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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45463**
Plaintiff-Respondent,	)	
	)	**Canyon County Case No.**
v.	)	**CR-2016-18457**
	)	
QUENTIN NAVA,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE GEORGE A. SOUTHWORTH
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Quentin Nava appeals from his judgment of conviction for one count of lewd and lascivious conduct and one count of sex abuse. He claims the district court erred when it denied his motion to sever.

Statement Of The Facts And Course Of The Proceedings

In Canyon County case no. CR-16-18457 the state charged Nava with one count of lewd and lascivious conduct and one count of sexual abuse. (R., pp.26-28.) The charges arose from an approximately[1] two-day period of time where Nava was hanging

[1] The state's superseding indictment alleged that Nava touched J.R.R. "on or about the 15th day of July, 2016," and that he touched J.L.R. "on or about the 17th day of July, 2016." (R., p.50.) The responding officer's affidavit of probable cause stated that the assaults happened on July 16th and July 17th, 2016. (R., p.24.) While J.R.R. testified it was "maybe close to a week" in which the assaults occurred, she then said it "probably" could have been less than a week. (Tr., p.508, L.19 – p.509, L.3.) Later, after imprecise questioning from defense counsel about whether "this happened" two nights in a row, J.R.R.—after clarifying the question—made plain that the assaults happened on two successive nights:

> Q. And you're saying this happened down in the same living room?
> A. Yes.
> Q. By the same person?
> A. Yes.
> Q. Two nights in a row?
> A. No. It didn't happen to *me* two nights in a row. *I'm talking about me and [J.L.R.] You didn't—*
> Q. I'm talking—
> A. specify it.
> Q. –about you and [J.L.R.]. Yeah, you and [J.L.R.] So is that what you're saying?
> A. Yeah. Yes. Jesus.

(Tr., p.545, Ls.10-23 (emphasis added).)

out with his friend Estella Ruiz, Ruiz's 12-year-old daughter ("J.R.R."), Ruiz's 12-year-old niece ("J.L.R."), and other friends and relatives for a series of family outings. (Tr., p.395, L.17 – p.396, L.11; p.399, L.15 – p.403, L.7; p.533, Ls.13-25; p.545, Ls.6-23.) Nava spent both nights at Ruiz's house, as did J.R.R., J.L.R., and several others. (R. pp.24-25.) On the first night, during the "early morning hours," Nava touched J.R.R.'s vagina outside of her underwear as she slept. (R., p.24; Tr., p.508, L.16 – p.512, L.13.) The next night, J.L.R. woke up to Nava unbuttoning her shorts and rubbing her buttocks. (R., p.24; Tr., p.334, L.11 – p.345, L.14.)

A grand jury indicted Nava on both counts. (R., pp.49-51.) After that, Nava filed a "Motion to Sever for Improper Joinder Pursuant to ICR 8(a)." (R., pp.77-81.) He contended the charges were not "properly joined" because, while the charges bore certain "similarities," they were not part of a "common scheme or plan." (R., p.80.) He also contended that "the prejudicial effect of having these two cases joined together is … substantial." (R., p.80.) The district court disagreed, finding there was "a great deal of evidence showing a common scheme or plan." (Tr., p.28, Ls.18-22.) The court also considered the potential prejudice to Nava; but, agreeing with the state's argument that other-charge evidence would come in for separate trials under Rule 404(b), concluded the potential prejudice "does not substantially outweigh the evidentiary value." (Tr., p.27, L.4 – p.28, L.12.) The court concluded "that joinder is proper" and denied Nava's motion to sever. (Tr., p.28, L.22 – p.29, L.1.)

Nava was found guilty of both counts (R., pp.194-95) and he admitted to two sentence enhancements (Tr., p.904, L.17 – p.910, L.21). The district court sentenced Nava to 40 years imprisonment with 18 years fixed. (R., p.217.)

Nava timely appealed. (R., pp.212-14.)

ISSUE

Nava states the issue on appeal as:

> Whether the district court erred by denying Mr. Nava's motion to sever the charges in this case.

(Appellant's brief, p.4.)

The state rephrases the issue as:

Has Nava failed to show the charges were improperly joined and failed to show the district court abused its discretion in denying the motion to sever; or, alternatively, was any error harmless?

ARGUMENT

Nava Fails To Show The Charges Were Improperly Joined, And Fails To Show The District Court Abused Its Discretion In Denying The Motion To Sever; Alternatively Any Error Was Harmless

A. Introduction

The district court found that the charges against Nava were properly joined because there was a "great deal of evidence showing a common scheme or plan." (Tr., p.18-22.) It therefore denied Nava's motion to sever. (Tr., p.28, L.24 – p.29, L.1.) On appeal Nava argues the district court erred because "the two charges are too unremarkable to justify joinder," and should therefore be severed. (Appellant's brief, p.1.)

Nava's argument fails because the evidence supports the district court's conclusion that there was a common scheme or plan here; accordingly, joinder was proper. (See Tr., p.28, Ls.18-22.) Moreover, Nava has failed to show the district court abused its discretion by denying his motion to sever. Finally, even if Nava has shown error, any such error was harmless.

B. Standard Of Review

"Whether a court improperly joined offenses pursuant to I.C.R. 8 is a question of law, over which this Court exercises free review." State v. Orellana-Castro, 158 Idaho 757, 760, 351 P.3d 1215, 1218 (2015) (quoting State v. Field, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007)). "In contrast, an abuse of discretion standard is applied when reviewing the denial of a motion to sever joinder pursuant to I.C.R. 14; however, that rule presumes joinder was proper in the first place." Id.

Nava spends a significant amount of time discussing the appropriate standard of review for this Court to deploy here. He purports that there is "confusion between *Field* and *Orellana-Castro* in regard to the applicable standard of review," and after surveying the case law, concludes that "the applicable standard for reviewing the district court's legal determination that the charges in this case were properly joined is free review." (Appellant's brief, p.8 (footnote omitted).)

The state ultimately agrees that the district court's ruling regarding the propriety of joinder should be freely reviewed. However, the state would clarify that the district court's *separate* finding regarding whether to sever the cases should be reviewed under an abuse of discretion standard.

The state respectfully disagrees that Field or Orellana-Castro are the source of any confusion here—those cases make plain that there is one standard for reviewing the propriety of joinder under Rule 8, and another for reviewing an order to sever under Rule 14. Field, 144 Idaho at 564, 165 P.3d at 278; Orellana-Castro, 158 Idaho at 760, 351 P.3d at 1218.

The only potential confusion can be traced back to Nava's own motion, which conflates these two separate issues. (R., pp.77-81.) Nava's motion would at times argue that "joinder of the offenses was improper," and repeatedly cited to Rule 8 and Field in briefing and argument. (R., pp.77-79.) However, Nava also argued that the cases should be severed, and talked about the alleged prejudicial effect of the joinder (all of which would go to Rule 14) (R., p.80). Even the title of Nava's motion boils these two issues (and operative rules) down into one analytical gumbo: it is not an "Objection to Joinder

Pursuant to Rule 8" or a "Motion to Sever Pursuant to Rule 14"—it is a "Motion to Sever for Improper Joinder Pursuant to ICR 8(a)."[2] (R., p.77.)

As a result of Nava combining these two issues the district court made two separate decisions. It held that under Rule 8, there was "a great deal of evidence showing a common scheme or plan," and that therefore "joinder is proper in this case." (Tr., p.26, L.7 – p.27, L.3; p.28, L.18 – p.29, L.1.) But the district court also looked to Rule 14, noted that any potential prejudice did "not substantially outweigh the evidentiary value," and concluded that the motion to sever should be denied. (Tr., p.27, L.4 – p.29, L.1.)

No tinkering with precedent is required to review these two decisions. Under a straightforward application of Field and Orellana-Castro the district court's ruling on the propriety of joinder should be reviewed *de novo*, and the ruling on whether to sever should be reviewed for abuse of discretion. Field, 144 Idaho at 564, 165 P.3d at 278; Orellana-Castro, 158 Idaho at 760, 351 P.3d at 1218.

C. Joinder Was Proper Here Because The Two Charges Were Part Of A Common Scheme Or Plan Sharing Common Elements, Similar Circumstances, Victims Of The Same Age, And Ample Evidence Of Grooming

"Joinder of offenses is permissible if those offenses 'could have been joined in a single complaint, indictment or information.'" Field, 144 Idaho at 565, 165 P.3d at 279 (quoting I.C.R. 13). "Two (2) or more offenses may be charged on the same complaint, indictment or information and a separate count for each offense, if the offenses charged

[2] Even Nava's appellate briefing mixes up the standards at one point, insofar as he argues up front (presumably in error) that "the district court abused its discretion when it denied his motion to sever" (Appellant's brief, p.1), but then goes on to argue why this Court should not apply an abuse of discretion standard (Appellant's brief, pp.5-8).

are based on . . . two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan." I.C.R. 8(a). "Whether joinder is proper is 'determined by what is alleged, not what the proof eventually shows.'" Field, 144 Idaho at 565, 165 P.3d at 279 (quoting State v. Cochran, 97 Idaho 71, 73, 539 P.2d 999, 1001 (1975)).

However, the Field Court rejected the argument that the appellate court reviewing the propriety of joinder "should look exclusively to the charging document and no other evidence." Id. at 565, n.3, 165 P.3d at 279, n.3. The Field Court made plain that "[w]hen we have reviewed the propriety of joinder we have not limited the review to allegations in the charging document," and cited Cochran's holding that "the district court did not err when it joined offenses and that the conclusion that the allegations show the offenses are part of a connected series of acts 'is supported by the *record*.'" Id. (citing Cochran, 97 Idaho 71, 73, 539 P.2d 999, 1001 (emphasis in original)). A review of a claimed joinder error should, therefore, consider the entirety of the record. See id.

"Cases discussing common plans have focused on whether the offenses were one continuing action or whether the offenses have sufficient common elements including the type of sexual abuse, the circumstances under which the abuse occurred, and the age of the victims." Field, 144 Idaho at 565, 165 P.3d at 279. Other cases "discuss whether evidence regarding other sex crimes would be admissible in a trial to prove a common plan." Id. at 566, 165 P.3d at 280 (citations omitted). The Supreme Court "has long recognized that joint trials conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused to trial. Rule 8 accommodates these interests while protecting against prejudicial joinder." United States

v. Lane, 474 U.S. 438, 449 (1986) (quotations and citation omitted); see also State v. Anderson, 138 Idaho 359, 361-362, 63 P.3d 485, 487-488 (Ct. App. 2003) (noting timing of offenses, location of offenses, and "overlapping evidence" as considerations relevant to joinder).

Below Nava contended the charges were "erroneously joined" because, while the charges bore certain "similarities," they were not part of a "common scheme or plan." (R., p.80.) The district court denied the motion, finding that,

> [The charges are] connected as to place, same room in the same house, time, just a day or two apart, victim type, both 12-year-old-girls, opportunity. They were both sleeping in the same room the defendant was staying [in]. Evidently they had fallen asleep there. And additionally, with the information that [defense counsel] didn't have today but [the prosecutor] developed in interviewing the victims, it appears that there [were] some previous instances of grooming in at least what the victims felt were perhaps inappropriate comments regarding their appearance, on one of them their breasts.

(Tr., p.25, L.24 – p.26, L.18.) The district court concluded that the charges were properly joined under Idaho Criminal Rule 8(a) because there was "a great deal of evidence showing a common scheme or plan." (Tr., p.28, Ls.18-24.)

The facts in the record show there was a common scheme or plan here, and therefore joinder was proper. The abuse took place in the same room in the same house over an approximately two-day span. (Tr., p.545, Ls.10-23.) The victims were both 12-year-old girls, both knew Nava personally, and were both sleeping in the same room as the defendant when they were assaulted. (See Tr., p.318, Ls.10-13; p.326, L. 9 – p.327, L.2; p.495, Ls.21-24; p.502, L.17 – p.503, L.14; p.508, L.16 – p.515, L.23.)

And far from being mere "evidence[] [of an] opportunistic tendency," State v. Comer, 162 Idaho 661, 665, 402 P.3d 1114, 1118 (Ct. App. 2017), the evidence showed

that Nava was grooming J.L.R. and J.R.R. for sexual abuse. "Grooming," defined by the state's expert, "is a way of basically warming the child up to abuse, to get them to that point of abuse without causing a major reaction from the child." (Tr., p.228, Ls.20-24.) After "pinpoint[ing]" the victim, a typical groomer will gain trust with the family, buy the victim gifts, strengthen the relationship with the victim, and, eventually, escalate to "where physical touch starts to come into play." (Tr., p.228, L.21 – p.231, L.18.) In other words, grooming evidence shows "the defendant took affirmative steps to select and entice his victims." State v. Sanchez, 161 Idaho 727, 732, 390 P.3d 453, 458 (Ct. App. 2017). This was exactly the sort of evidence that was missing in Comer and Field—where the Court of Appeals found there was no common scheme or plan—but that was present in State v. Schwartzmiller, where joinder was proper. Comer, 162 Idaho at 665, 402 P.3d at 1118; Sanchez, 161 Idaho at 732, 390 P.3d at 458; State v. Schwartzmiller, 107 Idaho 89, 92-93, 685 P.2d 830, 833-34 (1984).

There was ample evidence here that Nava groomed J.L.R. and J.R.R.—that he "took affirmative steps to select and entice" them. Sanchez, 161 Idaho at 732, 390 at 458. J.L.R. testified that Nava would take her to Dutch Bros. for coffee, buy her snacks, and take her to the lake. (Tr., p.327, Ls.3-13.) While J.L.R. "sometimes" saw Nava buy snacks for other relatives, she testified that Nava bought Dutch Bros. coffee for her and J.R.R.—and she did not ever see him buy coffee for any of J.R.R.'s siblings. (Tr., p.328, Ls.6-15.) J.L.R. testified that Nava would "call me pretty and give me nice compliments" about her personal appearance, which quite understandably made her feel "a little uncomfortable" because "he's a grown adult" and she was 12. (See Tr., p.328, L.16 – p.329, L.3.)

J.L.R. also testified that, the day leading up to the abuse, it "felt like" Nava was watching her. (Tr., p.331, Ls.8-21.) She testified that "Nava was making me feel uncomfortable" and "it just didn't feel right." (Tr., p.384, Ls.8-23.) J.R.R.'s mother told law enforcement that on that same day Nava "kind of held himself apart from the games and horseplay that [were] going on and was just kind of sitting back observing the children and what was going on." (Tr., p.455, Ls.8-15.) J.R.R.'s mother also testified that Nava was over at her house "all the time," and that he was "[v]ery friendly towards J.R.R.," buying her "Dutch [Bros.], Hot Cheetos," and "a bathing suit one time." (Tr., p.397, Ls.3-23.) She testified that Nava did not buy these things for the other kids. (Tr., p.397, L.20 – p.398, L.1.)

J.R.R. likewise testified that Nava was around "[s]ometimes like every day kind of," and that he would "volunteer" to take her to Dutch Bros. (Tr., p.503, Ls.13-14.) And she also testified that Nava would "[s]ometimes" say things that made her uncomfortable, like when he would "compliment [her] body." (Tr., p.506, Ls.8-9.) For example,

> Q. What would he say about your body?
>
> A. Like he would lift me out of the lake onto the dock, and then he would like look down, and then he would say like, "Whoa, like, pull up your shirt," like he was like looking there.
>
> Q. Looking where?
>
> A. Like in my shirt.
>
> Q. At what part of your shirt?
>
> A. My chest area, my boobs.

(Tr., p.506, Ls.5-18.)

Nava would also "[s]ometimes" make comments to J.R.R. "about covering [her] boobs." (Tr., p.507, Ls.3-8.) J.R.R. testified that, "a couple times," J.L.R. came to her and talked to her about feeling uncomfortable about Nava. (Tr., p.551, Ls.12-18.)

There was, therefore, ample support in the record for the district court's finding that Nava had a common scheme or plan. Unlike Comer, or Sanchez, where the facts only showed an unremarkable "opportunistic tendency," the facts here show Nava "took affirmative steps to select and entice his victims"—through repeated attention, gifts, and creepy flattery of their bodies and physical appearance. See Comer, 162 Idaho at 665, 402 P.3d at 1118; Sanchez, 161 Idaho at 732, 390 P.3d at 458. The district court therefore correctly concluded the two charges were part of a common scheme or plan and that joinder was proper.

On appeal Nava fails to show the district court's finding of a common scheme or plan was incorrect. He argues that the acts here were simply "innocuous" or "amorphous patterns" that "are not properly considered 'grooming'" because they lack a "pattern to progress a relationship with [the victims] toward a sexual encounter," and lacked any progressive compliance on a part of the victims. (Appellant's brief, pp.12-14.) Nava claims, "[i]n fact, J.L.R.'s allegations reveal precisely the opposite as she said she immediately put a stop to Mr. Nava's alleged actions on the night in question." (Appellant's brief, pp.13-14.)

These arguments go nowhere. For starters, it is neither "innocuous" nor "amorphous" for a 38-year-old man to call one 12-year-old girl pretty and compliment her personal appearance, "compliment [the] body" of another 12-year-old, and "look in" the

latter 12-year-old's shirt. (See Tr., p.328, L.16 – p.329, L.3; p.506, Ls.5-18.) This is overtly sexual and an obvious pattern.

And concluding there was no "pattern to progress a relationship … toward a sexual encounter" in part because the *victim* "immediately put a stop" to things gets everything backwards. (See Appellant's brief, pp.13-14.) J.L.R. "immediately put a stop" to Nava rubbing her buttocks precisely because the pattern progressed the way it did: from preferential gift-giving; to discomfiting "compliments" on her personal appearance; to, ultimately, outright sexual assault. (Tr., p.327, Ls.3-13; p.328, L.16 – p.329, L.3; p.334, L.11 – p.345, L.14.) Saying there was no pattern leading to a sexual encounter here misses the forest *and* the trees—insofar as it ignores both the pattern and the specific sexual encounter—and has the untoward effect of penalizing the victim for her resistance. This Court should not find there is insufficient evidence of grooming where the victim resists the groomer and, luckily, thwarts him from assaulting her further.

In addition to all the other similarities about the two charges, ample evidence showed that Nava was grooming J.L.R and J.R.R. The district court therefore correctly found there was a common scheme or plan and correctly concluded these charges were properly joined. (Tr., p.26, Ls.7-18; p.28, Ls.18-24.)

D. Nava Fails To Show The District Court Abused Its Discretion By Denying The Motion To Sever

Because the joinder of offenses was proper under I.C.R. 8(a), severance is only appropriate if the joinder is prejudicial. Nava has failed to show that the district court abused its discretion by denying his motion to sever the joined offenses. Idaho Criminal Rule 14 provides, in relevant part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information or by such joinder for trial together, the court may order the state to elect between counts, grant separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.

"When reviewing an order denying a motion to sever, the inquiry on appeal is whether the defendant has presented facts demonstrating that unfair prejudice resulted from a joint trial, which denied the defendant a fair trial." State v. Eguilior, 137 Idaho 903, 901, 55 P.3d 896, 908 (Ct. App. 2002) (citing State v. Cierelli, 115 Idaho 732, 734, 769 P.2d 609, 611 (Ct. App. 1989)). The "potential sources of prejudice" that have been recognized by Idaho's appellate courts include:

> (a) the possibility that the jury may confuse and cumulate the evidence, rather than keeping the evidence properly segregated; (b) the potential that the defendant may be confounded in presenting defenses; and (c) the possibility that the jury may conclude the defendant is guilty of one crime and then find him or her guilty of the other simply because of his or her criminal disposition, *i.e.* he or she is a bad person.

Eguilior at 901, 55 P.3d at 908 (citation omitted). Lastly, the Orellana-Castro Court identified another common means to show prejudice:

> When the defendant moves for severance under Criminal Rule 14, the alleged prejudice is often that evidence of the defendant's conduct which would be *admissible in the prosecution of one offense would not be admissible under Evidence Rule 404(b) in the prosecution of the other offense if it were tried separately.* In that circumstance, the analysis is the same as to whether the offenses are part of a common scheme or plan permitting joinder under Criminal Rule 8(a) *and whether the defendant would be prejudiced by joinder because the offenses were not part of a common scheme or plan under Evidence Rule 404(b).*

158 Idaho at 760, 351 P.3d at 1218 (emphasis added).

Nava fails to show the district court abused its discretion when it concluded any potential prejudice to Nava would not justify severing the charges. The district court

began by noting "in any case involving more than one count of sexual abuse there's going to be some degree of prejudice," insofar as the jury could very well consider the charges as propensity evidence "rather than consider each charge separately." (Tr., p.27, Ls.10-17.)

But the district court ultimately agreed with the state's argument that the other-charge evidence would come in for separate trials under Rule 404(b) due to "all the similarities here." (Tr., p.27, Ls.18-23.) The district court additionally agreed the evidence would come in under 404(b) for the additional purpose of showing opportunity. (Tr., p.28, Ls.13-17.) While the court acknowledged the possibility that Nava might present a different defense in a separate trial for Count 1 versus Count 2, the court ultimately found "the prejudice from that additional defense does not substantially outweigh the evidentiary value and therefore would be admissible in either trials anyway." (Tr., p.27, L.25 – p.28, L.12.) The district court accordingly denied the motion to sever. (Tr., p.28, L.24 – p.29, L.1.)

Nava fails to show that this was an abuse of discretion. The district court appropriately weighed the prejudice and the probative value of the evidence as part of its 404(b) analysis. (Tr., p.27, L.10 – p.28, L.12); State v. Grist, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2009) ("Second, the trial court must engage in a balancing under I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence."). And as explained above, the district court correctly determined there was "a great deal of evidence showing a common scheme or plan," which would have been an admissible use under Rule 404(b). (Tr., p.28, Ls.18-22; id. at 54, 205 P.3d at 1190 ("This statement is consistent with I.R.E. 404(b)'s recognition that

evidence may be admissible for certain purposes, including "preparation, plan, knowledge, [and] identity," which purposes are most frequently grouped together under the rubric of "common scheme or plan.").

But even if this latter finding was an error, the district court also correctly concluded that the evidence would be admissible under 404(b) to show opportunity. (Tr., p.28, Ls.13-17.) As the state pointed out (Tr., p.16, L.17 – p.18, L.7), one of Nava's early defenses, which later became an implied theory at trial, was he would not have had the opportunity to assault the victims in light of the other people sleeping in the living room at the time of the assaults (see, e.g., Tr., p.802, L.10 – p.803, L.24; p.805, L.21 – p.806, L.9). A similar defense was mounted in State v. Gomez, 151 Idaho 146, 154, 254 P.3d 47, 55 (Ct. App. 2011), where Gomez questioned "whether he could have had the opportunity to abuse V.B. in the presence of so many people."

The Court in Gomez determined that evidence of "similar touching" of prior victims pertained to "not only Gomez's ability to access the room, but also his ability, in a house full of people, to surreptitiously enter V.B.'s bedroom, while she was sleeping next to her brother, to touch her and offer her money to sleep with him." Id. at 155, 254 P.3d at 56. The Gomez Court concluded that the evidence "was relevant under I.R.E. 404(b)," and was ultimately admissible, "because it tended to show that Gomez seized the opportunity to secretly touch V.B.'s breast and genital areas while she was sleeping, since other individuals testified that he had exploited other opportunities to engage in similar touching." Id. That same conclusion would apply here, insofar as evidence that Nava successfully assaulted J.L.R. in a packed room, late at night, without waking any third party, would tend to show his opportunity to do the same to J.R.R.

On appeal, Nava fails to show this conclusion was an abuse of discretion. He argues that whether the evidence would come in under 404(b) "as evidence of opportunity is irrelevant to the analysis of the legal question regarding whether the joinder was appropriate in the first place." (Appellant's brief, p.7, n.2 (internal citations omitted.) This does not address whether—presuming joinder was proper—the court's 404(b) decision based on opportunity would still be intact, which would justify the court's decision not to sever. And Nava's final argument, comparing this case to Sanchez, fails to distinguish this case and that one on the facts. (Appellant's brief, p.7, n.2 (citing Sanchez, 161 Idaho at 732, 390 P.3d at 458).)

Regardless of the propriety of the initial joinder, Nava fails to show the district court abused its discretion by denying his motion to sever the offenses.

E. Even If This Court Concludes Nava Has Met His Burden Of Showing Error, Any Such Error Is Harmless

Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52. "[A]n error involving misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict." Lane, 474 U.S. at 449 (quotations and citation omitted).

Even if the district court erred in not severing these charges for trial, the error did not have a substantial or injurious effect or influence in determining the jury's verdict. As noted, evidence of Nava's abuse of both victims would have been admissible at separate trials even in the absence of a common scheme or plan because it would be

properly admitted as evidence of opportunity. Any error in joining the charges was, therefore, necessarily harmless.

CONCLUSION

The state respectfully requests this Court affirm the order denying Nava's motion to sever, and affirm the judgment of conviction.

DATED this 5th day of December, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of December, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd