UIdaho Law
Digital Commons @ UIdaho Law

Not Reported
Idaho Supreme Court Records & Briefs

2-9-2018

# State v. Dunn Appellant's Brief Dckt. 45115

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation
"State v. Dunn Appellant's Brief Dckt. 45115" (2018). *Not Reported*. 4313.
https://digitalcommons.law.uidaho.edu/not_reported/4313

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

<u>IN THE SUPREME COURT OF THE STATE OF IDAHO</u>

| | | |
|---|---|---|
| **STATE OF IDAHO,** | ) | |
| | ) | **NO. 45115** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **BONNEVILLE COUNTY** |
| | ) | **NO. CR 2012-18467** |
| **v.** | ) | |
| | ) | |
| **JEFFREY LEWIS DUNN,** | ) | **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 BONNEVILLE**

---

**HONORABLE JOEL E. TINGEY**
**District Judge**

---


**ERIC D. FREDERICKSEN**
**State Appellate Public Defender**
**I.S.B. #6555**

**ELIZABETH ANN ALLRED**
**Deputy State Appellate Public Defender**
**I.S.B. #7259**
**322 E. Front Street, Suite 570**
**Boise, Idaho 83702**
**Phone: (208) 334-2712**
**Fax: (208) 334-2985**
**E-mail: documents@sapd.state.id.us**

**ATTORNEYS FOR DEFENDANT-APPELLANT**

**KENNETH K. JORGENSEN**
**Deputy Attorney General**
**Criminal Law Division**
**P.O. Box 83720**
**Boise, Idaho 83720-0010**
**(208) 334-4534**

**ATTORNEY FOR PLAINTIFF-RESPONDENT**

## TABLE OF CONTENTS

PAGE


TABLE OF AUTHORITIES ........ iii

STATEMENT OF THE CASE ........ 1

Nature of the Case ........ 1

Statement of the Facts and Course of Proceedings ........ 2

ISSUES PRESENTED ON APPEAL ........ 5

ARGUMENT ........ 6

I. The District Court Abused Its Discretion When It Allowed The State To Read A Portion Of Mr. Dunn's Prior Testimony That Was Taken Out Of Context And, As A Result, Was Overly Prejudicial ........ 6

A. Introduction ........ 6

B. Standard Of Review ........ 6

C. The District Court Abused Its Discretion When It Allowed The State To Read A Portion Of Mr. Dunn's Prior Testimony, That Was Taken Out Of Context And, As A Result, Was Overly Prejudicial ........ 7

D. The Admission Of The Misleading Portion Of Mr. Dunn's Prior Testimony Was Not Harmless Error ........ 14

II. The District Court Erred In Denying Mr. Dunn's Motions For A Mistrial ........ 15

A. Introduction ........ 15

B. Standard Of Review ........ 15

C. The District Court Erred In Denying Mr. Dunn's Motions For Mistrial ........ 16

1. The First Motion For Mistrial: S.E.'s Statement Alluding To Mr. Dunn Being A Registered Sex Offender ........ 16

2. The Second Motion For Mistrial: Brianne Bierma's Statement The Mr. Dunn Had Been In Prison ........ 17

3. The Errors In Denying The Motions For Mistrial Amount To Reversible Error ........ 18

III. The State Violated Mr. Dunn's Right To A Fair Trial By Committing Prosecutorial Misconduct ........ 20

A. Introduction ........ 20

B. Standard Of Review ........ 21

C. The State Violated Mr. Fulton's Right To A Fair Trial By Committing Prosecutorial Misconduct ........ 22

1. The Prosecution Committed Misconduct By Appealing To The Emotions, Passions, And Prejudices Of The Jury ........ 23

2. The Alleged Instance Of Prosecutorial Misconduct Are Reviewable As Fundamental Error ........ 25

3. The Prosecutorial Misconduct Requires Vacation Of The Conviction ........ 26

IV. Even If The Above Errors Are Individually Harmless, Mr. Dunn'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 ........ 27

CONCLUSION ........ 28

CERTIFICATE OF MAILING ........ 29

**TABLE OF AUTHORITIES**

Cases

*Chapman v. California*, 386 U.S. 18 (1967) .....14

*City of Boise v. Frazier*, 143 Idaho 1 (2006) .....21

*Greer v. Miller*, 483 U.S. 756 (1987) .....22

*Herring v. New York*, 422 U.S. 853 (1975) .....23

*Leland v. Oregon*, 343 U.S. 790 (1952) .....22

*Schwartzmiller v. Winters*, 99 Idaho 18 (1978) .....22

*Smith v. Phillips*, 455 U.S. 209 (1982) .....22

*State v. Adams*, 147 Idaho 857 (Ct. App. 2009) .....21

*State v. Canelo*, 129 Idaho 386 (Ct. App. 1996) .....17

*State v. Christiansen*, 144 Idaho 463 (2007) .....26

*State v. Crotts*, 22 Wash. 245 (1900) .....26

*State v. Dunn*, 2016 Unpublished Opinion No. 353 (Ct. App. January 28, 2016) .....3

