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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44512**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY NO.**
v.	)	**CR 2016-784**
	)	
JEFFREY ALLEN JESKE,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE CYNTHIA K.C. MEYER
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
State of Idaho
I.S.B. #6555

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Jeffery Jeske contends the district court made several errors in his case. First, it allowed evidence commenting on the fact that he refused to submit to a blood draw in violation of his Fourth Amendment rights. Second, in violation of several other of his state and federal constitutional rights, on the morning of trial, it granted the State's motion to amend the information to allow it to add a new *per se* theory of DUI liability to the case. Third, on the impairment theory of DUI liability the State continued to pursue, it refused to give a requested jury instruction that the impairment must be "noticeable" or "perceptible." Finally, it erroneously admitted evidence about other uncharged misconduct on a *res gestae* basis even though that evidence is not admissible under I.R.E. 404(b). These errors, either independently or cumulatively, should result in this Court vacating the judgment of conviction and remanding this case for a new trial.

Statement of the Facts and Course of Proceedings

Given the number and diversity of the district court's errors in this case, to promote clarity, the facts relevant to the specific issues will be set forth in the respective sections of the brief. Generally, though, Mr. Jeske was pulled over for having only one operational headlight. (*See* R., p.8.) He was ultimately arrested for DUI, and a jury convicted him of that charge. (R., pp.8, 202.) With Mr. Jeske's agreement, the district court proceeded to hold a court trial on Parts II and III of the Information, which both alleged enhancements based on prior convictions,

and it found him guilty in both respects. (Tr., Vol.6, pp.8-12.)[1] The district court ultimately sentenced Mr. Jeske to a unified term of fourteen years, with seven years fixed, and retained jurisdiction. (Tr., Vol.7, p.21, Ls.19-23.) Mr. Jeske filed a notice of appeal timely from the judgment of conviction. (R., pp.220, 223.)

[1] The transcripts in this case are provided in seven separately bound and paginated volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcript of the motion to suppress hearing held on June 1, 2016. "Vol.2" will refer to the volume with the transcript of the morning-of pretrial discussions and the testimony taken on the first day of trial. "Vol.3" will refer to the volume with the transcript of the voir dire proceedings and the opening statements. "Vol.4" will refer to the volume containing the transcript of the second day of trial. "Vol.5" will refer to the volume containing the transcript of the jury instructions and closing arguments. "Vol.6" will refer to the transcript with the verdict and the subsequent court trial. "Vol.7" will refer to the volume with the transcript of the sentencing hearing.

ISSUES

I. Whether the district court allowed evidence of Mr. Jeske's refusal to consent to a blood draw in violation of his Fourth Amendment rights and in direct contravention of clear Idaho Supreme Court precedent.

II. Whether the district court erred by granting the State's motion to amend the information on the morning of trial because doing so prejudiced Mr. Jeske's constitutional rights to due process and a preliminary hearing.

III. Whether the district court erred by refusing to give the requested instruction that, to be guilty of DUI under an impairment theory, the impairment must be "noticeable" or "perceptible."

IV. Whether the district court erred when it allowed the State to present evidence of other uncharged misconduct under a *res gestae* analysis since that evidence is not admissible under the Rules of Evidence.

V. Whether the accumulation of errors in this case requires reversal even if this Court determines them all to be individually harmless.

ARGUMENT

I.

The District Court Allowed Evidence Of Mr. Jeske's Refusal To Consent To A Blood Draw In Violation Of His Fourth Amendment Rights And In Direct Contravention Of Clear Idaho Supreme Court Precedent

A. Relevant Facts

After Mr. Jeske had been arrested, the officer asked him if he would consent to a blood draw. (Trial Exh. 1, Clip 1068017.)[2] Mr. Jeske had already invoked his rights after the officer advised him of his *Miranda* rights. (MTS Exh. 1, Clip 1068016.) As such, he simply refused to answer the question about the blood draw and remained silent. (Trial Exh. 1, Clip 1068017.) However, after the officer got a warrant for the blood draw, Mr. Jeske broke his silence, but only to make it clear for the record that he was not consenting to the blood draw. (Trial Exh. 1, Clip 1068019.)

Mr. Jeske argued that, since people have a constitutional right to refuse to consent to searches, the district court should prohibit the State from offering evidence which commented on his refusal to consent to the blood draw. (Tr., Vol.2, p.23, Ls.13-18.) The district court denied Mr. Jeske's motion in that regard because, "I think there's been a sufficient showing that the refusal . . . to submit to a blood draw goes to the consciousness of guilt." (Tr., Vol.2, p.24, Ls.5-9.)

During the trial, the prosecutor engaged in the following direct examination of the officer:

---

[2] During the trial, the State submitted a single exhibit consisting of multiple video clips. It submitted a similar exhibit which contained all those same clips, plus a few others, during the hearing on Mr. Jeske's motion to suppress. Therefore, to avoid confusion, citations to those exhibits will be identified as either "MTS" or "Trial," and will be accompanied by the number of the particular video clip.

> Q. Did you give Mr. Jeske an opportunity to conduct another test of his own free will?
> A. Yes, I asked if he was willing to provide a blood sample.
> Q. Okay. Did you explain the process that you have to go through if he did not consent to that?
> A. I believe I did. I told him I needed to get a warrant from a judge.

(Tr., Vol.4, p.80, L.23 - p.81, L.4.) After that, she played the video showing Mr. Jeske refusing to answer the question about whether he would consent to a blood draw for the jury. (Tr., Vol.4, p.84, Ls.19-24.)

B. The Idaho Supreme Court Has Made It Clear That Evidence Commenting On The Defendant's Exercise Of His Fourth Amendment Right To Not Consent To A Search Cannot Be Admitted As Evidence Of Consciousness Of Guilt

A blood draw is a search under the Fourth Amendment of the federal constitution and Art. I, § 17 of the Idaho Constitution. *Maryland v. King*, ___ U.S. ___, 133 S. Ct. 1958, 1969 (2013); *State v. Wulff*, 157 Idaho 416, 418 (2014). Therefore, a warrant is required to conduct a blood draw unless the State can prove that one of the relevant exceptions applies on the facts of a particular case. *See, e.g., Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1558 (2013); *Wulff*, 157 Idaho at 418-19, 421.

Consent is one such exception, and by statute, Idaho implies consent to BAC testing from all who drive on Idaho's roads. *See Wulff*, 157 Idaho at 419. However, when a person declines to submit or objects to a blood draw, they have withdrawn that implied consent, and thus, invoked the protections of the Fourth Amendment. *See id.* at 422-23 (also acknowledging the Legislature's recognition of a defendant's "physical ability to refuse to submit to an evidentiary test") (internal quotation and emphasis omitted). Because that refusal constitutes an invocation of the Fourth Amendment protections, that refusal cannot be admitted as evidence of consciousness of guilt. *State v. Christiansen*, 144 Idaho 463, 470 (2007) ("The same rationale

that precludes evidence of an accused's assertion of his or her Fifth Amendment Rights offered for the purpose of impeaching or inferring guilt precludes evidence of the accused's assertion of his or her Fourth Amendment rights offered for the same purpose.")[3]

The district court's reason for denying Mr. Jeske's request to suppress that evidence is directly contrary to *Christiansen*: "I think there's been a sufficient showing that the refusal . . . to submit to a blood draw goes to the consciousness of guilt." (Tr., Vol.2, p.24, Ls.5-9.) Ergo, its decision was erroneous, and the subsequent admission of that evidence commenting on Mr. Jeske's refusal to consent to the blood draw violated Mr. Jeske's Fourth Amendment rights.

II.

The District Court Erred By Granting The State's Motion To Amend The Information On The Morning Of Trial Because Doing So Prejudiced Mr. Jeske's Constitutional Rights To Due Process And A Preliminary Hearing

A. Relevant Facts

The initial complaint alleged, in relevant part:

> That the defendant . . . did drive and/or was in actual physical control of a motor vehicle on or at a street . . . while under the influence of alcohol and/or intoxicating substance, all of which is contrary to the form, force and effect of the statute [I.C. §§ 18-8004, 18-8005(6), 19-2514] . . . .

(R., p.46.) Mr. Jeske waived his right to a preliminary hearing on those particular allegations. (R., p.54.) The information, filed on February 8, 2016, made identical allegations to the complaint. (*Compare* R., pp.46, 56.)

Thereafter, on February 24, 2016, the parties received results from the blood draw performed on Mr. Jeske. (Tr., Vol.4, p.9, Ls.13-18.) However, the State continued under the

[3] In fact, in *Christiansen*, the State conceded "the prosecutor could not have reasonably believed that such evidence was admissible" to show consciousness of guilt. *Christiansen*, 244 Idaho at 470-71.

original information until at least May 26, 2016, at which point, the prosecutor asserted she filed a motion to amend the information.[4] (*See* Tr., Vol.2, p.10, Ls.3-5.) In that amended information, the prosecutor sought to add a new allegation of fact:

> That the defendant . . . did drive and/or was in actual physical control of a motor vehicle on or at a street . . . while under the influence of alcohol and/or intoxicating substance, <u>and/or in the alternative, did drive the above described motor vehicle at the above described location, with an alcohol concentration of .08 percent or more, to-wit: .0182, as shown by an analysis of his blood,</u> all of which is contrary to the form, force and effect of the statute [I.C. §§ 18-8004, 18-8005(6), 19-2514] . . . .

(R., pp.149-50 (addition indicated by underline).)

The State's motion to amend the information was not taken up until the morning of trial. (*See* R., pp.146, 152.) At that time, defense counsel argued that the proposed amendment materially changed the nature of the charge, and so, the eleventh-hour amendment prejudiced Mr. Jeske's constitutional right to due process, as he did not have meaningful notice of, or opportunity to prepare a defense to, that new theory. (Tr., Vol.2, p.9, Ls.6-12.) In making that argument, she asserted the State had not, prior to seeking the amendment, provided the credentials of the person who had performed the blood draw. (Tr., Vol.2, p.8, Ls.14-21 ("the State did not provide any credentials for the witness who took the blood until just recently.").) She also argued that, because it alleged new facts which were not relevant to the essential elements of the originally-charged theory, allowing the amendment would prejudice Mr. Jeske's

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[4] While the prosecutor asserted she filed the amended information on May 26, 2016, the register of actions does not show any such filing. (*See generally* R., p.4.) The first filing it shows in relation to amending the information is the State's Brief in Support of Amended Information filed on June 2, 2016. (R., pp.4, 143.) The Amended Information itself was not file-stamped until June 6, 2016. (R., pp.4, 149.) However, trial counsel below appeared to accept the representation that the amended information was filed on May 26, 2016. (*See* Tr., Vol.2, p.8, Ls.6-7.)

state constitutional and statutory right to a preliminary hearing as well. (Tr., Vol.2, p.7, L.5 - p.8, L.4, p.9, Ls.6-7.)

The district court allowed the late amendment on the basis that Mr. Jeske's knowledge of the BAC test results themselves several months prior to trial meant the amendment would not substantially prejudice him. (Tr., Vol.2, p.12, Ls.12-14.) Ironically, a few days earlier, the substitute district court judge who presided over the hearing on the motion to suppress had refused to hear Mr. Jeske's claim that the officer had misrepresented or omitted material facts in his testimony in support of the warrant to conduct the blood draw on the basis that Mr. Jeske had not timely raised that claim and that proceeding on that late-disclosed argument would prejudice the State. (*See* Tr., Vol.1, p.12, L.7 - p.13, L.4.)

B. Adding The *Per Se* Theory At The Eleventh Hour Changed The Nature Of The Offense Charged, And So, Prejudiced Several Of Mr. Jeske's Constitutional Rights

Due process demands that "[a] defendant before being placed upon trial for his life or liberty is entitled to be appraised not only of the *name of the offense* with which he is charged, but, in general terms, of the *manner* in which he is charged with having committed the offense."[5] *State v. McMahan*, 57 Idaho 240, ___, 65 P.2d 156, 158 (1937) (emphasis from original). Reference to the relevant code section is usually sufficient to put the defendant on notice in this regard, as the code section will usually identify all the essential elements of the charged offense. *See, e.g., State v. Quintero*, 141 Idaho 619, 621-22 (2005). However, there is a particular group of charges, such as theft and manslaughter, where "the crime may be committed by a multitude of methods and conduct, [and] mere repetition of the statutory language may *not* be sufficient to

[5] This protection is embodied in both the federal and state constitutions, as well as several state statutes. *See State v. Gumm*, 99 Idaho 549, 551 (1978).

satisfy the pleading instrument function of notifying the defendant of the charge which must be defendant against" in those cases. *State v. Dorsey*, 139 Idaho 149, 151 (Ct. App. 2003) (emphasis from original). When a multiple-means offense is charged, "'[t]he facts alleged, rather than the designation of the offense, control'" the determination of whether the charging document gives sufficient notice of which particular theory or theories of liability are on the table. *State v. O'Neill*, 118 Idaho 244, 249 (1990) (quoting *State v. Mickey*, 27 Idaho 626, ___, 150 P. 39, 40 (1915)).

DUI is one of this group of multiple-means offenses, as it can be committed by driving with a BAC of more than 0.08 percent (the "*per se* theory"), or it can be committed when consumption of drugs or alcohol actually affects the ability to drive (the "impairment theory"). *See, e.g., State v. Edmonson*, 125 Idaho 132, 134 (Ct. App. 1994). The two theories of DUI liability require proof of different facts. The only fact that matters in a *per se* prosecution is the blood test result. *State v. Tomlinson*, 159 Idaho 112, 117 (Ct. App. 2015). Thus, under that theory, "the extent of the defendant's impairment is 'neither an element nor a fact of consequence in the state's case-in-chief.'" *Id.* (quoting *Edmonson*, 125 Idaho at 135). On the other hand, those facts are all that matter in an impairment theory prosecution, and it is the blood test results which are irrelevant, except in the narrow circumstance where those results are extrapolated back to the time the defendant was driving, so as to infer actual impairment. *State v. Robinett*, 141 Idaho 110, 113 (2005). Therefore, a charging document which only alleges facts relevant to one of those theories brings only that one theory into play; under such a charging document, evidence relevant to the uncharged theory is properly suppressed. *Edmonson*, 125 Idaho at 134-35 (holding, in a prosecution where the State "thus limited itself to

proving a *per se* violation of the statute" in the charging document, the defendant's evidence as to actual impairment was properly suppressed).

In this case, the original information document only alleged facts relevant to an impairment theory: that Mr. Jeske "was in actual physical control of a motor vehicle on or at a street . . . while under the influence of alcohol and/or intoxicating substance." (R., p.56.) Having thus limited itself to proving a violation through actual impairment, the State would not be allowed to present the irrelevant later-collected test results as direct evidence of guilt.

However, "[t]he court may permit [a charging document] to be amended at any time before the prosecution rests if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." I.C.R. 7(e); *accord* I.C. § 19-1420; *see State v. Severson*, 147 Idaho 694, 709 (2009) ("[A]n amendment that merely alleges additional means by which the defendant may have committed the crime is permissible if it does not prejudice the defendant.") Eleventh-hour amendments, like the one the district court allowed in this case, are particularly problematic because "to allow an amendment and then force the defendant to defend immediately, without allowing him to prepare against the amended information" is prejudicial to his rights. *Gumm*, 99 Idaho at 552.

First, the amendment in this case prejudiced Mr. Jeske's substantial right to due process by depriving him of adequate notice of the manner in which he was alleged to have violated the law and a meaningful opportunity to prepare a defense thereto. Rather, that decision, made on the morning of trial, did precisely what the Idaho Supreme Court stated in *Gumm* was improperly prejudicial – it forced Mr. Jeske to defend immediately without having time to prepare a defense in regard to the new allegations of fact.

The district court's point – that Mr. Jeske was aware of the BAC test results themselves well in advance of trial (Tr., Vol.2, p.12, Ls.12-14) – does not change that conclusion because whether or not he knew of the evidence itself is not the proper analysis. While it is true that "a defendant generally cannot be prejudiced by the absence of specific details in the information when those details are known to the defendant or provided to him by means other than the information," *State v. Jones*, 140 Idaho 41, 46-47 (Ct. App. 2003), the specific details of which the defendant must be apprised to meet the requirements of due process are, and always have been, that the defendant be made aware that the State *intends to use* that evidence against him. *See McMahan*, 65 P.2d at 159-60 ("Without knowledge as to the nature of the charge upon which he has to be tried, he could not [prepare his defense]."); *cf. State v. Sheldon*, 145 Idaho 225, 230 (2007) (acknowledging this same notice requirement in the similar context of admission of evidence under I.R.E. 404(b)).

In this case, for example, defense counsel asserted that the State had not disclosed the credentials of the person who drew the blood until it moved to amend the charge. (Tr., Vol.2, p.8, Ls.14-21.) As such, there was no indication the State would be able to lay the foundation to introduce that evidence per I.C. § 18-8003(1).[6] Furthermore, by the time the State filed its

[6] As defense counsel's argument suggests, there may have been other arguments as to that person's qualifications which could have been made had adequate notice been given. (Tr., Vol.2, p.8, Ls.14-21.) For example, there is a question as to whether the State met its discovery obligations under I.C.R. 16(b)(6). (*See* Tr., Vol.2, p.11, Ls.2-13 (the prosecutor arguing that, because that person's name was in the police reports, and the defense might have been able to get her qualifications from her employer, there was no prejudice in regard to the late disclosure of those qualifications).) However, the lateness of the motion to amend the information, (which is what made all this evidence relevant, and thus, this sort of decision necessary), left the district court in a position where it had to make decisions in that regard on the fly, and that further shows the prejudice to Mr. Jeske's rights. *Compare Sheldon*, 145 Idaho at 230 (noting that similar problems with the State's notice of intent to use evidence under I.R.E. 404(b) meant the notice requirement was not met, and so, the evidence was inadmissible).

motion to amend the information, Mr. Jeske had already filed his motion to suppress and brief in support, in which he raised arguments in relation to whether he actually appeared intoxicated. (*See generally* R., pp.68-70; Aug. pp.1-2.)[7] The State did not argue the BAC test results, either directly or by extrapolating back, in its responses to Mr. Jeske's arguments in that regard. (*See generally* R., pp.121-32; Tr., Vol.1.) Therefore, prior to actually amending the information, the State gave no indication that it intended to use the BAC test results against Mr. Jeske, particularly under a *per se* theory of liability. Since Mr. Jeske was not given notice of that critical fact, he had no reason to believe he needed to prepare a defense on that front. As a result, despite the fact that he knew about the BAC test results themselves, allowing the State to use that evidence against him under a new theory of liability on the morning of trial prejudiced his due process rights. *Compare State v. Naranjo*, 152 Idaho 134, 142 (Ct. App. 2011) (finding this same prejudice in the I.R.E. 404(b) context).

Second, allowing the late amendment prejudiced Mr. Jeske's state constitutional and statutory right to a preliminary hearing on those new facts and new theory of liability. (Tr., Vol.2, p.7, Ls.15-25.) When an information is "subsequently amended charging a defendant with a crime of a greater degree or *of a different nature* than that for which he or she was held by the committing magistrate, the defendant is denied his or her constitutional and statutory right to a preliminary hearing and the trial court is consequently without jurisdiction."[8] *State v. Palmer*, 138 Idaho 931, 936 (Ct. App. 2003) (emphasis added). Because the *per se* theory changes the nature of the offense, a new preliminary hearing was required on those new

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[7] A motion to augment the record with a copy of the motion to suppress has been filed contemporaneously with this brief.

[8] "Since the indictment or information provides subject matter jurisdiction to the court, the court's jurisdictional power depends on the charging document being legally sufficient to survive challenge." *State v. Schmierer*, 159 Idaho 768, ___, 367 P.3d 163, 165 (2016).

allegations. That hearing would, in fact, give Mr. Jeske the requisite notice, as well as an opportunity to develop his defense (through, for example, cross-examination of the State's witnesses) as to the elements of the new theory of prosecution. *See Jones*, 140 Idaho at 46-47 ("The preliminary hearing eliminated any uncertainty and gave Jones notice of the details of the charges against him."). Without that, however, this case falls under the rule in *Palmer*, and the late amendment which changed the nature of the charge prejudiced Mr. Jeske's substantial right to a preliminary hearing.

Because the late amendment prejudiced several of Mr. Jeske's substantial, constitutional rights, it should not have been allowed. Therefore, the district court erred when, on the morning of trial, it allowed the State to amend the charge to add the *per se* theory to the Information.

III.

The District Court Erred By Refusing To Give The Requested Instruction That, To Be Guilty Of DUI Under An Impairment Theory, The Impairment Must Be "Noticeable" Or "Perceptible"

A. Relevant Facts

Prior to trial, defense counsel requested, in regard to the impairment theory, that the district court instruct the jury: "To prove that someone was under the influence of alcohol, . . . [t]he influence must be noticeable or perceptible and impair a physical or mental function that relates to one's ability to drive." (R., p.138.) Mr. Jeske renewed that request at the close of evidence. (Tr., Vol.4, p.156, Ls.14-17.) The district court denied that request because that instruction was not part of the pattern jury instructions. (*See* Tr., Vol.4, p.57, Ls.1-11.)

B. Just Because It Is Not Included In The Pattern Jury Instruction Does Not Mean The Requested Instruction Was Not A Proper Statement Of The Law Which Needed To Be Given Because Of The Facts Of This Case

While the pattern jury instructions are presumptively correct, the district courts are to adapt them if another instruction "would more adequately, accurately, or clearly state the law." *State v. Reid*, 151 Idaho 80, 85 (Ct. App. 2011); *accord* Introduction and General Directions for Use [of the Pattern Instructions], available at https://isc.idaho.gov/main/criminal-jury-instructions. Thus, "a requested instruction *must be given* if: (1) it properly states the governing law; (2) a reasonable view of at least some evidence would support the defendant's legal theory; (3) the subject of the requested instruction is not adequately addressed by other jury instructions; and (4) the requested instruction does not constitute an impermissible comment as to the evidence." *State v. Macias*, 142 Idaho 509, 510 (Ct. App. 2005) (emphasis added); *see State v. Thomasson*, 122 Idaho 172, 175 (1992) (holding that, if "there *is* a reasonable view of the evidence to support an instruction on the lesser included offense, then it *must* instruct the jury on that lesser included offense") (emphasis from original).

First, the requested instruction properly states the governing law: "this Court has previously defined what it means to be under the influence in Idaho, and it includes impairment of driving ability to the slightest degree; *the impairment must be noticeable and perceptible*, but does not need to rise to the level where the defendant is incapable of driving safely or prudently." *State v. Schmoll*, 144 Idaho 800, 804 (Ct. App. 2007) (emphasis added); *accord State v. Andrus*, 118 Idaho 711, 714-15 (Ct. App. 1990).

Second, a reasonable view of some of the evidence supported the requested instruction. Specifically, that evidence is provided by the video clips the State admitted at trial which could reasonably be seen to show no perceptible intoxication. For example, Trial Exh. 1, Clip

1067904, which shows the initial traffic stop, shows no irregular driving patterns, such as swerving or speeding. Additionally, the district court made several factual findings about what the video from the officer's body camera (MTS Exh.1, Clip 1068014), which was admitted at trial, shows or does not show about Mr. Jeske's appearance and demeanor during the hearing on the motion to suppress.[9] For example, Mr. Jeske did not react inappropriately when the officer informed him of the purpose for the stop. (Tr., Vol.1, p.62, Ls.1-2.) There was no "bizarre" behavior; just some idiosyncratic behaviors which were indicative of nothing. (Tr., Vol.1, p.63, Ls.17-22.) The video did not show Mr. Jeske as unable to focus on the officer while being questioned, nor did it show him having a "thousand-yard stare." (Tr., Vol.1, p.64, Ls.3-8.) Mr. Jeske's speech, while slurred at times, was also clear at times. (Tr., Vol.1, p.63, L.24 - p.64, L.2.) The video did not show him as having lethargic or relaxed facial muscles. (Tr., Vol.1, p.64, Ls.9-16.) The video did not show Mr. Jeske swaying on his feet. (Tr., Vol.1, p.67, Ls.3-8.) Those findings all would support the position that Mr. Jeske was not noticeably or perceptibly impaired.

Third, the subject of the requested instruction was not adequately addressed in the other instructions. While it is true that the Court of Appeals has held this sort of instruction is not mandatory, it also indicated there may be cases when such a clarification is nevertheless necessary. *State v. Lewis*, 126 Idaho 282, 285 (Ct. App. 1994); *see also Reid*, 151 Idaho at 86 (indicating that the court should give additional instructions if it would more adequately and accurately state the law). In such cases, "We recommend that if an adjective phrase be used to

[9] To the extent the officer testified to the contrary of those factual findings, the district court's findings simply reveal that the jury could, as the district court did, reasonably conclude the officer's testimony is not credible in light of the video evidence.

describe the degree of impairment required, it be that the impairment is noticeable and perceptible." *Lewis*, 126 Idaho at 285.

This was the focal point of contention under the impairment theory, as demonstrated by defense counsel's closing argument on that issue: "Where is the evidence that he was intoxicated, that he was unable to properly drive that vehicle? He was not under the influence. The evidence shows that." (Tr., Vol.5, p.21, Ls.13-16.) This is a particularly important point in this case due to the dual nature of the State's case. Because of the *per se* theory, the jurors were aware that Mr. Jeske in fact had an intoxicating substance (alcohol) in his system. That means the impairment theory turned precisely on the determination of the degree of impairment due to that substance. Thus, unlike the general cases acknowledged in *Lewis*, the other instructions in this case did not adequately address the issue of degree of impairment that the requested instruction would discuss.

Fourth, the requested instruction was not a comment on the evidence. It left the question of whether the impairment was noticeable or perceptible to the jurors' determination. Since the requested instruction was a proper statement of the law and because it was necessary to accurately and fairly instruct the jury on the law relevant to its decision given the facts presented, the district court erred by refusing to give that instruction.

IV.

The District Court Erred When It Allowed The State To Present Evidence Of Other Uncharged Misconduct Under A *Res Gestae* Analysis Since That Evidence Is Not Admissible Under The Rules Of Evidence

A. Relevant Facts

When she received and reviewed the version of the video exhibit the State intended to use at trial, defense counsel argued that it contained improper evidence of other uncharged

misconduct, namely, Mr. Jeske's failure to purchase a driver's license.[10] (Tr., Vol.2, p.14, Ls.5-10.) When the officer had asked him about that, Mr. Jeske had made a hand gesture indicating it was simply due to monetary reasons. (Tr., Vol.2, p.18, Ls.17-18.) The State argued that evidence was relevant to Mr. Jeske's identity, that it was too intertwined with the other issues in the case, and that it was not prejudicial. (Tr., Vol.2, p.18, Ls.1-24.) The district court ultimately decided: "the response is not prejudicial. Mr. Jeske did not give a reason, such as he had a suspended license, you know, for other reasons, and I do find that it is sufficiently intertwined with other issues that it would be -- that it also goes to reasonable suspicion and probable cause." (Tr., Vol.2, p.24, Ls.10-17.)

B. <u>The District Court's Analysis On This Issue Is Irreconcilable With The Idaho Supreme Court's Recent Decision In *State v. Kralovec*, And That Evidence Is Inadmissible Under The Proper Analysis</u>

The district court's analysis – that the discussion about Mr. Jeske's driver's license was so intertwined with the other issues in the case that it had to be admitted – is a *res gestae* analysis.[11] However, the Idaho Supreme Court recently made it clear that sort of analysis is improper: "we decline to perpetuate the use of the *res gestae* doctrine in Idaho," and so, it will not justify the admission of otherwise inadmissible evidence; rather, the Rules of Evidence

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[10] The district court initially expressed concern as to why this motion was brought on the morning of trial, but after defense counsel explained that the trial version of the video exhibit had only been provided the previous Friday, the district court withdrew those concerns. (*See* Tr., Vol.2, p.15, L.22 - p.16, L.12, p.19, L.23 - p.20, L.4.)

[11] *Res gestae* was originally meant to allow for admission of statements which accompanied material acts in contexts which are now addressed by the hearsay rules. *Id*. at 587. However, it evolved into a justification for admitting evidence of "other acts that occur during the commission of or in close temporal proximity to the charged offense which must be described to 'complete the story of the crime by placing it in the context of nearby and nearly contemporaneous happenings." *Kralovec*, 388 P.3d at 587 (internal quotation omitted).

control whether evidence is admissible. *State v. Kralovec*, 161 Idaho 569, ____, 388 P.3d 583, 587-88 (2017).

The evidence of the other uncharged misconduct in this case – Mr. Jeske's failure to purchase a driver's license – is inadmissible under I.R.E. 404(b). That rule requires that evidence of other bad acts must be relevant to some non-propensity purpose, and that the prejudice caused by its admission does not substantially outweigh its probative value before it can be admitted. *State v. Grist*, 147 Idaho 49, 52 (2009).

Under the first step of that analysis, non-propensity purposes are things like the defendant's knowledge, intent, motive, plan, or absence of mistake or accident. *Id.* at 54. The State argued that the driver's license evidence was relevant to Mr. Jeske's identity. (Tr., Vol.2, p.18, Ls.1-24.) However, Mr. Jeske's identity as the driver of the car was never in dispute. (*See generally* R., Tr.) Therefore, that is not a valid basis to make the other bad acts evidence admissible. *Grist*, 147 Idaho at 52 (clarifying that the other bad acts evidence "must be relevant to a material *and disputed* issue concerning the crime charged") (emphasis added).

The district court, on the other hand, decided the driver's license evidence was relevant to reasonable suspicion and probable cause. (Tr., Vol.2, p.24, Ls.16-17.) However, neither of those are questions for the jury, and so, they are not *material* issues to the criminal charge. *Grist*, 147 Idaho at 52. Rather, that is simply a further iteration of its improper *res gestae* analysis – that it is relevant to complete the story by putting it in context of other contemporaneous happenings.

The district court also determined the driver's license evidence was relevant because Mr. Jeske did not offer an alternative explanation for why his license was suspended. (Tr., Vol.2, p.24, Ls.12-14.) First, that improperly flips the burden of proof. As the proponent of

the evidence, the State has the burden to show there is a non-propensity basis for admitting the evidence. *See, e.g., United States v. Urena*, 844 F.3d 681, 684 (7th Cir. 2016) (expressly stating the burdens in regard to F.R.E. 404(b)); *Grist*, 147 Idaho at 52 n.2 (noting that I.R.E. 404(b) is "substantially identical to F.R.E. 404(b)"). Therefore, Mr. Jeske did not have to offer an alternative explanation for why his license was invalid.

Besides, the alternative explanation the district court discussed is still only relevant for propensity purposes – that Mr. Jeske disregarded the rules regarding driving with a valid license, and so, he must also have disregarded the rules about driving after drinking. Nothing about the status of his driver's license, for whatever reason it is invalid, makes any of the material, disputed elements of the DUI charge more or less probable. *See Grist*, 147 Idaho at 52. Since there is no non-propensity basis for the admission of the driver's license evidence, it should have been suppressed on the first level of the I.R.E. 404(b) analysis.

Furthermore, the danger of undue prejudice substantially outweighs the non-existent probative value of that evidence. The risk is that the jurors, who were also shown various video clips of Mr. Jeske refusing to take statutorily-required evidentiary tests, would use the driver's license evidence to convict him based on his character for disregarding rules rather than a determination of whether he was actually under the influence under either theory the State was pursuing.

Therefore, since the district court used the wrong analysis to admit the driver's license evidence, and since that evidence is not admissible under the proper analysis, the district court erred when it allowed the State to present the evidence of the other uncharged misconduct in regard to the invalid status of Mr. Jeske's driver's license.

V.

<u>The Accumulation Of Errors In This Case Requires Reversal Even If This Court Determines Them All To Be Individually Harmless</u>

Even if this Court determines that each of the errors discussed *supra* was harmless by itself, this Court should still vacate Mr. Jeske's convictions under the cumulative-error doctrine. *See, e.g., State v. Field*, 144 Idaho 559, 572-73 (2007). The accumulation of independently-harmless errors may still deprive the defendant of his right to a fair trial. *Id*. In order to find cumulative error, the appellate court must first find more than one instance of error. *State v. Sheahan*, 139 Idaho 267, 287 (2003). To prove the accumulated errors harmless, the State would have to show that the guilty verdict rendered in this case was surely unattributable to the cumulative effect of the errors. *See State v. Whitaker*, 152 Idaho 945, 953 (Ct. App. 2012); *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (articulating the proper test for harmless error); *State v. Thomas*, 157 Idaho 919 (2014) (reaffirming the application of the *Sullivan* test in Idaho).

In this case, there are several instances of error, and there is a reasonable possibility that the accumulation of errors contributed to Mr. Jeske's conviction. As a result, even if all those errors are found to be independently harmless, this Court should still vacate the judgment of conviction and remand this case for a new trial because the accumulated errors deprived Mr. Jeske of his right to a fair trial.

CONCLUSION

Mr. Jeske respectfully requests that this Court vacate the judgment of conviction and remand this case for a new trial.

DATED this 2nd day of June, 2017.

__________/s/_______________
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of June, 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:

JEFFREY ALLEN JESKE
INMATE #85911
NICI
236 RADAR ROAD
COTTONWOOD ID 83522

CYNTHIA K C MEYER
DISTRICT COURT JUDGE
E-MAILED BRIEF

SAMANTHA HAMMOND
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

__________/s/________________
EVAN A. SMITH
Administrative Assistant

BRD/eas