5-19-2014

State v. Knutsen Respondent's Brief Dckt. 40803

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 40803
Plaintiff-Respondent,	)	
	)	Twin Falls Co. Case No.
vs.	)	CR-2009-3193
	)	
DAVID AARON KNUTSEN,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature Of The Case

David Aaron Knutsen appeals from his convictions for sexual abuse of a vulnerable adult.

Statement Of The Facts And Course Of The Proceedings

V. M. has a full-scale IQ of 72, which puts her in the borderline intellectual functioning range. (Trial Tr., p. 531, L. 5 – p. 533, L. 4.) Her IQ measure "means that her intellectual functioning is below average, below low average, and is right on the edge of someone in the extremely low range." (Trial Tr., p. 533, Ls. 17-21.) She has impaired decision-making capacity because of her slow speed in both assessing situations requiring a decision and in reasoning through the benefits and consequences of her potential choices. (Trial Tr., p. 533, L. 24 – p. 535, L. 17.) She would normally have difficulty making decisions, and that difficulty would be aggravated by depression. (Trial Tr., p. 540, L. 21 – p. 541, L. 7.) Ultimately V.M. is a person over the age of 18 "who is unable to protect [herself] from abuse, neglect, or exploitation because of mental or physical impairments." (Trial Tr., p. 542, L. 1 – p. 544, L. 5.)

V.M. was living in an Intensive Care Facility for the Mentally Retarded. (Trial Tr., p. 396, L. 18 – p. 397, L. 18.) Because she became suicidal she was moved into the Canyon View mental health facility. (Trial Tr., p. 406, L. 11 – p. 407, L. 19; p. 410, L. 9 – p. 411, L. 16.) At Canyon View she met Knutsen in the TV room. (Trial Tr., p. 412, L. 11 – p. 414, L. 23.)

Knutsen later came and sat at the same table when V.M. was in the cafeteria. (Trial Tr., p. 419, L. 16 – p. 422, L. 12.) Knutsen started asking "very personal questions" such as whether she was a virgin, whether she was wearing a bra, and how she, as a virgin, "pleasure[d her]self." (Trial Tr., p. 422, L. 13 – p. 425, L. 8.) He also told her, in response to her statement that she was a virgin, "[W]e can do something about that." (Trial Tr., p. 444, L. 1 – p. 445, L. 12.)

V.M. was initially flattered by the attention because she had "never really had a guy pay attention to [her] like that." (Trial Tr., p. 425, Ls. 10-19.) Flattery became fear, however, when, making a suggestive motion with his fingers, Knutsen asked how big her nipples were. (Trial Tr., p. 426, L. 1 – p. 427, L. 7.) When Knutsen asked to feel her breasts she said "yes" because she "was scared at the time." (Trial Tr., p. 427, Ls. 8-21.) While he felt her breast he "was watching the nurses' station, because the nurses could see right into the cafeteria." (Trial Tr., p. 427, Ls. 22-25.)

After touching her breasts he used his bare foot to "push[] [her] legs open" and then rub her vagina under the table. (Trial Tr., p. 428, L. 1 – p. 429, L. 7.) Again, while doing this he was "watching the nurses' station the whole time." (Trial Tr., p. 430, Ls. 2-11.)

After rubbing her vagina with his foot, Knutsen asked to see her vagina. (Trial Tr., p. 430, Ls. 12-15.) She said yes because she was "scared out of [her] mind." (Id.) He took her behind pop machines, so as to be out of the view of the nurses. (Trial Tr., p. 430, L. 16 – p. 434, L. 12; State's Exhibits 3, 4.) He asked her to pull down her pants, which she did. (Trial Tr., p. 434, L. 13 – p. 435, L.

14.) Knutsen told her "he would like that, that was nice" and touched his penis over his pants. (Trial Tr., p. 435, L. 15 – p. 437, L. 9.) He then touched her vagina and breasts with his hands. (Trial Tr., p. 437, L. 20 – p. 438, L. 15.) He also had her touch his penis through his pants. (Trial Tr., p. 446, L. 20 – p. 447, L. 22.)

Knutsen and V.M. went back to a table in the cafeteria, and Knutsen again touched her vagina with his foot, again while watching out for the nurses. (Trial Tr., p. 445, L. 16 – p. 446, L. 19.) As V.M. was walking out Knutsen told her to wait and, when she did, he again touched her breast and vagina, and told her he intended to go "jack off." (Trial Tr., p. 448, L. 14 – p. 449, L. 8.)

V.M. was "really scared" and "didn't know what to do," but when a nurse kept asking her what was wrong she finally told the nurse. (Trial Tr., p. 450, Ls. 8-22.)

A grand jury indicted Knutsen for four counts of sexual abuse of a vulnerable adult. (R., pp. 12-14.) Knutsen moved to dismiss the indictment, alleging several violations of procedure associated with the grand jury. (R., pp. 52-55.) He also filed a motion to have the sexual abuse of a vulnerable adult statute, I.C. § 18-1505B, declared constitutionally void and overbroad. (R., pp. 57-61.) The district court denied both motions. (R., pp. 183-99, 207-40.) The matter proceeded to trial (R., pp. 351-52, 371-76; see generally Trial Tr.), at the conclusion of which the jury returned guilty verdicts on all four counts (R., pp. 403-05).

After trial Knutsen absconded. (R., pp. 417-18.) He was subsequently incarcerated in Nevada on felony charges. (R., p. 419.) A warrant for his arrest in this case was served on him over two years after the original sentencing hearing. (R., p. 430.) The district court ultimately imposed four concurrent sentences of 25 years with 18 years determinate. (R., pp. 487-92.) Knutsen filed a notice of appeal, timely from entry of the judgment. (R., pp. 494-96.)

ISSUES

Knutsen's statement of the issues is found in the Appellant's brief at page 7. Due to its length it is not reproduced here. The state rephrases the issues as:

1. The district court determined that because its order started the grand jury term once it was "selected and convened," the time to measure the term was from when the grand jury first met to consider possible indictments instead of some other time. Has Knutsen failed to show error in the district court's interpretation of its own order?

2. Has Knutsen failed to show that the sexual abuse of vulnerable adults statute is constitutionally deficient, either on its face or as applied to his conduct?

3. Has Knutsen failed to show error in the district court's rejection of his proposed jury instruction that consent was a defense to a charge of sexual abuse of a vulnerable adult?

4. Is Knutsen's claim that the evidence is insufficient to support his convictions without merit?

5. Has Knutsen failed to show fundamental error in his four convictions based on a claim of double jeopardy?

ARGUMENT

I.
Knutsen Has Failed To Show Error In The District Court's Determination That The Grand Jury Acted Within Its Term

A. Introduction

On November 13, 2008, the district court issued an order that a grand jury be "summoned and convened in Twin Falls County, on the 14th day of November 2008." (Order Summoning and Convening Grand Jury, p. 1 (Augmentation) (hereinafter "Order").) The Order also states that "once selected and convened, the grand jury shall serve a term of four months until discharged by the Court." (Order, p. 2.) The judge instructed the grand jury that this meant they would be meeting on alternate Wednesdays starting December 3, 2008 and ending on March 25, 2009. (Grand Jury Tr., p. 10, Ls. 5-17.) The grand jury returned the indictment in this case on its last meeting, on March 25, 2009. (R., p. 12.)

