

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 5/15/06 }
AT 10:00 O'CLOCK }
CLERK, DISTRICT COURT }
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE		
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI		
STATE OF IDAHO,)	CASE NO. CR – 2006 - 1497
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	ORDER RE: DEFENDANT'S MOTION
v.)	TO DISMISS; DEFENDANT'S OBJEC-
)	TO USE OF 404(b) EVIDENCE;
JONATHAN WADE ELLINGTON,)	DEFENDANT'S OBJECTION TO
)	EXPERT WITNESS; DEFENDANT'S
)	MOTION TO EXCLUDE
Defendant.)	IMPEACHMENT MATERIALS

Arthur W. Verharen and David G. Robins, Kootenai County Prosecuting Attorney's Office for Plaintiff State of Idaho.

Anne C. Taylor and J. Bradford Chapman, Kootenai County Public Defender's Office for Defendant Jonathan Wade Ellington.

I. SUMMARY

A summary of this case is set forth in the Idaho Supreme Court opinion State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011). Important to the pending motions, after a three week trial, on September 7, 2006, a jury convicted the Defendant of two counts of aggravated battery and one count of second-degree murder. During the trial, the Defendant made multiple motions for a mistrial based on the prosecuting attorney's conduct, and this Court denied the motions. The Defendant also moved for a new trial

on the same basis, as well as the basis that Corporal Rice presented false testimony, and this Court denied the motion.

The Defendant appealed to the Idaho Supreme Court, alleging numerous errors. Ellington, 151 Idaho 53, 253 P.3d 727. The Idaho Supreme Court, after finding multiple instances of prosecutorial misconduct and evidentiary error, as well as concluding Cpl. Rice presented "false testimony," reversed this Court's denial of the Defendant's motion for a new trial, vacated the conviction and sentence, and remanded the case to this Court "for a new trial." Id. at 53, 253 P.3d at 727. Remittur issued on June 20, 2011. Retrial of the Defendant is scheduled to commence November 29, 2011.

On August 8, 2011, the State filed a "Notice of Intent to Produce I.R.E. 404(b) Evidence at Trial and Notice of Filing Factual Basis for I.R.E. 404(b) Evidence." The Defendant responded with an "Objection to Use of 404(b) Evidence," on August 10, 2011. The Defendant also filed a "Motion to Dismiss" on August 17, 2011, and supported the Motion to Dismiss with the following briefs: "Memorandum in Support of Motion to Dismiss" (August 19, 2011), "Memorandum in Support of Motion to Dismiss" (August 24, 2011), and "Supplemental Memorandum in Support of Motion to Dismiss" (August 24, 2011). The State responded with its "State's Response to Defendant's Motion to Dismiss" dated August 24, 2011, and the "State's Supplemental Response to Defendant's Motion to Dismiss."

The Defendant also filed an "Objection to Expert Witness" on August 19, 2011, objecting to the State's use of expert witness Dr. Marco Ross, and a "Motion to Exclude Impeachment Materials" on August 25, 2011, regarding materials the State intends to use to impeach the Defendant's expert witness. The State responded with a "State's

Response to Defendant's Objection to Expert Witness" and "Memorandum in Support of Admission of I.R.E. 404(b) Evidence at Trial." On September 1, 2011, the parties appeared and presented oral argument on each of the motions.¹ This Court took the matter under advisement and now issues its opinion and order.

II. ANALYSIS

A. **DEFENDANT'S MOTION TO DISMISS**

The Defendant moves to dismiss all pending charges on the grounds that "the Idaho and Federal Constitutions bans (sic) on double jeopardy bar a retrial of [the Defendant], and on the grounds that a new trial would be the result of outrageous government conduct and therefore would violate Mr. Ellington's due process rights under the Idaho and Federal Constitution." (Defendant's Motion to Dismiss, p.1.) Because the Defendant has moved to dismiss on both double jeopardy and due process grounds, this Court will analyze each claim separately.

1. **While the Degree of the Prosecuting Attorney's Misconduct was Great, the Defendant has Not Met His Burden and Shown the Intent and Purpose for the Misconduct as *Kennedy* Requires**

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Article I, Section 13 of the Idaho Constitution similarly provides "no person shall be twice put in jeopardy for the same offense" As stated by the Idaho Court of Appeals recently in State v. Corbus:

¹ The Defendant also filed two motions to compel, one on July 25, 2011, and one on August 11, 2011. The parties agreed at the September 1, 2011, hearing that because the parties have made significant disclosures and there is a need to review the disclosed and undisclosed material, the parties would renounce these motions and specify for this Court any remaining discovery issues. Therefore, this Court and the parties did not address any impending discovery issues at the September 1, 2011, hearing. MEMORANDUM OPINION AND ORDER RE: DEFENDANT'S MOTION TO DISMISS; DEFENDANT'S OBJECTION TO USE OF 404(b) EVIDENCE; DEFENDANT'S OBJECTION TO EXPERT WITNESS; DEFENDANT'S MOTION TO EXCLUDE IMPEACHMENT MATERIALS (*State of Idaho v. Jonathan Wade Ellington* (CR – 2006 - 1497)) - 3

the Double Jeopardy Clause of the Idaho and United States Constitutions affords a defendant three basic protections. It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple criminal punishments for the same offense.

151 Idaho 368, 370, 256 P.3d 776, 778 (Ct. App. 2011), *citing* Schiro v. Farley, 510 U.S. 222, 229, 114 S.Ct. 783, 788–89, 127 L.Ed.2d 47, 56 (1994) and State v. McKeeth, 136 Idaho 619, 624, 38 P.3d 1275, 1280 (Ct. App. 2001) (emphasis added).² The United States Supreme Court has elaborated on the meaning of the Double Jeopardy Clause, stating:

As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a “valued right to have his trial completed by a particular tribunal.” Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949). The Double Jeopardy Clause, however, does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding. United States v. Jorn, 400 U.S. 470, 483-484, 91 S.Ct. 547, 556, 27 L.Ed.2d 543 (1971) (plurality opinion); Wade v. Hunter, 336 U.S., at 689, 69 S.Ct., at 837. If the law were otherwise, “the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.”

Oregon v. Kennedy, 456 U.S. 667, 671-672, 102 S.Ct. 2083, 2087-2088 (1982) (emphasis added).

Whether a defendant's prosecution complies with the constitutional protection against being placed twice in jeopardy is a question of law. Corbus, 151 at 370, 256 P.3d at 778, *citing* State v. Santana, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000). It is the defendant's burden to show that the prosecution has not complied with

²The Idaho Appellate Courts have consistently applied one analysis to double jeopardy claims arising under both the United States and Idaho Constitutions. Buell v. Idaho Dept. of Transp. 254 P.3d 1253, 1257 (Ct. App. 2011), *citing* Berglund v. Potlatch Corp., 129 Idaho 752, 757, 932 P.2d 875, 880 (1996); State v. Sharp, 104 Idaho 691, 693, 662 P.2d 1135, 1137 (1983); State v. Randles, 115 Idaho 611, 615, 768 P.2d 1344, 1348 (Ct.App.1989).

the constitutional protections of the Double Jeopardy Clauses. See, State v. Sharp, 104 Idaho 691, 693-694, 662 P.2d 1135, 1137-1138 (1983), *overruled on other grounds by State v. Alanis*, 109 Idaho 844, 7012 P.2d 585 (1985).

Jeopardy attaches when a jury is sworn. State v. Alanis, 109 Idaho 884, 898, 712 P.2d 585, 599 (1985); Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). Neither party disputes that jeopardy attached when the jury was sworn in the Defendant's first trial on August 22, 2006. A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." Kennedy, 456 U.S. at 676, 102 S.Ct. at 2089, *citing United States v. Scott*, 437 U.S. 82, 93, 98 S.Ct. 2187, 2195, 57 L.Ed.2d 65 (1978). Neither party disputes that by requesting a multiple mistrials and a new trial the Defendant in this case elected to forgo his right to have the jury in the first case determine his guilt or innocence.

Generally, if a defendant consents to or requests termination of the initial trial, the Double Jeopardy Clause does not bar retrial. Sharp, 104 Idaho at 693-694, 662 P.2d at 1137-1138, *citing Kennedy*; United States v. Dinitz, 424 U.S. 600, 96 S. Ct. 1075 (1976), State v. Werneth, 101 Idaho 241, 611 P.2d 1026 (1980).³ However, the United States Supreme Court established an exception to this rule in Kennedy:

Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. Where prosecutorial error even of a degree sufficient to warrant a mistrial has

³When a defendant objects to the termination of a trial by the State or the court, double jeopardy bars retrial unless the state can show "manifest necessity" for the termination. State v. Sharp, 104 Idaho 691, 693-694, 662 P.2d 1135, 1137-1138 (1983), *overruled on other grounds by State v. Alanis*, 109 Idaho 844, 7012 P.2d 585 (1985), *citing Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824 (1978); Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963).

occurred, “[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.” United States v. Dinitz, *supra*, 424 U.S., at 609, 96 S.Ct., at 1080.

456 U.S. at 676, 102 S.Ct. at 2089.

The issue presented here is whether the State is barred from retrying the Defendant because the overreaching and harassing misconduct of the prosecuting attorney forced the Defendant to move for a mistrial on multiple occasions and ultimately compelled the Defendant to seek a new trial. This is not the first time an Idaho Court has been asked to apply the exception announced in Kennedy. In State v. Sharp, the Idaho Supreme Court evaluated the exception:

A defendant who moves for, or consents to a mistrial may raise a bar to retrial if the conduct that induced the mistrial motion was prosecutorial or judicial conduct designed specifically to provoke the defendant into calling for a mistrial. This exception is allowed only because:

“[W]here the prosecutor's actions giving rise to the motion for mistrial were done ‘in order to goad the [defendant] into requesting a mistrial.’ ... [T]he defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances.”

The United States Supreme Court in Oregon v. Kennedy, *supra*, has now specifically limited this exception to allow for a retrial of the defendant unless there is conduct intended to provoke the defendant into declaring a mistrial. A mere showing of prejudice is not sufficient.

104 Idaho at 693-694, 662 P.2d at 1137-1138, *citing Kennedy* (emphasis added; internal citations omitted).

The parties have presented this Court with cases in which the defendants take the position that the Kennedy exception applies when the prosecuting attorney engages in serious misconduct, regardless of the purpose and a mistrial results, and the state

counters that the Kennedy exception only applies to cases where the defendant receives a mistrial and the intent of the prosecuting attorney's misconduct is clear. See United States v. Wallach, 979 F.2d 912, 915-16 (2nd Cir. 1992), United State v. McAleer, 138 F.3d 852 (1998), Sharp, 104 Idaho at 693-694, 662 P.2d at 1137-1138. The Defendant in this case also invites this Court to expand the exception of Kennedy to a situation where the prosecuting attorney's misconduct is of such a degree that a new trial results, regardless of the purpose or intent. Conversely, the State takes an extremely narrow view of Kennedy, arguing that the exception applies only in cases where the purpose for the misconduct is to force a mistrial to avoid acquittal, going so far as to argue that a pro forma objection to a Defendant's request for a mistrial is evidence of a lack of intent.

The Defendant's arguments are logical and reflect this Court's concern that the Defendant and the taxpayer have endured the consequences of the prosecuting attorney's misconduct and Cpl. Rice's false testimony, but the State actors remain unaffected by the Idaho Supreme Court's findings and conclusions. However, even though the State remains in the same position and has suffered no adverse consequences as a result of the prosecuting attorney's misconduct, this Court also has significant concerns regarding the expansion of the Kennedy exception to this case.

First, courts have only applied the Kennedy exception in cases where the Defendant moved for and received a mistrial, and the trial court acted to dismiss the charges against the defendant because the prosecution clearly engaged in misconduct to avoid an acquittal. These cases show that the primary concern is allowing the State a "do over" at the expense of the Defendant's Fifth Amendment right to have his trial

completed by a particular tribunal. This case, however, is different because this Court did not grant the Defendant's motions for a mistrial,⁴ the Defendant did not appeal the denial of the motions for a mistrial, and the Idaho Supreme Court did not reverse the Defendant's conviction based on the prosecutor's misconduct. Instead, the Idaho Supreme Court reversed the Defendant's conviction based on the erroneous denial of the Defendant's motion for a new trial. Because no court has applied the Kennedy exception to a case where a new trial is ordered on remand because of a court's error, this Court is reluctant to do so in this case.

Second, the Kennedy exception requires a court to evaluate the behavior of the prosecuting attorney. While the Defendant would like this Court to reassess the prosecuting attorney's misconduct at this stage, this Court need not reiterate the findings and conclusions of the Idaho Supreme Court. This Court acknowledges that the Idaho Supreme Court identified multiple instances of prosecutorial misconduct, sufficiently described the egregious nature of the conduct, and identified specifically the refusal of the prosecuting attorney to follow the directives of this Court. State v. Ellington, 151 Idaho 53, 253 P.3d 727. Thus, it is clear that the prosecuting attorney's misconduct impacted the tenor, and ultimately the fairness, of the first trial to such a degree that a new trial is warranted. This Court need not repeat the findings of the Idaho Supreme Court or enter new findings for purposes of this opinion.

Of most concern to this Court is the inquiry the Kennedy exception requires this

⁴ However, had this Court granted any of the Defendant's motions for a mistrial or new trial this Court would have engaged in an Oregon v. Kennedy analysis and most likely determined that the prosecuting attorney's misconduct and the false testimony of Cpl. Rice had significant bearing on the Defendant's decision move for a mistrial. Upon retrial, this Court will employ a similar analysis under Oregon v. Kennedy if it is warranted by the presentation of the evidence and the conduct of the prosecuting attorney.

Court to conduct into the purpose of the prosecuting attorney's misconduct. Such an inquiry is certainly warranted in cases such as Kennedy where the prosecuting attorney's misconduct clearly reflects the goal of goading a defendant into seeking a mistrial to avoid acquittal and the behavior is assessed and addressed as part of the trial proceedings. Such an evaluation may even be appropriate upon appellate review of a denial of a defendant's motion for a mistrial. However, the Defendant here is not challenging, and did not challenge on appeal, this Court's denial of his motions for a mistrial. Instead the Defendant has received the relief of a new trial on remand. Given the current procedural posture of this case, an analysis of the prosecuting attorney's misconduct testimony at this stage may be unwarranted.

Even so, a review of the trial transcript and the Ellington decision reveals that while the prosecuting attorney's misconduct may have been for the purpose of forcing a mistrial to avoid acquittal or conviction on a lesser charge, other motives or intentions are also discernible. Arguably, the prosecuting attorney may have sought to obtain a conviction at any cost, in disregard of the Defendant's constitutional rights and the cost to the taxpayer. On the other hand, the strength, or lack thereof, of the evidence may have given the prosecuting attorney impetus to try to tip the scales of justice in favor of the State. It is also possible that the misconduct had no particular purpose, but was a continuation of a general practice of the Kootenai County Prosecuting Attorney's Office. See State v. Perry, 150 Idaho 209, 245 P.3d 961 (2010), State v. Phillips, 144 Idaho 82, 89 156 P.3d 583, 590 (Ct. App. 2007) (Judge Schwartzman specially concurring)⁵, State

⁵Regarding instances of "prosecutorial misconduct" in the Kootenai County Prosecuting Attorney's Office, Judge Schwartzman wrote: "This case represents yet another in a long line or pattern of repetitious misconduct from this prosecutorial office. A catalogue of cases in which the doctrine of "harmless error" MEMORANDUM OPINION AND ORDER RE: DEFENDANT'S MOTION TO DISMISS; DEFENDANT'S OBJECTION TO USE OF 404(b) EVIDENCE; DEFENDANT'S OBJECTION TO EXPERT WITNESS; DEFENDANT'S MOTION TO EXCLUDE IMPEACHMENT MATERIALS (State of Idaho v. Jonathan Wade Ellington (CR – 2006 - 1497)) - 9

v. Beebe, 145 Idaho 570 181 P.3d 496 (2007). Unfortunately, the misconduct may have simply served the personal needs, philosophies, or ambitions of the prosecuting attorney. Given the myriad of possible purposes for the prosecuting attorney's misconduct, as well as this Court's limited ability to identify the definitive intent or purpose for the misconduct, this Court cannot make the conclusion Kennedy requires.

In sum, while this Court agrees with the Defendant and the Idaho Supreme Court that the prosecuting attorney engaged in misconduct to a degree that it severely affected the tenor and fairness of the first trial, it is the purpose, not the degree, of the conduct that Kennedy requires this Court to consider. Because this Court cannot discern the purpose or intent for the misconduct, and because no court has expanded the exception in Kennedy to cases where a defendant receives a new trial on remand for reasons other than prosecutorial misconduct, this Court declines to apply the Kennedy exception. As a result, the Defendant's Motion to Dismiss is denied and the Defendant will receive a new trial.

2. While the Defendant's Conviction May Have Been Obtained in Violation of Due Process, there is No Bar to Subsequent Retrial

has reared its head and saved the conviction on appeal creates a less than enviable appellate track record. See State v. Vandenacre, 131 Idaho 507, 960 P.2d 190 (Ct.App.1998); State v. Brown, 131 Idaho 61, 951 P.2d 1288 (Ct.App.1998); State v. Lovelass, 133 Idaho 160, 983 P.2d 233 (Ct.App.1999); State v. Cortez, 135 Idaho 561, 21 P.3d 498 (Ct.App.2001); State v. Kuhn, 139 Idaho 710, 85 P.3d 1109 (Ct.App.2003). Two unpublished opinions also come readily to mind: State v. Blythe, Docket No. 25557, 135 Idaho 493, 20 P.3d 29, 2000 WL 1344686 (Ct.App. 2000), and State v. Gadberry, Docket No. 26604/26605 (Ct.App. 2001). As our own Supreme Court has noted in State v. Guzman, 122 Idaho 981, 984 n. 1, 842 P.2d 660, 663 n. 1 (1992): Mistakes must not become the practice instead of the exception. A court on observing that a pattern of mistakes has developed, on seeing yet another 'mistake,' might readily decide to view such circumstance with a jaundiced eye, and rule accordingly."

The Defendant also argues that the charges should be dismissed for violation of his due process rights. While the Fifth Amendment to the United States Constitution requires that the federal government provide due process of law, the Fourteenth Amendment specifically applies to the states: "nor shall any State deprive any person of life, liberty, or property, without due process of law" Article 1, Section 13 of the Idaho Constitution requires that a person not be "be deprived of life, liberty or property without due process of law." As set forth in State v. Jacobson, whether or not a Defendant's due process rights have been violated is a:

two-step process to determine due process rights: first, deciding whether a governmental decision would deprive an individual of a liberty or property interest within the meaning of the Fourteenth Amendment's Due Process Clause; and second, if a liberty or property interest is implicated, a balancing test must be applied to determine what process is due. State v. Rogers, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007) (citing Mathews v. Eldridge, 424 U.S. 319, 333–35, 96 S.Ct. 893, 902–03, 47 L.Ed.2d 18, 32–34 (1976))

. . . The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." State v. Carr, 128 Idaho, 181, 184, 911 P.2d 774, 777 (Ct. App. 1995) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308 (1973)) Upon identification of a liberty interest, the court must evaluate the facts to determine if due process was satisfied. Rogers, 144 Idaho at 742, 170 P.3d at 885.

150 Idaho 131, 134-135, 244 P.3d 630, 633 -634 (Ct. App. 2010). Ultimately whether the Defendant's due process rights were violated is a question of law. Jacobson, 150 Idaho at 134, 244 P.3d at 633, citing State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct.App.2001). It is the defendant's burden to demonstrate facts that constitute a due process violation. Id., citing State v. Cantrell, 139 Idaho 409, 412, 80 P.3d 345, 348 (Ct.App.2003).

The Defendant primarily argues that the Double Jeopardy Clause provides a bar to retrial, but the Defendant does mention due process concerns. The Defendant's liberty interest is certainly at issue because he would be deprived of his freedom if he is convicted of the crimes charged. Also, Defendant must receive a fair opportunity to defend himself and the Due Process Clause requires that this Court evaluate the ability of the Defendant to do so given the circumstances of the case.

It appears that the Defendant seeks a review of the actions of the prosecuting attorney and the presentation of false testimony by Cpl. Rice in the first trial. However, the Idaho Supreme Court, as the appellate and therefore reviewing court, has already reviewed the record and evaluated the due process concerns, stating:

We also note that 'a conviction by the knowing use of perjured testimony is fundamentally unfair' as a violation of due process. United States v. Agurs, 427 U.S. 91, 103, 96 S. Ct. 2392, 2397 (1976). We have no way to know whether or not the prosecutor had any knowledge of the falsity of Cpl. Rice's testimony given his past testimony and training materials, but we recognize the serious constitutional implications of the possibility. It is extremely disturbing to this Court that an Cpl. of the law would present false testimony in any case especially a murder case. In this case, however, it is impossible to believe there was any truth to the testimony of Cpl. Rice. It is abhorrent to this Court, as it would be to any other court, that a man can be sentenced to twenty five years for second degree murder based primarily on the false testimony of a trooper of this State.

Ellington, 151 Idaho at 75, 253 P.3d at 749. In making this conclusion, the Idaho Supreme Court acknowledged the difficulty of knowing whether the Defendant's rights were violated such that he did not receive the process due in the first trial.

This Court is in a similarly difficult position. As the trial court, this Court is not tasked with the authority to review the previous trial for due process error and must decline to address the Defendant's due process concerns as part of the Defendant's

Motion to Dismiss. However, this Court, in accordance with the attention that the Due
MEMORANDUM OPINION AND ORDER RE: DEFENDANT'S MOTION TO DISMISS; DEFENDANT'S
OBJECTION TO USE OF 404(b) EVIDENCE; DEFENDANT'S OBJECTION TO EXPERT WITNESS;
DEFENDANT'S MOTION TO EXCLUDE IMPEACHMENT MATERIALS (State of Idaho v. Jonathan Wade
Ellington (CR – 2006 - 1497)) - 12

Process Clause deserves, will ensure that the Defendant receives the process due upon retrial, that being a fair trial by an impartial jury untainted by prosecutorial misconduct or false testimony. Therefore, the Defendant's Motion to Dismiss is denied.

3. The District Court Does Not Possess Supervisory Powers

The Defendant also asks this Court to exercise its supervisory powers and dismiss the charges against him. The State identifies that this Court does not have supervisory powers and therefore lacks the authority to dismiss the charges. The State is correct that while federal courts are the beneficiaries of Article III of the United States Constitution, and the Idaho Supreme Court enjoys supervisory powers as per Article I and Article V of the Idaho Constitution, this Court does not have such supervisory powers. Further, had the Defendant desired that the Idaho Supreme Court dismiss the charges on the grounds set forth in the Defendant's Motion to Dismiss, the Defendant could have asked the Idaho Supreme Court to exercised its supervisory powers and dismissed the charges on appeal. However, the Defendant did not advocate for the use of supervisory powers by the Idaho Supreme Court, and the Idaho Supreme Court did not sua sponte invoke its supervisory authority. Instead, the Defendant sought and the Idaho Supreme Court granted the Defendant the relief requested, a new trial. The Defendant's Motion to Dismiss is therefore denied.

B. DEFENDANT'S OBJECTION TO USE OF 404(b) EVIDENCE

Idaho Rule of Evidence 404(b) provides that evidence of "other crimes, wrongs or acts is not admissible to prove the character of a person acted in conformity therewith. It may however be admissible for other purposes . . ." Before submitting the evidence,

there must be a showing that the prior bad act actually occurred and that those acts are relevant "to a material and disputed issue concerning the crime charged, other than propensity." State v. Grist, 147 Idaho 49, 54, 205 P.3d 1185, 1191 (2009), *citing State v. Field*, 144 Idaho 559, 569, 165 P.3d 273, 283 (2007). Next, there must be a determination as to "whether the danger of unfair prejudice substantially outweighs the probative value of the evidence." I.R.E. 403; Grist, 147 Idaho at 52, 205 P.3d at 1188. Admissibility of evidence is always within the trial court's discretion. Id., 147 Idaho at 54, 205 P.3d at 1188.

State gave notice that it intended to present the following evidence as per I.R.E.

404 (b):

1. That at the time the Defendant's contact with the Larsen family on January 1, 2006, the Defendant had an active bench warrant in the amount of \$10,000.00. Attached is a copy of the ROA report pertaining to that matter.
2. That following the Defendant's apprehension and after his contact with the Larsen family on January 1, 2006, the Defendant had a blood alcohol level of .19. Attached is a copy of his blood alcohol level as documented by an analysis conducted by ISP.
3. That at the time of the Defendant's contact with the Larsen family on January 1, 2006, the Defendant's driver's license was suspended in the State of Idaho. Attached is a copy of the Defendant's DMV printout.

(Notice of Intent to Produce I.R.E. 404(b) Evidence at Trial and Notice of Filing Factual Basis for I.R.E. 404(b) Evidence.) The Defendant objects because the State failed to give proper notice and that the evidence is irrelevant to the charges at issue. The State responds that it intends to use the evidence to rebut a potential "fight or flight defense," that may be propounded by the Defendant's expert witness.

This Court is somewhat persuaded by the Defendant's arguments. In regards to the outstanding bench warrant, in order for the evidence to be admissible the State must prove that the Defendant knew that the warrant, apparently issued three years earlier on March 6, 2003, for a failure to comply with a probation condition, was outstanding. The State has not provided this Court or the Defendants with a factual basis that the Defendant knew about the warrant and must do so before introducing the evidence at trial. Additionally, the "Register of Actions" print out supplied by the State is not a factual basis, but the bench warrant or a copy thereof however, would be. Lastly, the Defendant is correct that the admissibility of the evidence is dependent on the testimony of Dr. Hayes, and since the testimony of Dr. Hayes will not be given until trial, this Court is not in a position to determine the relevance of the outstanding bench warrant at this time. Thus, this Court reserves the issue of admissibility of the outstanding bench warrant for trial.

As for the evidence of the Defendant's blood alcohol level of .19, the Defendant points out that whether his car struck Mrs. Larsen is not in dispute, and he has admitted that he drank alcohol after the events with the Larsen family, but before he was arrested by the police. The Defendant, then, contends that evidence of the Defendant's blood alcohol level when it was taken is irrelevant. This Court tends to agree, but like the evidence of the outstanding warrant, the relevance of the rebuttal evidence of the Defendant's blood alcohol level cannot be determined until the Defendant's expert testifies. Thus, this Court reserves the question of admissibility of the Defendant's blood alcohol level for trial.

Lastly, the State desires to introduce evidence that the Defendant's driver's license was suspended. The State also intends to introduce this evidence as rebuttal evidence. This Court notes that like the bench warrant, the State must show that the Defendant knew his driver's license was suspended and provide a factual basis for the evidence at trial. But, for the same reasons that the Defendant's expert testimony must be admitted first, this Court will reserve the issue of admissibility of the suspension of the Defendant's driver's license for trial.

C. DEFENDANT'S OBJECTION TO EXPERT WITNESS

The State has disclosed Dr. Marco Ross as an expert it intends to use at trial. The State has asserted that Dr. Ross will "describe the injuries of the Defendant." The Defendant objects to the use of Dr. Ross's testimony as irrelevant because whether the Defendant's vehicle struck Ms. Larsen and caused her injuries is not at issue and Dr. Ross cannot testify as to where Ms. Larsen was standing when she was struck.

During the first trial, Dr. Ross testified as to the injuries suffered by Ms. Larsen, but did not testify as to where Ms. Larsen was standing when she was struck by the Defendant's vehicle. On appeal, the Defendant alleged that the prosecuting attorney committed a fraud upon the court by claiming that Dr. Ross would testify about where Ms. Larsen was standing when she was struck and the speed of the Defendant's vehicle, but instead Dr. Ross's "testimony focused only on the gruesome nature of the injuries in order to inflame the passions and prejudices of the jury." Ellington, 151 Idaho at 63-64, 253 P.3d at 737-738. The Idaho Supreme Court ultimately determined that the record showed that Dr. Ross' testimony included "distinguishing injuries that were the result of being struck and those that were the result of being run over, which was

relevant to the issue of what direction Mrs. Larsen may have been facing and where she was located.” Id. However the Idaho Supreme Court also noted that Dr. Ross’s testimony was “focused on cataloguing and describing in detail each of Mrs. Larsen’s injuries” and concluded that “the offer of proof was misleading as to the majority of Dr. Ross’ testimony, and highlights yet another attempt by the prosecutor to influence the jury’s passions and prejudices.” Id. The Defendant also argued on appeal that the introduction of Dr. Ross’s testimony was unfairly prejudicial and cumulative. Id., 151 Idaho at 67-68, 253 P.3d at 741-742. The Idaho Supreme Court did not assign error on these grounds.

This Court notes the arguments of the parties and the decision of the Idaho Supreme Court, and concludes that Dr. Ross’s testimony is relevant and prejudicial, but not unfairly prejudicial to the Defendant. Therefore, the testimony as asserted in the “State’ Response to the Defendant’s Objection to Expert Witness” is relevant. However, this Court will allow the Defendant to request an offer of proof prior to Dr. Ross’s testimony, and will reevaluate the admissibility of Dr. Ross’ testimony based on the State’s offer of proof. Additionally, this Court admonishes the State that Dr. Ross cannot testify as to where Mrs. Larsen was standing in the road. Lastly, this Court notifies both parties that it will closely observe and evaluate Dr. Ross’s testimony to ensure that it is presented for a proper purpose, and is not cumulative and not presented in a manner that inflames the passions and prejudices of the jury.

D. DEFENDANT’S MOTION TO EXCLUDE IMPEACHMENT MATERIALS

The Defendant moves to exclude certain materials in the State’s possession that may be introduced to impeach Dr. Hayes. The State is in possession of billing records

that show Dr. Hayes frequently performs work at the request of defense counsel and these records show that Dr. Hayes may be predisposed to favor the Defendant. The State asserted at oral argument that it did not intend to introduce the bills at trial, but would inquire of Dr. Hayes regarding the work he has performed for defense counsel. The Defendant argues Dr. Hayes frequently performs work for defense counsel because he is the only professional in the area that meets defense counsel's needs and that the billing material contains confidential information of other patients and cases that must be protected.

Although the Idaho Rules of Evidence do not specifically address impeachment of witnesses by evidence of bias, the right to do so is unquestionable. The bias, prejudice, or motive of a witness to lie concerning issues presented in a trial is always material and relevant to effective cross-examination. State v. Arzaiza, 124 Idaho 82, 856 P.2d 872 (1993), *citing* Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974). The scope or extent of cross-examination tending to show interest or bias of a witness rest largely in the sound discretion of the trial court. Hall v. Bannock County, 81, Idaho 256, 340 P.2d 855 (1959).

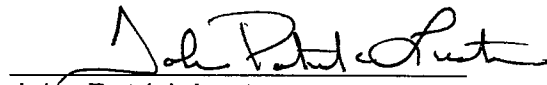
This Court will grant the Defendant's motion to exclude in part. First, this Court sees no need to reference the fact that the Defendant enjoys the representation of the public defender's office. This fact is irrelevant and may prejudice the jury. The public defender is a "law office" or "law firm" and must only be referred to as such during the proceedings. Second, the State is prohibited from introducing any billing information as an exhibit and may not introduce evidence of the hourly rate Dr. Hayes charges the defense counsel for performing evaluations of clients. However, the State may elicit

testimony from Dr. Hayes for impeachment purposes regarding the number of case Dr. Hayes has worked on for defense counsel, whether he received payment for that work, whether or not Dr. Hayes is being paid to testify as an expert witness in this case, and whether Dr. Hayes has been paid to testify as an expert witness other cases. However, based on the nature of Dr. Hayes' testimony and the proceedings at trial, the Defendant may reassert its objection throughout the proceedings.

III. CONCLUSION

The Defendant's Motion to Dismiss is hereby DENIED. The Defendant's Objection to Use of 404(b) Evidence is hereby RESERVED. The Defendants' Objection to Expert Witness is hereby RESERVED. The Defendant's Motion to Exclude Impeachment Materials is hereby GRANTED IN PART, and may be reasserted at trial.

DATED this 14th day of September, 2011.


John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER RE: DEFENDANT'S MOTION TO DISMISS; DEFENDANT'S OBJECTION TO USE OF 404(b) EVIDENCE; DEFENDANT'S OBJECTION TO EXPERT WITNESS; DEFENDANT'S MOTION TO EXCLUDE IMPEACHMENT MATERIALS was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 14 day of September, 2011 to the following:

Anne C. Taylor
J. Bradford Chapman
KOOTENAI COUNTY PUBLIC DEFENDER'S OFFICE
Fax (208) 446-1701

Arthur W. Verharen
David G. Robins
KOOTENAI COUNTY PROSECUTING ATTORNEY'S OFFICE
Fax (208) 446-1833

CLIFFORD T. HAYES
Clerk of the District Court

By: 

Deputy Clerk

#910