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

STATE OF IDAHO,	)	
	)	**No. 45627**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2016-34457**
	)	
BYRON LEE SANCHEZ,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Byron Lee Sanchez appeals from the judgment entered upon the jury verdict finding him guilty of threatening a public servant, in violation of I.C. § 18-1353(1)(b). On appeal, Sanchez argues the district court erred by denying his motion to dismiss, claiming as he did below that I.C. § 18-1353(1)(b) is unconstitutionally overbroad on its face. He also challenges a number of the district court's evidentiary rulings and argues the alleged errors, even if individually harmless, cumulated to deprive him of a fair trial.

Statement Of The Facts And Course Of The Proceedings

In 2014, Gem County Deputy Prosecutor Erick Thomson prosecuted Sanchez for felony injury to a child. (Tr., p.181, Ls.8-17, p.183, L.23 – p.184, L.2, p.185, L.15 – p.186, L.10, p.189, L.4 – p.190, L.17, p.191, L.18 – p.192, L.9; State's Exhibit 3.) Sanchez pled guilty to the charge and was thereafter sentenced to a period of retained jurisdiction and, ultimately, prison. (Tr., p.188, L.12 – p.189, L.3; State's Exhibit 3.) As a result of Sanchez's conviction, the state initiated a proceeding under the Child Protection Act (CPA) to determine the placement of Sanchez's children, and Mr. Thomson also represented the state in that proceeding. (Tr., p.186, L.15 – p.187, L.15, p.189, L.4 – p.190, L.17, p.190, L.23 – p.191, L.17; State's Exhibit 2.) In October 2015, Sanchez initiated a post-conviction proceeding to challenge his injury to a child conviction, and Mr. Thomson's office (though not Mr. Thomson, personally) represented the state in the post-conviction case. (Tr., p.187, L.16 – p.188, L.21, p.189, L.21 – p.190, L.17, p.192, L.10 – p.193, L.4; State's Exhibit 4.)

In September 2016, while still incarcerated on the felony injury to a child conviction, and while the CPA action and Sanchez's post-conviction case were pending, Sanchez wrote Mr. Thomson the following letter and mailed it to him at the Gem County Prosecutor's Office:

> Hello Erick,
>
> I hope you and your's are doing well and congradulations on the new addition to your family.
>
> To business: A prosecutor has the responsibility of a minister of justice … This responsibility carries with it specific obligations to see that the defendant is accorded justice, that guilt is decided upon the basis of sufficient evidence and that precautions are taken to prevent and to rectify the conviction of innocent persons. I.C.R. 3.8(g), (H).
>
> I am about to put some things into motion that neither you or I can undo. I don't want to, but I absolutely will. I would like to think that we are reasonable. I consider myself a Christian. Retribution does not restore. Hurting others, (even when they deserve it) also injures me. I seek mitigation. I am coming to you from a position of Legal strength asking you to consider coming to the prison and talking privately.
>
> I have operated transparently from the beginning. I am willing to make a one time offer which must be acted upon very soon; otherwise I will be forced to do this the hard-way. My chess pieces are ready to move, and moving. Parties have been contacted who await instructions.
>
> I seek an opportunity to show Idaho what mercy looks like.
>
> My God desires mercy over judgement, but make no mistake, when left no options, He will execute vengence and wrath. Mistakes have been made; let us mitigate them by having an honest private conversation and decide what action may be acceptable to all parties.
>
> Me, sitting in prison, with my children in harm's way, for a crime I didn't commit, past my fixed time, is unacceptable. I have four possible solutions to offer and all of them are more pleasant that what is about to happen. Refuse, and what happens next is your doing.
>
> [Sanchez's signature]

(State's Exhibit 1 (verbatim); see also Tr., p.197, L.9 – p.199, L.2, p.200, L.21 – p.201, L.10, p.212, Ls.15-20, p.228, L.17 – p.229, L.2, p.276, Ls.17-24, p.289, Ls.1-3.)

The state charged Sanchez with one count of "Threats Against Public Servants in Official Matters," in violation of I.C. § 18-1353(1)(b), with an enhancement for having committed the crime on the grounds of a correctional facility, I.C. § 19-2520F. (R., pp.59-60, 90-91.) Sanchez filed two separate motions to dismiss the charge. (R., pp.148-50.) In his first motion, Sanchez challenged I.C. § 18-1353(1)(b) as being both unconstitutionally overbroad and void for vagueness. (R., pp.148, 152-60.) In his second motion, he argued that the charging document was not legally sufficient to impart jurisdiction because it "fail[ed] to include the material element of 'harm' in the offense charged." (R., pp.149-50.) After entertaining briefing and conducting a hearing (R., pp.152-60, 166-84, 204-05), the district court entered a Memorandum Decision and Order denying Sanchez's motions to dismiss[1] (R., pp. 209-22).

The case proceeded to trial, at the conclusion of which the jury found Sanchez guilty as charged. (R., pp.234-242, 276; Tr., p.355, L.22 – p.357, L.1.) The district court entered judgment and imposed a unified sentence of five years, with four years fixed, to run consecutively to Sanchez's sentence in the injury to a child case. (R., pp.280-83.) Sanchez timely appealed. (R., pp.284-86.)

[1] Although the court found in relation to Sanchez's second motion to dismiss that the charging document was not jurisdictionally defective, it nevertheless "grant[ed] the State leave to amend so as to expressly include the element of 'harm'" "to insure there [was] no room for misunderstanding." (R., pp.220-21.) Consistent with the court's order, the state filed a Second Amended Information specifically alleging that Sanchez "did threaten harm to a public servant." (R., pp.224-25.)

ISSUES

Sanchez states the issues on appeal as:

I. Did the district court err by denying Mr. Sanchez's motion to dismiss because I.C. § 18-1353(1)(b) is facially overbroad?

II. Did the district court abuse its discretion by admitting irrelevant evidence of Mr. Thomson's reaction to Mr. Sanchez's letter?

III. Did the district court abuse its discretion by admitting irrelevant and prejudicial evidence of Mr. Sanchez's prior conviction for injury to a child?

IV. Did the district court abuse its discretion by admitting irrelevant evidence of Mr. Sanchez's post-conviction petition?

V. Did these errors in the aggregate deprive Mr. Sanchez of his right to a fair trial?

(Appellant's brief, p.7.)

The state rephrases the issues as:

1. Has Sanchez failed to show error in the district court's determination that I.C. § 18-1353(1)(b) is not unconstitutionally overbroad on its face?

2. Has Sanchez failed to show the district court abused its discretion by admitting evidence of Mr. Thomson's reaction upon reading Sanchez's threatening letter?

3. Has Sanchez failed to show the district court abused its discretion by admitting evidence of Sanchez's prior injury to a child conviction?

4. Has Sanchez failed to show the district court abused its discretion by admitting evidence of Sanchez's post-conviction proceeding?

5. Has Sanchez failed to show the cumulative error doctrine applies, much less that it requires reversal of his conviction?

ARGUMENT

I.
Sanchez Has Failed To Show Error In The District Court's Determination That I.C. § 18-1353(1)(b) Is Not Unconstitutionally Overbroad On Its Face

A. Introduction

Sanchez argues the district court erred by denying his motion to dismiss, claiming as he did below that I.C. § 18-1353(1)(b) prohibits a substantial amount of speech protected by the First Amendment and, as such, is unconstitutionally overbroad on its face.[2] (Appellant's brief, pp.8-15.) Sanchez's argument fails. The district court correctly determined the statute does not regulate a substantial amount of constitutionally protected conduct in relation to its plainly legitimate sweep and, as such, is not facially overbroad.

B. Standard Of Review

Where the constitutionality of a statute is challenged, the appellate court reviews the district court's decision *de novo*. State v. Rome, 160 Idaho 40, 42, 368 P.3d 660, 662 (Ct. App. 2016) (citing State v. Cobb, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998); State v. Martin, 148 Idaho 31, 34, 218 P.3d 10, 13 (Ct. App. 2009)). "The party attacking a statute on constitutional grounds bears the burden of proof and must overcome a strong presumption of validity." Id. (citing State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003), *abrogated on other grounds by* Evans v. Michigan, 568 U.S. 313 (2013); State v. Cook, 146 Idaho 261, 262, 192 P.3d 1085, 1086 (Ct. App. 2008)); accord State v.

[2] In denying Sanchez's motions to dismiss, the district court also rejected Sanchez's arguments that I.C. § 18-1353(1)(b) is unconstitutionally vague, both on its face and as applied to Sanchez's conduct, and that the charging document was jurisdictionally defective. (See R., pp.216-20.) Sanchez has not challenged these rulings on appeal.

Manzanares, 152 Idaho 410, 418, 272 P.3d 382, 390 (2012); Korsen, 138 Idaho at 711, 69 P.3d at 131. "Appellate courts are obligated to seek an interpretation of a statute that upholds its constitutionality." Manzanares, 152 Idaho at 418, 272 P.3d at 390 (quoting Korsen, 138 Idaho at 711, 69 P.3d at 131).

C. Idaho Code § 18-1353(1)(b) Is Not Unconstitutionally Overbroad On Its Face

"'The overbreadth doctrine is aimed at statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally protected freedoms.'" Manzanares, 152 Idaho at 423, 272 P.3d at 395 (quoting Korsen, 138 Idaho at 713, 69 P.3d at 133). Although facial attacks for overbreadth are not favored in the law, such challenges are allowed where, as here, the challenging party asserts that the statute in question impermissibly infringes upon speech or conduct protected by the First Amendment. See, e.g., United States v. Stevens, 559 U.S. 460, 473 (2010); City of Chicago v. Morales, 527 U.S. 41, 52 (1999); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); Manzanares, 152 Idaho at 423-24, 272 P.3d at 395-96; State v. Poe, 139 Idaho 885, 893, 88 P.3d 704, 712 (2004). The Supreme Court has cautioned, however, that the overbreadth doctrine is "strong medicine" and should be applied "sparingly and only as a last resort." Broadrick, 413 U.S. at 613. Accordingly, even a statute that "inhibit[s] the exercise of First Amendment rights" will be invalidated as facially overbroad only "if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" Morales, 527 U.S. at 52 (quoting Broadrick, 413 U.S. at 612-15); accord Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982); State v. Newman, 108 Idaho 5, 11, 696 P.2d 856, 862 (1985).

"As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002) (brackets, internal quotation marks, and citations omitted). It is well-settled, however, that not all forms of speech or expressive conduct are constitutionally protected. Certain categories of speech, including "true threats"—*i.e.*, "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"—may be proscribed without offending the First Amendment. E.g., Virginia v. Black, 538 U.S. 343, 359-60 (2003). Likewise, the Supreme Court has held that states may legitimately sanction expressive activities which amount to harmful conduct, rather than "pure speech," if the conduct in question is otherwise within the state's lawful power to proscribe:

> [F]acial overbreadth adjudication is an exception to our traditional rules of practice and . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Broadrick, 413 U.S. at 615. See also State v. Richards, 127 Idaho 31, 36, 896 P.2d 357, 362 (1995) ("The strength of an overbreadth challenge diminishes where the statutory proscription is directed at behavior other than pure speech …."). Furthermore, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a

sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968).

The first step in an overbreadth analysis is to determine whether the statute at issue regulates constitutionally protected conduct. Manzanares, 152 Idaho at 423, 272 P.3d at 395 (citing Korsen, 138 Idaho at 713, 69 P.3d at 133). The statute at issue in this case, I.C. § 18-1353(1)(b), provides: "A person commits an offense if he … threatens harm to any public servant with the purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding." As used in the statute, the word "harm" means "loss, disadvantage or injury, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested." I.C. § 18-1351(4). Although this definition clearly includes within its ambit the types of "true threats" that are not afforded any constitutional protection, see Black, 538 U.S. at 359-60, the state acknowledges it is broad enough to potentially include within its sweep some protected speech and expression. Such is not fatal to the validity of the statute, however. Rather, to succeed in his facial overbreadth challenge, Sanchez must demonstrate that "the statute precludes a significant amount of that constitutionally protected conduct." Manzanares, 152 Idaho at 423, 272 P.3d at 395 (citing Korsen, 138 Idaho at 713, 69 P.3d at 133). Correct application of the law to the statute's provisions shows that Sanchez has failed to carry this burden.

"'[A] statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications. Rather, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment

protections of parties not before the Court.'" Manzanares, 152 Idaho at 424, 272 P.3d at 396 (quoting Korsen, 138 Idaho at 714, 69 P.3d at 134). To prevail on his overbreadth challenge, Sanchez must show both "'from the text of [the statute] and from actual fact,' that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988)); accord State v. Doe, 148 Idaho 919, 925, 231 P.3d 1016, 1022 (2010). "Overbreadth is not substantial if, despite the fact that some constitutionally protected conduct is proscribed, the statute covers a wide range of conduct that is easily identifiable and within the [state's] power to prohibit." Doe, 148 Idaho at 925, 231 P.3d at 1022 (citing Korsen, 138 Idaho at 714, 69 P.3d at 134). "Where [a statute] proscribes protected speech only to some unknown extent, a court cannot justify invalidating the [statute]." Id. (citing Korsen, 138 Idaho at 714, 69 P.3d at 134).

Idaho Code § 18-1353(1)(b) clearly "covers a wide range of conduct that is easily identifiable and within the [state's] power to prohibit." Id. (citation omitted). Threats of violence, property damage, extortion, and blackmail are just a few examples of the types of harm that plainly fall within the statute's legitimate sweep. See I.C. § 18-1351(4) (defining "harm" as "loss, disadvantage or injury"). Indeed, there has never been any question that the conduct for which Sanchez was prosecuted in this case—threatening harm to Mr. Thomson and his family by way of a letter that made reference to, among other things, "[r]etribution," "vengeance and wrath" (See State's Exhibit 1 (spelling corrected))—fell outside the protections of the First Amendment. Because the statute covers a wide array of conduct that is not constitutionally protected, whatever overbreadth may exist should be addressed on a case-by-case basis. Broadrick, 413 U.S. at 615-16.

Without acknowledging the many legitimate applications of the I.C. § 18-1353(1)(b) to conduct, including his own, that is not protected by the First Amendment, Sanchez claims the statute is substantially overbroad because it includes within its ambit constitutionally protected speech and expression. (Appellant's brief, pp.11-15.) Specifically, he argues that, because the statute does not specifically prohibit only "threats of *unlawful* harm" and instead defines harm as any "loss, disadvantage or injury," the statute "prohibits all manner of protected speech, including core political speech." (Appellant's brief, pp.11-13 (emphasis in original).) He cites a number of hypothetical examples in which he claims the statute might be unconstitutionally applied—*e.g.*, prohibiting a criminal defendant from "threatening to file a bar complaint against a prosecutor" if he believes the charges against him are unfounded, prohibiting constituents concerned with a public servant's upcoming administrative decision from threatening to not vote for or support the public servant in the next election (Appellant's brief, p.13)—and he claims, based upon these hypotheticals, that "there is a realistic danger that I.C.§ 18-1353(1)(b) significantly compromises First Amendment protections" (Appellant's brief, pp.13-15). As found by the district court, however, "[w]hile such threats may conceivably be prohibited by the statute," Sanchez has failed to demonstrate that any prohibition on protected speech is both real and substantial, especially as compared to the statute's legitimate sweep. (See R., p.214.)

The reasoning of State v. Stephenson, 950 P.2d 38 (Wash. Ct. App. 1998), which addressed an overbreadth challenge to Washington's "intimidating a public servant" statute, and upon which the district court relied, is instructive. Similar to Idaho's threatening a public servant statute, the Washington statute criminalized the "use of a

threat" to "attempt[] to influence a public servant's vote, opinion, decision, or other official action." Id. at 40 (quoting RCW 9A.76.180). For purposes of the statute, the word "threat" was defined as "a direct or indirect communication with the intent … [t]o do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships." (quoting RCW 9A.04.110(25)(j)). Stephenson challenged the constitutionality of the statute, arguing it "swe[pt] too broadly and could encompass even a threat to file and run against a public official to coerce a decision to the threatener's liking." Id. at 43. The Washington appellate court disagreed. While the court acknowledged the statutory definition of threat "econcompasse[d] both protected and unprotected speech," id. at 41, it ultimately found that any impermissible applications were not substantial compared to the statute's legitimate reach, id. at 41-44.

In reaching its decision, the Stephenson Court observed that, on its face, the statute at issue served three "compelling" purposes:

> First, it protects public servants from threats of substantial harm based upon the discharge of their official duties. Second, it protects the public's interest in a fair and independent decision-making process consistent with the public interest and the law. And third, by deterring the intimidation and threats that lead to corrupt decision making, it helps maintain public confidence in democratic institutions.

Id. at 42 (citations, explanatory parenthetical, and footnote omitted). The court further reasoned that, "[b]y targeting only threats of 'substantial harm' that are designed to 'influence a public servant's vote, opinion, decision, or other official action as a public servant,' the challenged portion of the statute is narrowly tailored to address the overall problem it seeks to correct." Id. "Although it [was] possible to conceive of

circumstances in which application of the statute would be unreasonable," the court saw no "realistic danger that the statute [would] significantly compromise recognized First Amendment protections of parties not before the court" and, as such, concluded the statute was not unconstitutionally overbroad. Id. at 43-44.

Other courts have similarly rejected overbreadth challenges to statutes like the one at issue in this case. In People v. Janousek, 871 P.2d 1189 (Colo. 1994), for example, the Colorado Supreme Court upheld a statute that made it a crime to "attempt[] to influence any public servant by means of deceit or by threat of violence or economic reprisal." Id. at 1192 n.6 (quoting 18-8-306, 8B C.R.S. (1986)). In so doing, the court found that the statute regulated proscribable conduct and that whatever "minimal burden" the statute "placed on a person's speech interests [was] constitutionally insufficient to provoke the overbreadth doctrine." Id. at 1193-94.

More recently, in State v. Spottedbear, 380 P.3d 810 (Mont. 2016), the Montana Supreme Court rejected Spottedbear's assertion that his trial counsel rendered ineffective assistance by not challenging as facially overbroad a statute that made it a crime to "threaten[] harm to any person … with the purpose to influence the person's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter." Id. at 814 (citing MCA § 45-7-102(1)(a)(i)). Like Sanchez, Spottedbear argued the statute was unconstitutionally overbroad because the definition of "harm" was expansive, the statute was "not limited to threats of unlawful harm," and the statute "target[ed] the type of message that lies at the First Amendment's heart." Id. at 815 (internal quotation marks omitted). The Montana Supreme Court was unpersuaded and found, "when compared to the statute's plainly legitimate sweep, Spottedbear would

have a high hurdle to clear in showing how the statute adversely affects the rights of others in a real and substantial way." Id. at 816 (internal quotation marks and citation omitted). The court further noted that the conduct for which Spottedbear had been prosecuted "plainly came within the statute's legitimate sweep" and concluded, "[t]o the extent that the statute may reach constitutionally protected expression, any constitutional deficiencies not implicated by Spottedbear's case can be addressed at that time." Id. (internal quotation marks and citation omitted).

Like the statutes at issue in Stephenson, Janousek, and Spottedbear, Idaho's threatening a public servant statute, I.C. § 18-1353(1)(b), clearly addresses conduct that is within the government's legitimate power to proscribe. On its face, the statute seeks to safeguard the integrity of judicial and administrative proceedings by protecting public servants charged with making judicial and administrative decisions from threats of harm based upon the discharge of their official duties. That Sanchez has conceived of hypothetical circumstances in which application of the statute might be unconstitutional is not a sufficient basis upon which to invalidate the statute. Sanchez has failed to establish "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." Korsen, 138 Idaho at 714, 69 P.3d at 134. Accordingly, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may not be applied." Broadrick, 413 U.S. at 615-16.

II.
Sanchez Has Failed To Show The District Court Erred By Admitting Evidence Of Mr. Thomson's Reaction Upon Reading Sanchez's Threatening Letter

A. Introduction

The state prosecuted Sanchez for threatening a public servant based upon the letter Sanchez wrote and sent to Gem County Deputy Prosecutor Erick Thomson in September 2016. (R., pp.224-25.) Before introducing the letter into evidence at trial, the prosecutor established through Mr. Thomson's testimony that, until he received the letter, there were only "three contexts" in which Mr. Thomson was familiar with Sanchez: Mr. Thomson prosecuted Sanchez for a crime; he represent[ed] Gem County in a petition that was designed to take Mr. Sanchez's children away from him"; and the Gem County Prosecutor's Office represented the state in the post-conviction case in which Sanchez "was trying to undo the criminal conviction." (Tr., p.185, L.15 – p.194, L.17.)

After establishing "the extent of [Mr. Thomson's] relationship with Mr. Sanchez" (Tr., p.194, Ls.16-17), the prosecutor handed Mr. Thomson State's Exhibit 1, which Mr. Thomson identified as the letter he received from Sanchez while Sanchez was an inmate at the Idaho State Correctional Center and while Sanchez's child protection and post-conviction cases were still pending (Tr., p.197, L.9 – p.199, L.2). The following exchange then took place:

Q. Did you read the letter when it came to you?

A. I did.

Q. What was your initial reaction to it?

A. I was shocked, I was scared.

(Tr., p.199, Ls.3-6.) Immediately following Mr. Thomson's last answer, defense counsel interposed a "relevancy" objection, which the district court "[o]verruled." (Tr., p.199, Ls.7-8.) The prosecutor then continued his questioning and, over a "leading" objection, Mr. Thomson testified that the reason he was "shocked and scared" was that, "[b]ased on [his] prosecution of Mr. Sanchez," Sanchez "had shown several different instances of being very aggressive or violent." (Tr., p.199, L.10 – p.200, L.1.) When asked why that gave him "alarm based on the letter itself," Mr. Thomson responded, without objection, "Well, with my knowledge of Mr. Sanchez's history and the threats contained in the letter, I was worried that perhaps me or my family was in danger." (Tr., p.200, Ls.2-10.)

On appeal, Sanchez argues the district court erred "by overruling his relevancy objection to Mr. Thomson's reaction to his letter." (Appellant's brief, p.16.) According to Sanchez, "Mr. Thomson's testimony—that his initial reaction to the letter was 'shocked' and 'scared'—was irrelevant" because Mr. Thomson's "reaction does not have any tendency to make the existence of any fact of consequence more or less probable." (Appellant's brief, p.17 (citing I.R.E. 401).) Sanchez is incorrect. Mr. Thomson's reaction to the letter, while not itself an element of the charged crime, was relevant to a the jury's determination of whether the statements in the letter were in fact threats. Alternatively, even if the challenged testimony was not relevant, any error in its admission was harmless beyond a reasonable doubt.

B. Standard Of Review

Whether "evidence is relevant is a matter of law that is subject to free review." State v. Ehrlick, 158 Idaho 900, 907, 354 P.3d 462, 469 (2014). If this Court determines

that objected-to evidence was erroneously admitted, "the next issue is whether the error was harmless." State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010). A harmless error "does not require reversal or a new trial." State v. Hooper, 145 Idaho 139, 146, 176 P.3d 911, 918 (2007).

C. Evidence of Mr. Thomson's Reaction To Sanchez's Letter Was Relevant To The Jury's Determination Of Whether The Statements In The Letter Actually Constituted Threats

"To be admissible, evidence must be relevant." State v. Koch, 157 Idaho 89, 100, 334 P.3d 280, 291 (2014) (citing I.R.E. 401, 402). "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Id. (quoting I.R.E. 401). "Whether a fact is material is determined by its relationship to the legal theories presented by the parties." Koch, 157 Idaho at 100-01, 334 P.3d at 291-92 (citing State v. Yakovac, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008)).

To prove Sanchez was guilty of threatening a public servant, in violation of I.C. § 18-1353(1)(b), the state was required to prove that Sanchez "threaten[ed] harm" to Mr. Thomson[3] with the "purpose to influence [Mr. Thomson's] decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding." (See also R., p.259 (Jury Instruction No. 13 setting forth elements of crime).) The state's theory at trial was that the letter Sanchez wrote to Mr. Thomson in late September 2016 contained many statements that, considered in the context of Mr.

[3] It was undisputed at trial that Mr. Thomson was a "public servant" as defined by I.C. §§ 18-1351(8), -1353(1)(b).

Thomson's relationship with Sanchez and the status of Sanchez's legal proceedings, constituted both explicit and implicit threats to harm Mr. Thomson and/or his family if Mr. Thomson did not accede to Sanchez's demands that Mr. Thomson take action to "mitigate" what Sanchez claimed was his "unacceptable" continued imprisonment "for a crime [he] didn't commit." (Compare State's Exhibit 1 with Tr., p.329, L.3 – p.337, L.9, p.346, L.15 – p.348, L.7.) Sanchez's theory, on the other hand, was that Sanchez did not intend the statements in the letter to be threats, but that he was instead attempting to "negotiate" a resolution of his pending post-conviction case. (Tr., p.337, L.16 – p.346, L.8.) Whether the statements in the letter actually constituted threats of harm was, thus, an issue squarely before the jury; and, contrary to Sanchez's assertions on appeal (Appellant's brief, pp.15-19), evidence that Mr. Thomson was "shocked" and "scared" when he read the letter was directly relevant to that disputed issue.

In cases in which the government must prove as an element of the charged crime that the defendant made a threat, "[w]hether a given [statement] constitutes a threat is an issue of fact for the trial jury." State v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) (citing United States v. Lincoln, 589 F.2d 379, 381-82 (8th Cir.1979)), quoted in United States v. Fulmer, 108 F.3d 1486, 1492 (1st Cir. 1997). Although Idaho's appellate courts do not appear to have weighed in on the issue, other jurisdictions hold that the test for determining whether a particular statement is a threat is an objective one—*i.e.*, "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." State v. Cook, 947 A.2d 307, 315 (Conn. 2008); accord United States v. Hartbarger, 148 F.3d 777, 782-83 (7th Cir. 1998), overruled on other grounds by United

States v. Colvin, 353 F.3d 569 (7th Cir. 2003); Fulmer, 108 F.3d at 1491; United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990), overruled on other grounds by Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc); Manemann v. State, 878 S.W.2d 334, 337 (Tex. Ct. App. 1994); see also United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013) ("This Circuit's test for whether conduct amounts to a true threat is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury." (internal quotations and citations omitted, brackets in original)).

In evaluating whether a statement is a threat, "the entire factual context, *including* the surrounding events and *the reaction of the listeners*, must be considered." People v. Uecker, 91 Cal. Rptr. 3d 355, 368 (Cal. Ct. App. 2009) (internal quotations and citation omitted, emphasis added); accord, Cook, 947 A.2d at 315-16; Orozco-Santillan, 903 F.2d at 1265; Manemann, 878 S.W.2d at 337; People v. Stanley, 170 P.3d 782, 790 (Colo. Ct. App. 2007); Fulmer, 108 F.3d at 1499-1500. Although not determinative, "evidence of the effect of the threat upon its listener is relevant to what a reasonable person in the position of the speaker should have foreseen." Fulmer, 108 F.3d at 1500; see also Malik, 16 F.3d at 49 ("proof of the effect of the alleged threat upon the addressee is highly relevant"); State v. Schweppe, 237 N.W.2d 609, 614 (Minn. 1975) ("victim's reaction to the threat was circumstantial evidence relevant to the element of intent of the defendant in making the threat"); State v. Olson, 552 N.W.2d 362, 365 (N.D. 1996) (same). This is especially true in cases where the alleged threats are ambiguous; in such cases, "the recipients' states of minds and their reactions" may serve to "remove ambiguity by

shedding light upon the context of the alleged threats." Malik, 16 F.3d at 50; see also Manemann, 878 S.W.2d at 337 ("Threats of physical harm need not be directly expressed, but may be contained in veiled statements nonetheless implying injury to the recipient when viewed in all the circumstances." (citing State v. McGinnis, 243 N.W.2d 583 (Iowa 1976)).

Applying the foregoing principles in this case, it is clear that evidence of Mr. Thomson's reaction to Sanchez's letter was relevant in Sanchez's trial for threatening harm to a public servant. On its face, the letter contains a number of statements that, to an outside viewer, may not appear particularly threatening. (State's Exhibit 1.) In fact, Sanchez began the letter by greeting Mr. Thomson by his first name and congratulating him on the new addition to his family. (State's Exhibit 1.) As explained by Mr. Thomson, however, the only dealings he had ever had with Sanchez were in his professional capacity as a deputy prosecutor who prosecuted Sanchez for a crime and represented the state in an action to take Sanchez's children away from him. (Tr., p.185, L.15 – p.194, L.17; see also Tr., p.201, L.23 – p.203, L.1 (Mr. Thomson had "no idea" how Sanchez "would know about any changing dynamic to [Mr. Thomson's] family").) Evidence that Mr. Thomson was "shocked" and "scared" upon reading the letter is evidence that showed Mr. Thomson perceived the statements in the letter as threats based upon the context of his prior dealings with Sanchez, and that perception, in turn, was probative of what a reasonable person in Sanchez's position would have foreseen. See, e.g., Fulmer, 108 F.3d at 1500 (recipient's reaction to statement was "probative of whether one who makes such a statement might reasonably foresee that such a statement would be taken as a threat"). Because evidence of Mr. Thomson's reaction to the letter

was relevant to the disputed issue of whether the statements in the letter actually constituted threats of harm, Sanchez has failed to show any error in its admission.

D. Any Error In The Admission Of The Challenged Evidence Was Harmless

Even if the district court erred in admitting Mr. Thomson's testimony regarding his initial reaction upon reading Sanchez's letter, that error was harmless. "To establish harmless error, the State must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Parker, 157 Idaho 132, 140, 334 P.3d 806, 814 (2014) (quoting State v. Perry, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010)). "'In other words, the error is harmless if the Court finds that the result would be the same without the error.'" State v. Montgomery, 163 Idaho 40, ___, 408 P.3d 38, 44 (2017) (quoting State v. Almaraz, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013)). The result here would have been the same without the alleged error both because the specific testimony at issue had no prejudicial effect and because the evidence presented against Sanchez at trial was overwhelming.

First, any error in admitting the testimony at issue here was harmless because the testimony "had no prejudicial content." State v. Gerardo, 147 Idaho 22, 27, 205 P.3d 671, 676 (Ct. App. 2009); see State v. Rothwell, 154 Idaho 125, 136, 294 P.3d 1137, 1148 (Ct. App. 2013) ("In reviewing for harmless error, the court evaluates the potential prejudice from the inadmissible evidence in the context of the evidence presented at trial."). The objected-to testimony revealed to the jury only that Mr. Thomson was "shocked" and "scared" upon reading Sanchez's letter. (Tr., p.199, Ls.3-8.) However, having been seated on a case in which the charge against Sanchez was identified as

"threats against public servants in official matters" (see, e.g., Tr., p.84, Ls.23-25), the jury was presumably already aware that Mr. Thomson, the public official to whom the letter at issue was addressed, perceived the letter as threatening. Although Sanchez argues otherwise (Appellant's brief, p.20), there is no indication that Mr. Thomson's use of the words "shocked" and "scared" unfairly appealed to the jurors' passions or sympathies. Compare Fulmer, 108 F.3d at 1499-1500 (holding victim's characterization of message he interpreted as death threat as being "chilling" and "scary" "did not infect the proceedings with unfair prejudice"). Nor is there any indication that the testimony "confuse[d] the jury to focus on Mr. Thomson's reaction to the letter rather than Mr. Sanchez's intent in writing the letter and its contents." (Appellant's brief, p.20.) In fact, the jury was specifically instructed that, to find Sanchez guilty, the state must have proved that Sanchez "threatened harm" to Mr. Thomson (R., p.259), meaning that Sanchez "express[ed] [an] intention, conveyed by word and/or act, to harm [Mr. Thomson] by the commission of an unlawful act" (R., p.260).

In an effort to persuade this Court that the state "cannot meet its burden" of demonstrating harmless error in the admission of Mr. Thomson's objected-to testimony that he was "shocked" and "scared" upon reading Sanchez's letter, Sanchez points to Mr. Thomson's subsequent testimony that the reason he was "shocked" and "scared" was that Sanchez "had shown several different instances of being very aggressive or violent." (Appellant's brief, p.19; Tr., p.199, L.10 – p.200, L.10.) According to Sanchez, "[t]his testimony was impermissible character evidence, not relevant for any purpose except to show Mr. Sanchez's bad character and criminal propensity" (Appellant's brief, p.19 (citing, e.g., I.R.E. 404(b)) and would not "have been presented to the jury if the district

court had not admitted the evidence of Mr. Thomson's reaction in the first place" (Appellant's brief, p.20). The glaring flaw in Sanchez's argument is that Sanchez never challenged the admissibility of Mr. Thomson's testimony regarding Sanchez's history of being aggressive or violent, on I.R.E. 404(b) grounds or otherwise, below. (See Tr., p.199, L.10 – p.200, L.10 (defense counsel objecting to prosecutor's initial question regarding Mr. Thomson's knowledge of Sanchez's demeanor as "leading" but registering no objection to Mr. Thomson's subsequent testimony that Sanchez had in the past shown instances of aggression and violence).) That the testimony was offered and admitted as foundation for Mr. Thomson's reaction to Sanchez's letter does not show that the only testimony to which Sanchez objected—that Mr. Thomson was "shocked" and "scared"—was itself prejudicial. If Sanchez believed Mr. Thomson's testimony regarding Sanchez's history of aggression and violence was inadmissible character evidence under I.R.E. 404(b), it was incumbent upon Sanchez to make that objection at trial. See, e.g., State v. Cannady, 137 Idaho 67, 72, 44 P.3d 1122, 1127 (2002) (defendant's challenge to admissibility of evidence under I.R.E. 404(b) not preserved for appeal where defendant failed to raise challenge in trial court). Sanchez's attempt to preemptively poke holes in the state's harmless error argument by attacking the admissibility of evidence he never challenged in the trial court is merely an end-run around the requirement that parties to a case make timely objections and, as such, should be rejected.

Even if this Court entertains Sanchez's request to consider Mr. Thomson's unobjected-to testimony as part of its analysis in determining whether the objected-to reaction testimony contributed to the jury's verdict, any error was still harmless because other evidence presented at trial overwhelmingly established Sanchez's guilt. See

Montgomery, 163 Idaho at ___, 408 P.3d at 44 (holding error harmless "[b]ased on the overwhelming evidence presented against Montgomery at trial"). As noted above, Mr. Thomson testified that, before he received the letter, there were only three contexts in which he was familiar with Sanchez, all of which involved Mr. Thomson or Mr. Thomson's office representing the state in adversarial proceedings against Sanchez. (Tr., p.185, L.15 – p.194, L.17.) Sanchez wrote the letter, and Mr. Thomson received it, while Sanchez was still incarcerated for the crime for which Mr. Thomson had prosecuted him and while Sanchez's child protection and post-conviction cases were still pending. (Tr., p.197, L.9 – p.199, L.2.)

In the letter, Sanchez made a number of explicitly threatening statements and ultimatums—*e.g.*, "I am about to put some things into motion that neither you or I can undo"; "I am willing to make a one time offer which must be acted upon very soon; otherwise I will be forced to do this the hard way"; My chess pieces are ready to move, and moving. Parties have been contacted who await instructions"; "My God desires mercy over judgement, but make no mistake, when left no options, He will execute vengence and wrath"; "Me, sitting in prison, with my children in harm's way, for a crime I didn't commit, past my fixed time, is unacceptable. I have four possible solutions to offer and all of them are more pleasant that what is about to happen. Refuse, and what happens next is your doing." (State's Exhibit 1 (verbatim).) Sanchez also made statements in the letter that, in the context of his dealings with Mr. Thomson, were implicitly threatening—*e.g.*, referring to Mr. Thomson by his first name and congratulating him on the "new addition" to his family, despite having no personal

relationship with Mr. Thomson and no reason to know about Mr. Thomson's changing family dynamic. (State's Exhibit 1; Tr., p.201, L.23 – p.203, L.1.)

In an interview with law enforcement, Sanchez admitted that he authored the letter and sent it to Mr. Thomson with the objective of being released from prison and reunited with his family. (Tr., p.228, L.17 – p.229, L.6, p.230, Ls.2-10.) He also told law enforcement he was seeking an acquittal and money damages of $500 per day. (State's Exhibit 9 at 5:10 – 6:33; Tr., p.316, L.15 – p.320, L.4.) He made similar admissions while testifying at trial, confirming that he wrote the letter to Mr. Thomson (Tr., p.277, Ls.17-24, p.289, Ls.1-3), that at the time he did so he was incarcerated but believed he should have been on parole (Tr., p.291, Ls.23-25), and that his goal was "to motivate or incentivize Mr. Thomson to act in a way that to [sic] benefit [Sanchez] in a judicial or administrative proceeding" (Tr., p.309, L.18 – p.310, L.6).

The foregoing evidence, including Sanchez's admissions and the content of the letter itself, overwhelmingly established that Sanchez threatened harm to Mr. Thomson with the purpose of influencing Mr. Thomson's decision or recommendation in a judicial or administrative proceeding. Considering the strength of this evidence, there is no reasonable possibility that Mr. Thomson's testimony that he was "shocked" and "scared" upon reading the letter (or even his subsequent testimony that Sanchez had a history of being aggressive and violent) contributed to the jury's verdict. Any error in the admission of the testimony was thus harmless and did not affect Sanchez's substantial rights.

III.
Sanchez Has Failed To Show The District Court Abused Its Discretion By Admitting Evidence Of Sanchez's Prior Injury To A Child Conviction

A. Introduction

Sanchez wrote the letter at issue in this case while incarcerated in relation to a felony injury to child case in which Mr. Thomson was the prosecutor. Before trial, Sanchez moved for an order prohibiting the state from presenting evidence that the crime of conviction was injury to a child, arguing the nature of the crime was irrelevant, inadmissible I.R.E. 404(b) evidence, and unfairly prejudicial under I.R.E. 403. (Tr., p.41, L.24 – p.42, L.3, p.43, Ls.10-21, p.48, L.22 – p.60, L.13, p.62, L.20 – p.71, L.23.) The district court denied Sanchez's motion, finding the fact that Sanchez had been convicted of felony injury to a child was "not true 404(b) evidence" (Tr., p.58, Ls.13-20, p.64, Ls.20-23, p.71, Ls.2-3; see also p.243, L.1 – p.244, L.3) and, in any event, it was evidence relevant to Sanchez's "motive and intent" (Tr., p.58, L.21 – p.59, L.6, p.71, Ls.10-15; see also, p.243, Ls.10-19). The court also found the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. (Tr., p.59, Ls.6-14, p.71, Ls.15-23; see also p.243, Ls.18-24.) The court therefore permitted the state to introduce at trial the first page of the judgment of conviction that showed Sanchez had been convicted of felony injury to a child. (Tr., p.189, L.4 – p.190, L.17; State's Exhibit 3.)

Sanchez challenges the court's evidentiary ruling, arguing as he did below that "evidence of his prior conviction was not relevant for any proper purpose" and, "even if minimally relevant, the danger of unfair prejudice to Mr. Sanchez substantially outweighed the evidence's probative value." (Appellant's brief, pp.20-21.) Sanchez's arguments fail. Correct application of the law to the facts of this case supports the trial

court's determination that the nature of charge for which Mr. Thomson prosecuted Sanchez—injury to a child—was relevant to Sanchez's motive and intent to threaten Mr. Thomson. A review of the record and the applicable law also shows the trial court correctly exercised its discretion in concluding the probative value of the challenged evidence was not substantially outweighed by its danger of unfair prejudice, particularly since the trial court mitigated any potentially prejudicial effect by giving a limiting instruction. Alternatively, even if the court erred by admitting the evidence, any such error was harmless.

B. Standard Of Review

Relevance is a question of law reviewed de novo, while balancing under I.R.E. 403 is reviewed for an abuse of discretion. State v. Norton, 151 Idaho 176, 190, 254 P.3d 77, 91 (Ct. App. 2011). Rulings under I.R.E. 404(b) are also reviewed under a bifurcated standard: whether the evidence is admissible for a purpose other than propensity is given free review while the determination of whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice is reviewed for an abuse of discretion. State v. Grist, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009). In reviewing a trial court's discretionary decision, this Court evaluates whether the trial court correctly perceived the decision as discretionary, whether the trial court acted within the boundaries of its discretion and consistent with legal standards, and whether the court exercised reason in making its decision. Norton, 151 Idaho at 190, 254 P.3d at 91.

C. The Fact That Sanchez Was Convicted Of Injury To A Child In The Case Prosecuted By Mr. Thomson Was Relevant To The Disputed Issues Of Sanchez's Motive And Intent To Threaten Mr. Thomson

To be admissible, evidence must be relevant. I.R.E. 401, 402. Evidence that tends to prove the existence of a fact of consequence in the case, and has any tendency to make the existence of that fact more probable than it would be without the evidence, is relevant. State v. Hocker, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct. App. 1989).

"Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. However, such evidence may be admissible for a purpose other than that prohibited by I.R.E. 404(b)." State v. Truman, 150 Idaho 714, 249 P.3d 1169 (Ct. App. 2011) (citations omitted); see also State v. Grist, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2009) ("Evidence of uncharged misconduct must be relevant to a material and disputed issue concerning the crime charged, other than propensity." (citations omitted)). Under I.R.E. 404(b), evidence of prior wrongs or acts may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993). Evidence runs afoul of Rule 404(b) only "if its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." State v. Folk, 157 Idaho 869, 876, 341 P.3d 586, 593 (Ct. App. 2014) (citing Grist, 147 Idaho at 54, 205 P.3d at 1190; State v. Pokorney, 149 Idaho 459, 463, 235 P.3d 409, 413 (Ct. App. 2010)). "Of course, evidence of a prior crime, wrong or act may implicate a person's character while also being relevant and admissible for some permissible purpose, such as those listed in the rule." Id. (citing State v. Pepcorn, 152 Idaho 678, 688-89, 273 P.3d 1271, 1281-82 (2012)).

In this case, it is undisputed that Sanchez was in fact convicted of felony injury to a child as a result of Mr. Thomson's prosecution of him. (See State's Exhibit 3.) Thus, in determining whether evidence that Sanchez had been convicted of injury to a child was admissible, the first question before the district court was whether the nature of that conviction was "relevant to a material disputed issue concerning the crime charged [threatening a public servant], other than propensity." Grist, 147 Idaho at 52, 205 P.3d at 1188 (citations omitted). The district court concluded that it was, finding as an initial matter that, under the facts of this case, the nature of Sanchez's prior conviction was not "true 404(b) evidence" because it was "intrinsic to the facts of the case." (Tr., p.58, Ls.13-20, p.64, Ls.20-23, p.71, Ls.2-3; see also Tr., p.243, L.1 – p.244, L.3 (explaining State's Exhibit 3 was admitted, in part, because it was "proof of the underlying proceeding" that was the predicate to the parole proceeding about which Sanchez was charged with seeking to influence Mr. Thomson's recommendation).) The court further found that, even if I.R.E. 404(b) applied, the challenged evidence was relevant for non-propensity purposes—namely, to show that Sanchez had both the motive and the intent to threaten Mr. Thomas in order to influence Mr. Thomas' decision or recommendation in a judicial or administrative proceeding. (Tr., p.58, L.21 – p.59, L.6, p.71, Ls.10-15; see also, p.243, Ls.10-19.) Contrary to Sanchez's assertions, correct application of the law to the facts of this case supports the district court's rulings.

In order to prove Sanchez was guilty of threatening a public official as alleged in the charging document, the state was required to establish, beyond a reasonable doubt, that Sanchez "threaten[ed] harm" to Mr. Thomson "by sending [him] a threatening letter" with the "purpose to influence his decision, opinion, recommendation (vote) or other

exercise of discretion in … a pending child protection proceeding and/or future parole hearings." (R., pp.224-25; see also R., p.259 (elements instruction)); compare I.C. § 18-1353(1)(b). As argued by the prosecutor and found by the district court, Sanchez's felony injury to a child conviction was directly relevant to the charged crime because that conviction led to Sanchez's imprisonment and was the entire reason the child protection and parole proceedings at issue existed. (Tr., p.54, L.20 – p.57, L.8, p.58, L.13 – p.60, L.6, p.243, Ls.1-9.) Sanchez apparently recognized as much, as he conceded below that the state could present evidence that he was in prison after having been found guilty in a criminal case in which Mr. Thomson was the prosecutor, that he was "fighting that case," and that there was "a child protection case that derived from that." (Tr., p.54, Ls.5-10; Appellant's brief, p.27 (Sanchez does not contest admissibility of evidence indicating his past felony criminal conviction as a result of Mr. Thomson's prosecution).) Under the circumstances, evidence that the crime of conviction was injury to a child had no more tendency to indict Sanchez's character than did the evidence, which Sanchez acknowledges was admissible, that Sanchez had been imprisoned as a result of committing a serious criminal offense. Because the fact and nature of Sanchez's prior conviction was not improper character evidence, but was instead necessary to establish one of the elements of the charged offense, the district court correctly concluded the evidence was relevant and not subject to exclusion under I.R.E. 404(b).

Sanchez argues otherwise, claiming that, in finding that evidence of the nature of Sanchez's prior felony conviction was "not true 404(b) evidence," the district court engaged in an improper *res gestae* analysis. (Appellant's brief, pp.24-25.) The state acknowledges the Idaho Supreme Court's opinion in State v. Kralovec, 161 Idaho 569,

574, 388 P.3d 583, 588 (2017), which rejected *res gestae* as a basis for admitting evidence that otherwise does not comply with the standards for admission set forth in the Idaho Rules of Evidence. Contrary to Sanchez's assertions, however, it is not clear that the district court applied a *res gestae* standard in ruling that the evidence in question did not fall within the scope of I.R.E. 404(b). Although the court variously stated that the challenged evidence was "interrelated with" and "intrinsic to the facts of the case" being tried (Tr., p.58, Ls.18-20, p.64, Ls.20-23), it later clarified that it had admitted the evidence "because it was proof of the underlying proceeding" (Tr., p.243, Ls.1-9). Because, for the reasons explained above, that analysis was correct, Sanchez has failed to show any error in the court's initial ruling that the challenged evidence did not implicate I.R.E. 404(b).

Even if the evidence of the nature of Sanchez's prior conviction was subject to an I.R.E. 404(b) analysis, the district court conducted that analysis and correctly determined the evidence was relevant to the issues of Sanchez's motive and intent. "Motive is generally defined as that which leads or tempts the mind to indulge in a particular act." State v. Stevens, 93 Idaho 48, 53, 454 P.2d 945, 950 (1969), quoted in State v. Folk, 157 Idaho 869, 877, 341 P.3d 586, 594 (Ct. App. 2014). Intent, on the other hand, "is the purpose to use a particular means to effect a certain result." Id. "Evidence of 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, 336 P.3d 232, 241 (2014) (internal quotation marks omitted). Similarly, in cases in which intent is a disputed element, "[e]vidence of prior bad acts may be relevant to prove the

intent element of the charged offense." Folk, 157 Idaho at 879, 341 P.3d at 596 (citation omitted).

In this case, Sanchez's motive and intent in writing the letter to Mr. Thomson were both directly at issue. While it was undisputed that Sanchez wrote the letter, the state was still required to prove that the statements in the letter were threats, made for the purpose of influencing Mr. Thomson's decision or recommendation in Sanchez's child protection or parole proceedings. As explained in Section II.C., supra, Sanchez denied having intended to threaten Mr. Thomson, claiming instead that the statements he made in the letter were merely his attempt to "negotiate" a resolution to his post-conviction case. (Tr., p.337, L.16 – p.346, L.8.) The state's theory, however, was that Sanchez intended the statements in the letter as threats of harm to Mr. Thomson and his family so that Mr. Thomson would be incentivized by fear to act in a way that would benefit Sanchez in his child protection and/or parole proceedings. (See, e.g., Tr., p.309, L.23 – p.310, L.6.) Evidence that Sanchez was convicted of injury to a child in the case prosecuted by Mr. Thomson tended to make it more probable that Sanchez had a motive to threaten harm to Mr. Thomson and his family, that he intended the statements about Mr. Thomson and his family as threats, and that he made the threats in order to influence Mr. Thomson to take action to assist in restoring Sanchez's freedom and reuniting him with his own children, who had been removed from his care as a result of his injury to a child conviction. Compare, State v. Fischer, 354 N.W.2d 29, 32-33 (Minn. Ct. App. 1984) (evidence of defendant's prior assaultive relationship with victim was relevant to show defendant's intent and motive for making terroristic threats). Because the evidence

was relevant to Sanchez's motive and intent in making the alleged threats, the district court correctly determined its admission did not run afoul of I.R.E. 404(b).

As he did below, Sanchez argues on appeal that evidence of his injury to a child conviction was not relevant to demonstrate his motive but was instead "character evidence, plain and simple," with the only possible inference being that "Sanchez harmed a child so he is more likely to threaten harm to another person." (Appellant's brief, p.26.) Sanchez is incorrect. First, for the reasons set forth above, evidence that Sanchez had been convicted of injury to a child in the case prosecuted by Mr. Thomson was relevant to demonstrate both why Sanchez may have been inclined to threaten harm to Mr. Thomson and that he intended by the statements in his letter to do so. That the state's charging document alleged Sanchez's purpose in threating harm to Mr. Thomson was to influence Mr. Thomson's decision in a child protection or parole proceeding does not, as suggested by Sanchez, mean that Sanchez's motive was not at issue in the case. (See Appellant's brief, p.27.) Again, the state was required to prove that the statements Sanchez made in the letter were actually threats. Whether Sanchez had a *reason* to threaten Mr. Thomson was directly relevant to the jury's determination of that issue.

Second, because evidence of the injury to a child conviction was relevant to the issues of Sanchez's motive and intent in making the alleged threats, Sanchez's claim that the evidence "only shows his propensity or proclivity to (threaten) harm" (Appellant's brief, p.26) is necessarily without merit. Like the district court, the state recognizes that, absent a limiting instruction, there was a potential danger that the challenged evidence could implicate Sanchez's character. (See Tr., p.59, Ls.6-14.) However, because the evidence was also relevant for a permissible purpose—to show Sanchez's motive and

intent—its admission was not prohibited by I.R.E. 404(b). See, e.g., Grist, 147 Idaho at 54, 205 P.3d at 1190 (evidence is inadmissible under I.R.E. 404(b) only "when its probative value is *entirely dependent* upon its tendency to demonstrate the defendant's propensity to engage in such behavior" (emphasis added)); Folk, 157 Idaho at 876, 341 P.3d at 593 ("evidence of a prior crime, wrong or act may implicate a person's character while also being relevant and admissible for some permissible purpose, such as those listed in the rule"). Rather, as found by the district court, any potential that the jury might consider the evidence for an improper purpose could be, and ultimately was, addressed "with proper instructions." (See Tr., p.59, Ls.6-14, p.243, Ls.18-24; R., p.266 (Jury Instruction No. 20 limiting purposes for which jury could consider evidence of prior acts).) Sanchez has failed to show error in the district court's determination that evidence of his injury to a child conviction was admissible under I.R.E. 404(b).

Sanchez has also failed to show that the district court abused its discretion when it concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Pursuant to I.R.E. 403, relevant evidence may be excluded if, in the district court's discretion, the danger of unfair prejudice—which is the tendency to suggest a decision on an improper basis—substantially outweighs the probative value of the evidence. State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010); State v. Floyd, 125 Idaho 651, 654, 873 P.2d 905, 908 (Ct. App. 1994); State v. Nichols, 124 Idaho 651, 656, 862 P.2d 343, 348 (Ct. App. 1993).

Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. See State v. Leavitt, 116 Idaho 285, 290, 775 P.2d 599, 604 (1989) ("Certainly that evidence was prejudicial to the defendant,

however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant."). Rather, the rule protects only against evidence that is unfairly prejudicial, that is, evidence that tends to suggest a decision on an improper basis. Floyd, 125 Idaho at 654, 873 P.2d at 908. As previously explained by the Idaho Supreme Court: "Under the rule, the evidence is only excluded if the probative value is substantially outweighed by the danger of unfair prejudice. The rule suggests a strong preference for admissibility of relevant evidence." State v. Martin, 118 Idaho 334, 340 n.3, 796 P.2d 1007, 1013 n.3 (1990) (emphasis in original).

The district court concluded the evidence of Sanchez's injury to a child conviction was relevant "for the jury to understand what may have motivated [Sanchez] to reach out and try to influence" Mr. Thomson, explaining:

> What he's facing, a conviction for injury to child, a child protection proceeding, the fact that his sentence was imposed, these are all things that go to what [Sanchez] is facing, the seriousness of it, and his motivation to seek to influence the prosecutor and are all effectively backdrop to the case.

(Tr., p.58, L.21 – p.59, L.6; see also Tr., p.71, Ls.10-15 (court finding fact Sanchez was convicted of injury to a child "goes to motive and intent"), p.243, Ls.1-17 (court finding challenged evidence was relevant "for motive and the reason why [Sanchez] would write the letter, in addition to wanting out [of prison], it's the context of why it would be potentially considered a threat").) The only unfair prejudice identified by Sanchez, both below and on appeal, was the possibility the jury would infer from the nature of the conviction that Sanchez was a bad person and would convict him on that basis. (Tr., p.52, L.15 – p.54, L.16; Appellant's brief, pp.27-28.) The district court, however, specifically recognized the potential for that "collateral" prejudicial effect of the evidence

(see Tr., p.59, L.6-14, p.71, Ls.15-23, p.243, Ls.19-24); and ameliorated it by instructing the jury that it was not to consider the evidence "to prove the defendant's character or that the defendant has a disposition to commit crimes," but was to consider it "only for the limited purpose of proving the defendant's motive and/or to demonstrate the underlying facts and circumstances giving rise to the charge and/or to prove the existence and nature of the proceedings from which the state claims the defendant was seeking relief" (R., p.266 (Jury Instruction No. 20)).

Assuming, as this Court must, that the jury followed the court's instruction, see, e.g., Pepcorn, 152 Idaho at 690, 273 P.3d at 1283, there is no risk that the jury considered the evidence for anything other than its proper purpose. Sanchez has failed to show the trial court abused its discretion in concluding that, with an appropriate limiting instruction, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence to prove Sanchez's motive and intent in writing the threatening letter. See State v. Marks, 156 Idaho 559, 328 P.3d 539 (Ct. App. 2014) (although evidence of other bad acts "carried some risk that the jury would use it for an improper purpose," trial court did not abuse its discretion in concluding that, with a limiting instruction, risk of unfair prejudice did not substantially outweigh probative value of evidence for permissible purpose).

D. Even If The District Court Abused Its Discretion In Admitting Evidence Of Sanchez's Injury To A Child Conviction, The Error Was Harmless

Even when the trial court has abused its discretion, such "abuse of discretion may be deemed harmless if a substantial right is not affected. In the case of an incorrect ruling regarding evidence, this Court will grant relief on appeal only if the error affects a

substantial right of one of the parties." State v. Shackelford, 150 Idaho 355, 363, 247 P.3d 582, 590 (2010); accord I.R.E. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected …."); I.C.R. 52 ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). "An error is harmless if a reviewing court can find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence." State v. Vondenkamp, 141 Idaho 878, 887, 119 P.3d 653, 662 (Ct. App. 2005).

Even if the district court abused its discretion in admitting evidence that Sanchez was convicted of injury to a child, the error did not affect Sanchez's substantial rights. First, the jury was aware through evidence Sanchez agreed was admissible that Sanchez was convicted of a felony that was serious enough to result in his incarceration and the removal of his children from his custody. (Tr., p.54, Ls.5-10, p.185, L.15 – p.189, L.2, p.194, Ls.9-17.) There is no reasonable possibility that the jury found the fact that Sanchez's conviction was for injury to a child any more damning than the fact of the serious felony conviction itself. Second, the court's limiting instruction directing the jury that it was not to consider the challenged evidence as proof of Sanchez's character must be presumed to have eliminated the possibility that the jury might do so. See, e.g., Pepcorn, 152 Idaho at 690, 273 P.3d at 1283. Finally, the jury would have reached same result even without the challenged evidence because, for the reasons set forth in Section II.D., supra, the evidence against Sanchez was overwhelming. See, e.g., Montgomery, 163 Idaho at ___, 408 P.3d at 44. If there was error it was harmless beyond a reasonable doubt.

IV.
Sanchez Has Failed To Show The District Court Abused Its Discretion By Admitting Evidence Of Sanchez's Post-Conviction Proceeding

A. Introduction

Sanchez argues the district court erred by overruling his relevancy objection to State's Exhibit 4, which Mr. Thomson identified as the face-sheet of the document that initiated Sanchez's post-conviction proceeding to challenge his conviction in the injury to a child case. (Tr., p.189, L.21 – p.190, L.17; see also Tr., p.65, Ls.14-19 (objecting to State's Exhibit 4 on relevancy grounds).) According to Sanchez, the document should not have been admitted because "[t]he existence of the post-conviction proceedings was immaterial to the charged offense." (Appellant's brief, pp.29-31.) Sanchez is incorrect. Application of the law to the facts supports the district court's conclusion that evidence of Sanchez's post-conviction proceedings was relevant to the disputed issue of Sanchez's motivation and intent to threaten Mr. Thomson. Even if the evidence was not relevant, a review of the record shows its admission was harmless beyond a reasonable doubt.

B. Standard Of Review

Whether "evidence is relevant is a matter of law that is subject to free review." State v. Ehrlick, 158 Idaho 900, 907, 354 P.3d 462, 469 (2014).

C. Evidence Of Sanchez's Post-Conviction Proceeding Was Relevant To His Motivation And Intent To Threaten Mr. Thomson

"To be admissible, evidence must be relevant." State v. Koch, 157 Idaho 89, 100, 334 P.3d 280, 291 (2014) (citing I.R.E. 401, 402). "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence.'" Id. (quoting I.R.E. 401). "Whether a fact is material is determined by its relationship to the legal theories presented by the parties." Koch, 157 Idaho at 100-01, 334 P.3d at 291-92 (citing State v. Yakovac, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008)).

As explained in prior sections of this brief, the parties' theories in this case centered on whether Sanchez intended the statements he made in the letter to Mr. Thomson as threats of harm. Like the judgment of conviction in the injury to a child case, the document showing Sanchez had initiated a post-conviction proceeding to challenge his underlying felony conviction that resulted in his imprisonment and the removal of his children from his custody was relevant to show the context in which Sanchez wrote the letter and prove his motivation and intent to threaten Mr. Thomson. See Section III.C., supra. It was also relevant to Sanchez's own theory of the case—that he wrote the letter in an attempt to negotiate a resolution to his pending post-conviction case. (See Tr., p.337, L.16 – p.346, L.8.) In light of the fact that Sanchez himself relied on the evidence of his pending post-conviction proceeding to attempt to rebut the state's theory that he intended to threaten Mr. Thomson, his claims below and on appeal that the evidence was not relevant are without merit.

D. Any Error In Admission Of The Evidence Was Harmless

Even if the district court erred in admitting evidence of Sanchez's post-conviction proceeding, any such error is harmless because it did not contribute to the jury's verdict. I.C.R. 52; I.R.E. 103; State v. Perry, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010)).

First, Sanchez's claim that the evidence "painted [him] in a negative light as an overly litigious individual" and "prejudiced the jury against [him] for exercising his right to post-conviction relief" (Appellant's brief, p.31) is without any basis in the record. Nor is it a realistic possibility that such was the case in light of Mr. Thomson's testimony (1) describing a post-conviction action as "sort of like an appeal" to "challenge … legally, certain aspects of" a conviction, and (2) indicating that, at the time Sanchez wrote the letter at issue, "it would have been appropriate for there to be a post conviction case." (Tr., p.187, L.16 – p.188, L.5.)

Second, contrary to Sanchez's assertions, there is no reasonable possibility that evidence of Sanchez's post-conviction proceeding "misled the jury and confused the issues by indicating that the jury could find [him] guilty of intending to influence a different proceeding that the two proceedings alleged in the charging document." (Appellant's brief, p.31.) The jury was specifically instructed that, to find Sanchez guilty, the state must have proved he threatened harm to Mr. Thomson for the purpose of influencing Mr. Thomson's decision or recommendation in Sanchez's "pending child protection proceeding and/or future parole hearing." (R., p.259 (Jury Instruction No. 13).) Because the jury must be presumed to have followed this instruction, see, e.g., Pepcorn, 152 Idaho at 690, 273 P.3d at 1283, there is no risk the jury found Sanchez guilty based upon an attempt to influence his post-conviction proceeding.

Finally, the jury would have reached the same result even without the challenged evidence because, for the reasons set forth in Section II.D., supra, the evidence against Sanchez was overwhelming. See, e.g., Montgomery, 163 Idaho at ___, 408 P.3d at 44. If there was error it was harmless beyond a reasonable doubt.

V.
Sanchez Has Failed To Show The Cumulative Error Doctrine Applies, Much Less That It Requires Reversal Of His Conviction

Sanchez has failed to show that the cumulative error doctrine applies to his case. "Under the cumulative errors doctrine, an accumulation of irregularities, each of which might be harmless in itself, may in the aggregate reveal the absence of a fair trial in contravention of the defendant's right to due process." State v. Severson, 147 Idaho 694, 723, 215 P.3d 414, 443 (2009). The cumulative error doctrine may apply only if there is more than one error, excluding "errors not objected to at trial that are not deemed fundamental." Id. Sanchez has failed to show any error in the district court's handling of his trial and has thus failed to establish the requisite number of errors for the cumulative error doctrine to apply.

Even if Sanchez could show a sufficient number of errors to apply the cumulative error doctrine, it would not require a reversal of his conviction. "The presence of errors ... does not by itself require the reversal of a conviction, since under due process a defendant is entitled to a fair trial, not an error-free trial." State v. Moses, 156 Idaho 855, 873, 332 P.3d 767, 785 (2014). Any cumulative effect from the trial errors Sanchez alleges did not affect the verdict or deprive Sanchez of a fair trial—especially in light of the evidence presented against Sanchez. See Section II.D., supra; see also State v. Rothwell, 154 Idaho 125, 136-38, 294 P.3d 1137, 1148-50 (Ct. App. 2013) (finding no cumulative error "[h]aving considered the entirety of the trial evidence").

CONCLUSION

The state respectfully requests that this Court affirm the judgment.

DATED this 19th day of October, 2018.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of October, 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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LAF/dd