8, L.23 – p.9, L.18.)[4] Mr. Taylor recommended the district court place him on probation. (Sentencing Tr., p.20, L.25 – p.21, L.17.) The district court imposed a unified sentence of fifteen years, with five years fixed. (R., pp.444-49.)

Mr. Taylor filed a Notice of Appeal timely from the district court's Judgment and Sentence. (R., pp.454-55.) Mr. Taylor also filed a Rule 35 motion for a reduction of sentence. (R., p.468.) The district court, after conducting a hearing, issued an Order Partially Granting Rule 35, and reduced Mr. Taylor's sentence to a unified term of fifteen years, with four years fixed. (R., pp.474-75.)

[4] All citations to the "Sentencing Tr." refer to the 31-page transcript of the Sentencing Hearing held on May 23, 2016.

## ISSUES

1. Did the district court err when it admitted into evidence a photograph of the alleged victim?

2. Did the district court abuse its discretion when it failed to place Mr. Taylor on probation?

## ARGUMENT

## I.

## The District Court Erred When It Admitted Into Evidence A Photograph Of The Alleged Victim

### A. Introduction

Mr. Taylor asserts the district court erred when it admitted into evidence a photograph of A.B.T. during her interview with Detective Shaw. The photograph was not relevant. Even if the photograph were relevant, it should have been excluded under Idaho Rule of Evidence 403 because its minimal probative value was substantially outweighed by the danger of unfair prejudice to Mr. Taylor. The State will be unable to prove, beyond a reasonable doubt, that there was no reasonable possibility the admission of the photograph contributed to the conviction. Additionally, Mr. Taylor's motion for a new trial should have been granted on the basis the improper admission of the photograph was an error of law.

During Detective Shaw's testimony, the State sought to admit Plaintiff's Exhibit 9, a photograph showing how A.B.T. and Detective Shaw were positioned during A.B.T.'s interview. (Tr., p.251, Ls.7-23; *see* Sealed Exs., p.579 (Plaintiff's Ex. 9).) Mr. Taylor objected. (*See* Tr., p.251, L.24 – p.252, L.8.) Outside the presence of the jury, Mr. Taylor's counsel asserted, "[t]he photograph has absolutely no relevance whatsoever." (Tr., p.252, Ls.9-11.) His counsel also asserted the State was "trying to offer it because there's a cute little girl sitting in there. He's trying to do nothing but draw sympathy from the jury. And there is an extreme danger that that's exactly the only thing that the jury would use that photograph for." (Tr., p.252, Ls.11-15.)

The district court overruled the objection: "It's certainly not overly prejudicial. And based upon what we heard at the first trial, I think it does have some probative effect on the issues regarding the interview." (Tr., p.254, L.24 – p.255, L.2.) The district court suggested the photograph was relevant to the methods by which Detective Shaw conducted the interview with A.B.T. (*See* Tr., p.253, Ls.21-23.) The district court therefore admitted the photograph. (Tr., p.254, Ls.2-8.) However, the photograph should not have been admitted into evidence, because it was not relevant. Even if the photograph were relevant, it should have been excluded under Rule 403 because its minimal probative value was substantially outweighed by the danger of unfair prejudice.

B. Standard Of Review

An appellate court "freely reviews the question of relevancy as an issue of law." *State v. Johnson*, 148 Idaho 664, 667 (2010). "The trial court's I.R.E. 403 determination will not be disturbed on appeal unless it is shown to be an abuse of discretion." *Id.*

When reviewing an exercise of discretion, an appellate court conducts a multi-tiered inquiry into whether the trial court (1) rightly perceived the issue as one of discretion, (2) acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices, and (3) reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

C. The Photograph Was Not Relevant

The photograph here was not relevant. The Idaho Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." I.R.E. 401. Relevant evidence is generally admissible, but "[e]vidence which is not relevant is not admissible." I.R.E. 402.

The district court erred when it determined the photograph was relevant. The State argued the photograph was relevant to "whether or not this detective followed the correct procedures when she gave the interview" (*see* Tr., p.252, L.23 – p.253, L.12), an argument apparently adopted by the district court (*see* Tr., p.253, Ls.21-23). However, the photograph only captured a single moment during A.B.T.'s interview with Detective Shaw. Detective Shaw testified she believed the interview lasted about twenty-five minutes. (Tr., p.251, Ls.5-6.) The photograph would not have depicted any procedural or other irregularities that might have occurred during the rest of the interview. It did not have any tendency to make the existence of any fact that was of consequence to the determination of the action, namely the methods the detective used, more probable or less probable. *See* I.R.E. 401. Thus, the photograph was not relevant to the procedures by which Detective Shaw conducted the interview with A.B.T. *See id.* The photograph, because it was not relevant, should not have been admitted. *See* I.R.E. 402.

D. The Photograph Should Have Been Excluded Under Rule 403

Even if the photograph were relevant, it should have been excluded under Idaho Rule of Evidence 403 because its minimal probative value was substantially outweighed by the danger of unfair prejudice to Mr. Taylor. Thus, the district court abused its discretion when it admitted the photograph under Rule 403, because it did not act consistently with the applicable legal standards.

Rule 403 provides that, "[a]lthough 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." I.R.E. 403. The Idaho Supreme Court has explained that Rule 403 "creates a balancing test. On one hand, the trial judge must measure the probative worth of the proffered evidence. The trial judge, in determining probative worth, focuses upon the degree of relevance and materiality of the evidence and the need for it on the issue on which it is to be introduced." *State v. Rhoades*, 119 Idaho 594, 603 (1991) (quoting *Davidson v. Beco Corp.*, 114 Idaho 107, 110 (1987). On the other hand, "the trial judge must consider whether the evidence amounts to unfair prejudice. Here, the concern is whether the evidence will be given undue weight, or where its use results in an inequity, or as several commentators have suggested, 'illegitimate persuasion.'" *Id.* at 603-04 (quoting *Davidson*, 114 Idaho at 110).

The Idaho Supreme Court in *Rhoades* acknowledged that "[a]ny evidence is prejudicial to the party whose theory of the case it contradicts." *Rhoades*, 119 Idaho at 604. In the context of Rule 403, "[t]he proper focus of the trial court is upon 'unfair prejudice;' whether fact to be shown by the evidence justifies the tendency of the evidence to 'persuade by illegitimate means.'" *See id.* (quoting Wright & Graham, *Federal Practice and Procedure* § 5215, at 275.) "In other words, evidence should be excluded if it invites inordinate appeal to lines of reasoning outside of the evidence or emotions which are irrelevant to the decision making process." *Id.*

Even if it were relevant, any relevance the photograph in the instant case had to the procedures used to conduct A.B.T.'s interview was minimal, because the photograph only captured a moment in her twenty-five-minute-long interview with Detective Shaw. Conversely, the danger of unfair prejudice to Mr. Taylor was great. The photograph invited inordinate appeal to the jurors' sympathy for A.B.T., an emotion which was irrelevant to the decision making process. As Mr. Taylor's counsel's asserted, the State was "trying to offer it because there's a cute little girl sitting in there. He's trying to do nothing but draw sympathy from the jury." (*See* Tr., p.252, Ls.11-13.) Counsel further asserted, "there is an extreme danger that that's exactly the only thing that the jury would use that photograph for." (Tr., p.252, Ls.14-15.) Thus, the danger of unfair prejudice substantially outweighed the minimal probative value of the photograph.

The photograph here invited inordinate appeal to the jurors' sympathy, and the danger of unfair prejudice substantially outweighed its minimal probative value. Thus, the photograph should have been excluded under Rule 403. *See Rhoades*, 119 Idaho at 604. The district court abused its discretion when it admitted the photograph, because it did not act consistently with the applicable legal standards. *See Hedger*, 115 Idaho at 600.

## E. The State Will Be Unable To Prove, Beyond A Reasonable Doubt, That There Was No Reasonable Possibility The Admission Of The Photograph Contributed To The Conviction

Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). *See*

*State v. Perry*, 150 Idaho 209, 227 (2010). "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman*, 386 U.S. at 24). Mr. Taylor asserts the State will simply be unable to prove, beyond a reasonable doubt, that there was no reasonable possibility the admission of the photograph contributed to the conviction. Thus, the judgment of conviction should be vacated and the case should be remanded to the district court for a new trial.

F. The District Court Abused Its Discretion When It Denied Mr. Taylor's Motion For A New Trial

Mr. Taylor asserts the district court abused its discretion when it denied his motion for a new trial, because the motion should have been granted on the basis the improper admission of the photograph was an error of law. One of the grounds for a new trial Mr. Taylor asserted was that "[a] photograph of the alleged victim was admitted contrary to the Rules of Evidence." (R., p.426.) At the hearing on the motion for a new trial, Mr. Taylor asserted the photograph came into evidence "over objection with absolutely no probative value. It was intended solely to draw sympathy from the jury. Frankly, it did just what it was intended to do. It had no probative value. The unfair prejudice [was] substantial." (Tr., p.951, Ls.17-22.)

The district court, in denying the motion on that ground, determined, "[a]s far as the photo of the alleged victim, it seems to me that it was harmless certainly. Did show the circumstances surrounding the interview. It was nothing prejudicial to the defense in presenting that." (Tr., p.960, Ls.11-15.) However, the motion for a new trial should

have been granted on the basis the improper admission of the photograph was an error of law.

The denial of a motion for a new trial is reviewed for an abuse of discretion. *State v. Stevens*, 146 Idaho 139, 148 (2008) (citing *State v. Hayes*, 144 Idaho 574, 577 (Ct. App. 2007)). A trial court may grant a new trial, on a defendant's motion, "if required in the interest of justice." I.C.R. 34. Idaho Code § 19-2406 contains the permissible grounds for a new trial, which include "[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial." I.C. § 19-2406(5). The Idaho Court of Appeals has held that "the admission of irrelevant evidence would be an error of law—one of the statutory grounds for a new trial." *State v. Carlson*, 134 Idaho 389, 397 (Ct. App. 2000).

For the reasons discussed above in Section I.C., the photograph was not relevant. Thus, the district court's admission of the irrelevant photograph was an error of law. *See Carlson*, 134 Idaho at 397. The district court therefore should have granted Mr. Taylor's motion for a new trial. *See* I.C. § 19-2406(5). By denying the motion for a new trial, the district court abused its discretion, because it did not act consistently with the applicable legal standards. *See Hedger*, 115 Idaho at 600. Thus, the order denying the motion for a new trial and the judgment of conviction should be vacated, and the case should be remanded to the district court for a new trial.

II.

The District Court Abused Its Discretion When It Failed To Place Mr. Taylor On Probation

Mr. Taylor asserts the district court abused its discretion when it, despite his recommendation, failed to place him on probation.

"A trial court's decision regarding whether imprisonment or probation is appropriate is within its discretion." *State v. Reber*, 138 Idaho 275, 278 (2002). Before imposing a sentence, a district court must consider the criteria of I.C. § 19-2521 regarding whether a defendant should be placed on probation. *Id.* "A decision to deny probation will not be deemed an abuse of discretion if it is consistent with the criteria articulated in I.C. § 19-2521." *Id.*

Section 19-2521 provides that a sentencing court

> *shall* deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:
>
> (a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
>
> (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
>
> (c) A lesser sentence will depreciate the seriousness of the defendant's crime; or
>
> (d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or
>
> (e) Imprisonment will provide an appropriate deterrent for other persons in the community; or
>
> (f) The defendant is a multiple offender or professional criminal.

I.C. § 19-2521(1) (emphasis added). Additionally, while not controlling the discretion of the court, the following grounds

> *shall* be accorded weight in favor of avoiding a sentence of imprisonment:
>
> (a) The defendant's criminal conduct neither caused nor threatened harm;
>
> (b) The defendant did not contemplate that his criminal conduct would cause or threaten harm;
>
> (c) The defendant acted under a strong provocation;
>
> (d) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (e) The victim of the defendant's criminal conduct induced or facilitated the commission of the crime;
>
> (f) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that was sustained; provided, however, nothing in this section shall prevent the appropriate use of imprisonment and restitution in combination;
>
> (g) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
>
> (h) The defendant's criminal conduct was the result of circumstances unlikely to recur; [and]
>
> (i) The character and attitudes of the defendant indicate that the commission of another crime is unlikely.

I.C. § 19-2521(2) (emphasis added). However, a district court need not "recite the statutory criteria of I.C. § 19-2521, or its application of the facts to those criteria in rendering its decision on probation." *Reber*, 138 Idaho at 278.

Mr. Taylor asserts that the district court did not act consistently with the applicable legal standards when it failed to place him on probation, because it did not adequately consider factors falling within the criteria of I.C. § 19-2521. Specifically, the

district court did not adequately consider Mr. Taylor's low risk to the community. Mr. Taylor had a LSI-R score of 12.0. (Sealed Exs., p.188.) The presentence investigator stated that score "indicates he is a low risk to reoffend based on the criminogenic and protective factors in his life at present." (Sealed Exs., p.168.)

The district court also did not give adequate consideration to the fact that the present charge is Mr. Taylor's first felony. While Mr. Taylor had prior convictions in Colorado for misdemeanor domestic violence and child abuse (*see* Sealed Exs., p.150), as well as a Colorado conviction for misdemeanor violation of a protective order (*see* Sealed Exs., p.151), the present charge is his first felony conviction (*see* Sealed Exs., pp.149-53).

Further, the district court did not adequately consider Mr. Taylor's support from his friends and family. In a letter of support, Mr. Taylor's stepfather, Michael Lowery, wrote that Mr. Taylor "was an exemplary role model and mentor to many children, youth, and young adults through his community involvement." (Sealed Exs., pp.244-45.) Mr. Lowery asked the district court to "apply a fair sentence which allows Dan to continue to function in society, earn an income and continue to be with friends and family." (Sealed Exs., p.245.)

Mr. Taylor also submitted multiple letters of support from his friends. For example, Tracey Vaughan, who directed two plays that Mr. Taylor acted in, wrote she had always known Mr. Taylor "to be an upstanding citizen and someone who 'did the right thing' in multiple circumstances. He is a great person who has contributed a lot to our local community in many ways." (Sealed Exs., p.239.) Meghan Ferrin, who had known Mr. Taylor for over twenty years, stated Mr. Taylor "was the kind of teacher who

kids remember, who they later say shaped their lives, their interests, their pursuit of education." (Sealed Exs., pp.234, 237.) Kathy Dennis, whose sons had been members of a youth swimming team with Mr. Taylor, wrote, "[k]nowing both sides gives me the ability to tell you that I do support Danny to this day." (Sealed Exs., p.243.)

Additionally, the district court did not adequately consider Mr. Taylor's plans to continue to contribute to society in the future. Mr. Taylor had earned two master's degrees in education and educational/leadership/curriculum instruction. (Sealed Exs., p.159.) At the time of sentencing, Mr. Taylor was in the process of earning a third master's degree, in environmental sustainability. (*See* Sealed Exs., pp.158-59.) At the sentencing hearing, Mr. Taylor indicated he was pursuing the third master's degree because "I have a lot to give." (*See* Sentencing Tr., p.22, Ls.12-15.) He stated, "I've got so many more things to do in this life. I've got so many more things to—to give to people, to provide, both with friends and family, as well as the greater community." (Sentencing Tr., p.22, Ls.7-10.) Mr. Taylor told the district court, "[t]here's a lot of—a lot of ills in this world and I—I have the skills and the knowledge necessary to make things better." (Sentencing Tr., p.22, Ls.17-19.)

Mr. Taylor submits that, in light of the above mitigating factors falling within the criteria of I.C. § 19-2521, district court did not act consistently with the applicable legal standards when it failed to place him on probation. Thus, the district court abused its discretion. The district court should have followed Mr. Taylor's recommendation by placing him on probation.

## CONCLUSION

For the above reasons, Mr. Taylor's respectfully requests this Court vacate his judgment of conviction, or vacate the district court's order denying his motion for a new trial and the judgment of conviction, and remand his case to the district court for a new trial. Alternatively, Mr. Taylor respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 20th day of April, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of April, 2017, 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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_____/s/_____
EVAN A. SMITH
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BPM/eas