9-5-2017

State v. Fulton Appellant's Brief Dckt. 44688

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44688**
Plaintiff-Respondent,	)	
	)	**JEFFERSON COUNTY**
	)	**NO. CR 2015-2752**
v.	)	
	)	
ISRAEL FULTON,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

BRIEF OF APPELLANT

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

HONORABLE ALAN C. STEPHENS
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Mr. Fulton appeals from his Judgement of Conviction for sexual battery of minor child sixteen or seventeen years of age. He asserts that his trial was so infected with error that his right to due process of law was categorically rejected.

On appeal, Mr. Fulton asserts that he was denied his right to due process because of two distinct fatal variances between the charging document and the jury instructions, one related to the elements instruction and one related to the statutory instruction. Although neither of the alleged variance was objected to, Mr. Fulton asserts that both variances are fatal and are reviewable as fundamental error.

He also asserts that the jury instructions were rife with error, resulting in jury instructions that were confusing and misleading to the jury, impermissibly lowered the State's burden of proof, and ultimately prejudiced the defense. Again, the error was not preserved for appellate review. However, Mr. Fulton asserts that the erroneous jury instructions are reviewable as fundamental error.

Additionally, Mr. Fulton asserts that the State committed prosecutorial misconduct which deprived him of a fair trial. The prosecution violated its duty to see that Mr. Fulton had a fair trial by improperly arguing that conduct which did not amount to lewd and lascivious conduct could be considered in determining whether the State had proven that Mr. Fulton had committed actions amounting to lewd conduct, appealing to the passions and prejudices of the jury, engaged in vouching behavior, and disparaged defense counsel. Mr. Fulton contends that the misconduct committed in his case was either preserved by objection or constituted fundamental error and that the errors are not harmless.

Next, he asserts that the district court violated his right to due process of law by incorrectly instructing the jury, in response to a jury question, that "[l]ascivious means wanton, lewd, lustful, licentious, libidinous, salacious. Lewd means licentious, lecherous, dissolute, sensual, debauched, impure, obscene, salacious, pornographic." He asserts that instruction was erroneous because it did not limit lewd and lascivious conduct to the manual-genital allegation. Mr. Fulton did not object to the district court's response to the jury question. However, he asserts that error amounts to a fundamental error.

Furthermore, Mr. Fulton asserts that he was denied due process of law when the jury returned a verdict of guilty for "Sexual Abuse of a Child Amounting to Lewd and Lascivious Conduct," a crime with which he had not been charged and, again, when the district court entered a Judgment of Conviction for the crime of "Sexual Battery of a Minor Child Sixteen or Seventeen Years of Age, a violation of Idaho Code Section 18-1508A(1)(a)," a crime for which he had not been convicted.

In addition, Mr. Fulton asserts that the district court erred in denying his motion for a mistrial. During the reading of the jury instructions, the district court read instructions four and five, which each contained language from the sexual battery statute. Both instructions included the statement, "[i]t is a felony for . . ." Defense counsel objected during the reading of the jury instructions and the district court instructed the jury to mark out the word "felony" and replace it with the word "crime." The subsequent motion for mistrial was denied.

Finally, Mr. Fulton asserts that the errors are not harmless or, alternatively, that the errors amount to cumulative error, depriving him of his right to a fair trial.

Statement of the Facts and Course of Proceedings

On October 23, 2015, an Information was filed charging Mr. Fulton with one count of Sexual Battery of a Minor Child Sixteen or Seventeen Years of Age. (R., pp.44-45.) He entered a plea of not guilty. (R., pp.48-49.)

The case proceeded to trial. (R., pp.93-101.) The State presented the testimony of Jared Crane, the Utah officer that interviewed the alleged victim; Natasha Robison, the defendant's wife; Samuel Tower, the Idaho detective that worked on the case, and D.B., the alleged victim. (*See* Tr. Trial.) D.B. testified that Mr. Fulton had held her hand, kissed her, made her sit on his lap, "rubbed [her] through her leggings," kissed her again, unclipped her bra, touched her breasts, and put his "hand down [her] pants and started rubbing." (Tr. Trial, p.93, Ls.2-14, p.94, Ls.1-25.)[1] She clarified that he touched her genitals when his hand was inside of her pants. (Tr. Trial, p.95, Ls.15-19.)

Defense counsel called Natasha Robison and the defendant, Mr. Fulton. (*See* Tr. Trial.) Mr. Fulton testified that he kissed D.B., she sat on his lap while they were making out, he unsnapped her bra, and touched her breasts. (Tr., Trial, p.136, Ls.24-25, p.139, Ls.10-20.) He specifically denied putting his hand down D.B.'s pants, touching her crotch, touching her vagina, touching her labia, or touching her genitals. (Tr. Trial, p.140, Ls.5-15, p.141, Ls.9-13.)

The jury was instructed that it could find Mr. Fulton guilty if it believed the statute I.C. § 18-1508A(1)(a) had been violated or if Mr. Fulton had committed manual-genital contact or "any other lewd or lascivious act." (Jury Instructions No. 4 and 7; Tr. Addenda, p.63, L.12 –

[1] For ease of reference, the transcript of the trial testimony will be cited as "Tr. Trial." The transcript of the additional portions of the trial and the sentencing hearing will be cited as "Tr. Addenda."

p.64, L.14, p.66, Ls.5-19.)[2] During the reading of the jury instructions, defense counsel objected because two of the instructions included the word "felony." (Tr. Addenda, p.62, L.25 – p.64, L.20.) The district court then told the jury to replace the word "felony" with the word "crime" on their copy of the jury instructions. (Tr. Addenda, p.63, L.4 – p.65, L.1.)

During closing argument, the prosecution made several comments which Mr. Fulton asserts amount to prosecutorial misconduct.

After the jury was sent to deliberate, defense counsel made a motion for mistrial based on the district court's use of the word felony in the jury instructions. (Tr. Trial, p.161, L.20 – p.164, L.11.) The district court noted that defense counsel "brought up this issue early on in the jury instruction conference" and was told that the motion should be reserved until the jury had been sent out. (Tr. Trial, p.165, Ls.20-25.) The district court denied the motion and noted that the problem had been fixed by informing the jury that it was a typo and to replace the word "felony" with the word "crime" and that any prejudice was suffered by the State, not the defense. (Tr. Trial, p.155, Ls.2-14.)

During jury deliberation, the jury sent a question asking "Can we get a definition of lewd and lascivious act? In Instruction No. 10, we see definitions for erotic fondling and explicit sexual conduct but no lewd and lascivious act." (Tr. Trial, p.167, Ls.13-17.) The district court provided the following answer: "Lascivious means wanton, lewd, lustful, licentious, libidinous, salacious. Lewd means licentious, lecherous, dissolute, sensual, debauched, impure, obscene, salacious, pornographic." (Tr. Trial, p.167, L.18 – p.168, L.2.)

The jury found Mr. Fulton guilty of "*Sexual Abuse* of a Child Amounting to Lewd and

[2] A Motion to Augment with a copy of the jury instructions has been filed contemporaneously with this brief.

Lascivious Conduct." (R., p.80 (emphasis added).)

The district court entered a Judgment of Conviction for the crime of "*Sexual Battery* of a Minor Child Sixteen or Seventeen Years of Age, a violation of Idaho Code Section 18-1508A(1)(a)." (R., pp.107-108 (emphasis added).) Mr. Fulton was sentenced to a unified sentence of 15 years, with 7 years fixed, and the district court retained jurisdiction. (R., pp.107-108.) He filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.124-126.)

ISSUES

I. Did a fatal variance exist between the charging document and the jury instructions (elements instruction)?

II. Did a fatal variance exist between the charging document and the jury instructions (statutory instruction)?

III. Did the jury instructions confuse or mislead the jury, lower the State's burden of proof, and prejudice Mr. Fulton?

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

V. Did the district court violate Mr. Fulton his right to due process of law when it incorrectly defined lewd and lascivious conduct, in response to a jury question?

VI. Was Mr. Fulton's right to due process of law violated when the jury was allowed to return a verdict for a crime with which he had not been charged and when the district court entered a Judgment of Conviction for a crime with which he had not been convicted?

VII. Did the district court err in denying Mr. Fulton's motion for a mistrial?

VIII. Even if the above errors are individually harmless, was Mr. Fulton's Fourteenth Amendment right to due process of law violated because the accumulation of errors deprived him of his right to a fair trial?

ARGUMENT

I.

A Fatal Variance Existed Between The Charging Document And The Jury Instructions: Elements Instruction

A. Introduction

The jury was incorrectly instructed on the elements of sexual battery of a minor child sixteen or seventeen years of age committed by means of lewd or lascivious conduct – the jury was instructed that the State must prove, "the defendant Israel Fulton committed an act of manual-genital contact, *or any other lewd or lascivious act upon or with the body of D.B.*"[3] (Jury Instruction No.7; Tr. Addenda, p.66, Ls.9-12 (emphasis added).) Because Mr. Fulton was only charged with committing the sexual battery by means of manual-genital contact in the Prosecuting Attorney's Information (R., pp.44-45), the italicized language created a fatal variance. It also incorrectly defined lewd conduct, essentially allowing Mr. Futon to be convicted of lewd conduct for an act that would not constitute actual lewd conduct.

B. Standard Of Review

The existence of an impermissible variance is a question of law over which appellate courts exercise free review. *State v. Day*, 154 Idaho 476, 479 (Ct. App. 2013). If it is established that a variance exists, the Court will then examine whether it rises to the level of prejudicial error requiring reversal of the conviction. *Id.* However, trial error ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v. Adams*,

[3] Mr. Fulton raises two separate variance claims. In Issue I, he asserts there was a variance between the elements instruction and the Prosecuting Attorney's Information. In Issue II, he asserts there was a variance between the statutory instruction and the Prosecuting Attorney's Information.

147 Idaho 857, 861 (Ct. App. 2009). Mr. Fulton acknowledges that there was no objection made to this jury instruction. Because this claim of error is raised for the first time on appeal, he must establish that the error is reviewable as "fundamental error." *State v. Perry*, 150 Idaho 209, 222 (2010). Pursuant to *Perry*, in order to prove an error is fundamental a defendant must demonstrate that: 1) one or more of his unwaived constitutional rights were violated; 2) there was a clear and obvious error without the need for additional information not contained in the appellate record; and 3) the error affected the defendant's substantial rights, meaning that there is a reasonable probability that the error affected the outcome of the trial proceedings. *Id*. at 226.

C. A Fatal Variance Existed Between The Charging Document And The Jury Instructions

Mr. Fulton was charged with Sexual Battery of a Minor Child Sixteen or Seventeen Years of Age. (R., pp.44-45.) Specifically, the Prosecuting Attorney's Information charged Mr. Fulton with committing the sexual battery "by having Lewd and / or Lascivious contact with and / or upon the body of a minor, D.B., a child sixteen or seventeen years of age, to-wit: sixteen years old, by manual-genital contact." (R., p.44.) However, when the jury was instructed, in the elements instruction, that it could find Mr. Fulton guilty of sexual battery if "3. the defendant Israel Fulton committed an act of manual-genital contact, or *any other lewd or lascivious act upon or with the body of D.B. . . .*" (Jury Instruction No.7; Tr. Addenda, p.66, Ls.9-12 (emphasis added).)

This instruction allowed Mr. Fulton to be found guilty for contact other than the manual-genital contact for which he was charged. The jury heard testimony about touching other than manual-genital contact. D.B. testified that Mr. Fulton had held her hand, kissed her, made her sit on his lap, "rubbed [her] through her leggings," kissed her again, unclipped her bra, touched her breasts, and put his "hand down [her] pants and started rubbing." (Tr. Trial, p.93, Ls.2-14, p.94,

Ls.1-25.) Mr. Fulton testified that he had only kissed D.B., she sat on his lap while they were making out, he unsnapped her bra, and touched her breasts. (Tr. Trial, p.136, Ls.24-25, p.139, Ls.10-20.) Therefore, the jury may have found that Mr. Fulton's actions in kissing D.B. and touching her breasts may have constituted "any other lewd or lascivious act."

Mr. Fulton asserts that the erroneous elements instruction created a fatal variance and incorrectly defined lewd conduct. A trial court has the duty to properly instruct the jury on the law applicable to the case before it." *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 313 (2010). A variance may occur where there is a disparity between the allegations in the charging instrument and the jury instructions. *Day*, 154 Idaho at 479; *State v. Montoya*, 140 Idaho 160, 165 (Ct. App. 2004). The instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged. *State v. Hooper*, 145 Idaho 139, 147 (2007). If they do not, there can be a fatal variance between the jury instructions and the charging document. *State v. Folk*, 151 Idaho 327, 342 (2011). Additionally, the jury instruction must not permit the defendant to be convicted of conduct that does not constitute the type of crime charged. *Id.*

Based upon the Prosecuting Attorney's Information, manual-genital contact was the conduct that had to be proven beyond a reasonable doubt in order for Mr. Fulton to be found guilty. It had to be clear to the jury that he could not be found guilty based upon some other conduct, even if the jury believed such conduct could be described as lewd and lascivious. By instructing that the jury could find Mr. Fulton guilty by means of manual-genital "*or any lewd or lascivious act . . . ,*" the court was indicating that Mr. Fulton could be guilty based upon some

other type of conduct if the jury believed it was lewd and lascivious.[4] However, the only type of conduct for which Mr. Fulton could lawfully have been convicted was manual-genital contact, even if the jury believed that Defendant engaged in other touching with the intent to gratify his lust, passions, or sexual desires. As such, the elements jury instruction created a fatal variance.

D. The Error Is Fundamental

Mr. Fulton meets all of the prong of the *Perry* test and the variance is reviewable as fundamental error.

First, the alleged error is a violation of Mr. Fulton's right to due process. A fatal variance is a due process violation. *See De Jonge v. Oregon*, 299 U.S. 353, 362 (1937), *State v. Chapa*, 127 Idaho 786, 790 (Ct. App. 1995). Mr. Fulton has shown that the variance was fatal in section C, above. Thus, the error implicates one of Mr. Fulton's unwaived constitutional rights.

Further, the only other evidence of inappropriate conduct that the jury heard was the allegations that Mr. Fulton had touched D.B.'s breasts, unhooked her bra, and kissed her. This conduct does not amount to sexual battery by means of lewd conduct. The crime of sexual battery by means of lewd conduct with a minor specifically includes several types of sexual contact, including genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact. I.C. § 18-1508A(1)(a). In *State v. Kavajecz*, 139 Idaho 482 (2003), the Idaho Supreme Court addressed whether touching or

[4] This danger is heightened by the later answer to a jury question. During jury deliberation, the jury sent a question asking "Can we get a definition of lewd and lascivious act? In Jury Instruction No. 10, we see definitions for erotic fondling and explicit sexual conduct but no lewd and lascivious act." (Tr. Trial, p.167, Ls.13-17.) The district court, provided the following answer: "Lascivious means wanton, lewd, lustful, licentious, libidinous, salacious. Lewd means licentious, lecherous, dissolute, sensual, debauched, impure, obscene, salacious, pornographic." (Tr. Trial, p.167, L.18 – p.168, L.2.) Mr. Fulton's assertion that this instruction was erroneous can be found in Issue V.

kissing the chest of a prepubescent girl constituted lewd conduct. The Court held that it did not because the type of conduct included in the phrase "including but not limited to" must be the conduct of a like or similar class or character to the types of conduct specifically listed. *Id.* at 486–87.

It was apparent from the jury instruction that the jury could convict Mr. Fulton based on conduct other than manual-genital contact. This type of activity is not only different from that with which Mr. Fulton was originally charged, but is not conduct that constitutes the type of crime charged. The only type of conduct for which Mr. Fulton could lawfully have been convicted was manual-genital contact, even if the jury believed that he engaged in other touching with the intent to gratify his lust, passions, or sexual desires. Touching the breast area or kissing would not constitute the crime of sexual battery by means of lewd conduct. Thus, giving this instruction violated Mr. Fulton's right to due process.

Second, the error is clear and obvious from the record. The law is clear that the instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged, and that if they do not, there can be a fatal variance between the jury instructions and the charging document. *Folk*, 151 Idaho at 342. The charging document and the jury instruction are in the record, so there is no need for additional information outside the record. Further, there is no indication, in the record, that Mr. Fulton knew more about the law than the trial court or the State nor any indication that he was trying to sandbag the court. There is no evidence that the failure to object to the instruction was a strategic decision, as Mr. Fulton gained absolutely no strategic advantage by giving the jury an opportunity to convict him on uncharged conduct that does not meet the definition of lewd conduct. Clearly, it would not be a reasonable strategic decision to allow Mr. Fulton to be

convicted of conduct that does not constitute the crime charged simply for the sake of a potential appellate reversal.

Third, there is a reasonable possibility that the error affected the outcome of the proceedings. While the jury heard evidence of manual-genital contact, the jury also heard evidence that Mr. Fulton had kissed D.B., touched her breasts, and unhooked her bra. Regarding the manual-genital conduct, Mr. Fulton testified that while he did kiss D.B. and touch her breast, he adamantly denied any touching of D.B.'s genitals. (Tr. Trial, p.136, Ls.24-25, p.139, Ls.10-20, p.140, Ls.5-15, p.141, Ls.9-13.) The jury could have believed that Mr. Fulton did not have manual-genital contact, but willfully kissed D.B. and touched her breasts. Further, the prosecutor, while discussing the elements of sexual battery by means of lewd conduct during closing argument, specifically argued, "Now, that's why this word [sic] "but not limited to." You can find the other acts that he committed, even without deciding the genital issue – that it was lewd and lascivious: sitting on his lap, fondling her breast, taking her bra off, kissing her." (Tr. Addenda, p.77, Ls.20-25.) The jury was left with the impression that it could convict Mr. Futon based upon touching other than manual-genital.

Because the giving of this instruction violated Mr. Fulton's right to due process, and because he meets all three prongs of Idaho's fundamental error test, Mr. Fulton's conviction must be vacated.

II.

A Fatal Variance Existed Between The Charging Document And The Jury Instructions: Statutory Instruction

A. Introduction

The jury was incorrectly instructed on sexual battery of a minor child sixteen or seventeen years of age committed by means of lewd or lascivious conduct when the district court

read a section of the statute to the jury and instructed them that they should find Mr. Fulton guilty if the statute had been proven beyond a reasonable doubt. This section of the statute included the language "(a) Commit any lewd or lascivious act or acts upon or with the body or any part or any member thereof of such minor child including, *but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact or* manual-genital contact, whether between persons of the same or opposite sex, or *who shall involve such minor child in any act of explicit sexual conduct.*" (Jury Instruction No. 4; Tr. Addenda, p.62, L.18 – p.64, L.14 (emphasis added).) Because Mr. Fulton was only charged with committing the sexual battery by means of manual-genital contact in the Prosecuting Attorney's Information (R., pp.44-45), the italicized language created a fatal variance.

B. Standard Of Review

The standard of review for variance issues was articulated in Section I(B) and is incorporated herein by reference.

C. A Fatal Variance Existed Between The Charging Document And The Jury Instructions

Mr. Fulton was charged with Sexual Battery of a Minor Child Sixteen or Seventeen Years of Age. (R., pp.44-45.) Specifically, the Prosecuting Attorney's Information charged Mr. Fulton with committing the sexual battery "by having Lewd and / or Lascivious contact with and / or upon the body of a minor, D.B., a child sixteen or seventeen years of age, to-wit: sixteen years old, by manual-genital contact." (R., p.44.) However, when the jury was instructed, the district court read the following instructions to the jury:

INSTRUCTION NO. 4

There is a statute that is charged in this case that reads as follows:

It is a ~~felony~~ crime for any person at least five (5) years of age or older than a minor child who is sixteen (16) or (17) years of age, who, with the intent of arousing, appealing to or gratifying the lust, passion, or sexual desires of such person, minor child, or third party, to:

(a) Commit any lewd or lascivious act or acts upon or with the body or any part or any member thereof of such minor child including, but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of explicit sexual conduct.

If you find from the evidence that this statute has been proven by the State beyond a reasonable doubt then you should find the defendant guilty.

If you find from the evidence that this statute has not been proven by the State beyond a reasonable doubt then you should find the defendant not guilty.

(Jury Instruction No. 4; Tr. Addenda, p.62, L.18 – p.64, L.14 (emphasis added).) This instruction must be read with Instruction 10, which defines some of the legal terms used in the language of part (a):

INSTRUCTION NO. 10

As used in these jury instructions, the following words have the following meaning:

. . .

(b) "Erotic fondling" means touching a person's clothed or unclothed genitals or pubic areas, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts (if the person is a female), or developing or undeveloped breast area (if the person is a female child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. "Erotic fondling" shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(c) "Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, sexual excitement, or bestiality. . . .

(Jury Instruction No. 10, Tr. Addenda, p.68, L.8 – p.69, L.4.)

These instructions allowed Mr. Fulton to be found guilty for contact other than the manual-genital contact for which he was charged. The jury heard testimony about touching other than manual-genital contact. D.B. testified that Mr. Fulton had held her hand, kissed her, made her sit on his lap, "rubbed [her] through her leggings," kissed her again, unclipped her bra, touched her breasts, and put his "hand down [her] pants and started rubbing." (Tr. Trial, p.93, Ls.2-14, p.94, Ls.1-25.) Mr. Fulton testified that he had only kissed D.B., she sat on his lap while they were making out, he unsnapped her bra, and he touched her breasts. (Tr. Trial, p.136, Ls.24-25, p.139, Ls.10-20.) Therefore, the jury may have found that Mr. Fulton's actions in kissing D.B. and touching her breasts may have constituted "lewd or lascivious acts . . . but not limited to," or "explicit sexual conduct."

Mr. Fulton concedes that several of the types of conduct described in instruction four could not have been applied to the facts of his case. For example, there was no testimony regarding genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or, under the explicit sexual conduct section, sexual intercourse, erotic nudity, sadomasochism, or bestiality. However, there was evidence presented at trial that they jury could believe amounted to other lewd and lascivious acts and/or explicit sexual conduct, specifically, erotic fondling by means of touching D.B.'s breasts.

As such, Mr. Fulton asserts that the erroneous statutory instruction created a fatal variance. The instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged. *State v. Hooper*, 145 Idaho 139, 147 (2007). If they do not, there can be a fatal variance between the jury instructions and the charging document. *State v. Folk*, 151 Idaho 327, 342 (2011).

Additionally, the jury instruction must not permit the defendant to be convicted of conduct that does not constitute the type of crime charged. *Id.*

As noted in Issue I, based upon the Prosecuting Attorney's Information, manual-genital contact was the conduct that had to be proven beyond a reasonable doubt in order for Mr. Fulton to be guilty. It had to be clear to the jury that he could not be found guilty based upon some other conduct, even if the jury believed such conduct could be described as lewd and lascivious or explicit sexual conduct. By instructing that the jury could find Mr. Fulton guilty by any means found in part (a) of the statute, the court was indicating that Mr. Fulton could be guilty based upon some other type of conduct that the jury believed was lewd and lascivious[5] or amounted to explicit sexual conduct. However, the only type of conduct for which Mr. Fulton could lawfully have been convicted was manual-genital contact, even if the jury believed that he engaged in other touching with the intent to gratify his lust, passions, or sexual desires. As such, statutory jury instruction created a fatal variance.

D. The Error Is Fundamental

Mr. Fulton meets all of the prong of the *Perry* test and the variance is reviewable as fundamental error.

First, the alleged error is a violation of Mr. Fulton's right to due process. A fatal variance is a due process violation. *See De Jonge v. Oregon*, 299 U.S. 353, 362 (1937), *State v. Chapa*, 127 Idaho 786, 790 (Ct. App. 1995). Mr. Fulton has shown that the variance was fatal in section C, above. Thus, the error implicates one of Mr. Fulton's unwaived constitutional rights.

[5] Additional arguments about how the jury instructions may have mislead the jury to believe that conduct like kissing or touching the breast could amount to lewd conduct under the "but not limited to" language can be found in Issue I and are incorporated herein by reference.

Second, the error is clear and obvious from the record. The law is clear that the instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged, and that if they do not, there can be a fatal variance between the jury instructions and the charging document. *Folk*, 151 Idaho at 342. The charging document and the jury instruction is in the record, so there is no need for additional information outside the record. Further, there is no indication, in the record, that Mr. Fulton knew more about the law than the trial court or the State nor any indication that he was trying to sandbag the court. There is no evidence that the failure to object to the instruction was a strategic decision, as Mr. Fulton gained absolutely no strategic advantage by giving the jury an opportunity to convict him on uncharged conduct that does not meet the definition of lewd conduct. Clearly, it would not be a reasonable strategic decision to allow Mr. Fulton to be convicted of conduct that does not constitute the crime charged simply for the sake of a potential appellate reversal.

Third, there is a reasonable possibility that the error affected the outcome of the proceedings. While the jury heard evidence of manual-genital contact, the jury also heard evidence that Mr. Fulton had kissed D.B., touched her breasts, and unhooked her bra. Regarding the manual-genital conduct, Mr. Fulton testified that while he did kiss D.B. and touch her breast, he adamantly denied any touching of D.B.'s genitals. (Tr. Trial, p.140, Ls.5-15, p.141, Ls.9-13.) The jury could have believed that Mr. Fulton did not have manual-genital contact, but willfully kissed D.B. and touched her breasts. Further, the prosecutor, while discussing the elements of sexual battery by means of lewd conduct during closing argument, specifically argued, "Now, that's why this word [sic] "but not limited to." You can find the other acts that he committed, even without deciding the genital issue – that it was lewd and lascivious: sitting on his lap,

fondling her breast, taking her bra off, kissing her." (Tr. Addenda, p.77, Ls.20-25.) Additionally, "explicit sexual conduct" includes "erotic fondling." The definition of "erotic fondling" includes the touching of breasts. Therefore, the jury was left with the impression that it could convict Mr. Futon based upon touching other than manual-genital.

Because the giving of this instruction violated Mr. Fulton's right to due process, and because he meets all three prongs of Idaho's fundamental error test, Mr. Fulton's conviction must be vacated.

III.

The Jury Instructions Confused Or Mislead The Jury, Lowered The State's Burden Of Proof, And Prejudiced Mr. Fulton

A. Introduction

The jury instructions in Mr. Fulton's case were replete with errors. The district court provided instructions that confused or mislead the jury and prejudiced Mr. Fulton by providing instructions that varied from the Idaho Criminal Jury Instructions, incorrectly instructing on the conduct for which Mr. Fulton could be convicted, providing unnecessary and prejudicial surplus instructions, providing erroneous lesser included instructions, and providing an inaccurate verdict form. Mr. Fulton did not object to these instructions. However, he asserts that these instructions misstated the law, created fatal variances, and lowered the State's burden, thus violating his constitutional right to due process. Also, the errors are plain on the face of the record, and there is a reasonable possibility that the errors affected the outcome of the trial.

B. Standard Of Review

"Whether the trial court properly instructed the jury presents a question of law over which this Court exercises free review." *State v. Poe*, 139 Idaho 885, 905 (2004). This Court

may review un-objected to jury instructions under Idaho's fundamental error rule. *State v. Adamcik*, 152 Idaho 445, 472-473 (2012); (citing *State v. Johnson*, 145 Idaho 970 (2008)). Idaho appellate courts generally will not consider an assertion of error on appeal unless the issue was preserved in the trial court proceedings. *State v. Perry*, 150 Idaho 209, 224 (2010). Pursuant to *Perry*, in order to prove an error is fundamental a defendant must demonstrate that: 1) one or more of his unwaived constitutional rights were violated; 2) there was a clear and obvious error without the need for additional information not contained in the appellate record; and 3) the error affected the defendant's substantial rights, meaning that there is a reasonable probability that the error affected the outcome of the trial proceedings. *Id.* at 226.

C. The Jury Instructions Confused Or Mislead The Jury And Prejudiced Mr. Fulton

When reviewing jury instructions, the appellate court looks to whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Parsons*, 153 Idaho 666, 669 (Ct. App. 2012). Jury instructions are reviewed as a whole because an ambiguity in one instruction may be made clear by other instructions, and an instruction that appears incomplete when viewed in isolation may fairly and accurately reflect the law when read together with the remaining instructions. *Id.* "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." *State v. Humpherys*, 134 Idaho 657, 659 (2000); *State v. Young*, 138 Idaho 370, 372 (2002). In addition, the Idaho Supreme Court has held that errors in jury instructions are fundamental if the error functions to "relieve[ ] the State of its duty to prove all elements of the charges beyond a reasonable doubt." *State v. Draper*, 151 Idaho 576, 588 (2011); *see also Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (holding that "'the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement."). Mr. Fulton

asserts that the district court's jury instructions misstated the law, were apt to confuse the jury, created a variance, and lowered the State's burden to prove each element beyond a reasonable doubt.

In the case at hand, the district court provided the following instructions to the jury:

INSTRUCTION NO. 4

There is a statute that is charged in this case that reads as follows:

It is a ~~felony~~ crime for any person at least five (5) years of age or older than a minor child who is sixteen (16) or (17) years of age, who, with the intent of arousing, appealing to or gratifying the lust, passion, or sexual desires of such person, minor child, or third party, to:

(a) Commit any lewd or lascivious act or acts upon or with the body or any part or any member thereof of such minor child including, but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of explicit sexual conduct.

If you find from the evidence that this statute has been proven by the State beyond a reasonable doubt then you should find the defendant guilty.

If you find from the evidence that this statute has not been proven by the State beyond a reasonable doubt then you should find the defendant not guilty.

INSTRUCTION NO. 5

There is a statute that is charged in this case that reads as follows:

It is a ~~felony~~ crime for any person at least five (5) years of age or older than a minor child who is sixteen (16) or (17) years of age, who, with the intent of arousing, appealing to or gratifying the lust, passion, or sexual desires of such person, minor child, or third party, to:

(~~a~~ c) Cause or have sexual contact with such minor child, not amounting to lewd conduct as defined in paragraph (a) of this subsection.

If you find from the evidence that this statute has been proven by the State beyond a reasonable doubt then you should find the defendant guilty.

If you find from the evidence that this statute has not been proven by the State beyond a reasonable doubt then you should find the defendant not guilty.

. . .

INSTRUCTION NO. 7

In order for the defendant to be guilty of Sexual Battery of a Child Amounting to Lewd and Lascivious Conduct, the state must prove each of the following:

1. Between July 31 and August 2, 2015

2. in the State of Idaho

3. the defendant Israel Fulton committed an act of manual-genital contact, or any other lewd or lascivious act upon or with the body of D.B.,

4. the defendant engaged in such conduct with the specific intent of arousing, appealing to, or gratifying the lust, passion, or sexual desires of the defendant, of such child, or of some other person,

5. D.B. was 16 or 17 years of age, and

6. the defendant was at least 5 years of age or older than D.B.

If any of the above had 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.

INSTRUCTION NO. 8

In order for the defendant to be guilty of Sexual Battery of a Child <u>not</u> Amounting to Lewd and Lascivious Conduct, the state must prove each of the following:

1. Between July 31 and August 2, 2015

2. in the State of Idaho

3. the defendant Israel Fulton committed an act of manual-genital contact upon or with the body of D.B.,

[or]

the defendant Israel Fulton involved D.B. in erotic fondling (defined by Jury Instruction no. ~~13~~ 10),

4. the defendant engaged in such conduct with the specific intent of arousing, appealing to, or gratifying the lust, passion, or sexual desires of the defendant, of such child, or of some other person,

5. D.B. was 16 or 17 years of age, and

6. the defendant was at least 5 years of age or older than D.B.

If any of the above had 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.

. . .

INSTRUCTION NO. 10

As used in these jury instructions, the following words have the following meaning:

(a) "Child" means a person who is less than eighteen (18) years of age.

(b) "Erotic fondling" means touching a person's clothed or unclothed genitals or pubic areas, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts (if the person is a female), or developing or undeveloped breast area (if the person is a female child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. "Erotic fondling" shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(c) "Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, sexual excitement, or bestiality.

(d) "Sexual excitement" means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(Jury Instruction Nos. 4, 5, 7, 8, 10; Tr. Addenda, p.62, L.18 – p.69, L.4.)

These instructions are erroneous. Specifically, instruction seven is erroneous because it creates a fatal variance, as discussed in Issue I, and lowers the State's burden by allowing the jury to convict for sexual contact other than manual-genital.

Instructions four, five, and ten are unnecessary, contain highly confusing surplus language, and do not follow the Idaho Criminal Jury Instructions. These instructions contain

the statutory language for I.C. § 18-508A sexual battery of a minor child sixteen or seventeen years of age and some definitions of related terms from I.C. § 18-1507 sexual exploitation of a child. While the Idaho Supreme Court has upheld jury instructions that do not strictly comply with those contained in the Idaho Criminal Jury Instructions, has cautioned: "[w]e emphasize, however, that any court which varies from jury instructions previously approved by this Court does so at considerable risk that the verdict rendered will be overturned on appeal." *State v. Merwin*, 131 Idaho 642, 647 (1998). Neither instruction four nor five follow the relevant pattern instruction, ICJI 928.

Instruction four created a fatal variance by instructing on forms of lewd conduct for which Mr. Fulton was not charged, presenting the "but not limited to" language, and including instruction on "explicit sexual conduct," as discussed in Issue II. Additionally, the instruction lowered the State's burden, by allowing the jury to convict Mr. Fulton for sexual conduct which was less severe than manual-genital contact. The instruction was also unnecessary due to the inclusion of the later elements instruction. Finally, the instruction informed the jury that they should find Mr. Fulton guilty, if they found that the statue had been proven, but the instruction did not state which charge the jury should convict for, if they found Mr. Fulton guilty based upon the language of instruction four.

Instruction ten is also unnecessary, because the phrase "or who shall involve such minor child in any act of explicit sexual conduct," found in instruction four, is not relevant to the actual charge. As such, instruction ten merely provides definitions of terms that are not relevant to the actual charge in the case at hand. The defined terms allow for the jury to find Mr. Fulton guilty, by finding that he had committed acts of sexual conduct less severe than the charged manual-genital contact. As such, instruction ten contributed to the fatal variance, discussed in Issue II, is

unnecessary because it did not define any terms related to the actual charge, and served only to confuse the jury.

Instruction five, provided in relation to the lesser included offense, was also a superfluous instruction. Although presumably unnecessary due to the later elements instruction on the lesser included charge, it was actually not relevant because the later elements instruction included incorrect statements of law, and did not instruct on "sexual contact" as noted in section (c) of the statute. This instruction also erroneously informed the jury that they should find Mr. Fulton guilty, if they found that the statue had been proven, but the instruction did not state which charge the jury should convict for, if they found Mr. Fulton guilty based upon the language of instruction five.

Instruction eight was an erroneous instruction. Although the instruction states that it is for a crime with conduct "not Amounting to Lewd and Lascivious Conduct," it then lists the specified contact as "manual-genital" or "erotic fondling." (Jury Instruction No. 8, Tr. Addenda, p.67, Ls.1-8.) Clearly, manual-genital contact is lewd and lascivious conduct. Additionally, erotic fondling, by definition, is "explicit sexual contact." (I.C. § 18-1508A; I.C. § 18-1507.) As such, both types of asserted conduct fall under I.C. § 18-1508A(1)(a), not I.C. § 18-1508A(1)(c). This instruction is an incorrect statement of law and is both confusing and misleading. In effect, it left the jury unsure what conduct constituted which offense and made it impossible to logically differentiate between the possible verdicts.

Instructions five and eight are also erroneous because "sexual contact" is not a lesser included offense of the lewd contact, by means of manual-genital contact, charged. The relevant portion of I.C. § 18-1508A states:

> (1) It is a felony for any person at least five (5) years of age older than a minor child who is sixteen (16) or seventeen (17) years of age, who, with the

> intent of arousing, appealing to or gratifying the lust, passion, or sexual desires of such person, minor child, or third party, to:
>
> (a) Commit any lewd or lascivious act or acts upon or with the body or any part or any member thereof of such minor child including, but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of explicit sexual conduct as defined in section 18-1507, Idaho Code; or
>
> . . .
>
> (c) Cause or have sexual contact with such minor child, not amounting to lewd conduct as defined in paragraph (a) of this subsection . . .

I.C. § 18-1508A.

Section (c) specifies that the sexual contact must not amount to lewd conduct. As such, section (c) cannot be a lesser included because the crime necessarily have different elements. Comparing sections (a) and (b) of the sexual battery statute is similar to comparing I.C. § 18-1508 lewd conduct and I.C. § 18-1506 sexual abuse. As the Idaho Supreme Court noted, sexual abuse of a child could not be a lesser included offense of lewd conduct under the statutory theory because it is possible to commit lewd conduct without committing sexual abuse. *State v. Flegel*, 151 Idaho 525, 529 (2011). "Each of these crimes requires proof of separate essential elements not required of the other and the conviction of one will not bar conviction of the other." *Id.* (quoting *State v. McCormick*, 100 Idaho 111, 115 (1979)). The *Flegel* Court noted that an important reason that sex abuse was not a lesser included was that by statutory definition, the conduct establishing sex abuse was "sexual contact with such minor child, not amounting to lewd conduct as defined in section 18–1508, Idaho Code." *Id.;* I.C. § 18-1506. Therefore, it was error to provide the "lesser offense" instructions as provided in instructions five and eight.

In addition to the above erroneous instructions, the jury received an incorrect verdict form. The form provided them with the option to find Mr. Fulton guilty or not guilty of three crimes: "Sexual Abuse of a Child Amounting to Lewd and Lascivious Conduct," "Sexual Abuse of a Child not Amounting to Lewd and Lascivious Conduct," and "Battery." (R., pp.80-81.) Mr. Fulton was charged with sexual battery, not sexual abuse. (R., pp.44-45.) Regardless, the erroneously instructed jury found Mr. Fulton guilty of Sexual Abuse of a Child Amounting to Lewd and Lascivious Conduct. (R., pp.80-81.) Arguments in support of the assertion that Mr. Fulton was denied due process of law when the jury found him guilty of an offense for which he was not charged can be found in Issue VI.

Finally, it appears that the jury did not have the benefit of all of the jury instructions during deliberations. It appears only post-proof instructions went into the jury room for deliberations. The post-proof instructions were numbered 1-19 and the district court discussed providing the packet of instructions, including only instructions 1-19, to the jury. (Tr. Addenda, p.55, L.4 – p.59, L.23.) Although the district court read pre-proof instruction, the failure to provide a copy to the jury may have caused further confusion or a misunderstanding of critical information regarding burdens and the reasonable doubt standard. The pre-proof instructions, a copy of which was presumably not provided to the jury for deliberations, included instructions about the presumption of innocence, the State's burden, reasonable doubt, punishment, and so on. (Tr. Trial, p.24, L.2 – p.31, L.17.)

D. The Errors Are Fundamental

Mr. Fulton meets all three of the prong of the *Perry*. First, the alleged error is a violation of Mr. Fulton's right to due process. A criminal defendant's right to a fair trial is protected by the

due process clause of the Fourteenth Amendment and Article I, § 13 of the Idaho Constitution. U.S CONST. amd XIV; ID. CONST art. 1 § 13. The Idaho Court of Appeals has observed,

> An erroneous instruction that relieves the State of its burden to prove an element of a charged crime can be characterized as either a violation of due process, *State v. Draper*, 151 Idaho 576, 588, 261 P.3d 853, 865 (2011); *State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886, 892 (2007); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.Ct. 2078, 2080–81, 124 L.Ed.2d 182, 188–89 (1993); or as a violation of the Sixth Amendment's jury trial guarantee. *Neder v. United States*, 527 U.S. 1, 12, 119 S.Ct. 1827, 1835, 144 L.Ed.2d 35, 48–49 (1999); *Sullivan*, 508 U.S. at 277–78, 113 S.Ct. at 2080–81, 124 L.Ed.2d at 187–88.

Parsons, 153 Idaho at 669. A fatal variance is a due process violation. *See De Jonge v. Oregon*, 299 U.S. 353, 362 (1937), *State v. Chapa*, 127 Idaho 786, 790 (Ct. App. 1995). Further, instructions that mislead the jury or prejudice the complaining party are reversible error. *Young*, 138 Idaho at 372.

Mr. Fulton has shown that the instructions were incorrect, misleading, created a fatal variance (*see* Issues I and II), and lowered the State's burden in section C, above. Thus, the jury instruction errors implicate one or more of Mr. Fulton's unwaived constitutional rights.

Second, the error is clear and obvious from the record. The jury instructions necessary for review of this issue are in the record. Further, there is no indication in the record that Mr. Fulton was trying to sandbag the court. There is no evidence that the failure to object to the instructions was a strategic decision, as Mr. Fulton gained absolutely no strategic advantage by allowing confusing and misleading instructions to the jury or by giving the jury an opportunity to convict him on uncharged conduct that does not meet the definition of lewd conduct. Clearly, it would not be a reasonable strategic decision to allow Mr. Fulton to be convicted of conduct that does not constitute the crime charged simply for the sake of a potential appellate reversal.

Third, because Mr. Fulton did not object to the instructions during trial, he bears "the burden of proving there is a reasonable possibility that the error[s] affected the outcome of the trial." *Perry*, 150 Idaho at 226. Mr. Fulton asserts that there is a reasonable possibility that the instructional errors in this case affected the outcome of his trial. In addition to the reasons Mr. Fulton argued in Sections I(C)(1) and II(C)(1) of his brief above, the errors in instructions four, five, seven and eight in essence relieved the State of its burden of proving each element beyond a reasonable doubt because the instructions allowed the jury to convict for conduct that did not amount to manual-genital contact. Additionally, the instructions are confusing and misleading, referencing statutes without instructing which offense the statute is related to and referring the jurors to unnecessary definitions regarding irrelevant conduct. Taken as a whole, the instructions are misleading, incorrect, and prejudicial. As such, there is a reasonable possibility that the errors contained in the jury instructions contributed to the jury's finding.

Because the erroneous jury instructions violated Mr. Fulton's right to due process, and because he meets all three prongs of Idaho's fundamental error test, Mr. Fulton's conviction must be vacated.

IV.

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

A. Introduction

Mr. Fulton asserts that the prosecutor committed misconduct in his case which requires the vacation of his conviction. During closing argument, the prosecution committed misconduct which rises to the level of fundamental error because the misconduct was related to one or more of Mr. Fulton's constitutional rights and was so egregious that it may have contributed to the jury's verdicts. The unfairness created by the prosecutor's misconduct resulted in Mr. Fulton

being denied due process of law and was in violation of his right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution. The violations occurred when the prosecutor improperly argued that conduct that did not amount to lewd and lascivious conduct could be considered in determining whether the State had proven Mr. Fulton had committed actions amounting to lewd conduct, appealed to the passions and prejudices of the jury by asking that the jury send a message and keep the community safe, engaged in vouching behavior by repeatedly stating that the prosecution believed in the case, and disparaged defense counsel. Although defense counsel did not object to these instances of misconduct, Mr. Fulton asserts that the prosecutorial misconduct amounted to fundamental error, was not harmless and, as such, this Court should vacate his convictions.

Additionally, defense counsel objected when the State informed the jury that Mr. Fulton was "grooming" the jury. This statement was clear misconduct and the State cannot prove that the comment did not contribute to the conviction. As such, Mr. Fulton also asserts his conviction should be vacated on this basis.

B. Standard Of Review

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

Because these claims of error are raised for the first time on appeal, he must establish that the errors are reviewable as "fundamental error." *Id.* The Idaho Supreme Court stated that to obtain relief on appeal for fundamental error:

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

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

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

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005);

Greer v. Miller, 483 U.S. 756, 765 (1987). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. *Id.* The hallmark of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

1. Misconduct For Which There Was No Objection

Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Its purpose "is to enlighten the jury and to help the jurors remember and interpret the evidence." *Id.* (quoting *State v. Reynolds*, 120 Idaho 445, 450 (Ct. App. 1991)). "Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *Id.* (quoting *State v. Sheahan*, 139 Idaho 267, 280 (2003)). However, considerable latitude has its limits, both in matters expressly stated and those implied. *Id.*

a. The Prosecution Committed Misconduct By Diminishing Its Burden And/Or Attempting To Modify The Legal Requirements For Lewd And Lascivious Conduct

As noted in Issues I-III, there were numerous issues with the jury instructions in this case. The instructional errors resulted in a variance and likely mislead the jury. These errors were compounded by the prosecutor's misconduct in asserting that jury could find Mr. Fulton guilty of sexual battery by means of lewd and lascivious contact if they believed he had committed a lewd

or lascivious act other than the charged manual-genital contact. Additionally, the prosecution attempted to lower the State's burden to prove acts amounting to lewd and lascivious conduct when it erroneously suggested that Mr. Fulton's admitted conduct, allowing D.B. to sit on his lap, touching D.B.'s breasts, removing D.B.'s bra, and kissing D.B., amounted to "other lewd or lascivious acts."

During closing argument, the prosecutor made the following arguments:

> Now, if you go to Instruction No. 4, along with Instruction 7 – Instruction 4 is the actual wordage – wording from the statutes in the State of Idaho. So we, as prosecutors, take those statutes, and we apply it to the facts of an individual case. And I'll have you kind of go through the statute, Instruction No. 4. And there's a very key word in that statute. It says: Commit any lewd or lascivious act or acts upon or with the body or any part or any member thereof of such a minor child. **Then it says: Including – and here's the key words – but not limited to . . . . And it tells you all of the different ways that you could have a lewd and lascivious act.** The reason I point that out is the victim in this case, the young lady, indicated that her vaginal area was touched, manual to genital. The defendant denied that.
>
> Now, I don't find it unusual that the defendant would get on the stand and deny that act. He has nothing to lose. She has nothing to gain by saying it happened. **Now, that's why this word [sic] "but not limited to." You can find the other acts that he committed, even without deciding the genital issue – that it was lewd and lascivious: sitting on his lap, fondling her breast, taking her bra off, kissing her.** This is a 34-year-old man with a 16-year-old girl. Who's the adult, and who's the child?
>
> So going to Instruction No. 7 . . . No. 3 says that Israel Fulton, the defendant, committed an act of manual-genital contact. **And then the big word [sic] "or any other lewd or lascivious act upon or with the body of D.B."** . . .
>
> So when you go through this – and you can check off 1 and 2, I think, pretty easily. And I think you can check off No. 3 fairly easily. **And you've got the big word [sic], and I want you to circle it, "or any other lewd or lascivious act upon or with the body of D.B."**
>
> . . .
>
> In jury trials we often give the jury a decision that they can do a lesser included offense than the main offense. And I just told you the main offense that we've charged. And we believe it, and we believe you should just stick to that.

> . . . If for some unknown reason to me, you don't think that I proved, for the benefit of the State of Idaho, beyond a reasonable doubt, the main charge, you can go to this second charge.
>
> And that's Instruction No. 5. And it's the same statute that was used in Instruction No. 5. And it's the same statute that was used in Instruction No. 4, but there's a subsection C. . . . And C says: Cause or have sexual contact with such minor child, not amounting to lewd conduct as defined in paragraph A of this subsection. And so if you find that his actions weren't lewd, then you have the opportunity to go to this lesser included subsection C, which corresponds with Instruction No. 8.

(Tr. Addenda, p.76, L.25 - p.80, L.18 (emphasis added).)

> It can't possibly be just simple battery. It can't possibly. **There were sexual events that occurred: touching of breast, making out, sitting on his lap, and touching her genitals. These are sexual events that are lewd**, that we don't accept in society.

(Tr. Addenda, p.97, Ls.8-13 (emphasis added).)

Misconduct may occur if the prosecutor diminishes or distorts the State's burden to prove the defendant's guilt beyond a reasonable doubt. *State v. Erickson*, 148 Idaho 679, 685 (Ct. App. 2010). Further, a closing argument may not misrepresent the law. *State v. Missamore*, 114 Idaho 879, 882 (Ct. App. 1988); *Phillips*, 144 Idaho at 86. Mr. Fulton contends that the prosecution's argument was tantamount to asking the jury to refuse to apply actual Idaho law and find that Mr. Fulton's admitted actions (kissing D.B. and touching her breasts) amounted to lewd or lascivious conduct. The prosecution created a blatant error by arguing to the jury that it could convict Mr. Fulton of sexual battery by means of lewd or lascivious conduct for lesser conduct that could not legally amount to lewd conduct.

Since the Idaho legislature amended the lewd conduct statute in 1984, amending Idaho Code § 18-6607 and redesignating it Idaho Code § 18-1508, lewd or lascivious conduct has been acknowledged to include genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, or bestiality or sado-

masochism. I.C. § 18-1508. Certainly, the statue also notes that this is not an exhaustive list by noting lewd or lascivious conduct is "including but not limited to" the delineated conduct. I.C. § 18-1508. However, in 2003, the Idaho Supreme Court addressed whether touching or kissing the chest of a prepubescent girl constituted lewd conduct. *State v. Kavajecz*, 139 Idaho 482, 486-487 (2003). The Court held that it did not, because the type of conduct included in the phrase "including but not limited to" must be the conduct of a like or similar class or character to the types of conduct specifically listed. *Id.* Kissing, touching the breasts, removing a bra, and lap sitting do not amount to a like or similar type of conduct and, as such, do not legally amount to lewd or lascivious conduct.[6]

The State either knew, or should have known, the legal requirements for lewd or lascivious conduct in Idaho. The State's misrepresentation to the jury, that they could convict Mr. Fulton of sexual battery by means of lewd conduct without deciding the genital contact issue because he had committed other "lewd" acts, was blatant misconduct.

The Idaho Supreme Court has stated:

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

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

In this case, the prosecution's assertions that kissing, touching the breasts, removing a bra, and lap sitting amounted to lewd conduct was calculated to encourage the jury to reach a

[6] During jury deliberation, the jury requested a definition of the terms lewd and lascivious. The district court provided a dictionary definition of the terms. Mr. Fulton asserts that the district court's answer to the question was erroneous and mislead the jury. His arguments in support of this assertion can be found in Issue V.

guilty verdict based on an improper theory, rather than the facts of the case and their legal application to the law. This argument violated Mr. Fulton's rights to a fair trial and to due process under the Sixth and Fourteenth Amendments. As such, this misconduct directly implicates Mr. Fulton's constitutional rights and is reviewable for fundamental error.

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

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

During closing argument, the prosecutor appealed to the passions and prejudices of the jury by stating:[7]

> This isn't a pleasant experience for anyone. And most of all I'm proud of the little victim to come forward, to prevent this type of activity. And do we want to send a message? Certainly we do. But most of all we want justice, and that's up to you.
>
> It's been a pleasure, as much as it can be, being before you. This is what I do. But these are the kind of cases that make you solemn, make you don't sleep at night, that make you worry about your grandchildren, your children, and others. This is a good community. We must keep it that way.

(Tr. Addenda, p.97, L.19 – p.98, L.5.)

[7] Mr. Fulton asserts that there was one additional instance of prosecutorial misconduct by means of appealing to the passions and prejudices of the jury. That instance was objected to and is discussed in section 2, of this issue.

Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics, are impermissible. *State v. Raudebaugh*, 124 Idaho 758, 769 (1993); *State v. Smith*, 117 Idaho 891, 898 (1990); *State v. LaMere*, 103 Idaho 839, 844 (1982); *Phillips*, 144 Idaho at 87 (Ct. App. 2007). The prosecutor's statements resulted in an improper plea for the jury to decide this case based on its fears, passions, and prejudices; namely, that if the jury did not send a message by finding Mr. Fulton guilty, the community would no longer be safe. In *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), the Ninth Circuit held that such pleas are wholly improper:

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

Id. at 1149 (quoting *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994) (quoting *United States v. Monaghan*, 741 F.2d 1434, 41 (D.C. Cir. 1984))). In *Weatherspoon*, where the defendant was charged with being a convicted felon in possession of a firearm, portions of the prosecutor's closing argument focused on the personal comfort and community safety which is attendant to taking armed ex-cons off the streets. *Id*. at 1149. The Ninth Circuit held that, "[t]hat entire line of argument . . . was improper." *Id.* Then, after quoting the above language from *Koon* and *Monaghan*, it observed that since Mr. Weatherspoon's case turned solely on the question of whether he had, in fact, been in possession of a firearm on the night in question, the prosecutor's arguments about the "potential social ramifications of the jury's reaching a guilty verdict," were "irrelevant and improper" because "[t]hey were clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact." *Id.* at 1149-1150.

Because the prosecutor's statements, much like the prosecutor's pleas in *Weatherspoon*, were calculated to encourage the jury to reach a guilty verdict based on its emotion, rather than the facts of the case, they were irrelevant and improper and their admission violated Mr. Fulton's rights to a fair trial and due process under the Sixth and Fourteenth Amendments. Additionally, the misconduct also interfered with the jury's ability to make an impartial decision, thereby interfering with Mr. Fulton's specific Sixth Amendment right to an impartial jury. As such, the misconduct in this case clearly violates Mr. Fulton's unwaived constitutional rights and deprived Mr. Fulton of his right to a fair trial.

c. The Prosecution Committed Misconduct By Vouching For The Alleged Victim

In closing argument, "both the prosecutor and defense counsel are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom," and that this includes "the right to identify how, from the party's perspective, the evidence confirms or calls into doubt the credibility of particular witnesses." *State v. Lovelass*, 133 Idaho 160, 168 (Ct. App. 1999) (citation omitted). However, "it is improper for a prosecutor to express a personal belief or opinion regarding the truth or falsity of any testimony or evidence or as to the guilt of the defendant." *Id*. (citation omitted). Closing argument should not include the prosecutor's personal opinions and beliefs about the credibility of a witness. *Phillips,* 144 Idaho at 86.

In the case at hand, the prosecution repeatedly told the jury that he personally believed in the case and that the victim was honest. The prosecution's statements went much further than the permissible bounds and encouraged the jury to rely on the prosecutor's beliefs:

> Now, we sincerely believe, as the State of Idaho, that her genitals were touched by his hand. . . .

(Tr. Addenda, p.78, Ls.11-12.

> In jury trials we often give the jury a decision that they can do a lesser included offense than the main offense. And **I just told you the main offense that we've charged. And we believe it, and we believe you should stick to that.** . . . If for some unknown reason to me, you don't think that I proved, for the benefit of the State of Idaho, beyond a reasonable doubt, the main charge, you can go to this second charge.

(Tr. Addenda, p.79, L.23 – p.80, L.8 (emphasis added).)

> . . . If for some reason you believe his version of the facts, **it's possible that you can move onto this lesser included charge. I don't believe that, as the representative of the State of Idaho, based on the evidence we presented**. But you have to go with what the evidence was, not with my beliefs, but with your beliefs.

(Tr. Addenda, p.80, L.24 - p.81, L.6 (emphasis added).)

> And [the alleged victim] was specifically asked by defense counsel, "What do you have to gain about this?" And she answered honestly. . . .

(Tr. Addenda, p.86, Ls.12-14.)

> They indicated that this was one of the best witnesses they ever saw. Well, the truth will set you free. When you don't have to get up and worry about what you're saying, you can say pretty much the truth without having to worry, without having to prepare, without having to study.

(Tr. Addenda, p.95, L.23 – p.96, L.3.)

A prosecutor may commit misconduct by vouching during his closing arguments for the credibility of the evidence he presented. *State v. Wheeler*, 149 Idaho 364, 368 (Ct. App. 2010). A prosecutor improperly vouches for evidence when he puts the prestige of the state behind that evidence, expressing his personal opinions or beliefs about the quality of that evidence. *Id.*

Idaho Rule of Professional Conduct 3.4 provides, "A lawyer shall not ... in trial ... state a personal opinion as to ... the credibility of a witness ... or the guilt or innocence of an accused." The rule applies to both the prosecuting attorney and to defense counsel. *State v. Carson*, 151 Idaho 713, 721 (2011). With respect to due process, the United States Supreme Court has

explained why the prosecutor cannot vouch for a witness's credibility or express a personal opinion of the defendant's guilt, stating:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and 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, 18–19 (1985).

In the case at hand, the State vouched for the credibility of D.B. and referred to the prosecutor's personal belief that Mr. Fulton was guilty of the sexual battery by means of lewd conduct charge numerous times during closing arguments.

Mr. Fulton asserts that the comments by the prosecution crossed the line and amounted to more than a fair comment on the evidence or inferences to be drawn there from. Instead, they were attempts to bolster the credibility of D.B. and the State's case in general. Regardless of the State's isolated comment that the jury needed to draw its conclusions based on its own beliefs, the closing, when reviewed in its entirety, was designed to inform the jury of the conclusions that they needed to reach because they were the conclusions of the prosecutor.

Prosecutorial vouching for the credibility of a witness either through bolstering or undermining credibility is not merely an evidentiary issue as it is when a witness provides vouching testimony. Instead, it is a distinct form of prosecutorial misconduct that implicates a

constitutional right.[8] It is a violation of Mr. Fulton's Fourteenth Amendment right to a fair trial to have a jury reach its decision on any factor other than the evidence admitted at trial and the law as explained in the jury instructions. In this case, misconduct related to the prosecution expressing personal beliefs and bolstering the credibility of D.B. interfered with the jury's ability to make an impartial decision, thereby interfering with Mr. Fulton's Sixth Amendment right to an impartial jury. The misconduct in this case clearly violates his unwaived constitutional rights and deprived him of his right to a fair trial. As such, this misconduct is reviewable as fundamental error.

d. The Prosecution Committed Misconduct By Disparaging Defense Counsel

Closing arguments should not contain disparaging comments about opposing counsel. *State v. Sheahan*, 139 Idaho 267, 280 (2003); *State v. Page*, 135 Idaho 214, 223 (2000); *State v. Brown*, 131 Idaho 61, 69 (Ct. App. 1998); *State v. Baruth*, 107 Idaho 651, 657 (Ct. App. 1984). *See also Phillips*, 144 Idaho at 86 (finding that the prosecutor's comments that the jury should be "irritated" and "upset" with the defense constituted prosecutorial misconduct and warranted a new trial).

