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# State v. McClain Respondent's Brief Dckt. 38576

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38576, 38577
	)	
vs.	)	
	)	
JERRY LEE MCCLAIN,	)	
	)	
Defendant-Appellant.	)	
_____	)	

**BRIEF OF RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

**HONORABLE RONALD J. WILPER  
District Judge**

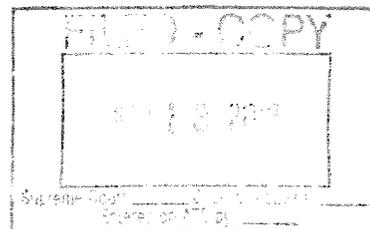
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## STATEMENT OF THE CASE

### Nature of the Case

Jerry Lee McClain appeals from his conviction for violation of a no-contact order, domestic violence in the presence of a child, and intimidating a witness with a persistent violator enhancement. On appeal, McClain challenges the sufficiency of the evidence supporting his persistent violator enhancement. Additionally, McClain contends the district court erred by admitting an unredacted version of an interrogation.

### Statement of the Facts and Course of the Proceedings

McClain repeatedly kicked, hit and slapped his wife, Janna McClain, during a sexual encounter while their young son was asleep in his bedroom within hearing distance. (11/10/2012 JT Tr., p.178, L.9 – p.188, L.17.) The state charged McClain with rape and felony domestic battery. (38576 R., pp.25-27.) After McClain was arrested on those charges, he called Janna from jail and asked her to “speak to the prosecutors” and “change her story.” (11/10/2012 JT Tr., p.196, Ls.7-20.) The state charged McClain with intimidating a witness and violation of a no contact order. (38577 R., pp.26-7.) The state subsequently filed a sentencing enhancement alleging McClain had previously been convicted of two or more felonies. (38577 R., pp.33-35.) The criminal cases were consolidated for trial. (38577 R., p.32.)

The state filed a motion in limine seeking to introduce evidence of “[t]he history of domestic violence in the relationship [between McClain and his wife], including the power and control [McClain] exercised over the victim daily, and the

prior incidents of domestic violence,” asserting they were “both relevant and probative to the case at hand.” (38576 R., p.97.) After a hearing on the motion, the district court concluded:

[I]n the context of this case, because the state’s evidence is so strong without it and the likelihood of unfair prejudice to the defendant in this case outweighs the relatively slight relevance of this information, I’m not going to let it in on the state’s case in chief.

(10/14/2010 Tr., p.43, Ls.5-10.)

Before the trial began, McClain objected to the introduction by the state of a video of his interrogation by law enforcement (11/08/2012 JT Tr., p.56, L.22 – p.58, L.13), claiming the 68 minute video related, almost in its entirety, “to other events, acts, and wrongs other than the night in question” (11/08/2010 JT Tr., p.57, Ls.6-8). The state argued it had already redacted the video in accordance with the court’s previous evidentiary ruling and there were no “mentions of any prior acts of violence” between the McClains, nor any “mention of the cycle of power and control.” (11/08/2010 JT Tr., p.58, Ls.21-24.) The court indicated it would review the video at a later time and “rule accordingly with instructions to the state either to redact or not.” (11/08/2010 JT Tr., p.65, Ls.2-4.) Before ruling on the admissibility of the video, the court granted McClain’s motion for mistrial after Janna volunteered testimony that violated the court’s earlier ruling prohibiting the introduction of evidence of the volatile and controlling nature of McClain’s relationship with Janna. (11/08/2010 JT Tr., p.100, L.17 – p.105, L.6.)

Prior to the start of the second trial, the court had time to review the video of McClain’s police interrogation. (11/10/2010 JT Tr., p.13, Ls.10-14.) The court denied McClain’s request to exclude the first 57 minutes and 20 seconds of the

video finding the evidence relevant and the unfair prejudice to McClain was not outweighed by that relevance. (11/10/2010 JT Tr., p.13, Ls.15-23.) The court also denied McClain's request to exclude the last four minutes of the video, agreeing with the state that the statements therein were relevant to McClain's attack on the credibility of the witnesses against him. (11/10/2010 JT Tr., p.18, L.9 – p.19, L.15.) During the second trial, McClain again objected to the introduction of the video based on his claim that it was "fraught with references to prior acts or wrongs." (11/12/2010 JT Tr., p.224, Ls.6-8.) The state stood on its previous response to McClain's objection and the court's previous ruling that the video was admissible in its entirety. (11/12/2010 JT Tr., p.226, Ls.22-25.) The court stood by its previous ruling and allowed the introduction of the video interrogation of McClain. (11/12/2010 JT Tr., p.227, Ls.1-2.)

The jury ultimately found McClain guilty of felony domestic violence, intimidation of a witness, and violation of a no contact order. (38576 R., pp.146-147; 38577 R., pp.92-93; 11/10/2010 JT Tr., p.397, L.1 – p.398, L.12.) The trial immediately moved to the production of evidence on the sentencing enhancement wherein state's exhibits 62 and 63, identified as "certified judgments of conviction," were admitted by stipulation. (11/10/2010 JT Tr., p.405, L.15 – p.406, L.2.) Exhibit 62 was a certified judgment of conviction showing McClain had been convicted of possession of a controlled substance in Canyon County. (11/10/2010 JT Tr., p.407, Ls.1-9.) Exhibit 63 was described to the jury by the state as follows:

Then referring to State's Exhibit 63, this is a little bit more difficult to read. You can see up at the top of the certified judgment

of conviction that it was entered in Malheur County, Oregon. You can see the defendant's name, Jerry Lee McClain. You can see the case number there. You can see that he was convicted of assault number three – or assault in the third degree.

And then up in the corner, you can see that the judgment of conviction was entered on August 21 of 1991.

And then if you flip back to the page that contains the indictment in this case, which is also part of the judgment of conviction here, you can see that this is a felony. In Count I, it specifically states there “unlawfully, feloniously, and intentionally.”

And, again, this is all part of State's Exhibit 63. And these are self-authenticating documents, so you can consider them as true and correct copies.”

(11/10/2010 JT Tr., p.407, L.23 – p.408, L.19.) McClain argued to the jury that exhibit 63 did not prove that the conviction out of Oregon was for a felony:

Going back to the first page, he was found – he was convicted of the following offense: Assault third degree.

It does not indicate whether that is a felony or misdemeanor charge. I don't see that on the document. Here the state has to prove that both of these charges are felonies.

(11/10/2010 JT Tr., p.409, Ls.4-10.) The state countered this argument with reference to the indictment: “[Y]ou can see, referring to this document, the indictment, that this is a felony.” (11/10/2010 JT Tr., p.409, Ls.18-20.)

During deliberation of the Part II, the jury sent a question to the court which asked, “Is the most serious level of misdemeanor Class A[?]” (11/10/2010 JT Tr., p.426, Ls.4-5.) Before the court could respond to the jury's question, the jury came back with a verdict finding McClain had previously been convicted of the two alleged felonies. (11/10/2010 JT Tr., p.426, L.6 – p.428, L.6; 38576 R., p.148, 38577 R., p.94.) McClain filed a motion for judgment of acquittal, claiming

the state failed to present sufficient evidence to support the verdict on the Part II. (38576 R., pp.202-204, 38577 R., pp.95-97.) The court denied the motion for judgment of acquittal (38576 R., pp.207-209; 38577 R., pp.98-100) and sentenced McClain to concurrent enhanced unified sentences of 10 years fixed followed by 10 years indeterminate for intimidating a witness and felony domestic battery, and one year on the violation of a no contact order. (38576 R., pp.226-228; 38577 R., pp.109-111.)

McClain timely appeals. (38576 R., pp.229-232; 38577 R., pp.112-115.) The criminal cases have been consolidated for purposes of this appeal. (38576 R., pp.2-3.)

## ISSUES

McClain states the issues on appeal as:

1. Did the State present insufficient evidence to support the jury's finding that Mr. McClain was a persistent violator?
2. Did the district court abuse its discretion when it admitted the un-redacted copy of Mr. McClain's interrogation?

(Appellant's brief, p.6.)

The state wishes to rephrase the issues on appeal as:

1. Was there substantial competent evidence to support the jury's verdict finding McClain guilty of being a persistent violator?
2. Has McClain failed to establish that the district court erred in admitting the video of his interrogation?

## ARGUMENT

I.

### McClain Has Failed To Establish The Evidence Was Insufficient To Support The Jury's Verdict Of Guilty On The Persistent Violator Enhancement

#### A. Introduction

McClain asserts there was insufficient evidence presented to support the jury's verdict finding him guilty of being a persistent violator. (Appellant's Brief, pp.7-10.) Specifically, McClain contends "the information regarding the prior conviction in Oregon was not sufficient to support his conviction." (Appellant's brief, p.7.) A review of the record shows McClain is incorrect.

#### B. Standard Of Review

"Appellate review of the sufficiency of evidence is limited in scope." State v. Marsh, 2011 WL 6430816 \*4 (Ct. App. 2011). An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed

in favor of upholding the jury's verdict. Miller, 131 Idaho at 292, 955 P.2d at 607; Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. McClain Has Failed To Establish That Exhibit 63 Does Not Constitute Substantial, Competent Evidence That He Was Previously Convicted Of Felony Third Degree Assault For Purposes Of The Persistent Violator Enhancement

Idaho law provides for a sentencing enhancement for “[a]ny person convicted for the third time of the commission of a felony[.]” Idaho Code § 19-2514. Idaho Criminal Jury Instruction 1601 requires a jury to unanimously determine if the evidence presented supports the state's contention that the defendant has been convicted of felony offenses on at least two prior occasions.

The jury in the instant case was so instructed:

Ladies and gentlemen, we're prepared now to proceed on Part II of the Information.

So, I'm going to read you the Amended Information Part II. It reads as follows:

“Greg H. Bower, prosecuting attorney in and for the County of Ada, State of Idaho, who in the name of and by the authority of said state prosecutes in its behalf, in proper person comes now before the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, and given the court to understand it to be further informed that as Part II of the Information on file herein, the Defendant Jerry Lee McClain is a persistent violator of the law in that the defendant has heretofore been convicted of two or more felonies, to wit, number one, that the said Defendant Jerry Lee McClain, on or about the date, 3<sup>rd</sup> day of July, 2002, was convicted of the crime of possession of a controlled substances, a felony, in the County of Canyon, State of Idaho, by virtue of that certain judgment of conviction made and entered by the Honorable Judge Kerrick in Case No. CR-01-020285 C.

“Count 2, that the said Defendant Jerry Lee McClain, on or about the 21<sup>st</sup> day of August in 1991, was convicted of the crime of

assault in the third degree, a felony in the County of Malheur, State of Oregon.

"Wherefore, the said defendant, having been convicted previously of two or more felonies, should be considered a persistent violator of the law and should be sentenced accordingly pursuant to Idaho Code 19-2514 upon conviction of the charge or charges contained in Part I of the Information.

"Dated this 29<sup>th</sup> of June 2012, signed by Ada County Prosecuting Attorney."

Ladies and gentlemen, a moment ago I read you a jury instruction letting you know that having found the defendant guilty of two of these predicate offenses, the state now alleges that the defendant has these two prior felony convictions.

The burden is on the state to prove your unanimous satisfaction and beyond a reasonable doubt to each and every one of the allegations contained in Part II of the Information as I just read to you.

(11/10/2010 JT Tr., p.402, L.19 – p.404, L.17.)

In support of its allegation that McClain was a persistent violator, the state offered two certified judgments of conviction, identified as Exhibits 62 and 63. (11/10/2010 JT Tr., p.405, L.15 – p.406, L.2.) Based on this evidence, the jury convicted McClain of being a persistent violator. (38576 R., p.148, 38577 R., p.94.) On appeal, McClain asserts the evidence admitted was insufficient to prove McClain had been convicted of two prior felonies because Exhibit 63 did not establish "that assault in the third degree was a felony." (Appellant's brief, p.10.) A review of the record shows McClain's claim is without merit for two reasons. First, because the record before this Court is insufficient to show exactly what the Oregon judgment of conviction stated, it must be presumed to support the district court's ruling denying McClain's motion for a judgment of

acquittal for insufficient evidence to support the jury's verdict of guilt on the sentencing enhancement. Additionally, the state did provide the necessary proof at trial, that being the fact of the prior conviction.

Exhibit 63 was offered and admitted by stipulation as a self-authenticating document. (11/10/2010 JT Tr., p.405, L.15 – p.406, L.3.) McClain argued at trial that the judgment of conviction did not indicate whether the aggravated assault in the third degree of which he was convicted was a misdemeanor or a felony and, as such, was insufficient evidence to support a finding that McClain had committed a prior felony offense. (11/10/2010 JT Tr., p.409, Ls.4-10.)