Knutsen moved to dismiss, asserting the grand jury "acted without jurisdiction" because it met "after the expiration of the four month term specified" in the court's order convening the grand jury. (R., p. 53.) The district court rejected this claim for two reasons. First, it concluded that, pursuant to the order convening it, the grand jury began its four-month term when it was "selected and convened," which happened at its first post-selection convening, on December 3, 2008. (R., pp. 210-11.) Second, it concluded that "even if this grand jury convened outside of the four-month window" of the written order, it "still had jurisdiction" because the court orally extended the term when it ordered the jury

to meet on March 25, 2009, which was within the six month jurisdictional period allowed by law. (R., pp. 211-14.)

Although the district court concluded the grand jury had jurisdiction on two bases, Knutsen challenges only the first on appeal. (Appellant's brief, pp. 8-12.) This Court must therefore affirm the district court on the unchallenged basis for its ruling. Moreover, even if both bases are reviewed on the merits, Knutsen has failed to show any error by the district court.

B. Standard Of Review

"A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate court's] attention and should be addressed prior to considering the merits of an appeal." State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

The interpretation of an unambiguous court order presents a question of law over which the appellate court exercises free review. Suchan v. Suchan, 113 Idaho 102, 106, 741 P.2d 1289, 1293 (1986); Sun Valley Ranches, Inc. v. Prairie Power Cooperative, Inc., 124 Idaho 125, 131, 856 P.2d 1292, 1298 (Ct. App. 1993). The interpretation of an ambiguous court order presents a question of fact. Suchan, 113 Idaho at 106, 741 P.2d at 1293. Where the order is reasonably subject to conflicting interpretations, the appellate court must accept the trial court's interpretation, particularly when the trial court is interpreting its

own order, unless that interpretation is clearly erroneous. Id. at 107-08, 741 P.2d at 1294-95 (citations omitted).

C. The District Court's Ruling Must Be Affirmed On The Unchallenged Holding That It Orally Ordered The Grand Jury To Meet On March 25, 2009

Where a basis for a ruling by a district court is unchallenged on appeal, the appellate court will affirm on the unchallenged basis. See State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998). Here Knutsen does not challenge the district court's conclusion that it orally ordered the grand jury to meet on March 25, 2009, within the six months allowed by law, and therefore the grand jury had jurisdiction on that date. (Compare R., pp. 211-14 (holding that the grand jury had jurisdiction because the court orally ordered it to convene on March 25, 2009, within the six months allowed by law), with Appellant's brief, pp. 8-12 (failing to acknowledge or address the district court's holding that by orally ordering the grand jury to meet on March 25, 2009 such meeting was within its ordered term).) The district court's ruling must be affirmed on the unchallenged basis.

D. Knutsen Has Shown No Error In The District Court's Interpretation Of Its Own Order As Starting The Term Of The Grand Jury On December 3, 2008 And Discharging It After March 25, 2009

Even if this Court chooses to review the merits of the order denying the motion to dismiss, no error is shown. A grand jury lacks jurisdiction to issue an indictment outside its legal term of service. State v. Dalling, 128 Idaho 203, 206, 911 P.2d 1115, 1118 (1996). "A grand jury shall serve until discharged by the

court but no grand jury shall serve more than six (6) months unless specifically ordered by the court which summoned the grand jury." I.C.R. 6.8. There is no dispute that the grand jury returned the current indictment within six months. Rather, the only issue presented is whether the grand jury had been "discharged by the court" prior to March 25, 2009. Review of the record clearly shows it was not.

First, the grand jury was not discharged by the Order summoning it. The Order provided that a grand jury "be summoned and convened" on November 14, 2008. (Order, p. 1.) It further ordered that the grand jury serve a four month term "once selected and convened." (Order, p. 2.) The difference in the wording shows that the term did not start with the summoning and selection of the grand jury, but only after the grand jury had been "selected." The November 14, 2008 hearing at which the grand jury was selected was not contemplated to be within the term specified in the order. Thus, the term started the first time the grand jury convened post-selection, on December 3, 2008. The district court's ruling is supported by the plain language of the order and, to the extent the language is ambiguous, the district court's interpretation of its own order requires deference.[1]

Moreover, there is no basis in the record to believe that the court discharged the grand jury prior to March 25, 2009. Even if the written order could be interpreted as starting the four-month term on November 14, 2008, the court's

[1] That the district court interpreted it order from the beginning as starting the four month term with the first meeting to hear potential cases is demonstrated by the fact the court instructed the grand jury to meet in the four months from December to March.

instruction to the grand jury to meet on March 25, 2009, cannot be interpreted as anything other than the court's intention that the grand jury not be discharged prior to that date. In short, there is nothing in the record indicating that the grand jury was in fact discharged prior to March 25, 2009.

Because the Rule provides that the grand jury serves for six months or until discharged, and because the grand jury returned the present indictment within six months and without having been discharged, Knutsen's argument the grand jury lacked jurisdiction is without merit.

II.
Knutsen Has Shown No Constitutional Infirmity Of The Sexual Abuse Of A Vulnerable Adult Statute

A. Introduction

Knutsen throws the constitutional kitchen sink at the sexual abuse of a vulnerable adult statute, asserting it is unconstitutionally overbroad (Appellant's brief, pp. 13-25); infringes upon his due process right to private, consensual conduct as applied (Appellant's brief, pp. 25-26); violated his right to substantive due process (Appellant's brief, pp. 27-29); violated his right to equal protection (Appellant's brief, pp. 29-30); is void for vagueness (Appellant's brief, pp. 30-40); and is vague as applied (Appellant's brief, pp. 40-43). Of these constitutional arguments, only the claims that the statute is overboard, void for vagueness, and vague as applied are preserved. (R., pp. 183-99.) Knutsen has failed to show that the district court erred in rejecting them. As to the claims presented for the first time on appeal (that application of the statute violated his rights to privacy,

substantive due process, and equal protection), Knutsen has failed to show fundamental error.

B. Standard Of Review

Where the constitutionality of a statute is challenged, the appellate court reviews it *de novo*. State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). The party challenging the constitutionality of the statute must overcome a strong presumption of constitutionality and clearly show the invalidity of the statute. Id. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id.

C. Knutsen Has Failed To Show Error In The District Court's Determinations That The Sexual Abuse Of A Vulnerable Adult Statute Is Not Void For Vagueness, Overbroad, Or Vague As Applied

1. The Statute Is Not Void For Vagueness

"A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" F.C.C. v. Fox Television Stations, Inc., ___ U.S. ___, 132 S.Ct. 2307, 2317 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). Thus, "the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." Skilling v. United States, 561 U.S. 358, ___, 130 S.Ct. 2896, 2933 (2010). Statutes, however, have a "strong presumption of validity" and the court must, if it can, "construe, not condemn" them. Id., 130

S.Ct. at 2928 (internal quotes and cites omitted). That "close cases can be envisioned" is insufficient to "render[] a statute vague" because the state must still prove its case beyond a reasonable doubt. United States v. Williams, 553 U.S. 285, 305-06 (2008). Even if a statute's "outermost boundaries" are "imprecise," such uncertainty has "little relevance" if the "appellant's conduct falls squarely within the 'hard core' of the statute's proscriptions." Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); see also Skilling, 130 S.Ct. at 2933 (citing Broadrick). Furthermore, sufficient clarity "may be supplied by judicial gloss on an otherwise uncertain statute." United States v. Lanier, 520 U.S. 259, 266 (1997).

There is nothing vague about the sexual abuse of a vulnerable adult statute, much less vagueness rising to the level of rendering the statute beyond construction and requiring condemnation. The statute prohibits "any person" from "caus[ing] or hav[ing] sexual contact with a vulnerable adult" with the "intent of arousing, appealing to or gratifying" his or her own or another's "lust, passion or sexual desires." I.C. § 18-1505B. The phrases "any person" and "caus[ing] or hav[ing] sexual contact" and the language describing sexual intent are straight-forward and clear, and do not seem to be at issue here.

The definition of the phrase "vulnerable adult" appears to be the part of the statute Knutsen challenges:

> a person eighteen (18) years of age or older who is unable to protect himself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent that he lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his person, funds, property or resources.

I.C. § 18-1505(4)(e). Although this definition is broad (it applies to several types of abuse or exploitation of vulnerable adults) it is not vague. A person is a "vulnerable adult" if he or she is 18 or over, has a "physical or mental impairment" that affects "judgment or behavior" such that the person "lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his person, funds, property or resources" and the person is "unable to protect himself." A person of ordinary intelligence is provided notice of what this statute prohibits.

Knutsen makes no actual claim that the language of the statute is vague. Rather, he merely asserts that the prosecutor's argument was vague, that there are hypothetical scenarios where he believes the application of the statute is not clear, and complains about the lack of a scienter or fiduciary capacity element. (Appellant's brief, pp. 37-40.) These arguments show, at best, that the "outermost boundaries" of this statute may be "imprecise" or that "close cases can be envisioned." Neither of these is sufficient to overcome the presumption of validity that must be applied to this statute. See Williams, 553 U.S. at 305-06; Broadrick, 413 U.S. at 608. The statute clearly prohibits the sexual abuse of adults who cannot protect themselves from such abuse due to physical or mental impairment that makes them vulnerable because of reduced capacity. It is not vague, much less void-for-vagueness.

2. The Statute Is Not Overbroad

"To succeed in a typical facial attack, [the appellant] would have to establish that no set of circumstances exist under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." United States v. Stevens, 559 U.S. 460, 472 (2010) (internal quotations omitted).[2] There is a "second type of facial challenge," established by demonstrating that a "substantial number" of the challenged statute's applications are "unconstitutional, judged in relation to the statute's plainly legitimate sweep," but such applies only in "the First Amendment context." Id. at 473 (internal quotations omitted).

Although Knutsen argues for application of the second type of facial challenge, the constitutional right he invokes is not grounded in the First Amendment, but rather in the due process clauses of the Fifth and Fourteenth amendments. Lawrence v. Texas, 539 U.S. 558, 577-79 (2003).[3] "The fact that

[2] The Supreme Court of the United States has not resolved which of these two legal standards "applies in a typical case." Stevens, 559 U.S. at 472. Knutsen claims the Idaho Supreme Court has erred by adopting the first standard, that "no set of circumstances exists" under which the statute would be valid, and that cases applying that standard should be overruled. (Appellant's brief, pp. 32-35.) Absent resolution of that issue by the Supreme Court of the United States, Knutsen has failed to show grounds for reversing Idaho precedent. Regardless, his claim fails under either standard.

[3] Knutsen engages a "bait and switch," asserting that the right he is invoking is also protected by the First Amendment right of association. (Appellant's brief, pp. 19-20.) While the authority he asserts is sufficient to establish that there is a First Amendment right of association, he cites nothing indicating it protects sexual contact of the sort at issue here. The only relevant authority he cites for constitutional protection of private, consensual sex by adults is *Lawrence* (Appellant's brief, pp. 15-19), which, as noted, is rooted in due process, not the First Amendment.

[a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' challenge outside the limited context of the First Amendment." United States v. Salerno, 481 U.S. 739, 745 (1987). Because there is no viable claim that the statute in question potentially violates the First Amendment, Knutsen bears the burden of demonstrating that there is "no set of circumstances" where the statute may be constitutionally applied or that "the statute lacks any plainly legitimate sweep."

Knutsen has not tried to bear this burden, and in fact any effort would prove futile. In the case of a truly non-consenting victim the statute may be constitutionally applied. State v. Hamlin, ___ Idaho ___, ___ P.3d ___, 2014 WL 1687137, at p. *8 (Idaho App., 2014); State v. Cook, 146 Idaho 261, 262, 192 P.3d 1085, 1086 (Ct. App. 2008). Because there is no viable First Amendment challenge to the statute, Knutsen must show that the statute is unconstitutional in all its applications or that it has no plainly legitimate sweep. Because he has neither tried nor succeeded in bearing that burden his argument must be rejected.

3. The Statute Is Not Vague As Applied

To show that the statute is vague "as applied" a defendant "must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the defendant's conduct was proscribed or failed to provide sufficient guidelines such that police had unbridled discretion in determining whether to arrest him." State v. Ruggiero, ___ Idaho ___, ___ P.3d ___, 2014 WL 1660728,

at p. *8 (Idaho App., 2014) (citing State v. Korsen, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003)). The question is whether the statute, "read as a whole," "provides fair notice of the conduct that it prohibits." State v. Alley, 155 Idaho 972, ___, 318 P.3d 962, 973 (Ct. App. 2014). Furthermore, "a statute need not provide absolute precision in describing the exact conduct that it covers; only fair notice understandable by persons of ordinary intelligence is required." Id.

In Ruggiero the "plain language of the statute provided fair notice that it was illegal for Ruggiero to prepare false documents and submit them to the magistrate with the intent they be produced in his criminal proceeding 'as true and genuine' for a 'fraudulent or deceitful purpose ...." Id. Likewise, in this case the plain language of the statute gave ample notice that it was unlawful to have sexual contact with a vulnerable adult. This statute is similar to sex crimes based on the age of the victim, such as statutory rape or lewd and lascivious conduct with a minor: That the age of the victim may not have been readily apparent to the defendant does not render those statutes vague. Likewise, even assuming the veracity of Knutsen's claim that the *facts* as he understood them did not provide notice that C.M. was a vulnerable adult,[4] such did not make the notice provided by the plain language of the *statute* vague. Knutsen's claim that the statute is vague as applied to him is without merit.

[4] Of course the state disputes Knutsen's factual claims. V.M.'s mental limitations would have been readily apparent and the fact Knutsen encountered her in a mental health facility was at least an indication she may have a reduced capacity.

D. Knutsen Has Failed To Show, Pursuant To The Fundamental Error Standard, That Application Of The Statute Violated His Rights To Consensual Sexual Activity, Substantive Due Process, And Equal Protection

Although Knutsen's motion stated it was based on "the right to due process of law and equal protection" (R., pp. 57, 77), the only due process claims asserted in the arguments supporting the motion were vagueness (facial and as applied) and overbreadth (R., pp. 57-61, 77-86), and "equal protection" is nowhere else mentioned (Id.). The district court also concluded that there were three issues presented by Knutsen; namely that the statute was void for vagueness, vague as applied, and overbroad. (R., p. 138 (identifying three issues raised by the motion to dismiss).) Knutsen did not object to the scope of the district court's ruling on his motion or request clarification or reconsideration. (See generally, R.)

On appeal Knutsen argues that holding him criminally accountable infringed upon his due process right to private, consensual conduct (Appellant's brief, pp. 25-26); violated his right to substantive due process (Appellant's brief, pp. 27-29); and violated his right to equal protection (Appellant's brief, pp. 29-30). Because these claims were neither raised nor ruled on below, they are not preserved for appellate review. See Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP, 148 Idaho 479, 491, 224 P.3d 1068, 1080 (2009) ("Even though an issue was argued to the court, to preserve an issue for appeal there must be a ruling by the court."); see also Kolas v. Cassia County Idaho, 142 Idaho 346, 354, 127 P.3d 962, 970 (2005) ("To properly preserve an issue for

appeal, one must either receive an adverse ruling on the issue or raise it in the court below.").

In a criminal case, where an issue is not preserved it may only be reviewed for fundamental error. State v. Perry, 150 Idaho 209, 924, 245 P.3d 961, 976 (2010). To show fundamental error the appellant must show a violation of an unwaived constitutional right; that the error is clear or obvious; and that the error affected the outcome of the trial proceedings. Id. at 226, 245 P.3d at 978; State v. Pentico, 151 Idaho 906, 913, 265 P.3d 519, 526 (Ct. App. 2012). Knutsen has not attempted, much less succeeded, to show fundamental error.

1. The Record Does Not Establish Knutsen Was Engaged In Constitutionally Protected Conduct

The state may not criminalize the private sexual conduct of two adults, undertaken "with full and mutual consent from each other." Lawrence v. Texas, 539 U.S. 558, 578 (2003). "However, *Lawrence* makes clear that this constitutional protection does not apply to nonconsensual acts, including sex with those incapable of consenting." State v. Hamlin, ___ Idaho ___, ___ P.3d ___, 2014 WL 1687137, at p. *7 (Idaho App., 2014). Likewise, sexual conduct that occurs in public is not protected. State v. Cook, 146 Idaho 261, 263-64, 192 P.3d 1085, 1087-88 (Ct. App. 2008).

Knutsen claims that the "trial reveals that two adults ... engaged in consensual sexual contact." (Appellant's brief, p. 26.) This claim is viable only if this Court declines to read the transcript. V.M. was in the borderline intellectual functioning range and "right on the edge" of the extremely low range. (Trial Tr.,

p. 531, L. 5 – p. 533, L. 21.) Her decision-making capacity was impaired by slow speed in both assessing situations requiring a decision and in reasoning through the benefits and consequences of her potential choices. (Trial Tr., p. 533, L. 24 – p. 535, L. 17.) Her already impaired decision-making skills were further impaired by depression. (Trial Tr., p. 540, L. 21 – p. 541, L. 7; p. 406, L. 11 – p. 407, L. 19; p. 410, L. 9 – p. 411, L. 16.) Ultimately V.M. is a person over the age of 18 "who is unable to protect [herself] from abuse, neglect, or exploitation because of mental or physical impairments." (Trial Tr., p. 542, L. 1 – p. 544, L. 5.) She testified herself that she said yes to Knutsen's aggressive sexual advances despite being "scared out of [her] mind." (Trial Tr., p. 427, Ls. 8-21; p. 430, Ls. 12-15; p. 450, Ls. 8-22.) The evidence clearly shows she acquiesced from a combination of Knutsen's pressure and her mental and emotional incapacity. Knutsen's claim that the evidence establishes the opposite is specious.

Moreover, Knutsen makes no claim that the conduct was private. Rather, evidence conclusively establishes that the behavior was in the cafeteria of a mental health facility where Knutsen kept a constant watch out for the nurses. (Trial Tr., p. 427, Ls. 22-25; p. 430, Ls. 2-11; p. 445, L. 16 – p. 446, L. 19.) The only thing keeping the claim that the conduct was private from being specious is Knutsen's failure to make it.

Knutsen aggressively and in a predatory fashion convinced a young woman suffering mental and emotional disabilities to acquiesce to sexual contact in the cafeteria of a mental health facility. His claim he had a constitutional right

to do so is demeaning to the Constitution. He has failed to present the whiff of a valid claim of fundamental error.

2. Knutsen Has Shown No Viable Claim Of A Violation Of His Rights To Substantive Due Process

Knutsen invokes substantive due process based on his "right to privacy" under Lawrence, admits the state has a "legitimate purpose in protecting all citizens from nonconsensual sex," but claims the statute "simply does not meet the State's legitimate purpose because it just defines an entire group of people as incapable of consenting to sexual contact." (Appellant's brief, pp. 27-29.) Knutsen thus argues for application of the "strict scrutiny" test, with its attendant requirement that the statute employ the least restrictive means to effectuate the state interest. (Id.) This argument fails because, as set forth above, there is no constitutionally protected conduct in this case. Lawrence specifically excluded nonconsensual sex such as is at issue in this case. Hamlin, ___ Idaho ___, ___ P.3d ___, 2014 WL 1687137, at p. *7; Cook, 146 Idaho at 263-64, 192 P.3d at 1087-88. "Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irregularity." State v. Bennett, 142 Idaho 166, 169, 125 P.3d 522, 525 (2005) (internal quotation and citations omitted). Because Knutsen had no constitutional right (fundamental or otherwise) to sexually abuse a vulnerable adult, Knutsen must demonstrate that there is no rational basis for prohibiting the sexual abuse of vulnerable adults. State v. Sherman, ___ Idaho ___, ___ P.3d ___, 2014 WL 1281723, at pp. *2-3

(Idaho App., 2014). Knutsen makes no such claim, nor could he prevail on it if he did. Having failed to establish a violation of his substantive due process rights, much less one that is clear on the record and prejudicial, Knutsen has failed to establish fundamental error.

3. Knutsen Has Failed To Show A Viable Claim Of A Violation Of His Equal Protection Rights

The Supreme Court of the United States "has long held that a classification neither involving fundamental rights nor proceedings along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Armour v. City of Indianapolis, Ind., ___ U.S.___ 2073, 132 S.Ct. 2073, 2079-80 (2012) (internal quotes and citations omitted, ellipse original). Thus, the "first step in an equal protection analysis is to identify the classification at issue." Bagley v. Thomason, 155 Idaho 193, ___, 307 P.3d 1219, 1224 (2013) (internal quotes and citations omitted). Where a party claiming an equal protection violation has failed to identify a classification, the Court will not review that claim because "this Court does not consider issues not supported by argument or authority." Id. (internal quotes and citations omitted).

The classification Knutsen identifies is a distinction between married and unmarried people. (Appellant's brief, pp. 29-30.) He admits his claim that the statute distinguishes between married and unmarried people is not based on statutory language, but instead on a claim that the legislature "presumed" that married adults were "exempted from the law." (Id.) Having failed to identify an

actual classification created by the law, Knutsen has failed to identify a classification that the Court can consider, much less a classification that rises to an equal protection fundamental error.

III.
Knutsen Has Shown No Error In The District Court's Rejection Of His Proposed Consent Defense Instruction

A. Introduction

When invited to put any objection to the proposed jury instructions on the record, Knutsen's counsel referenced "constitutional issues" that had been "litigated" and were subject to the district court's previously issued opinion. (Trial Tr., p. 636, Ls. 4-13.) Counsel "object[ed] specifically to any instructions having to do with strict liability or any instruction having to do with the defendant not needing to know that a person has mental deficiencies and is, therefore, unable to give informed consent." (Trial Tr., p. 636, Ls. 13-20.) The district court instructed the jury that "it is not a defense ... that V.M. may have consented to the alleged conduct." (R., p. 393.)

On appeal "Knutsen asserts that the district court should not have provided the consent defense instruction." (Appellant's brief, p. 44.[5]) However, Knutsen has failed to establish that the instruction in any way misstated the law. He has therefore failed to show error.

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[5] Knutsen argues in the alternative that the district court "should have utilized the consent instruction applicable to rape involving a person of unsound mind." (Appellant's brief, p. 44, 47-48.) Knutsen did not request that this instruction be used at trial, however, and on appeal does not claim its omission amounts to fundamental error. The alternative argument should, therefore, be disregarded as unpreserved.

B. Standard Of Review

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004); State v. Dorn, 140 Idaho 404, 405, 94 P.3d 709, 710 (Ct. App. 2004). Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587-88, 261 P.3d 853, 864-65 (2011) (citing State v. Humphreys, 134 Idaho 657, 659, 8 P.3d 652, 654 (2000)).

C. Knutsen Has Failed To Show That Consent Is A Defense To Sexual Abuse Of A Vulnerable Adult

It is a felony for "any person" to have "sexual contact with a vulnerable adult" "with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of such person." I.C. § 18-1505B(1). The jury was instructed on these elements. (R., pp. 385-88.) The jury was also instructed with the statutory definition of the phrase "vulnerable adult." (R., p. 389.) In order to find Knutsen guilty it had to find that Knutsen engaged in specific acts of touching (touching V.M.'s genitals with his foot, touching her genitals with his hand, touching her breasts with his hand, and having her touch his genitals with her hand), that such touching was with sexual intent, and that V.M. was an adult who was "unable to protect herself from abuse, neglect or exploitation due to physical or mental impairment" which affected her "judgment or behavior to the extent" that she lacked "sufficient understanding or capacity to make or communicate or

implement decisions about her person, funds, property, or resources." (R., pp. 385-89.)

Lacking from the statute is any defense of consent. That V.M. said yes because she was "scared out of [her] mind" did not provide Knutsen with a defense. (Trial Tr., p. 430, Ls. 12-15.) The district court properly instructed the jury that evidence that V.M. said yes to her own abuse was not a defense available to Knutsen under the plain language and elements of the statute.

Knutsen first argues that V.M.'s testimony that she said yes was a defense because "the only time that consent of victim [sic] is no defense is when the charge involves a child under age." (Appellant's brief, p. 46.) As authority for this broad claim Knutsen cites State v. Herr, 97 Idaho 783, 554 P.2d 961 (1976), and State v. Oar, 129 Idaho 337, 924 P.2d 599 (1996). (Appellant's brief, p. 46.) In Herr the Idaho Supreme Court upheld the trial court's refusal to give, in a trial for lewd conduct with a child, an instruction on an included offense of fornication on the grounds that fornication was not an included offense because it had an element, consent, not present in the crime of lewd conduct with a child. Herr, 97 Idaho at 786-87, 554 P.2d 964-65. In Oar the Court held that consent is not a defense to a charge of sexual battery of a child. Oar, 129 Idaho 340, 924 P.2d at 602. These cases do not support the argument that the legislature was required to or in fact did include consent as a defense to sexual abuse of a vulnerable adult.

Knutsen next argues that had the court not instructed the jury that consent was not a defense he would have had "more room to argue the meaning of

vulnerable adult as it relates to the charges, and whether or not V.M. had the capacity to protect herself from abuse." (Appellant's brief, p. 46.[6]) The state is unaware of any legal basis for a "more room to argue" for an acquittal legal standard, and Knutsen cites no legal authority for it. A defendant is not entitled to an erroneous statement of the law, see State v. Johns, 122 Idaho 873, 881, 736 P.2d 1327, 1335 (1987), regardless of how much it would improve, from his perspective, his closing argument.

Knutsen has cited no law indicating that he was not guilty of sexual abuse of a vulnerable adult because he got the victim to say "yes" in the course of sexually abusing her. Because the instructions were accurate statements of the law, and Knutsen has failed to show otherwise, Knutsen has failed to show error.[7]

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[6] Knutsen likewise argues he was "unable to argue that V.M. had the ability to protect herself from sexual contact." (Appellant's brief, p. 48.) This claim is false. The jury was instructed that before it could convict it would have to find, beyond a reasonable doubt, that V.M. was "unable to protect herself from abuse, neglect or exploitation." (R., p. 389.) The instruction that consent was not a defense in no way prevented Knutsen from arguing the elements of the crime.

[7] Because the jury found V.M. to be a vulnerable adult and the evidence shows that V.M. said "yes" under conditions that show she did not give knowing and voluntary consent, any error is also harmless. State v. Perry, 150 Idaho 209, 222, 245 P.3d 961, 974 (2010) (error will be deemed harmless if, beyond a reasonable doubt, it did not contribute to the conviction).

IV.
Knutsen Has Failed To Show That The Evidence Of His Guilt Is Insufficient To Support His Convictions

A. Introduction

Knutsen argues that the evidence was insufficient to support the jury's verdict because the jury could not reasonably conclude that V.M. was unable to protect herself from abuse. (Appellant's brief, pp. 49-52.) In making this argument Knutsen cites to evidence he believes supports a conclusion other than that reached by the jury, but fails to acknowledge evidence supporting the jury's verdict. (R., p. 51.) Review of the evidence supporting the jury's conclusion shows more than substantial evidence supporting the verdict.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. State v. Hughes, 130 Idaho

698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997); Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. Knutsen Has Failed To Show Any Inadequacy In The Evidence

To show that V.M. was a vulnerable adult the state had the burden of proving that V.M. was "unable to protect [herself] from abuse, neglect or exploitation." I.C. § 18-1505(4)(e). The evidence amply supports the jury's finding on this matter.

V. M. was in the borderline intellectual functioning range with an overall IQ score of 72, which is "right on the edge" of the extremely low range. (Trial Tr., p. 531, L. 5 – p. 533, L. 23.) Her decision-making capacity was impaired by slow speed in both assessing situations requiring a decision and in reasoning through the benefits and consequences of her potential choices. (Trial Tr., p. 533, L. 24 – p. 535, L. 17.) V.M.'s already impaired decision-making skills were further impaired by depression. (Trial Tr., p. 540, L. 21 – p. 541, L. 7; p. 406, L. 11 – p. 407, L. 19; p. 410, L. 9 – p. 411, L. 16.) "[I]n a decision that's going to be complex, where there's a lot of information or a lot of things to consider, [for] someone with an IQ of 72 it's going to be quite challenging for them without some extra assistance." (Trial Tr., p. 535, Ls. 9-13.)

The psychological evidence that V.M. would be overwhelmed by having to make difficult or complex decisions is confirmed by V.M.'s testimony that she said yes to Knutsen's aggressive sexual advances despite being "scared out of [her] mind." (Trial Tr., p. 427, Ls. 8-21; p. 430, Ls. 12-15; p. 450, Ls. 8-22.)

Finally, if the above were not enough, Dr. Hogland specifically testified that, in her professional opinion, V.M. is a vulnerable adult because she meets the statutory criteria of being a person over the age of 18 "who is unable to protect [herself] from abuse, neglect, or exploitation because of mental or physical impairments." (Trial Tr., p. 542, L. 22 – p. 544, L. 5.[8]) The evidence supports the finding that V.M. was incapable of protecting herself from sexual abuse by Knutsen because of her mental limitations.

In claiming otherwise, Knutsen first cites Dr. Hogland's testimony that with education V.M. would be able to understand what sexual interaction is. (Appellant's brief, p. 51; compare Trial Tr., p. 552, L. 17 – p. 555, L. 15.) Of course evidence that V.M. has the ability to learn *in the future* what sexual interaction is directly refutes any claim that she possessed that understanding at the time of the crime. This evidence actually cuts for the state's position.

Knutsen points out that V.M.'s full IQ score is two points above formal classification as mentally retarded and that her verbal subtest score is 81, in the low normal range. (Appellant's brief, p. 51.) The statute, however, does not require formal classification as mentally retarded. I.C. § 18-1505B(1). Furthermore, the clinical psychologist testified that the more relevant IQ subtest score was in processing speed, which was 71, and indicated that V.M. would have trouble making decisions. (Trial Tr., p. 533, L. 24 – p. 538, L. 17.) The

[8] This testimony belies Knutsen's claim "[t]here was no evidence that V.M. should have been qualified as a vulnerable adult because she was unable to protect herself from abuse due to her mental impairment." (Appellant's brief, p. 51.)

evidence regarding V.M.'s IQ supports the jury's verdict, rather than showing it unreasonable.

Knutsen finally points out evidence that V.M. graduated from high school and argues she "received Bs and Cs in the more difficult classes." (Appellant's brief, p. 51.) However, in high school she mostly took "[s]pecial ed resource classes" that were "not ... normal classes" but were for "people that had learning disabilities." (Trial Tr., p. 403, Ls. 18-23.) She got Bs and Cs in her non-special education classes, such as "[c]ooking class and history class" and "computer classes" (Trial Tr., p. 460, Ls. 4-23), but such achievement hardly removes her from being vulnerable to predators like Knutsen.

Ultimately Knutsen's argument is merely that there is evidence in the record that he believes supports his argument that V.M. was not unable to protect herself from sexual abuse. Simply ignoring the considerable evidence to the contrary, however, does not render the jury verdict unreasonable or unsupported by evidence. When all of the evidence is considered the jury verdict is eminently reasonable.

V.
Knutsen Has Failed To Show Fundamental Error In His Multiple Punishments For Multiple Crimes

A. Introduction

Knutsen asserts, for the first time on appeal, that his four crimes are in fact "one offense" for purposes of the Double Jeopardy Clause. (Appellant's brief, pp. 52-55.) He has failed to show any violation of his rights against double jeopardy, much less fundamental error.

B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Whether a defendant's prosecution complies with the constitutional protection against double jeopardy is a question of law subject to free review. State v. Santana, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000).

C. Knutsen Has Failed To Show Fundamental Error In Imposing Four Sentences Upon His Four Convictions

"The Double Jeopardy Clause of the Fifth Amendment provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'" Illinois v. Vitale, 447 U.S. 410, 415 (1980). "At its root, the Double Jeopardy Clause forbids the duplicative prosecution of a defendant for the 'same offense.'" United States v. Felix, 503 U.S. 378, 385 (1992). The Double Jeopardy Clause "serves principally as a restraint on courts and prosecutors," but the legislature "remains free" to "define crimes and fix punishments." Brown v. Ohio, 432 U.S. 161, 165 (1977). Thus, the test for what constitutes "the same offense" is "one of legislative intent." Garrett v. United States, 471 U.S. 773, 778-79 (1985).

"'There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction.*'" Garrett, 471 U.S. at 779 (emphasis original) (quoting Albrecht v. United States, 273 U.S. 1, 11 (1927)). If the "applicable [Idaho] statutes" make the different sexual contacts in this case "a single offense," then the double jeopardy bar applies. See Brown, 432 U.S. at 169. If, however, "the [Idaho] legislature provided that" each act of sexual touching is itself a crime, we "have a different case." Id. at 169 n.8. Application of the legal standard articulated by the Supreme Court of the United States to the facts of this case shows that Knutsen was properly charged with, convicted of, and sentenced for four separate crimes.

The grand jury indicted Knutsen on four counts of sexual abuse of a vulnerable adult. Count I alleged that Knutsen "did cause or have sexual contact ... not amounting to lewd conduct" by "touching V.M.'s genitals with his foot." (R., p. 13.) Count II alleged that Knutsen "did commit a lewd and\or lascivious act" by "touching V.M.'s genitals with his hand." (R., p. 13.) Count III alleged that Knutsen "did cause or have sexual contact ... not amounting to lewd conduct" by "touching V.M.'s breasts with his hand(s)." (R., p. 13.) Count IV alleged that Knutsen "did commit a lewd and\or lascivious act" by "having V.M. touch his genitals with her hand." (R., p. 14.) Counts II and IV were charged under I.C. § 18-1505B(1)(a), while Counts I and III were charged under I.C. § 18-1505B(1)(c). (R., pp. 13-14.) Thus, all four counts charge a different type of touching and

invoke two different subsections of the relevant statute. These distinctions show that Knutsen committed four, not one, offenses.

First, the counts charged under subsection (a) and those charged under subsection (c) both have elements different than the other, and therefore do not offend double jeopardy. Under the standard articulated by the Supreme Court of the United States, "the same act or transaction" may be prosecuted and punished under "two distinct statutory provisions" if "each provision requires proof of a fact which the other does not." Brown, 432 U.S. at 166 (quoting Blockburger v. United States, 328 U.S. 640 (1946)). See also Vitale, 447 U.S. at 416 ("if each *statute* requires proof of an additional fact which the other does not, the offenses are not the same under the *Blockburger* test" (internal quotations and citations omitted, emphasis original)). Here the two different statutes require proof of a fact the other does not. I.C. § 18-1505B(1)(a) requires proof the defendant "[c]ommit[ted] any lewd or lascivious act or acts" while I.C. § 18-1505B(1)(c) requires proof the defendant "[c]ause[d] or [had] sexual contact ... not amounting to lewd conduct as defined in paragraph (a)." Application of the Blockburger test shows that conviction and sentencing for two crimes for violating both I.C. § 18-1505B(1)(a) and I.C. § 18-1505B(1)(c), based on two different and mutually exclusive types of sexual touching, do not infringe upon any double jeopardy rights.

Second, Knutsen was not convicted for the same crime in any of the four counts, because each charged a different act of touching. The lewd and lascivious acts that violated subsection (a) were, respectively, Knutsen touching

V.M.'s genitals with his hand and having her touch his genitals with her hand. (R., pp. 13-14.) The sexual touching not amounting to lewd and lascivious conduct were separate acts of touching V.M.'s genitals with his foot and touching her breasts with his hands. (R., p. 13.) There is nothing in the statute that would make these four separate acts of sexual touching one crime. No one of them is a lesser included offense of any other. See United States v. Dixon, 509 U.S. 688, 705-08 (1993) (holdings of prior cases finding double jeopardy "rest[] squarely upon the existence of a lesser included offense"). Acquittal on any count would not have required acquittal on any other, nor would conviction on any one count required conviction on any other. Because the legislature has not defined separate acts of sexual contact as a single crime, the four acts of sexual contact Knutsen perpetrated were not "the same offense" and therefore not within the scope of double jeopardy protections.

Knutsen advances a legal standard by which "one continuing transaction" must be deemed the same offense for double jeopardy purposes. (Appellant's brief, p. 54.) This legal standard is not meaningfully distinguishable from the "same transaction rule" espoused by Justice Brennan, under which "all charges growing out of conduct constituting a single criminal act, occurrence, episode, or transaction must be tried in a single proceeding." Brown, 432 U.S. at 170 (Brennan, J. concurring) (internal quotes omitted). However, the Supreme Court of the United States has "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." Garrett, 471 U.S. at 790; see also Dixon,

509 U.S. at 709 n.14 ("the same transaction rule ... has been consistently rejected by the Court").

As set forth above, the Court has continually held that the proper analysis is of legislative intent, with the starting point being that where the legislature criminalized the same conduct with different statutes, each having an element not found in the other, the legislature intended both statutes to apply such that they did not constitute the "same offense."

In support of his argument that "part[s] of one continuing transaction" are the same offense for double jeopardy purposes Knutsen cites two cases, State v. Major, 111 Idaho 410, 725 P.2d 115 (1986), and State v. Estes, 111 Idaho 423, 725 P.2d 128 (1986). (Appellant's brief, p. 54.) In the latter case, the victim "testified that Estes had entered her room and forcibly raped her four times." Estes, 111 Idaho at 424, 725 P.2d at 129. On appeal Estes argued the "trial court erred by refusing to require the prosecution to elect which of the four acts of sexual intercourse forcibly committed upon [the victim] it would rely on in seeking to prove the crime of rape" because "Idaho Criminal Rule 8 requires that each crime be charged in a separate count." Id. at 427, 725 P.2d at 132. At no point in the opinion does the court even mention double jeopardy, much less apply double jeopardy legal analysis. The Court's rejection of Estes' argument, finding no violation of I.C.R. 8 because that rule allows joinder of offenses constituting a common scheme, id., has no obvious relevance to this case. That four acts of rape could be pursued as one count without violating I.C.R. 8 does not

reasonably translate to a conclusion that punishing four acts of sexual abuse of a vulnerable adult as four offenses violates double jeopardy.

The Major case is no more helpful to Knutsen. In that case Major challenged her conviction on a single count of grand theft by possession on two grounds: First that the state court lacked jurisdiction because she was an Indian and the crime occurred in Indian country and, second, that the amendment of the information to include the property later-recovered outside the reservation to the single count of grand theft violated I.C.R. 7(e). 111 Idaho at 412-13, 725 P.2d at 117-18. Although this opinion at least mentions double jeopardy, id. at 414, 725 P.2d at 119, there was no claim of a double jeopardy violation before the Court. Thus, any discussion of double jeopardy is, at best, *dicta*.[9] State v. Hawkins, 155 Idaho 69, ___, 305 P.3d 513, 518 (2013) (*dicta* is a statement "not necessary to decide the issue presented to the appellate court" and is "not controlling").

In deciding that the information was properly amended, the Court adopted a test used "in the context of deciding the propriety of aggregating several small larcenous acts into one charge of grand larceny," namely, whether the stolen items were "possessed as part of 'a single incident or pursuant to a common scheme or plan reflecting a single, continuing [criminal] impulse or

[9] In addition, the Court relied on and quoted State v. Hall, 86 Idaho 63, 69, 383 P.2d 602, 606 (1963), for the proposition that "[w]hether a course of criminal conduct should be divided or aggregated depends on whether or not the conduct constituted 'separate, distinct and independent crimes.'" Major, 111 Idaho at 414, 725 P.2d at 119. This part of Hall, however, was expressly overruled in Sivak v. State, 112 Idaho 197, 211, 731 P.2d 192, 206 (1987), which applied a legal standard addressing whether the convictions were for included offenses. Thus, the *dictum in Major is* no longer good law for this reason also.

intent.'" Major, 111 Idaho at 414, 725 P.2d at 119 (brackets original, quoting State v. Lloyd, 103 Idaho 382, 383, 647 P.2d 1254, 1255 (1982)). The evidence showed that all the property in question was stolen from one individual at the same time, transported by Major and her associates off the reservation where one item was sold the a pawn shop, then the rest of the property was transported back to the reservation. Major, 111 Idaho at 414, 725 P.2d at 119. The Court ultimately concluded that Major committed "but one offense" of possession of stolen property, and therefore "the amendment to the information adding the property recovered from the pawn shop under the same offense was permissible." Id. at 415, 725 P.2d at 120. Tellingly, at no point in Major, or in Lloyd, the case relied on, does the Court claim that the rule it ultimately applied, whereby the state may aggregate theft offenses, is of constitutional origin or significance.

To show fundamental error Knutsen bears the burden of demonstrating a violation of unwaived constitutional rights, that the error is clear, and that the error is prejudicial. State v. Perry, 150 Idaho 209, 227-28, 245 P.3d 961, 979-80 (2010). Knutsen has failed to show fundamental error because he has failed to show that under the correct constitutional standard there is error, much less clear and prejudicial error. Application of the double jeopardy legal standards as articulated by the Supreme Court of the United States leads to the conclusion that the four counts were not the "same offense" because none is a lesser included of the others. There is thus no constitutional error, much less is that error clear on the record.

There is one opinion, not cited by Knutsen, that the state wishes to address. In State v. Moffat, 154 Idaho 529, 533, 300 P.3d 61, 65 (Ct. App. 2013), the Idaho Court of Appeals stated that "[c]onsistent with" Supreme Court precedent "it is generally held" that where "multiple acts against the same victim" occur "during a single criminal episode" the "'offense' is typically the episode" and not the individual acts that would "independently support a conviction for the same offense." This assertion does not withstand analysis because the conclusion that double jeopardy focuses on the "episode" instead of the "offense" is not "consistent with" Supreme Court precedent, and is in fact entirely inconsistent with that precedent. Even if this standard were the law, its application does not show fundamental error in this case.

In Blockburger the defendant asserted that his convictions for two counts of the illegal sale of narcotics violated double jeopardy because they "constitute a single continuing offense" because they were "made to the same purchaser and following each other, with no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold." 284 U.S. at 301-02.[10] The Court rejected this argument, stating that because "the first sale was consummated," the second sale, "however closely following," was a "separate and distinct sale completed by its delivery." Id. The Court distinguished between "a continuous offense, having duration," and "an offense consisting of an isolated act." Id. at 302 (internal citations and quotations

[10] This analysis is in a different part of the opinion than the part generally cited for the "Blockburger test" for whether a single act may be subject to two criminal sanctions.

omitted). Because the statute in question did not criminalize "the business of selling the forbidden drugs," but instead "penalizes any sale made," "[e]ach of several successive sales constitute a distinct offense, however closely they may follow each other." Id. "The test is whether the individual acts are prohibited or the course of action they constitute. If the former, then each act is punishable separately. *** If the latter, there can be but one penalty." Id. (internal quotes omitted, asterisks original).

The analysis in Blockburger is clearly at odds with a general rule that the offense is generally the episode instead of the act. Rather, the offense is whatever the legislature has defined the offense as. If it has defined the offense as a course of action, the offense is a course of action. Where, as here, the offense is defined as a particular act, the offense is a particular act, and committing multiple prohibited acts in rapid succession against the same victim does not transform the legislative definition of the crime.

The Court of Appeals' rule that committing multiple crimes against a single victim in rapid succession converts those crimes into a single offense for double jeopardy purposes is also not "consistent with the *Brown* analysis." Moffat, 154 Idaho at 533, 300 P.3d at 65. The Brown analysis started with applying the Blockburger test and concluding that the Double Jeopardy Clause "forbids successive prosecution and cumulative punishment for a greater and lesser included offense." Brown, 432 U.S. at 169.

The Court then turned to the Ohio court holding that because the date specified in the first charge was the last day of the joy ride (the date of his arrest)

while the date in the second charge was limited to the first day (the day he took the car), the "prosecutions are based on two separate acts ..., one of which occurred on November 29th and one which occurred on December 8th." Id. at 164. The Court rejected the conclusion "Brown could be convicted of both crimes because the charges against him focused on different parts of this 9-day joyride." Id. at 169. Because the applicable statutes made "the theft and operation of a single car a single offense," the Double Jeopardy implications could not be avoided by "the simple expedient of dividing a single crime into a series of temporal or spacial units." Id. In a subsequent case the Court pointed out that the "very same conduct" underlay both convictions for joyriding and automobile theft because "[e]very moment of [Brown']s conduct was as relevant to the joyriding charge as it was to the auto theft charge." Garrett, 471 U.S. at 787.

The analysis employed by the Supreme Court of the United States is clear. A conviction for two crimes cannot stand if the crimes are actually the "same offense" because the convictions are for included offenses. Offenses are not included offenses if they arise out of the same criminal act if each offense has an element not found in the other. Likewise, offenses are not included offenses if they arise from different criminal acts.

Both of these analyses apply here, but particularly the latter. Knutsen perpetrated four different acts of sexual abuse under two statutory provisions. Each crime was proved by evidence of an independent act. The separate acts were not included offenses of each other and conviction on one did not mean

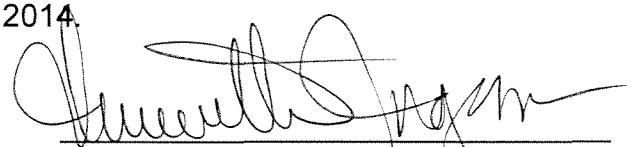
conviction on all, nor did acquittal on one mean acquittal on all. "Every minute that Nathaniel Brown drove or possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony, but the same simply is not true of [Knutsen]." Id. at 789. It is not "consistent" with Brown, and is directly contrary to Blockburger, to mash separate criminal acts into one offense merely because they were perpetrated in rapid succession on the same victim.

There is no constitutional requirement that this Court deem Knutsen's actions a single offense. It is the legislature's prerogative to define what constitutes an offense, and the legislature's definition did not create a course of conduct offense—it created a single act offense. Because each of Knutsen's acts was a separate offense, his convictions and sentences on four counts do not implicate double jeopardy, and he has failed to show fundamental error.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the lower court.

DATED this 19th day of May, 2014.



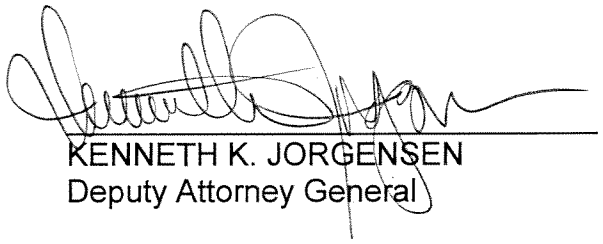
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of May, 2014, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

DIANE WALKER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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



KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm