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State of Idaho v. Rachel Elizabeth Luna Appellant's Brief Dckt. 47760

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

STATE OF IDAHO,	)	
	)	**NO. 47760-2020**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY**
v.	)	**NO. CR01-18-57711**
	)	
RACHEL ELIZABETH LUNA,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JONATHAN MEDEMA
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, Rachel Luna was convicted of one count of abuse, exploitation, or neglect of a vulnerable adult, and sentenced to two years fixed. She appeals from her judgment of conviction, raising two issues. First, she contends the district court erred in prohibiting her from presenting evidence to the jury regarding gifts given to her and other women by the alleged victim in this case, and regarding checks she wrote pursuant to her power of attorney on the alleged victim's bank account. Second, she contends the district court erred in instructing the jury regarding the requirements for gift-giving under the Uniform Power of Attorney Act, which was not referred to in the charging document. As a result of either or both of these errors, this Court should vacate Ms. Luna's conviction, and remand this case to the district court for a new trial on Count II.

Statement of Facts and Course of Proceedings

Ms. Luna met Benton Merrill "Skip" Hofferber, the alleged victim in this case, in late 2014. (Tr., p.248.)[1] She was working as a bartender at the Kona Grill at the Village in Meridian at the time; he was "a frequent patron." (Tr., p.248.) She was [redacted]. (*See* PSI, p.1; Exs., p.2.) The two developed a friendship that grew over time. They enjoyed meals together, spent the holidays together, and vacationed together. (Tr., p.249.) They were with each other on "almost a daily basis." (Tr., p.249.)

Ms. Luna and her daughter moved in with Mr. Hofferber in December 2015, and they acted like a family, participating in normal family activities. (Tr., pp.249-50.) Their relationship was one of love and friendship; it was not sexual. (Tr., pp.250, 271.) Ms. Luna testified at trial

[1] The transcript in this case does not include line numbers.

that Mr. Hofferber asked her to marry him on "[m]any, many occasions" but, "I told him that he's my friend, and that's how it's always going to stay, and I can't marry somebody for a best-friend love, [which] is what I had for him." (Tr., p.271) Ms. Luna described herself, during the presentence investigation process, as "Skip's best friend and his caretaker." (PSI, p.5.)

Ms. Luna lived with Mr. Hofferber until August or September 2016, when she moved into an apartment. (Tr., pp.250-51.) She moved back in with Mr. Hofferber in October 2016, after he suffered his first stroke. (Tr., pp.251-52.) She cared for him when she was at home, and hired a CNA to care for him when she was at work. (Tr., p.253.)

Mr. Hofferber, who never married and has no children of his own, was always very generous with young women, including Ms. Luna. (*See* R., pp.97-98.) Though the jury did not learn of this, Mr. Hofferber bought Ms. Luna a Range Rover in November 2016, gave her a significant amount of money, took her on lavish vacations, paid her rent, and paid for private school for her daughter. (R., pp.97-98; PSI, pp.5, 120; Tr., p.122.) Mr. Hofferber intended for Ms. Luna to be a joint account-holder on his personal account at the Bank of the Cascades, but made her a power of attorney instead. (Tr., pp.131-32.) Pursuant to this power of attorney, effective October 25, 2016 ("the bank account power of attorney"), Ms. Luna had 100 percent control over Mr. Hofferber's account and was able to withdraw and deposit funds, which she treated as her own. (Tr., pp.127, 130, 270; R., pp.100.) In his Last Will and Testament, executed on March 22, 2017, Mr. Hofferber gave his residuary estate to Ms. Luna and named her as his personal representative. (Exs., pp.24-25.)

One of the gifts Mr. Hofferber gave to Ms. Luna was a ladies Rolex watch. Ms. Luna testified Mr. Hofferber first mentioned in early 2016 that he wanted to give her a Rolex watch as a gift. (Tr., pp.253-54.) She said, "Skip wanted me to have it as a gift. I told him I would never

wear something that valuable. Asked if I could sell it, and he said it's yours to do what you want with it." (Tr., p.254) He ultimately gave her the watch in September 2015. (Tr., pp.253-54.) Ms. Luna was not interested in wearing the watch, so she decided to sell it. (Exs., pp.43-46.) She first had it appraised locally, at Hal Davis Jewelers, in October 2017. (Exs., p.39.) The jewelry store offered her $6,000 for the watch. (Tr., pp.155, 258; Exs., p.39.) Ms. Luna did not think this was a fair price so, at Mr. Hofferber's suggestion, she sent the watch to Watchworks, in Portland, Oregon, on November 3, 2016. (Tr., p.257; Exs., p.41.) Alex Hofberg, the owner of Watchworks, held the watch on consignment for a number of months. (Tr., pp.259-60.) Ultimately, he offered to purchase the watch from Ms. Luna for $24,000, and made payment to her in April 2017. (Tr., pp.259-60.)

Ms. Luna and Mr. Hofferber contacted a real estate agent in October 2016 about selling Mr. Hofferber's house in Garden City, Idaho, and they put the house on the market in December 2016. (Tr., p.263.) They accepted an offer on the house in February 2017, with closing scheduled for May 1, 2017. (Tr., p.264.) Unfortunately, Mr. Hofferber suffered a serious stroke in April 2017, and was admitted to St. Luke's Hospital. (Tr., p.153.) At the request of the title company, Ms. Luna contacted the hospital to ensure the closing could go forward notwithstanding Mr. Hofferber's hospitalization. (Tr., p.267.) Mr. Hofferber's treating physician executed a letter stating Mr. Hofferber is "critically ill and unable to make decisions at this time. (Exs., p.2.) As a result of this letter, a durable springing power of attorney, which had been drafted on March 22, 2017 ("the springing power of attorney"), took effect on April 17, 2017. (Exs., pp.3-9.) The springing power of attorney did not provide Ms. Luna with the ability to give gifts on Mr. Hofferber's behalf. (*See* Exs., p.5.)

Based on her authority under the springing power of attorney, Ms. Luna closed on the sale of Mr. Hofferber's house, and $92,000 was transferred into Mr. Hofferber's bank account, which was the account subject to the bank account power of attorney. (Tr., p.172; Exs., p.14.) Ms. Luna took $60,000 from the proceeds of the sale for her own use. (Tr., p.172; Exs., p.14.) The detective involved in investigating Ms. Luna, an investigation initiated by Shauna Urzua, who was second-in-line in Mr. Hofferber's will, testified Ms. Luna told him she had previously agreed with Mr. Hofferber that she would use some of the proceeds from the sale of the house to pay off two car loans and help pay her daughter's school tuition. (Tr., pp.178, 220.) Ultimately, Ms. Luna resigned as power of attorney under the springing power of attorney on May 15, 2017. (Tr., pp.268-69.) Ms. Urzua succeeded Ms. Luna in this role. (Tr., p.165.)

The State charged Ms. Luna by Information with two counts of abuse, exploitation, or neglect of a vulnerable adult, in violation of Idaho Code § 18-1505(3). (R., pp.41-42.) The first count pertained to Ms. Luna's receipt of proceeds from the sale of the Rolex watch on April 28, 2017. (Tr., p.113.) The second count pertained to Ms. Luna's receipt of funds from the sale of Mr. Hofferber's house on May 8, 2017. (Tr., pp.113-14.)

Idaho Code § 18-1505(3) provides that any person who exploits a vulnerable adult is guilty of a felony if the monetary damage from the exploitation exceeds $1,000. For purposes of this section, the word "exploitation" or "exploit" means "an action which may include, but is not limited to, the unjust or improper use of a vulnerable adult's financial power of attorney, funds, property or resources by another person for profit or advantage." I.C. § 18-1505(4)(c). The statute does not refer to the Uniform Power of Attorney Act, and the State did not refer to the Uniform Power of Attorney Act in the charging document. (*See* I.C. § 18-1505; R., pp.41-42.)

Just prior to trial, Ms. Luna filed a motion in limine seeking to introduce evidence of prior gifts given by Mr. Hofferber to Ms. Luna and other women. (R., pp.96-121.) The district court denied the motion because it was not timely filed, and stated it would rule on any evidentiary issues at trial. (R. p.96; *see also* R., p.80.) At trial, the district court prohibited Ms. Luna from presenting evidence regarding other gifts given by Mr. Hofferber to her and other women, and from presenting evidence regarding checks she wrote pursuant to the bank account power of attorney. (*See* Tr., pp.122-26, 144-47.)

The district court instructed the jury that the State had to prove Ms. Luna "exploited [Mr. Hofferber] by taking and/or obtaining proceeds and/or money from Mr. Hofferber . . . who was at that time a vulnerable adult." (R., pp.154-55.) The district court also instructed the jury, over objection, regarding the power of an agent to make gifts of the principal's property under the Uniform Power of Attorney Act. The district court instructed the jury as follows:

> A person (the agent) who has been given a power of attorney by another person (the principal) may give the principal's money to others if the written power of attorney expressly grants the power to make gifts of the principal's property.
>
> However, the agent may not give the principal's money or other property to the agent himself unless the written power of attorney expressly authorizes the agent to do so.

(R., p.153.)

The jury found Ms. Luna not guilty of Count I (money from the watch), but guilty of Count II (money from the house). (R., p.166.) The presentence investigator recommended probation. (PSI, pp.19, 22.) Mr. Hofferber's conservator told the presentence investigator "that Skip did not think Rachel did anything wrong." (PSI, p.3.) Counsel for Ms. Luna requested probation, and did not object to the State's request for restitution in the amount of $60,000. (Tr., p.340.) Ms. Luna told the district court she "had no malicious or ill intentions when

receiving the money that [she] received from Skip," and "care[d] about him very much." (Tr., p.341.) The district court sentenced Ms. Luna to two years fixed, imposed, and ordered her to pay $60,000 restitution. (Tr., p.344; R., p.173.) Ms. Luna filed a timely notice of appeal from the judgment of conviction. (R., pp.177-81, 188-91.) Ms. Luna subsequently filed a motion pursuant to Idaho Criminal Rule 35 for reconsideration of sentence, which the district court denied. (R., pp.193-95.)

ISSUES

I. Did the district court err by prohibiting Ms. Luna from presenting evidence regarding other gifts given by Mr. Hofferber to her and other women, and regarding checks she wrote pursuant to her power of attorney on Mr. Hofferber's bank account?

II. Did the district court err in instructing the jury regarding the requirements for gift-giving under the Uniform Power of Attorney Act?

ARGUMENT

I.

The District Court Erred By Prohibiting Ms. Luna From Presenting Evidence Regarding Other Gifts Given By Mr. Hofferber To Her And Other Women, And Regarding Checks She Wrote Pursuant To Her Power Of Attorney On Mr. Hofferber's Bank Account

A. Introduction

The district court prohibited Ms. Luna from presenting evidence regarding other gifts given by Mr. Hofferber to her and other women, and from presenting evidence regarding checks she wrote pursuant to her power under the bank account power of attorney, because it concluded this evidence was not relevant. The district court also concluded the evidence of other gifts was inadmissible character evidence. The district court erred and abused its discretion in excluding Ms. Luna's proffered evidence. The district court's evidentiary errors were not harmless, and require reversal of Ms. Luna's conviction.

B. Standard Of Review

"The question of whether evidence is relevant is reviewed de novo, while the decision to admit relevant evidence is reviewed for an abuse of discretion." *State v. Garcia*, 166 Idaho 661, __, 462 P.3d 1125, 1133 (2020) (citation omitted). In considering an alleged abuse of discretion, this Court considers "[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life,* 163 Idaho 856, 863 (2018) (citation omitted).

C. The District Court Erred In Concluding Evidence Of Prior Gifts And Of Ms. Luna's Use Of The Bank Account Power Of Attorney Was Not Relevant, As This Evidence Tends To Make It More Probable That Her Receipt Of The Money At Issue In This Case Was Neither Unjust Nor Improper

At trial, counsel for Ms. Luna sought to introduce evidence regarding checks Mr. Hofferber gave to Kristine Orloff in 2016, and gifts he gave to Ms. Luna and other women before he was hospitalized in April 2017. (Tr., pp.122-26.) Counsel argued these gifts were relevant because "this is a case of an older man that gives large gifts to young women." (Tr., p.122.) He argued the prior gifts show Mr. Hofferber intended to give Ms. Luna the money she took from the sale of the watch and the house. (Tr., pp.122, 142.) The district court concluded "the evidence that Mr. Hofferber gave gifts to another person or he gave gifts other than the two transactions alleged to Ms. Luna, is simply not relevant." (Tr., p.125) In the district court's view, "[t]he fact that someone has given gifts to someone else in the past, doesn't mean that it is more or less likely that they gave that person a gift on any particular occasion." (Tr., pp.125-26.)

Counsel for Ms. Luna also asked the district court to rule on whether he could present evidence regarding transactions made by Ms. Luna pursuant to the bank account power of attorney. (Tr., p.127.) He said:

> I'd like her to be able to testify and bring in those records of her writing checks based on [the] power of attorney over that bank account because she ultimately did a cashier's check from that same bank account where I have no evidence that it was ever revoked for the $60,000 cashier's check.

(Tr., p.127.) The district court responded:

> What I hear you to be asking me . . . is whether I think evidence in the form of checks that Ms. Luna wrote out of some bank account belonging to Mr. Hofferber are going to be admissible, and your argument is that he gave her the power of attorney to do that. What relevance does the fact that she paid his water bill have to whether or not she's entitled to the proceeds from the house?

(Tr., p.129) Defense counsel expained:

> The key is we're trying to determine his intent when he's of sound mind. He gave her the power of attorney when he was of sound mind. It was never revoked. The state wants to rely solely on a power of attorney that has language helpful to them, when I've got a power of attorney that's just as valid and created at the bank by bank employees that says she can write checks . . . out of this bank account with no evidence that it was ever revoked.

(Tr., p.129.)

The district court ruled the defense could not present evidence regarding how Ms. Luna used her power under the bank account power of attorney, finding it was irrelevant. The district court explained:

> Certainly, the defense can present evidence that Mr. Hofferber was of sound mind and simply gave these sums to Ms. Luna either on the date that the checks were transmitted or on some earlier occasion . . . . [H]ow she exercised those powers on other occasions, or how Mr. Hofferber gave her gifts on other occasions, is in my view, simply not relevant. It doesn't say anything about whether these were gifts or whether these were appropriate exercises of her powers granted to her in the written power of attorney guidelines, and so at this point I don't think any of her evidence of her spending his money or receiving gifts from him is relevant.

(Tr., p.132.)

The district court erred in concluding evidence of Mr. Hofferber's prior gifts to Ms. Luna and other women and of Ms. Luna's use of the bank account power of attorney was not relevant.[2] The standard for relevance is low. *Garcia*, 166 Idaho at __, 462 P.3d at 1135, n.3 (2020) (citing a secondary source for the proposition that I.R.E. 401 "requires only minimal relevance"). Rule 401 defines evidence as relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence[,] and (b) the fact is of consequence in determining the action." Whether a fact is of consequence for purposes of I.R.E. 401 "is determined by its

[2] Because the district court concluded the proffered evidence was not relevant, it did not determine whether the (in its view, non-existent) value of the probative evidence was substantially outweighed by the danger of unfair prejudice within the meaning of I.R.E. 403.

relationship to the legal theories presented by the parties." *Garcia*, 166 Idaho at __, 462 P.3d at 1134 (quotation marks and citation omitted).

Surely the fact that Mr. Hofferber gave gifts to Ms. Luna and other women before he was hospitalized in April 2017 is probative and material to a disputed fact of consequence in this action—specifically, whether Ms. Luna's taking of proceeds from the sale of Mr. Hofferber's house and the sale of the Rolex watch—was unjust or improper. As defense counsel argued in the district court, this evidence "is crucial to show Mr. Hofferber was not 'exploited' regardless of whether he was later deemed 'vulnerable' as this was his normal intent and regular choices." (R., p.98.) In terms of Ms. Luna's legal theory—that she did not exploit Mr. Hofferber—the evidence of his prior gifts and her use of the bank account power of attorney was relevant. Ms. Luna wanted to argue to the jury that she did not exploit Mr. Hofferber because her use of Mr. Hofferber's money was not "unjust or improper." *See* I.C. § 18-1505(4)(c) (defining "exploitation" or "exploit" for purposes of section 18-1505(3)). The evidence Ms. Luna sought to present to the jury has a tendency (and not just a minimal tendency) to make it more probable that Ms. Luna's use of the money was neither unjust nor improper. The evidence was thus relevant, and the district court erred in concluding otherwise.

D. The District Court Abused Its Discretion In Concluding Mr. Hofferber's History Of Giving Gifts Was Inadmissible Character Evidence

The district court also prohibited Ms. Luna from presenting evidence of Mr. Hofferber's history of gift-giving, concluding it was inadmissible character evidence. (*See* Tr., p.124.) The district court's ruling was based on the following argument from the prosecutor:

> Fundamentally, the evidence that he seeks to introduce is prohibited propensity evidence under 404(a). It does not fall in line to any exception that I can see . . . under 404(b) . . . . Counsel is not permitted by the Rules of Evidence to put on other gifts purportedly having come from Mr. Hofferber in order to then argue

> that because he gave other gifts, he must have given this gift to Ms. Luna. That's frankly, not – it's just . . . not permissible.

(Tr., pp.124-25.) The district court agreed, stating:

> If the question is, did I give my kids Christmas presents last year, or, let's say, did I hand out candy for Halloween this year, the fact that I've handed out candy every year for Halloween in the past says really nothing about whether I did it this year, and so they are simply, other than to say, I'm the type of person who gives out candy at Halloween, and, therefore, because I'm the type of person who does that thing, I must have done it this year, and that, is in my view, character evidence and that is what Rule 403 bars.[3]

(Tr., p.126.)

The district court ruled Ms. Luna could introduce evidence of Mr. Hofferber's character for generosity in the form of opinion or reputation evidence. (Tr., pp.143-44.) The court explained, "Rule 404 limits specific instances of conduct, and the act of him giving Ms. Luna other sums of money is a specific [instance] of conduct, and as I indicated before, I don't think that's relevant to whether he gave her a gift on either of these two occasions." (Tr., p.144.) Defense counsel argued, "I mean, if someone gave me multiple gifts . . . I think it makes it more likely that a subsequent large gift was voluntarily . . . ." (Tr., p.147.) The district court responded, "Sure; I agree with that as well, but it's because that person is a generous giving person who is the type of person who gives you gifts, and that's precisely the type of evidence the rule precludes other than by reputation or opinion, so she can say he's a generous guy." (Tr., p.147.)

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[3] Reviewing the record as a whole, it is clear the district court intended to refer to I.R.E. 404 here, not I.R.E. 403. I.R.E. 403 does not bar character evidence; instead, it provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by" a number of factors, including unfair prejudice. The district court had already ruled the proffered evidence was not relevant, and thus never reached the question under I.R.E. 403 of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. (*See* Tr., pp.127-32.)

The district court abused its discretion in concluding Mr. Hofferber's history of giving gifts to Ms. Luna and other women was inadmissible character evidence under I.R.E. 404. Rule 404(a)(1) states that, as a general rule, "[e]vidence of a person's character or trait of character is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." However, I.R.E. 404(a)(2)(B) states that, as one of the exceptions to the general rule set forth in Rule 404(a)(1), "a defendant may offer evidence of an alleged victim's pertinent trait of character, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." Mr. Hofferber was the alleged victim in this case, and Mr. Hofferber's history of being generous with gifts (in particular, towards young women) was pertinent, or relevant, to the crime charged because it made it more probable that Mr. Hofferber intended to give the money at issue to Ms. Luna, a young woman, as a gift. *See State v. Rothwell*, 154 Idaho 125, 131 (Ct. App. 2013) (citations omitted) (stating that, for purposes of I.R.E. 404(1)(2)(B), the word "pertinent" is generally synonymous with "relevant," and "a pertinent character trait is [thus] one that is relevant to the crime charged by making any material fact more or less probable").

The district court appeared to believe the evidence of Mr. Hofferber's gift-giving was not admissible under I.R.E. 404(b), but, as an initial matter, it is not even clear this section applies to the proffered evidence. Rule 404(b) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Evidence of Mr. Hofferber's gift-giving is arguably not evidence of a crime, wrong, or other act. Even if it is, it would still be admissible under I.R.E. 404(b)(2) to prove Mr. Hofferber's intent. Rule 404(b)(2) provides that evidence of crimes, wrongs, or other acts "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of

accident." Mr. Hofferber's intent was critical to this case—specifically, whether Mr. Hofferber intended to give Ms. Luna, as a gift, money from the sale of the watch and the sale of his house.

The district court abused its discretion in concluding specific instances of Mr. Hofferber's gift-giving was inadmissible character evidence because it did not act consistently with the legal standards applicable to the specific choices available to it in reaching its decision, and did not reach its decision by an exercise of reason. *See Lunneborg*, 163 Idaho at 863 (stating standard for abuse of discretion review).

E. The District Court's Evidentiary Errors Were Not Harmless

Where, as here, a district court makes an incorrect evidentiary ruling, this Court will grant relief if the error affects a substantial right of one of the parties. *State v. Jones*, 167 Idaho 353, __, 470 P.3d 1162, 1174 (2020). "To establish harmless error, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (quotation marks and citation omitted). The State cannot make that showing here. The jury surely could have found Ms. Luna not guilty if the district court had allowed her to present evidence of other gifts given by Mr. Hofferber to her and other women, and evidence of checks she wrote pursuant to the bank account power of attorney. As it was, the jury found Ms. Luna not guilty of Count I, pertaining to her receipt of the proceeds from the sale of the Rolex watch. (R., p.166; Tr., p.113.) The jury may well have concluded Ms. Luna did not exploit Mr. Hofferber when she took proceeds from the sale of Mr. Hofferber's house (by writing a check to herself pursuant to the bank account power of attorney), if it had learned of Mr. Hofferber's history of gift-giving and of Ms. Luna's history of writing checks under the bank account power of attorney. On the record presented, the State cannot prove the district court's evidentiary errors were harmless beyond a reasonable doubt.

II.

The District Court Erred When It Instructed The Jury Regarding The Requirements For Gift-Giving Under The Uniform Power Of Attorney Act

A. Introduction

The district court's instruction to the jury regarding the requirements for gift-giving under the Uniform Power of Attorney Act resulted in a variance with the Information, because the instruction did not match the allegations in the charging document as to the means by which Ms. Luna was alleged to have committed the charged crimes. The variance is fatal because it violated Ms. Luna's constitutional right to due process by depriving her of her right to fair notice of the charges against her and lowering the State's burden of proof. The instruction allowed the jury to find Ms. Luna guilty of violating Idaho Code § 18-1505(3) if it found she did not act in accordance with the Uniform Power of Attorney Act. Because this was not the crime charged in the Information, Ms. Luna's conviction must be reversed.

B. Standard Of Review

"The existence of an impermissible variance between a charging instrument and jury instructions is a question of law over which we exercise free review." *State v. Sherrod*, 131 Idaho 56, 57 (Ct. App. 1998) (citations omitted). Whether a jury was properly instructed is also a question of law over which this Court exercises free review. *See State v. Blake*, 133 Idaho 237, 239 (1999).

C. The District Court's Instruction To The Jury Resulted In A Fatal Variance

"Jury instructions should match the allegations in the charging document as to the means by which a defendant is alleged to have committed the charged crime." *State v. Miller*, 165 Idaho

115, 120 (2019) (citation omitted). Failure to do so creates a variance, which is fatal when it violates due process. *Id.* In determining whether a fatal variance exists, this Court must first determine whether a variance exists, and must next determine whether the variance is fatal. *See State v. Brazil*, 136 Idaho 327, 329 (Ct. App. 2001). A variance is fatal, requiring reversal of the defendant's conviction, when it deprives the defendant of the right to fair notice or leaves him or her open to the risk of double jeopardy. *See State v. Windsor*, 110 Idaho 410, 417-18 (1985); *Brazil*, 136 Idaho at 330. In the present case, there was a variance between the Information and the jury instructions, and the variance was fatal, requiring reversal of Ms. Luna's conviction, because it deprived her of her constitutional right to due process.

1. There Was A Variance Between The Information And The Jury Instructions

The State charged Ms. Luna with two counts of abuse, exploitation, or neglect of a vulnerable adult, in violation of Idaho Code § 18-1505(3). (R., pp.41-42.) The prosecutor alleged Ms. Luna "did exploit" Mr. Hofferber, a vulnerable adult, "by taking and/or obtaining proceeds and/or money from Mr. Hofferber, where the monetary damage . . . exceeds one thousand dollars ($1,000.00)." (R., pp.41-42.) The language used in the charging document tracks the language of section 18-1505(3), which provides that any person who exploits a vulnerable adult is guilty of a felony if the monetary damage from the exploitation exceeds $1,000. For purposes of section 18-1505, the word "exploitation" or "exploit" means "an action which may include, but is not limited to, the unjust or improper use of a vulnerable adult's financial power of attorney, funds, property or resources by another person for profit or advantage." I.C. § 18-1505(4)(c).

The Information does not refer to the Uniform Power of Attorney Act ("the Act"), which applies, as a default, to all powers of attorney except "[a] power to the extent it is coupled with an interest in the subject of the power;" [a] power to make health care decisions;" "[a] proxy . . .

to exercise voting rights or management rights;" and "[a] power created on a from prescribed by a government . . . for a governmental purpose." I.C. § 15-12-103. The Act provides, among other things, that an agent that has accepted an appointment as a power of attorney "shall . . .[a]ct in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest." I.C. § 15-12-114(1)(a). The Act provides that the agent's authority to make a gift with the principal's property must be expressly granted, and is not unlimited. *See* I.C. §§ 15-12-201(1)(b), 15-12-217; *see also Matter of Estate of Smith*, 164 Idaho 457, 472-73 (2018) (discussing gift-making authority under the Act). The Act contains a remedy provision—it states, in pertinent part, that "[a]n agent that violates this chapter is liable to the principal . . . for the amount required to: (1) Restore the value of the principal's property to what it would have been had the violation not occurred; and (2) Reimburse the principal . . . for the attorney's fees and costs . . . paid on the agent's behalf."[4] I.C. § 15-12-117.

The prosecutor submitted proposed jury instructions to the district court, which asked the jury to determine whether Ms. Luna "exploited" Mr. Hofferber, and whether "the monetary damage from the exploitation exceeded one thousand dollars ($1,000)." (R., p.89.) The State proposed that the jury be instructed on the meaning of "exploit" as defined in the statute. (R., p.90.) The State did not propose that the jury be instructed regarding the power of agents to give gifts under the Uniform Power of Attorney Act. (*See* R., pp.87-90.) The State's proposed instruction was consistent with the pattern jury instruction for felony exploitation of a vulnerable adult, which does not refer to the Uniform Power of Attorney Act. *See* ICJI 1293.

[4] Notably, Ms. Luna did not object to the State's request for restitution in the amount of $60,000, which would be the remedy available for a violation of the Uniform Power of Attorney Act. (Tr., p.340.)

At a break during trial, the district court asked the parties, "Are there going to be requests that I give the jury instruction on the Uniform Power of Attorney Act." (Tr., p.240.) The prosecutor responded, "I'm going to request the court give an instruction consistent with what the court articulated earlier in our motion debate, essentially, the default is that there is not a power to give gifts unless it's specifically designated." (Tr., p.240.) The district court asked defense counsel whether he "knew what portion of the Uniform Power of Attorney Act he's talking about." (Tr., p.240.) Defense counsel responded regarding the bank account power of attorney. (Tr., pp.240-41.) The district court said:

> Well, I'm not talking about objections based on the Parole Evidence Rule. If we're going to interpret a document. My question was, he's asking me to give an instruction that's essentially a recitation of a portion of the Uniform Power of Attorney Act. I know you haven't seen that because he didn't prepare it, but do you know enough about what he's asking me to talk about that now, or do you want to see it before you talk about it?

(Tr., p.241.) Defense counsel responded that he would have to see it first. (Tr., p.241.) The prosecutor said he would "submit it tonight." (Tr., p.241.) The prosecutor did not submit any additional instructions to the district court. (*See generally* R., pp.6-7.)

On its own initiative, the district court drafted the following jury instruction regarding the power of an agent to give gifts under the Uniform Power of Attorney Act:

> A person (the agent) who has been given a power of attorney by another person (the principal) may give the principal's money to others if the written power of attorney expressly grants the power to make gifts of the principal's property.
>
> However, the agent may not give the principal's money or other property to the agent himself unless the written power of attorney expressly authorizes the agent to do so.

(R., p.153.) At the jury instruction conference, defense counsel asked, referring to this instruction, "where does that come from?" The district court responded, "It's the paraphrasing of the Uniform Power of Attorney Act." (Tr., pp.292-93.) Defense counsel objected to this

instruction because the language was from a civil code, not a criminal code. (*See* Tr., p.293.) The district court overruled the objection. (Tr., p.294.) The following exchange then took place:

> THE COURT: I don't know that—the law's the law, Mr. Barrera. Do you have some authority that the law doesn't apply in criminal cases?
>
> MR. BARRERA: Well, Judge, I mean, uniform probate code doesn't talk about any . . . remedies at all. It never even addresses criminal remedies or criminal sanctions.
>
> THE COURT: I agree that the legislature has not made—well, they don't define any crimes in the Uniform Power of Attorney Act. Do you contend that's not a correct statement of the law?
>
> MR. BARRERA: This instruction effectively creates its own crime. You're taking a civil prohibition and turning it into a crime.
>
> THE COURT: Idaho Code 18-1505 defines abuse of vulnerable adult to include misuse of the vulnerable adult's power of attorney, so when the jury has to interpret what misuse is, doesn't it make sense that they understand the lawful use of power of attorney under the Uniform Power of Attorney Act?
>
> MR. BARRERA: Judge, I'll just renew my objection and move on.
>
> THE COURT: Those objections are overruled.

(Tr., pp.294-95.) The district court provided the instruction it created from the Uniform Power of Attorney Act to the jury. (R., p.153.)

The district court's instruction created a variance, as the State did not charge Ms. Luna with violating Idaho Code § 18-1505(3) by giving a gift to herself, as an agent from a principal, in contravention of the Uniform Power of Attorney Act. Instead, the State charged Ms. Luna with violating section 18-1505(3) by exploiting Mr. Hofferber, a vulnerable adult, by taking from him money in excess of $1,000. (R., pp.41-42.) Defense counsel argued in the district court that the instruction "effectively creates its own crime" by "taking a civil prohibition and turning it

into a crime." (Tr., p.294.) This was not the crime charged in the Information, and the instruction thus created a variance.

2. The Variance Was Fatal

The variance was fatal because it deprived Ms. Luna of her constitutional right to due process. An erroneous jury instruction violates due process if it omits a contested element of a crime or if it relieves the State of the burden of proving every element of the crime beyond a reasonable doubt. *State v. Draper,* 151 Idaho 576, 588 (2011). Here, the district court's instruction lowered the State's burden of proof and deprived Ms. Luna of fair notice of the charges against her.

The critical question in this case was not whether Mr. Hofferber was a vulnerable adult, or whether Ms. Luna took over $1,000 from Mr. Hofferber. These facts were not disputed. The critical question was whether Ms. Luna exploited Mr. Hofferber, her self-described best friend, when she took the money at issue from the proceeds of the sale of Mr. Hofferber's house and the Rolex watch. (PSI, p.5; *see also* R., p.97.) The district court's instruction allowed the jury to find Ms. Luna exploited Mr. Hofferber simply because she did not comply with the requirements for gift-giving set forth in the Uniform Power of Attorney Act. This lowered the State's burden of proving the essential element of exploitation.

The jury instruction also violated Ms. Luna's constitutional right to due process because it deprived her of fair notice of the charges against her. Up until the jury instruction conference, Ms. Luna believed she could defend against the charges against her by showing she did not exploit Mr. Hofferber within the meaning of section 18-1505, because her use of the springing power of attorney, and her acceptance of money from the sale of the house and the watch, were neither unjust nor improper. *See* I.C. § 18-1505(4)(c) (defining "exploit" to mean "an action

which may include, but is not limited to, the unjust or improper use of a vulnerable adult's financial power of attorney, funds, property or resources by another person for profit or advantage").

However, the district court's instruction to the jury meant she had to defend her actions as proper under the Uniform Power of Attorney Act. It appears from the transcript that defense counsel was not even aware of the requirements for gift-giving contained in the Act prior to the jury instruction conference. Defense counsel told the district court he would have to see the proposed instruction before commenting on it, and then asked the court where the language of the proposed instruction "come[s] from." (Tr., pp.241, 292-93.) Defense counsel objected to the proposed instruction on the grounds that it "tak[es] a civil prohibition and turn[s] it into a crime." (Tr., pp.294-95.) Defense counsel had it exactly right. The instruction essentially charged Ms. Luna with a new crime, about which she did not have fair notice.

The Idaho Supreme Court found a fatal variance existed in *State v. Folk*, 151 Idaho 327 (2018), when the district court's instruction to the jury permitted it to find the defendant guilty of a crime not charged in the information. The State charged the defendant with lewd conduct by committing oral-to-genital contact with a child, but the district court instructed the jury that it could find the defendant guilty if he committed any form of lewd and lascivious conduct, including "oral-genital contact, genital-genital contact, genital-anal contact, manual-genital contact, manual-anal contact, oral-anal contact, etc." *Id.* at 339-40. The Court held the instruction was erroneous because "a valid conviction could be based only upon a finding beyond a reasonable doubt that Defendant engaged in an act of oral-genital contact." *Id.* at 340. The Court explained:

> In this case, Defendant was charged with lewd conduct by committing oral-genital contact upon Child. The instructions to the jury must match the allegation in the

> charging document as to the means by which a defendant is alleged to have committed the crime charged. Otherwise, there can be a fatal variance between the jury instructions and the charging document. Also, the jury instruction must not permit the defendant to be convicted of conduct that does not constitute the type of crime charged.

Id. at 342.

The variance here is similar to the variance in *Folk*, in that it allowed the jury to convict Ms. Luna based on conduct not charged in the Information. The proper remedy for the variance that occurred here, as in *Folk*, is to vacate the judgment of conviction and remand this case to the district court for a new trial on Count II. *See Folk*, 151 Idaho at 342.

CONCLUSION

Ms. Luna respectfully requests that the Court vacate her conviction, and remand this case to the district court for further proceedings.

DATED this 17th day of December, 2020.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

AWR/eas