[8] Additionally, the Idaho Court of Appeals, in an unpublished opinion, held that "unlike the elicitation of an opinion from a lay witness in regard to credibility, vouching by a prosecutor implicates a constitutional right." *State v. Anderson*, Supreme Court Docket Number 39227, Idaho Court of Appeals, 2013 Unpublished Opinion No.805 (December 30, 2013). Mr. Fulton recognizes that this is an unpublished opinion and is not to be cited as authority because it is neither case law nor binding precedent. *See* Internal Rule of the Idaho Supreme Court 15(f) ("If an opinion is not published, it may not be cited as authority or precedent in any court."). Accordingly, Mr. Fulton is only citing to this case as an example of how the Idaho Court of Appeals has dealt with this argument in the past. While this case is not binding authority, it is limitedly persuasive on the issue of whether the type of misconduct prevalent in the case at hand deals with a constitutional right, not merely an evidentiary issue.

During closing argument, the prosecution made disparaging comments about defense counsel:

> Now, one thing that I wanted to bring out – and it's not abnormal for defense counsel to try to taint a victim, to make them less than appealing to you, to try to somehow indicate that they're at fault or they're wrong or they're less than ideal.

(Tr. Addenda, p.82, Ls.7-12.)

> He tries to impugn the defendant [sic], the defense does. I don't like to take personal shots at attorneys. The defense tries to impugn the victim, [D.B.] . . .

(Tr. Addenda, p.95, Ls.15-18.)

These comments were designed to not only disparage defense counsel, but also to undermine the jury's ability to make their own credibility determinations. This argument violated Mr. Fulton's rights to a fair trial and to due process under the Sixth and Fourteenth Amendments. Additionally, the misconduct also interfered with the jury's ability to make an impartial decision, thereby interfering with Mr. Fulton's specific Sixth Amendment right to an impartial jury. Therefore, this misconduct is reviewable as fundamental error.

e. The Alleged Instances Of Prosecutorial Misconduct Are Reviewable As Fundamental Error

It is a violation of Mr. Fulton'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 linked to a constitutional provision.

In this case, the State's argument that certain actions, which are legally not lewd conduct, amounted to lewd and lascivious conduct, acted to both lower the State's burden and modify the legal requirements, a clear violation of Mr. Fulton's right to due process of law. The misconduct also interfered with the jury's ability to make an impartial decision by clouding the issues through pleas to the passions and prejudices of the jury, expressing personal beliefs about the strength of the State's case and the truth of D.B.'s testimony, and disparaging defense counsel, thereby interfering with Mr. Fulton's Sixth Amendment right to an impartial jury. The State violated Mr. Fulton's right to a jury trial when the prosecutor attempted to encroach upon the jury's vital and exclusive function to weigh the evidence or lack of evidence presented. "The right to a jury trial contained in the Sixth Amendment . . . includes the right to have the jury be 'the sole judge of the weight of the testimony.'" *State v. Elmore,* 154 Wash. App. 885, 228 P.3d 760 (WA 2010) (quoting *State v. Lane,* 125 Wash.2d 825, 838, 889 P.2d 929 (WA 1995) (quoting *State v. Crotts,* 22 Wash. 245, 250-51, 60 P. 403 (1900)).

The misconduct in this case not only involved Mr. Fulton's state and federal constitutional rights to due process, but also his federal and state constitutional rights to a jury trial. As such, the error is reviewable for fundamental error. The error in this case plainly exists from the record and no additional information is necessary. The record in this case suggests no reason to conclude that defense counsel elected, as a matter of trial strategy, to waive any objection when the prosecution committed numerous instance of misconduct. In fact, the record shows that when counsel recognized misconduct he did object, as discussed in Section 2 of this issue. Further, it cannot be a tactical decision on the part of the defense to have a jury reach a

verdict, not based on the evidence and law, but based on impermissible grounds presented through misconduct.

f. The Prosecutorial Misconduct Requires Vacation Of The Conviction

Neither misconduct objected to nor misconduct constituting fundamental error, will require vacating a conviction, unless the errors were not harmless beyond a reasonable doubt. *See State v. Christiansen*, 144 Idaho 463, 471 (2007); *see also State v. Field*, 144 Idaho 559, 571 (2007). In the case at hand, the prosecutorial misconduct requires vacation of the conviction because it cannot be said that it did not affect the outcome of the trial.

The prosecution committed numerous instances of misconduct, each of which requires that Mr. Fulton's conviction be reversed. The prosecution informed the jury that they could convict Mr. Fulton of sexual battery by means of lewd and lascivious conduct for conduct that does not amount to lewd conduct, i.e. kissing, touching the breasts, unhooking a bra, and sitting on a lap. This misconduct amounted to an egregious misrepresentation of the law. When coupled with the issues in jury instruction (*see* Issues I-III and V), there is a strong probability that the misconduct affected the outcome of the trial.

The prosecution unabashedly appealed to the passions and prejudices of the jury. Asking jurors to send a message and save their community from this type of conduct is especially persuasive. The pressure to protect a community and their own children and grandchildren is too heavy a burden for the average juror to disregard. As such, there is a great danger that the jury considered protecting those they care about, rather than merely the evidence presented, in rendering their verdict.

The prosecution bolstered the credibility of D.B. and the strength of its case through the prosecutor's expression of his personal beliefs. This misconduct encouraged the jury to

disregard their exclusive role as the judges of credibility in favor of the prosecutor's beliefs. This is a case that largely hinges on credibility. Mr. Fulton was convicted for having contact with D.B. that amounted to lewd conduct. (R., p.80.) He admitted only to conduct that would not amount to lewd conduct, specifically denying the he had manual-genital contact. (Tr. Trial, p.136, Ls.24-25, p.139, Ls.10-20, p.140, Ls.5-15, p.141, Ls.9-13.) However, D.B. testified that Mr. Fulton had touched her genitals. (Tr. Trial, p.93, Ls.2-14, p.94, Ls.1-25, p.95, Ls.15-19.) There was no other evidence that the manual-genital conduct occurred. As such, determining who to believe in this he-said, she-said case was the jury's most vital decision. The prosecutor's repeated comments that he, a representative of the State of Idaho, believed in the case and the victim likely affected the outcome of the trial.

Similarly, the prosecution's disparaging of defense counsel likely had a similar effect, due to its potential to undermine the jury's ability to make clear credibility determinations.

Therefore, the prosecutorial misconduct could have influenced the way the jury considered the evidence, made credibility determinations, and rendered their verdict. This Court should find that the misconduct denied Mr. Fulton of his right to a fair trial because it cannot say beyond a reasonable doubt that misconduct did not contribute to the verdict. In reviewing the trial as a whole, the prosecutor's improper comments, constituting misconduct, likely influenced the jury. As such, this Court must vacate the conviction.

2. Misconduct For Which There Was An Objection: The Prosecution Committed Misconduct By Appealing To The Passions And Prejudices Of The Jury

During closing argument, defense counsel objected to the prosecution's inappropriate argument:

> And in this case the defendant takes the stand and says, "I did this and this and this." But what's he trying to do to you? He's trying to gain your confidence. He's grooming you.
>
> MR. BARTHOLICK: Objection. I guess I'm going to object to that statement. It's overly prejudicial.
>
> THE COURT: Overruled. It's just argument.

(Tr. Addenda, p.85, L.17 – p.86, L.1.)

In addition to the earlier alleged prosecutorial misconduct, the prosecutor also appealed to the passions and prejudices of the jury when he referred to Mr. Fulton's testimony as an attempt to groom the jury. The jury heard earlier testimony from Detective Tower about grooming in the context of child sexual abuse. (Tr. Trial, p.72, L.1 – p.74, L.12.) As such, it is clear the jury would have understood the prosecutor's reference. Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible. *Raudebaugh*, 124 Idaho at 769; *Smith*, 117 Idaho at 898; *LaMere*, 103 Idaho at 844; *State v. Griffiths*, 101 Idaho 163, 168 (1980); *Phillips*, 144 Idaho at 87.

In this instance, the district court did not provide any curative instruction to the jury and, therefore, the error was not remedied. Because this instance of prosecutorial misconduct was objected to, the State has the burden of proving the error is harmless. *Perry*, 150 Idaho at 222. Mr. Fulton asserts the State will not be able to meet this burden.

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

Mr. Fulton asserts that the prosecutorial misconduct errors which occurred throughout his closing were not individually harmless. However, assuming arguendo that this Court finds that they were, the accumulation of the errors and irregularities that took place negated his right to a fair trial and, thus, mandate reversal and a new trial. Mr. Fulton asserts that if this Court finds

that more than one of the asserted, unpreserved, instances of prosecutorial misconduct is found to be fundamental error, that these errors, along with the preserved error, can then be reviewed for cumulative error for the purposes of determining if the prosecutor was engaging in a pattern of misbehavior. *State v. Ellington*, 151 Idaho 53, 70-71 (2011). Recently, the Idaho Supreme Court noted that when ruling on a motion for mistrial brought after an instance of alleged prosecutorial misconduct, the district court should not limit its view of the misconduct to the specific isolated incident, but should also take into consideration whether or not the prosecutor is engaging in a pattern of misbehavior. *Id*. "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. However, a necessary predicate to the application of the doctrine is a finding of more than one error." *Perry*, 150 Idaho at 230.

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 3 U.S. 83, 87 (1963). In *State v. Wilbanks*, 95 Idaho 346 (1973), the Idaho Supreme Court, when reviewing a claim of prosecutorial misconduct, quoted the language of the United States Supreme Court which found:

> 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and **whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done**. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. **But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one**.'

Id. at 353-354 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added)).

Mr. Fulton asserts that given the multiple instances of prosecutorial misconduct, it is likely that even if each of the instances individually did not amount to reversible error, the accumulation of the misconduct influenced the jury and deprived Mr. Fulton of a fair trial.

V.

The District Court Violated Mr. Fulton's Right To Due Process Of Law By Incorrectly Defining Lewd And Lascivious Conduct In Response To A Jury Question

A. Introduction

Mr. Fulton asserts that the district court violated his right to due process of law by incorrectly instructing the jury, in response to a jury question, that "[l]ascivious means wanton, lewd, lustful, licentious, libidinous, salacious. Lewd means licentious, lecherous, dissolute, sensual, debauched, impure, obscene, salacious, pornographic." (Tr. Trial, p.167, L.18 – p.168, L.2.) Because the statute defines the specific acts that constitute lewd conduct, and because other sexual contact that does not amount to lewd conduct could be included under the district court's definition, the district court's response was erroneous. The jury had heard testimony that Mr. Fulton had kissed D.B. and touched her breasts and the prosecution had argued that the jury could find Mr. Fulton guilty of sexual battery amounting to lewd conduct for these actions. The law specifically disallows a conviction for sexual battery by lewd and lascivious conduct for this type of contact and, as such, Mr. Fulton's due process rights were violated. Mr. Fulton did not object to the district court's response to the jury question. However, he asserts that error amounts to a fundamental error and requires vacation of his conviction.

B. Standard Of Review

The standard of review for not objected to instructional error was articulated in Section III(B) and is incorporated herein by reference.

C. The District Court Denied Mr. Fulton's Right To Due Process Of Law By Incorrectly Defining Lewd And Lascivious Conduct In Response To A Jury Question

In *State v. Crowe*, 135 Idaho 43 (Ct. App. 2000), the Idaho Court of Appeals held, "[t]he requirement that the State prove every element of a crime beyond a reasonable doubt is grounded in the constitutional guarantee of Due Process." *Id.* at 47 (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *In re Winship*, 397 U.S. 358 (1970); *State v. McDougall*, 113 Idaho 900, 902 (Ct. App. 1988)). "A jury instruction that lightens the prosecution's burden of proof by omitting an element of the crime, creating a conclusive presumption as to an element, or shifting to the defendant the burden of persuasion on an essential element, is impermissible." *Id.* (citing *Mullaney v. Wilbur*, 421 U.S. 684, 95 (1975); *Morissette v. United States*, 342 U.S. 246 (1952); *State v. Buckley*, 131 Idaho 164 (1998); *State v. Williams*, 103 Idaho 635, 639 (Ct. App. 1982)).

During jury deliberation, the jury sent a question asking: "Can we get a definition of lewd and lascivious act? In Instruction No. 10, we see definitions for erotic fondling and explicit sexual conduct but no lewd and lascivious act." (Tr. Trial, p.167, Ls.13-17.) The district court, relying on *State v. Evans*, 73 Idaho 50 (1952), determined that it would provide the jury with the following answer: "Lascivious means wanton, lewd, lustful, licentious, libidinous, salacious. Lewd means licentious, lecherous, dissolute, sensual, debauched, impure, obscene, salacious, pornographic." (Tr. Trial, p.167, L.18 – p.168, L.2.)

"A trial court has the duty to properly instruct the jury on the law applicable to the case before it." *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 313 (2010). *State v. Pinkney*, 115 Idaho 1152, 1154 (Ct. App. 1989), discusses the district court's duties when responding to jurors' questions:

> In general, it is within the trial court's discretion to determine whether, and the manner in which, to respond to a question posed by the jury during deliberations. I.C.R. 30(b). *See also Dawson v. Olson*, 97 Idaho 274, 543 P.2d 499 (1975). This

> grant of discretion is premised on the assumption that the instructions as given are clear, direct and proper statements of the law. *Dawson v. Olson, supra.* Consequently, if a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury but it is under no duty to do so. However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *Dawson v. Olson, supra. See also* I.C. §§ 19–2132(a) and 19–2204 (trial court must instruct the jurors on all matters of law necessary for their information).

Id. The instructions to the jury must match the allegation in the charging document as to the means by which a defendant is alleged to have committed the crime charged. *State v. Hooper*, 145 Idaho 139, 147 (2007). If they do not, there can be a fatal variance between the jury instructions and the charging document. *State v. Folk*, 151 Idaho 327, 342 (2011). Additionally, the jury instructions must not permit the defendant to be convicted of conduct that does not constitute the type of crime charged. *Id.*

In this case, Mr. Fulton was charged with sexual battery by having lewd conduct, specifically by committing manual-genital contact upon D.B. (R., pp.44-45.) The jury's question demonstrates that they did not understand what acts could constitute lewd and lascivious conduct. Instead of simply informing the jury that, in this case, lewd and lascivious conduct could only be manual-genital contact, the district court provided an erroneous, extremely out-of-date definition of the terms lewd and lascivious. The district court relied on a definition of the terms lewd and lascivious from *State v. Evans*, 73 Idaho 50 (1952). This case relied upon the old Idaho Code § 18-6607, amended, to the current form Idaho Code § 18-1508, in 1984.

Prior to 1984, the statute provided:

> Any person who shall willfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor or child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or

> child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

Folk, 151 Idaho at 341 (quoting Ch. 1 § 1, 1973 Idaho Sess. Laws 1, 1.) At that time, the words lewd and lascivious were thought to be words in common use and a dictionary definition was thought to make the meaning clear. *Evans*, 73 Idaho at 56-57; *State v. Herr*, 97 Idaho 783, 787 (1976).

On July 20, 1983, a federal district judge issued his opinion in *Schwartzmiller v. Gardner*, 567 F.Supp. 1371 (1983), in which he held unconstitutionally vague the wording of Idaho Code § 18–6607, the former lewd conduct statute, because the terms lewd and lascivious were vague and suggested that the statute be amended to identify the specific conduct prohibited. *Id.* at 1376 -1379. The Idaho legislature took the judge's suggestion and amended the statute. From 1984 on, lewd conduct has specifically identified several types of sexual contact, including genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact. I.C. § 18-1508. In *State v. Kavajecz*, 139 Idaho 482 (2003), the Idaho Supreme Court addressed whether touching or kissing the chest of a prepubescent girl constituted lewd conduct. The Court held that it did not because the type of conduct included in the phrase "including but not limited to" must be the conduct of a like or similar class or character to the types of conduct specifically listed. *Id.* at 486–87.

As such, the 1950's dictionary definitions, provided by the district court, for the terms "lewd" and "lascivious" were erroneous. Much like the federal district court found, in 1983, the definitions provided by the district court were vague and provided the jury with an opportunity to find that conduct other than the charged manual-genital could amount to lewd conduct for the purposes of sexual battery. This instruction provided for yet another fatal variance in Mr. Fulton's case.

1. The Error Was Fundamental

Mr. Fulton meets all three of the prongs of the test articulated in *State v. Perry*, 150 Idaho 209, 226 (2010).

First, the alleged error is a violation of Mr. Fulton's right to due process. Mr. Fulton's arguments in support of this assertion can be found in Section C above and additional support is located in Sections I(D), II(D), and III(D) and incorporated herein by reference.

Second, the error is clear and obvious from the record. The district court's response to the jury question is in the record. Further, there is no indication in the record that Mr. Fulton was trying to sandbag the court. There is no evidence that the failure to object to the instructions was a strategic decision. Mr. Fulton gained absolutely no strategic advantage by allowing a responsive instruction that mislead the jury to believe they could convict him of sexual battery by lewd conduct for any conduct that was "wanton, lewd, lustful, licentious, libidinous, salacious, licentious, lecherous, dissolute, sensual, debauched, impure, obscene, salacious, or pornographic," instead of the charged manual-genital conduct. Clearly, it would not be a reasonable strategic decision to allow Mr. Fulton to be convicted of conduct that does not constitute the crime charged simply for the sake of a potential appellate reversal.

Third, because Mr. Fulton did not object to the instructions during trial, he bears "the burden of proving there is a reasonable possibility that the error[s] affected the outcome of the trial." *Perry*, 150 Idaho at 226. Mr. Fulton asserts that there is a reasonable possibility that the instructional errors in this case affected the outcome of his trial.

As noted above, heard evidence that Mr. Fulton had kissed D.B., touched her breasts, and unhooked her bra (Tr. Trial, p.136, Ls.24-25, p.139, Ls.10-20.) The jury had been instructed that the State must prove, "the defendant Israel Fulton committed an act of manual-genital contact, *or*

any other lewd or lascivious act upon or with the body of D.B."[9] (Jury Instruction No.7; Tr. Addenda, p.66, Ls.9-12 (emphasis added).) Or, that the State must prove that Mr. Fulton had violated a statute by "(a) Commit[ing] any lewd or lascivious act of acts upon or with the body or any part or any member thereof of such minor child including, *but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact or* manual-genital contact, whether between persons of the same or opposite sex, or *who shall involve such minor child in any act of explicit sexual conduct.*" (Jury Instruction No. 4; Tr. Addenda, p.62, L.18 – p.64, L.14 (emphasis added).) Mr. Fulton has asserted that each of these instructions created a fatal variance. *See* Issues I and II. Additionally, the prosecuting attorney had told the jury that "You can find the other acts that he committed, even without deciding the genital issue – that it was lewd and lascivious: sitting on his lap, fondling her breast, taking her bra off, kissing her." (Tr. Addenda, p.77, Ls.21-25.) Based on the testimony presented, the erroneous instructions, and the prosecutorial misconduct, there was already a great danger that the jury may have convicted on an improper theory. After all, if the jury believed that manual-genital contact had occurred, there would be no need for their question; what manual-genital contact required was actually clear from the instructions.

Mr. Fulton asserts that there is a reasonable probability that the jury reached its verdict on an improper theory and that district court's instruction in response to the jury question contributed to the jury's finding. Additional argument's in support of this assertion can be found in Sections I(D), II(D), and III(D), and are incorporated herein by reference.

[9] Mr. Fulton raises two separate variance claims. In Issue I, he asserts there was a variance between the elements instruction and the Prosecuting Attorney's Information. In Issue II, he asserts there was a variance between the statutory instruction and the Prosecuting Attorney's Information.

Because the erroneous jury instruction violated Mr. Fulton's right to due process, and because he meets all three prongs of Idaho's fundamental error test, Mr. Fulton's conviction must be vacated.

VI.

Mr. Fulton's Right To Due Process Of Law Was Violated When The Jury Was Allowed To Return A Verdict For A Crime With Which He Had Not Been Charged And When The District Court Entered A Judgment Of Conviction For A Crime With Which He Had Not Been Convicted

A. Introduction

Mr. Fulton asserts that he was denied due process of law when the jury returned a verdict of guilty for "Sexual Abuse of a Child Amounting to Lewd and Lascivious Conduct," a crime with which he had not been charged and, again, when the district court entered a Judgment of Conviction for the crime of "Sexual Battery of a Minor Child Sixteen or Seventeen Years of Age, a violation of Idaho Code Section 18-1508A(1)(a)," a crime for which he had not been convicted.

B. Standard Of Review

Because Mr. Fulton's claim is grounded in constitutional principles, it involves questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2 (2006). Mr. Fulton did not object to the improper jury verdict or the improper conviction. As such, he must establish that the errors are reviewable as "fundamental error." *State v. Perry*, 150 Idaho 209, 222 (2010). Pursuant to *Perry*, in order to prove an error is fundamental a defendant must demonstrate that: 1) one or more of his unwaived constitutional rights were violated; 2) there was a clear and obvious error without the need for additional information not contained in the appellate record; and 3) the error affected the defendant's substantial rights,

meaning that there is a reasonable probability that the error affected the outcome of the trial proceedings. *Id.* at 226.

C. Mr. Fulton's Right To Due Process Of Law Was Violated When The Jury Was Allowed To Return A Verdict For A Crime With Which He Had Not Been Charged And When The District Court Entered A Judgment Of Conviction For A Crime With Which He Had Not Been Convicted

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall…deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be…deprived of life, liberty or property without due process of law." ID. CONST. art. I, §13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 361–64 (1970).

In the case at hand, the Information specifically charged Mr. Fulton with Sexual Battery as follows:

> SEXUAL BATTERY OF A MINOR CHILD SIXTEEN OR SEVENTEEN YEARS OF AGE
> Idaho Code § 18-1508A(3)
> (Life/$50,000 Fine; or both)

> Said defendant, between July 31 and August 2, 2015, at Rigby, Jefferson County, Idaho, did commit sexual battery by having Lewd and/or Lascivious contact with and/or upon the body of a minor, D.B., a child sixteen or seventeen years of age, to-wit: sixteen years old, by manual-genital contact.

(R., p.44.) However, the jury returned a verdict form that found Mr. Fulton guilty of "Sexual Abuse of a Child Amounting to Lewd and Lascivious Conduct."[10] (R., p.80.) The verdict was read in open court and confirmed by the jury:

> THE CLERK: State of Idaho, plaintiff, versus, Israel Fulton, defendant. We, the jury, for our verdict, unanimously answer the question submitted to us as follows: Question No. 1. Is Israel Fulton guilty or not guilty of *sexual abuse of a child*, amounting to lewd and lascivious conduct? Guilty. . . . Dated the 30th day of June 2016. Presiding officer, Karen Cawley.
>
> THE COURT: So, ladies and gentleman of the jury, is this your verdict?
>
> UNIDENTIFIED JURORS: Yes.

(Tr. Trial, p.170, L.12 – p.171, L.1 (emphasis added).) Following the sentencing hearing, the district court entered a Judgment of Conviction for the crime of "Sexual Battery of a Minor Child Sixteen or Seventeen Years of Age, a violation of Idaho Code Section 18-1508A(1)(a)." (R., pp.107-108.) As such, Mr. Fulton was charged with sexual battery of a minor child sixteen or seventeen years of age; convicted of sexual abuse of a child, amounting to lewd and lascivious conduct; and sentenced for the original charge. It is undeniable that both being convicted of a crime for which one has not been charged with and punished for a crime for which one has not been found guilty is amounts to a serious due process violation.

[10] Sexual abuse of a child amounting to lewd and lascivious conduct is not actually a cognizable crime in the State of Idaho. I.C. § 18-1506 codifies sexual abuse of a child under the age of sixteen years. However, it specifically notes that the sexual contact must not amount to lewd conduct. I.C. § 18-1506(1)(b).

D. The Error Is Fundamental

Mr. Fulton meets all of the prong of the *Perry* test and the issue is reviewable as fundamental error. First, as discussed in section C, the alleged error is a violation of Mr. Fulton's right to due process. Thus, the error implicates one of Mr. Fulton's unwaived constitutional rights.

Second, the error is clear and obvious from the record. The record contains the Prosecuting Attorney's Information charging the crime of sexual battery of a minor child sixteen or seventeen years of age (R., pp.44-45), the verdict from showing a conviction for sexual abuse of a child amounting to lewd and lascivious conduct (R., pp.80-81), and the Judgment of Conviction for the crime of sexual battery of a minor child sixteen or seventeen years of age (R., pp.107-108), so there is no need for additional information outside the record. Further, there is no indication in the record that Mr. Fulton knew more about the law than the trial court or the State nor any indication that he was trying to sandbag the court. There is no evidence that the failure to object to the erroneous jury verdict or the erroneous Judgment of Conviction was a strategic decision. Clearly, it would not be a reasonable strategic decision to allow Mr. Fulton to be convicted of an offense for which he was not charged or to allow the district court to punish him for an offense for which he had not been convicted simply for the sake of a potential appellate reversal.

Third, there is a reasonable possibility that the error affected Mr. Fulton's substantial rights. While it may be argued that error was simply a typo in the verdict form, there is a reasonable possibility that the jury verdict accurately reflects their unanimous decision. As was discussed in Issue III, the jury instructions were misleading and replete with error. It is possible

that the jury, confused by the jury instructions, determined that Mr. Fulton was guilty, not of sexual battery by means of lewd conduct, but instead, sexual abuse.

Additionally, Mr. Fulton was sentenced to a unified sentence of 15 years, with 7 years fixed, for a crime for which he has not been found guilty. (R., pp.107-108.) He began serving a period of retained jurisdiction in October of 2016. (R., pp.107-108.) As such, he already has suffered a deprivation of his liberty as a result of the due process violation

Because being convicted of a crime for which he was not charged and punished for a crime for which he had not been found guilty violated Mr. Fulton's right to due process, and because he meets all three prongs of Idaho's fundamental error test, Mr. Fulton's conviction must be vacated.

VII.

The District Court Erred In Denying Mr. Fulton's Motion For A Mistrial

A. Introduction

During the reading of the jury instructions, the district court read instructions four and five, which each contained language from the sexual battery statute for charge. Both instructions included the statement, "It is a felony for . . . ." Defense counsel objected during the reading of the jury instructions and the district court instructed the jury to mark out the word "felony" and replace it with the word "crime." Defense counsel moved for a mistrial. Mr. Fulton assert that the motion was erroneously denied.

B. Standard Of Review

Idaho's appellate courts effectively review denials of motions for mistrial *de novo*. *State v. Field*, 144 Idaho 559, 571 (2007).

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

Id. (quoting *State v. Sandoval-Tena*, 138 Idaho 908, 912 (2003) (quoting *State v. Shepherd*, 124 Idaho 54, 57 (Ct. App. 1993) (quoting *State v. Urquhart*, 105 Idaho 92, 95 (Ct. App. 1983))).

C. The District Court Erred In Denying Mr. Fulton's Motion For A Mistrial

A motion for a mistrial is controlled by I.C.R. 29.1, which provides that "[a] mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a); *State v. Canelo*, 129 Idaho 386, 389 (Ct. App. 1996). Mr. Fulton asserts that the district court erred in failing to grant a mistrial.

During the reading of the jury instructions, the following events occurred:

> No. 4: There is a statute that is charged in this case this case that reads as follows: It is a felony for any person at least five years of age or older than a minor child who is 16 or 17 years of age, who, with the intent of arousing, appealing to, or gratifying the lust, passion, or sexual desires of such person –
>
> MR. BARTHOLICK: You Honor, I hate to interrupt. Can we sidebar just very quickly?
>
> THE COURT: Sure.
>
> (Pause.)
>
> THE COURT: There's always something.

> Okay. So in Instruction No. 4 that you have in front of you, where it says, in the second line, "It is a felony . . . .," I'm crossing out "felony." You all have a pen. Cross out "felony" and write over the top "crime." You got that? Okay.
>
> Okay. So I am going to start over on No. 4. There is a statute . . .
>
> No. 5: There is a statute that is charged in this case that reads as follows: --
>
> MR. BARTHOLICK: Your Honor, I'm going to have – if we can sidebar again. And I might need to sidebar with the court really quick if we can.
>
> THE COURT: Okay.
>
> (Pause.)
>
> THE COURT: When you make a typo once, it seems to follow. Computers.
>
> So in No. 5 where it says, "It is a felony . . . .," you should cross out "felony" and write "crime."
>
> . . .

(Tr. Addenda, p.62, L.18 – p.65, L.1.)

After the jury was sent to deliberate, defense counsel made a motion for mistrial based on the district court's use of the word felony in the jury instructions and the prejudicial effect created as a result. (Tr. Trial, p.161, L.20 – p.164, L.11.) The State argued that the legislature had written the statute and jury instruction, that the words "felony" or "misdemeanor" appear in most trial instructions, and that there could be no harm or error to "give the exact language the State of Idaho has endorsed." (Tr. Trial, p.164, L.18 – p.165, L.19.) The district court noted that defense counsel "brought up this issue early on in the jury instruction conference" and was told that the motion should be reserved until the jury had been sent out. (Tr. Trial, p.165, Ls.20-25.) The district court then ruled that:

> I've also always felt that using the term "felony" is prejudicial to the State and not the defendant because I think sometimes jurors are hesitant to convict someone of

> a felony when you use that word. And so – plus, I also feel that where we explained to the jury that that was a typo and to use the word "crime," that that fixes any issue. I don't think it prejudices the defendant. If it prejudices anybody, it prejudices the State, and the State has not objected. And therefore I'm going to deny the motion. But the motion I consider to be a timely motion.

(Tr. Trial, p.155, Ls.2-14.)

Mr. Fulton asserts that it was error for the district court to deny the motion for mistrial because informing the jury that the crime he was charged with was a felony was overly prejudicial, likely had a continuing impact on the jury, and deprived Mr. Fulton of his right to a fair trial.

It is error to inform the jury whether a crime is a felony or a misdemeanor. The pattern Idaho Criminal Jury Instructions are presumptively correct statements of law, and trial courts are expected to use them unless another instruction would more adequately, accurately, or clearly state the applicable law. *State v. Reid,* 151 Idaho 80, 85 (Ct. App. 2011). As such, a proper instruction for sexual battery would follow ICJI 928 Sexual Battery of a Child. The word felony does not appear in ICJI 928. In fact, the pattern jury instructions for most crimes do not include the words felony or misdemeanor. The only notable objection being instructions related to a special verdict or enhancement, which require a bifurcated trial and those cases where having a preexisting status as a felon creates the underlying offense, i.e. possession of a firearm by a felon. (ICJIs 1008, 1009, 1401, 1601.) (*See also State v. Johnson,* 86 Idaho 51 (1963) (announcing that where a criminal defendant is charged under the persistent violator statute, the information must be prepared in two parts, the first setting forth the substantive offense charged, and the second alleging prior convictions and that the trial must also be bifurcated); *State v. Wiggins,* 96 Idaho 766 (1975) (holding that the same procedure used in *Johnson* must be applied to repeat offender DUI cases).) As such, the practical inference from the lack of the words

"felony" and "misdemeanor" in the majority of Idaho Criminal Jury Instructions is that using such words would be inappropriate.

Informing the jury that a crime is a felony or misdemeanor allows that jury to concern themselves with punishment as it provides the jury insight into punishment. It is common understanding that felonies are punished more severely than misdemeanors. When a jury is instructed that they should not concern themselves with the subject of penalty or punishment, it only follows that the jury should not be provided with information that might entice them to do the opposite.

Furthermore, it is undoubtedly prejudicial to use the term felony. The term carries with it a certain stigma that can only serve to further prejudice a defendant. It is common knowledge that felons have to explain their criminal past on job applications and are not eligible to vote or possess firearms. This common knowledge and related stigma are inherently prejudicial.

In the case at hand, the district court not only allowed the jury to erroneously hear the term felony when instructing on the charges[11], but repeatedly highlighted the term by asking the jury to mark it out and replace it with the term "crime." The jury was then allowed to take their modified jury instructions with them into the jury room. The entirety of the curative instruction given to remedy the error was, "When you make a typo once, it seems to follow. Computers." (Tr. Addenda, p.64, Ls.22-23.) The statement was made only after the second objection to the term felony appearing in a second jury instruction. The district court's off-hand comment did little, if anything, to alleviate the prejudice of the term. Contrary to the district court's assertion, the statement did not "fix" the issue as it did not clarify that the term should not be considered,

[11] Mr. Fulton maintains that jury instructions four and five were unnecessary and misleading. His arguments in support of this assertion can be found in Issue III.

that the jury should not speculate about whether a crime is a felony or a misdemeanor, or remind the jury that they were not to concern themselves with punishment.

Including the word felony in the initial version of the jury instructions was erroneous and highlighting the charge as a felony had an overwhelmingly prejudicial effect. There is a great danger that the jury did not disregard the term, but that it considered it to Mr. Fulton's detriment. Mr. Fulton asserts that including the term felony only added fuel to the fire in a case that was rife with error. As such, it was reversible error for the district court to deny the motion for mistrial.

VIII.

Even If The Above Errors Are Individually Harmless, Mr. Fulton's Fourteenth Amendment Right To Due Process Of Law Was Violated Because The Accumulation Of Errors Deprived Him Of His Right To A Fair Trial

Mr. Fulton asserts that if the Court finds that the above errors were harmless, the district court's errors combined amount to cumulative error. The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process. *State v. Paciorek*, 137 Idaho 629, 635 (Ct. App. 2002). In order to find cumulative error, this Court must first conclude that there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial. *State v. Lovelass*, 133 Idaho 160, 171 (Ct. App. 1999). Under that doctrine, even when individual errors are deemed harmless, an accumulation of such errors may deprive a defendant of a fair trial. *State v. Martinez*, 125 Idaho 445, 453 (1994). However, a finding of cumulative error must be predicated upon an accumulation of actual errors. *State v. Medina*, 128 Idaho 19, 29 (Ct. App. 1996).

Mr. Fulton asserts that the district court's errors amounted to actual errors depriving him of a fair trial. His arguments in support of this assertion are found in sections I–VII above, and need not be repeated, but are incorporated herein by reference.

CONCLUSION

Mr. Fulton respectfully requests that this Court vacate his conviction and remand this case for a new trial.

DATED this 5th day of September, 2017.

_____/s/_____
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of September, 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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INMATE #120538
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DISTRICT COURT JUDGE
E-MAILED BRIEF

SEAN P BARTHOLICK
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

EAA/eas