*State v. Ellington*, 151 Idaho 53 (2011) .....15

*State v. Elmore*, 154 Wash. App. 885 (WA 2010) .....26

*State v. Enno*, 119 Idaho 392 (1991) .....7

*State v. Field*, 144 Idaho 559 (2007) .....15, 26

*State v. Irwin*, 9 Idaho 35 (1903) .....23

*State v. Joy*, 155 Idaho 1 (2013) .....7

*State v. LaMere*, 103 Idaho 839 (1982) .....24

*State v. Lamphere*, 130 Idaho 630 (1997) .....6

*State v. Lane*, 125 Wash.2d 825 (WA 1995) .....26

*State v. Lovelass*, 133 Idaho 160 (Ct. App. 1999) .....27

*State v. Martinez*, 125 Idaho 445 (1994) .......... 27

*State v. Medina*, 128 Idaho 19 (Ct. App. 1996) .......... 27

*State v. Paciorek*, 137 Idaho 629 (Ct. App. 2002) .......... 27

*State v. Perry*, 150 Idaho 209 (2010) .......... *passim*

*State v. Phillips*, 144 Idaho 82 (Ct. App. 2007) .......... 23, 24

*State v. Raudebaugh*, 124 Idaho 758 (1993) .......... 23

*State v. Reynolds*, 120 Idaho 445 (Ct. App. 1991) .......... 23

*State v. Sanchez*, 142 Idaho 309 (Ct. App. 2005) .......... 22

*State v. Sandoval-Tena*, 138 Idaho 908 (2003) .......... 16

*State v. Sharp*, 101 Idaho 498 (1980) .......... 14

*State v. Sheahan*, 139 Idaho 267 (2003) .......... 23

*State v. Shepherd*, 124 Idaho 54 (Ct. App. 1993) .......... 16

*State v. Shutz*, 143 Idaho 200 (2006) .......... 6

*State v. Smith*, 117 Idaho 891 (1990) .......... 23

*State v. Stevens*, 146 Idaho 139 (2008) .......... 7

*State v. Urquhart*, 105 Idaho 92 (Ct. App. 1983) .......... 16

*Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87 (1991) .......... 7

*United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994) .......... 24

*United States v. Monaghan*, 741 F.2d 1434 (D.C. Cir. 1984) .......... 24

*United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005) .......... 24

Rules

I.C.R. 29.1 .......................................................................................................16

I.R.E. 403.......................................................................................................7

I.R.E. 404(b) .......................................................................................................*passim*

I.R.E. 801(d)(2)(A) .......................................................................................................13

# STATEMENT OF THE CASE

## Nature of the Case

Jeffery Lewis Dunn appeals from the district court's Judgment of Conviction. The jury convicted Mr. Dunn of three counts of lewd conduct. Mr. Dunn's convictions were previously vacated and his case remanded for a new trial. He asserts that his second trial was also contaminated by errors and that his convictions must again be vacated.

Specifically, Mr. Dunn asserts that the district court erred and abused its discretion when it allowed the State to present a portion of his testimony from the prior trial. The testimony was not presented in its entirety due to the district court ruling that I.R.E. 404(b) evidence presented in the last trial was inadmissible in the second trial. One of the three portions of testimony presented to the jury was taken out of context and the meaning of the testimony was greatly altered. Mr. Dunn asserts that this portion of prior testimony should not have been presented as it was, when taken out of context, unfairly prejudicial. Although the testimony was relevant, it was minimally probative and the probative value was substantially outweighed by the danger of unfair prejudice.

During the trial, Mr. Dunn made two motions for mistrial; the first after S.E. alluded to Mr. Dunn being a registered sex offender when she was staying with him and the second after Brianne Bierma informed the jury that Mr. Dunn had been in prison. Mr. Dunn asserts that the district court erred in denying his motions for mistrial.

Additionally, Mr. Dunn asserts that the State committed prosecutorial misconduct which deprived him of a fair trial. The prosecution violated its duty to see that Mr. Dunn had a fair trial by appealing to the emotions, passions, and prejudices of the jury. Mr. Dunn contends that the

misconduct committed in his case constituted fundamental error and that the error is not harmless.

Finally, Mr. Dunn 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 December 20, 2012, an Information was filed charging Mr. Dunn with three counts of lewd conduct and with a repeat sexual offender sentencing enhancement. (R. 42196, pp.55-58.)[1] The charges were the result of a report to police that Mr. Dunn had been inappropriately touching S.E. and A.D. (Presentence Investigation Report (*hereinafter*, PSI), p.3.) Mr. Dunn entered not guilty pleas to the charges. (R. 42196, pp.59-60.)

The jury found Mr. Dunn guilty of each of the three lewd conduct charges. (R., p.153.) Following the return of the jury verdict, Mr. Dunn pled guilty to being a persistent sexual offender. (Tr. Trial 2, p.202, L.6 – p.203, L.11.)[2] Mr. Dunn was sentenced to three concurrent fixed life sentences. (R. 42196, pp.164-165.) Mr. Dunn filed a Rule 35 motion within 14 days of the filing of the Judgment of Conviction. (R., p.167.) The motion was denied and Mr. Dunn filed a Notice of Appeal timely from the Order Denying Motion. (R., pp.172-178.)

[1] On June 7, 2017, an Order Augmenting Appeal was filed ordering that the current appeal was augmented to include the Clerk's Record, Reporter's Transcript, and Exhibits from Mr. Dunn's prior appeal, Supreme Court Docket Number 42196. For ease of reference, the augmented record will be cited as "R. 42196." The record in the pending case will be cited as "R."

[2] The transcript of the first trial (Supreme Court Docket Number 42196) is broken into two separate transcripts. For ease of reference, the transcript of the testimony presented at the first trial will be cited as "Tr. Trial 1." The transcript of the *vior dire*, opening and closing arguments, return of jury verdict, and post-verdict activities from the first trial will be cited as "Tr. Trial 2." The transcript in the pending case will be cited as "Tr."

In the 2016 Unpublished Opinion No. 353 (Ct. App. January 28, 2016) (*hereinafter*, Opinion), the Court of Appeals held that the district court had abused its discretion when it admitted I.R.E. 404(b) evidence regarding a 1995 case and Mr. Dunn's prior inconsistent statements. (Opinion, p.14.) The Court vacated Mr. Dunn's judgment of conviction and remanded the case for a new trial. (Opinion, pp.1-14.)

Following remand, the State filed a State's Motion in Limine requesting a pre-trial ruling that the I.R.E. 404(b) evidence that the Court of Appeals held was inadmissible was nonetheless admissible in the second trial. (R., pp.72-77.) The State also filed the State's Motion In Limine Regarding Admission of Defendant's Prior Testimony requesting a ruling permitting the presentation of portions of Mr. Dunn's prior trial testimony. (R., pp.108-111.) Prior to the start of the second trial, the district court ruled that the I.R.E. 404(b) evidence admitted in the prior trial was inadmissible in the second trial. (Tr., p.13, Ls.2-12.) As a result, the district court also ruled that any portion of Mr. Dunn's prior testimony related to prior bad acts was also inadmissible. (Tr., p.106, Ls.17-25.)

The case proceeded to trial. (R., pp.183-194.) The State presented the testimony of three alleged victims, S.E., A.D., and M.T. (Tr., p.127, L.1 – p.302, L.25); Brianne Bierma, the mother of one alleged victim (Tr., p.310, L.20 – p.343, L.23); Detective Patrick McKenna, the detective that investigated the allegations (Tr., p.344, L.8 – p.401, L.14); and Thomas Tueller, the owner and clinical supervisor of Tueller Counseling (Tr., p.435, L.16 – p.470, L.17).

During the trial, Mr. Dunn made two motions for mistrial; the first after S.E. alluded to Mr. Dunn being a registered sex offender (Tr., p.130, Ls.3-7, p.130, L.16 – p.132, L.19) and the second after Brianne Bierma informed the jury that Mr. Dunn had been in prison (Tr., p.331, Ls.1-22). The motions for mistrial were denied. (Tr., p.134, L.20 – p.135, L.9, p.334, Ls.12-13.)

On the second day of trial, the State provided the district court with a selection of Mr. Dunn's prior testimony that it intended to introduce. (Tr., p.303, L.16 – p.304, L.24.) The State requested that the district court rule that the testimony was admissible. (Tr., p.305, Ls.3-9.) Defense counsel objected noting that the limited portion of the testimony was taken out of context, without additional context the statements were inadmissible because they were overly prejudicial, and additional context could not be provided without presenting I.R.E. 404(b) evidence. (Tr., p.305, L.20 – p.306, L.11; p.308, L.18 – p.309, L.8.) The district court allowed the State to present the portion of Mr. Dunn's prior testimony. (Tr., p.307, L.21 – p.309, L.19.)

During the presentation of the State's rebuttal argument, the State committed misconduct by appealing to the emotions, passions, and prejudices of the jury when the prosecutor stated "The last thing you probably ought to do, as [S.E.] said, tell the Defendant this is not how daddies show love to little girls." (Tr., p.506, Ls.11-13.) Defense counsel did not object.

The jury returned guilty verdicts for each of the three charges. (R., p.189.) Mr. Dunn then admitted that he had a prior conviction that qualified him for the charged repeat sexual offender sentencing enhancement. (Tr., p.511, L.1 – p.512, L.8.) Ultimately, Mr. Dunn was sentenced to three unified sentences of life, with twenty-five years fixed. (R., pp.205-208.) He filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.212-214.)

## ISSUES

I. Did the district court abuse its discretion when it allowed the State to read a portion of Mr. Dunn's prior testimony that was taken out of context and, as a result, was overly prejudicial?

II. Did the district court err in denying Mr. Dunn's motions for a mistrial?

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

IV. Even if the above errors are individually harmless, was Mr. Dunn'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.

## The District Court Abused Its Discretion When It Allowed The State To Read A Portion Of Mr. Dunn's Prior Testimony That Was Taken Out Of Context And, As A Result, Was Overly Prejudicial

### A. Introduction

The State was allowed to present portions of Mr. Dunn testimony from his first trial. One of these portions of testimony was taken out of context, altering the statements' meaning. During the first trial, significant I.R.E. 404(b) evidence was admitted regarding a prior victim of sexual abuse committed by Mr. Dunn. During his prior testimony, Mr. Dunn discussed that he had received treatment, that one of tools he had learned was to avoid being around young females, the type of person that had been a previous trigger for his inappropriate behavior. In this vein, Mr. Dunn acknowledged that he had attempted to keep M.T. from spending the night at his home because she was a young female and he was trying to avoid individuals that had been triggers in the past. However, the statement admitted, that he had initially not allowed M.T. to spend the night based upon "knowing" that he must "separate [himself] from the object of desire," misconstrued his testimony and conveyed that M.T. was an object of his desire, not that in the past young females had been an object of desire or trigger for him. Mr. Dunn asserts that the district court abused its discretion when it allowed the State to present this portion of his prior testimony.

### B. Standard Of Review

The relevancy of evidence is reviewed *de novo*. *State v. Shutz*, 143 Idaho 200, 202 (2006) (citing *State v. Lamphere*, 130 Idaho 630, 632 (1997)). The district court's determination of whether the probative value of evidence is outweighed by the danger of unfair prejudice is

reviewed for an abuse of discretion. *Id.* Appellate courts use a three-part test for determining whether a district court abused its discretion: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *State v. Stevens*, 146 Idaho 139, 143 (2008) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991)).

C. The District Court Abused Its Discretion When It Allowed The State To Read A Portion Of Mr. Dunn's Prior Testimony, That Was Taken Out Of Context And, As A Result, Was Overly Prejudicial

The determination to admit or exclude relevant evidence is made by the trial court. *State v. Joy*, 155 Idaho 1, 6 (2013) (citations omitted). "The applicable rule in determining whether such relevant evidence is admissible is whether its 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *State v. Enno*, 119 Idaho 392, 405 (1991) (quoting I.R.E. 403).

Mr. Dunn asserts that the district court abused its discretion by failing to reach its decision based upon an exercise of reason. Had the district court conducted a proper balancing of the probative value of the offered portion of Mr. Dunn's prior testimony and the danger of unfair prejudice, it would have found that any limited value was outweighed by the prejudice created by presenting an out of context statement that mislead the jury.

In the case at hand, the State filed a State's Motion In Limine Regarding Admission of Defendant's Prior Testimony requesting a ruling permitting the presentation of portions of Mr. Dunn's prior trial testimony. (R., pp.108-111.) Although the district court did not address

the motion prior to trial, the district court did rule that the I.R.E. 404(b) evidence admitted in the prior trial was inadmissible in the second trial. (Tr., p.13, Ls.2-12.) The district court also ruled that any portion of Mr. Dunn's prior testimony related to prior bad acts was correspondingly inadmissible. (Tr., p106, Ls.17-25.)

On the second day of trial, the State provided the district court with a more limited selection of Mr. Dunn's prior testimony that it intended to introduce. (Tr., p.303, L.16 – p.304, L.24.) The State acknowledged that a specific portion of the prior testimony was "fairly prejudicial" and requested that the district court rule that the testimony was admissible. (Tr., p.305, Ls.3-9.) Defense counsel objected noting that the limited portion of the testimony was taken out of context, without additional context the statement was inadmissible because it was overly prejudicial, and additional context could not be provided without presenting I.R.E. 404(b) evidence. (Tr., p.305, L.20 – p.306, L.11; p.308, L.18 – p.309, L.8.) The district court allowed the State to present the portion of Mr. Dunn's prior testimony. (Tr., p.307, L.21 – p.309, L.19.)

The testimony offered was taken out of context. The relevant portion of the testimony discusses Mr. Dunn's treatment for committing a prior sexual offense and related matters. However, only a small portion of this testimony was read to the jury in the second trial. The relevant portions of the prior testimony are as follows:

> Q. Now I'm not horribly familiar with, you know, the counseling or treatment which I assume you went through with regard to your probationary period.
>
> A. Yes, sir.
>
> Q. But I assume there's some discussion regarding boundaries?
>
> A. Yes, sir.
>
> . . .

Q. Well, you abused Crystal. She was 13. She was your daughter?

A. Right.

Q. So there's a discussion about making sure the proper boundaries –

A. It doesn't happen again.

Q. Okay.

. . .

Q. . . . During your treatment, you would have been treated and counseled and we discussed the need to refrain from contact with other minors at all for a while and then specifically within the range of those that you've identified as a prior victim. Correct?

A. Yes, sir.

Q. And yet you went against that counseling, went against those prior prerogative or those restrictions. Whatever you want to call it, by the probation officer, or by the treatment provider as it related to while you were on probation. Correct?

A. If I understand what you're asking, yes.

Q. I think you do. And you also, after being off probation, continued the level of contact with other girls that would have been restricted to you while you were on probation?

A. Yes.

Q. In fact, you began that contact, after the probation officer notified you, immediately. Correct?

A. I don't know if it was immediately.

Q. Within a couple weeks?

A. Within a week.

Q. Within a week. Okay. So not immediately but within a week. Okay. Did you – and then you went from that point – at what point did you have an issue with [M.T.] spending the night?

A. When we first met her.

Q. And you told Detective McKenna to some extent, may not be at all, but to some extent that's based upon boundaries that you need to abide by. Correct?

A. Yes, sir.

Q. And yet ignored that boundary. Correct? You had a boundary –

A. Yes, sir.

Q. You still let her sleep there?

A. Uh-huh.

Q. Okay. And then I don't know if this is a rule, but I'm guessing sleeping in the same bed as the age – with girls who are the same age as you prior victims, my guess is that probably is frowned upon in your treatment or in what you learned through that process. Would you agree with that?

A. Probably.

Q. And you ignored that. You ignored that directive?

A. Yes, sir.

Q. At this point it's a suggestion. Treatment provider and probation officer they've got no control over you. Right?

A. Right.

Q. So at this point it's a, I've learned this. I need to apply it. Correct?

A. Yes, sir.

. . .

Q. Now you did reference certain things with Detective McKenna about efforts you were making –

A. Yes, sir.

Q. -- to abide by what those directives.

A. Yes, sir.

Q. Why are those directives in place? When you're on probation receiving treatment, why are those given to you as thing you are to do?

A. I don't know that I can answer that. That's just the way – that's the rules they have. So.

Q. Is there some level of understanding to remove you from a desire to do that? That would have come out in your treatment. Correct?

A. I think that's accurate.

Q. And so there's conditions put in place that sole purpose of removing you from the temptation of what you desire. Correct? Not suggesting you desired these three victims. That's not what I am driving at. You have a desire that you've acted on in 1995.

A. Right, okay.

Q. Correct?

A. Yes.

Q. In order to remove you from the ability to act on that desire that's been identified, you are told to stay away?

A. Yes, sir.

Q. And you ignored that?

A. Yes, sir.

Q. Okay. You went to some effort to tell Detective McKenna that you had stayed from the park?

A. Yes, sir.

Q. Girl was washing the dog, and you removed yourself from that?

A. I paid her to wash the dog.

Q. You removed yourself in order –

A. Yes.

Q. -- to separate you from the object that you had desired in the past?

A. Yes, sir.

Q. And as I asked you before, you had initially rebuffed, I assume [A.D.] was probably bugging the heck out of you to let [M.T.] spend the night?

A. Yes, sir.

Q. She was pulling all over you to have a friend spend the night. I have no doubt that's how it plays out. Right?

A. Yes, sir.

Q. And you rebuffed that?

A. In the beginning, yes.

Q. And in part, rebuffed that based upon you knowing you must –

A. Yes.

Q. -- separate yourself from the object of a desire.

A. Yes, sir.

Q. But you didn't stick with that one either. Right?

A. No, sir.

. . .

(Tr. Trial 1, p.470, L.3 – p.476, L.2.) The excerpt read at the second trial is as follows:

Q. And as I asked you before, you had initially rebuffed, I assume [A.D.] was probably bugging the heck out of you to let [M.T.] spend the night?

A. Yes, sir.

Q. She was pulling all over you to have a friend spend the night. I have no doubt that's how it plays out. Right?

A. Yes, sir.

Q. And you rebuffed that?

A. In the beginning, yes.

Q. And in part, rebuffed that based upon you knowing you must –

A. Yes.

Q. -- separate yourself from the object of desire. [3]

A. Yes, sir.

Q. But you didn't stick with that one either. Right?

A. No, sir.

(Tr., p.393, L.6-24.)

Mr. Dunn concedes that normally his prior testimony, from the first trial, would be admissible in the second trial. *See* I.R.E. 801(d)(2)(A). However, he asserts that the above testimony, read to the jury at his second trial, was taken out of context and, as a result, was overly prejudicial because it mislead the jury. When the prior testimony is read in its entirety it is clear that Mr. Dunn was testifying that he initially did not allow M.T. to spend the night in an effort to avoid a potential trigger. When only the portion of the testimony read to the jury in the second trial is considered, it clearly and incorrectly conveys that Mr. Dunn had previously testified that he desired M.T., something he never testified to. As such, the testimony, as read, was misleading and the effect of the misleading testimony was undoubtedly devastating to Mr. Dunn's case. It is difficult to imagine testimony more damning in a lewd conduct case than testimony from a defendant that he thought of the alleged victim as an "object of desire."

Normally, if only a portion of a witness prior testimony is presented, defense counsel can mitigate any misleading effect by presenting additional testimony. However, in this case, once the testimony was read to the jury, Mr. Dunn could not supplement by reading additional portions of his prior testimony in an effort to clarify the meaning of the testimony without

presenting the jury with I.R.E. 404(b) evidence that he had previously committed a sexual offense against a child. As such, allowing counsel to supplement the testimony provided with additional testimony was not an appropriate remedy in Mr. Dunn's case. The only proper remedy was to exclude this portion of the prior testimony in its entirety.

Therefore, Mr. Dunn asserts that the district court abused its discretion in allowing the State to present unfairly prejudicial evidence that was taken out of context and mislead the jury.

D. The Admission Of The Misleading Portion Of Mr. Dunn's Prior Testimony Was Not Harmless Error

The admission of the prior testimony was not harmless error. The harmless error doctrine has been defined by this Court: "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the conviction." *State v. Sharp*, 101 Idaho 498, 507 (1980) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Where alleged error is raised, allowing the district court to rule upon the issue, and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman*. *See State v. Perry*, 150 Idaho 209, 227 (2010). In this case, the State will be unable to prove that the admission of the prior testimony was harmless error.

---

[3] It should be noted that when the testimony was read at the second trial, the word "a" was not read. The word "a" should appear between the words "of" and "desire."

## II.

## The District Court Erred In Denying Mr. Dunn's Motions For A Mistrial

### A. Introduction

The State presented the testimony S.E., one the alleged victims. In response to a question from the State, S.E. stated "[w]hen I was younger, he was living at our place of residence. He was registered at a different home, but he was definitely living with us." (Tr., p.130, Ls.3-5.) S.E.'s response to the State's question impliedly informed the jury that Mr. Dunn was required to register as a sex offender. Defense counsel objected and made a motion for a mistrial. Later that same day, Brianne Bierma, the mother of one of the alleged victims, informed the jury that Mr. Dunn had been in prison. Defense counsel again objected and made a motion for a mistrial. The district court denied both of the motions for mistrial. Mr. Dunn asserts that the motions for mistrial were erroneously denied.

### B. Standard Of Review

Mr. Dunn asserts that, following *State v. Perry*, 150 Idaho 209 (2010), the standard of review for motions for mistrial is unclear.[4] Previously, Idaho courts have 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

[4] The *Field* standard has been referenced in post-*Perry* cases by Idaho appellate courts. *See State v. Ellington*, 151 Idaho 53, 68 (2011). However, it does not appear that the specific question of whether *Perry* altered the burden of proof has been addressed.

> 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))).

However, for alleged errors for which there was a timely objection, Mr. Dunn 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." *Perry*, 150 Idaho at 227. The *Perry* Court noted only two objections to this standard: when there is a structural defect or when the jury reached its verdict based upon erroneous instruction. *Id.* at 227-228.

As such, there are two competing standards of review and it is unclear whether Mr. Dunn has to burden to prove that the failure to grant a motion for mistrial constituted reversible error or if he only has to prove that an error occurred and the burden then shifts to the State to prove that the erroneously admitted testimony did not contribute to the verdict. Regardless, error is harmless and not reversible if the reviewing court is convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 221.

C. The District Court Erred In Denying Mr. Dunn's Motions For Mistrial

Mr. Dunn asserts that the district court erred in denying both of his motions for mistrial because both portions of the erroneously admitted testimony deprived him of a fair trial. 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. Dunn asserts that the district court erred in failing to grant a mistrial.

1. The First Motion For Mistrial: S.E.'s Statement Alluding To Mr. Dunn Being A Registered Sex Offender

During [S.E.]'s testimony she was asked to elaborate on the times that she lived with Mr. Dunn. (Tr., p.129, L.25 – p.130, L.2.) She noted that "[w]hen I was younger, he was living at our place of residence. He was registered at a different home, but he was definitely living with us. But that was only on Woodruff. After Woodruff they moved, and he was living over on H Street on his own." (Tr., p.130, Ls.3-7.) Shortly thereafter, defense counsel made a motion for mistrial noting concern that the jury had been informed that Mr. Dunn was "registered" at a different home and may assume, correctly, that [S.E.] was refereeing to Mr. Dunn registering as a sex offender. (Tr., p.130, L.16 – p.132, L.19.) The district court noted that the erroneous testimony was "problematic" and presented "a serious issue." (Tr., p.134, Ls.10-11.) The district court determined that a curative instruction would only serve to highlight the testimony. (Tr., p.134, Ls.11-16.) After mentioning that it was a "difficult question," the court denied the motion and held that:

> It was simply a brief reference, albeit improper and problematic. But I don't think it's enough to where we've just sacrificed a fair trial. I don't think we're there.
>
> Now, it may become – I mean, a mistake like this may add up. And I guess we'll wait and see. I mean, if it – if there's other mistakes that are referenced prior conduct, which, again, has been part of the Court's pretrial order, if there's other statements that get into that, then it becomes cumulative to the point where I think, okay, now we have sacrificed a fair trial. I don't think we're there yet. It certainly is unfortunate, but I don't think we've tainted the jury at this point based upon this single inadvertent and unfortunate reference to registration.

(Tr., p.134, L.20 – p.135, L.9.)

2. <u>The Second Motion For Mistrial: Brianne Bierma's Statement The Mr. Dunn Had Been In Prison</u>

During cross-examination of Brianne Bierma, she made the unsolicited statement that Mr. Dunn "was in prison already." (Tr., p.331, Ls.1-2.) Defense counsel objected and moved to strike the testimony. (Tr., p.331, Ls.3-4.) The district court sustained the objection and instructed the jury to disregard Ms. Bierma's answer. (Tr., p.331, Ls.5-7.) Outside the presence of the jury, defense counsel made a motion for mistrial and argued that the testimony was prejudicial and related to inadmissible I.R.E. 404(b) evidence by asserting that Mr. Dunn was in custody for some sort of illegal activity. (Tr., p.331, L.20 – p.332, L.9.) The district court found that Ms. Bierma's statement was inaccurate, that it did not, per se, refer to a bad act, and that the error was curable by instructing the jury. (Tr., p.334, Ls.1-12.) The motion for mistrial was denied. (Tr., p.334, Ls.12-13.) The jury was then instructed: "Just to clear the record and make sure the jury's not confused, during the time that these allegations are referring to, the Defendant was not in prison, was not in jail. That's a judicial finding." (Tr., p.338, Ls.7-10.)

3. <u>The Errors In Denying The Motions For Mistrial Amount To Reversible Error</u>

As demonstrated by the Court of Appeal's prior remand of Mr. Dunn's case, the district court's ruling that no I.R.E. 404(b) evidence was admissible in Mr. Dunn's second trial, the district court's description of the erroneous testimony as improper and problematic, and efforts to remedy the error by providing a limiting instruction, evidence that Mr. Dunn was required to register as a sex offender and/or that he had been in prison was highly prejudicial evidence. The admission of this prejudicial evidence was clearly error. The State has the duty to prove that the erroneous admission of the evidence was harmless. *Perry*, 150 Idaho at 227. Mr. Dunn asserts

that the State will be unable to prove the error was harmless as it likely contributed to the verdict in his case.

Alternatively, Mr. Dunn asserts that the errors amount to reversible error because the prejudicial evidence likely had a continuing impact on the trial. S.E. and Ms. Bierma's statements informed the jury, at least impliedly, that Mr. Dunn had a criminal history. S.E.'s statements alluded to a prior sexual offense by mentioning that Mr. Dunn was "registered" at different home than where he was actually residing. While the word "registered" may not always lead to the jury to believe that an individual was required to register as a sexual offender, in the context of this trial there is a great danger that the jury would have reached that exact conclusion. Why would S.E. discuss the fact that Mr. Dunn was "registered" at another home unless that information was of significance? Certainly S.E. did not attempt to discuss voter registration or any other of the possible meanings of the term "registered" during her testimony. The only logical conclusion the jury could reach from her mentioning registration during this portion of her testimony was that Mr. Dunn had to register as a sex offender. This information, much like all of the other I.R.E. 404(b) evidence that had been excluded from the trial, was highly prejudicial.

Ms. Bierma's statement that Mr. Dunn was in prison was also highly prejudicial. Mr. Dunn acknowledges that the testimony was initially struck, but the district court's later instruction to the jury brought the issue back to the forefront of the jury's minds and told them to consider the evidence - as it was transformed from stricken testimony to "a judicial finding." (Tr., p.338, L.10.) The district court's instruction to the jury that "during the time that these allegations are referring to, the Defendant was not in prison, was not in jail" is insufficient, did not cure the initial error, and created new error. (Tr., p.338, Ls.8-10.) While it cleared up the

inaccuracy of Ms. Bierma's testimony, it allowed the jury to consider that Mr. Dunn was in prison at a different time due to the specific "during the time that these allegations are referring to" limitation of the instruction. Information that Mr. Dunn had been in prison, whether during the time of the charged allegations, earlier, or later, was not relevant and was highly prejudicial.

Allowing the jury to ponder whether Mr. Dunn was already a registered sexual offender and consider information that he had been incarcerated was not only prejudicial, but in this case it deprived Mr. Dunn of a fair trial. When viewed in the context of the full record, the two instances of improper testimony likely had a continuing impact on the trial. The jury had to weigh the evidence against Mr. Dunn and, in this case, the only evidence of guilt was the alleged victims' testimony (which must be evaluated to determine credibility) and an improperly admitted statement, taken out of context, from the prior trial. When this evidence was evaluated in conjunction with the I.R.E. 404(b) information that Mr. Dunn was a registered sex offender and had been incarcerated, the evidence unquestionably had a continuing impact on his trial.

As such, there is a great danger that the jury considered S.E.'s statement and information that Mr. Dunn had been incarcerated to his detriment, that it had a continuing impact on the trial, may have contributed to the verdict, and, ultimately, deprived Mr. Dunn of his right to a fair trial. It was error for the district court to not declare a mistrial.

## III.

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

### A. Introduction

Mr. Dunn 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. Dunn'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. Dunn 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 violation occurred when the prosecution appealed to the emotions, passions, and prejudices of the jury by asking that the jury send a message to the defendant at the request of an alleged victim that "this is not how daddies show love to little girls." Although defense counsel did not object to this instance of misconduct, Mr. Dunn asserts that the prosecutorial misconduct amounted to fundamental error, was not harmless and, as such, this Court should vacate his convictions.

B. Standard Of Review

Because Mr. Dunn's prosecutorial misconduct claim is 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). On appeal, Mr. Dunn is raising an instance of un-objected to misconduct. 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). 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.*

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.*

1. <u>The Prosecution Committed Misconduct By Appealing To The Emotions, Passions, And Prejudices Of The Jury</u>

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 emotions, passions, and prejudices of the jury by stating, "The last thing you probably ought to do, as [S.E.] said, tell the Defendant this is not how daddies show love to little girls." (Tr., p.506, Ls.11-13.)

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 emotions, passions, and prejudices; namely, that if the jury did not send a message by finding Mr. Dunn guilty, the jury would be effectively condoning the sexual abuse of children by father figures. 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, 1441 (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. Dunn'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. Dunn's specific Sixth Amendment right to an impartial jury. As such, the misconduct in this case clearly violates Mr. Dunn's unwaived constitutional rights and deprived him of his right to a fair trial.

2. The Alleged Instance Of Prosecutorial Misconduct Are Reviewable As Fundamental Error

It is a violation of Mr. Dunn'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 clouded the issues through a plea to the emotions, passions, and prejudices of the jury and, as a result, the State's comment violated Mr. Dunn's right to due process of law. The misconduct also interfered with the jury's ability to make an impartial decision, thereby interfering with Mr. Dunn's Sixth Amendment right to an impartial jury. Specifically, the State violated Mr. Dunn'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, by asking them to decide the cases based on emotion rather than evidence.

"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. Dunn'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 misconduct. 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.

3. <u>The Prosecutorial Misconduct Requires Vacation Of The Conviction</u>

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 unabashedly appealed to the emotions, passions, and prejudices of the jury. Asking jurors to send a message and to "tell the Defendant this is not how daddies show love to little girls" is especially persuasive. The pressure to find the defendant guilty, following a shrewd plea to their emotions, is too heavy a burden for the average juror to disregard. As such, there is a great danger that the prosecutor's improper comment, constituting misconduct,

influenced the jury; specifically, a danger that the jury rendered their verdict based upon their emotion, rather than merely the evidence presented. This Court should find that the misconduct denied Mr. Dunn his right to a fair trial because it cannot say beyond a reasonable doubt that misconduct did not contribute to the verdict. Therefore, this Court must vacate the conviction.

## IV.

## Even If The Above Errors Are Individually Harmless, Mr. Dunn'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. Dunn 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. Dunn 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–II above, and need not be repeated, but are incorporated herein by reference.

CONCLUSION

Mr. Dunn respectfully requests that his convictions be vacated and his case remanded for a new trial.

DATED this 9th day of February, 2018.

____________/s/_____________
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of February, 2018, 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:

JEFFREY LEWIS DUNN
INMATE #48236
C/O BONNEVILLE COUNTY
SHERIFF'S OFFICE
605 N CAPITAL
IDAHO FALLS ID 83402

JOEL E TINGEY
DISTRICT COURT JUDGE
E-MAILED BRIEF

NEAL S RANDALL
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_________/s/_________________
EVAN A. SMITH
Administrative Assistant

EAA/eas