The exhibit list from McClain's jury trial identifies State's Exhibit 63 as a judgment of conviction out of Malheur County. (Exhibits, p.1.) Although referred to at trial as including an indictment as well as a certified copy of judgment of conviction (11/10/2010 JT Tr., p.408, Ls.10-19), Exhibit 63 as included in the record before this Court consists only of an indictment from Malheur County for the offense of assault in the first degree. (Exhibits, pp.126-128.) McClain indicates on appeal he filed a motion to augment contemporaneously with his brief to include the judgment of conviction (Appellant's brief, p.8, n.2), however, none was filed. Because this Court does not presume error, this missing portion of the record must be presumed to support the court's decision denying McClain's motion for judgment of acquittal. State v. Mowrey, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996) (missing portions of record presumed to support decision of trial court).

Even on the present record, McClain's claim of an inadequate record to support the jury's finding of guilt on the persistent violator sentencing enhancement fails. A persistent violator enhancement pursuant to I.C. § 19-2514 applies to "[a]ny person convicted for the third time of a commission of a felony." The former convictions relied upon to support the persistent violator enhancement must be alleged in the indictment or information and proved at trial. State v. Medrain, 143 Idaho 329, 332, 14 P.3d 34, 37 (Ct. App. 2006) (citing State v. Cheatham, 139 Idaho 413, 416, 80 P.3d 349, 352 (Ct. App. 2003) and State v. Martinez, 102 Idaho 875, 880, 643 P.2d 555, 560 (Ct. App. 1982)). Although the Court of Appeals' holding in State v. Williams, 103 Idaho 635, 647, 651 P.2d 569, 581 (Ct. App. 1982), required a showing by the state at trial on a persistent violator sentencing enhancement "that the prior convictions were for felonies under the laws of the state where the offenses occurred," in order to prove the persistent violator enhancement, the state was only required to produce certified copies of judgments indicating McClain had previously been convicted of two prior felonies. I.C. § 19-2514; I.R.E. 803(8), 902(4); see Medrain, 143 Idaho at 333, 144 P.3d at 37 ("a certified copy of a judgment of conviction" along with evidence establishing identity of person formerly convicted is sufficient to prove persistent violator enhancement); State v. Smith, 116 Idaho 553, 560, 777 P.2d 1226, 1233 (Ct. App. 1989) (in order to prove persistent violator enhancement, "the state needed only to produce copies of judgments specifically identifying the crimes as felonies, or – if the judgments were not so specific – to offer admissible copies of the felony statutes applicable to the

crimes recited in the judgments”). The evidence before this jury was sufficient to make the finding.

Here, the evidence admitted by stipulation at trial by the state to prove McClain had a prior felony conviction from the state of Oregon consisted of a certified copy of a judgment of conviction indicating McClain had been convicted of an assault in the third degree and an indictment for the original charge of assault in the first degree and delivery of an imitation controlled substance. (Exhibits, pp. 1, 126-128.) Exhibit 63 as found in this Court’s record consists of the indictment which reads McClain did “unlawfully, feloniously and intentionally cause serious physical injury” to another with a “dangerous weapon.” (Exhibits, p.126.) The information specifically states the conduct was done “unlawfully, feloniously, and intentionally.” (11/10/2010 JT Tr., p.408, Ls.11-15.) The evidence before the jury included the fact that McClain was charged with a felony assault charge for using a dangerous weapon on another person and that McClain was convicted of an assault of a different degree.

McClain does not claim he was not convicted of an assault for using a dangerous weapon on another person. He does not argue the evidence insufficient to establish he is the individual listed on the indictment or the judgment of conviction. He does not dispute the charge involved an assault against a person with a dangerous weapon. McClain only asserts it is unclear from the judgment of conviction taken with the indictment whether or not he was convicted of a felony. Because the information regarding the nature of the offense charged by indictment coupled with the information from the judgment

clearly identifies McClain's prior assault conviction as a felony, McClain has failed to establish the state presented insufficient evidence to support the jury's verdict finding him guilty of being a persistent violator.

## II.

### McClain Has Failed To Show That The District Court Erred in Admitting The Unredacted Video of McClain's Interrogation With Law Enforcement

#### A. Introduction

McClain asserts the district court erred in admitting a copy of an interrogation contrary to its prior ruling finding evidence of McClain's prior bad acts inadmissible. (Appellant's brief, pp.11-17.) McClain's argument fails because it is unsupported by the record.

#### 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); State v. Cross, 132 Idaho 667, 670, 978 P.2d 227, 230 (1999).

#### C. McClain Has Failed To Establish Error In The Admission Of His Interrogation At Trial

Evidence of prior bad acts is admissible if (a) it is relevant for any purpose other than to prove the defendant's character in order to show he acted in

conformity therewith, and (b) the potential prejudice associated with proof of character does not substantially outweigh the proper probative value of the evidence. I.R.E. 404(b); State v. Cross, 132 Idaho 667, 670, 978 P.2d 227, 230 (1999). The first prong of this test is met if the evidence is admissible for any purpose other than proving character and actions in conformity therewith, 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). The second prong of this test only excludes evidence if the danger of unfair prejudice from having the jury conclude the defendant is of bad character substantially outweighs its proper probative value. State v. Sheahan, 139 Idaho 267, 275-276, 77 P.3d 956, 964-965 (2003). This weighing process is "committed to the judge's sound discretion." State v. Buzzard, 110 Idaho 800, 802, 718 P.2d 1238, 1240 (Ct. App. 1986).

McClain asserts on appeal the interrogation recording contained statements of McClain's prior bad acts in violation of the court's prior ruling that such evidence was inadmissible. (Appellant's brief, p.12.) The specific statements complained of include McClain's acknowledgment "that he had put his kids through a bunch of 'bullshit' before," a statement that McClain's wife had hurt him and he has "hurt people," and he has "been that person before" when asked about his capability to snap under certain circumstances. (Appellant's brief, pp.12-13.) McClain asserts the court failed to properly analyze the evidence at question and erred by simply asserting "that will be the ruling of the

court.” (Appellant’s brief, p.13.) McClain fails to consider the fact the court previously conducted the analysis when making its initial ruling on his objection.

Before the beginning of the first jury trial, the court heard argument on the state’s motion in limine regarding evidence of prior bad acts. The court ruled that, although slightly relevant, evidence that McClain exercised control over his victim throughout their relationship was not admissible in the state’s case in chief because of the risk of unfair prejudice to McClain. (10/14/2010 Tr., p.39, L.4 – p.43, L.10.) As the first trial began, McClain argued an already redacted copy of his interrogation was not sufficiently redacted and requested the court order further redaction in accordance with its previous Rule 403 ruling. (11/08/2010 JT Tr., p.56, L.22 – p.58, L.13.) Both parties made argument to the court with the understanding that, the court would rule on whether further redaction was required after it had the opportunity to review the video. (11/08/2010 JT Tr., p.65, Ls.2-4.) The trial began and ultimately ended in mistrial after the second of the state’s witnesses took the stand and volunteered testimony that violated the court’s prior evidentiary ruling disallowing evidence of prior bad acts. (11/08/2010 JT Tr., p.103, L.23 – p.105, p.6.)

As the second trial began two days later, the court indicated it had reviewed the 68 minute video previously argued by McClain to be inadmissible. Although McClain asserts on appeal there was no analysis by the court before ruling the video admissible (Appellant’s brief, p.13), he overlooks the discussion on the record prior to jury selection in the second trial:

THE COURT: The court was able to view the 68-minute video, and there had been a defense motion in limine requesting

that the court exclude the first 57 minutes and 20 seconds of the video as well as the final 4 minutes of the video.

The first 57 minutes and 20 seconds contains relevant evidence on elements of one or more matters upon which the state has the burden of proof. And the evidence is relevant, and I do not believe that consideration of waste of time or unfair prejudice to the defendant outweighs that relevance. Therefore, the motion to exclude the first 57 minutes and 20 seconds of the video is denied.

The final 4 minutes, though, I would like to hear more argument on that issue. What is your objection precisely to the final 4 minutes, Mr. McKenzie?

MR. MCKENZIE [defense counsel]: Judge, and I don't know if this was clear before. In that earlier portion where [Detective] Brechwald is stating, "This is what Janna [McClain] told me and this is the truth," or where he says, referring to the bruising, like at 49 minutes and 25 seconds, "These are bruising [sic] that can only be caused by someone suffering from domestic violence."

THE COURT: Oh, no kidding. I guess I didn't pick up on that.

MR MCKENZIE: Well, I could point out the exact minutes where those occur.

THE COURT: So it's the police officer interrogating the defendant and making the statement?

MR MCKENZIE: Right. So like at 38 minutes, 30 seconds, to 44 minutes, Brechwald speculates as to the source and timing of the bruising.

THE COURT: And you say Brechwald, that's the policeman?

MR. MCKENZIE: The detective.

THE COURT: So 38 minutes to [sic] 30 seconds to 44 minutes, right?

MR. MCKENZIE: Right.

THE COURT: And he is speculating as to the cause of the bruises.

MR. MCKENZIE: Source and timing of bruising, refers to hearsay statements from Janna; claims that the state has certain physical evidence such as MRI. At 44 minutes, 35 seconds, the detective says the state does not need Janna as a witness because it has physical evidence.

From 44 minutes to 47 minutes, Detective Brechwald discussed this more as hearsay statements, asserts that it is obvious that the defendant is lying. Again says the state has certain physical evidence, including MRI, and says that the defendant's explanation is not reasonable.

All those things are opinion evidence he wouldn't be able to offer on the stand and shouldn't come in.

And then at 49 minutes, 25 seconds, the detective speculates that bruising came from Janna being shaken, which I don't even think is asserted by any party, Judge. And from then on there's quite a bit of the detective discussing just in general men in America need to be taking responsibility for their actions. That the defendant needs to take responsibility.

And then the last 4 minutes from 64 to the end, there's some general discussion, and the detective says, "You're going to have a difficult time selling your story to other people." There's more discussion about possible motives of Janna and her mother and discussion unrelated to [the night of the incident].

(11/10/2010 JT Tr., p.13, L.10 – p.16, L.10.)

The state countered McClain's argument, calling it a mischaracterization in some respects. (11/10/2010 JT Tr., p.16, Ls.17-20.) The state asserted the detective confronted McClain with physical evidence as an interrogation technique and discussed with him the motives of the witnesses against him to lie. (11/10/2010 JT Tr., p.16, L.31 – p.17, L.s 18.) The final four minutes involved discussion of why McClain thought the witnesses were making up this story about his alleged rape and physical abuse of his wife; those four minutes encompassed McClain's attack of the credibility of the witnesses against him.

(11/10/2010 JT Tr., p.18, L.11 – p.19, L.13.) Upon considering the state's argument of relevance, the court ruled the final four minutes of the interrogation were admissible in the state's case in chief, thus overruling McClain's objection to the redacted video in its entirety. (11/10/2010 JT Tr., p.19, Ls.14-15.)

Following jury selection and the commencement of the state's presentation of evidence, McClain again objected to the introduction by the state of the 68-minute video interrogation "based upon the court's earlier ordering on [the] motion under 404 where the court made a ruling that prior acts and wrongs, although may be relevant, are unduly prejudicial" as said video was "fraught with references to prior acts or wrongs." (11/10/2010 JT Tr., p.224, Ls.1-8.) After brief argument by McClain, the state stood on its previous argument to the court on the issue and requested it stand by its previous ruling that the entire interview was admissible. (11/10/2010 JT Tr., p.226, Ls.22-25.) The court stood by its previous ruling. (11/10/2010 JT Tr., p.227, Ls.1-2.)

Idaho Rule of Evidence 404(b) is a relevance rule. State v. Avila, 137 Idaho 410, 412-413, 49 P.3d 1260, 1262-1263 (Ct. App. 2002). However, as discussed previously, when the state seeks to admit evidence subject to I.R.E. 404(b), the court must not only determine if the evidence is relevant for a purpose beyond criminal propensity, it must also determine, pursuant to I.R.E. 403, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Cross, 132 Idaho at 670, 978 P.2d 227 at 230.

The evidence McClain complains of on appeal appears to be limited to statements that he had put his kids through "bullshit" before, he had "hurt

people” and he had been the kind of person to snap under pressure. (Appellant’s brief, pp.12-13.) McClain now argues these statements were not relevant to any issue other than propensity and the court erred by admitting them. (Appellant’s brief, p.14.) The district court correctly determined that the evidence was relevant for purposes beyond criminal propensity when determining the statements made by McClain in his attempt to attack the credibility of those he believed to be making up stories at his expense were relevant. (11/10/2010 JT Tr., p.13, L.10 – p.19, L.13.) In further concluding that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to I.R.E. 403, the district court ultimately conducted an analysis that satisfied the requirements of admission pursuant to I.R.E. 404(b). (Id.) Thus, the district court did not ultimately err in admitting the evidence.

