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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44627
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR-FE-2016-854
v.)	
)	
JUAN SALINAS, JR.,)	APPELLANT'S BRIEF
)	
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 STEVEN J. HIPPLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Juan Salinas contends the district court erred by admitting evidence of other acts which was not relevant to any non-propensity purpose. The district court's decision to admit the other-acts evidence in this case is based on a mistaken understanding of what I.R.E. 404(b) deems admissible as motive, and would authorize essentially any evidence of the defendant's sexual proclivities to be admissible, thereby effectively reviving the distinction between admission of evidence in sexual assault cases and all other cases despite the Idaho Supreme Court decision that such a distinction is improper. Essentially, the district court erroneously admitted propensity evidence under the mask of motive. As such, this Court should reverse that decision, vacate Mr. Salinas' conviction, and remand his case for further proceedings.

Statement of the Facts and Course of Proceedings

The State charged Mr. Salinas with attempted lewd conduct with a minor after a detective, under a fictitious adult persona, responded to an ad Mr. Salinas had placed on an internet forum. (*See R.*, pp.24-25.) During the ensuing conversations, the detective and Mr. Salinas discussed entering a sexual relationship which would include the persona's fictitious nine-year-old daughter. (*See generally Exhibits*, pp.3-466.)¹ Eventually, they agreed to meet at a hotel, and Mr. Salinas was arrested when he drove there. (*See generally Tr.*, Vol.3, p.106, L.5 - pp.107, 16.)²

¹ "Exhibits" refers to the PDF document "Salinas 44627 ex."

² The transcripts in this case are provided in three independently bound and paginated volumes. To avoid confusion, "Vol.1" will refer to the volume containing the transcript of the hearing on the State's notice of intent to use propensity evidence held on July 29, 2016. "Vol.2" will refer to the volume containing the transcript of the continuation of that hearing held on August 15, 2016. "Vol.3" will refer to the volume containing the transcript of the trial and sentencing hearings.

In preparation for a court trial, the State filed a notice of intent to introduce evidence of other acts under I.R.E. 404(b). (R., pp.51-52.) Specifically, it wanted to introduce two pictures, one of a partially-clad fifteen-year-old girl and one of an unclad four-year-old girl, as well as text and email conversations between Mr. Salinas and two other adults who had responded to the same ad the detective had answered. (R., p.64.) The prosecutor argued that this evidence was relevant to Mr. Salinas' motive or intent, or for potential impeachment purposes. (R., p.63) Mr. Salinas objected, arguing, *inter alia*, all this evidence was not relevant to any non-propensity purpose. (R., pp.57-62.) For example, at the ensuing hearing on the matter, defense counsel explained that the pictures were not relevant because of the inaccuracy of "the assertion that people that possess child pornography on a one-to-one ratio are the people who are going to go out and abuse a child. Nobody has present[ed] me with that relationship --" (Tr., Vol.1, p.24, Ls.6-15.)

The district court ultimately refused to admit the picture of the fifteen-year-old, determining that it was, indeed, merely propensity evidence and was not relevant to any non-propensity purpose. (Tr., Vol.2, p.9, Ls.1-11.) However, it decided that the other pieces of evidence were relevant to motive, as "what tempts the mind to act, in this case to want to engage in sexual conduct with a prepubescent minor." (Tr., Vol.2, p.11, Ls.12-16, p.13, L.22 - p.14, L.9.) It also noted that, as it would be the finder of fact, it would consider that evidence only for motive and not as character evidence. (Tr., Vol.2, p.11, L.17 - p.12, L.6, p.14, Ls.10-14.)

At trial, Mr. Salinas argued that the conversation in this case was "internet fantasy talk," and that he did not intend to actually engage in any of the acts described in the conversation. (*See generally* Tr., Vol.3; *see also* R., p.58 (taking this position in the response to the State's 404(b) notice).) Nevertheless, the district court found him guilty as charged. (Tr., Vol.3, p.262,

Ls.9-21; R., p.87.) It subsequently imposed and executed a unified sentence of fifteen years, with four and one-half years fixed, on him. (Tr., Vol.3, p.296, L.22 - p.297, L.4.) Mr. Salinas filed a notice of appeal timely from the judgment of conviction. (R., pp.105, 109.)

ISSUE

Whether the district court erred by admitting evidence of other acts which was not relevant to a non-propensity purpose.

ARGUMENT

The District Court Erred By Admitting Evidence Of Other Acts Which Was Not Relevant To A Non-Propensity Purpose

A. Standard Of Review

The Idaho Supreme Court applies a two-part test when reviewing a trial court's decision regarding the admission of evidence under I.R.E. 404(b): first, it evaluates whether the evidence is relevant as a matter of law to a non-propensity issue; and second, it evaluates whether the district court abused its discretion by finding the risk of undue prejudice from admitting that evidence substantially outweighed the probative value of that evidence. *State v. Joy*, 155 Idaho 1, 8 (2013). The district court erred in its analysis on the first prong of that test in this case, an analysis of which is reviewed *de novo*. *Id.* at 6.

B. The Other-Acts Evidence Was Not Relevant To Mr. Salinas' Alleged Motive

Evidence of other acts is not admissible unless it is relevant to a non-propensity purpose, such as motive or common scheme or plan. I.R.E. 404(b). Motive is "something (as a need or desire) that causes a person to act." MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS, 528 (2007); accord *State v. Pepcorn*, 152 Idaho 678, 689 (2012) ("Motive is generally defined as that which leads or tempts the mind to indulge in a particular act."). In *Pepcorn*, for example, the defendant was charged with sexually assaulting two of his nieces by marriage. *Pepcorn*, 152 Idaho at 689. The Court explained that his motive for doing that, his reason for deciding to target those two people, was because his wife was refusing to have sex with him. *Id.* As such, his motive was the reason he decided to engage in a particular course of conduct, not some general assertion about his sexual proclivities in regard to prepubescent females.

The admissibility of motive evidence is limited by the strictures of I.R.E. 404(b). *See, e.g., State v. Folk*, 157 Idaho 869, 877 (2014). Additionally, “[e]vidence of a motive is relevant when the existence of a motive is a circumstance tending to make it more probable that the person in question did the act.” *State v. Russo*, 157 Idaho 299, 308 (2014)); *see also Joy*, 155 Idaho at 9 (quoting *State v. Grist*, 147 Idaho 49, 54-55 (2009)) (explaining, in the context of the plan exception to I.R.E. 404(b), other-acts evidence must be “‘so related to each other that proof of one tends to establish the other.’”) (emphasis from *Grist*). As a result of that rule, motive evidence that merely shows a proclivity toward the charged conduct is not admissible because it is not so related to the charged conduct as to make it more probable that the defendant did the charged act. *Compare Pepcorn*, 152 Idaho at 689. Thus, evidence that the defendant engaged in similar sexual conduct towards similarly-situated children on other occasions is not admissible as evidence of motive because the probative value of such evidence is “entirely dependent upon their tendency to demonstrate the defendant’s propensity to engage in such behavior.” *Folk*, 157 Idaho at 878.

Like the evidence in *Folk*, the evidence which the district court admitted in Mr. Salinas’ case is not connected to the charged conduct. The email and text communications merely, if believed, show Mr. Salinas engaging in conversations similar to the one he allegedly had in this case. In fact, both those conversations were in response to the same ad and started after the detective began his conversation with Mr. Salinas. *See State v. Kralovec*, 161 Idaho 569, 574 (2017) (indicating that mere temporal proximity of events is not a sufficient basis to admit evidence which is otherwise inadmissible under the rules of evidence). As such, those conversations do not make it more probable that he intended to recreate any of the acts discussed in his conversation with the detective. *See Russo*, 157 Idaho at 308 (explaining this is the

relevant point motive evidence needs to address). Rather, they simply demonstrate a proclivity for engaging in conversations, meaning whatever relevance they might have is entirely dependent on propensity analysis. *Compare State v. Field*, 144 Idaho 559, 570 (2007) (explaining that, in the context of the plan exception to I.R.E. 404(b), the defendant's history of making "lewd comments" to an alleged victim was inadmissible propensity evidence). Thus, the email and text evidence "is merely propensity evidence served up under a different name." *Grist*, 147 Idaho at 55 (warning district courts to beware of such situations, so as not to mistakenly admit propensity evidence). As such, that evidence should not have been admitted.

Similarly, the picture which the district court admitted does not show a motive, a reason, for Mr. Salinas deciding to act as he did in this case. *Compare Pepecorn*, 152 Idaho at 689 (explaining motive as the reason for deciding to target the victim, as opposed to mere evidence of sexual proclivities). No evidence was offered to suggest a relationship exists between possession of such a picture and molestation behaviors. (Tr., Vol.1, p.24, Ls.6-15.) In fact, both the Idaho Supreme Court and Court of Appeals have recently, repeatedly rejected the idea that mere similarity between the other act and the charged act is enough to show a valid non-propensity basis for admission of the other acts evidence. *Joy*, 155 Idaho at 9; *Grist*, 147 Idaho at 54-55; *Folk*, 157 Idaho at 878. Since the admitted picture is relevant only based on that sort of similarity, it is no more relevant to this case than the picture which the district court properly decided to exclude as mere propensity evidence. As such, as the Supreme Court noted in *Field*, while such behavior may be reprehensible, it "is character or propensity evidence only." *Field*, 144 Idaho at 570. Therefore, it also should not have been admitted.

The district court based its contrary decision to admit that evidence on the holdings in *Russo* and *State v. Rossignol*, apparently believing they simply authorize admission of any

evidence of sexual proclivities as evidence of motive wholesale. (*See* Tr., Vol.2, p.11, Ls.12-16, p.13, L.22 - p.14, L.9.) However, that decision represents a misunderstanding of the analysis behind those two holdings. Given a proper understanding of those decisions, neither actually justifies the admission of the evidence in this case as evidence of motive. *Cf. Grist*, 147 Idaho at 55 (reiterating that “there must be limits on the use of bad acts evidence,” in terms of the plan exception to I.R.E. 404(b)).

In fact, a proper understanding of the analysis in *Rossignol* indicates it is a relic of the line of cases which the Idaho Supreme Court abrogated in *Grist*. The other-acts evidence in *Rossignol* was the defendant’s possession of stories about incestual relationships as well as pictures of pornography. *State v. Rossignol*, 147 Idaho 818, 824 (Ct. App. 2009). The district court had held that all that evidence was admissible as corroborating the victim’s testimony. *Id.* at 825. While the appellate court held that the defendant had shown no error in that decision, it also addressed the State’s alternative argument on appeal in regard to motive, stating simply that “incest stories may be admissible as relevant to a defendant’s intent and motive to have a sexual relationship with his daughter.” *Id.* at 824. However, it did not explain what relationship existed between those stories and the defendant’s decision to act.

Rather, the *Rossignol* Court simply accepted the premise that such evidence was admissible by pointing to an Arizona case which had held similar evidence to be admissible. *Rossignol*, 147 Idaho at 824-25 (citing *State v. Ramsey*, 124 P.3d 756 (Ariz. Ct. App. 2005)). Critically, though, *Rossignol* did not recognize that the Arizona case had been decided, in part, on an Arizona Rule of Evidence which expressly allowed for admission of propensity evidence showing aberrant sexual characteristics in sexual abuse cases. *Ramsey*, 124 P.3d at 767 (quoting

Ariz. R. Evid. 404(c)). Thus, *Rossignol* actually perpetuated the idea that other-acts evidence in sexual abuse cases should be treated differently than other-acts evidence in all other cases.

That is problematic because the Idaho Supreme Court has expressly held that sexual abuse cases are not to be treated any differently than any other cases under Idaho's evidentiary rules. *Grist*, 147 Idaho at 55.³ In fact, it specifically abrogated the case which had perpetuated the use of corroboration as an exception to I.R.E. 404 because the analysis behind that rule was "indistinguishable from admitting such evidence based upon the accused's propensity to engage in such behavior based upon his or her past behavior" *Id.* at 54-55. Since the underlying premise of the decision in *Rossignol* has been abrogated, the propriety of relying on *Rossignol's* conclusion is doubtful. That is particularly true since doing so would effectively revive the distinction between evidence in sexual abuse cases and all other cases which the Supreme Court erased in *Grist*.

In contrast to *Rossignol*, *Russo* shows how similar evidence might be properly admitted as motive. In that case, the defendant was charged with raping a woman at knifepoint. *Russo*, 157 Idaho at 302. The Supreme Court pointed out that one of the witnesses in that case had actually testified about the issue of motive, explaining those sort of assaults are driven by a desire to have power or control over another person. *Id.* at 308. Therefore, the Supreme Court held that the other-acts evidence in that case – that the defendant had certain rape fantasies centering on such aspects of power and control, and that he possessed pornography depicting those fantasies – was relevant as evidence of motive. *Id.* Essentially, the evidence of those fantasies showed the defendant was more likely to have committed the offense than some other

³ *Rossignol* was actually decided six months after the *Grist* opinion, but does not discuss *Grist* in its analysis. See generally *Rossignol*, 147 Idaho 818 (citing *Grist* only for the standard of review under I.R.E. 404(b).)

person because of his desire to experience the power and control. *Id.* However, when the other-acts evidence does not identify that sort of a connection to the reason the defendant chose to act, but rather, showed only a proclivity toward a particular type of victim, the other-acts evidence is not relevant to motive. *Folk*, 157 Idaho at 878 (distinguishing *Russo* in this regard).

The evidence in Mr. Salinas's case is more like the evidence in *Folk* than the evidence in *Russo*. The email and text conversations are simply other attempts to have the same sort of relationship he was alleged to have been seeking in this case, not the cause, the reason, for his actions in this case. Similarly, there was no evidence suggesting a causal relationship between Mr. Salinas' alleged possession of the picture and his alleged decision to try to actually molest a different child. (*See Tr.*, Vol.1, p.24, Ls.6-11.) Therefore, any probative value that evidence might have is entirely dependent on the sort of propensity analysis about his character or his sexual proclivities. That sort of evidence has been repeatedly excluded in cases like *Folk*, *Grist*, and *Field*, and so, should have been here as well.

Since the evidence was improperly admitted, this Court should vacate Mr. Salinas' conviction and remand this case for further proceedings. This is true despite the fact that this case went to a court trial and there is a presumption that judges are capable of considering evidence only for proper purposes. *See Isaacson v. Obendorf*, 99 Idaho 304, 310 (1978) (explaining that appellate courts presume the trial court did not consider incompetent evidence "unless the contrary is shown"). The district court stated it would consider the other-acts evidence as evidence of motive. (*Tr.*, Vol.2, p.11, L.17 - p.12, L.6, p.14, Ls.10-14.) However, that simply was not a proper purpose for considering that evidence. It was, whether the district court recognized it or not, just a propensity analysis masquerading under a different name.

Therefore, even though this was a court trial, this case still needs to be remanded in light of the erroneous admission of the propensity evidence.

CONCLUSION

Mr. Salinas respectfully requests this Court reverse the decision admitting the propensity evidence, vacate his conviction, and remand his case for further proceedings.

DATED this 12th day of September, 2017.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of September, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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