10-4-2011

# State v. Nichols Respondent's Brief Dckt. 38123

IN THE SUPREME COURT OF THE STATE OF IDAHO



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| STATE OF IDAHO, | ) | |
| | ) | |
| Plaintiff-Respondent, | ) | NO. 38123 |
| | ) | |
| vs. | ) | |
| | ) | |
| TIMOTHY NICHOLS, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |
| | ) | |

# BRIEF OF RESPONDENT

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

HONORABLE CHERI C. COPSEY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

SARAH E. TOMPKINS
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEY FOR
DEFENDANT-APPELLANT

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## STATEMENT OF THE CASE

### Nature of the Case

Timothy Nichols appeals from the judgment entered upon the jury verdict finding him guilty of statutory rape.

### Statement of Facts and Course of Proceedings

On August 23, 2009, Mountain Home Police Officer Humberto Fuentes was dispatched to Nichols' residence in response to a report that K.F., "a juvenile runaway from the [S]tate of Washington," may be there. (Trial Tr., p.100, L.18 – p.103, L.1, p.104, Ls.22-24, p.105, L.18 – p.106, L.10.) When Officer Fuentes arrived at the residence he observed Nichols and K.F. sitting under a tree in the front yard; K.F. "was extremely upset." (Trial Tr., p.103, Ls.5-17, p.105, Ls.14-17, p.106, L.14 – p.107, L.18.) After speaking with Nichols and K.F. and contacting the Everett, Washington, Police Department, Officer Fuentes took K.F. into custody. (Trial Tr., p.107, L.22 – p.109, L.3.) Officer Fuentes subsequently interviewed K.F. and, based on that interview, turned the case over to Detective Ty Larsen for investigation. (Trial Tr., p.109, L.8 – p.110, L.18, p.70, Ls.18-23.) In his report to Detective Larsen, Officer Fuentes stated "that he had located a runaway in the City of Mountain Home, and there had been possible other illegal contacts involving with [sic] her." (Trial Tr., p.70, Ls.18-23.)

Detective Larsen interviewed Nichols on August 25, 2009. (Trial Tr., p.70, L.8 – p.78, L.16, p.85, L.3 – p.91, L.3.) During the interview, Nichols provided the officer with a driver's license listing Nichols' date of birth as [redacted]

(Trial Tr., p.72, L.3 – p.73, L.18; State's Exhibit 3.) After waiving his *Miranda*[1] rights, Nichols told the officer that he had met K.F. in Everett, Washington, and that the two had moved to Idaho together approximately one month previously. (Trial Tr., p.75, L.15 – p.78, L.7, p.85, Ls.7-15, p.86, L.19 – p.87, L.11.) Nichols admitted that he and K.F. were in a "dating relationship," that they shared a room together in their two-bedroom apartment and, that since living in Idaho, they had engaged in "penis and vaginal-style" sexual intercourse approximately two to three times a week. (Trial Tr., p.85, L.25 – p.86, L.18, p.87, L.12 – p.89, L.8, p.90, L.16 – p.91, L.3.)

The state charged Nichols with statutory rape. (R., pp.17-18.) At the time of trial, K.F.'s whereabouts were unknown and, as such, the state was unable to call her as a witness. (Trial Tr., p.43, Ls.17-20, p.57, Ls.5-6.) However, K.F.'s adoptive mother testified that she believed K.F.'s date of birth to be [redacted] thus making K.F. 17 years old at the time she was living with Nichols. (Trial Tr., p.53, Ls.2-25.) The state also called Officers Fuentes and Larsen, who testified regarding their respective contacts and interviews with K.F. and Nichols. (Trial Tr., p.68, L.14 – p.113, L.15.) At the conclusion of the state's case-in-chief, Nichols moved for a judgment of acquittal, arguing that the state failed to present evidence, independent of Nichols' confession, to establish the *corpus delicti* of the crime. (Trial Tr., p.116, Ls.10-23, p.119, L.18 – p.120, L.13.) The district court denied the motion and submitted the case to the jury, who found Nichols

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

guilty. (Trial Tr., p.120, L.14 – p.123, L.5, p.164, Ls.16-24; R., p.68.) Nichols timely appealed from the judgment. (R., pp.90-93, 116-20.)

## ISSUES

Nichols states the issues on appeal as:

1. Did the district court err when it denied Mr. Nichols' Rule 29 motion seeking a judgment of acquittal because the State presented insufficient evidence to establish the *corpus delicti* independent of Mr. Nichols' confessions and statements?

2. Did the district court err when it permitted the introduction of inadmissible hearsay in order to establish the age of the alleged victim in this case?

3. Did the district court's jury instructions in this case impermissibly lower the State's burden of proof, and therefore constitute fundamental error, when the district court provided an elements instruction for the offense of statutory rape that omitted an essential element and when the district court failed to *sua sponte* instruct the jury regarding *corpus delicti*?

4. Did the prosecutor commit misconduct, rising to the level of fundamental error, when the prosecutor misstated the testimony provided at trial and introduced facts not in evidence for the jury's consideration during closing arguments?

(Appellant's brief, p.8.)

The state rephrases the issues on appeal as:

1. Has Nichols failed to establish that the district court erred in denying his motion for judgment of acquittal?

2. Has Nichols failed to show error in the district court's evidentiary rulings?

3. Has Nichols failed to demonstrate fundamental error in the jury instructions?

4. Has Nichols failed to show prosecutorial misconduct, much less misconduct rising to the level of fundamental error?

## ARGUMENT

### I.
### Nichols Has Failed To Establish Error In The Denial Of His Motion For Judgment Of Acquittal

#### A. Introduction

Nichols challenges the denial of his motion for judgment of acquittal, arguing, as he did below, that the state failed to present evidence, independent of Nichols' admissions, to establish the *corpus delicti* of statutory rape. (Appellant's brief, pp.9-12.) Nichols' argument fails. A review of the record and the applicable law supports the district court's determination that the state presented sufficient evidence to corroborate Nichols' admissions and establish the *corpus delicti* of the crime.

#### B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Sheahan, 139 Idaho 267, 285-86, 77 P.3d 956, 974-75 (2003); State v. Reyes, 121 Idaho 570, 572, 826 P.2d 919, 921 (Ct. App. 1992). The evidence is sufficient where there is substantial, even if conflicting, evidence from which a reasonable juror could find all the elements of the crime proven beyond a reasonable doubt. State v. Thomas, 133 Idaho 172, 174, 983 P.2d 245, 247 (Ct. App. 1999). Moreover, the facts and inferences to be drawn from those facts are construed in favor of upholding the jury's verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997).

C. The State Presented Sufficient Evidence To Corroborate Nichols' Admissions And Establish The *Corpus Delicti* Of The Crime

The doctrine of *corpus delicti* "prohibits the conviction of a criminal defendant based upon nothing more than the defendant's own confession to prove that the crime occurred." Thomas v. State, 145 Idaho 765, 771, 185 P.3d 921, 927 (Ct. App. 2008) (citing State v. Tiffany, 139 Idaho 909, 912, 88 P.3d 728, 732 (2004); State v. Roth, 138 Idaho 820, 823, 69 P.3d 1081, 1084 (Ct. App. 2003)). Historically, the *corpus delicti* doctrine required the state to "show the 'body' of a crime by establishing the first two elements of a crime, *i.e.*, the injury and the criminal agency, independently from a defendant's confession." Roth, 138 Idaho at 823, 69 P.3d at 1084 (citing State v. Urie, 92 Idaho 71, 75, 437 P.2d 24, 28 (1968) (McFadden, J., special concurrence); State v. Darrah, 60 Idaho 479, 482, 92 P.2d 143, 144 (1939)); see also Thomas, 145 Idaho at 771, 185 P.3d at 927; State v. Webb, 144 Idaho 413, 414, 162 P.3d 792, 793 (Ct. App. 2007). It has long been the law in Idaho, however, that "[w]hile the evidence adduced at the trial might not be sufficient, in the absence of appellant's extrajudicial confession, to sustain a conviction thereon, it is not necessary to establish independently of the confession each element of the *corpus delicti*." Urie, 92 Idaho at 73, 437 P.2d at 26 (citing State v. Keller, 8 Idaho 699, 70 P. 1051 (1902)); see also Tiffany, 139 Idaho at 915, 88 P.3d at 734; Thomas, 145 Idaho at 771, 185 P.3d at 927; Webb, 144 Idaho at 414, 162 P.3d at 793. Instead, the state must merely provide slight evidence corroborating at least one of those elements, and such evidence may be entirely

circumstantial. Tiffany, 139 Idaho at 915, 88 P.3d at 734; State v. Richardson, 56 Idaho 150, 152-53, 50 P.2d 1012, 1014-15 (1935); Keller, 8 Idaho at 700, 70 P. at 1052; Thomas, 145 Idaho at 771, 185 P.3d at 927.

At the time of the offense in this case, Idaho Code section 18-6101 defined statutory rape as "the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female ... "[w]here the female is under the age of eighteen (18) years." I.C. § 18-6101(1) (2009).[2] Seizing on the element of penetration, Nichols argues, as he did below, that the state failed to establish the *corpus delicti* of statutory rape because, he contends, "there is absolutely no corroboration of any sexual intercourse between Mr. Nichols and K.F. independent of his confessions or admissions." (Appellant's brief, p.11; see also Tr., p.116, Ls.10-23, p.119, L.18 – p.120, L.13.) The district court rejected Nichols' argument below, reasoning:

> [I]t's not required that there be corroboration of each and every element or each and every statement made by the defendant. The corroboration is slight. It means that there is enough corroborating evidence to suggest that this confession or his admissions are, in fact, based on something real as to void the possibility that somebody is out there confessing to things that there's no basis for them to confess.

(Tr., p.120, Ls.16-24.) The court also specifically rejected Nichols' argument that

[2] Effective July 1, 2010, the statute was amended to define two categories of statutory rape, depending on the respective ages of the victim and the perpetrator. See I.C. § 18-6101(1) and (2) (as amended by 2010 Idaho Sess. Laws, ch. 235, § 7 at 542; and 2010 Idaho Sess. Laws, ch. 352, § 1 at 920). Because Nichols was alleged to have violated I.C. § 18-6101 in August 2009, the 2010 amendments have no application to this case.

the state was required to present direct evidence, independent of Nichols' confessions, that sexual intercourse occurred, stating:

> [T]he state is not required to have direct evidence that, in fact, intercourse had occurred. It's the corroboration of the existence of that relationship that [sic] from which a jury could infer that, in fact, an illicit relationship occurred with someone who was under the age of 18.

(Tr., p.122, L.22 – p.123, L.3.) Contrary to Nichols' claims on appeal, the district court was correct.

As intimated by the district court, the purposes of the *corpus delicti* doctrine are to prevent errors in convictions based on false confessions, to act as a safeguard against the defendant's act of confessing but being mistaken that a crime occurred, and to force the prosecution to use its best evidence. Webb, 144 Idaho at 414, 162 P.3d at 793 (Ct. App. 2007) (citing Urie, 92 Idaho at 76, 437 P.2d at 29) (McFadden, J., special concurrence)). While corroborative evidence that itself establishes the fact of sexual intercourse in a statutory rape case would obviously satisfy the underlying purposes of the *corpus delicti* doctrine, such evidence is not required. Rather, as noted by the district court, in cases where sexual intercourse is an element of the crime the state's corroborative evidence need only show the existence of equivocal circumstances tending to show an illicit relationship and an opportunity to commit the crime. See State v. Richardson, 56 Idaho 150, 151, 50 P.2d 1012, 1013 (1935) ("We think the rule well established that in cases of this character [adultery] the corpus delicti may be established by circumstantial evidence, and that direct evidence of the fact of intercourse is not required, but may be inferred from circumstances

that lead to it by fair inference as a necessary conclusion."); State v. Downing, 23 Idaho 540, 130 P. 461 (1913) (finding evidence sufficient to corroborate defendant's confession in attempted rape case where "[s]ome of the circumstances corroborating the alleged confession" were the defendant's "appearance in the room of [a witness] in his stocking feet, and, shortly after, the girl's coming in crying and in a disheveled condition"). As stated by the Court in Richardson:

> If the evidence establish that the parties were together in equivocal circumstances, an opportunity to commit the crime, and an adulterous inclination or disposition in the minds of the parties, and it is further shown that the circumstances are inconsistent with any other reasonably hypothesis than that of guilt, then there is sufficient circumstantial evidence to support a conviction.

Richardson, 56 Idaho at 151, 50 P.2d at 1013. A review of the trial record supports the district court's determination that the state carried its burden of presenting sufficient circumstantial evidence to corroborate Nichols' admissions in this case.

First, the state's evidence showed that Nichols had the opportunity to commit the confessed crime. Nichols told Officer Fuentes and Detective Larsen that he and K.F. were living together in an apartment in Mountain Home. (Tr., p.70, L.24 – p.71, L.10, p.85, L.16 – p.86, L.14, p.101, L.1 – p.102, L.22, p.104, L.22 – p.105, L.6.) This information was corroborated by Officer Fuentes, who testified that he was dispatched to that same residence to investigate a report of a possible juvenile runaway and, upon arrival at the residence, found K.F. and Nichols together in the front yard. (Tr., p.100, L.22 – p.103, L.17, p.105, L.21 – p.106, L.23.) That Nichols and K.F. were living together was also corroborated

by K.F.'s adoptive mother, Melody Fairfax, who testified that she received a call from K.F., before K.F. was taken into custody. (Tr., p.55, L.3 – p.56, L.11.) K.F. placed the call using Nichols' cell phone and told Ms. Fairfax that she was calling from "a place where she was with [Nichols]." (Tr., p.56, Ls.8-11.) Ms. Fairfax also testified that she received several calls from Nichols on the night K.F. was taken into custody, during which Nichols expressed concern for K.F.'s welfare and told Ms. Fairfax that "he had taken care of her [K.F.]."[3] (Tr., p.55, L.20 – p.56, L.7, p.65, L.8 – p.66, L.4.) Together, this evidence was sufficient to establish an opportunity to commit the crime.

The state's evidence was also corroborative of Nichols' confession, in that it established Nichols and K.F. were together in "equivocal circumstances." The evidence showed not only that 54-year-old Nichols was living with K.F., a 17-year-old runaway, but that Nichols actually moved with K.F. from her hometown of Everett, Washington, and brought her with him to Idaho. (Tr., p.53, Ls.2-25, p.73, Ls.15-18, p.85, L.7 – p.87, L.24.) Nichols admitted as much to Detective Larsen (Tr. p.86, L.23 – p.87, L.24, p.95, L.9 – p.96, L.7, p.97,

[3] The state acknowledges that Nichols' statements to Ms. Fairfax might not themselves be sufficiently corroborative of his statements to law enforcement to satisfy the *corpus delicti* doctrine because Idaho *corpus delicti* law does not differentiate between direct confessions of guilt made to authorities, and admissions made to third parties from which guilt may be inferred. See Roth, 138 Idaho at 822 n.2, 69 P.3d at 1082 n.2 (citing State v. Wilson, 51 Idaho 659, 669, 9 P.2d 497, 500 (1932); Keller, 8 Idaho at 704, 70 P. at 1051). Nevertheless, while the *corpus delicti* rule likely cannot be satisfied solely by a defendant's multiple admissions, the Idaho appellate courts have not forbidden the use of multiple admissions as part of a *corpus delicti* analysis. Indeed, multiple admissions, made in different contexts, and to different parties, address the *corpus delicti* purpose of safeguarding against false or mistaken confessions.

L.13 – p.98, L.1), and this admission was corroborated by K.F.'s adoptive mother, who testified that she contacted the Everett Police Department and reported K.F. a runaway in July 2009, roughly coinciding with the date Nichols stated he and K.F. moved to Idaho (Tr., p.54, Ls.18-22, p.86, L.25 – p.87, L.3). Given the age difference between Nichols and K.F. and the circumstances under which they came to live together in Idaho, there is at least a fair inference that Nichols and K.F. were involved in some sort of illicit relationship and, as such, the evidence was sufficient to corroborate Nichols' admissions of sexual intercourse. See Richardson, 56 Idaho at 151, 50 P.2d at 1013 ("direct evidence of the fact of intercourse is not required, but may be inferred from circumstances that lead to it by fair inference as a necessary conclusion").

Finally, Nichols' admissions were corroborated by the fact that, before the admissions were made, K.F. made statements to Officer Fuentes that resulted in a criminal investigation of Nichols. Officer Fuentes turned the case over to Detective Larsen after learning in his interview with K.F. that "there had been possible other illegal contacts involving with [sic] her." (Tr., p.70, Ls.16-23, p.110, Ls.6-18.) While K.F. did not testify at trial, the fact that she made some type of statement to Officer Fuentes that initiated a criminal investigation against Nichols was introduced into evidence without objection. (Id.) The corresponding response to these statements by law enforcement itself provided strong corroboration of Nichols' admissions.

Viewed in light of the applicable legal standards, and considering the purposes of the *corpus delicti* doctrine, the record supports the district court's

determination that the state carried its burden of presenting slight corroborative evidence which, taken together with Nichols' extrajudicial admissions, established the *corpus delicti* of statutory rape. Nichols has thus failed to show that the trial court erred in denying his motion for judgment of acquittal.

## II.
## Nichols Has Failed To Show Error In The District Court's Evidentiary Rulings

### A. Introduction

Nichols argues that the district court erred by permitting K.F.'s adoptive mother to testify as to K.F.'s date of birth as proof that K.F. was under 18 years of age, a necessary element of statutory rape. See I.C. § 18-6101(1) (2009). As he did below, Nichols contends that the testimony was inadmissible hearsay and should have been excluded. (Appellant's brief, pp.12-16.) He also argues that the court erred by allowing Officer Fuentes to testify that K.F. was a runaway, contending that this evidence was offered solely to prove K.F.'s age and should have been excluded pursuant to his hearsay objection. (Appellant's brief, pp.17-19.) For the reasons set forth below, neither claim has merit.

### B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of discretion. State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 970 (2010) (citations omitted).

C. Nichols Has Failed To Show That The District Court Erred By Permitting K.F.'s Adoptive Mother To Testify As To K.F.'s Date Of Birth

1. The Challenged Testimony And The District Court's Ruling

At trial, the prosecutor sought to elicit testimony from K.F.'s adoptive mother, Melody Fairfax, regarding K.F.'s date of birth. (Tr., p.50, L.6 – p.53, L.22.) Nichols initially objected to the proposed testimony on the basis that the state had failed to lay foundation as to Mrs. Fairfax's basis of knowledge of K.F.'s birth date, and that objection was sustained. (Tr., p.50, L.18 – p.51, L.23.) Thereafter, the prosecutor laid additional foundation and again asked Ms. Fairfax, "[W]hat is [K.F.'s] date of birth?" (Tr., p.52, L.1 – p.53, L.5.) Ms. Fairfax initially responded, "I have a birth certificate, and it says May 4, 1992." (Tr., p.53, Ls.10-11.) Following a hearsay objection, however, Ms. Fairfax testified, "I believe her birthday is May 4, 1992." (Tr., p.53, Ls.12-16.) Nichols again asserted a hearsay objection, which the court again overruled, reasoning, "[S]he is not testifying what she saw and what it said. She's testifying to what she understands her birth date to be, so I will overrule the objection." (Tr., p.53, Ls.17-22.)

Following the trial and the jury's verdict finding Nichols guilty of statutory rape, the district court issued a "Memorandum Re: Evidentiary Trial Ruling" in which it clarified its reason for permitting Ms. Fairfax's testimony. (R., p.73.) The court noted that, while it had originally ruled that Ms. Fairfax's testimony regarding K.F.'s birth date was not hearsay, the testimony was actually admissible pursuant to I.R.E. 803(19), which excepts from the hearsay rule evidence of reputation concerning personal or family history. (R., p.73.) The

court therefore altered its ruling to reflect that it overruled Nichols' hearsay objection "in reliance on I.R.E. 803(19)." (Id.)

Nichols challenges the district court's evidentiary ruling, contending there was insufficient foundation for admission of Ms. Nichols' testimony under I.R.E. 803(19). (Appellant's brief, pp.13-16.) Application of the relevant legal standards, however, shows Nichols' argument to be with merit.

2. Nichols Has Failed To Establish Error In The District Court's Determination That The Challenged Testimony Was Admissible Pursuant To I.R.E. 803(19)

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Hearsay evidence is generally inadmissible. I.R.E. 802. However, I.R.E. 803(19) specifically excepts from the hearsay rule evidence of reputation concerning personal or family history. Specifically, the rule provides that the following is not excluded by the hearsay rule, regardless of whether declarant is available as a witness:

> **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

I.R.E. 803(19).

Idaho's appellate courts have never addressed the hearsay exception for evidence of reputation concerning personal or family history contained in I.R.E. 803(19). As explained by other courts addressing the same or substantially

similar provisions, however, the underlying rationale of the exception is that well-reputed facts concerning personal and family history are inherently reliable:

> Rule 803(19) refers to "fact[s] of personal or family history" that, due to their historical nature, are often very difficult to ascertain. Moreover, the pool of persons who have personal knowledge of an individual's birth, death, adoption, *etc.*, is typically quite small, and some or all of such persons may no longer be living at the time proof is sought. *See* 5 WIGMORE ON EVIDENCE § 1481. Reputations among family members or in the community as to such facts are considered inherently trustworthy in light of "the 'natural effusions' ... of those who talk over family affairs when no special reason for bias or passion exists." *Id.* at § 1482. It is for these reasons that reputation evidence of facts of personal or family history is allowed.

Commonwealth v. Collins, 957 A.2d 237, 270 (Pa. 2008) (bracket and ellipsis in original); see also State v. May, 112 P.3d 39, 43-44 (Ariz. Ct. App. 2005) (evidence of reputation concerning personal or family history "is held admissible not only because of the extreme difficulty of producing any better evidence – that is, because it is the best evidence of which the nature of the matter admits – but also because of its general reliability") (internal quotations and citations omitted); Blackburn v. United Parcel Service, Inc., 179 F.3d 81, 98 (3d Cir. 1999) ("[R]eputations regarding relationships and other personal and family matters within a well-defined community are considered to have the circumstantial guarantee of trustworthiness that justifies a hearsay exception.") (Citation omitted).

Consistent with the underlying rationale of the exception, before a witness may testify regarding another person's personal or family history, the proponent of the evidence must establish through foundational testimony that the witness is sufficiently qualified to give the reputation testimony. That is, "the witness must

be qualified by showing membership in a group that could have been familiar with the personal or family history of the person in question, namely, family, associates or community...." Blackburn, 179 F.3d at 100 (quoting 5 *Weinstein's Federal Evidence* § 803.24[1] (Joseph M. McLaughlin ed., 2d ed. 1999)); see also State v. Mitchell, 568 N.W.2d 493, 500 (Iowa 1997) ("Exceptions to the general rule against hearsay are permitted with respect to pedigree where the declaration is by a relative or one in a position that he or she would likely know the facts."). Because a parent is normally familiar with the personal and family history of his or her own child, it is generally accepted that Rule 803(19) permits the parent to testify as to the date and/or circumstances of his or her child's birth, even though the parent may have no personal knowledge of those facts. See United States v. Jean-Baptiste, 166 F.3d 102, 110 (2d Cir. 1999) (father permitted to testify regarding his belief as to son's birthplace, holding Fed. R. Evid. 803(19) "plainly contemplates that members of a family may testify with regard to the common understanding as to the birth of another family member"); May, 112 P.3d at 44 ("Rule 803(19) generally would allow a father to testify to his son's age even though he had no personal knowledge of it.").

At least one court has specifically held that an adoptive parent's testimony regarding her adopted daughter's birth date falls within the hearsay exception for statements of reputation concerning personal or family history. In State v. Mitchell, *supra*, the defendant was charged with third degree sexual abuse, which required the state to prove that the victim was at the time of the abuse 14 or 15 years of age. 568 N.W.2d at 495. At trial, the district court permitted the

victim's adoptive mother to testify regarding the date of the victim's birth, ruling that the testimony was admissible pursuant to Iowa Rule of Evidence 803(19), a provision identical to I.R.E. 803(19). Mitchell, 568 N.W.2d at 499. The Iowa Supreme Court upheld the trial court's admissibility determination, reasoning:

> Exceptions to the general rule against hearsay are permitted with respect to pedigree where the declaration is by a relative or one in a position that he or she would likely know the facts. [Citation omitted.] It is enough that the declarant had such opportunity for acquiring knowledge concerning the pedigree information as leads to a reasonable inference that the declarant possessed such knowledge. [Citations omitted.]
>
> Although [the victim] was adopted, the declarant – the adoptive mother – was certainly in a position to know when [the victim] was born. At the very least, the adoptive mother had the opportunity to acquire such knowledge, and that opportunity would permit a reasonable inference by the jury that she possessed such knowledge. The adoptive mother's testimony about [the victim's] birthday was therefore admissible under rule 803(19).

Mitchell, 568 N.W.2d at 500. The court also upheld the admission of the victim's testimony regarding her own birth date, reasoning, "[T]he adoptive mother's presumptive knowledge of [the victim's] birthday constituted the family tradition and reputation supporting [the victim's] belief as to her age." Id.

In this case, as in Mitchell, the trial court permitted the victim's adoptive mother, Melody Fairfax, to testify as to the victim's age. (Tr., p.53, Ls.13-22.) Because it was established through Ms. Fairfax's testimony that she did not have personal knowledge of the victim's birth date, and because the testimony was offered to prove the matter asserted – *i.e.*, the victim's age – the testimony would ordinarily be excluded by the hearsay rule. See I.R.E. 801(c), 802; Blackburn, 179 F.3d at 96. Like the testimony in Mitchell, however, Ms. Fairfax's testimony

regarding K.F.'s birth date was properly admitted because it fell within the I.R.E. 803(19) exception to the hearsay rule. Like the adoptive mother in Mitchell, Ms. Fairfax was qualified by virtue of her familial relationship with K.F. to know the facts of K.F.'s birth. See Mitchell, 568 N.W.2d at 500 ("Rule 803(19) is not limited to blood relatives but expressly includes members of the family by adoption."). Also like the witness in Mitchell, Ms. Fairfax "was certainly in a position to know when [K.F.] was born" and, "[a]t the very least, ... had the opportunity to acquire such knowledge." Id. In fact, Ms. Fairfax specifically testified regarding the circumstances of K.F.'s adoption and the facts upon which she based her belief regarding K.F.'s age. (Tr., p.51, L.3 – p.53, L.11.) Because Ms. Fairfax, as K.F.'s adoptive mother, was a member of K.F.'s family and in a position (perhaps better than any other, save K.F.'s birth mother and/or adoptive father) to know the circumstances of K.F.'s birth, the district court correctly ruled that Ms. Fairfax's testimony regarding K.F.'s birth date was admissible under I.R.E. 803(19).

Without even citing the foundational requirements for admissibility under I.R.E. 803(19), Nichols argues that the state failed to meet them. (Appellant's brief, pp.14-15.) He contends, in wholly conclusory fashion, that "there was insufficient foundation to establish the trustworthiness of the information that K.F. [sic] adopted mother relied on as to K.F.'s birth date" and, as such, there was "an insufficient foundation for the admission of this testimony under I.R.E. 803(19)." (Appellant's brief, p.15.) This argument lacks merit for at least three reasons. First, it ignores the actual foundational requirements which, in this case, required

the state to show a familial relationship giving rise to a familiarity with the facts of K.F.'s personal and family history. Blackburn, 179 F.3d at 100; Mitchell, 568 N.W.2d at 500. Second, assuming the state was required to independently establish the reliability of the information upon which Ms. Fairfax based her belief as to K.F.'s birth date, the state did so in this case. Ms. Fairfax testified that she went through an adoption agency and was "given a birth certificate of [K.F.'s] birth date and the place where she was born" (Tr., p.52, Ls.11-18); it is hard to imagine a more trustworthy source of a person's birth date than a birth certificate. Finally, to the extent Nichols believes the state was required to establish a hearsay exception for "each hearsay link in the chain of communications regarding" Ms. Fairfax's knowledge of K.F.'s birth date (see Appellant's brief, p.15), such is not the law. The rationale underlying the hearsay exception for evidence of reputation concerning personal or family history recognizes that "reputations regarding relationships and other personal and family matters within a well-defined community are considered to have the circumstantial guarantee of trustworthiness." Blackburn, 179 F.3d at 98. Thus, it is only when the proponent of the evidence fails to make the foundational showing of a familial or other relationship giving rise to circumstantial guarantees of trustworthiness that the proponent of the evidence must establish that "each hearsay link in the communication chain falls under some exception." Id., 179 F.3d at 101 n.14. As discussed in detail above, the state made the requisite foundational showing in this case.

In addition to challenging the state's foundational showing, Nichols also contends that the district court failed to consider "other relevant factors" before admitting Ms. Fairfax's testimony regarding K.F.'s age. (Appellant's brief, p.16.) Citing Blackburn, Nichols contends that, "in addition to considerations of whether a sufficient foundation has been laid, a trial court should also consider additional factors such as how significant the evidence is to the issues disputed at trial, the availability of other evidence of the facts testified to, and the nature of the litigation." (Appellant's brief, p.15 (citing Blackburn, 179 F.3d at 100).) The state acknowledges that the Blackburn opinion cited these factors as considerations a district court should undertake in determining the admissibility of evidence pursuant to the federal counterpart to I.R.E. 803(19). However, as is apparent from the language of the opinion itself, none of these factors bear on the question of whether the proponent of Rule 803(19) evidence has actually made the foundational showing necessary to establish the applicability of the exception. See Blackburn, 179 F.3d at 100 (quoting *Weinstein's Federal Evidence*, § 803.24[3]) ("The judge should consider ... *not only the foundation that has been laid for the reception of this reputation evidence, but also such factors as* ....") (emphasis and concluding ellipsis added). Instead, the factors appear to be aimed at assessing the prejudice a party might suffer if the evidence is admitted. Because Nichols did not raise the issue of prejudice below, he cannot claim it for the first time on appeal as a basis for excluding what the district court correctly determined was otherwise admissible evidence pursuant to I.R.E. 803(19). See I.R.E. 103(a)(1); State v. Norton, 134 Idaho 875,

880, 11 P.3d 494, 499 (Ct. App. 2000) (citing State v. Higgins, 122 Idaho 590, 596, 836 P.2d 536, 542 (1992); State v. Gleason, 130 Idaho 586, 592, 944 P.2d 721, 727 (Ct. App. 1997)) ("Objecting to the admission of evidence on one basis does not preserve a separate and different basis for exclusion of the evidence.").

The district court applied the correct legal standards and correctly determined that Ms. Fairfax's testimony concerning K.F.'s birth date was admissible under I.R.E. 803(19). Nichols has failed to establish an abuse of discretion.

D. Nichols Has Failed To Establish That Officer Fuentes' Testimony Regarding K.F.'s Status As A Runaway Was Inadmissible Hearsay Offered And Admitted For The Purpose Of Proving K.F.'s Age

Officer Humberto Fuentes testified at trial that he was the officer who responded to Nichols' residence to investigate a report regarding "a possible juvenile runaway." (Tr., p.100, L.18 – p.101, L.2.) When asked on direct examination why he contacted the Everett Washington Police Department after making contact with K.F. at Nichols' residence, the officer testified, without objection, "I was told that she was a runaway from the state of Washington." (Tr., p.107, L.19 – p.108, L.2.) The following exchange then took place:

> Q. And after speaking with them, what did you do next?
>
> A. I confirmed with the state of Washington – there was some confusion as to whether or not she was a missing person or she was a runaway, and I had to clarify which one she was. And they clarified it for me that she was, in fact, a runaway.

(Tr., p.108, Ls.8-15.) At that point defense counsel interjected a hearsay objection, which the district court sustained. (Tr., p.108, Ls.16-19.)

On redirect examination, the prosecutor again asked Officer Fuentes regarding K.F.'s status as a runaway:

> Q. Okay. And then [defense counsel] had asked you so you had no idea what age [K.F.] was. Correct?
>
> A. Correct.
>
> Q. You indicated [K.F.] was a runaway from Washington. Correct?
>
> A. Correct.

(Tr., p.112, Ls.17-23.) Defense counsel again objected on the basis of hearsay. (Tr., p.112, Ls.24-25.) The court overruled the objection, stating, "He's already testified to that." (Tr., p.113, Ls.1-2.) The prosecutor then resumed his line of questioning and asked the officer whether it was his "understanding that to be a runaway you have to be under 18 years of age," to which the officer responded, "Yes." (Tr., p.113, Ls.3-6.) Defense counsel again objected, and the court sustained the objection, stating, "I will strike the answer and the question. The jury is to disregard that. That's calling for a legal conclusion." (Tr., p.113, Ls.8-12.)

On appeal, Nichols argues that the district court erred by permitting Officer Fuentes to testify regarding K.F.'s status as a runaway, contending the evidence was offered and admitted solely for the hearsay purpose of establishing the truth of the matter asserted – "to show that K.F. was under the age of 18." (Appellant's brief, pp.18-19.) Nichols' argument fails on its premise, and is not properly before this Court on appeal, because Officer Fuentes'

testimony that he was told K.F. was a runaway is not, by itself, hearsay evidence of K.F.'s age, nor was the officer permitted to testify as to that issue.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). The truth of the matter asserted in Officer Fuentes' statement that he was told K.F. was a runaway was just that – that K.F. was a runaway; the statement did not, by itself, assert any matter relating to K.F.'s age. Compare, State v. Boehner, 114 Idaho 311, 756 P.2d 1075 (Ct. App. 1988) (evidence that officers were told defendant "wanted to kill a cop" was inadmissible hearsay in trial for assault with intent commit a serious felony upon a law enforcement officer where only relevant purpose was to show that defendant actually held that desire). Although the state subsequently attempted in its questioning to extrapolate from the officer's testimony whether K.F.'s status as a runaway meant that she had to be under 18 years of age, it was not permitted to do so. The court sustained Nichols' objection, struck both the question and the officer's answer, and instructed the jury to disregard it. (Tr., p.113, Ls.3-12.) Because the officer's testimony regarding K.F.'s status as a runaway was not hearsay evidence of K.F.'s age, and because the court expressly precluded the officer from otherwise testifying to any matters pertaining to K.F.'s age, there is no adverse ruling to form the basis of Nichols' claim on appeal, much less any showing of error. See State v. Barnes, 133 Idaho 378, 384, 987 P.2d 290, 296 (1999) (quoting State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993)) (appellate court "will not 'review a trial

court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for an assignment of error.'").

Even assuming an adverse ruling and error in the admission of Officer Fuentes' testimony concerning K.F.'s status as a runaway, such error was harmless. Where evidence is erroneously admitted, the test for determining if the error was harmless is "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction and that the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" State v. Jones, 125 Idaho 477, 488, 873 P.2d 122, 133 (1994) (quoting State v. Pizzuto, 119 Idaho 742, 762, 810 P.2d 680, 700 (1991)); see also State v. Zimmerman, 121 Idaho 971, 976, 829 P.2d 861, 865 (1992) (quoting State v. Sharp, 101 Idaho 498, 507, 616 P.2d 1034, 1043 (1980)) (to hold erroneous admission of evidence harmless, court must "'declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that [the] evidence complained of contributed to the conviction'") (brackets original). The State has the burden of demonstrating that an objected-to error is harmless beyond a reasonable doubt. State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 974 (2010).

Application of the foregoing principles to the facts of this case shows that any error in the admission of Officer Fuentes' testimony was harmless. The state called three witnesses at trial, each one of whom testified at one point or another, without objection, that K.F. was a runaway. (See Tr., p.54, Ls.18-22 (K.F.'s adoptive mother testifying from personal knowledge that she reported

K.F. as a runaway); p.70, Ls.16-23 (Detective Larsen testifying without objection that he received a report from Officer Fuentes indicating that he had "located a runaway"); p.100, L. 22 – p.101, L.2 (Officer Fuentes testifying without objection that he responded to a dispatch regarding "a possible juvenile runaway"); p.107, L.19 – p.108, L.2 (Officer Fuentes testifying without objection that he "was told that [K.F.] was a runaway from the state of Washington").) In addition, K.F.'s adoptive mother, Melody Fairfax, testified as to K.F.'s date of birth (Tr., p.53, Ls.13-25) and, for the reasons set forth in Section II.C., *supra*, that testimony was properly admitted. Given the numerous un-objected to references to K.F.'s status as a runaway and the fact that K.F.'s own mother testified regarding K.F.'s age, there is no reasonable possibility that Officer Fuentes' objected-to testimony that K.F. was a runaway contributed to the jury's ultimate determination that K.F. was under 18 years of age. This is especially true since, almost immediately following that testimony, the district court specifically instructed the jury to disregard a question and answer concerning the age of a runway, generally. (Tr., p.113, Ls.3-12.) Presuming as this Court must that the jury followed that instruction, e.g., State v. Gomez, 151 Idaho 146, ___, 254 P.3d 47, 57 (Ct. App. 2011) (review denied 7/7/11); State v. Kilby, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997), there is no reasonable possibility that the admission of the evidence caused the jury to convict Nichols on an improper basis. If there was error, it was harmless.

## III.
## Nichols Has Failed To Show Fundamental Error In The Jury Instructions

### A. Introduction

For the first time on appeal, Nichols argues that the district court erred by failing to properly instruct the jury regarding the elements of statutory rape. (Appellant's brief, pp.21-22.) He also argues that the court committed fundamental error by failing to *sua sponte* instruct the jury on *corpus delicti* and corroboration of his extrajudicial statements. (Appellant's brief, pp.23-24.) For the reasons set forth below, Nichols has failed to establish fundamental error with respect to either of his claims of instructional error and, as such, the claims are not reviewable for the first time on appeal.

### B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, ___ P.3d ___, 2011 WL 4030069, *9 (Idaho, Sept. 13, 2011); State v. Pina, 149 Idaho 140, 147, 233 P.3d 71, 78 (2010) (citing State v. Young, 138 Idaho 370, 372, 64 P.3d 296, 298 (2002)). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." Draper, ___ P.3d at ___, 2011 WL 4030069 at *9 (quoting State v. Shackelford, 150 Idaho 355, ___, 247 P.3d 582, 600-01 (2010)).

C. Nichols Has Failed To Carry His Burden Of Establishing Fundamental Error With Respect To Either Of His Claims Of Instructional Error

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). See also State v. Draper, ___ P.3d ___, 2011 WL 4030069, *9 (Idaho, Sept. 13, 2011) (citing State v. Sheahan, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003)) ("An error generally is not reviewable if raised for the first time on appeal."). This same principle applies to alleged errors in jury instructions. See I.C.R. 30(b) ("No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection."). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 979 (2010).

Review under the fundamental error doctrine requires Nichols to demonstrate that each error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (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) was not harmless." Perry, 150 Idaho at ___, 245 P.3d at 980. Application of this three-prong test to Nichols' claims of instructional error shows that Nichols has failed to meet his burden.

1. Nichols Has Failed To Show Fundamental Error In The Elements Instruction For Statutory Rape

The district court instructed the jury that, to find Nichols guilty of statutory rape, it must find that the state proved each of the following elements beyond a reasonable doubt:

1. On or between the 1st day of August 2009 and the 21st day of August 2009
2. in the state of Idaho
3. the defendant TIMOTHY L. NICHOLS did penetrate the vaginal opening of K.F., a female person, and
4. K.F. was under the age of eighteen years of age.

(Jury Instruction No. 13 (Augmentation).)

Nichols did not object to this instruction below but argues on appeal that it was erroneous because it failed to instruct the jury that the penetration of K.F.'s vaginal opening had to be accomplished with Nichols' penis. (Appellant's brief, pp.21-22.) Nichols contends that, because I.C. § 18-6101(1) (2009) defined statutory rape as the "penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female who is under the age of 18," the omission of the "with the perpetrator's penis" language from the elements instruction relieved the state of its burden of proving a statutory element and amounted to fundamental error. (Appellant's brief, pp.21-22.) Nichols is incorrect.

The state acknowledges that, had an objection been raised below, it would have been error for the district court not to have altered the instruction to match the statutory language. Nichols has failed to show that the failure of the

district court to *sua sponte* correct the instruction to reflect the statutory language rose to the level of fundamental error, however, because he has failed to show either that the error was clear on the record or that he was prejudiced thereby. See Perry, 150 Idaho at ___, 245 P.3d at 980. In other words, Nichols has failed to show that the error in the instruction actually relieved the state of its burden of proving all of the elements of statutory rape beyond a reasonable doubt. See, e.g., Draper, ___ P.3d at ___, 2011 WL 4030069 at *10 (a jury instruction that relieves the state of its duty to prove the essential elements of a crime violates due process and rises to the level of fundamental error).

As set forth above, a party seeking appellate review of an unpreserved issue pursuant to the fundamental error doctrine must show that the alleged error is "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." Perry, 150 Idaho at ___, 245 P.3d at 980 (parenthesis omitted). Nichols argues that defense counsel's failure to object to the omission of the "with the perpetrator's penis" language from the elements instruction could not have been the product of trial strategy because "Nichols pleaded not guilty, thereby putting each and every element of the charged offense at issue in his trial" and, "[i]n such cases, there is no tactical advantage to be gained from excusing the State of its burden of proof." (Appellant's brief, p.22 (citation omitted).) Nichols' argument is unpersuasive, however, because it ignores both the state of the evidence and the defense's theory in this case.

Nichols advanced two theories at trial: (1) he did not have sexual intercourse with K.F., and (2) even if he did, K.F. was not under the age of 18. (See generally, Tr., p.150, L.16 – p.156, L.154, L.23.) With respect to the first theory, Nichols argued to the jury that the admissions he made during his police interview were not corroborated and were otherwise not necessarily reliable because they were "extracted in a windowless room" and Nichols may have been pressured to make them. (Tr., p.152, Ls.5-16, p.154, Ls.13-23.) However, he never contested the fact that, if the sexual intercourse happened, it happened in the only manner he confessed, *i.e.*, "penis and vaginal-style sex." (Tr., p.88, L.20 – p.89, L.8.) Nor was there any evidence from which the jury could conclude that Nichols penetrated K.F.'s vaginal opening with anything other than his penis. The only evidence the state presented with respect to the penetration element of statutory rape consisted of Nichols' admission that he and K.F. engaged in "penis and vaginal-style sex." (Id.) Given the dearth of evidence establishing any other form of vaginal penetration, it is unsurprising that defense counsel would choose not to object to the court's elements instruction. Even if counsel had deemed the instruction technically erroneous for failing to include the statutory "with the perpetrator's penis" language, counsel may have deliberately chosen to forego objecting for any number of reasons, including counsel's determination that the omitted language did not relieve the state of its burden of proof because there was no evidence from which the jury could find the vaginal penetration by means other than Nichols' penis. Nichols has failed to show that the error he claims plainly exists on the record.

For similar reasons, Nichols has also failed to carry his burden of establishing the third prong of the fundamental error standard, which requires him to demonstrate that the error he asserts was not harmless. Perry, 150 Idaho at ___, 245 P.3d at 980. The Idaho Supreme Court has recently reiterated the standard for harmless error applicable to claims that a jury instruction omitted an element of a charged offense as follows:

> [W]here the jury instructions were only partially erroneous, such as where the jury instructions improperly omitted one element of a charged offense, the appellate court may apply the harmless error test, and where the evidence supporting a finding on the omitted element is overwhelming and uncontroverted, so that no rational jury could have found that the state failed to prove that element, the constitutional violation may be deemed harmless.

Draper, ___ P.3d at ___, 2011 WL 4030069 at *13-14 (quoting Perry, 150 Idaho at ___, 245 P.3d at 976). See also Neder v. United States, 527 U.S. 1, 17 (1999) ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."). For the reasons set forth in the preceding paragraph, and incorporated herein by reference, application of this standard to the facts of this case shows that the error in the omission of the "with the perpetrator's penis" language from the elements instruction was harmless. Nichols never contested that, if he penetrated K.F.'s vaginal opening, he did so in the only manner supported by the evidence, *i.e.*, with his penis. Because the element was uncontested, and because there was no evidence from which the jury could find that Nichols penetrated K.F.'s vaginal

opening with anything other than his penis, this Court can conclude beyond a reasonable doubt that the jury verdict would have been the same even absent the error. Nichols has failed to carry his burden of establishing that the error was not harmless. His claim of instructional error, raised for the first time on appeal, therefore fails.

2. Nichols Has Failed To Establish That The District Court Committed Fundamental Error By Failing To *Sua Sponte* Give A *Corpus Delicti* Instruction

Nichols argues that the district court erred by failing to *sua sponte* instruct the jury regarding the *corpus delicti* doctrine and, specifically, the requirement that there be independent evidence corroborating Nichols' admission of sexual intercourse. (Appellant's brief, pp.23-24.) Because Nichols never requested such an instruction below, he must satisfy the three-prong fundamental error test established by the Idaho Supreme Court in Perry, *supra*. For the reasons that follow, he has failed to do so. Indeed, Nichols' claim fails under the first prong of the Perry analysis because the failure to give a *corpus delicti* instruction did not violate any of his constitutional rights. Perry, 150 Idaho at ___, 245 P.3d at 980.

It is axiomatic that due process requires the state in every criminal case to prove the essential elements of a crime beyond a reasonable doubt. E.g., Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993); In Re Winship, 397 U.S. 358, 364 (1970). In Idaho, the fact that a crime has been committed cannot be proven by the defendant's extrajudicial statements alone. State v. Tiffany, 139 Idaho 909, 915, 88 P.3d 728, 734 (2004). However, this principle, known as the *corpus delicti* doctrine, is not rooted in either the federal or state constitution.

Rather, it is a judicially created doctrine, first recognized by the Idaho Supreme Court in 1902. See State v. Keller, 8 Idaho 699, 70 P. 1051 (1902) (discussed extensively in Tiffany, 139 Idaho at 912-13, 88 P.3d at 731-32). While the *corpus delicti* rule serves as sort of a prophylactic measure to safeguard against wrongful convictions based on false confessions, see, e.g., Thomas v. State, 145 Idaho 765, 771, 185 P.3d 921, 927 (Ct. App. 2008), there is no constitutional requirement (or even a statutory requirement, for that matter) that the body of a crime be proven other than by a defendant's admissions. Because a *corpus delicti* instruction was not constitutionally required, Nichols has failed to establish that the failure of the trial court to *sua sponte* give such an instruction violated any of his unwaived constitutional rights.

The second element of a claim of fundamental error is that the alleged error is "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." Perry, 150 Idaho at ___, 245 P.3d at 980 (parenthesis omitted). Nichols argues that defense counsel's failure to object to the lack of a *corpus delicti* instruction could not have been a tactical decision because defense counsel argued the *corpus delicti* issue both before trial and in his motion for judgment of acquittal at the close of the state's case. (Appellant's brief, p.24.) However, it is precisely because Nichols' theory of the case was that the state failed to present adequate corroborative evidence of his admissions to establish the *corpus delicti* of statutory rape that the asserted error in the court's

failure to give a *corpus delicti* instruction never requested by Nichols is not "clear."

The reasoning of State v. Eastman, 122 Idaho 87, 831 P.2d 555 (1992), and State v. Adair, 99 Idaho 703, 587 P.2d 1238 (1978),[5] is instructive. In Eastman, the Idaho Supreme Court held that the district court did not err when it did not *sua sponte* instruct the jury on the defense theory of necessity where Eastman had not requested an instruction on his theory of the case, stating, "The defendant's argument would mandate the trial court to instruct the jury on any defense theory possible. We find no authority for this proposition." Eastman, 122 Idaho at 90, 831 P.2d at 558. The Court applied the same analysis it applies when there is no requested instruction on an included offense, and stated: "It is incumbent upon the defendant to submit a requested instruction [on his theory of the case] or in some other manner apprise the trial court of the specific instructions requested." Eastman, 122 Idaho at 90, 831 P.2d at 558.

In Adair, the defendant asserted that his counsel had been ineffective for failing to request an instruction on corroboration of an accomplice. Id. at 707, 587 P.2d at 1242. The Idaho Supreme Court agreed that where it is clear that a state's witness is an accomplice, the trial court is obligated to instruct regarding the necessity of corroboration if "defense counsel requested such an instruction." Id. at 708, 587 P.2d at 1243. However, because trial counsel may have deemed it "tactically advantageous" to not interject such an issue in the trial, Adair's claim

[5] Overruled on other grounds by State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981).

of ineffective assistance of counsel for failing to request such an instruction failed. Id.

Here, trial counsel twice argued the *corpus delicti* issue to the trial court but, for reasons undisclosed by the record, failed to request a *corpus delicti* instruction and/or object to the lack of such instruction. Trial counsel may have recognized the futility of requesting such an instruction knowing, as set forth in more detail in Section I.C., *supra*, that the state presented the slight corroborative evidence necessary to establish the *corpus delicti* of statutory rape. Trial counsel may also have thought it tactically advantageous to not call to the attention of the jury that the corroborating evidence need only be slight and need not be sufficient to establish each element of the *corpus delicti*. Tiffany, 139 Idaho at 915, 88 P.3d at 734. Even assuming that the court would have had a duty to instruct the jury on corroboration had such a request been made, the court was simply not obligated to give an unrequested instruction on Nichols' theory of the defense. Eastman, 122 Idaho at 90, 831 P.2d at 558; Adair, 99 Idaho at 708, 587 P.2d at 1243. Because the district court was not obligated to instruct the jury on a defense theory absent an affirmative request, Nichols has failed to show that its failure to do so constituted clear error. Nichols' argument, therefore, also fails under the second prong of Perry.

The final element of a claim of fundamental error requires Nichols to demonstrate that the error he asserts was not harmless. Perry, 150 Idaho at ___, 245 P.3d at 980. Stated another way, Nichols has the burden of "demonstrat[ing] that the error *did* affect the outcome." Id. at ___, 245 P.3d at

977 (emphasis original). Nichols cannot meet this burden. For the reasons set forth in Section I.C., *supra*, and incorporated herein by reference, the state presented slight corroborative evidence which, taken together with Nichols' extrajudicial admissions, established the *corpus delicti* of statutory rape. Because there was sufficient corroboration of Nichols' admissions, there is no reason to believe the jurors would have reached a different result if they had been instructed on the corroboration requirement. See State v. Hill, 140 Idaho 625, 630, 97 P.3d 1014, 1019 (Ct. App. 2004) (assuming without deciding that trial court had duty to *sua sponte* instruct on accomplice corroboration requirement, any error in failing to give such instruction was harmless where ample corroborative evidence was presented). Nichols has failed to meet his burden of establishing that any error actually affected the outcome of the trial. His claim of instructional error, raised for the first time on appeal, therefore fails.

## IV.
## Nichols Has Failed To Show Fundamental Error With Respect To His Unpreserved Claims Of Prosecutorial Misconduct

### A. Introduction

For the first time on appeal Nichols argues that the prosecutor made statements during closing argument that constituted prosecutorial misconduct and amounted to fundamental error. Specifically, he contends that the prosecutor committed misconduct by twice arguing facts that were not in evidence. (Appellant's brief, pp.25-28.) A review of the challenged remarks shows no misconduct, much less misconduct rising to the level of fundamental error.

B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989).

C. Nichols Has Failed To Show Any Prosecutorial Misconduct, Much Less Misconduct Amounting To Fundamental Error

An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" 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," generally by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Id. at ___, 245 P.3d at 978.

Nichols argues that the prosecutor committed misconduct rising to the level of fundamental error by twice arguing during closing argument facts that were not in evidence. (Appellant's brief, pp.25-28.) Nichols, however, has failed to show fundamental error from the record. Indeed, a review of the record and the applicable law shows that the arguments singled out are entirely proper and, as such, Nichols has failed to satisfy even the first prong of the fundamental error analysis.

A prosecutor has considerable latitude in closing argument. State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009); State v. Porter, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997); State v. Priest, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995). He or she is entitled to argue all reasonable inferences from the evidence in the record. Severson, 147 Idaho at 720, 215 P.3d at 440; Porter, 130 Idaho at 786, 948 P.2d at 141 (citing State v. Garcia, 100 Idaho 108, 110, 594 P.2d 146, 148 (1979)). If a prosecutor exceeds this latitude and "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 ___, 245 P.3d at 979.

In this case, Nichols contends that "the prosecutor referred to facts that were never introduced into evidence at two separate points during his closing argument." (Appellant's brief, p.27.) The first alleged instance of misconduct

relates to the following remarks made by the prosecutor when discussing Officer Fuentes' testimony:

> When [K.F.] was at the police station, the officer indicated he set her down in the interview room and talked with her. During the course or based upon what he learned from that interview with [K.F.], he felt something wasn't right. And because he felt something wasn't right about what he heard, he then passed his report on to the detective division so further investigation could be performed. And that further investigation entailed the detective, Detective Larsen in this case, following up with Mr. Nichols.

(Tr., p.143, Ls.13-23.) Nichols argues that the above argument was an improper attempt by the prosecutor to secure a verdict on a basis other than the evidence presented at trial because Officer Fuentes never expressly testified that "he felt something wasn't right" after his interview with the victim. (Appellant's brief, p.27.) Nichols has failed to show error, much less error of constitutional significance, however, because a review of the record shows that the prosecutor's statement that the officer "felt something wasn't right" was a reasonable inference flowing from the evidence presented at trial.

Officer Fuentes specifically testified that he interviewed K.F. and, based upon that interview, decided to turn the case over to the detective division. (Tr., p.110, Ls.6-18.) Detective Larsen testified that he began investigating the case after receiving a report from Officer Fuentes "that he had located a runaway in the City of Mountain Home, and there had been possible other illegal contacts involving with [sic] her." (Tr., p.70, Ls.16-23.) Given this direct evidence, which showed that Officer Fuentes turned the case over to Detective Larsen based on his determination following K.F.'s interview that "there had been possible other illegal contacts" with her, there can be no question that the prosecutor's

argument was proper. Although Officer Fuentes did not expressly testify that he turned the case over to the detective division based upon a feeling that "something wasn't right," such is clearly the reasonable inference from the evidence actually presented on this issue. Nichols has failed to show error, much less fundamental error, in relation to his first claim of prosecutorial misconduct.

Nichols' second claim of misconduct relates to the following statements made by the prosecutor when arguing the significance of Detective Larsen's testimony concerning the admissions Nichols made during his police interview:

> He testified further that – in trying to figure out that they had been living here, explain – had Mr. Nichols explain to him the living arrangements of the situation here in Idaho. Mr. Nichols told Detective Larsen that they were both on the lease together. He asked, "Explain the layout or the arrangements of the residence." There was two bedrooms. They both slept in one bedroom. They both slept in one bed.

(Tr., p.146, Ls.14-22.) Nichols claims that this argument was an improper attempt by the prosecutor to secure a conviction on evidence other than that presented at trial because "Detective Larsen only testified that Mr. Nichols had told him that he shared a room with K.F., not that the two slept in the same bed within this room." (Appellant's brief, p.27 (citing Tr., p.86, Ls.15-18).) Once again, Nichols has failed to show error. Detective Larsen testified that Nichols made several admissions, including that he and K.F. were in a "dating relationship," that they shared a room together in their two-bedroom apartment and that, since living in Idaho, they had had engaged in "penis and vaginal-style" sexual intercourse approximately two to three times a week. (Tr., p.85, L.24 –

p.86, L.18, p.87, L.12 – p.89, L.8, p.90, L.16 – p.91, L.3.) Although not directly admitted by Nichols or testified to by Detective Larsen, the fact that Nichols and K.F. shared a bed is the obvious inference from the evidence that Nichols and K.F. were in a dating relationship, shared a bedroom and engaged in sexual intercourse. Nichols has failed to show that the prosecutor's argument was improper, much less that it rose to the level of fundamental error.

Because a review of the record shows that the arguments Nichols challenges were based on reasonable inferences drawn from the evidence at trial, Nichols has failed to show that the arguments were improper. His unpreserved claims of prosecutorial misconduct therefore fail under the first prong of Perry.

## CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Nichols guilty of statutory rape.

DATED this 4th day of October 2011.

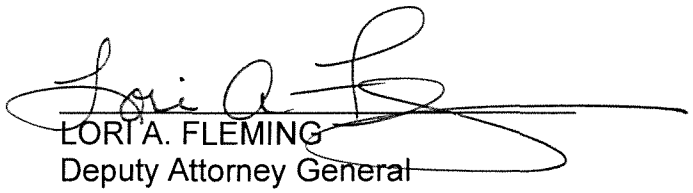
LORI A. FLEMING
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of October 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARAH E. TOMPKINS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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



LORI A. FLEMING
Deputy Attorney General

LAF/pm