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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44553**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
	)	**NO. CR 2015-15784**
v.	)	
	)	
JEFFREY LYNN ALWIN,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

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

_____

HONORABLE CYNTHIA K.C. MEYER
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Jeffrey Alwin appeals from his judgment of conviction after a jury found him guilty of one count of felony eluding. Following the jury trial, Mr. Alwin was sentenced to two years, with one years fixed, but the district court suspended the sentence and placed Mr. Alwin on probation for two years. On appeal, Mr. Alwin asserts that the district court erred in admitting prohibited 404(b) propensity evidence, and that the prosecutor committed misconduct when it bolstered the testimony of the State's witness during closing argument, personally guaranteed that the defense's theory was untrue, and invited the jury to decide the case on evidence not admitted at trial when it offered its personal opinion contradicting the testimony of the defense's eyewitness identification expert. Although the prosecutorial misconduct was not objected to, Mr. Alwin asserts that it amounted to fundamental error and therefore can be considered on appeal. The misconduct violated Mr. Alwin's right to a fair trial, right to present a defense, and his right to due process. Mr. Alwin also asserts that the district court erred in denying his motion for a new trial.

Statement of the Facts and Course of Proceedings

On August 3, 2015, at approximately 1:30 a.m., an officer on patrol saw a black Mercedes-Benz he believed to be exceeding the speed limit and conducted a traffic stop. (Trial Tr., p.128, Ls.21-25; p.130, L.3 – p.133, L.22; p.135, Ls.1-20.) The driver pulled over, and rolled the window at least halfway down. (Trial Tr., p.137, Ls.3-15.) The officer briefly spoke to the driver before the driver drove away before the officer had concluded the stop. (Trial Tr., p.138, L.13 – p.139, L.1; State's Trial Exhibit No. 1.) The officer followed the driver and tried again to pull over the car, but the driver did not pull over, and failed to yield to the other

officers who pursued the car. (Trial Tr., p.182, L.9 – p.184, L.8; p.157, L.21 – p.158, L.14; p.165, L.25 – p.168, L.4; State's Trial Exhibit Nos. 1, 4, 5, 6.) The police ended the pursuit. (Trial Tr., p.184, Ls.6-8.) The car was registered to Jeffery Alwin. (Trial Tr., p.140, Ls.1-4.) Officer Cohen pulled up a photograph of the registered driver, and believed the person he pulled over was Mr. Alwin. (Trial Tr., p.140, L.1 – p.141, L.3; p.151, L.24 – p.152, L.20.) Based on these facts, the State filed an Information alleging Mr. Alwin committed felony eluding. (R., pp.40-41.)

The case proceeded to trial. (*See* Trial Tr.)

The State called Officer Cohen. (Trial Tr., p.126, Ls.3-5.) He testified that he stopped the driver of the Mercedes-Benz for speeding. (Trial Tr., p.135, Ls.8-15; p.144, Ls.3-7.) He had only a side view of the driver of the car, and that the driver was wearing a baseball cap. (Trial Tr., p.138, Ls.12-20; p.146, Ls.6-17.) He saw the driver for about 20 seconds before the driver then drove away. (Trial Tr., p.139, Ls.7-10.)

At trial, the State sought to have admitted a booking photograph of Mr. Alwin that Officer Cohen had pulled up and used to identify Mr. Alwin as the driver of the car. (Plaintiff's Ex. 2; Augmentation, p.1[1]; Trial Tr., p.140, L.1 – p.141, L.5.) Defense counsel objected to the evidence as 404(b) propensity evidence, but the district court overruled the objection. (Trial Tr., p.141, Ls.4-15.) Officer Cohen made an in-court identification of Mr. Alwin as the driver of the car. (Trial Tr., p.137, L.16 – p.138, L.2.) Officer Cohen also told the jury that he had briefly seen a tribal tattoo on the driver's left arm, but he only had the occasion to view the tattoo when

[1] The original Plaintiff's Exhibit 2 is a black and white version of the color photograph viewed by the jury during trial. Mr. Alwin has augmented the record with the more accurate color version of the exhibit and will be referring to the color version of Plaintiff's Ex. 2 throughout his Appellant's Brief. (Augmentation, p.1.)

the driver leaned over to access the glove box. (Trial Tr., p.142, Ls.9-21.) Officer Cohen identified the driver by pulling up a picture of the registered owner of the car approximately 15 minutes after the stop. (Trial Tr., p.151, L.24 – p.152, L.20.) He testified, after refreshing his recollection from his report, "from the photograph, I believe it was Mr. Alwin driving the vehicle." (Trial Tr., p.152, Ls.5-20.)

The State next called Sergeant Brady Reed to the stand. (Trial Tr., p.155, Ls.4-8.) Officer Reed testified that after Officer Cohen put in a call for a traffic stop on the black Mercedes, he saw the car and tried to stop it, but it did not pull over. (Trial Tr., p.157, L.2 – p.158, L.14; p.165, L.25 – p.168, L.3.)

After the State rested, the defense called four witnesses. (Trial Tr., p.186, L.3 – p.273, L.15.)

Mr. Alwin testified that he did own the black Mercedes-Benz, but two days before the incident, he traveled to Bigfork, Montana, with his brother to visit his dad and fish. (Trial Tr., p.187, L.22 - p.189, L.22.) He testified that he did not drive his car to Montana, but got a ride with his brother. (Trial Tr., p.189, Ls.3-12.) When he got back into town, he noticed his car was damaged, but did not learn that his car had been driven or that he was wanted in connection with an eluding charge, until he saw his face on the news. (Trial Tr., p.190, Ls.3-8.) Upon learning that he was wanted in connection with the incident, he turned himself in. (Trial Tr., p.190, Ls.7-12.) Mr. Alwin told the jury that he had let two other individuals drive his car, and that he had a hide-a-key by the spare tire. (Trial Tr., p.190, L.13 – p.191, L.8.) He testified that one of the individuals slightly matched the description of the person driving the car. (Trial Tr., p.192, Ls.10-13.)

Mr. Alwin's landlady, Carol Gales, testified that she saw Mr. Alwin leave with his brother a couple days before the incident. (Trial Tr., p.197, L.22 – p.198, L.21.) She testified that his car was parked in the driveway while he was gone that week, and she did not see anyone driving the car while he was gone. (Trial Tr., p.198, L.12 – p.199, L.12.)

Mr. Alwin's brother, Jacob Weilacher, testified that he was with Mr. Alwin in Montana when the driver of Mr. Alwin's car failed to pull over for the officers. (Trial Tr., p.204, L.5 – p.205, L.14.)

The defense's final witness was Dr. Daniel Reisberg, a Ph.D criminal psychologist who specializes in memory and has written and spoken extensively on eyewitness identification. (Trial Tr., p.214, L.16 – p.217, L.22; p.221, L.3 – p.222, L.8.) Dr. Reisberg testified as an expert witness who had prepared a report based on Mr. Alwin's case. (Trial Tr., p.223, Ls.3-5.) Dr. Reisberg testified that, in the case of Officer Cohen's identification of Mr. Alwin, there were a variety of factors which, together, tended to make Officer Cohen's identification less reliable. (Trial Tr., p.229, L.20 – p.232, L.2; p.241, L.3 – p.257, L.14.)

Ultimately, the jury convicted Mr. Alwin of felony eluding. (Trial Tr., p.307, L.19 – p.308, L.5; R., p.174.)

Mr. Alwin filed a motion for a new trial pursuant to I.C.R. 34 and I.C. § 19-2406, asserting that the district court erred in admitting the booking photograph. (8/5/16 Tr., p.7, L.1 – p.9, L.11; R., pp.176-180.) The district court denied the motion after a hearing. (R., pp.188-189.)

The district court sentenced Mr. Alwin to a sentence of two years, with one year fixed, but suspended the sentence and placed Mr. Alwin on probation for two years. (9/7/16 Tr., p.20,

Ls.21-25; R., pp.195-210.) Mr. Alwin filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.211-215.)

ISSUES

1. Did the district court err in admitting un-noticed evidence of prior bad acts?

2. Did the State commit prosecutorial misconduct in its closing argument?

3. Did the district court err in denying Mr. Alwin's motion for a new trial?

ARGUMENT

I.

The District Court Erred In Admitting Evidence Of Mr. Alwin's Prior Bad Acts

A. Introduction

At trial, the jury saw a booking photograph of Mr. Alwin that Officer Cohen pulled up on his computer system 15 minutes after he initially made contact with the driver of the car. Mr. Alwin asserts that district court erroneously admitted the photograph without analyzing the prejudicial nature of the photo, and it failed to address the State's I.R.E. 404(b) notice violation.

Although the district court overruled the objection, agreeing with the State that the booking photograph was not alleging any "conduct" thus it would not fall under the purview of I.R.E. 404(b) (Trial Tr., p.141, Ls.4-13), the booking photograph was clearly evidence demonstrating Mr. Alwin's propensity to commit crimes, or at least be arrested for committing crime(s). The district court further erred when it admitted the State's evidence in absence of any showing of good cause that would excuse the State's failure to timely provide and serve notice of its intent to introduce prior bad acts evidence at trial, and by failing to consider the prejudicial effect of such information versus any probative value pursuant to I.R.E. 403.

B. Standard Of Review

This Court generally reviews the district court's decision whether to admit prior bad acts evidence under I.R.E. 404(b) for an abuse of discretion. *See, e.g., State v. Grist*, 147 Idaho 49, 51 (2009). Under I.R.E. 404(b), this Court reviews both whether the evidence admitted was relevant to a material and disputed issue regarding the crime charged, other than propensity, and whether the probative value of the evidence is outweighed by the danger of unfair prejudice to

the defendant. *State v. Field*, 144 Idaho 559, 569 (2007). The district court's determination as to whether to admit or to exclude evidence based upon the potential for prejudice of that evidence under I.R.E. 403 is likewise reviewed by this Court for an abuse of discretion. *State v. Johnson*, 148 Idaho 664, 667 (2010). Three pertinent considerations are attendant upon review for an abuse of discretion: (1) whether the district court correctly perceived the issue as an issue of discretion; (2) whether the district court acted in accordance with applicable legal standards and within the proper bounds of its discretion; and (3) whether the district court reached its decision through an exercise of reason. *Id.*

However, the relevance of evidence is a question of law and therefore this Court reviews the district court's determination that evidence is relevant *de novo*. *State v. Raudebaugh*, 124 Idaho 758, 764 (1993).

C. The District Court Erred When It Admitted Evidence Of A Prior Bad Act Against Mr. Alwin Because The State Failed To Provide Timely Notice Of Its Intent To Introduce This Evidence, And Because The Evidence Was More Prejudicial Than Probative

Mr. Alwin asserts that the district court failed to act in accordance with applicable legal standards when it admitted the booking photograph, as this evidence should have been excluded pursuant to I.R.E. 404(b).

"Under I.R.E. 404(b), evidence of other crimes, wrongs, or acts is not admissible to show a defendant's criminal propensity." *Johnson*, 148 Idaho at 667. Such evidence may, however, be admissible for a non-propensity or character purpose so long as the prosecution provides timely notice of its intent to use such evidence. *Id*.

To determine the admissibility of evidence of prior bad acts, the Idaho Supreme Court had adopted a two-tiered test. The first tier involves a two-part inquiry as to whether: (1) there is sufficient evidence to establish the prior bad act as fact; and (2) the prior bad act is relevant to

a material disputed issue concerning the crime charged, excepting propensity. *Grist*, 147 Idaho at 52; *State v. Johnson*, 148 Idaho 664, 667 (2010).

The second tier of the I.R.E. 404(b) analysis is a determination under I.R.E. 403 regarding whether the probative value of the evidence is substantially outweighed by unfair prejudice. *Johnson*, 148 Idaho at 667; *Grist*, 147 Idaho at 52.

In reviewing a trial court's decision regarding the admissibility of "bad act" evidence under Rule 404(b), Idaho's appellate courts apply differing standards of review to the different steps of the analysis. The questions of whether there is sufficient evidence to establish the "bad act" as fact, and whether the "bad act" evidence is relevant to an issue other than character or propensity, are questions of law which are reviewed *de novo*. *See State v. Joy*, 155 Idaho 1, 8 (2013); *see also Grist*, 147 Idaho at 52 (making it clear that the question of whether there was sufficient evidence of the "bad act" is judged under an objective standard and is actually part of the relevance analysis). On the other hand, the question of whether the probative value of the evidence was substantially outweighed by the risk of unfair prejudice is reviewed for an abuse of discretion. *Joy*, 155 Idaho at 8.

1. The Booking Photo Is I.R.E. 404(b) Evidence

Of course, I.R.E. 404(b) is not limited to bad acts. *State v. Norton*, 151 Idaho 176, 190 (Ct. App. 2011). The Rule encompasses "other crimes, wrongs, or acts." I.R.E. 404(b). Evidence of other crimes, wrongs, or acts may be admissible for "other purposes" as listed in Rule 404(b), such as knowledge or plan. I.R.E. 404(b); *State v. Sams*, 160 Idaho 917 (Ct. App. 2016); *see also State v. Blackstead*, 126 Idaho 14, 18 Ct. App. 1994) (noting that the enumerated "other purposes" for admission of Rule 404(b) evidence is not "exhaustive"). Trial courts typically exclude mug shots from evidence. *United States v. George*, 160 Fed. Appx. 450, 456

(6th Cit. 2005). A mug shot is usually not admissible under 404(b), and, even if it is relevant, it tends to make the jury believe that the person is "bad," and thus can be unfairly prejudicial. *Id*. "Mug shot evidence is prejudicial because it informs the jury that a defendant has a criminal record." *Murray v. Superintendent, Kentucky State Penitentiary*, 651 F.2d 451, 454 (6th Cir. 1981). Further, "the visual impact of a mug shot, apart from mere references to a prior conviction, can leave a lasting, although illegitimate, impact on the jury." *George*, 160 Fed. Appx. At 456 (citing *United States v. McCoy,* 848 F.2d 743, 745-46 (6th Cir.1988) (holding that lineup photographs were unfairly prejudicial as they suggest that the defendant "is a 'bad guy' who belongs in jail," thus, "a typical juror could thereby be influenced irrationally to conclude that he is guilty of the offense charged.").)

During Mr. Alwin's trial, as part of the State's case-in-chief, the prosecutor introduced into evidence a booking photograph of Mr. Alwin. (Trial Tr., p.140, Ls.15-24.) Officer Cohen testified that he had pulled up the photograph of the registered driver of the Mercedes using the computer system in his car, and that he believed the driver of the car was Mr. Alwin. (Trial Tr., p.139, L.4 – p.141, L.5.) Mr. Alwin timely objected when the prosecutor asked to publish Plaintiff's Exhibit 2 after Officer Cohen identified the photo:

Q. And is that a true and accurate copy of the photo you looked at that night?

A. It is.

PROSECUTOR: At this point in time, the State would move to admit Plaintiff's 2.

THE COURT: Any objection?

DEFENSE: We would object under 404(b), Your Honor.

THE COURT: Any response?

PROSECUTOR: No, I don't think it is 404(b), Your Honor. There is no conduct being alleged.

THE COURT: I agree. I'm going to admit the exhibit.

(Trial Tr., p.141, Ls.1-13.) The following photograph was admitted:

(Plaintiff's Ex. 2.)

However, the booking photograph of Mr. Alwin demonstrated that Mr. Alwin had been incarcerated or at least arrested in the past. (Plaintiff's Ex. 2.) In overruling Mr. Alwin's objection, the district court never addressed the fact that the State failed to give notice pursuant to I.R.E. 404(b) that it intended to seek admission of the booking photo. (Trial Tr., p.141, Ls.4-18.) Further, the district court did not conduct any I.R.E. 403 analysis of whether the evidence was more prejudicial than probative.

In this case, the evidence proffered by the State of prior incarceration lacked both timely notice of its intended use by the State and was more prejudicial than probative.

2. The State Failed To Provide Timely Notice Of Its Intent To Use I.R.E. 404(b) Propensity Evidence

Under I.R.E. 404(b), the State may be able to introduce other-acts evidence against a defendant if, *inter alia*, the State files and serves notice of its intent to introduce such evidence

reasonably in advance of trial, or during trial if the district court excuses the lack of such notice upon a showing of good cause for the failure to provide such notice. I.R.E. 404(b).

The Idaho Supreme Court in *State v. Sheldon* has addressed the practical consequences for the State's failure to provide timely notice of its intent to introduce prior bad acts evidence at trial. *See State v. Sheldon*, 145 Idaho 225 (2008). In *Sheldon*, the State elicited evidence at trial regarding allegations that the defendant had made statements admitting that he had previously engaged in drug sales. *Id*. at 227. In reviewing whether the admission of the prior bad acts evidence was error in light of the State's failure to file timely notice of this evidence, the *Sheldon* Court held that compliance with the notice requirement of I.R.E. 404(b) is mandatory. *Id*. at 230-231. The *Sheldon* Court further concluded that, because the State failed to comply with the notice provisions contained in I.R.E. 404(b), the State's prior bad acts evidence was inadmissible. *Id*. As the introduction of this evidence was highly prejudicial to the defendant, and because such evidence also likely caught defense counsel off-guard when the district court permitted its introduction, the *Sheldon* Court vacated the defendant's conviction for trafficking in methamphetamine. *Id*.

This Court should do the same. The State in this case failed to provide notice of its intent to admit evidence of uncharged acts "reasonably in advance of trial." In fact, the State did not provide *any* notice of its intent to admit this evidence prior to trial.[2]

[2] While the prosecutor did mention the booking photo during a break after the jury had been empaneled, the parties argued about the admission of other photos—photographs of Mr. Alwin's tattoo taken while he was being booked on the instant offense. (Trial Tr., p.110, L.14 – p.119, L.13.) The prosecutor focused on the photograph(s) of Mr. Alwin's tattoo and did not make arguments regarding the booking photo viewed by Officer Cohen; nor did the district court make any rulings regarding the future Plaintiff's Exhibit 2. (*Id.*)

As such, the district court did not find good cause that would excuse the untimeliness. The lack of notice deprived Mr. Alwin of any ability to defend against these allegations. In light of this, the district court erred when it admitted evidence that he had been arrested in the past.

3. There Was Ample Evidence To Establish The "Bad Act" As Fact

Contrary to the district court's post-hoc rationalizations when ruling on the motion for a new trial, the booking photo is readily identifiable as a booking photo. (*See* Plaintiff's Ex. 2.) It is a close-up headshot of Mr. Hall wearing a yellow scrub shirt, in front of a plain backdrop, staring unsmilingly into the camera; it is clearly a booking photo. (*See* Plaintiff's Ex.2.) It is clear that Mr. Alwin is wearing jail clothing, and he appears to have a black eye. (Plaintiff's Ex. 2.) The officer testified that he was able to pull the photo up from the computer in his car. (Trial Tr., p.140, Ls.2-21.) Further, the prosecutor told the jury in its opening statement that officer "matched it to a picture that was on file." (Trial Tr., p.122, Ls.3-6.)

However, after defense counsel objected to the admission of the booking photo, the district court agreed with the prosecutor's comment that the photo was "not conduct" and allowed the prosecutor to show the booking photograph to the jury and admit it into evidence. (Trial Tr., p.141, Ls.4-18.) Defense counsel was clearly caught off-guard when the district court admitted the exhibit. (*See* 8/5/16 Tr., p.7, Ls.4-24; p.12, Ls.13-23.)

During the hearing on Mr. Alwin's motion for a new trial, the district court explained why it admitted the exhibit:

> Now, in the process, this photo was never actually shown to me, and, I mean, I could see it from a distance, and it's hard to see what a witness is dealing with in this particular courtroom, because they are right next to me, but I was never actually handed the photo.
> . . .
> When I saw this photo from a distance, I thought it was a driver's license photo. I didn't know that it was a booking photo. When you said 404(b), that should have

> clicked. It didn't completely. I'm going, what 404(b)? What conduct is being alleged here? I don't recognize this yellow shirt as jail garb.
> . . .
> I think people were very careful about this, and I don't recall any discussion about any prior arrest of Mr. Alwin.

(8/5/16 Tr., p.15, L.4 – p.16, L.7.)

However, the explanations of the district court during the hearing on Mr. Alwin's motion for a new trial further demonstrates that the district court failed to act consistently with applicable legal standards and within the proper bounds of its discretion when ruling on the 404(b) objection. The district court failed to realize the booking photo depicts propensity evidence and that analysis under I.R.E. 404(b) was necessary. The court had no unique ability to evaluate the booking photo, and no special insight into how it would be perceived by the jury and failed to recognize that it was a discretionary decision and failed to reach its decision through an exercise of reason. The court's finding that a photograph was "not conduct" is erroneous and an abuse of its discretion.

4. The District Court Erred In Admitting The Booking Photograph Of Mr. Alwin Because The Potential Prejudice Of This Evidence Substantially Outweighed Any Probative Value That The Evidence May Have Had

Mr. Alwin asserts that the district court's admission at trial of the booking photograph was error because the prejudice of this evidence substantially outweighed any probative value.

"As with the admissibility of any piece of evidence, where the probative value of the statement[s] is substantially outweighed by the danger of unfair prejudice . . . this evidence should be excluded." *State v. Goodrich*, 97 Idaho 472, 477 (1976). This requires an analysis of whether the testimony should have been excluded under Idaho Rule of Evidence 403, which allows for the exclusion of relevant evidence "if its probative value is substantially outweighed

by the danger of unfair prejudice." *See* I.R.E. 403. Under I.R.E. 403, relevant evidence can be excluded by the district court if, *inter alia*, the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, danger of misleading the jury, or if the evidence would involve needless presentation of cumulative evidence. *State v. Tapia*, 127 Idaho 249, 254 (1995). "The trial judge, in determining probative worth, focuses upon the degree of relevance and materiality of the evidence and the need for it on the issue on which it is to be introduced." *Davidson v. Beco Corp*., 114 Idaho 107, 110 (1987). To some extent, all probative evidence is prejudicial. *State v. Gauna*, 117 Idaho 83, 88 (Ct. App. 1989). The question is whether that prejudice is unfair; whether it harms the defendant because it is so inflammatory that it would lead the jury to convict regardless of other facts presented. *Id*. This inquiry does not center on "whether the evidence is harmful to the strategy of the party opposing its introduction," but on whether the evidence "invites inordinate appeal to lines of reasoning outside the evidence or emotion which are irrelevant to the decision making process." *State v. Rhoades*, 119 Idaho 594, 604 (1991).

The district court erred in admitting the booking photo. While the booking photo was relevant and minimally probative because the officer used it to establish the driver's identity, its minimal probative value was substantially outweighed by the risk of unfair prejudice. *See* I.R.E. 401, 402 & 403. Whether evidence is relevant is reviewed *de novo*, while trial court "conclusions of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice is reviewed under an abuse of discretion standard." *State v. Page*, 135 Idaho 214, 219 (2000).

Plaintiff's Exhibit 2 is readily identifiable as a booking photo. It is a close-up headshot of Mr. Hall wearing a yellow shirt, in front of a plain backdrop, staring unsmilingly into the

camera; it has all the hallmarks of a booking photo. (*See* Plaintiff's Ex.2.) It is clear that Mr. Alwin is wearing jail clothing, and he appears to have a black eye. (Plaintiff's Ex. 2.) "The use of mug shot evidence is unfair and prejudicial . . . because it informs the jury that a defendant has a criminal record." *Murray v. Superintendent, Kentucky State Penitentiary*, 651 F.2d 451, 454 (6th Cir. 1981). As such, the photo allowed the prosecution to better portray Mr. Alwin as a criminal. Accordingly, the photo was exceptionally and unfairly prejudicial and, when this unfair prejudice is measured against the photo's minimal probative value, it is clear that the district court abused its discretion by failing to exclude it under Rule 403. *State v. Woods*, 370 A.2d 1080 (Conn. 1976)).

The booking photo had little probative value where the officer testified only that when he pulled up the photo of Mr. Alwin, he "believed" the driver and Mr. Alwin were the same person. (Trial Tr., p.152, Ls.5-20.) In fact, Officer Cohen refused to say he was certain the driver and Mr. Alwin were the same person, but only that he was "very confident" of the identification. (Trial Tr., p.153, Ls.3-9.) Further, the defense expert testified at length regarding the myriad of factors that would make the eyewitness identification performed by Officer Cohen less reliable. (Trial Tr., p.230, L.10 – p.232, L.3; p.241, L.3 – p.257, L.14.) Thus, the booking photo had little probative value, in light of Officer Cohen's uncertain identification.

The district court also should have excluded the booking photograph on the basis that the potential for prejudice of the allegations that Mr. Alwin had been incarcerated or arrested in the past substantially outweighed any probative value of this evidence. *See* I.R.E. 403. The booking photograph placed Mr. Alwin's propensity to commit crimes in front of the jury. Thus, admission of this evidence tended to work great prejudice on Mr. Alwin's case, as this evidence necessarily would tend to imply that Mr. Alwin had a propensity to commit offenses like the

ones charged in this case. This prejudice was amplified by the lack of notice that the State would be eliciting testimony of this nature against Mr. Alwin, effectively defeating his ability to investigate and prepare a defense against the implication that he had engaged in criminal conduct in the past.

In sum, the booking photograph depicted Mr. Alwin as a person with a propensity to commit the charged offense in the minds of the jury. The total lack of disclosure by the State coupled with the extremely prejudicial nature of the allegation precluded Mr. Alwin from being able to provide a defense against the assertion that he had been incarcerated in the past. The admission of this evidence was improper, and it was not harmless given that the case turned on the eyewitness identification—the prosecutor referenced the booking photo in its closing argument. (Trial Tr., p.287, Ls.1-6.).

II.

The State Violated Mr. Alwin's Right To A Fair Trial By Committing Multiple Acts Of Prosecutorial Misconduct

A. Introduction

Mr. Alwin's one-day trial was rife with instances of prosecutorial misconduct. Mr. Alwin asserts that his right to a fair trial, guaranteed by the Sixth and the Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, was violated when the prosecutor: (1) bolstered the testimony of the State's witness; (2) denigrated the defense's theory of the case by personally guaranteeing the defense's theory was not true; and (3) implicitly asked the jury to find Mr. Alwin guilty based on information other than the evidence adduced at trial. Because these instances of misconduct were not objected to by

defense counsel, Mr. Alwin can only prevail to the extent that he can establish fundamental error. *State v. Perry*, 150 Idaho 209, 224-26, 227 (2010).

For the reasons set forth fully below, Mr. Alwin contends that each of the alleged instances of misconduct satisfies the *Perry* standard. Mr. Alwin asserts that the prosecutor's misconduct deprived Mr. Alwin of his right to a fair trial and his ability to present a defense, which amounted to fundamental error, and, therefore this Court should vacate his conviction, and his case should be remanded to the district court for a new trial.

B. Applicable Standards Of Review

The Idaho Supreme Court has held that "[e]very person accused of crime in Idaho has the right to a fair and impartial trial." *State v. Sharp*, 101 Idaho 498, 504 (1980). Further, the prosecutor has an independent duty to the defendant with regard to his or her right to a fair trial. In the words of the Supreme Court:

> We long ago held, "It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury. They should not "exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused."

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

While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571 (2007). Nonetheless, in reviewing allegations of prosecutorial misconduct the court will keep in mind the realities of trial—a fair trial is not necessarily a perfect trial. *Id.*

As the Idaho Supreme Court noted, "As public officers, prosecutors have a duty to ensure that defendants receive fair trials." *State v. Severson*, 147 Idaho 694, 715 (2009). Thus "a

prosecutor must 'guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.' A prosecutor must also ensure that the jury receives only competent evidence." *Id.* (quoting *State v. Irwin*, 9 Idaho 35, 44 (1903)).

As the United States Supreme Court has explained, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 16-19 (1985); *Accord State v. Garcia*, 100 Idaho 108, 110-111 (1979); *State v. Rosencrantz*, 110 Idaho 124, 131 (Ct. App. 1986). Closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007); *Garcia*, 100 Idaho at 110-111. "[A] prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence" but he should "exercise caution to avoid interjecting his personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial." *Phillips*, 144 Idaho at 86, n.1 (*quoting State v. Pizzuto*, 119 Idaho 742, 753 n.1 (1991)). The safer course of action "is for a prosecutor to avoid the statement of opinion, as well as the disfavored phrases 'I think' and 'I believe' altogether." *Id*.

In *State v. Beebe*, the Idaho Court of Appeals analyzed the purpose of closing argument, noting that "closing argument is an opportunity for the attorneys to clarify the issues that must be resolved by the jury; to review the evidence and discuss, from the parties' respective standpoints, the inferences that jurors should draw therefrom; and to discuss the law contained in the jury instructions as it applies to the trial evidence. 145 Idaho 570, 576 (Ct. App. 2007) (vacating conviction where prosecutor misstated the evidence, misstated the law by grotesquely

mischaracterizing the defendant's defense, and repeatedly appealed to the jury to decide the case on factors other than evidence of guilt). The *Beebe* Court held that "[u]rgings, explicit or implied, for the jury to render a verdict based on factors other than the evidence admitted at trial and the law contained in the jury instructions have no place in closing arguments." *Id.*

The right to present a defense is protected by the Sixth Amendment of the United States Constitution and made applicable to the states through the due process clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 19 (1967). "This right is a fundamental element of due process of law." *Id.* The right to present a defense includes the right to offer testimony of witnesses, compel their attendance, and to present the defendant's version of the facts "to the jury so it may decide where the truth lies." *Id.* The right to a jury trial contained in the Sixth Amendment . . . includes the right to have the jury be 'the sole judge of the weight of the testimony.'" *State v. Elmore*, 228 P.3d 760, 755-756 (Wash. Ct. App. 2010) (quoting *State v. Lane*, 889 P.2d 929, 935 (Wash. 1995) (quoting *State v. Crotts*, 22 Wash. 245, 250-51, 60 P. 403, __ (Wash. 1900)). It is the jury's vital and exclusive role to make all credibility determinations, a role that is also rooted in one's Sixth Amendment right to a jury trial. *See Perry*, 150 Idaho at 229.

The Idaho Supreme Court has also held that "[w]here 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," and thus is reviewable as fundamental error. *Perry*, 150 Idaho at 227.

C. The State Violated Mr. Alwin's Right To A Fair Trial By Committing Multiple Acts Of Prosecutorial Misconduct

1. It Was Misconduct For The Prosecutor To Vouch For The Credibility Of The State's Witness

In his closing arguments, the prosecutor vouched for the credibility of the State's witness:

> There's one person in here who has the motive to not tell the truth, and he's sitting right there. Not Officer Cohen, a police officer. He is not going to sit up here under oath and not tell the truth. He is credible. His testimony is credible. . .

(Trial Tr., p.288, Ls.19-23.) And he later told the jury, "Officer Cohen wasn't making anything up." (Trial Tr., p.299, Ls.9-10.)

The prosecution asked the jury to make a decision after telling them that the prosecution's witness was a credible witness. When the prosecutor told them that he, as a government agent, believed Officer Cohen was credible because he was a police officer, he improperly placed the imprimatur of the State on Officer Cohen's testimony. The prosecution's statements improperly bolstered the testimony of the law enforcement witness and usurped the jury's vital and exclusive role to make all credibility determinations and thereby violated Mr. Alwin's right to a fair trial.

2. It Was Misconduct For The Prosecutor To Personally Guarantee The Jury That The Defense's Theory Of The Case Was Not True

The prosecutor committed misconduct during his rebuttal closing argument when he guaranteed to the jury that Officer Cohen's ability to identify who driving the car was correct:

> I guarantee if I walked him in here at the beginning of this case, had him stand there and look at you and then look away for 20 seconds, starting now, when you saw a picture of him 15 minutes later and said, That's the guy, you're all going to pick him out, because it's him.

(Trial Tr., p.299, Ls.2-7.) He then said, "And I guarantee you one thing: It's not two Russian guys, one of two Russian guys who looks slightly like him. It didn't happen that way." (Trial

Tr., p.301, Ls.1-3.) The prosecutor, with the weight of his office behind his statements, personally guaranteed to the jury that eyewitness's identification was accurate and that the defendant's theory of the case was untrue. Such was error and violated Mr. Alwin's right to a fair trial and right to present a defense.

The prosecutor's comments personally guaranteeing that the defense's theory of the case was not accurate violated Mr. Alwin's right to a fair trial and his right to present a defense. It is the jury's vital and exclusive role to make all credibility determinations, a role that is also rooted in the Sixth Amendment right to a jury trial. When the prosecutor provides the jury with his personal guarantees, with the weight of his office behind the statement, such constitutes prosecutorial misconduct.

3. It Was Misconduct For The Prosecutor To Tell The Jury That He Thought The Defense's Expert Witness's Conclusions Were Wrong And Substitute His Personal, Non-Expert Opinion For That Of The Expert's—Ultimately Asking The Jury To Decide The Case On Facts Not In The Record

In its rebuttal closing statements, the prosecutor substituted his own opinions for those of the expert:

> And I completely disagree with the expert. I know that, you know, he's got some fancy titles and stuff, that when you're under stress, you focus less. I completely disagree. I think that a lot of people get hyperfocused when they stress.

(Trial Tr., p.297, L.24 – p.298, L.3.) These assertions by the prosecutor were based on testimony that was not in evidence. Instead of retaining an expert to controvert the defense expert's testimony, the prosecutor asked the jury to ignore the testimony of the defense expert to agree with his unsubstantiated personal opinion that "I think a lot of people get hyperfocused when they stress." (Trial Tr., p.298, Ls.2-3.) He was asking the jury to trust his opinion, as a prosecutor instead of an expert (and conflicting with the trial evidence) to make a finding

contrary to the only evidence in the record. Further, such a statement was entirely unsupported by the record—the prosecutor was inserting his own personal opinion, with the weight of his office behind him, that the defense's esteemed expert—one of the preeminent experts nationwide on eyewitness identification—was wrong and could not be trusted.

A prosecutor may not base its closing argument on evidence not in the record. *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007); *United States v. Kojayan*, 8 F.3d 1315, 1321 (9th Cir.1993) (holding that it is "definitely improper" for a prosecutor to make "unsupported factual claims" during closing). A prosecutor must also be careful to phrase the argument "in such a manner that it is clear to the jury that [he or she] is summarizing evidence rather than inserting personal knowledge and opinion into the case." *United States v. Hermanek*, 289 F.3d 1076, 1100 (9th Cir. 2002); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (Stating that a prosecutor has a "special obligation to avoid improper suggestions and insinuations. A prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus."); *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir.1985) ("Even if the jury did not understand the prosecutor to refer to his knowledge of facts outside the record, the jury could have construed his statements of opinion as 'expert testimony' based on his personal knowledge and his prior experience with other cases").

D. The Prosecutorial Misconduct Constituted Fundamental Error

Even though Mr. Alwin did not object at trial, this Court is able to review the issue as fundamental error, pursuant to *State v. Perry*, 150 Idaho 209, 226 (2010). To show fundamental error, the defendant must demonstrate that the alleged error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear or obvious without the need for

reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings." *State v. Perry*, 150 Idaho at 228; *State v. Corbus*, 151 Idaho 368, 371 (Ct. App. 2011), *rev. denied*. The record in this case demonstrates that the prosecutorial misconduct was a fundamental error under the *Perry* test.

1. The Errors Violated Mr. Alwin's Constitutional Rights

First, Mr. Alwin's due process and fair trial rights were violated when the prosecutor told the jury that Office Cohen was a credible witness, essentially because he was a law enforcement officer. (Trial Tr., p.288, Ls.19-23.) Prosecutorial vouching for the credibility of a witness through bolstering is not merely an evidentiary issue such as when a witness provides vouching testimony. Instead, it is a distinct form of prosecutorial misconduct that implicates a constitutional right.

Mr. Alwin contends that the prosecutor's conduct violated his right to a fair trial and due process of law.[3] *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (recognizing that where prosecutorial misconduct does not directly infringe upon rights specifically guaranteed by the Constitution (such as the Fifth Amendment right against compelled self-incrimination), it may violate the Constitution by rendering the defendant's trial unfair). In light of this, it cannot be said that Mr. Alwin received a fair trial.

Mr. Alwin's rights to due process and a fair trial were also violated when the prosecutor appealed to the jury to convict Mr. Alwin based on facts not in the record—his own personal opinion that stress causes a witness to be "hyperfocused." (Trial Tr., p.298, Ls.2-3.) Mr. Alwin's constitutional rights to due process and a fair trial and right to present a defense

[3] *See* U.S. CONST. amends. VI, XIV; IDAHO CONST., art. I § 13.

were again violated when the prosecutor personally guaranteed the jury that his theory of the case was not true.

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

The misconduct in this case not only involved Mr. Alwin's state and federal constitutional rights to due process, but also his federal and state constitutional rights to a jury trial. As such, the errors involve an unwaived constitutional right and are reviewable for fundamental error.

2. The Violation Of Mr. Alwin's Constitutional Rights Is Clear And Obvious From The Record

The record is clear that the State vouched for the credibility of its witness by reminding the jury that Officer Cohen, *a police officer*, would have no reason to lie. (Trial Tr., p.288, Ls.19-25) (emphasis added.) The record is also clear that the State personally guaranteed that the defense's theory that the persons who previously owned the car likely took the car that night was untrue (Trial Tr., p.301, Ls.1-4), and that the prosecutor controverted the defense expert's testimony by placing his own testimony and opinion before the jury (Trial Tr., p.297, L.24 –

p.298, L.3). The errors in this case plainly exist from the record and no additional information is necessary. Further, failure to object to the testimony was not a tactical decision by Mr. Alwin's counsel. Where all of the State's witnesses were law enforcement, there is no strategic advantage to permitting the State to tell the jury panel that its witness was credible *because* he was a police officer—putting the imprimatur of the State on the officer's testimony. Further, there is simply nothing to be gained from allowing a prosecutor to tell the jury that it personally guaranteed the State's theory of the case or in allowing the prosecutor to provide his own, unsubstantiated opinion contrary to the defense's expert's opinion. The misconduct is a clear and obvious violation of Mr. Alwin's rights to due process and a fair trial. As such, the second prong of the *Perry* test is met. *See Perry,* 150 Idaho at 228.

3. The Errors Likely Affected The Outcome Of The Case

The prosecutor had the opportunity to have the last word and leave the last impression in the minds of the jurors as to how to evaluate this case. The prosecutor used that opportunity to personally promise that the defendant's version of the facts was not true. Not only did the prosecutor promise the jury that Mr. Alwin was driving the car—the prosecutor also told them that his witness was credible, that, in his opinion, the defense's expert witness was wrong regarding an eyewitness's observations while under stress, and that the defense expert was trying to "fudge" the case for the defense.[4]

This case turned on the identification of Mr. Alwin as the driver of the car. (*See* 8/5/16 Tr., p.6, Ls.11-17.) However, Mr. Alwin had an alibi supported by the testimony of two

[4] At closing, the prosecutor told the jury of Dr. Reisberg's testimony, "And then I saw how he -- at least it appeared that he tried to fudge the case towards the defense." (Trial Tr., p.289, Ls.6-8.)

witnesses. (Trial Tr., p.197, L.10 – p.200, L.12; p.204, L.5 – p.208, L.21.) Further, the officer who identified him as the driver of the car was not absolutely certain of the identification—he never saw anything but the driver's profile and the driver was wearing a hat. (Trial Tr., p.138, Ls.14-20; p.146, Ls.6-8.) The officer ultimately testified only that he "believed" the registered owner of the car and the driver he stopped were one and the same. (Trial Tr., p.152, Ls.5-20.) Finally, the jury heard ample evidence from the defense's expert that an eyewitness identification in the circumstances present that night may not be accurate. (Trial Tr., p.230, L.10 – p.232, L.3; p.241, L.3 – p.257, L.14.) These facts highlight the overall weakness of the evidence against Mr. Alwin.

The jury would thus be far more likely to convict Mr. Alwin after the prosecutor made a personal guarantee to them that the defense's theory of the case was not accurate. The prosecutor was essentially asking the jury to decide the case not on the facts in evidence, but in reliance on its own personal guarantees of Mr. Alwin's guilt. Thus, the prosecutor's attempt to bolster the credibility of its witness, malign the defense's theory of the case, and substitute its own opinion for that of an expert witness, likely contributed to the jury's guilty verdict. There is at least a reasonable possibility that that misconduct affected the outcome of the trial where the conduct was done repeatedly, thereby tainting the entire trial. Further, all of the misconduct went to the defense's theory of the case, thus negatively impacting Mr. Alwin's ability to present a defense. In a case where the sole issue was identity—whether Mr. Alwin was driving the car—the prosecutorial misconduct affecting witness credibility and the defense's theory of the case undoubtedly affected the jury's perception of the veracity of his defense. Therefore, the violation of Mr. Alwin's rights affected the outcome of his case. Thus, the third prong of the *Perry* test is met. *See Perry*, 150 Idaho at 228.

Mr. Alwin asserts that, given the multiple instances of egregious prosecutorial misconduct, the misconduct influenced the jury and resulted in fundamental error. The errors that took place negated his right to a fair trial and to present a defense and, thus, mandate reversal and a new trial.

III.

The District Court Abused Its Discretion In Denying Mr. Alwin's Motion For A New Trial Where The District Court Improperly Admitted Evidence Of Prior Bad Acts

A. Introduction

Mr. Alwin made a motion for a new trial on the grounds that the district court had erred in admitting evidence of prior bad acts—the booking photo. The district court realized that it was confused and was not aware that Plaintiff's Exhibit 2 was a booking photo, but denied Mr. Alwin's motion for a new trial, holding that defense counsel did not properly state the grounds for the objection and that the applicable case law does not prohibit showing the jury a photo of the defendant in jail garb. Mr. Alwin asserts that the district court abused its discretion in denying his motion for a new trial based on this finding.

B Standard Of Review

Idaho Criminal Rule 34 provides the standard that the trial court must apply when it considers the statutory grounds for a new trial, as identified in I.C. § 19-2406. *State v. Carlson*, 134 Idaho 389, 397 (2000). "A decision on a motion for new trial under I.C.R. 34 is reviewed under an abuse of discretion standard." *Id*. at 396. The admission of irrelevant evidence is an error of law; however, the balancing of probative value against prejudice and the ultimate decision to admit or exclude the evidence is discretionary, thus, is not a question of law. *Id*. at

397-398. In reviewing a trial court's discretionary decision on appeal, the reviewing court conducts an inquiry involving three questions: "(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason." *Id.* at 396-397.

C. The District Court Abused Its Discretion In Denying Mr. Alwin's Motion For A New Trial Where The District Court Improperly Admitted Evidence Of Prior Bad Acts

Mr. Alwin asserts that the district court should have granted his motion for a new trial because the court admitted evidence of prior misconduct despite counsel's I.R.E. 404(b) objection. His arguments in support of this assertion are found in section I, and need not be repeated, but are incorporated herein by reference.

Idaho Criminal Rule 34 grants the district court discretion to order a new trial if doing so is "in the interest of justice. I.C.R. 34. However, Idaho Code § 19-2406 sets forth the only grounds upon which a district court may grant a motion for a new trial. *State v. Ellington* 157 Idaho 480, 485 2014) (quoting *State v. Cantu*, 129 Idaho 673, 675 (1997)). When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial when the court has misdirected the jury in a matter of law or has erred in the decision of any question of law arising during the course of the trial, I.C. § 19-2406(5), or when the verdict is contrary to law or evidence, I.C. § 19-2406(6).

When a movant asserts error in the trial court's evidentiary ruling, the reviewing court first examines that ruling to determine if it was incorrect. *State v. Roberts*, 129 Idaho 325, 329 (Ct. App. 1995) (holding the district court committed an error of law when it denied the defendant's motion to exclude evidence of his imprisonment in Nevada). If the reviewing court

finds error in the trial court's decision to admit evidence, the court must "then consider whether, in view of that error, the denial of a new trial was manifestly contrary to the interests of justice." *Id*.

After trial, Mr. Alwin filed a timely motion for a new trial pursuant to I.C.R. 34 and I.C. § 19-2406, asserting that the district court erred in admitting the booking photograph. (8/5/16 Tr., p.7, L.1 – p.9, L.11; R., pp.176-180.) In ruling on the motion, the court said,

> Now, in the process, this photo was never actually shown to me, and, I mean, I could see it from a distance, and it's hard to see what a witness is dealing with in this particular courtroom, because they are right next to me, but I was never actually handed the photo.
> . . .
> When I saw this photo from a distance, I thought it was a driver's license photo. I didn't know that it was a booking photo. When you said 404(b), that should have clicked. It didn't completely. I'm going, what 404(b)? What conduct is being alleged here? I don't recognize this yellow shirt as jail garb. I've never seen an inmate in a yellow shirt. To me, it looks like scrubs, and people sometimes wear scrubs, so I don't know – you know, as I'm looking at this, I don't know if this is a passport photo, a driver's license photo, oh, a booking photo. But I don't recall that it was ever discussed that this is a booking photo. I think people were very careful about this, and I don't recall any discussion about any prior arrest of Mr. Alwin.

(8/5/16 Tr., p.15, L.4 – p.16, L.7.) The district court stated, "I disagree that the yellow shirt that Mr. Alwin was in in that particular photo is readily apparent to lay jurors that would be jail garb, that that would be a booking photo." (8/5/16 Tr., p.17, Ls.5-8.) The court also found that Mr. Alwin's counsel did not sufficiently state the grounds for the objection, and that the court did not understand the objection. (8/5/16 Tr., p.17, Ls.9-20.) After the court found the booking photo was offered to identify the driver, the court told the parties that it would have ordered the jail clothing redacted from the photo, had such a request been made by the defense.[5] (8/5/16

[5] It is not incumbent on the defense to request redaction where it had no prior notice that the State would attempt to admit a jail booking photo prohibited under I.R.E. 404(b). Thus, the

Tr., p.18, L.5 - p.19, L.7.) Although defense counsel advised the court that Mr. Alwin was wearing "prior-to-classification garb" and that "[a]nyone in Kootenai County who's ever been arrested or has attended first appearance has seen that yellow suit, so everyone, anyone who has had any contact with being booked is going to know what that garb was," the district court concluded that it did not know that the jurors would have understood that Mr. Alwin was wearing Kootenai County jail clothing, and it did not "see a requirement in the case law that jail garb is something that cannot be shown in the photos." (8/5/16 Tr., p.19, L.20 – p.20, L.5.) The court denied the motion and likened the photo to a driver's license photo or a passport photo. (8/5/16 Tr., p.19, L.8-9; p.20, Ls.10-12; R., pp.188-189.)

The district court committed an error of law in not realizing that the booking photo was evidence of a prior bad act and, thus, in failing to recognize that analysis under I.R.E. 404(b) was required. (*See* 8/5/16 Tr., p.12, Ls.8-12.) The district court admitted it was confused by the objection and acknowledged that it did not really look at the photo before admitting it. (8/5/16 Tr., p.19, Ls.20-15.) Further, in concluding that the exhibit was not clearly a booking photo, the district court failed to reach its decision through an exercise of reason and failed to act consistently with any legal standards applicable to the specific choices before it. The court had no unique ability to evaluate the booking photo, and no special insight into how it would be perceived by the jury, especially where defense counsel had advised the court that anyone in Kootenai County who has ever been arrested or has attended a first appearance would recognize the yellow scrub top that Mr. Alwin was wearing. (8/5/16 Tr., p.19, Ls.20-15.)

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necessity of provision of prior notice to the defense of the State's intent to introduce propensity. I.R.E. 404(b).

For the foregoing reasons, Mr. Alwin respectfully requests that he be granted a new trial. In the alternative, Mr. Alwin requests that the order denying his motion for a new trial be vacated and remanded to the district court for further proceedings.

CONCLUSION

Mr. Alwin respectfully requests that this Court vacate the judgment of conviction for felony eluding.

DATED this 30th day of May, 2017.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of May, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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CYNTHIA K C MEYER
DISTRICT COURT JUDGE
E-MAILED BRIEF

JAY LOGSDON
KOOTENAI COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas