5-4-2012

State v. Frauenberger Appellant's Brief Dckt. 39136

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ROBERT JOSEPH FRAUENBERGER, Defendant-Appellant.	)	NO. 39136 APPELLANT'S BRIEF

BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

Nature of the Case

Robert Joseph Frauenberger appeals from the district court's judgment of conviction. A jury convicted Mr. Frauenberger of three counts of lewd conduct and one count of delivery of marijuana to a person under the age of eighteen. The Third Amended Criminal Information listed Bonnie Noe as the alleged minor victim involved in each count. However, no evidence at trial was presented concerning the alleged victim, thirteen year-old "Bonnie Noe." On appeal, Mr. Frauenberger asserts that the evidence presented at trial was insufficient to support the convictions because the State failed to provide substantial competent evidence to find, beyond a reasonable doubt, that Mr. Frauenberger engaged in inappropriate sexual contact with "Bonnie Noe" or provided her with marijuana.

Alternatively, Mr. Frauenberger asserts that the district court did not have jurisdiction to allow the jury to make findings on crimes related to B.H. as he had never been charges with said crimes. At trial, evidence was presented which showed that Mr. Frauenberger may have committed crimes, similar to those charged, involving another minor, B.H. Although the information charged Mr. Frauenberger with committing these crimes against "Bonnie Noe," the jury was instructed that it must find Mr. Frauenberger guilty if they believed he committed these crimes against B.H. Because Mr. Frauenberger had never been charged with committing lewd conduct against B.H. or providing marijuana to B.H., he asserts that the district court did not have jurisdiction to allow the jury to make a finding on Mr. Frauenberger's guilt as to those charges which had never been filed.

Alternatively, Mr. Frauenberger asserts that the district court created an impermissible variance when it failed to limit the elements instruction for each of the charges to those overt acts alleged in the Information, specifically that the alleged victim was Bonnie Noe, not B.H. as the jury was instructed.

Additionally, Mr. Frauenberger asserts that the State committed prosecutorial misconduct which deprived him of a fair trial. The prosecution violated its duty to see that Mr. Frauenberger had a fair trial by engaging in vouching, presenting improper evidence, and appealing to the passions and prejudices of the jury. Mr. Frauenberger contends that the misconduct committed in his case was either preserved by objection or constituted fundamental error and that the errors are not harmless. Moreover, Mr. Frauenberger asserts the district court abused its discretion in failing to grant his motion for a mistrial based upon prosecutorial misconduct.

Further, Mr. Frauenberger contends the district court abused its discretion when it sentenced him to an excessive sentence without considering the mitigating factors that exist in his case.

Statement of the Facts and Course of Proceedings

On December 14, 2010, a Criminal Information was filed charging Mr. Frauenberger with three counts lewd conduct with a child under the age of sixteen and two counts of delivery of marijuana to a person under the age of eighteen. (R., pp.18-21.) The charges specifically listed that the illegal contact had occurred with thirteen year-old Bonnie Noe. (R., pp.18-21.) The Information was amended several times, but the actual crimes charged and victim listed did not change. (R., pp.37-40, 46-49, 75-77.) Mr. Frauenberger entered a not guilty plea to each of the charges. (R., p.22.)

At the initial trial, after selecting a jury, the district court declared a mistrial because each side had not been afforded the proper number of preemptory challenges. (R., pp.51-52.) The trial was rescheduled. (R., pp.51-52.) On April 26, 2011, the new trial began. (R., pp.112-118.)

At the beginning of the trial, the jury was read the information and was told that the charges involved thirteen-year-old Bonnie Noe. (Tr.4/26/11, p.11, L.24 – p.14, L.9.)[1] Then, during *voir dire*, the district court told the jury the alleged victim was B.H.[2] (Tr.4/26/11, p.34, Ls.14-15.)

The State's first witness was B.H. (Tr., p.6, Ls.3-17.) B.H. provided testimony that she had engaged in sexual activity with Mr. Frauenberger when she was thirteen on three occasions, and that he had provided her with marijuana on one occasion. (*See generally* Tr., p.7, L.3 – p.76, L.16.) During cross examination, B.H. was asked if she is "Bonnie No[e]"; she responded, "I guess, yeah." (Tr., p.83, Ls.23-24.) Isabella Maw testified that she was sneaking out with B.H. and verified that the two had contact with Mr. Frauenberger on one of the nights that the alleged lewd conduct occurred. (*See generally* Tr., p.131, L.15 – p.160, L.3.) Paul Nigg testified that he had seen Mr. Frauenberger with B.H. on a couple of occasions, did not see any illegal activities involving B.H., but did tease Mr. Frauenberger about rumors that Mr. Frauenberger had sexual contact with B.H. (*See generally* Tr., p.160, L.11 – p.214, L.9.)

The State's final witness was Officer Smith. Officer Smith investigated the charges and discussed his interviews with both B.H. and Mr. Frauenberger. (*See*

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[1] For ease of citation, the original trial transcript will be cited to as Tr., all other transcripts will also include a relevant date.

[2] Although the district court used B.H.'s entire name throughout proceedings, she will be referenced only as B.H. on appeal. It is important to note that B.H.'s first name is not Bonnie, nor is it related to or similar to the name Bonnie.

generally Tr., p.215, L.3 – p.264, L.21.) During Officer Smith's testimony, the State began asking questions about the number of thirteen year-olds that Officer Smith had interviewed and whether or not B.H.'s behavior was "usual." (Tr., p.233, Ls.5-21.) Defense counsel objected several times. (Tr., p.233, Ls.5-21.) As the questioning continued, defense counsel objected on the grounds that the testimony was invading the province of the jury by vouching for the credibility of the B.H. (Tr., p.234, Ls.5-10.) The questioning then continued, but in a more general nature regarding Officer Smith's interviews with children in the past. (Tr., p.234, L.12 – p.238, L.3.) The State then asked how similar B.H.'s interview was to other interviews Officer Smith had completed. (Tr., p.238, Ls.4-10.) Officer Smith answered:

> I was just wanting to – I guess I was wanting to make sure we weren't getting into a state where we were too comfortable with each other, and I wanted to communicate with [B.H.] that I wanted to ensure that she was telling me the truth. And I felt that we were at a very comfortable point in the interview where she was becoming very comfortable in talking to me. I didn't believe, at that point, that she was lying necessarily.

(Tr., p.238, Ls.11-19.) Defense counsel objected and the district court struck the last sentence from the record and told the jury to not "consider the witness' belief as to whether the victim was telling the truth or not." (Tr., p.238, Ls.20-25.)

Later, after discussing Officer Smith's interview with Mr. Frauenberger, the prosecution asked Officer Smith if Mr. Frauenberger "indicate[d] to you whether or not he had ever been placed on probation for having been possessing marijuana." (Tr., p.247, Ls.10-12.) Office Smith answered, "Yes, he did." (Tr., p.247, L.13.) Defense counsel again objected and asked to be heard outside the presence of the jury. (Tr., p.247, Ls.14-23.)

Defense counsel then made a motion for mistrial based upon two grounds: that the State improperly brought up, for the first time, Mr. Frauenberger's criminal history

when the conviction was not a felony or related to truthfulness, and that after several objections the State continued with a line of questioning that resulted in Officer Smith vouching for the credibility of B.H. (Tr., p.248, L.9 – p.249, L.12.) The prosecution agreed that it was improper to have asked about probation; that the prosecutor was "misreading my questions"; that a jury instruction would address the issue; and that Officer Smith was not bolstering B.H.'s credibility, but was responding to an inference defense counsel made during cross-examination about Officer Smith shaking his head. (Tr., p.249, L.15 – p.250, L.21.) Defense counsel responded that he agreed limited questioning was appropriate; that he did not object to the initial questioning about the area he touched on in cross-examination, but that the questioning went too far; the judge recognized that, struck the statement, told the jury to disregard it, but that it is difficult for a jury to do, and now that the jury has heard two totally improper things; that a jury instruction is not sufficient; and that a "mistrial with prejudice is the appropriate remedy here." (Tr., p.250, L.23 – p.251, L.19.)