Even if the district court had erred in permitting the introduction of the three contested statements made by McClain during his interrogation, such error was clearly harmless beyond a reasonable doubt. 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). These brief

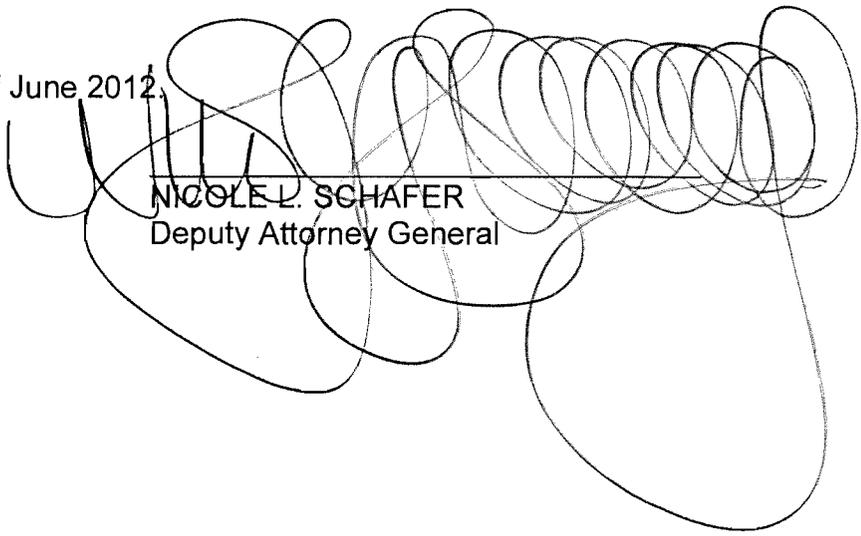
statements were a small part of a 68-minute interrogation, which was itself a small part of a trial with six state witnesses and what the district court deemed “a very strong case” for the state. (10/14/2010 Tr., p.42, Ls.12-13.)

Even if the evidence was not intrinsic to the charged crimes, and thus subject to 404(b), the district court did not err in ultimately admitting it, because its relevancy and I.R.E. 403 analyses satisfied the I.R.E. 404(b) requirements for admission. Finally, even if the district court erred in admitting 68-minute interrogation as previously redacted by the state, such error was clearly harmless beyond a reasonable doubt. This Court should thus affirm McClain's conviction.

#### CONCLUSION

The state respectfully asks this Court to affirm the judgment of conviction entered after a jury found McClain guilty of felony domestic battery, violation of a no contact order, and intimidation of a witness with a sentencing enhancement for being a persistent violator.

DATED this 13<sup>th</sup> day of June 2012,



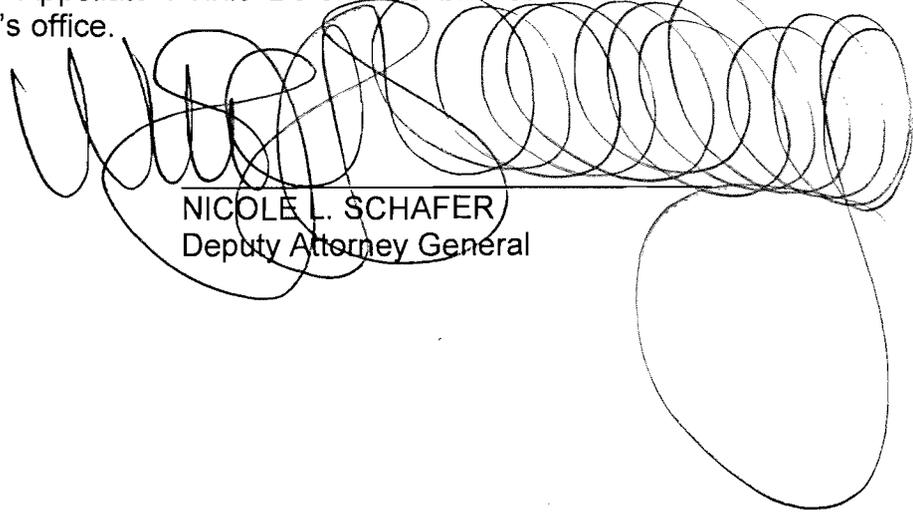
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13<sup>th</sup> day of June 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS  
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.

A large, complex handwritten signature in black ink, consisting of many overlapping loops and swirls, positioned over the typed name and title of Nicole L. Schaffer.

NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm