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State v. Nichols Appellant's Brief Dckt. 38123

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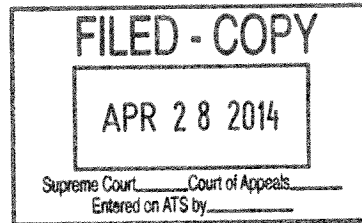
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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 38123
Plaintiff-Respondent,)	
)	ELMORE COUNTY NO. CR 2009-4407
v.)	
)	
TIMOTHY NICHOLS,)	APPELLANT'S BRIEF
)	IN SUPPORT OF
Defendant-Appellant.)	PETITION FOR REVIEW
_____)	

STATEMENT OF THE CASE

Nature of the Case

Timothy Nichols asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2014 Opinion No. 6 (Ct. App. February 24, 2014) (*hereinafter*, Opinion). He asks that this Court grant his petition for review because this case deals with issues of first impression and because the underlying opinion by the Idaho Court of Appeals is likely in conflict with prior precedent from this Court.

Statement of the Facts & Course of Proceedings

Mr. Nichols was charged by information with statutory rape. (R., pp.17-18.) Thereafter, the State filed a motion in limine with the district court seeking to preclude Mr. Nichols from raising any defense to this charge with regard to either mistake of age or consent. (R., pp.33-36.) The State asserted that any such defenses would be irrelevant to the charge of statutory rape under I.R.E. 401 in light of Idaho case law that indicated that neither mistake of age or consent can stand as a defense to an allegation of rape pursuant to I.C. § 18-6101(1). (R., pp.33-36.)

At the hearing on the State's motion in limine, Mr. Nichols addressed two sets of concerns with regard to his case: first, he asserted that he should be allowed to raise the defenses of good faith mistake as to age and consent against the charge of statutory rape; and second, Mr. Nichols asserted that his case presented a *corpus delicti* issue if the alleged victim did not testify at trial. (Tr., p.8, L.10 – p.18, L.15.) However, because Mr. Nichols was not personally present for this hearing, the district court delayed any ruling on these issues. (Tr., p.6, L.11 – p.7, L.24, p.18, L.17 – p.19, L.7.)

Following this hearing, the State submitted two sets of briefing – one addressing the issue of *corpus delicti* and one providing supplemental authority regarding the potential defenses at trial of consent and/or mistake of age. (R., pp.46-52.) Regarding the *corpus delicti* issue, the State asserted that the testimony of the alleged victim was not necessary in order to establish the *corpus delicti* of the offense in this case. (R., pp.46-47.) But the only "corroboration" of Mr. Nichols' confession offered up by the State was that he was living with the alleged victim at the time that a police officer was

dispatched to his home¹ and that the alleged victim's mother stated to police that she came to Idaho from her home in Washington State in order to retrieve the alleged victim. (R., p.47.)

Regarding Mr. Nichols' intent to claim consent and/or reasonable mistake regarding age as a defense, the State asserted that the primary case relied upon by Mr. Nichols in his argument, *Lawrence v. Texas*, was inapposite to his claim because the *Lawrence* Opinion's holding was expressly limited to private, consensual encounters between adults. (R., pp.49-51.) The State also provided the district court with case law from other jurisdictions reaching a similar conclusion. (R., pp.50-51.)

The district court took up the issues relating to the State's motion in limine on the day of trial. The court granted the State's motion in limine to preclude Mr. Nichols from raising any defense as to good faith mistake regarding the alleged victim's age, or raising any defense of consent. (Tr., p.26, L.21 – p.31, L.5.) However, the court did not address the issue previously raised by Mr. Nichols regarding the absence of any evidence or corroboration of the *corpus delicti* of the charged offense aside from his confession. (Tr., p.26, L.21 – p.31, L.15.)

The State presented only three witnesses at trial. The first was Melody Fairfax, K.F.'s adopted mother. (Tr., p.50, L.3 – p.51, L.6.) Ms. Fairfax was not present when K.F. was born. (Tr., p.51, Ls.14-19.) She was only told that K.F. was approximately 10 months old when Ms. Fairfax adopted K.F.; and she further testified that, as part of the

¹ This Court may wish to note that this purported "corroboration" – i.e. that K.F. and Mr. Nichols were living together - was itself only evinced by Mr. Nichols' statements and confession to law enforcement, and therefore this would not constitute "corroboration" of the same confession.

adoption process, she was given a birth certificate for K.F. that listed her date and place of birth. (Tr., p.51, L.3 – p.52, L.18.) Mr. Nichols objected to the testimony regarding K.F.'s birth date on hearsay grounds, but the district court originally held that this was not hearsay. (Tr., p.53, Ls.2-22.)

Ms. Fairfax also testified that K.F. was diagnosed with schizoaffective disorder and Asperger's Syndrome. (Tr., p.54, Ls.1-9.) Unfortunately, K.F. apparently would refuse to take her medications for these conditions and frequently ran away from home. (Tr., p.54, Ls.10-17.) K.F. had apparently run away from home prior to being found at Mr. Nichols' residence in Idaho. (Tr., p.54, L.18 – p.56, L.7.) In fact, at the time of trial K.F. had again run away from home and her whereabouts were unknown. (Tr., p.57, Ls.5-6.) By Ms. Fairfax's estimation, K.F. had run away from home between 15-20 times in the past. (Tr., p.66, L.25 – p.67, L.8.) Ms. Fairfax further testified that she was at the point where she refused to report K.F. as missing to law enforcement given her history for running away. (Tr., p.66, L.25 – p.67, L.8.)

The second witness for the State was Detective Ty Larsen, who was a detective with the Mountain Home police department. (Tr., p.68, L.22 – p.69, L.23.) Detective Larsen testified that he contacted Mr. Nichols after receiving a report that Mr. Nichols might be living with a potential runaway. (Tr., p.70, L.8 – p.71, L.4.) Upon being contacted, Mr. Nichols agreed to come in to the police station for an interview. (Tr., p.71, Ls.15-22.)

According to the officer, Mr. Nichols admitted that he and K.F. were residing together in a two-bedroom apartment for about one month. (Tr., p.85, L.25 – p.86, L.22.) Mr. Nichols stated to the officer that he had come to Idaho from Washington

state, and that K.F. had moved with him. He further allegedly admitted that he and K.F. were involved in a dating relationship. (Tr., p.86, L.23 – p.87, L.18.)

Detective Larsen provided the only testimony at all during the trial that indicated any sexual relationship between K.F. and Mr. Nichols, and this came solely from Mr. Nichols' alleged confessions to the officer. The detective testified that Mr. Nichols admitted to engaging in sexual intercourse as part of this dating relationship. (Tr., p.88, L.8 – 89, L.8.) But Detective Larsen never verified at all that the two were, in fact, living together in Idaho. (Tr., p.94, L.24 – p.95, L.8.)

The final witness presented by the State was another police officer – Officer Humberto Fuentes, also with the Mountain Home police department. (Tr., p.98, L.22 – p.99, L.2.) Officer Fuentes was the officer who first responded to a dispatch regarding a potential runaway. (Tr., p.100, L.18 – p.101, L.2.) When the officer arrived at Mr. Nichols' house, he observed Mr. Nichols and K.F. sitting underneath a tree in the front yard of the residence. (Tr., p.103, Ls.5-9.) K.F. appeared to be upset and crying, and Mr. Nichols was trying to comfort her. (Tr., p.103, Ls.12-17.) Officer Fuentes talked to Mr. Nichols, who allegedly told the officer that he and K.F. resided at the apartment together and had moved there from Washington. (Tr., p.103, L.24 – p.105, L.6.) After confirming that K.F. was a runaway, Officer Fuentes placed her in custody and called her mother. (Tr., p.107, L.19 – p.109, L.22.)

The officer never saw any identification from K.F. that listed a birth date and had no personal knowledge of her age. (Tr., p.111, Ls.3-19.)

After the testimony of Officer Fuentes, Mr. Nichols moved the district court pursuant to Idaho Criminal Rule 29 (*hereinafter*, Rule 29) for a judgment of acquittal on

the basis that the State had failed to establish the *corpus delicti* of the charged offense. (Tr., p.116, L.10 – p.123, L.5.) The district court denied this motion and held that no independent proof of intercourse was actually required in order to establish the *corpus delicti* of the charged offense. (Tr., p.120, L.14 – p.123, L.5.) And so the jury was never instructed regarding *corpus delicti*. (Tr., p.133, L.9 – p.140, L.22.)

The district court did provide a non-pattern jury instruction with regard to the statutory elements of statutory rape in Idaho. (Tr., p.135, L.13 – p.136, L.1.) However, the court's instruction failed to inform the jurors that they had to find that Mr. Nichols had penetrated K.F. with his penis – they merely instructed the jurors that any finding of vaginal penetration would suffice. (Tr., p.135, L.13 – p.136, L.1.)

During closing arguments, the prosecutor made several statements characterizing the testimony that was provided at trial. In the process, the prosecutor misstated the testimony of both Detective Larsen and Officer Fuentes, referring to facts that were not in evidence at trial. With regard to Detective Larsen, the prosecutor stated that the detective had testified that Mr. Nichols and K.F. had “both slept in one bed,” in the same room during the time that K.F. was alleged to have lived with Mr. Nichols. (Tr., p.146, L.22.) As to Officer Fuentes' testimony, the prosecutor told the jury that:

During the course or based upon what he learned from the interview with [K.F.], he felt that 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.

(Tr., p.143, Ls.15-21.) Contrary to the representations of the State, Officer Fuentes never testified about feeling “something wasn't right,” based upon the statements of K.F.

The jury convicted Mr. Nichols of statutory rape. (Tr., p.164, L.16 - p.167, L.5; R., p.68.) After the trial had already concluded, the district court returned to its earlier

ruling with regard to K.F.'s mother's testimony regarding K.F.'s date of birth. (R., p.73.) Although acknowledging that, at trial, the court had characterized this testimony as "not hearsay," the district court amended this conclusion and instead found that this testimony fell within an exception to the hearsay rule. (R., p.73.) Specifically, the court found that this testimony fell within the exception for reputation concerning personal or family history provided under I.R.E. 803(19). (R., p.73.) The district court entered its memorandum regarding this ruling apparently in order to "augment" the court's prior ruling. (R., p.73.)

The district court sentenced Mr. Nichols to 10 years, with two years fixed, and retained jurisdiction over his case. (4/2/10 Tr., p.33, L.4 – p.34, L.1; R., pp.90-92.) Prior to the expiration of the district court's period of retained jurisdiction, the court relinquished jurisdiction over Mr. Nichols' case and executed his sentence without reduction. (Tr., p.208, Ls.12-18; R., pp.113-114.) Thereafter, Mr. Nichols filed a timely Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion seeking a reduction of his sentence, which was denied by the district court without a hearing. (Motion for Correction or Reduction of Sentence, Augment; Memorandum Decision on Defendant's Motion for Reduction of Sentence, Augment.) Mr. Nichols timely appealed from the district court's order re-imposing his sentence and relinquishing jurisdiction. (R., pp.116-119.)

During the pendency of this appeal, this Court granted the State's petition for review in *State v. Suriner*² and further granted Mr. Nichols' motion to stay appellate proceedings pending a decision from this Court regarding the *corpus delicti* issue in that

² *State v. Suriner*, 154 Idaho 81 (2013).

case. Thereafter, in a published opinion, the Idaho Court of Appeals affirmed Mr. Nichols' judgment of conviction and sentence for statutory rape. (Opinion, pp.1-18.) This petition for review timely followed.

ISSUES

1. Should this Court grant Mr. Nichols' petition for review?
2. 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?
3. 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?
4. 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*?
5. Did the prosecutor commit misconduct, rising to the level of a 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?

ARGUMENT

I.

This Court Should Grant Mr. Nichols Petition For Review And Reverse His Judgment Of Conviction For Statutory Rape In Light Of The Errors That Occurred At His Trial

Although left unaddressed by the Idaho Court of Appeals' opinion, Mr. Nichols' case presents an important issue that is left unresolved by that opinion: whether this Court's prior ruling in *Suriner*, which abolished the *corpus delicti* rule in Idaho, can be retroactively applied to those defendants whose trials occurred prior to the issuance of that decision. (See Opinion, p.3 n.3 (indicating that the Court of Appeals would not resolve this issue in light of its disposition that sufficient proof of corroboration existed at trial).) Mr. Nichols asks that this Court grant his petition for review and clarify that, under due process principles, this Court's ruling in *Suriner* eliminating the *corpus delicti* rule, is prospective in application.

It is well established that the constitutional prohibition against *ex post facto* laws precludes a legislative enactment from being applied retroactively to a criminal defendant where that action, among other things, operates so as to alter the legal rules of evidence so as to receive different or less testimony than the law required at the time of the commission of the alleged offense. See, e.g., *Carmell v. Texas*, 529 U.S. 513, 521-522 (2000); *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990). Although the *ex post facto* clauses of the State and federal constitutions apply by their terms only to legislative enactments and provisions, the Fifth Amendment of the United States Constitution provides similar protections with regard to judicial actions that operate in a similar manner. *Marks v. United States*, 430 U.S. 188, 191-192 (1977). This due process protection emanates from the Fifth Amendment of the United States

Constitution, and “is based on the notion that persons have the right to fair warning of that conduct which will give rise to criminal penalties.” *Id.*; see also *State v. Shackelford*, 150 Idaho 355, 374 n.8 (2010).

The United States Supreme Court made this clear in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Bouie*, the Court held that, “[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.” *Bouie*, 378 U.S. at 352. The *Bouie* Court further expanded on the nature of such a due process violation when a reviewing court unexpectedly alters the common law to a defendant’s detriment:

Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one “that makes an action done before the passing of the law, and which was innocent when done, criminal; and which punishes such action” or “that aggravates a crime, or makes it greater than it was, when committed.” If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. **The fundamental principle that “the required criminal law must have existed when the crime occurred” must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.** If a judicial construction of a criminal statute is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,” it must not be given retroactive effect.

Id. at 353-354 (internal citations omitted) (emphasis added).

Subsequent to *Bouie*, the United States Supreme Court recognized that this due process protection extends not only to judicial interpretations of statutes, but also to judicial alterations of protections that existed only at common law. See *Rogers v. Tennessee*, 532 U.S. 451 (2001). The Court in *Rogers* held that a judicial alteration of

the prior existing common law cannot be retroactively applied under the Due Process Clause of the Fifth Amendment where that alteration is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.” *Id.* at 462. In making this determination, the *Rogers* Court looked to factors such as whether the common law at issue retained current justification for its on-going existence, whether it had been given meaningful effect in prior decisions (as opposed to being mentioned in passing and as dicta), whether the common law rule involved a substantive right, and whether the alteration of the reviewing court was consistent with the actions undertaken in other jurisdictions. *Id.* at 462-467.

Although the standard articulated in *Rogers* with regard to when a due process violation is established is broad in its sweep, the prior Opinion in *Bouie* – which formed the basis for the *Rogers* Opinion – provides clearer guidance. In *Bouie*, the U.S. Supreme Court clarified that, “[w]hen a state court **overrules a consistent line of procedural decisions** with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprive him of due process of law ‘in its primary sense of an opportunity to be heard and to defend (his) substantive right.’” *Bouie*, 378 U.S. at 354 (quoting *Brinkerhoff-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930)) (emphasis added). In other words, where there is an established line of case law wherein a substantive right has been recognized by the courts, an abrupt departure from this consistent set of holdings cannot be retroactively applied to a criminal defendant under the Due Process Clause of the Fifth Amendment. See *Lancaster v. Metrish*, 683 F.3d 740, 744 (6th Cir. 2012).

It was this standard that led the Supreme Court of Colorado to conclude that its judicial abrogation of the *corpus delicti* requirement could not be applied retroactively under due process principles. In *People v. LaRosa*, the Supreme Court of Colorado had occasion to revisit the on-going viability of the *corpus delicti* rule in the context of a case where the only corroboration of a defendant's confession of sexual assault was the opportunity for the defendant to have committed the offense. *People v. LaRosa*, 293 P.3d 567, 570-579 (Colo. 2013). After a discussion of the roots of the *corpus delicti* rule under the Colorado common law, the Colorado Supreme Court ultimately abandoned this rule in favor of a more general trustworthiness standard. *Id.* However, this did not end the discussion regarding the disposition of the *LaRosa* case: the Colorado Supreme Court still had to resolve whether this alteration could be applied retroactively under the Due Process Clause.

The *LaRosa* Court determined that it could not. In *LaRosa*, the Court first distinguished the abolition of the *corpus delicti* rule from the common law rule at issue in the *Rogers* Opinion. *LaRosa*, 293 P.3d at 578-579. In particular, the *LaRosa* Court noted that the common law rule at issue in *Rogers* was characterized as a “substantive principle” of law, “‘in name only’ because it had never been enforced” in any state court decision, and “had never served as a ground of decision in any homicide prosecution in the State and had only been mentioned in three cases, each time in dicta.” *Id.* at 579 (quoting *Rogers*, 532 U.S. at 464). Although recognizing that the *corpus delicti* rule had been subject to some criticism, the Colorado Supreme Court nevertheless recognized that the rule had been in actual force in several jurisdictions, including the court's own prior decisions. *Id.* In fact, the *LaRosa* Court noted that the *corpus delicti*

rule had been the substantive law in Colorado for over one hundred years. *Id.* Accordingly, because overturning this rule was a clear, and therefore unexpected, break from well-established case law, the Court in *LaRosa* held that it would violate due process to apply the elimination of this rule to those whose convictions arose prior to its decision. As such, the Court in *LaRosa* reversed the defendant's conviction. *Id.*

Similarly, the Supreme Court of Utah has also held that it would be unconstitutional to apply the elimination of its common law *corpus delicti* rule retroactively to those whose offenses arose prior to the court's decision. See *State v. Mauchley*, 67 P.3d 477 (Utah 2003). Moreover, the conclusion that the elimination of the *corpus delicti* rule cannot be retroactively applied is consistent with prior decisions from the Supreme Court of Idaho in a related context.

In *State v. Byers*, this Court eliminated the common law requirement of corroboration of an alleged victim's allegation of rape in prosecutions for this offense. *State v. Byers*, 102 Idaho 159, 160-165 (1981). However, in doing so this Court recognized that it was altering the quantum of proof required in order to establish this offense. *Id.* at 165-167. In light of this, the *Byers* Court held that the corroboration rule must be followed with regard to the defendant in that case, along with those who were tried prior to the issuance of the Court's opinion. *Id.*

The Court in *Byers* so held because, "[t]o apply today's decision in passing on the validity of Byers' conviction would be the equivalent of applying an ex post facto law, and is within the prohibitions of Article I, § 10 of the United States Constitution and Art. I, § 16 of our Idaho Constitution." *Id.* at 166. The *Byers* Court recognized that the elimination of the corroboration requirement, "alters the rules of evidence such that 'less

or different testimony than the law required at the time of the commission of the offense (is necessary) in order to convict the offender.” *Id.* (quoting *Bouie*, 378 U.S. at 354) (alterations in the original). In light of this, the *Byers* Court held that the newly announced rule eliminating the corroboration requirement, “is to be applied prospectively to criminal trials commenced hereafter.” *Id.* at 167.

As with *Byers*, Idaho courts prior to *Suriner* had consistently recognized the *corpus delicti* rule in Idaho – dating back over one hundred years to its adoption in *State v. Keller* in 1902.³ See, e.g., *State v. Tiffany*, 139 Idaho 909 (2004); *State v. Urie*, 92 Idaho 71 (1968); *State v. Keller*, 8 Idaho 699 (1902); *State v. Roth*, 138 Idaho 820 (Ct. App. 2003). And, like *LaRosa*, this rule was not one that had never had substantive force in Idaho – the requirements of *corpus delicti* were unequivocally recognized as part of the State’s burden of proof of the charged offense at trial. See, e.g., *Thomas v. State*, 145 Idaho 765, 771 (Ct. App. 2008); *Roth*, 138 Idaho at 822.

Moreover, the elimination of the *corpus delicti* rule in Idaho under *Suriner* was particularly unexpected, given that the this Court has left **no** standard of corroboration in its wake in order for a conviction to be sustained on the basis of a confession alone. In eliminating the *corpus delicti* rule in Idaho, this Court in *Suriner* held that:

Because the harm caused by the rule exceeds whatever benefits there may be, we hold that the *corpus delicti* rule no longer applies in Idaho. **We see no reason to attempt to fashion another rule to take its place.** Instead, the jury can give a defendant’s extrajudicial confession or statement whatever weight it deems appropriate along with all of the other evidence when deciding whether the State has proved guilt beyond a reasonable doubt.

³ By appellate counsel’s count, there are approximately 70 cases in Idaho that have analyzed and applied the *corpus delicti* rule in Idaho as part of its substantive law. For sake of brevity, only a sampling of cases are cited herein.

Suriner, 154 Idaho at 88 (emphasis added).

This represents a drastic departure, not only from over a hundred years of prior established jurisprudence in Idaho, but with the general requirements for admission of or use of a confession in order to establish guilt throughout the country. “Courts adhere **almost universally** to the principle that ‘an extrajudicial confession, by itself, is not sufficient to sustain a conviction for a crime.’” *Mauchley*, 67 P.3d 477, 481 (quoting *State v. Weldon*, 314 P.2d 353, 354 (1957)) (emphasis added). This nearly universal requirement of additional corroboration was further reflected in *LaRosa*, wherein the Supreme Court of Colorado recognized that, “[a]**lmost all courts** adhere to a corroboration requirement, which requires the prosecution to present corroborating evidence of a defendant’s confession to either allow for its admission into evidence or sustain a conviction.” *LaRosa*, 293 P.3d 567, 571 (emphasis added).

Although the modern trend has been to adopt a general trustworthiness standard with regard to the admission and use of criminal confessions, the fact remains that some requirement of corroboration remains in nearly all jurisdictions with regard to a defendant’s confessions. Accordingly, the Opinion in *Suriner* also represents a departure from the case law in nearly all jurisdictions in that there is now no standard that has supplanted *corpus delicti* in ensuring the reliability and factual corroboration of a criminal confession – or its use as the sole proof of guilt in a criminal case.

Finally, a clear indication that the elimination of *corpus delicti* in Idaho should not be retroactively applied comes from this Court *Suriner* itself. In the *Suriner* Opinion, this Court did not apply its decision to eliminate the *corpus delicti* rule to the defendant’s own case – rather, the Court first analyzed whether the traditional legal standards of

corpus delicti had been met in the defendant's case before proceeding to eliminate the rule. *Suriner*, 154 Idaho at 1095-1098. This indicates that the elimination of the *corpus delicti* rule was not intended by this Court to operate retroactively. Mr. Nichols asks that this Court expressly make this clear and grant his petition for review.

In addition, Mr. Nichols submits that the Court of Appeals' Opinion, applying the *corpus delicti* rule, is likely not in accord with prior decisions from this Court regarding the minimum standards of evidence for the corroboration requirement of this rule.

The Court of Appeals' Opinion in this case indicates that mere presence with the alleged victim or the opportunity to commit the offense of statutory rape is sufficient to meet with the corroboration requirement of the *corpus delicti* rule. (Opinion, pp.8-9.) This holding is in error. In order to establish the *corpus delicti* of the charged offense in Idaho, the State bears the burden to show either the charged injury or the criminal agency – and the mere opportunity to commit the charged offense does not meet either prong. See *Roth*, 138 Idaho at 822-823; *LaRosa*, 293 P.3d at 571-579; *People v. Robson*, 80 P.3d 912, 913 (Colo. App. 2003); *State v. Campbell*, 178 P.3d 337, 340 (Or. Ct. App. 2008); *State v. Ray*, 926 P.2d 904, 907 (Wash. 1996). The reason behind this was stated succinctly by the Oregon Court of Appeals in *Campbell* – “The evidence showing that defendant had an opportunity to commit the offenses establishes only that—that he had the *opportunity*; it does not tend to establish that the offenses actually occurred.” *Campbell*, 178 P.3d at 340.

Likewise, the notion that there existed additional “corroboration” due to the circumstances under which Mr. Nichols was found in the alleged victim's presence is similarly misplaced. While there was testimony as to the alleged victim's age and

Mr. Nichols' age, the only evidence as to any actual relationship between them in the record comes directly from Mr. Nichols' own confession to the police. (See Tr., p.85, L.7 – p.87, L.24; p.95, L.9 – 98, L.1.) The *corpus delicti* rule requires that the corroboration come from a source **aside from the confession itself**. See *Suriner*, 154 Idaho at 83. As was set noted by this Court in *Suriner*, the *corpus delicti* rule requires that, “there must be some evidence or corroborating circumstances tending to show that a crime has been committed, **aside from such confessions or statements**.” *Id.* While multiple confessions to third parties may suffice for this rule, using the confession to “corroborate” itself does not. *Id.* at 1095-1098. Otherwise, there would be no corroboration requirement at all to the *corpus delicti* rule – mere internal consistency would suffice.

The State failed to establish any proof of the *corpus delicti* of the charged offense in this case, as was their burden of proof at trial. Accordingly, Mr. Nichols asks that this Court grant his petition for review in this case.

II.

The District Court Erred When It Denied Mr. Nichols' Rule 29 Motion Seeking A Judgment Of Acquittal Because The State Presented Insufficient Evidence To Establish The *Corpus Delicti* Of The Charged Offense Independent Of Mr. Nichols' Confessions And Statements

A. Introduction

Corpus delicti principles require that the State, as part of its burden of proof of any criminal offense, provide some quantum of evidence independent of a confession to demonstrate either the injury underpinning the offense or the criminality of the alleged action. With regard to statutory rape, both the injury and the criminality aspects of this

offense require proof of intercourse. There was no evidence aside from Mr. Nichols' alleged confession that corroborated that any intercourse occurred between Mr. Nichols and K.F. Given this, the district court erred when it denied Mr. Nichols' Idaho Criminal Rule 29 motion seeking a judgment of acquittal based upon the failure of the State to prove the *corpus delicti* of the charged offense.

B. Standard Of Review

On review of the district court's denial of an Idaho Criminal Rule 29 motion seeking a judgment of acquittal, this Court will not reverse a verdict on such grounds where every element of the offense is established by substantial and competent evidence. See, e.g., *State v. Willard*, 129 Idaho 827, 828 (Ct. App. 1997). All of the inferences from the evidence are viewed in the light most favorable to the State. *Id.*

This Court will likewise not overturn a conviction based upon insufficiency of the evidence where a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, nor will this Court substitute its own view of the evidence for that of the jury. See, e.g., *State v. Vandenacre*, 131 Idaho 507, 510 (Ct. App. 1998). Further, matters regarding credibility of the witnesses, the weight of the testimony, and the reasonable inferences to be drawn therefrom are solely within the province of the jury. *Id.* "A judgment must be reversed, however, if the evidence is insufficient to support the conviction." *State v. Hughes*, 130 Idaho 698, 701 (Ct. App. 1997).

C. The District Court Erred When It Denied Mr. Nichols' Rule 29 Motion Seeking A Judgment Of Acquittal Because State Presented Insufficient Evidence To Establish The *Corpus Delicti* Independent Of Mr. Nichols' Confessions And Statements

"A plea of not guilty puts in issue every material allegation of the indictment." *State v. Cutler*, 94 Idaho 295, 296 (1971). One of the material allegations that is placed at issue in every criminal offense is the *corpus delicti* of the charged offense. *Id.*; *State v. Pullos*, 76 Idaho 369, 373-374 (1955). The prosecution has the burden of proof of the *corpus delicti*. *Id.*

"*Corpus delicti*, meaning, 'the body of a crime,' is a common law principle that requires the state to establish some evidence that a crime occurred independently from a defendant's confession." *State v. Roth*, 138 Idaho 820, 822 (Ct. App. 2003); see also *Suriner*, 154 Idaho at 83. This principle applies both to a defendant's extrajudicial admissions, as well as extrajudicial confessions. *Roth*, 138 Idaho at 822 n.2. For every criminal offense, in order to prove the offense at trial, the burden is on the State to prove three broad elements: (1) that an injury occurred; (2) that the injury was caused by criminal agency; and (3) the identity of the person who caused the injury. *Id.* at 823. In Idaho, the State must present corroborating evidence – other than a confession - of either of the first two elements in order to establish the *corpus delicti* of the charged offense. *Id.* Only slight corroboration by independent evidence is required. *Id.* However, the corroboration must relate to establishing either the injury or that the injury was produced by criminal agency. See also *Thomas v. State*, 145 Idaho 765, 771 (Ct. App. 2008).

As this offense existed at the time of Mr. Nichols' trial, Idaho 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 18.⁴ See I.C. § 18-6101(1) (2010) (amended by S.L. 2010, ch. 235, § 7, eff. July 1, 2010; S.L. 2010, ch. 352, § 1, eff. July 1, 2010). The “injury” addressed by this statute is sexual intercourse; and the “criminality” is proof of sexual intercourse with a female who is under the age of 18. Under this statutory scheme, the injury and the criminality prongs of this offense are partly co-extensive. Both require some independent proof or corroboration of the act of sexual intercourse. See also *State v. Smith*, 265 P. 666, 667 (1928) (holding that *corpus delicti* of statutory rape is proof of intercourse).

In this case, there is absolutely no corroboration of any sexual intercourse between Mr. Nichols and K.F. independent of his confession or admissions. K.F. did not testify at trial. There was no forensic or medical examination of K.F. presented as evidence to the jury. Law enforcement officers did not even verify that K.F. and Mr. Nichols were, in fact, living together – the only evidence of that came from the same confession wherein Mr. Nichols allegedly admitted to sexual intercourse. (Tr., p.86, Ls.3-22.) There is, in this case, nothing at all that would corroborate that sexual intercourse occurred between Mr. Nichols and K.F. aside from Mr. Nichols' confession. Because the *corpus delicti* doctrine requires corroboration of sexual intercourse in support of a finding of either injury or criminality with regard to the offense of statutory rape, and because there was no corroboration of this aspect of Mr. Nichols' confession at all at trial, the district court erred in this case when it denied Mr. Nichols' Rule 29

⁴ The Idaho State legislature has subsequently amended Idaho's rape statute – and, in particular, Idaho's formulation of statutory rape – in 2010. The amended statute now makes two separate provisions regarding statutory rape, and defines the offense in terms of the differential in age between the alleged victim and the alleged perpetrator. See I.C. §§ 18-6101(1), (2).

motion seeking a judgment of acquittal. Therefore, Mr. Nichols' conviction for statutory rape must be dismissed with prejudice.

III.

The District Court Erred When It Permitted, Over Mr. Nichols' Objection, The Introduction Of Inadmissible Hearsay In Order To Establish The Age Of The Alleged Victim In This Case

A. Introduction

The sole testimony presented in this case as to K.F.'s age at the time of the alleged sexual intercourse – which is an essential element to the charge of statutory rape in Idaho – came in the form of hearsay testimony from two of the three witnesses for the State. Mr. Nichols submits that this testimony was erroneously admitted by the district court and, because this hearsay was the sole evidence of one of the essential elements of the charged offense in this case, this error was not harmless.

B. Standard Of Review

Where a defendant makes a contemporaneous objection as to the admission of evidence, this Court employs an abuse of discretion standard. See, e.g., *State v. Perry*, 150 Idaho 209, 218 (2010). This standard involves a three-part inquiry: (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the proper boundaries of its discretion and consistent with the legal standards attendant on that discretion; and (3) whether the district court reached its decision through an exercise of reason. *Id.* In every case where the defendant objects to the error before the district court, the defendant bears the initial burden to establish

that error occurred, but the State bears the burden to establish, beyond a reasonable doubt, that the error was harmless. *Id.* at 222.

C. The District Court Erred When It Permitted, Over Mr. Nichols' Objection, The Introduction Of Inadmissible Hearsay In Order To Establish The Age Of The Alleged Victim In This Case

1. The District Court Erroneously Admitted Hearsay Testimony From K.F.'S Adopted Mother Because There Was Insufficient Foundation For Admission Of This Testimony Under I.R.E. 803(19)

The district court in this case initially – and erroneously – ruled that Ms. Fairfax's testimony regarding K.F.'s purported date of birth was not hearsay, and therefore allowed this testimony to be admitted at trial for proof of the matter asserted. (Tr., p.53, Ls.2-22.) Likely in recognition of its error, the district court entered a memorandum several days after the jury's verdict in this case "augmenting" the record to alter this ruling. (R., p.73.) As an alternative basis for allowing the testimony of K.F.'s adopted mother as to K.F.'s birth date, the court concluded that such testimony fell within the hearsay exception for reputation concerning personal or family history contained in I.R.E. 803(19). Mr. Nichols asserts that either ruling on the part of the district court was error.

The Idaho Supreme Court has recently articulated the limitations attendant on the district court's discretion with regard to admissibility determinations regarding the Idaho Rules of Evidence. The Court in *State v. Watkins* cited with approval the following statement of law on such issues:

The law of evidence is structured by rules, forged by centuries of experience and continually tested against evolving notions of fairness and truth-seeking. Our Supreme Court recently has adopted a detailed and painstakingly drafted formulation of such rules. See Idaho Rules of

Evidence (effective July 1, 1985). These rules are not merely precatory guides to discretion; they are standards controlling the outcome of evidentiary questions. A trial judge possesses no “discretionary” authority to alter or to disregard specific standards-particularly in criminal trials, where these standards impart real meaning to an accused’s right to a fair trial.

State v. Watkins, 148 Idaho 418, 420-421 (2009) (quoting *State v. Maylett*, 108 Idaho 671, 674 (Ct. App. 1985) (Burnett, J., specially concurring)) (emphasis added).

Idaho Rule of Evidence 801 defines “hearsay” as, “a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.” I.R.E. 801(c). While hearsay may not generally be introduced into evidence, there are some exceptions to this rule. One such exception is a statement regarding reputation concerning personal or family history. See I.R.E. 802, 803(19).

Following Mr. Nichols’ trial, the district court determined that Ms. Fairfax’s testimony regarding what she was told as to K.F.’s birth date fell within the hearsay exception for reputation concerning personal or family history contained in I.R.E. 803(19). (R., p.73.) There does not appear to be any case law in Idaho regarding the “reputation concerning personal or family history” exception to the prohibition against hearsay. However, this provision is substantially similar to that employed in other jurisdictions, and therefore an examination of cases from other jurisdictions regarding the requirements under this exception may be instructive for this Court.

Other jurisdictions have recognized that statements regarding a common familial understanding regarding a family member’s birth date (or the circumstances of his or her birth) is hearsay when not based upon personal knowledge of the witness— but that such testimony may fall within the “reputation concerning personal or family history”

exception to the prohibition against introduction of hearsay evidence. See, e.g., *U.S. v. Jean-Baptiste*, 166 F.3d 102, 110 (2d Cir. 1999). However, for such evidence to be admissible for the truth of the matter asserted, a sufficient foundation must be laid. And each hearsay link in the chain of communications regarding this matter must also fall within a hearsay exception. See I.R.E. 805; *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 101 n.14 (3d Cir. 1999); *State v. Taylor*, 240 S.W.3d 789, 799-801 (Tenn. 2007). In addition, federal case law indicates 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. *Blackburn*, 179 F.3d at 100.

In this case, while K.F.'s adopted mother is presumably familiar with those facts and occurrences within their family from the time that K.F. came to be adopted, her mother was not present at the time she was born and had no apparent personal knowledge of the circumstances of K.F.'s birth other than what she was told. (Tr., p.50, L.18 – p.53, L.22.) Given this, Ms. Fairfax's testimony regarding K.F.'s birth date constituted hearsay. Assuming for purposes of argument that testimony from an adopted parent regarding the adopted child's birth date falls within the hearsay exception contained in I.R.E. 803(19), there was insufficient foundation to establish the trustworthiness of the information that K.F. adopted mother relied on as to K.F.'s birth date. There was, therefore, an insufficient foundation for the admission of this testimony under I.R.E. 803(19).

In addition, the district court failed to consider the other relevant factors identified by the *Blackburn* Court with regard to admissibility of hearsay evidence under the personal or family reputation exception.⁵ *Blackburn*, 179 F.3d at 100. A review of these factors likewise militates against the admissibility of this testimony as the sole substantive proof of an element of a criminal offense. The significance of this evidence was immense for the State – the age of the alleged victim was an essential component of its criminal charge and the absence of proof of this element precluded a criminal conviction. Given this, greater caution with regard to admission of hearsay testimony should have been exercised.

Second, there were other potential sources of information that were likely more reliable, given that the record at trial does not indicate that Ms. Fairfax had any direct, personal knowledge of the circumstances of K.F.'s birth. Presumably there was an official birth certificate created upon K.F.'s birth, although such a document was not admitted at trial. In light of the fact that there was a more reliable and direct source of evidence for the fact at issue, this also weighed against the admission of this hearsay testimony.

Finally, the nature of these proceedings also demonstrates that the admission of this hearsay was error. As noted in the above-quoted passage from *Watkins*, in criminal trials, the rules of evidence “impart real meaning to an accused’s right to a fair trial.” *Watkins*, 148 Idaho at 421. Given the heightened interests at stake in criminal

⁵ This is quite likely because the district court failed to recognize that this evidence was hearsay until after trial. (*Compare* Tr., p.53, Ls.2-22; R., pp.73-74.)

proceedings, the district court should not have admitted this hearsay evidence before the jury for the truth of the matters asserted.

2. The District Court Erred When It Permitted Officer Fuentes To Testify In Re-Direct Examination As To Hearsay Regarding K.F.'S Purported Status As A Runaway, Despite The Fact That The District Court Had Previously Ruled That This Exact Testimony Was Inadmissible Hearsay

During the State's direct examination of Officer Fuentes, the following exchange took place:

Q: And after speaking to them [a party from the Everett Police Department in Washington State], what did you do next?

A: I confirmed with the state of Washington – there was some confusion as to whether or not [K.F.] 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.**

DEFENSE COUNSEL: **I'm going to object to hearsay.**

COURT: **I'm going to sustain the objection.**

Tr., p.108, Ls.8-19.

At that point, the State moved on to another line of questioning. However, on re-direct examination, the State sought to introduce an identical line of questioning specifically to establish the truth of the matter asserted – i.e., that K.F. was, in fact, a runaway as evidence that she was under the age of 18. (Tr., p.111, L.25 – p.113, L.2.)

Oddly, despite the fact that the district court had already determined that this evidence was inadmissible hearsay, the court reversed its ruling when Mr. Nichols objected on hearsay grounds. (Tr., p.112, L.21 – p.113, L.2.) The basis for the court's ruling was that the officer, "had already testified to that." (Tr., p.113, Ls.1-2.) This was error for two reasons. First, the district court was incorrect in its recollection of the

officer's prior testimony – the court had actually sustained the objection to the officer testifying as to what he was told regarding whether K.F. was a runaway and therefore this testimony was not properly before the jury.

But second, and more importantly, this evidence was inadmissible hearsay. The Idaho Court of Appeals' opinion in *State v. Boehner* is instructive on this point. See *State v. Boehner*, 114 Idaho 311 (1988). In *Boehner*, several police officers testified as to the substance of a dispatch that they had received that indicated the defendant had previously stated that he “wanted to kill a cop.” *Id.* at 313. Defense counsel filed a motion in limine prior to trial to exclude this testimony and objected to this testimony as hearsay at trial. *Id.* at 313-314. The district court permitted this testimony to be presented at trial. *Id.*

The *Boehner* Court determined that the district court erred when it permitted this testimony to be introduced into evidence. *Boehner* 114 Idaho at 314. First, this evidence was not relevant to the case for the non-hearsay purpose identified by the district court – the information possessed by the officers at the time that they confronted the defendant and how this influenced their actions. *Id.* at 314. The *Boehner* Court recognized that this was irrelevant to the jurors – while the jury was charged with determining the defendant's intent with regard to the charged offense there was no aspect of the charge at issue that dealt with the police officers' “collective state of mind.” *Id.*

The only thing that this hearsay testimony was relevant to establish for purposes of the charged offense in *Boehner* – that is, the intent of the defendant – would expressly have to embrace the truth of the matter asserted from the police dispatch. *Id.*

at 314-315. Because the only relevance of this evidence of an out-of-court assertion required the jurors to first assume the truth of the matter asserted, which is prohibited under I.R.E. 802, the *Boehner* Court held that it was error for this evidence to have been admitted at trial. *Id.* at 315.

Here, it is abundantly clear that the State was seeking to admit this evidence for the truth of the matter asserted. This is apparent in the manner in which the State initially attempted to frame the question to Officer Fuentes on re-direct examination. The State first asked the officer, "Officer Fuentes, you just testified that you had not been provided the age of [K.F.]. **Because she was a runaway, wouldn't you have known that she was under 18?**" (Tr., p.111, L.25 – p.112, L.3) (emphasis added.) When the officer didn't understand the question, the State later rephrased the question to ask specifically whether K.F. was, in fact, a runaway from Washington. (Tr., p.112, L.21 – p.113, L.2.) Again, the context of the State's question was to demonstrate the truth of the matter asserted in order to show that K.F. was under the age of 18, which was an essential element of Mr. Nichols' charged offense. The district court erred when it determined otherwise.

The only proof at all in Mr. Nichols' trial as to the age of the alleged victim came solely through hearsay testimony. Mr. Nichols asserts that none of this testimony was properly admitted. Moreover, because this testimony was the sole proof of an essential element of the offense of statutory rape, the introduction of this testimony was not harmless.

IV.

The District Court's Jury Instructions In This Case Impermissibly Lowered The State's Burden Of Proof, And Constituted Fundamental Error, When The District Court Provided An Elements Instruction For The Offense Of Statutory Rape That Omitted An Element And When The District Court Failed To *Sua Sponte* Instruct The Jury Regarding *Corpus Delicti*

A. Introduction

The district court's non-pattern elements instruction to the jury omitted the element that the State had to prove that Mr. Nichols had penetrated the alleged victim with his penis. Additionally, the district court failed to *sua sponte* instruct the jury regarding the State's burden of proof of the *corpus delicti* of the charged offense, particularly in relation to the requirement of some degree of corroboration of the underlying alleged injury or criminality. Both omissions relieved the State of its burden of proof at trial, and therefore rose to the level of a due process violation, and neither omission was harmless. Because of this, the district court's jury instruction errors rose to the level of a fundamental error requiring reversal.

B. Standard Of Review

Review for fundamental error is reserved for those alleged errors that are of constitutional magnitude. *Perry*, 150 Idaho at 226. In cases of un-objected to, fundamental error, a three-part test governs this Court's review. First, the defendant must demonstrate that one or more of his or her un-waived constitutional rights were violated. *Id.* Second, the error must be "clear and 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." *Id.* Finally, the defendant must

demonstrate that the error affected his or her substantial rights – i.e. that there is a reasonable possibility that the error affected the outcome of the trial. *Id.*

This Court reviews alleged errors in the jury instructions provided by the district court for fundamental error where those errors are of a constitutional magnitude. See, e.g., *State v. Anderson*, 144 Idaho 743, 746-748 (2007). Where the defendant alleges a violation of his or her constitutional rights with regard to the trial court's jury instructions, this Court will defer to the district court's findings of fact, but reviews *de novo* the district court's application of those facts to the constitutional requirements. *Id.* at 746. "The propriety of jury instructions is a question of law over which this Court exercises free review." *Id.* In reviewing an issue regarding jury instructions, this Court must determine whether the instructions, when viewed as a whole, fairly and adequately present the issues and state the applicable law. *Id.*

C. The District Court's Elements Instruction To The Jury Regarding The Charge Of Statutory Rape Omitted An Essential Element Of This Offense, And This Omission Constitutes Fundamental Error

While Idaho Criminal Rule 30(b) generally precludes raising allegations of error with regard to jury instructions for the first time on appeal, a reviewing court in Idaho can consider such issues if the allegation of error rises to the level of a fundamental error. *Anderson*, 144 Idaho at 748. An instruction that omits any element of the charged offense, or otherwise relieves the State of its burden of proof at trial, violates due process and may be reviewed by this Court for fundamental error. *Id.*

The district court's instruction on this case with regard to the elements instruction provided as follows:

In order for the defendant to be guilty of Rape, as charged in the Information, the State must prove each of the following:

- (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.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(Jury Instruction 13, Augment; Tr., p.135, L.13 – p.136, L.1.)

This instruction was not in conformance with the model pattern jury instruction for statutory rape, which directly instructs the jury that they must find the defendant **caused his penis to penetrate**, however slightly, the vaginal opening of the alleged victim. See ICJI 901 (emphasis added). The instruction given by the court omitted the element that the penetration was caused by the defendant's penis. As has been noted, at the time Mr. Nichols was alleged to have committed statutory rape, Idaho 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. See I.C. § 18-6101(1) (2010) (amended by S.L. 2010, ch. 235, § 7, eff. July 1, 2010; S.L. 2010, ch. 352, § 1, eff. July 1, 2010). Given that the district court's instruction omitted a statutory element from the charged offense, this was error plain on the face of the record.

The failure of defense counsel to object to this omission was not the product of trial strategy. Mr. Nichols pleaded not guilty, thereby putting each and every element of

the charged offense at issue in his trial. See *Cutler*, 94 Idaho at 296; I.C. 19-1715. In such cases, there is no tactical advantage to be gained from excusing the State of its burden of proof. Therefore, the failure to object to this error was not the product of a strategic determination on Mr. Nichols' part

Finally, the omission of this element by the district court was not harmless. The test for harmlessness is whether there is a reasonable possibility that this error – the omission of a material element – could have affected the outcome of the trial. Particularly when viewed in conjunction with the absence of any proof of sexual intercourse aside from Mr. Nichols' confession to law enforcement, a reasonable juror could have easily found in Mr. Nichols' favor with regard to this element.

D. The District Court Had A Duty To *Sua Sponte* Instruct The Jury With Regard To Proof Regarding The *Corpus Delicti* Of The Charged Offense, And The Failure To Do So Was Fundamental Error As It Reduced The State's Burden Of Proof At Trial

"In charging the jury, the court must state to them all matters of law necessary for their information." *State v. Pearce*, 146 Idaho 241, 247 (2008); I.C. § 19-2132(a). While there is no duty on the part of the district court to instruct the jury on every theory of the defense that a defendant may have, the failure of the district court to *sua sponte* instruct the jury as to a particular point of law may be raised on appeal if the "instruction constitutes a necessary matter of law whose omission would constitute fundamental error." *Id.* at 248. An instruction that relieves the State of its burden of proof at trial violates due process and may be reviewed by this Court for fundamental error. *Anderson*, 144 Idaho at 748.

The district court was well aware of the *corpus delicti* issue in this case. Mr. Nichols had asserted that there would be insufficient independent proof of the *corpus delicti* should the victim not testify at trial at the hearing on the State's motion in limine. (Tr., p.13, L.7 – p.18, L.15.) The State provided written briefing on this issue prior to trial. (R., pp.46-47.) Finally, the absence of independent proof or corroboration of the *corpus delicti* formed the basis of Mr. Nichols' Rule 29 motion seeking a judgment of acquittal. (Tr., p.116, Ls.10-23.) Taken together, the district court had abundant notice that the absence of independent proof of the *corpus delicti* of the charged offense was a critical dispute in this case, and therefore the jury needed to be instructed on this issue.

In addition, the failure of the district court to instruct the jury regarding *corpus delicti* rose to the level of a due process violation constituting fundamental error because this omission reduced the State's burden of proof. As previously noted, one of the material allegations at issue in every criminal offense is the *corpus delicti* of the charged offense, and the State bears the burden of proving *corpus delicti* at trial. *Cutler*, 94 Idaho at 296 *State v. Pullos*, 76 Idaho 369, 373-374 (1955). However, the jury was never told that the State has this burden.

The jury in this case was never instructed that, in order to sustain a conviction for statutory rape, the State was required to produce some independent evidence, aside from Mr. Nichols' confession, to corroborate that sexual intercourse occurred in this case. (Tr., p.133, L.9 – p.140, L.19.) Moreover, the failure of defense counsel to object to the absence of a *corpus delicti* instruction in this case was not a tactical decision. As has been noted, Mr. Nichols argued the absence of proof of *corpus delicti* prior to trial

and through a motion for judgment of acquittal at the close of the State's case. (Tr., p.13, L.7 – p.18, L.12, p.116, Ls.10-23.) Given that the absence of any outside corroboration was identified by Mr. Nichols as an area of the State's case where there was no proof at all to support the State's evidentiary burden, there is no reasonable strategic reason why Mr. Nichols would then decline to inform the jury as to the requirements of corroboration under the *corpus delicti* rule.

In light of this, there is every possibility that the district court's omissions in instructing the jury regarding the State's burden of proof of *corpus delicti*, and as to the elements for statutory rape, very likely affected the outcome of the proceedings in Mr. Nichols' trial. Such an omission rises to the level of a fundamental error, and requires reversal in this case.

V.

The Prosecutor Committed Misconduct, Rising To The Level Of A 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

A. Introduction

The prosecutor in Mr. Nichols case argued facts that were never introduced into evidence twice during closing arguments. Both sets of facts were prejudicial, and tended to bolster the State's allegations in a case that was otherwise largely devoid of any proof. Because this argument constitutes an error of a constitutional magnitude, that is plain from the record and was not harmless, Mr. Nichols asserts that this misconduct constituted fundamental, reversible error.

B. Standard Of Review

This Court reviews an allegation of prosecutorial misconduct that is not objected to at trial for fundamental error. *Perry*, 150 Idaho at 226. As previously noted, a three-part test governs this Court's review: first, the defendant must demonstrate that one or more of his or her un-waived constitutional rights were violated; second, the error must be clear and obvious from the record, and not the product of trial strategy; and third, the defendant must demonstrate a reasonable possibility that the error affected the outcome of the trial. *Id.*

C. The Prosecutor Committed Misconduct, Rising To The Level Of A 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

Mr. Nichols asserts that the prosecutor, at two distinct points during closing arguments, argued facts that were not in evidence. Although this misconduct was not objected to at trial, Mr. Nichols further asserts that this misconduct rises to the level of a fundamental error that is properly justiciable by this Court.

The purpose of closing arguments is to sharpen and clarify the issues that the jury is charged with resolving at trial, to enlighten the jury as to the legal arguments at stake, and to help the jurors remember and interpret the evidence. *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). Given the broad nature of this task, both sides have traditionally been afforded considerable latitude in presenting their closing arguments to the jury. *Id.*

"Considerable latitude, however, has its limits, both in matters expressly stated and those implied." *Id.* It is well-established that it constitutes prosecutorial misconduct

for the State to argue facts not properly introduced as evidence at trial during closing arguments. See, e.g., *State v. Griffiths*, 101 Idaho 163, 166 (1980) (overruled on other grounds by *State v. LePage*, 102 Idaho 387, 396 (1981)); *State v. Spencer*, 74 Idaho 173, 183-184 (1953); *State v. Troutman*, 148 Idaho 904, 911-912 (Ct. App. 2010). As was noted by the court in *Troutman*, “The desire for success should never induce a prosecutor to obtain a verdict by argument based upon anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same.” *Troutman*, 148 at Idaho at 908.

Additionally, the *Perry* Court has indicated that this type of misconduct rises to the level of a due process violation that is properly justiciable under the fundamental error doctrine. “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.

In this case, the prosecutor referred to facts that were never introduced into evidence at two separate points during his closing argument. The first instance came as the prosecutor was setting forth the testimony of Officer Fuentes. In discussing the officer's discussion with K.F., the prosecutor characterized the officer's testimony as follows:

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 passed the report on to the detective division so further investigation could be performed.

Tr., p.143, Ls.15-21.

In actuality, there was never any testimony at all about what it was that K.F. told Officer Fuentes, and the officer never testified as to having any sort of feeling that something “wasn’t right,” based upon his conversation with K.F. (Tr., p.110, Ls.10-21.) The sole testimony that was had was that the officer turned the case over to a detective following his interview of K.F. (Tr., p.110, Ls.10-21.) Moreover, in repeatedly stating that Officer Fuentes had felt something “wasn’t right,” based upon the undisclosed statements that K.F. made, the prosecutor was inviting the jury to speculate further as to what K.F. may have told the officer that would have caused him such concern.

The second instance of the prosecutor commenting on facts not in evidence dealt with the testimony of the other law enforcement officer in this case – Detective Larsen. The prosecutor stated that the detective had testified that, not only did Mr. Nichols state that he and K.F. shared a bedroom in the apartment that Mr. Nichols resided in, but that they both shared the same bed in this room. (Tr., p.146, L.22.) This was not the substance of the detective’s testimony. 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. (Tr., p.86, Ls.15-18.) There was no testimony at trial that the detective had ever been inside the two-bedroom apartment and had verified that there was only one bed in the room that Mr. Nichols allegedly shared with K.F. (Tr., p.68, L.22 – p.98, L.3.)

As previously noted, it is misconduct that constitutes a due process violation for a prosecutor to refer to facts never introduced into evidence during closing arguments. *See Perry*, 150 Idaho at 227. This error is also plain on the face of this record, and was not the product of any legitimate trial strategy. Mr. Nichols stood to gain absolutely no

strategic advantage from the introduction of damaging factual allegations that were never subjected to the test of cross-examination during the witnesses' testimony.

Additionally, there is a reasonable possibility that this misconduct affected the outcome of Mr. Nichols' trial. Both statements of alleged facts not in evidence were intended to strengthen and reinforce the inference of a romantic and/or sexual relationship between Mr. Nichols and K.F. – a relationship for which there was no proof at all outside of Mr. Nichols' own confession. There was not even any circumstantial proof, aside from the confession, to sustain such a finding. Therefore, the prosecutor's allegations of facts not in evidence during closing arguments in this case was directed at the question at the heart of the criminal allegations at trial and for which the State had virtually no evidence at all. In such circumstances, there is every possibility that this type of misconduct affected the outcome of the trial.

The prosecutor in this case committed misconduct rising to the level of reversible, fundamental error when the prosecutor argued prejudicial facts that were never admitted into evidence in asking the jury to convict Mr. Nichols of the charged offense. Given this, Mr. Nichols asserts that this Court should reverse his conviction for statutory rape with prejudice.

CONCLUSION

Mr. Nichols respectfully requests that this Court reverse his conviction for statutory rape with prejudice, as there was insufficient evidence of the charged offense. In the alternative, Mr. Nichols respectfully requests that this Court reverse his judgment of conviction and sentence and remand this case for further proceedings.

DATED this 28th day of April, 2014.

A handwritten signature in black ink, appearing to read 'S. Tompkins', written over a horizontal line.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of April, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT COURT JUDGE
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SET/eas