The district court had the court reporter read the question again. (Tr., p.251, Ls.20-25.) The district court then held that although the questioning was improper, both eliciting vouching testimony and eliciting testimony about Mr. Frauenberger being on probation, that because no answer was giving to the probation question and Mr. Frauenberger's use of marijuana had been addressed, that the motion for mistrial would be denied. (Tr., p.252, L.7 – p.254, L.5.) The district court then struck the question and told the jury not to consider it. (Tr., p.254, Ls.16-19.)

The State rested. (Tr., p.264, L.25 – p.265, L.1.) Following a Rule 29 motion, the district court dismissed Count IV, delivering marijuana to a person under the age of eighteen. (Tr., p.266, L.13 – p.267, L.18.)

Defense counsel then called Mr. Frauenberger who testified that he did not have sexual contact with B.H., did not provide her with marijuana, and discussed the fact that he was on probation for possession of marijuana. (*See generally* Tr., p.269, L.10 – p.327, L.10.) Defense counsel specifically noted that since the probation had been brought up by the State that they were now going to address it though Mr. Frauenberger's testimony. (Tr., p.290, Ls.17-21.) The defense then rested. (Tr., p.327, Ls.22-23.)

The State presented a very brief rebuttal. (Tr., p.370, L.17 – p.387, L.12.) During rebuttal, the State called Aletia Straub, Mr. Frauenberger's probation officer. (Tr., p.377, L.10 – p.378, L.3.) During her testimony she mentioned that in August of 2009, there had been a probation violation hearing. (Tr., p.381, Ls.3-11.)

During closing argument, the prosecution continued to commit misconduct by vouching for the alleged victim and appealing to the passions and prejudices of the jury. (Tr.4/28/11, p.186, L.6 – p.198, L.18.)

The jury was instructed that in order to find Mr. Frauenberger guilty of counts one and two it must find that:

> 3. the defendant Robert Joseph Frauenberger committed manual-genital contact upon or with the body of [B.H.],[3]
>
> 4. [B.H.] was a child under the age of sixteen (16) years of age. . .

(R., pp.89-90.) On count three the jury was instructed:

> 3. The defendant Robert Joseph Frauenberger committed oral-genital contact upon or with the body of [B.H.],
>
> 4. [B.H.] was a child under sixteen (16) years of age . . .

[3] B.H.'s full name was used in the jury instructions.

(Augmentation, Jury Instruction Number 10.)[4] On count five, the jury was instructed that, "3. the defendant Robert Joseph Frauenberger delivered any amount of marijuana to [B.H.], a person who was under 18 years old . . ." (R., p.91.) B.H.'s full name, not Bonnie Noe, is used in several other jury instructions, but the name Bonnie Noe does not appear in any instructions. (R., pp.80-105.)

After deliberation, the jury returned guilty verdicts on all of the remaining charges. (R., pp.107-108.)

Later, defense counsel filed a Motion for New Trial based upon the prosecutorial misconduct that occurred during the trial. (R., pp.119-123.) The motion was denied. (R., pp.133-134.) The case proceeded to sentencing. The State recommended a unified sentence of eleven years, with five years fixed, for each charge, to be run concurrently. (Tr., p.411, L.20 – p.412, L.1.) Defense counsel requested that the district court withhold judgment and place Mr. Frauenberger on probation. (Tr., p.405, Ls.12-14.) Additionally, the presentence investigator recommended that the district court retain jurisdiction. (Presentence Investigation Report (*hereinafter,* PSI), p.12.) Mr. Frauenberger was sentenced to unified sentences of ten years, with two years fixed, for the lewd conduct charges, and four years, with one year fixed, for the delivery of marijuana charge, to be served concurrently. (Augmentation: Judgment of Conviction – Order of Commitment ***Re-Corrected***.) Mr. Frauenberger filed a Notice of Appeal timely from the Judgment of Conviction. (R., pp.139-141.)

[4] Mr. Frauenberger filed a Motion to Augment on May 3, 2012. It has not been ruled on upon the filing of this Appellant's Brief.

ISSUES

1. Was the evidence presented at trial insufficient to support the jury's verdicts finding Mr. Frauenberger guilty of lewd conduct or delivery of marijuana to Bonnie Noe?

2. Were the charges for which Mr. Frauenberger was ultimately convicted, related to criminal conduct involving a minor victim B.H., charges for which no information or indictment had been filed and for which subject matter jurisdiction had not been conferred?

3. Did the district court create a fatal variance from the State's information when it instructed the jury that the charges involved the minor victim B.H. instead of Bonnie Noe as alleged in the information?

4. Did the State violate Mr. Frauenberger's right to a fair trial by committing prosecutorial misconduct?

5. Did the district court abuse its discretion when it imposed, upon Mr. Frauenberger, unified sentences of ten years, with two years fixed, for the lewd conduct charges, and four years, with one year fixed, for the delivery of marijuana charge, to be served concurrently?

ARGUMENT

I.

The Evidence Presented At Trial Was Insufficient To Support The Jury's Verdicts Finding Mr. Frauenberger Guilty Of Lewd Conduct Or Delivery Of Marijuana To Bonnie Noe

A. Introduction

A jury convicted Mr. Frauenberger of three counts of lewd conduct and one count of delivery of marijuana to a person under the age of eighteen. The Third Amended Criminal Information listed Bonnie Noe as the alleged minor victim involved in each count. However, no evidence as trial was presented concerning the alleged victim, thirteen year-old Bonnie Noe. As such, Mr. Frauenberger asserts that the evidence presented at trial was insufficient to support the convictions because the State failed to provide substantial competent evidence to find, beyond a reasonable doubt, that Mr. Frauenberger engaged in inappropriate sexual contact with Bonnie Noe or provided her with marijuana.

B. The Evidence Presented At Trial Was Insufficient To Support The Jury's Verdicts Finding Mr. Frauenberger Guilty Of Lewd Conduct Or Delivery Of Marijuana To Bonnie Noe

A Judgment of Conviction, entered upon a jury verdict, must be overturned on appeal where there lacks substantial competent evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Cortez,* 135 Idaho 561, 562 (2001); *State v. Nelson,* 131 Idaho 210, 219 (Ct. App. 1998). "For evidence to be substantial, it must be of sufficient quality that reasonable minds could reach the same conclusion." *State v. Johnson*, 131 Idaho 808, 809 (Ct. App. 1998) (citing *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 586 (1996)).

On appellate review, the significance of the evidence will not be reweighed as it relates to specific elements of the crime, instead the Court will examine the supporting evidence. *State v. Thomas,* 133 Idaho 172, 174 (Ct. App. 1999). When reviewing the evidence for sufficiency to support the jury verdict, the reviewing Court will review all of the trial evidence, including testimony presented by the defendant. *State v. Brown,* 131 Idaho 61, 71 (Ct. App. 1998). This Court does not substitute its view of the evidence for that of the jury with regard to matters of the credibility of the witnesses, the weight to attach to the testimony, or the reasonable inferences that may be drawn from the evidence. *State v. Herrera-Brito*, 131 Idaho 383, 385 (Ct. App. 1998). Additionally, the Court will construe all of the evidence in favor of upholding the verdict. *State v. Glass,* 139 Idaho 815, 818 (2004).

Mr. Frauenberger was charged, by information, with three counts of lewd conduct with a child under the age of sixteen and two counts of delivery of marijuana to a person under the age of eighteen. (R., pp.18-21.) The charges specifically listed that the illegal contact had occurred with thirteen year-old "Bonnie Noe." (R., pp.18-21.) The Information was amended several times, but the crimes charged and listed victim did not change. (R., pp.37-40, 46-49, 75-77.) At the beginning of the trial, the jury was read the information and was told that the charges involved thirteen-year-old "Bonnie Noe." (Tr.4/26/11, p.11, L.24 – p.14, L.9.) However, no evidence was ever provided as to Bonnie Noe's involvement with Mr. Frauenberger.

In this case, the State's evidence was as follows: The State's first witness was B.H. (Tr., p.6, Ls.3-17.) B.H. provided testimony that she had engaged in sexual activity with Mr. Frauenberger when she was thirteen on three occasions and that he had provided her with marijuana on one occasion. (*See generally* Tr., p.7, L.3 – p.76,

L.16.) During cross examination, B.H. was asked if she is "Bonnie No[e]"; she responded, "I guess, yeah." (Tr., p.83, Ls.23-24.) Isabella Maw testified that she was sneaking out with B.H. and verified that the two had contact with Mr. Frauenberger on one of the nights that the alleged lewd conduct occurred. (*See generally* Tr., p.131, L.15 – p.160, L.3.) Paul Nigg testified that he had seen Mr. Frauenberger with B.H. on a couple of occasions, did not see any illegal activities involving B.H., but did tease Mr. Frauenberger about rumors that Mr. Frauenberger had sexual contact with B.H. (*See generally* Tr., p.160, L.11 – p.214, L.9.) The State's final witness was Officer Smith. Officer Smith investigated the charges and discussed his interviews with both B.H. and Mr. Frauenberger. (*See generally* Tr., p.215, L.3 – p.264, L.21.)

B.H.'s response to defense counsel's question that she guessed she was Bonnie Noe is insufficient to prove beyond a reasonable doubt, that the State intended to use Bonnie Noe as an alias for B.H. or to create a fictitious name for B.H. to protect her identity. Traditionally, a child's initials are used instead of their full name to protect the identity of the child. I.R.C.P. 3(c)(1)(b). Because no testimony, which could satisfy the reasonable doubt standard, was offered to the jury explaining to them that Bonnie Noe was somehow B.H., they were left to presume that Bonnie Noe was not B.H. The State failed to present any evidence regarding Bonnie Noe at trial.

The Due Process Clause of the United States Constitution precludes conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *See In re Winship*, 397 U.S. 358, 364 (1970); *see also State v. Gittens*, 129 Idaho 54, 57 (Ct. App. 1996). There was no evidence, much less substantial and competent evidence, presented that proved, beyond a reasonable doubt, that B.H. was Bonnie Noe or that Mr. Frauenberger had any sexual

contact or provided marijuana to Bonnie Noe. Because this showing was essential in order to establish the State's charges beyond a reasonable doubt, there was no evidence that would support a finding of guilt on any of the charges and the convictions must be overturned.

II.

The Charges For Which Mr. Frauenberger Was Ultimately Convicted, Related To Criminal Conduct Involving A Minor Victim B.H., Were Charges For Which No Information Or Indictment Had Been Filed And For Which Subject Matter Jurisdiction Had Not Been Conferred

A. Introduction

Mr. Frauenberger was charged with three counts of lewd conduct and one count of delivery of marijuana to a minor, all charges specifically noting that Bonnie Noe was the alleged victim. No evidence was presented at trial that Bonnie Noe was a victim. However, evidence was presented at trial which showed that Mr. Frauenberger may have committed similar crimes involving another minor, B.H. Although the information charged Mr. Frauenberger with committing these crimes against Bonnie Noe, the jury was instructed that it must find Mr. Frauenberger guilty if they believed he has committed these crimes against B.H. Because Mr. Frauenberger had never been charged with committing lewd conduct against B.H. or providing marijuana to B.H., the district court did not have jurisdiction to allow the jury to make a finding on Mr. Frauenberger's guilt as to those charges that had never been filed.

B. The Charges For Which Mr. Frauenberger Was Ultimately Convicted, Related To Criminal Conduct Involving A Minor Victim B.H., Were Charges For Which No Information Or Indictment Had Been Filed And For Which Subject Matter Jurisdiction Had Not Been Conferred

Whether a court lacks jurisdiction is a question of law, over which the appellate courts exercise free review. *State v. Jones,* 140 Idaho 755, 757 (2004). In a criminal

case, the filing of an information alleging that an offense was committed within the State of Idaho confers subject matter jurisdiction. *Id.* at 757-58. Because the information provides subject matter jurisdiction to the district court, the district court's jurisdictional power depends on the charging document being legally sufficient to survive challenge. *Id.* at 758. Whether a charging document conforms to the requirements of law and is legally sufficient is also a question of law subject to free review. *Id.*

A challenge to the jurisdictional efficiency of a charging information is never waived and may be raised at any time, including for the first time on appeal. *State v. Cook*, 143 Idaho 323, 326 (Ct. App. 2006); *Jones,* 140 Idaho at 758. When the information's jurisdictional sufficiency is challenged after trial, it will be upheld unless it is so defective that it does not, by any fair or reasonable construction, charge the offense for which the defendant was convicted. *Jones,* 140 Idaho at 759; *State v. Robran,* 119 Idaho 285, 287 (Ct.App.1991). A reviewing court has considerable leeway to imply the necessary allegations from the language of the information. *Jones,* 140 Idaho at 759; *Robran,* 119 Idaho at 287. In short, when considering a post-trial challenge to the jurisdictional sufficiency of the information, a reviewing court need only determine that, at a minimum, the information contains a statement of the territorial jurisdiction of the court below and a citation to the applicable section of the Idaho Code. *Cook*, 143 Idaho at 326; *State v. Quintero,* 141 Idaho 619, 622 (2005).

Mr. Frauenberger does not challenge that the information is defective. He asserts that he was properly tried for the crimes involving Bonnie Noe, but that sufficient information was not provided for the jury to return guilty verdicts on those charges. *See* section I *above.* Mr. Frauenberger instead and alternatively asserts that he had never

been charged for crimes associated with an alleged victim named B.H. Therefore, there was no jurisdiction for the district court to instruct the jury on crimes related to B.H.

In the case at hand, Mr. Frauenberger was charged, by information, with three counts of lewd conduct with a child under the age of sixteen and two counts of delivery of marijuana to a person under the age of eighteen. (R., pp.18-21.) The charges specifically listed that the illegal contact had occurred with thirteen year-old "Bonnie Noe." (R., pp.18-21.) At the beginning of the trial, the jury was read the information and was told that the charges involved thirteen-year-old "Bonnie Noe." (Tr.4/26/11, p.11, L.24 – p.14, L.9.) However, after the close of evidence, the jury was instructed that in order to find Mr. Frauenberger guilty of counts one and two it must find that:

> 3. the defendant Robert Joseph Frauenberger committed manual-genital contact upon or with the body of [B.H.],
>
> 4. [B.H.] was a child under the age of sixteen (16) years of age. . .

(R., pp.89-90.) On count three the jury was instructed:

> 3. The defendant Robert Joseph Frauenberger committed oral-genital contact upon or with the body of [B.H.],
>
> 4. [B.H.] was a child under sixteen (16) years of age . . .

(Augmentation, Jury Instruction Number 10.) On count five, the jury was instructed that, "3. the defendant Robert Joseph Frauenberger delivered any amount of marijuana to [B.H.], a person who was under 18 years old . . ." (R., p.91.) B.H.'s full name, not Bonnie Noe, is used in several other jury instructions, but the name Bonnie Noe does not appear in any instructions. (R., pp.80-105.)

A legally sufficient information must adequately set forth the nature and circumstances of the offense charged to enable a person of ordinary understanding to know what is intended in the charge. *State v. Lenz*, 103 Idaho 632, 633-34 (Ct. App.

1982); I.C. § 19-1409. Further, the information should reflect the name of the prosecutrix as such data is an essential part of the charge against a defendant for lewd and lascivious conduct. *State v. Thurlow*, 85 Idaho 96, 103 (1962). In this case, there is no information charging Mr. Frauenberger with any criminal actions involving B.H. The information filed conferred jurisdiction only for the crimes charged involving Bonnie Noe.

Therefore, Mr. Frauenberger asserts that while many of the elements would be the same for the crimes for which he was charged and the crimes for which the jury was asked to determine guilt, they are not the charges for which jurisdiction had been conferred. Because there was no jurisdiction for the district court to allow the jury to make a determination as to Mr. Frauenberger's potential guilt associated with his possible actions involving B.H., he asserts that his convictions must be vacated.

III.

The District Court Created A Fatal Variance From The State's Information When It Instructed The Jury That The Charges Involved The Minor Victim B.H., Instead Of Bonnie Noe As Alleged In The Information

A. Introduction

The district court created an impermissible variance when it failed to limit the element instruction for each of the charges to those overt acts alleged in the Information; specifically, that the alleged victim was Bonnie Noe, not B.H. as the jury was instructed. The jury was allowed to find Mr. Frauenberger guilty of three counts of lewd conduct and one count of delivery of marijuana to a minor if it believed that the alleged victim was B.H. However, Mr. Frauenberger was charged with these same offenses with a different minor, Bonnie Noe.

B. Standard Of Review

Whether a variance exists between the charging document and the evidence presented at trial or between the information and the jury instructions is a question of law over which an appellate court exercises free review. *See State v. Brazil,* 136 Idaho 327, 330 (Ct. App. 2001). Although Mr. Frauenberger's counsel did not object to the variances during the trial proceedings, this Court can review these errors for the first time on appeal as fundamental error. In order to meet Idaho's fundamental error standard:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning . . . that it must have affected the outcome of the trial proceedings.

State v. Perry, 150 Idaho 209, 226 (2010). The defendant must prove that the error was not harmless by demonstrating "a reasonable possibility that the error affected the outcome of the trial." *Id.*

The error in the instant case is fundamental under *Perry*. Mr. Frauenberger is challenging a variance from the charging document which he alleges is fatal, i.e., a violation of his right to due process that leaves him open to the risk of double jeopardy. *See State v. Wolfrum,* 145 Idaho 44, 47 (Ct. App. 2007) (holding that a variance between from the charging document requires reversal when it deprives a defendant of his substantial rights by violating the defendant's right to fair notice or leaving him open to the risk of double jeopardy); *State v. Cariaga,* 95 Idaho 900, 903-04 (1974) ("Because the variance between the complaint and conviction denies the appellant due process of law, she has not waived her right to object even though no objection has been

previously made."). As such, Mr. Frauenberger is challenging a violation of his constitutional rights. Next, the error in this case is clear and obvious. In the instant case, there is nothing indicating that defense counsel for Mr. Frauenberger intentionally waived the variance and there is no reasonable tactical decision for failing to object to the jury instructions varying from the charging document. Finally, Mr. Frauenberger's substantial rights were affected as he is left open to the risk of double jeopardy because, although the jury found him guilty of committing crimes associated with B.H., the information charges him with crimes associated with Bonnie Noe, thereby allowing the State to potentially recharge him in a case listing the victim as B.H., subjecting him to punishment for crimes for which he has already been punished.

C. The District Court Created A Fatal Variance From The State's Information When It Instructed The Jury That The Charges Involved The Minor Victim B.H., Instead Of Bonnie Noe As Alleged In The Information

"A criminal defendant is entitled to be apprised by the charging instrument not only of the name of the offense charged but in general terms of the manner in which it is alleged to have been committed." *Brazil,* 136 Idaho at 331 (citing I.C. §§ 19-1303, -1409 (charging instrument must contain a statement of the acts constituting the offense); I.C. § 19-1411 (charging instrument must be direct and certain as it regards the particular circumstances of the offense charged); *State v. McMahan*, 57 Idaho 240, 246-47 (1937) (holding that an information must not only state the name of the alleged crime but also inform the accused as to how it is claimed the accused comrnitted the offense.)).

A determination of whether a variance is fatal depends on whether or not the basic functions of the pleading requirement have been met. As stated by the United

States Supreme Court in *Berger v. United States,* 295 U.S. 78, 82 (1935), *overruled on other grounds* by *Stirone v. United States,* 361 U.S. 212 (1960):

> The true inquiry ... is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

Therefore, a variance is held to require reversal of the conviction only when it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy. *State v. Windsor,* 110 Idaho 410, 417-18 (1985); *Brazil,* 136 Idaho at 330-31; *State v. Love,* 76 Idaho 378, 381(1955).[5] However,

> commentators have argued that the double jeopardy element is no longer as vital a function of the pleading document as it once was since now transcripts of the trial itself are available and more readily relied on to establish what was before the court and jury and ultimately resolved by them, as a bar to future prosecutions. 2 W. LaFave & J. Israel, Modern Criminal Procedure, § 19.2(b), at 446 (1984), *citing State v. Smith,* 102 Idaho 108, 626 P.2d 206 (1981). "Accordingly, it is argued, 'protection against successive prosecutions for the same offense ... [should] not require of an accusation any more completeness than the notice function demands.'" 2 W. LaFave & J. Israel, *supra,* § 19.2(b) at 446, *quoting* Scott, *Fairness in the Accusation of Crime,* 41 Minn.L.Rev. 509, 516–17 (1957).

Windsor, 110 Idaho at 418, n.1.

In the case at hand, Mr. Frauenberger was charged, by information, with three counts of lewd conduct with a child under the age of sixteen and two counts of delivery of marijuana to a person under the age of eighteen. (R., pp.18-21.) The charges

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[5] There are two types of variances: variances involving a difference between the allegations in the charging instrument and the proof adduced at trial, and variances involving a difference between the allegations in the charging instrument and the jury instructions. *State v. Montoya,* 140 Idaho 160, 165 (Ct. App. 2004). The analysis for both types of variances is the same. *Compare, e.g., Windsor,* 110 Idaho at 417-18, *with Love,* 76 Idaho at 381.

specifically listed that the illegal contact had occurred with thirteen year-old "Bonnie Noe." (R., pp.18-21.) At the beginning of the trial, the jury was read the information and was told that the charges involved thirteen-year-old "Bonnie Noe." (Tr.4/26/11, p.11, L.24 – p.14, L.9.) However, after the close of evidence, the jury was instructed that in order to find Mr. Frauenberger guilty of counts one and two it must find that:

> 3. the defendant Robert Joseph Frauenberger committed manual-genital contact upon or with the body of [B.H.],
>
> 4. [B.H.] was a child under the age of sixteen (16) years of age. . .

(R., pp.89-90.) On count three the jury was instructed:

> 3. The defendant Robert Joseph Frauenberger committed oral-genital contact upon or with the body of [B.H.],
>
> 4. [B.H.] was a child under sixteen (16) years of age . . .

(Augmentation, Jury Instruction Number 10.) On count five, the jury was instructed that, "3. the defendant Robert Joseph Frauenberger delivered any amount of marijuana to [B.H.], a person who was under 18 years old . . ." (R., p.91.) B.H.'s full name, not Bonnie Noe, is used in several other jury instructions, but the name Bonnie Noe does not appear in any instructions. (R., pp.80-105.)

These instructions clearly do not describe the same crimes for which Mr. Frauenberger was charged. Mr. Frauenberger asserts that the switching of the alleged victim's name from Bonnie Noe to B.H. created a fatal variance, violating Mr. Frauenberger's right to due process and potentially subjecting him to additional punishment. While Mr. Frauenberger does not assert a variance in regards to a lack of notice, he does acknowledge that his variance claim may need to be addressed under the notice standard. A review of whether the defendant was deprived of his or her right to fair notice requires the court to determine whether the record suggests the possibility

that the defendant was misled or embarrassed in the preparation or presentation of his or her defense. *Brazil*, 136 Idaho at 330. Certainly, not being correctly informed of the identity of the alleged victim would mislead a defendant and greatly affect the defense presented. Similarly, Mr. Frauenberger's substantial rights were affected as he is left open to the risk of double jeopardy because although the jury found him guilty of committing crimes associated with B.H. the information charges him with crimes associated with Bonnie Noe and the State may potentially recharge him in a case listing the victim as B.H., subjecting him to punishment for crimes for which he has already been punished.

Therefore, because the district court created a variance and thereby violated Mr. Frauenberger's right to due process and leaves him open to the risk of double jeopardy, and because he meets all three prongs of Idaho's fundamental error test, Mr. Frauenberger's conviction must be vacated.

IV.

The State Violated Mr. Frauenberger's Right To A Fair Trial By Committing Prosecutorial Misconduct

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon,* 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall...deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Additionally, the Idaho Constitution also guarantees that,

"[n]o person shall be...deprived of life, liberty or property without due process of law." ID. CONST. art. I, §13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters,* 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *State v. Sanchez,* 142 Idaho 309, 318 (Ct. App. 2005); *Greer v. Miller,* 483 U.S. 756, 765 (1987). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. *Id.* The hallmark of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips,* 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

A. Standard Of Review

Because Mr. Frauenberger's prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2 (2006). Trial error ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v. Adams*, 147 Idaho 857, 861 (Ct. App. 2009). For alleged errors for which there was a timely objection, Mr. Frauenberger only has the duty to prove that an error occurred, "at which point the State has the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222 (2010). On appeal, Mr. Frauenberger also raises instances of un-objected to misconduct. Because these claims of error are raised for the first time on appeal, Mr. Frauenberger must establish that the errors are reviewable as "fundamental error." *Id.* The Idaho Supreme Court

recently revisited fundamental error and stated that to obtain relief on appeal for fundamental error:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id. (footnote omitted). Thus, on a claim of fundamental error, a defendant must first show that the alleged error "violates one or more of the defendant's unwaived constitutional rights," and that the error "plainly exists" in that the error was plain, clear, or obvious. *Id.* at 228. If the alleged error satisfies the first two elements of the *Perry* test, the error is reviewable. *Id.* To obtain appellate relief, however, the defendant must further persuade the reviewing court that the error was not harmless, i.e., that there is a reasonable possibility that the error affected the outcome of the trial. *Id.* at 226-228.

B. The State Violated Mr. Frauenberger's Right To A Fair Trial By Committing Prosecutorial Misconduct

1. Misconduct For Which There Was An Objection: The Prosecution Committed Misconduct By Eliciting Vouching Testimony From Officer Smith, And By Asking Officer Smith Whether Mr. Frauenberger Was On Probation For Possessing Marijuana

a. The Prosecution Committed Misconduct By Encroaching Upon The Province Of The Jury By Eliciting Vouching Testimony From Officer Smith

The prosecution committed misconduct in this case by asking a witness to testify about the credibility of the alleged victim, a clear and obvious error. "Statements by a witness as to whether another witness is telling the truth are prohibited." *State v. Johnson,* 119 Idaho 852, 857 (Ct. App. 1991) (citing *United States v. Azure,* 801 F.2d 336 (8th Cir. 1986); *State v. Batangan*, 71 Haw. 552, 799 P.2d 48 (1990); *State v.*

Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986); *State v. Fitzgerald,* 39 Wash. App. 652, 694, P.2d 1117 (1985); *State v. Keen,* 309 N.C. 158, 305 S.E.2d 535 (1983)). Testimony from lay witnesses regarding issues of credibility is inadmissible. *See Reynolds v. State,* 126 Idaho 24, 31 (Ct. App. 1994).

During the State's examination of Officer Smith, the State began asking questions about the number of thirteen year-olds that Officer Smith had interviewed and whether or not B.H.'s behavior was "usual." (Tr., p.233, Ls.5-21.) Defense counsel objected several times. (Tr., p.233, Ls.5-21.) As the questioning continued, defense counsel objected on the grounds that the testimony was invading the province of the jury by vouching for the credibility of the B.H. (Tr., p.234, Ls.5-10.) The questioning then continued, but in a more general nature regarding Officer Smith's interviews with children in the past. (Tr., p.234, L.12 – p.238, L.3.) The State then asked how similar B.H.'s interview was to other interviews Officer Smith had completed. (Tr., p.238, Ls.4-10.) Officer Smith answered:

> I was just wanting to – I guess I was wanting to make sure we weren't getting into a state where we were too comfortable with each other, and I wanted to communicate with [B.H.] that I wanted to ensure that she was telling me the truth. And I felt that we were at a very comfortable point in the interview where she was becoming very comfortable in talking to me. **I didn't believe, at that point, that she was lying necessarily.**

(Tr., p.238, Ls.11-19 (emphasis added).) Defense counsel objected and the district court struck the last sentence from the record and told the jury to not "consider the witness' belief as to whether the victim was telling the truth or not." (Tr., p.238, Ls.20-25.)

The State violated Mr. Frauenberger's right to a jury trial when the prosecutor attempted to encroach upon the jury's vital and exclusive function to make credibility determinations. The Supreme Court of the Territory of Idaho stated over one-hundred

years ago, that a question calling "for the opinion of one witness as to the truthfulness of another . . . is clearly an invasion of the province of the jury, who are the judges of the credibility of witnesses." *Perry,* 150 Idaho at 229 (quoting *People v. Barnes,* 2 Idaho 148, 150 (1886)). This prohibition is not simply a court rule by which trials are conducted, but instead, is rooted in one's Sixth Amendment right to a jury trial.

The Idaho Court of Appeals has recognized that,

> In a jury trial, it is for the jury to determine the credibility of a witness, not another witness. *See State v. Batangan*, 71 Haw. 552, 799 P.2d 48 (1990). *See also United States v. Samara*, 643 F.2d 701 (10th Cir.) cert. denied, 454 U.S. 829, 102 S.Ct. 122, 70 L.Ed.2d 104 (1981), *reh. denied*, 454 U.S. 1094, 102 S.Ct. 662, 70 L.Ed.2d 633 (1981); *United States v. Awkard*, 597 F.2d 667, 671 (9th Cir.), cert. denied, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979); *State v. Hoyt*, 806 P.2d 204, 211 (Utah App.1991); State v. Ross, 152 Vt. 462, 568 A.2d 335 (1989); *State v. Taylor*, 663 S.W.2d 235 (Mo.1984). Statements by a witness as to whether another witness is telling the truth are prohibited. *See United States v. Azure*, 801 F.2d 336 (8th Cir.1986); *Batangan*, 71 Haw. 552, 799 P.2d 48; *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (1986); *State v. Fitzgerald*, 39 Wash.App. 652, 694 P.2d 1117 (1985); *State v. Keen*, 309 N.C. 158, 305 S.E.2d 535 (1983).

Johnson, 119 Idaho at 857.

"The right to a jury trial contained in the Sixth Amendment . . . includes the right to have the jury be 'the sole judge of the weight of the testimony.'" *State v. Elmore,* 154 Wash. App. 885, 228 P.3d 760 (WA 2010) (quoting *State v. Lane,* 125 Wash.2d 825, 838, 889 P.2d 929 (WA 1995) (quoting *State v. Crotts,* 22 Wash. 245, 250-51, 60 P. 403 (1900)). Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *State v. Demery,* 144 Wash.2d 753, 759, 30 P.3d 1278, 1282 (WA 2001) (quoting *City of Seattle v. Heatley,* 70 Wash.App. 573, 577, 854 P.2d 658 (1993) (citing *State v. Black,* 109 Wash.2d 336, 348, 745 P.2d 12 (1987))). Admitting impermissible opinion

testimony regarding the defendant's guilt may be reversible error because admitting such evidence "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury." *Id.* (quoting *State v. Carlin,* 40 Wash.App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley,* 70 Wash.App. 573, 854 P.2d 658 (1993)).

The questioning of Officer Smith by the prosecution was clearly designed to provide Officer Smith an opportunity to share his opinion regarding B.H.'s truthfulness. Such opinion testimony is clearly inadmissible. The district court correctly recognized that the statement was misconduct. And although a limiting instruction was given, this statement, that a trained police officer believed B.H., is the type of evidence that would seriously impede a jury's ability to independently judge credibility. As such, a limiting instruction was insufficient and a new trial should have been ordered.

b. The Prosecution Committed Misconduct By Asking Officer Smith Whether Mr. Frauenberger Was On Probation For Possessing Marijuana

After discussing Officer Smith's interview with Mr. Frauenberger, the prosecution asked Officer Smith if Mr. Frauenberger "indicate[d] to you whether or not he had ever been placed on probation for having been possessing marijuana." (Tr., p.247, Ls.10-12.) Office Smith answered, "Yes, he did." (Tr., p.247, L.13.) Defense counsel again objected and asked to be heard outside the presence of the jury. (Tr., p.247, Ls.14-23.) Later, the prosecution admitted that it was improper to have asked about probation, that the prosecutor was "misreading my questions." (Tr., p.449, Ls.15-22.)

Recently the Idaho Supreme Court stated:

> We long ago held, "It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury." *State v. Irwin,* 9 Idaho 35, 44, 71 P. 608, 611 (1903). They should not "exert their skill and ingenuity to see how far they can trespass

upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused." *Id.*

State v. Christiansen, 144 Idaho 463, 469 (2007).

The above question is clearly improper and constitutes prosecutorial misconduct. Information that Mr. Frauenberger had a criminal record, especially related to possessing marijuana, when a marijuana charge is at issue, is highly prejudicial. Again, this is the type of information that may interfere with the jury's ability to make an impartial decision about whether or not Mr. Frauenberger is innocent of the charges against him. As such, he asserts the proper remedy, was to grant a new trial.

c. The District Court Abused Its Discretion By Denying Mr. Frauenberger's Motion For Mistrial

Mr. Frauenberger asserts that the district court abused its discretion in denying his motion for a mistrial. A motion for a mistrial is controlled by I.C.R. 29.1, which provides that, "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a); *State v. Canelo,* 129 Idaho 386, 389 (Ct. App. 1996). The decision whether to grant a mistrial rests within the sound discretion of the district court and, absent an abuse of discretion, it will not be disturbed on appeal. *Id.*; *State v. Atkinson,* 124 Idaho 816, 818 (Ct. App. 1993). The Supreme Court has held that the question on review is not whether the trial court reasonably exercised its discretion under the circumstances existing when the motion was made; but, whether the event or events which brought about the motion for mistrial constitute reversible error when viewed in the context of the entire record. *Id.*

In cases where juries have been exposed to extraneous information or other improper influences, the Idaho Supreme Court has followed an approach similar to the approach adopted by the federal courts and declined to require a determination of actual prejudice. *Roll v. City of Middleton*, 115 Idaho 833, 837 (Ct. App. 1989). These courts have generally held that if the trial judge finds that the extraneous information reasonably could have resulted in prejudice a new trial should be ordered. *Id.*

Consequently, the Idaho Court of Appeals has held that the proper standard is whether prejudice reasonably could have occurred, rather than whether prejudice actually has occurred. *Id.* The Court's holding relies on two considerations:

> First, the extreme rigor of an actual prejudice test would severely restrict the availability of relief for misconduct, thereby diminishing public confidence in the jury system and eroding the fundamental principle that a "verdict must be based upon the evidence developed at the trial." *United States v. Howard,* 506 F.2d 865, 867 (5th Cir.1975) (quoting *Irvin v. Dowd,* 366 U.S. 717, 722 (1961)). Second, Rule 606(b), I.R.E., precludes a full inquiry into actual prejudice. As mentioned above, Rule 606(b) bars jurors from giving evidence concerning their mental processes. Because jurors cannot be questioned as to whether they were in fact prejudiced by extraneous information, the trial judge must determine whether the information reasonably could have produced prejudice, when evaluated in light of all the events and the evidence at trial.

Id. Therefore, it is sufficient for the judge to merely determine whether prejudice reasonably could have occurred. *Id.* at 839. In making this determination, courts must give due regard to "the policy of assuring that jury verdicts are based upon the evidence at trial, not upon extraneous information or improper influences." *Id.*

Further, a trial court's declaration of mistrial and dismissal of charges against a defendant because of prosecutorial misconduct during trial prevents retrial. *State v. Stevens,* 126 Idaho 822, 830 (1995).

In the case at hand, following improper vouching questions and an improper question about Mr. Frauenberger being on probation, defense counsel made a motion

for mistrial based upon two grounds: that the State improperly brought up, for the first time, Mr. Frauenberger's criminal history when the conviction was not a felony or related to truthfulness, and that after several objections the State continued with a line of questioning that resulted in Officer Smith vouching for the credibility of B.H. (Tr., p.248, L.9 – p.249, L.12.) The prosecution agreed that it was improper to have asked about probation; that she was "misreading my questions"; that a jury instruction would address the issue; and that Officer Smith was not bolstering B.H.'s credibility, but was responding to an inference defense counsel made during cross-examination about Officer Smith shaking his head. (Tr., p.249, L.15 – p.250, L.21.) Defense counsel responded that he agreed limited questioning was appropriate; that he did not object to the initial questioning about the area he touched on in cross-examination, but that the questioning went too far; the judge recognized that, struck the statement, told the jury to disregard it, but that it is difficult for a jury to do, and now that they have heard two totally improper things; that a jury instruction is not sufficient; and that a "mistrial with prejudice is the appropriate remedy here." (Tr., p.250, L.23 – p.251, L.19.)

The district court had the court reporter read the question again. (Tr., p.251, Ls.20-25.) The district court then held that:

> Mr. Archibald raises two issues for grounds for the mistrial. The first surrounds the witness' statement that he didn't believe that she was not telling the truth. And that particular testimony came at a time, as counsel points out, where there were some objections to that particular line of questioning. The Court had given some guidance as to the demeanor of the witness. The witness had talked about the experience that he had had in interviewing children and the differences between the kinds of responses you would expect between adults and children. The Court felt that that line of questioning was appropriate and had given admonitions not to vouch for the credibility.
>
> At the time the statement was made by the witness that he didn't believe that at that time she was not telling the truth, the Court – I don't know if it was by objection or quickly perceiving that issue, did give a

> limiting instruction and not just sustained the objection but quickly asked the jury not to consider that. So the Court is satisfied that the appropriate remedy was undertaken with regard to that issue.
>
> The referencing by the prosecutor of probation is a more difficult question for the Court. I think the Court perceived that at the same time that Mr. Archibald did. And the good news with regards, I think, to this particular issue is that there was not an answer provided, and I think had there been, that would have been more aggravating and more difficult for the Court to deny the motion for mistrial.
>
> I would note that the witness did testify regarding the statement that the defendant had made that he had been smoking marijuana since he was 15 years old. That evidence came in without any sort of objection, and so I think that needs to be stated in the context of this objection, and so what the Court intends on doing is giving a lirniting instruction to the jury again not to consider the previous question.
>
> And, with that, this Court will deny defense's motion for the mistrial on those two grounds. I think it's recognized by the prosecutor that that was not an appropriate question and, again, I believe that the jury has been introduced to the marijuana issue. It's one of the counts that has been charged. The defendant has made some statement, whether you call them admissions or not, surrounding that marijuana mitigates the prejudice that the jury or that the defendant would experience as a result of the jury just hearing the question by the prosecutor.

(Tr., p.252, L.7 – p.254, L.5.) The district court then struck the question and told the jury not to consider it. (Tr., p.254, Ls.16-19.)

Mr. Frauenberger asserts that the district court abused its discretion by failing to recognize that the extraneous information to which the jury was exposed could have reasonably resulted in prejudice. Arguments regarding the vouching testimony provided by Officer Smith and that such testimony is misconduct can be found above and are incorporated by reference. He asserts that a limiting instruction is insufficient and that the proper remedy was for the district court to grant a mistrial because of the danger of improper influence.

Further, contrary to the district court's findings, the record reflects that the jury heard Officer Smith answer the question affirmatively regarding Mr. Frauenberger's

probation. (Tr., p.247, Ls.10-13.) As such, the district court's analysis is flawed. The district court acknowledged that if there had been an answer the prejudice would be greater. Mr. Frauenberger asserts that the jury hearing information not only that he had used marijuana in the past, but had been criminally punished, created a great risk that prejudice could have occurred.

Additionally, Mr. Frauenberger asserts that providing the jury with information that he was on probation for possessing marijuana is comparable evaluating the need for a bifurcated trial in felony driving under the influence cases. The Idaho Supreme Court has held, in determining the need for bifurcated trials for felony driving under the influence charges, that "[t]he possibility of prejudice against defendant resulting from evidence or knowledge of prior crimes outweighs any policy argument regarding the complication of trial proceedings." *State v. Wiggins,* 96 Idaho 766, 768 (1975). In so finding, the *Wiggins* Court quoted *State ex rel. Edelstein v. Huneke,* 249 P. 784 (Wash.1926): "It seems too plain for argument that to place before a jury the charge in an indictment, and to offer evidence on trial as a part of the state's case that the defendant has previously been convicted of one or more offenses is to run a great risk of creating a prejudice in the minds of the jury that no instruction of the court can wholly erase." *Id.*

The information regarding Officer Smith's opinion of B.H.'s veracity and Mr. Frauenberger's past criminal conviction, even with the benefit of a limiting instruction, could have reasonably resulted in prejudice to Mr. Frauenberger and,

ultimately, deprived him of his right to a fair trial.[6] As such, Mr. Frauenberger asserts that the district court abused its discretion in denying the motion for mistrial.

Mr. Frauenberger contends that this error was not harmless. Because there was a timely objection, Mr. Frauenberger only has the duty to prove that an error occurred, "at which point the State has the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho at 222. The State cannot show the error was harmless in this case.

2. Misconduct For Which There Was No Objection: The Prosecution Committed Misconduct By Encroaching Upon The Jury's Function To Make Credibility Determinations, And By Appealing To The Passions And Prejudices Of The Jury

Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Phillips,* 144 Idaho 82, 86 (Ct. App. 2007) (quoting *Herring v. New York,* 422 U.S. 853, 862 (1975)). Its purpose "is to enlighten the jury and to help the jurors remember and interpret the evidence." *Id.* (quoting *State v. Reynolds,* 120 Idaho 445, 450 (Ct. App. 1991)). "Both sides have traditionally

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[6] Mr. Frauenberger felt that he must take the stand and discuss the fact that he was on probation as a result of the improper questioning, despite the limiting instruction. Defense counsel specifically noted that since the probation had been brought up by the State that they were now going to address it though Mr. Frauenberger's testimony. (Tr., p.290, Ls.17-21.) Defense counsel further explained the perceived need for this testimony at the hearing on the Motion for New Trial:

> . . . when the issue of the probation came up, it – that did, that did put us in an impossible position because not the Court – now the jurors had heard it. . . I had to talk to my client and his father about it, about – do we proceed? Do – does Joey take the stand? Do we address this probation issue? How, how do we address that? And, and, and a criminal defendant shouldn't have to be in that position, should have to focus his defense on, on improper questioning of the prosecuting attorney. And so, and so it was, it was just a difficult situation.

(Tr.6/15/11, p.5, L.21 – p.6, L.8.)

been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *Id.* (quoting *State v. Sheahan,* 139 Idaho 267, 280 (2003)). However, considerable latitude has its limits, both in matters expressly stated and those implied. *Id.*

a. The Prosecution Committed Misconduct By Encroaching Upon The Jury's Function To Make Credibility Determinations

The prosecutor engaged in impermissible vouching by stating that he believed the victim and her story during closing arguments. Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. *State v. Irwin,* 9 Idaho 35, ___, 71 P. 608, 610 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.* The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*

In *Lovelass,* the prosecutor informed the jury in closing argument that Lovelass had committed "full-fledged perjury," that Lovelass had lied on more than one occasion, and everything he said to the jury was fabricated. *State v. Lovelass*, 133 Idaho 160, 169 (Ct. App. 1999). The *Lovelass* Court stated that in closing argument, "both the prosecutor and defense counsel are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom," and that this includes "the right to identify how, from the party's perspective, the evidence confirms or calls into doubt the credibility of particular witnesses." *Id.* at 168, 983 P.2d at 241

(citation omitted). However, "it is improper for a prosecutor to express a personal belief or opinion regarding the truth or falsity of any testimony or evidence or as to the guilt of the defendant." *Id.* (citation omitted). The Court of Appeals held that the comments did not constitute fundamental error as they appeared to have fallen within the broad range of fair comment on the evidence rather than an expression of the prosecutor's personal belief, but also recognized that the prosecutor's comments were troubling and less than artful. *Id.* at 169. In *State v. Hairston*, 133 Idaho 496 (1999), even though the Idaho Supreme Court held that the prosecutor's statement that Hairston was a "murdering dog" did not constitute fundamental error, the statement was criticized as "clearly improper." *Id.* at 507, 988 P.2d at 1181. The Idaho Supreme Court cautioned that, "[t]rial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument and persist in its use, they should not be members of The ... Bar." *Id.* at 508 (citing *Luce v. State*, 642 So.2d 4 (Fla. Ct. App. 1994)).

Here, the prosecutor's complained of comments during closing argument were not directed toward the evidence, or inferences drawn therefrom. Instead, the prosecutor expressed his opinion and belief that the alleged victim, B.H., was a credible and truthful witness. The prosecution's statements went much further than the permissible bounds allowed to encourage a jury to question the credibility of witnesses. The prosecutor committed misconduct when he stated the following: "[B.H.] told you about these behaviors, and **she was honest with you. It's the state's position that she has no impetus to lie,** if she's willing to tell you what a tough kid she was." (Tr.4/28/11, p.187, Ls.10-13 (emphasis added).) This comment was a direct statement

that the prosecutor, and all the official powers behind her position, believed that B.H. was telling the truth, and is prosecutorial misconduct.

It is a violation of Mr. Frauenberger's Fourteenth Amendment right to a fair trial to have a jury reach its decision on any factor other than the evidence admitted at trial and the law as explained in the jury instructions. In this case, misconduct related to prosecutorial vouching interfered with the jury's ability to make an impartial decision, thereby interfering with Mr. Frauenberger's Sixth Amendment right to an impartial jury. As such, the misconduct in this case clearly violates Mr. Frauenberger's unwaived constitutional rights and deprived him of his right to a fair trial. As such, this Court must vacate the conviction.

b. The Prosecution Committed Misconduct By Appealing To The Passions And Prejudices Of The Jury

During closing arguments, the prosecutor made the following statements:

> [B.H.] was pretty vulnerable to someone who wanted to get his own way with her. She didn't have anybody really looking out for her. . . . The defendant, was in a really good position to be able to prey on someone who was wondering away from the herd, a really good position. Because let's look at it. How does a wolf decide on its prey? It looks for someone who is weak. They could be old, could be sick, could be really young and not have the physical strength to resist it. Looks for someone who's wandering away from the herd, ignoring the safety in numbers that comes with that, sneaking out, looking for greener grass someplace else or maybe entertainment or diversion if you're a 13-year-old girl without anybody watching out for you. Someone who's unaware of the danger and unaware of what can happen with you sneak out in the middle of the night with some boy, looking for maybe somebody who doesn't care about the danger. So those conditions make that particular prey an easy target. Here the prey was [B.H.]. What made here an easy target? Well, as I said, most of the evidence that was heard from her, she was 13 years old in the 8th grade. Talked about the family situation. . . . She didn't have any guidance of an adult. And her testimony here, as you maybe saw, it wasn't easy for her. . . She was so nervous that she peeled the skin off her little finger while she was testifying Tuesday.

(Tr.4/28/11, p.187, L.14 – p.189, L.8.)

> . . . find the defendant guilty, because he is a predator. He preyed on someone who was vulnerable and weak, and don't let that happen here in our city, because [B.H.] doesn't have anything except the law that says people under 16 don't have the capacity to consent. That's what she has to protect her.

(Tr.4/28/11, p.198, Ls.13-18.)

The prosecutor's statements amounted to an improper plea for the jury to decide this case based upon its fears, passions, and prejudices. In *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), the Ninth Circuit held that such pleas are wholly improper:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

Id. at 1149 (quoting *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994) (quoting *United States v. Monaghan*, 741 F.2d 1434, 41 (D.C. Cir. 1984))). In *Weatherspoon*, where the defendant was charged with being a convicted felon in possession of a firearm, portions of the prosecutor's closing argument focused on the personal comfort and community safety which is attendant to taking armed ex-cons off the streets. *Id.* at 1149. The Ninth Circuit held that, "[t]hat entire line of argument . . . was improper." *Id.* Then, after quoting the above language from *Koon* and *Monaghan*, it observed that since Mr. Weatherspoon's case turned solely on the question of whether he had, in fact, been in possession of a firearm on the night in question, the prosecutor's arguments about the "potential social ramifications of the jury's reaching a guilty verdict," were "irrelevant and improper" because "[t]hey were clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact." *Id.* at 1149-50. *See also*

v. Payne, 260 Conn. 446, 462-463 (2002) (finding prosecutorial misconduct where the prosecutor made a closing argument statement that was "a direct and unabashed appeal for the jury to find the defendant guilty out of sympathy for the victim and his family").

Because the prosecutor's statements in this case, much like the prosecutor's pleas in *Weatherspoon* and *Payne*, were calculated to encourage the jury to reach a guilty verdict based on its emotion and sympathy for B.H., rather than the facts of the case, they were irrelevant and improper and their admission violated Mr. Frauenberger's rights to a fair trial and due process under the Sixth and Fourteenth Amendments. As such, this Court must vacate the conviction.

c. The Prosecutorial Misconduct Related To Encroaching Upon The Jury's Function To Make Credibility Determinations And Appealing To The Passions And Prejudices Of The Jury Is Reviewable As Fundamental Error

First, it is a violation of Mr. Frauenberger's Fourteenth Amendment right to a fair trial to have a jury reach its decision on any factor other than the evidence admitted at trial and the law as explained in the jury instructions. As such, prosecutorial misconduct, in general, directly violates a constitutional right. It should be noted that the Idaho Supreme Court stated in *Perry* that, "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. This is an implicit recognition by the Idaho Supreme Court that prosecutorial misconduct claims are connected to a constitutional provision.

In this case, the misconduct also interfered with the jury's ability to make an impartial decision by personally vouching for a witness' credibility and clouding the

issues with appeals to the passions and prejudices of the jury, thereby interfering with Mr. Frauenberger's Sixth Amendment right to an impartial jury. The State violated Mr. Frauenberger's right to a jury trial when the prosecutor attempted to encroach upon the jury's vital and exclusive function to weigh the evidence or lack of evidence presented. "The right to a jury trial contained in the Sixth Amendment . . . includes the right to have the jury be 'the sole judge of the weight of the testimony.'" *State v. Elmore,* 154 Wash. App. 885, 228 P.3d 760 (WA 2010) (quoting *State v. Lane,* 125 Wash.2d 825, 838, 889 P.2d 929 (WA 1995) (quoting *State v. Crotts,* 22 Wash. 245, 250-51, 60 P. 403 (1900)).

The misconduct in this case not only involved Mr. Frauenberger's state and federal constitutional rights to due process, but also his federal and state constitutional rights to a jury trial. As such, the error is reviewable for fundamental error. The error in this case plainly exists from the record and no additional information is necessary. Further, it cannot be a tactical decision on the part of the defense to have a jury reach a verdict, not based on the evidence and law, but based on impermissible grounds presented through misconduct.

The prosecutorial misconduct requires vacation of the conviction. In the case at hand, this Court should find that the misconduct denied Mr. Frauenberger his right to a fair trial because it cannot say beyond a reasonable doubt that misconduct did not contribute to the verdict. The case was not clear cut and was based solely upon the jury's credibility determination of both B.H. and Mr. Frauenberger, as they were the only individuals who may have witnessed or engaged in any inappropriate conduct because no other witness was able to testify to observing anything more than seeing the two in each others presence. Additionally, there was no physical evidence provided either of

the alleged sexual contact or the existence or use of marijuana. In reviewing the trial as a whole, the prosecutor's improper comments, constituting misconduct, may have influenced the jury in this case. As such, this Court must vacate the conviction.

3. Even If The Above Errors Are Harmless, The Accumulation Of The Prosecutorial Misconduct Amounts To Cumulative Error

Mr. Frauenberger asserts that if the Court finds that the above prosecutorial misconduct was harmless, the errors combined amount to cumulative error. "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. However, a necessary predicate to the application of the doctrine is a finding of more than one error." *Perry,* 150 Idaho at 230. Recently, the Idaho Supreme Court noted that when ruling on a motion for mistrial brought after an instance of alleged prosecutorial misconduct, the district court should not limit its view of the misconduct to the specific isolated incident, but should also take into consideration whether or not the prosecutor is engaging in a pattern of misbehavior. *State v. Ellington*, 151 Idaho 53, ___, 253 P.3d 727, 744-45 (2011).

Mr. Frauenberger asserts that given the multiple instances of prosecutorial misconduct, it is likely that even if each of the instances individually did not amount to reversible error, the accumulation of the misconduct including the presentation of vouching testimony, providing the jury with improper information, and appealing to the passions and prejudices of the jury, influenced the jury and deprived Mr. Frauenberger of his right to a fair trial.

V.

The District Court Abused Its Discretion When It Imposed, Upon Mr. Frauenberger, Unified Sentences Of Ten Years, With Two Years Fixed, For The Lewd Conduct Charges, And Four Years, With One Year Fixed, For The Delivery Of Marijuana Charge, To Be Served Concurrently

Mr. Frauenberger asserts that, given any view of the facts, his unified sentences of ten years, with two years fixed, for the lewd conduct charges, and four years, with one year fixed, for the delivery of marijuana charge, to be served concurrently, are excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Frauenberger does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Frauenberger must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo,* 136 Idaho 138 (2001)).

Mr. Frauenberger asserts that the district court failed to properly consider the mitigating factors that exist in his case. Specifically, he asserts that the district court failed to give proper consideration to his young age and desire to become a successful, contributing member of society as an adult. Mr. Frauenberger was only eighteen years old when the instant offenses occurred. (PSI, pp.1-2.) The Idaho Supreme Court has recognized a point first made by Justice Bistline in his dissent in *State v. Adams*, 99 Idaho 75 (1978), that in modifying sentences, the Court "has given great weight to the age of a defendant." *Broadhead*, 120 Idaho at 144 (citations omitted). Further, Mr. Frauenberger has completed his GED and attended a semester of college at the College of Southern Idaho. (PSI, p.7.) He has noted that he has goals for a better future including "to be successful, have a good job, have an amazing family, [and] own my own business." (PSI, p.11.) Mr. Frauenberger's young age and desire to have a successful future counsels toward a less sever sentence.

Furthermore, Mr. Frauenberger has family support. In *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. *Id.* At the sentencing hearing, Mr. Frauenberger's father, noted that he had done all he could to support his son, would be available as a source of help to him if he were released, loved his son, and only wants the best for him. (Tr., p.399, Ls.3-12.)

Prior to these offenses, Mr. Frauenberger has never been convicted of a felony. (PSI, pp.3-5.) The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673 (1998) (quoting *State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on*

other grounds by State v. Shepherd, 94 Idaho 227 (1971)); *see also State v. Nice*, 103 Idaho 89, 91 (1982). The defendant in *Hoskins* pled guilty to two counts of drawing a check without funds. *Hoskins*, 131 Idaho at 673. In *Nice*, the defendant pled guilty to the charge of lewd and lascivious conduct with a minor. *Nice*, 103 Idaho at 90. In both *Hoskins* and *Nice*, the court considered, among other important factors, that the defendants had no prior felony convictions. *Hoskins*, 131 Idaho at 673; *Nice*, 103 Idaho at 90. The *Hoskins* Court ultimately found that based upon the nature of the offense and the absence of any prior serious criminal record, the district court abused its discretion in imposing the sentence. *Hoskins*, 131 Idaho at 675.

Although Mr. Frauenberger does have a history of juvenile and misdemeanor convictions, the felony charges in this case are his only felony convictions. This fact counsels toward a less sever punishment.

Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982), *see also State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991). Mr. Frauenberger has admitted to prior occasional alcohol use and prior marijuana use. (PSI, p.10.) At times, his marijuana use has been as often as daily use. (PSI, p.10.) It was recommended that Mr. Frauenberger participate in Level I Outpatient Treatment to address his substance abuse issues. (PSI, p.11.)

Based upon the above mitigating factors, Mr. Frauenberger asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his young age, family support, status as a first time felony offender, and substance abuse coupled with a need for

treatment, it would have crafted a sentence that focused on his rehabilitation and future potential in the community, rather than incarceration.

CONCLUSION

Mr. Frauenberger respectfully requests that this Court vacate his convictions and remand his case for further proceedings. Alternatively, he requests that this Court reduce his sentence as it deems appropriate.

DATED this 4th day of May, 2012.

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of May, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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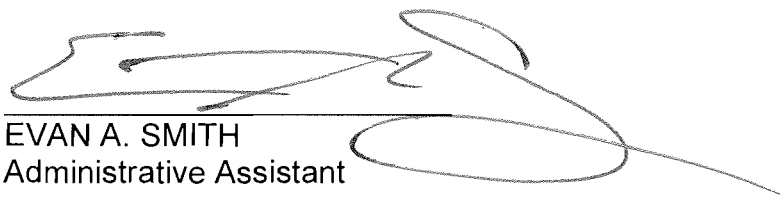

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