11-20-2018

State v. Schiermeier Appellant's Brief Dckt. 45642

Electronically Filed
11/20/2018 8:35 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45642**
Plaintiff-Respondent,	)	
	)	**BLAINE COUNTY NO. CR 2016-3203**
v.	)	
	)	
CHAD SCHIERMEIER,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE JONATHAN BRODY
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

JENNY C. SWINFORD
Deputy State Appellate Public Defender
I.S.B. #9263
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

Nature of the Case

From 2009 to 2015, Chad Schiermeier was the sole manager of Blaine County D.A.R.E./P.A.L., Inc. ("DARE/PAL"), a nonprofit corporation formed in 1994 with donated funds from the Blaine County Sheriff's Office ("BCSO"). The BSCO created DARE/PAL to reach out to in-need children in the community, build positive relationships with law enforcement, and educate about the dangers of drug and alcohol use. As the DARE/PAL manager, Mr. Schiermeier could exercise similar authority as a director of the corporation. He could disburse funds, compensate for projects, and execute any other measures deemed proper to promote the objects of DARE/PAL. It was undisputed that Mr. Schiermeier successfully ran the DARE/PAL program for many years. However, following an investigation, the State charged Mr. Schiermeier with one count of grand theft for stealing money from DARE/PAL. A jury found him guilty. The district court subsequently sentenced him to fourteen years, with six years fixed.

Mr. Schiermeier now appeals. He argues the State did not prove the elements of grand theft beyond a reasonable doubt and, as such, this Court should remand this case with instructions for the district court to enter a judgment of acquittal. He also argues the district court abused its discretion by imposing an excessive sentence under any reasonable view of the facts.

Statement of Facts and Course of Proceedings

In October 2016, the State filed an Indictment charging Mr. Schiermeier with six counts of misuse of public funds. (R., pp.31–34.) About five months later, in March 2017, the State filed a superseding Information charging Mr. Schiermeier with one count of grand theft. (R., pp.139,

140–41.) Mr. Schiermeier waived a preliminary hearing and a reading of the Information. (R., p.139.) The charged offense read in full:

> That the Defendant, CHAD R. SCHIERMEIER, on or about January, 2009, up to and including December, 2015, in the County of Blaine, State of Idaho, did wrongfully take, and/or obtain, and/or withhold, and/or exercise unauthorized control over, lawful money of the United States, with an aggregate value in excess of one thousand dollars ($1,000.00), from the owner, Blaine County D.A.R.E/P.A.L., INC., with the intent to deprive another of property, and/or to appropriate to himself certain property of another, and/or to appropriate to a third person certain property of another, to-wit: through a common scheme or plan did unlawfully, and without authority, withdraw monies from US Bank account number XXXX-8338 by cash, and/or check withdrawals, and/or the use of a financial transaction card, Visa debit card number XXXX-7161 and/or XXXX-1876, from an account exclusively for the use of the Blaine County D.A.R.E./P.A.L., INC., to purchase merchandise and/or withdraw money for his personal use where the aggregate amounts of the separate incidents exceed one thousand dollars ($1000.00), in violation of Idaho Code §§ 18-2403(1), 18-2407(1)(b)(1), 18-2408(2)(a) GRAND THEFT, a FELONY.

(R., pp.140–41.) Mr. Schiermeier pled not guilty and exercised his right to a jury trial. (R., p.139.)

In late August, early September 2017, the district court held a seven-day jury trial. (*See generally* Tr. Vol. I,[1] p.1, L.1–P.842, L.15; Tr. Vol. II, p.843, L.1–p.1425, L.17.) After the State rested, Mr. Schiermeier moved for a judgment of acquittal. (*See* Tr. Vol. II, p.1070, L.3–p.1090, L.4.) The district court denied his motion. (Tr. Vol. II, p.1090, L.5–p.1096, L.8.) The jury found Mr. Schiermeier guilty of one count of grand theft. (R., p.443; Tr. Vol. II, p.1423, L.15–p.1424,

[1] There are four transcripts in the record on appeal. The first, cited as Volume I, contains jury trial days 1–4 (August 23, 24, 25, and 29, 2017). The second, cited as Volume II contains jury trial days 5–7 (August 30 and 31, 2017, and September 1, 2017) and the sentencing hearing, held on November 7, 2018. The third, cited as Volume III, contains a status hearing, held on March 21, 2017, a pretrial conference, held on August 1, 2017, a motion to withdraw hearing, held on October 3, 2017, and a motion for bail pending appeal hearing, held on December 5, 2017. The fourth, cited as Volume IV, contains a pretrial conference, held on April 18, 2017, a motion to continue hearing, held on April 24, 2017, and a restitution hearing, held on January 2, 2018.

L.4.) After trial, Mr. Schiermeier again moved for a judgment of acquittal or, in the alternative, a new trial. (R., pp.458–81, 486–90.) Mr. Schiermeier then withdrew the motion as untimely filed. (R., pp.507–08.) The same day, Mr. Schiermeier moved to dismiss the criminal action pursuant to Idaho Criminal Rule 48(a)(2). (R., pp.509–33.) The State objected. (R., pp.540–50.)

Before sentencing, Mr. Schiermeier filed a sentencing memorandum requesting probation. (R., pp.595–600.) The district court held a sentencing hearing in November 2017. (R., pp.605–06.) At the start of the hearing, the district court heard argument on Mr. Schiermeier's motion to dismiss the criminal action and denied that motion. (Tr. Vol. II, p.1437, L.10–p.1448, L.23.) The district court proceeded to sentencing. (*See generally* Tr. Vol. II, p.1448, L.24–p.1531, L.16.) The State recommended a sentence of fourteen years, with six years fixed. (Tr. Vol. II, p.1498, Ls.20–24.) Mr. Schiermeier requested the district court place him on probation or retain jurisdiction ("rider"). (Tr. Vol. II, p.1506, L.24–p.1507, L.25, p.1510, Ls.17–18, p.1511, Ls.11–13.) The district court agreed with the State's recommendation and sentenced Mr. Schiermeier to fourteen years, with six years fixed. (Tr. Vol. II, p.1531, Ls.6–9.)

On November 8, 2017, the district court entered a judgment of conviction, and on December 14, 2017, Mr. Schiermeier filed a timely notice of appeal. (R., pp.607–09, 631–36.) After a restitution hearing, the district court ordered Mr. Schiermeier to pay $86,868.03 in restitution to DARE/PAL. (R., pp.653, 656–59.)

ISSUES

I. Did the State meet its burden to prove the elements of grand theft beyond a reasonable doubt?

II. Did the district court abuse its discretion when it sentenced Mr. Schiermeier to fourteen years, with six years fixed, for one count of grand theft?

ARGUMENT

I.

The State Did Not Meet Its Burden To Prove The Elements Of Grand Theft Beyond A Reasonable Doubt

A. Introduction

Mr. Schiermeier maintains the State did not present sufficient evidence to prove the essential elements of grand theft beyond a reasonable doubt. Specifically, he argues the State did not prove with sufficient evidence that his taking, obtaining, withholding, or control of DARE/PAL money was wrongful or unauthorized. The State is unable to meet this element of wrongfulness or lack of authority because the State did not show that Mr. Schiermeier, as the manager of DARE/PAL, was not using the money in a manner permitted by DARE/PAL's articles of incorporation and by-laws. By failing to show a wrongful or unauthorized use of the DARE/PAL money, the State did not present sufficient evidence to sustain the guilty verdict for grand theft.

B. Standard Of Review

> "This Court will not overturn a judgment of conviction, entered upon a jury verdict, where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt." *State v. Sheahan*, 139 Idaho 267, 285 (2003). "Evidence is substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." *State v. Eliasen*, 158 Idaho 542, 546 (2015). A conviction can be based primarily upon circumstantial evidence, *State v. Stevens*, 93 Idaho 48, 50–51 (1969), and "even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt," *State v. Severson*, 147 Idaho 694, 712 (2009).

State v. Smith, 161 Idaho 782, 790 (2017). The Court does not substitute its "judgment for that of the jury on issues of witness credibility, weight of the evidence, or reasonable inferences to be

drawn from the evidence." *State v. Eliasen*, 158 Idaho 542, 546 (2015) (quoting *State v. Adamcik*, 152 Idaho 445, 460 (2012)). The Court views "the evidence in the light most favorable to the prosecution." *Id.* (quoting *Adamcik*, 152 Idaho at 460).

C. The State Did Not Prove The Elements Of Grand Theft Beyond A Reasonable Doubt Because The State Failed To Show Mr. Schiermeier's Use Of DARE/PAL Money Was Wrongful Or Unauthorized

Mr. Schiermeier argues the State failed to offer sufficient evidence to sustain the jury's guilty verdict for grand theft. The State has the burden to prove all elements of the offense beyond a reasonable doubt:

> [T]he Fourteenth Amendment of the United States Constitution guarantees the right to due process, and the U.S. Supreme Court has held that as a part of that due process, "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."

Eliasen, 158 Idaho at 5 (quoting *State v. Goggin*, 157 Idaho 1, 5 (2014)). "[E]ven when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt," "a properly instructed jury may occasionally convict." *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). Appellate review of sufficiency is limited in scope, however. *Eliasen*, 158 Idaho at 545. The inquiry is not whether this Court would find the defendant guilty, but whether any rational jury could have found the State met its burden to prove each essential element with substantial evidence. *Id.* at 546. Mr. Schiermeier contends the State did not meet its burden here.

Under Idaho law, "[a] person steals property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof." I.C. § 18-2403(1). A person also commits theft "when he knowingly takes or exercises unauthorized control over,

or makes an unauthorized transfer of an interest in, the property of another person, with the intent of depriving the owner thereof." I.C. § 18-2403(3).

In the case at bar, the State charged Mr. Schiermeier with wrongfully taking, obtaining, or withholding or exercising unauthorized control over money valued in excess of $1,000 from DARE/PAL with the intent to deprive or appropriate property of another. (R., pp.140–41.) The State specifically alleged Mr. Schiermeier, though a common scheme or plan, unlawfully and without authority withdrew money from the DARE/PAL bank account by cash, check, or debit card use in order to purchase merchandise or withdraw money for his personal use. (R., pp.140–41.) The aggregate amounts of the separate incidents exceeded $1,000. (R., pp.140–41.) Accordingly, the district court instructed the jury:

> In order for the defendant to be guilty of Grand Theft, the state must prove each of the following:
>
> 1. On or about or between January 2009 and December 2015
> 2. in the state of Idaho
> 3. the defendant Chad Schiermeier wrongfully took, obtained or withheld property or money described as: funds of Blaine County D.A.R.E./P.A.L., Inc.,
> 4. another person was the owner of the funds
> 5. with the intent to deprive an owner of the funds or to appropriate the funds, and
> 6. the funds exceeded one thousand dollars ($1000) in value
>
> OR
>
> In order for the defendant to be guilty of Theft by Unauthorized Control, the state must prove each of the following:
>
> 1. On or about or between January 2009 and December 2015
> 2. in the state of Idaho
> 3. the defendant Chad Schiermeier took or obtained or withheld money of Blaine County D.A.R.E./P.A.L., Inc.,
> 4. another person was the owner of the funds,
> 5. the defendant knew that the defendant was not authorized by the owner to do so, and
> 6. the defendant had the intent to deprive the owner of such funds.
> 7. the funds exceeded one thousand ($1000) in value

> If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(R., p.430.) The jurors did not have to agree on the form of theft or the amounts, as long as each juror found a value over $1,000. (R., pp.431–32.) The district court provided standard instructions on the intent to deprive or appropriate and definitions for theft, person, owner, property, and obtain. (R., pp.427, 433–37.) Further, the district court instructed the jury that donations to DARE/PAL became DARE/PAL's property once they were donated. (R., p.428.) The district court did not provide a definition of "wrongfully" or "not authorized." (*See generally* R., pp.417–37 (final jury instructions).)

The evidence adduced at trial did not prove Mr. Schiermeier's taking, obtaining, withholding, or control of DARE/PAL money was wrongful or unauthorized. The evidence showed, in 1994, the BCSO started the DARE/PAL program to develop community relationships between law enforcement and children and to reduce drug and alcohol use. (Tr. Vol. I, p.304, L.2–p.305, L.16; *see generally* State's Ex. 1.[2]) The BCSO created a non-profit corporation for the program: DARE/PAL. (Tr. Vol. I, p.305, Ls.17–23; *see generally* State's Ex. 1.) Article III of the Articles of Incorporation outlined DARE/PAL's purpose:

> The purpose or purposes for which this nonprofit corporation is organized are the transaction of any and all lawful business for which corporations may be incorporated under the Idaho Nonprofit Corporation Act. This organization is organized exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. The specific and primary charitable purposes for which this nonprofit corporation is formed are to act as a coordinating, educational, fundraising and service organization to foster, promote, encourage and increase the knowledge, and understanding of alcohol and drug addictions or related problems. This nonprofit corporation shall essentially direct its services and functions toward the people of the State of Idaho, but may extend its services and opportunities to all who otherwise qualify.

[2] Citations to the State's exhibits refer to the exhibit number, and any citation to a specific page refer to the pagination of the 548-page electronic document containing these exhibits.

(State's Ex. 1, p.1.) Article IX further provided: "A manager is authorized to exercise some or all of the powers which would otherwise be exercised by or under the authority of the Board of Directors, as more fully set forth in the By-laws of this nonprofit corporation." (State's Ex. 1, p.3.) The by-laws, in turn, outlined the directors' authority and duties:

> Duties. All corporate powers shall be exercised by or under the authority of and the affairs of the nonprofit corporation managed under the direction of the Board of Directors, except the Manager is authorized to exercise corporate powers, as set forth in the Articles of Incorporation, and these By-laws. The board of directors may:
>
> . . . .
>
> f) audit bills and disburse funds of the corporation;
>
> g) employ agents;
>
> h) determine what, if any, compensation shall be paid to a director of a project; and
>
> i) devise and carry into execution such other measures as it deems proper and expedient to promote the objects of the nonprofit corporation and to best protect the interests and welfare of its members.

(State's Ex. 2, p.10.) One of the DARE/PAL directors had to be associated with a Blaine County law enforcement agency. (State's Ex. 2, p.9.) The board of directors could also elect officers, such as president, secretary, and treasurer, and the officers had to be members or directors. (State's Ex. 2, pp.13–16.) The officers could not be compensated, but the by-laws did not prohibit compensation for the board of directors or manager. (*See* State's Ex. 2, p.16.) The by-laws also outlined the manager's authority:

> The Board of Directors may appoint a Member[3] to be a Manager, who is authorized to exercise some or all of the powers which would otherwise be

[3] Under the articles of incorporation, DARE/PAL could have members: "The number and qualification of members, the different classes of membership, and the voting and other rights of

> exercised by the Board of Directors. To the extent so authorized, such Manager shall have the duties and responsibilities of the Directors, and the Directors shall be relieved to that extent from such duties and responsibilities. The Board of Directors may remove the Manager at any time, with or without cause, by a majority vote of the Board of Directors.

(State's Ex. 2, pp.16–17.) DARE/PAL initially had five directors on the board, including a deputy officer who ran the program. (State's Ex. 1, p.3; Tr. Vol. I, p.309, Ls.17–24, p.313, Ls.12–20.) A director's term was either two or three years, and an officer's term was one year. (State's Ex. 2, pp.9–10, 13–14.) The State did not present any evidence of any amendments to DARE/PAL's by-laws after its adoption. (*See* Tr. Vol. I, p.469, Ls.5–9.)

The initial source of funding for DARE/PAL came from grants. (Tr. Vol. I, p.307, Ls.18–21.) In the late 1990s, the BSCO received one million dollars in drug forfeiture money and began using a portion of that money to fund DARE/PAL. (*See* Tr. Vol. I, p.326, L.23–p.329, L.21, p.331, Ls.19–23.) The BCSO hired Mr. Schiermeier in 1999. (Tr. Vol. I, p.326, Ls.7–11, p.439, Ls.5–25; State's Ex. 4.) By 2002, Mr. Schiermeier was the only person running DARE/PAL. (Tr. Vol. I, p.332, L.23–p.333, L.19, p.387, L.25–p.388, L.15, p.533, Ls.1–10.) Most of the advertised DARE/PAL programming occurred in June, July, and August for children ages nine to sixteen. (Tr. Vol. I, p.323, L.19–p.324, L.4; State's Ex. 10, p.54; State's Ex. 12, p.59; State's Ex. 17, p.72; State's Ex.20, p.81; State's Ex. 22, p.85; State's Ex. 23, p.86.) Later on,

---

each or all classes of members shall be as set forth in the By-laws of this nonprofit corporation." (State's Ex. 1, p.2.) The by-laws provided:

> Membership in this nonprofit corporation shall be granted to any individual or entity who requests to become a member upon approval by the Board of Directors, which approval shall not be unreasonably withheld. The maximum number of members in this nonprofit corporation shall fifteen (15) members. The corporation, through the Board of Directors, may establish other reasonable rules and regulations regarding membership, expulsion, and membership fees or dues as may be deemed necessary or desirable. A member may resign at any time.

Mr. Schiermeier also worked as a school resource officer ("SRO") at Wood River Middle School ("WRMS") during the school year and occasionally as a patrol officer. (Tr. Vol. I, p.396, Ls.12–21, p.549, Ls.21–23, p.638, Ls.13–17, p.639, L.17–p.640, L.13.) He received generally good performance reviews from BSCO, and the DARE/PAL program was considered a success. (Tr. Vol. I, p.560, Ls.5–9, p.604, L.18–p.605, L.13, p.644, Ls.20–24)

Sometime between 2002 and 2009, after Mr. Schiermeier took over, DARE/PAL stopped having meetings. (Tr. Vol. I, p.389, L.8–p.390, L.7, p.394, Ls.3–14, p.461, Ls.2–7, p.462, Ls.7–9, p.462, L.25–p.463, L.5.) The directors and officers "sort of seemed to melt away." (Tr. Vol. I, p.462, Ls.11–16.) Starting in 2002, Mr. Schiermeier was the sole manager of DARE/PAL. (Tr. Vol. I, p.392, L.24–p.393, L.2, p.515, Ls.8–9, p.660, Ls.4–9.) By 2011, Mr. Schiermeier was also a director.[4] (Tr. Vol. I, p.640, Ls.20–22, p.642, Ls.4–12.) According to the DARE/PAL annual report, Mr. Schiermeier was the secretary for 2002, secretary and treasurer for 2003, secretary for 2004, president for 2005, director for 2006 to 2010, and secretary for 2011 to 2015. (State's Ex. 3, pp.24–37.) From 2009 to 2015 (the years of the alleged offense), Mr. Schiermeier was the only listed officer on the annual reporting form. (State's Ex. 3, pp.31–37.) In addition, Mr. Schiermeier was added to DARE/PAL's US Bank checking account as an authorized user. (Def.'s Ex. A, pp.1–4; State's Ex. 31, pp.143–44; *See* Tr. Vol. I, p.806, L.5–p.807, L.24.)

In 2013, the BSCO's drug forfeiture money started to run low, and DARE/PAL began to be funded by other donations. (Tr. Vol. I, p.541, Ls.23–25, p.543, Ls.4–11, p.548, Ls.2–16.) In 2015, one group of donors asked how its money was spent, and that request eventually led to an

---

(State's Ex. 2, p.6.)

[4] At trial, the State did not dispute that Mr. Schiermeier was the sole director or manager of DARE/PAL at the time of the alleged offenses. (*See* Tr. Vol. I, p.261, Ls.5–8, p.269, Ls.13–15 (prosecutor's opening statement); Tr. Vol. II, p.1327, Ls.16–24, p.1328, Ls.15–16, p.1342, Ls.11–18, p.1347, Ls.10–11 (prosecutor's closing argument).)

Idaho State Police investigation of Mr. Schiermeier's use of DARE/PAL funds. (Tr. Vol. I, p.548, Ls.17–25, p.558, Ls.2–32, p.562, L.13–p.563, L.9; *see generally* Tr. Vol. II, p.670, L.21–p.691, L.1,) Through a financial investigation and forensic accounting expert, the State presented evidence of Mr. Schiermeier's alleged theft of DARE/PAL money in two ways: purchases with the US Bank debit card and cash withdrawals. (*See generally* Tr. Vol. I, p.827, L.14–p.841, L.11; Tr. Vol. II, p.862, L.17–p.910, L.23; *see* State's Ex. 40.[5]) The State identified over fifty purchases with the debit card that it believed were unlawful. (*See* State's Ex. 40, pp.47–67.) Similarly, the State speculated that any cash withdrawals from September to May were unlawful. (*See* State's Ex. 40, pp.40–46, 57–67.) The State did not deem any cash withdrawals during June, July, and August to be unlawful. (Tr. Vol. II, p.1408, Ls.4–5, Tr. Vol. II, p.908, Ls.12–19, p.909, L.1–p.910, L.23.) In fact, the State conceded in closing argument:

> We acknowledge during the summer months the cash that was withdrawn may have been spent on DARE/PAL activities, may not have, can't prove it. It's not for you to consider it in determining beyond a reasonable doubt. It's just cash that was withdrawn. I don't know how it was spent and neither do you.

(Tr. Vol. II, p.1350, Ls.11–17, p.1407, Ls.4–5.) In total, the State alleged Mr. Schiermeier stole, in purchases and withdrawals, $18,192.24 in 2009, $18,416.56 in 2010, $20,780.68 in 2011, $10,476.07 in 2012, $11,498.95 in 2013, $3,580.00 in 2014, and $3,923.53 in 2015, for a total of $86,868.03. (State's Ex. 40, p.68.)

In light of this evidence, Mr. Schiermeier maintains the State failed to prove beyond a reasonable doubt that his use of DARE/PAL money was wrongful or without authority—an essential element of the offense. The State had two alternative theories for the means of the commission of grand theft: a wrongful taking, obtaining, or withholding of DARE/PAL money or an exercise of unauthorized control of DARE/PAL money. (R., pp.140–41, 430.) But, as the

[5] State's Exhibit 40 is contained in a separate PowerPoint file in the record.

sole manager of the corporation, Mr. Schiermeier had discretion to determine how to use DARE/PAL funds to further its interests. (*See* State's Ex. 1, p.3; State's Ex. 2, pp.10, 16–17.) The State did not present any evidence that Mr. Schiermeier's use of the money was *not* for DARE/PAL purposes or objectives.

Turning first to the purchases with the DARE/PAL debit card, the State presented no evidence that Mr. Schiermeier, as the manager of the corporation, did not purchase items to further the corporation's interests. For example, the State showed Mr. Schiermeier purchased expensive, high-end outdoor equipment and clothing, among other items, with the DARE/PAL debit card. (*See* State's Exs. 501–15; Tr. Vol. I, p.835, L.25–p.836, L.8.) The State also showed Mr. Schiermeier had some of these items in his possession and used some of that gear during non-DARE/PAL activities. (*See* State's Exs. 518(a)–51; Tr. Vol. II, p.948, L.23–p.1039, L.23, p.1045, L.16–p.1053, L.4.) That being said, the State did not show Mr. Schiermeier exclusively used these items for non-DARE/PAL purposes. For example, Mr. Schiermeier could have also used the items for hikes, camping, archery, or other outdoor activities with the children in the program. As the manager, Mr. Schiermeier could determine those items were necessary for DARE/PAL purposes, and nothing in the DARE/PAL articles of incorporation or by-laws prohibited him from using those items for personal use as well. (*See* State's Ex. 1, p.3; State's Ex. 2, pp.10, 16–17.) Although former DARE/PAL directors, officers, or members may have disagreed with Mr. Schiermeier's purchases and questioned whether they were in the corporation's best interests, Mr. Schiermeier, as the sole actor on the corporation's behalf, had complete authority to make those decisions. Put another way, Mr. Schiermeier did not wrongfully or without authority use DARE/PAL money to purchase items. The DARE/PAL articles of incorporation and by-laws allowed him to use the money, and he could use it for any

purpose he deemed fit to further the corporate objectives. If Mr. Schiermeier believed certain items allowed him to better serve those purposes, he was completely permitted to make those purchases. Thus, the State did not present any evidence that Mr. Schiermeier's purchases were not within his discretion at the manager of DARE/PAL.

Turning next to the cash withdrawals, the State's evidence similarly fails to show wrongfulness or lack of authority. The State did not show Mr. Schiermeier used the cash for non-DARE/PAL purposes. The State offered no evidence of the cash's use, whether summer or winter or any year of the alleged theft. The State also conceded it could not prove, beyond a reasonable doubt, the cash withdrawals during the summer months were not for DARE/PAL purposes because there was no evidence on how DARE/PAL or Mr. Schiermeier used the money. (Tr. Vol. II, p.1350, Ls.11–17, p.1407, Ls.4–5.) The winter cash withdrawals, however, contained the same deficiency. During the winter months, Mr. Schiermeier could have used the cash to reserve tickets for events, buy equipment, or purchase non-perishable food items for future programs. But, regardless of the cash's use (during any month), the State did not show that Mr. Schiermeier's taking, obtaining, or withholding of that money was wrongful or without authority. Mr. Schiermeier was authorized to take out money, dispense it, compensate himself or others (as a project manager), and do anything else necessary for the corporation. (*See* State's Ex. 1, p.3; State's Ex. 2, pp.10, 16–17.) The State failed to present any evidence that Mr. Schiermeier, as the manager, did not use the cash for a legitimate purpose. Rather, the State relied on an arbitrary distinction that any withdrawals during the winter months were not for DARE/PAL. That is not sufficient evidence to sustain a conviction. Therefore, the State did not present any evidence that Mr. Schiermeier's cash withdrawals were not within his discretion at the sole manager.

In summary, while Mr. Schiermeier acknowledges that the BSCO, donors, and the jury may now second-guess his use of DARE/PAL funds, he did not wrongfully or without authority take, obtain, withhold, or control DARE/PAL money, based on the evidence adduced at trial. The funds belonged to DARE/PAL, and Mr. Schiermeier was the only individual with authority to exercise DARE/PAL's objectives. Whether his use of the money was extravagant, the articles of incorporation and by-laws gave him discretion to use the funds as he deemed proper and expedient to promote the objects of DARE/PAL. (State's Ex. 2, p.10.) In light of this discretion and authority, the State did not present sufficient evidence that Mr. Schiermeier's use of DARE/PAL money was wrongful and without authority. Having failed to meet this essential element beyond a reasonable doubt, this Court should vacate Mr. Schiermeier's judgment of conviction and remand this case with instructions for the district court to enter a judgment of acquittal.

II.

The District Court Abused Its Discretion When It Sentenced Mr. Schiermeier To Fourteen Years, With Six Years Fixed, For One Count Of Grand Theft

A. Introduction

Mr. Schiermeier maintains the district court failed to exercise reason and thus abused its discretion when it sentenced him to fourteen years, with six years fixed, for grand theft. He argues proper consideration of the mitigating circumstances in this case warranted a more lenient sentence.

B. Standard Of Review

> When considering whether the trial court abused its discretion, this Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion

> and consistently with the legal standards applicable; and (3) whether the trial court reached its decision by an exercise of reason.

State v. McIntosh, 160 Idaho 1, 8 (2016). Factual findings, including whether a certain factor is a mitigating or aggravating circumstance, will be upheld if supported by substantial and competent evidence. *State v. Porter*, 130 Idaho 772, 788–89 (1997).

C. The District Court Did Not Reach Its Sentencing Decision By An Exercise Of Reason Because It Failed To Give Sufficient Weight To The Mitigating Factors

"It is well-established that '[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (alteration in original)). *Id.* Similarly, "[t]he choice of probation, among available sentencing alternatives, is committed to the sound discretion of the trial court . . . ." *State v. Landreth*, 118 Idaho 613, 615 (Ct. App. 1990). Here, Mr. Schiermeier's sentence does not exceed the statutory maximum. *See* I.C. § 18-2408(2) (fourteen year maximum). Accordingly, to show the sentence imposed was unreasonable, Mr. Schiermeier "must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts." *State v. Strand*, 137 Idaho 457, 460 (2002).

"'Reasonableness' of a sentence implies that a term of confinement should be tailored to the purpose for which the sentence is imposed." *State v. Adamcik*, 152 Idaho 445, 483 (2012) (quoting *State v. Stevens*, 146 Idaho 139, 148 (2008)).

> In examining the reasonableness of a sentence, the Court conducts an independent review of the entire record available to the trial court at sentencing, focusing on the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Stevens, 146 Idaho at 148. "A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution." *State v. Delling*, 152 Idaho 122, 132 (2011).

In this case, Mr. Schiermeier argues the district court failed to exercise reason and thus abused its discretion by imposing an excessive sentence under any reasonable view of the facts. Specifically, he contends the district court should have sentenced him to a lesser term of imprisonment, a rider, or probation in light of the mitigating factors, including the lack of any criminal history, absence of any substance abuse or mental health issues, acceptance of responsibility and remorse, and strong support network.

First, the fact that Mr. Schiermeier has no prior convictions or arrests stands strongly in favor of a lesser sentence or probation. "The absence of a criminal record is a mitigating factor that courts consider." *State v. Miller*, 151 Idaho 828, 836 (2011). "It has long been recognized that '[t]he first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673 (Ct. App. 1998) (alteration in original) (quoting *State v. Nice*, 103 Idaho 89, 91 (1982)). Here, Mr. Schiermeier has no prior criminal convictions or arrests. (PSI, pp.4–5.) His criminal record consists just of two traffic infractions at ages sixteen and twenty-one. (PSI, p.5.) This instant case is his first felony offense. (PSI, p.5.) Moreover, while released pending trial, Mr. Schiermeier complied with all court conditions. (*See* R., pp.53, 88–89, 90–92, 446.) Considering Mr. Schiermeier had no past convictions, charges, arrests, or compliance issues pending trial, the district court should have imposed a more lenient sentence for his first criminal offense.

Second, the district court failed to give adequate weight to multiple mitigating factors that establish Mr. Schiermeier should have received a lesser term of imprisonment, a rider, or

probation. For example, Mr. Schiermeier does not have any friends that had recently been involved in criminal activity. (PSI, p.6.) He rarely consumes alcohol. (PSI, p.10.) Similarly, Mr. Schiermeier has never used any illegal substances. (PSI, p.10.) He also does not have any mental health issues. (PSI, p.10.) Until the instant offense, Mr. Schiermeier was employed for over fifteen years with the BSCO. (PSI, p.9; R., p.597.) He worked primarily as the SRO for WRMS. (R., p.597.) In his free time, Mr. Schiermeier engages in healthy, constructive activities, such as spending time in the outdoors and with his family. (PSI, p.6.) Moreover, Mr. Schiermeier remains close with his parents, who live in Twin Falls, and they are supportive of him. (PSI, p.6.) If placed on probation, he plans to live in Twin Falls and work for his father's business. (R., p.596.) Mr. Schiermeier is close with his brother as well. (PSI, p.6.) Mr. Schiermeier's children are the most important aspect of his life. Mr. Schiermeier and his ex-wife have three children together, ages eighteen, thirteen, and eight. (PSI, pp.7–8.) His children are very important to him, and he is very close with them. (PSI, pp.8, 11.) In fact, Mr. Schiermeier's ex-wife wrote a letter explaining the likely impact of Mr. Schiermeier's incarceration on their three children. She stated in part:

> They admire, respect, and love their father despite his many shortcomings, mistakes, and current situation. They need and desire his presence in their lives and his absence creates an emotional turmoil for them that is indescribable. The very idea that he will not be present for the special moments of their lives, missed holidays, graduations, and possibly missing out on their weddings weighs heavily on their hearts. It is my sincere hope that you will take them, their lives, and the magnitude of this decision's impact on their futures into consideration in your final preceding [sic] of this case.

(Addendum to PSI, p.3.) Mr. Schiermeier was assessed with a LSI-R score of 10 and, as such, a low risk of recidivism. (PSI, pp.11–12.) These mitigating factors—Mr. Schiermeier's drug-free lifestyle, stable mental health, employment history, positive interests and activities, strong family values, support network, and low risk to reoffend—strongly supported a more lenient sentence.

By imposing a sentence of fourteen years, with six years fixed, Mr. Schiermeier asserts the district court did not give sufficient weight to these mitigators and therefore failed to exercise reason at sentencing.

Next, Mr. Schiermeier's difficult experience in custody prior to sentencing also warranted a more lenient sentence. As recognized by the district court, Mr. Schiermeier did not look well at sentencing: "And I'll just note for the record and I'll probably say it in pronouncing sentence, he doesn't look particularly good, frankly. The record can reflect that. He doesn't look the same in the picture in the PSI or him sitting here today in court. It's not good." (Tr. Vol. II, p.1506, Ls.14–18.) While in custody after trial but before sentencing, Mr. Schiermeier lost at least thirty pounds and developed gout. (Tr. Vol. II, p.1506, Ls.12–13, 19; R., p.598.) He was in isolation for the first forty days of custody due to his work as a law enforcement officer. (Tr. Vol, II, p.1506, Ls.1–6, 10–11; R., p.598.) Mr. Schiermeier contends his health problems and isolation in custody stand in favor of mitigation.

Further, Mr. Schiermeier's acceptance of responsibility and remorse warrant a lesser sentence. Acceptance of responsibility, remorse, and regret are all factors in favor of mitigation. *State v. Shideler*, 103 Idaho 593, 595 (1982). As argued by his attorney at sentencing, Mr. Schiermeier's interview with the presentence investigator occurred on September 8, 2017, just seven days after the jury's verdict. (R., p.443; PSI, p.4; Tr. Vol. II, p.677, Ls.4–5.) Mr. Schiermeier was upset with the verdict at the time of the interview. (Tr. Vol. II, p.677, Ls.5–6.) But now, his attorney argued, having spent approximately seventy days in custody, Mr. Schiermeier realized "that he screwed up" and was ready to accept responsibility for his actions. (Tr. Vol. II, p.1500, Ls.18–24.) To this end, Mr. Schiermeier stated at sentencing, "I realize that the choices I've made and actions provoked on my part has led to my demise and the

severe consequences I now face at this time in sentencing." (Tr. Vol. II, p.1511, Ls.18–20.) He also apologized to the community affected by his criminal conduct:

> I want to apologize for the stress I put on my fellow citizens of the Wood River Valley who have stood by on good faith and good conscience and were deceived by my ways of conducting business. I know that the trust and the faith these citizens once had may not have been completely destroyed but certainly crippled by my behaviors and my business endeavors. I have ruined their trust, and whether these citizens were directly or indirectly affected, they are victims of my actions, and for that I am deeply grieved and I apologize.

(Tr. Vol. II, p.1511, L.25–p.1512, L.9.) He also stated, "I know I have an obligation to mend my wrongs and plan on doing just that. I place the rest of my life and my freedom and liberties into your hands and humbly ask for probation and pledge to not let any of you down here or anywhere else." (Tr. Vol. II, p.689, Ls.17–21.) These statements establish Mr. Schiermeier accepted responsibility for his actions and felt remorse. Mr. Schiermeier maintains the district court did not give sufficiently consider this mitigating factor.

Lastly, and significantly, the numerous letters and testimony in support of Mr. Schiermeier and his good character demonstrate, despite the aggravating factors, the district court should have imposed a more lenient sentence. *See Shideler*, 103 Idaho at 594–95 (family support and good character as mitigation); *see State v. Ball*, 149 Idaho 658, 663–64 (Ct. App. 2010) (district court considered family and friend support as mitigating circumstance). Twenty-five letters in support were submitted with the PSI. The letters stated in summary:

- A family friend of eleven years wrote that Mr. Schiermeier was a sincere, great person, and that the children in the DARE/PAL program looked up to him as a mentor and friend. (PSI, p.32.)

- Two family friends of twenty-five years described Mr. Schiermeier as an honest and trustworthy person. (PSI, p.33.) They also wrote that he "has always been a great neighbor, excellent father, and hard worker." (PSI, p.33.) They supported him "100% and would like to be able to see him raise his children to be as good and kind of a person as we know [him] to be." (PSI, p.33.)

- Two family friends since 1964 wrote that Mr. Schiermeier and his family were "upstanding people who were kind and thoughtful and honest." (PSI, p.34.)

- A friend of over twenty-five years, Mr. Williams, described Mr. Schiermeier as "an upright and honest type of guy" who "always displayed integrity and impeccable character." (PSI, p.35.) Mr. Williams wrote: "He is very enjoyable to be around, and is always helpful. We have had many talks about his work and how much he loved working with kids at school as a DARE officer and in summer programs. He knew all of the kids at school on a first-name basis and he took a great interest in them for many years. They were all part of his life and he cared a lot for each and every one of them." (PSI, p.35.) Mr. Williams also wrote that Mr. Schiermeier was a great father and his children meant "everything to him." (PSI, p.35.)

- Two long-time family friends were "shocked and saddened" by the events, but believed Mr. Schiermeier was a "good and caring person and a loving father to his children." (PSI, p.36.) They described him as "an upstanding citizen and an asset to the communities where he's lived and worked." (PSI, p.36.)

- Two friends of twenty-five years explained that they knew Mr. Schiermeier as a child and watched him grow up. (PSI, p.37.) They wrote that he was honest, respectful, and reliable. (PSI, p.37.) They believed his stressful divorce contributed to "the thinking errors leading to his decisions and/or actions in this case." (PSI, p.37.) They also wrote: "We are confident that Chad's core is a strong, moral one and he has the potential to rectify any perceptions to the contrary. He is not a 'hardened criminal'. He is loved and cherished by his family and children. The crime of which he is convicted was a non-violent, non-malicious, and as far as we know, his first and only offense. Therefore, we encourage the court to consider alternatives to incarceration such as financial retribution, and intensive court and community supervision. Given the opportunity, Chad clearly has the capacity to make a difference in his community by providing presentations or teaching classes about the dangers of 'thinking errors' such as those he may have engaged in when making some of [the] decision[s] within his job." (PSI, p.37.)

- An employer during Mr. Schiermeier's release pending trial wrote that he was always punctual, a team player, respected by his co-workers, and a hard-worker. (PSI, p.38.)

- Two long-time family friends stated that Mr. Schiermeier was always helpful to his peers, children, or the elderly. (PSI, p.39.) They described him as an attentive father and a family man. (PSI, p.39.)

- Family friends of forty years explained, "We have watched Chad grow up in a close knit family who learned the values of honesty, integrity, and high morals

as a way of life." (PSI, p.42.) They believed Mr. Schiermeier enjoyed his work because he loved teaching children about nature and outdoor activites. (PSI, p.42.) They stated, "Chad is a wonderful family man that wants the best for his children." (PSI, p.42.)

- Another family friend of over forty years, Mr. Woods, asked the district court to recognize Mr. Schiermeier's contributions to the community and his family before he committed the alleged offense. (PSI, p.43.) Mr. Woods described Mr. Schiermeier as a dedicated family man and committed to his community. (PSI, p.43.)

- A friend of thirty-five years, who worked on a basketball camp for DARE/PAL programming, believed Mr. Schiermeier was "a great person who cares more about others than himself." (PSI, p.44.) He described Mr. Schiermeier as always willing to help others and work hard. (PSI, p.44.)

- A social worker at WRMS, who worked with Mr. Schiermeier for fourteen years at the school, found "Chad to be a consistent, steady presence for the students." (PSI, p.45.) This co-worker believed Mr. Schiermeier built positive relationships with the students and organized positive experiences for the children in the DARE/PAL program. (PSI, p.45.)

- The head custodian at WRMS worked with Mr. Schiermeier since 1999 and knew him to be a "decent, hard working, and giving person." (PSI, p.46.) This co-worker joined Mr. Schiermeier on some DARE/PAL programs and believed he was a great role model for the children in the program. (PSI, p.46.)

- A teacher at WRMS, who knew Mr. Schiermeier for thirty-four years, wrote that Mr. Schiermeier often came to the school early. (PSI, p.47.) The teacher stated that Mr. Schiermeier helped with many field trips. (PSI, p.47.) This teacher also spoke very highly of Mr. Schiermeier's DARE/PAL programming. (PSI, p.47.)

- A retired teacher and administrator of the Blaine County School District believed Mr. Schiermeier to be an honest and friendly person and that the offense was extremely out of character. (PSI, p.48.)

- A co-worker of ten years at WRMS described Mr. Schiermeier as "careful, considerate, and dedicated to the well-being of all the students and teachers at our school." (PSI, p.49.) The co-worker wrote, "He is well-regarded among all the staff at the school as a person of high integrity and honesty. We have been together in several emergency situations, and he has always conducted himself with common sense and compassion. I hope this letter will give you an idea of his good character and help him get a second chance to prove this was an unusual occurrence." (PSI, p.49.)

- Another co-worker at WRMS stated that Mr. Schiermeier often discussed DARE/PAL programming with him. (PSI, p.50.) The co-worker observed Mr. Schiermeier engage in activities with the students and believed the students enjoyed their interactions with him. (PSI, p.50.)

- Another co-worker of twelve years at WRMS, who saw Mr. Schiermeier run the DARE/PAL program, described him as a positive role model for underprivileged children. (PSI, p.51.) This co-worker asked the district court "to take into consideration all the good Chad has done for the kids in the Wood River Valley." (PSI, p.51.)

- A co-worker of ten years at WRMS stated Mr. Schiermeier "worked tirelessly to ensure that the [DARE/PAL] program ran effectively and efficiently and in a way that included as many opportunities as possible for the children of Blaine County to experience things that they wouldn't normally have the opportunity to do." (PSI, p.53.) The co-worker believed that "the number of children that benefited from being around Chad is simply astounding." (PSI, p.52.)

- A mother described the positive impact Mr. Schiermeier, in his role as an SRO officer, had on her oldest daughter, who struggled in middle school with low self-esteem and confidence. (PSI, p.53.) The mother explained that Mr. Schiermeier helped her daughter with her anxiety and encouraged her to attend class. (PSI, p.53.)

- A teacher and coach at WRMS, who worked with Mr. Schiermeier for fifteen years, spoke very highly of Mr. Schiermeier's dedication to his students and the DARE/PAL programming. (PSI, pp.54–55.)

- A long-time family friend, Ms. Trenkle, described Mr. Schiermeier as a proud, loving parent, dedicated family man, serious about his responsibilities, always willing to help others, and a loyal, honest person. (PSI, p.56.) Ms. Trenkle believed Mr. Schiermeier chose his line of work to protect those around him and make life better for others. (PSI, p.56.) She asked the district court to consider Mr. Schiermeier's good character at sentencing. (PSI, p.56.)

- Two long-time family friends explained that Mr. Schiermeier was "an upstanding student" with a kind and outgoing personality. (PSI, p.57.) They wrote that he was devoted to his three children and always went "above and beyond" with work. (PSI, p.57.)

- Another good family friend, who watched Mr. Schiermeier grow up, found it impossible to believe that Mr. Schiermeier committed the offense due to his good character, honesty, and integrity. (PSI, p.58.)

- One of Mr. Schiermeier's teachers and a family friend, Mr. Gerrish, wrote: "Chad was a quiet, conscientious young man who was a pleasure to have in class. He was a good student with a passion for the out-of-doors. Over subsequent years, Chad and I have had occasional interactions through business and common hobbies, and [h]e has always been forthright and helpful." (PSI, p.59.) Mr. Gerrish believed "our society is best served when fathers are present and able to be actively involved in the raising of their children." (PSI, p.59.) Mr. Gerrish asked the district court to consider the impact of Mr. Schiermeier's incarceration on his children at sentencing. (PSI, p.59.)

In addition to these letters, seven individuals testified at the sentencing hearing on Mr. Schiermeier's behalf:

- Mr. Homer, who worked in the Blaine County school system and wrote a letter in support, (PSI, p.48), testified that he believed Mr. Schiermeier "ran a quality program" because the students respected him. (Tr. Vol. II, p.1454, Ls.9–20, p.1455, Ls.13–22.) Mr. Homer was unable to reconcile the offense because he did not believe Mr. Schiermeier "would do anything intentionally that would place the DARE program in jeopardy or himself as a law enforcement officer in jeopardy." (Tr. Vol. II, p.1455, L.23–p.1456, L.3.)

- Mr. Silvis, who also wrote a letter in support, (PSI, p.52), worked with Mr. Schiermeier at WRMS for about ten years, and he testified that Mr. Schiermeier was dedicated to the well-being of the students. (Tr. Vol. II, p.1457, Ls.6–15, p.1458, Ls.1–3.) As in his letter, Mr. Silvis testified that Mr. Schiermeier worked hard to run the program and had "a knack for working with kids and helping these kids experience the outdoors in a safe and loving environment." (Tr. Vol. II, p.635, Ls.10–12.) He believed Mr. Schiermeier "was a wonderful addition to the community through the opportunities that he had and he did with the kids of this valley." (Tr. Vol. II, p.635, Ls.12–15.)

- Ms. Ward, who wrote a letter describing her daughter's experience in the DARE/PAL program, (PSI, p.53), testified that she had three children in the program. (Tr. Vol. II, p.636, Ls.14–16.) She explained that she "had an incredible amount of trust" in Mr. Schiermeier and her children "felt extremely safe with him." (Tr. Vol. II, p.637, Ls.4–7.) She further testified that she experienced firsthand "how much they benefited from being with Chad and the experiences that he was able to give them was extremely rewarding." (Tr. Vol. II, p.637, Ls.19–21.)

- Ms. Cey, a teacher for Blaine County, helped Mr. Schiermeier with some summer DARE/PAL trips. (Tr. Vol. II, p.1463, Ls.16–22.) Ms. Cey explained

that she helped with fundraising because she believed in the program. (Tr. Vol. II, p.1463, L.23–p.1465, L.6.)

- Mr. Berry, a close family friend, testified to Mr. Schiermeier's good character and his observations on the deterioration of Mr. Schiermeier's health throughout the case. (*See* Tr. Vol. II, p.1467, L.3–p.1470, L.21.)

- Mr. Trenkle, a teacher and coach at WRMS who also wrote a letter in support, (PSI, pp.54–55), testified that Mr. Schiermeier worked very hard to run the DARE/PAL program. (Tr. Vol. II, p.1473, Ls.8–15.)

- Mr. Evans, a pastor in Twin Falls, testified to his relationship with Mr. Schiermeier since his incarceration. (Tr. Vol. II, p.1476, Ls.6–7, p.1476, L.16–p.1477, L.8.) Mr. Evans visited with Mr. Schiermeier about twenty times. (Tr. Vol. II, p.1477, Ls.6–8.) He testified that, over time, Mr. Schiermeier had a changed attitude since the trial and showed "genuine remorse and contrition." (Tr. Vol. II, p.1478, Ls.3–21.)

As shown by these letters and testimony, Mr. Schiermeier's facilitation of the DARE/PAL program was invaluable to the Wood River Valley community. Mr. Schiermeier provided countless in-need children with positive experiences and mentorship. He was also a dedicated family man and well-respected friend. For many family, friends, and co-workers, the instant offense was not illustrative of Mr. Schiermeier's character. Moreover, Mr. Schiermeier expressed genuine remorse and acceptance of responsibility for his clearly uncharacteristic actions. The district court, however, did not give adequate weight to these statements of support and good character. Nor did the district court adequately weigh Mr. Schiermeier's contribution to the community though the DARE/PAL program and as an SRO. If these mitigating circumstances were properly factored into its sentencing decision, the district court should have imposed a lesser sentence than the one recommended by the State of fourteen years, with six years fixed.

In summary, Mr. Schiermeier's strong support from family, friends, and co-workers, along with the other mitigating factors discussed above, support a lesser sentence, a rider, or

probation. The district court did not reach its sentencing decision by an exercise of reason and therefore abused its discretion by imposing an excessive sentence for Mr. Schiermeier's first criminal offense.[6]

CONCLUSION

Mr. Schiermeier respectfully requests this Court vacate the district court's judgment of conviction and remand this case to the district court with instructions to enter a judgment of acquittal. In the alternative, he respectfully requests this Court reduce his sentence as it deems appropriate or vacate the district court's judgment of conviction and remand this case for a new sentencing hearing.

DATED this 20th day of November, 2018.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

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

JCS/eas

[6] In making this sentencing argument, Mr. Schiermeier in no way intends to concede or waive his challenge to the sufficiency of the evidence.