STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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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,

Plaintiff,

vs.

JOHN MARK LEWIS, JR.,

Defendant.

Case No. **CRF 2009 1746**

MEMORANDUM DECISION ON I.R.E. 404(b) ISSUES

I. INTRODUCTION AND BACKGROUND.

John Mark Lewis, Jr. (Lewis) is charged with Count I, Lewd Conduct with a Minor Under Sixteen for events alleged to have occurred on January 2, 2009, with a minor female D.M.P., age 15; Count II, Delivery of a Controlled Substance (marijuana) to a Minor, for events alleged to have occurred the day before, on January 1, 2009, specifically involving D.M.P and her sister K.C.P. who was 17 years old; and Count III, Dispensing alcohol to minors, D.M.P. and K.C.P., also on January 1, 2009.

In the charge of Lewd Conduct, the State must prove not only the type of contact, but also that Lewis committed such contact upon the minor D.M.P., not only intending the contact (ICJI 305), but also intending the contact with the specific intent to arouse, appeal to, or gratify the lust or passions or sexual desires of the defendant Lewis, of such child, or of some other person. ICJI 929. Thus, Lewis' specific intent is relevant in this trial. Lewis'

specific intent is not an issue in dispensing alcohol to a minor. ICJI 1250. All that need be proven in the charge Delivery of a Controlled substance to a minor is Lewis' knowledge that the substance was marijuana or that he believed it was a controlled substance. ICJI 428, 404. To that extent, it is a general intent crime. *State v. Fox,* 124 Idaho 924, 866 P.2d 181 (1993).

At the preliminary hearing, D.M.P. testified that she and her sister babysat for Lewis and his wife for four consecutive nights during "this last winter break." March 29, 2009, Preliminary Hearing, Tr. p. 22, Ll. 12-23. D.M.P. testified she lives in Spokane, Washington, and that Lewis drove her and her sister to his house babysit his children. Tr. p. 25, Ll. 3-5. D.M.P. indicated they originally planned to stay only one night, but for unknown reasons, stayed four nights. Tr. p. 59, Ll. 12-16. D.M.P. testified that on the first night, Lewis told her she could go into his bedroom, and after she did, Lewis came in, sat on the bed next to her and said "…let's pretend we're having sex to see what your sister will do." Tr. p. 41, Ll. 1-20. D.M.P. testified that on the second or third night Lewis and his wife gave her and her sister some marijuana to smoke, using a soda can as a smoking device. Tr. p. 34, Ll. 15-20. D.M.P. testified Lewis and his wife gave D.M.P. and her sister a lot of alcohol to drink. Tr. p. 67, Ll. 1-21. D.M.P. also testified that Lewis engaged in sexual contact with her on the morning of the fourth day, and that Lewis had sexual intercourse with her even though she told Lewis "no". Tr. p. 54, Ll. 1-23; p. 61, L. 11 – p. 62, L. 4. Lewis' wife was out of the house. The sexual intercourse stopped when Lewis' daughter knocked on the door. Tr. p. 54, L. 24 – p. 55, L. 3.

On May 14, 2009, the State filed its "Notice of Intent to Use I.R.E. 404(b) Evidence", to show: 1) that Lewis had consumed and had access to illegal controlled substances and alcohol, 2) that Lewis had provided controlled substances to others in the past, 3) that

Lewis in the recent past had similar sexual contact with an underage female babysitter, and 4) that Lewis' claim of sexual monogamy with his wife is not true. Notice of Intent, pp. 1-2. The State claimed this evidence was relevant to show Lewis' motive, opportunity, intent, preparation, plan, knowledge, identity, or lack of mistake and/or accident. *Id.,* p. 2. Nothing more specific as to what the evidence was or who the witnesses might be was given in that notice.

On May 19, 2009, Lewis filed an "Objection to State's Notice of Intent to use I.R.E. 404(b) Evidence", claiming "There is not sufficient evidence to establish the alleged 404(b) evidence, and/or the State has failed to disclose such evidence timely through the discovery process", and "Further, the alleged 404(b) evidence is not relevant to any charge contained in this Information." Objection to State's Notice of Intent to use I.R.E. 404(b) Evidence, p. 1.

On June 17, 2009, the State filed a Memorandum in Support of Use of I.R.E. 404(b) evidence. This document provided the "notice" to Lewis, in a timely fashion, as required under I.R.E. 404(b). On June 24, 2009, counsel for Lewis and the State were present at a hearing scheduled for Lewis' Motion for Return of Property. The Court inquired if Lewis' counsel was ready to discuss the I.R.E. 404(b) issue, but since Lewis' counsel had only received the State's memorandum recently, Lewis' counsel indicated she was not ready to discuss that issue at that time. A hearing was scheduled for July 16, 2009. At the conclusion of the July 16, 2009, hearing, this Court ruled that it would take evidence via the live testimony of the State's proposed witnesses who may give I.R.E. 404(b) testimony, the entire morning of the first day of trial, August 3, 2009. This evidence would be for the purpose of this Court determining if there was a factual basis for each witness' specific I.R.E. 404(b) testimony. *State v. Grist,* 2009 Opinion No. 14, (January 29, 2009). The jury

would be picked later in the afternoon of that first day. On July 24, 2009, the State filed "State's Brief in Support of Notice of Intent to Admit Evidence Pursuant to I.R.E. 404(b) and Response to Defendant's Motion in Limine. Finally, on July 31, 2009, Lewis submitted "Defendant's Brief in Support of Objection to State's Use of 404(b) Evidence."

II. ANALYSIS.

The admission of evidence is a matter of discretion vested in the trial court. *State v. Grist,* 2009 Opinion No. 14, p. 2, citing, *State v. Field,* 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). There is a two-tiered analysis in determining admissibility of evidence of other crimes, wrongs, or acts when offered for a permitted purpose. "First, the trial court must determine whether there is sufficient evidence to establish the other crime or wrong as fact." *State v. Grist,* 2009 Opinion No. 14, p. 4, citing M. CLARK, REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE, C 404, p. 4 (4th Supp. 1985). "The trial court must also determine whether the fact of another crime or wrong, if established, would be relevant to a material and disputed issue concerning the crime charged, other than propensity." *Grist,* 2009 Opinion No. 14, p. 4, citing, *State v. Field,* 144 Idaho 559, 569, 165 P.3d 273, 283. "Second, the trial court must engage in a balancing under I.R.E. 403 and determine whether the danger of unfair prejudice substantially outweighs the probative value of the evidence." *State v. Grist,* 2009 Opinion No. 14, p. 4, citing M. CLARK, REPORT OF THE IDAHO STATE BAR EVIDENCE COMMITTEE, C 404, p. 4 (4th Supp. 1985); *State v. Sheahan,* 139 Idaho 267, 275, 77 P.3d 956, 964 (2003).

A. THE TESTIMONY OF H. T.

1. Whether there is sufficient evidence to establish the other crime or wrong as fact.

The Idaho Court of Appeals recently expressed its cautionary instruction against a trial judge (now an Idaho Supreme Court Justice) taking an offer of proof as a means of

determining if the other crime or wrong occurred. *State v. Parmer,* 2009 Opinion No. 15, pp. 2-8. However, the Idaho Court of Appeals held that the district court did not abuse its discretion by determining that the Rule 404(b) witnesses could testify based only on the state's offer of proof to the court concerning the content of the proposed witnesses' testimony. *Id.,* p. 8. In an abundance of caution, this Court will hear testimony from the witnesses themselves, on the first day of trial, prior to the jury being selected.

The standard, as stated in *Parmer,* is that this Court must determine whether these witnesses, "if believed by the jury, demonstrated that Parmer [the defendant] engaged in inappropriate sexual contact." *Id.,* p. 7. Thus, it seems this Court need not make a credibility finding on these witness, but only need to make a finding as to whether these witnesses, "if believed by the jury", demonstrate Lewis engaged in prior inappropriate sexual contact.

One of the witnesses listed by the State is H.T., an underage (16 year-old) babysitter Lewis hired to watch his children last year, upon whom Lewis allegedly committed a sex offense in September 2007. Memorandum in Support of 404(b), p. 6. According to the police report, Post Falls police received a call from the father of H.T., who was very "noticeably shaken" when he arrived to have his daughter talk to police about Lewis in the present case. H.T. told the officer that there was "one incident where both she and John [Lewis] had engaged in sexual touch", sometime in early September 2007", H.T. said that Lewis "fingered" her, that Lewis' finger had been "inside her vagina", and later H.T. said that she then gave Lewis "head", and explained that Lewis' "erect penis went insider her mouth." H.T. also told police that there were two events in the summer of 2007 and summer of 2008, where Lewis allowed her to drink alcohol in his apartment.

Whether this incident described by H.T. is a "fact", depends on H.T.'s credibility.

Factos weighing on H.T.'s credibility are when, why and how she came forward with this evidence, and how she came to be investigated in this case.

While a jury cannot consider these other events for propensity, in this Court's determination as to the factual basis for a specific prior crime or wrong, this Court can keep in mind any other specific prior crime or wrong that it has found has a factual basis. In other words, the fact that the State has listed quite a significant number of prior crimes and wrongs involving Lewis is of no value to this Court in determining if a specific prior crime or wrong has a factual basis. However, if this Court determines, for instance, that the H.T. event has a factual basis, than that event would make it more probable that other events have a factual basis.

2. Whether the Fact of Another Crime or Wrong, if Established, is Relevant to a Material and Disputed Issue Concerning Lewis' Crimes Charged, Other Than Propensity.

The proposed testimony of H.T., if there is a factual basis as determined by this Court, is admissible under I.R.E. 404(b). It "demonstrate[s] [a] general plan to exploit and abuse an indentifiable group of young female victims." *State v. Moore,* 120 Idaho 743, 744, 819 P.2d 1143, 1144 (1991). In *Moore,* the State accused a grandfather with lewd conduct with a minor, his six or seven-year-old granddaughter. *Id.* The State sought to introduce evidence that the defendant had engaged in similar conduct with his stepdaughter when she was between five and nine years of age, and with his daughter when she was between the ages of nine and thirteen years old. *Id.* The defendant objected, arguing the events in question were irrelevant to the present case and too remote to qualify under I.R.E 404(b) *Id.* The trial court denied defendant's motion in limine on the basis that "the evidence showed a common scheme or plan, was probative of [defendant's] motives or lustful disposition toward children, and was indicative of specific intent." *Id.* The Idaho Supreme

Court agreed, holding that the remoteness was trumped by the similarities in ages of the victims and acts the victims testified that the defendant had committed. 120 Idaho 743, 747, 819 P.2d 1143, 1147. The evidence was relevant to the issues of credibility and corroboration of the victim's testimony. 120 Idaho 743, 745, 819 P.2d 1143, 1145. "Evidence of all the incidents of abuse, taken together, may provide an evidentiary plan or pattern that tends to make the alleged incidents more plausible than probable." 120 Idaho 743, 746, 819 P.2d 1143, 1146. The situation involving H.T. was only about eighteen months prior to the acts involving the alleged victim in the instant case. Thus, the present case has all the factual similarities of *Moore,* and lacks the large expanse of time that was trumped by those factual similarities in *Moore.*

Another case holding that such acts qualified as part of the common scheme or plan, outside of the I.R.E. 404(b) context is *State v. Longoria,* 133 Idaho 819, 992 P.2d 1219 (Ct.App. 1999). In that case the defendant allegedly abused victims while they attended sleep-overs with his daughters. The patterns and conduct were virtually identical, showing a common plan to exploit and sexually abuse an indentifiable group of young female victims. Thus, denial of the motion to sever was proper.

In the present case, the information provided by the State at this point, regarding the proposed testimony of H.T. indicates significant and substantial similarities between the incidents with H.T. and those with D.M.P., the alleged victim in the present case. Both girls were 16 at the time of the alleged abuse, both were babysitting Lewis' children at the time, Lewis' wife was out of the home at the time of both incidents, and the type and degree of sexual conduct is very similar. That similarity indicates a pattern similar to those upheld in *Moore, Longoria,* and other cases.

The State cites *United States v. Johnson,* 132 F.3d 1279 (9th Cir. 1997), for the

proposition that the past conduct (Lewis' alleged conduct with H.T.) need not be identical to the conduct charged regarding D.M.P., but need only be similar enough to be probative of intent. State's Brief on 404(b) and Motion in Limine, p. 2. Indeed, the Ninth Circuit Court of Appeals stated just that. 132 F.3d 1279, 1283. The Ninth Circuit Court of Appeals also held:

> To be probative of something other than criminal propensity, the prior bad act evidence must: (1) prove a material element of the crime currently charged; (2) show similarity between the past and charged conduct; (3) be based on sufficient evidence; and (4) not be too remote in time. *[United States v.] Hinton,* 31 F.3d [817] at 822 [(9th Cir. 1994)]. Once relevance is established, the district court should admit the evidence unless its prejudicial impact substantially outweighs its probative value. *See United States v. Boise,* 916 F.2d 497, 502-03 (9th Cir.1990).

132 F.3d 1279, 1282. In *Johnson* the Ninth Circuit Court of Appeals held that even though thirteen or more years had passed since the prior conduct and the conduct for which the defendant was being tried: "The prior act evidence in this case is sufficiently similar to the charged conduct to render it probative despite the passage of time." 132 F.3d 1279, 1283. This Court finds the similarities between H.T. and D.M.P. to be much more similar to those in *Johnson,* and the difference in time is about eighteen months compared to nearly fourteen years.

Finally, as noted by the State (State's Brief on 404(b) and Motion in Limine, p. 14), the Idaho Supreme Court in *State v.Grist,* 147 Idaho 49, 205 P.3d 1185 (2009); 2009 Opinion No. 14, stated regarding attempts to prove a common scheme or plan theory:

> [S]uch evidence may be admissible if relevant to prove…a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, knowledge, identity, or absence of mistake or accident. We once again caution the trial courts of this state that they must carefully examine the evidence offered for the purpose of demonstrating the existence of a common scheme or plan in order to determine whether the requisite relationship exists.

205 P.3d 1185, 1190-91.

3. Balancing Under I.R.E. 403 Whether the Danger of Unfair Prejudice Substantially Outweighs the Probative Value of the Evidence.

The relevance or probative value of H.T.'s testimony is to prove a common scheme or plan in a very similar fact situation. H.T.'s testimony is also relevant in corroborating the testimony of the victim in the instant case, D.M.P. The Idaho Supreme Court in *Grist* clearly cautioned trial courts to distinguish between corroboration and common scheme or plan on one hand, and inadmissible propensity evidence on the other hand. *State v. Grist,* 2009 Opinion No. 14, pp. 5-8. While corroboration is no longer mandatory in sex crime cases, corroborating evidence may still be relevant, particularly in sex crime cases involving minor victims. *Id.,* p. 6. "Evidence of uncharged misconduct may not be admitted pursuant to I.R.E. 404(b) when its probative value is *entirely* dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." *Id.,* pp. 6-7. (emphasis added). The emphasized portion is supported by prior decisions. "To be admissible, such evidence must be relevant to show something *other* than the defendant's character and propensity to commit the crime charged, it must be relevant to a material and disputed issue." *State v. Doe,* 140 Idaho 873, 880, 103 P.3d 967, 974 (Ct.App. 2004). (emphasis added). "The district court must first inquire whether under I.R.E. 404(b) the evidence is relevant to *an issue* other than character or propensity." *State v. Eytchison,* 136 Idaho 210, 216, 30 P.3d 988, 993 (Ct.App. 2001). (emphasis added). In other words, the evidence need only be admissible for just one legitimate purpose. In the present case, there is much more than one legitimate purpose. In the present case, H.T.'s testimony is not "entirely" dependent upon its tendency to demonstrate Lewis' propensity to engage in such behavior against D.M.P. in the instant case. H.T.'s testimony does prove a common scheme, it corroborates D.M.P.'s testimony, it is relevant to show Lewis' motive, intent,

plan, knowledge, absence of mistake or accident. Such evidence may be admissible "if relevant to prove…a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, knowledge, identity, or absence of mistake or accident." *State v. Grist,* 2009 Opinion No. 14, p. 8, *citing State v. Pizzuto,* 119 Idaho 742, 810 P.2d 680 (1991). That relationship exists between H.T.'s testimony, and D.M.P.'s testimony.

The balancing has been stated many ways, but perhaps one of the more clear ways was by Craig Lewis, professor at the University of Idaho College of Law:

> …probative value and unfair prejudice can best be seen as opposite sides of the same concern, the search for reliable decisions. The probative value of evidence is its tendency to prove, in a reliable way, a matter in issue; the unfairly prejudicial impact of evidence is its tendency to lead the jury toward an erroneous decision, whether through an appeal to sympathy or bias, through misleading or confusing the jury as to the legitimate issues in the case, or through altering the jury' requirements for proof of guilt.
>
> Evidence can be legitimately probative and nonetheless carry the risk of illegitimate use by the jury. In a proper Rule 403 balancing the judge is balancing a prediction of how much a piece of evidence will contribute toward an accurate determination against the judge's assessment of how likely it is that the evidence will lead the jury astray.

Prof. D. Craig Lewis, University of Idaho, College of Law, PROOF AND PREJUDICE: SHOULD RULE 403 BE AMENDED?, Advocate, August, 1991. H.T.'s testimony, has a tendency to prove, in a reliable way, a matter in issue, ie., the events with D.M.P. It is reliable because it shows Lewis' motive, intent, plan, knowledge, absence of mistake or accident with D.M.P. As noted by the State, *State v. Cardell,* 132 Idaho 217, 970 P.2d 10 (1998), held that evidence that the defendant had the same type of sexual contact with three previous adult women as that which the minor child victim described was properly admitted to prove the absence of mistake or accident. State's Brief on 404(b) and Motion in Limine, p. 6. In the present case, H.T. is, like D.M.P., also a minor. There is even more reason to allow this

testimony in the present case as compared to *Cardell.* There is certainly a risk of unfair prejudice, with the jury taking such evidence to prove Lewis' propensity to commit such an act. However, that risk can be addressed by a limiting instruction.

Even if Lewis does not testify, the implicit claim by Lewis is that nothing happened with D.M.P., thus, D.M.P. is lying. *State v. Phillips,* 123 Idaho 178, 191, 845 P.2d 1211, 1214 (1993) shows that in a situation where testimony of three witnesses regarding defendant's alleged sexual misbehavior with them when they were minors was admissible because, by not testifying, defendant defended on the theory that the acts never happened. As correctly noted by the State:

> This type of posture at trial places the credibility of the victim squarely in issue for the jury to decide. In other words, the jury must decide whether to believe or disbelieve the testimony of the victim. Testimony of prior sexual misconduct is admissible where the party's credibility is at issue.

Id., State's Brief on 404(b) and Motion in Limine, p. 8. The State also cited *State v. Lewis*, 123 Idaho 336, 351, 848 P.2d 394, 409 (1993), for the same proposition. State's Brief on 404(b) and Motion in Limine, p. 20. While that case concerned prior unlawful uncharged acts with the same victim, the Idaho Supreme court held:

> When the alleged conduct in this case is considered with the victim's testimony regarding prior sexual misconduct with Lewis, "the jury was better able to compare patterns and methods, details and generalities, consistencies and discrepancies, and thereby ma[k]e a more meaningful and accurate assessment of the parties' credibility." *[State v.] Tolman,* 121 Idaho [899] at 906, 828 P.2d [1304] at 1310 [(1992)].

123 Idaho 336, 351, 848 .2d 394, 409.

This Court finds the risk of any unfair prejudice can be cured by a limiting instruction. The Idaho Court of Appeals in *State v. Parmer,* 2009 Opinion No. 15, p. 6. "Next, the district court satisfied the second tier of they analysis by finding that the probative value was not substantially outweighed by the danger of unfair prejudice because any prejudicial

effect could be cured by a limiting instruction." The last business day before Lewis' jury trial, neither counsel for the State and for Lewis submitted jury instructions. Neither counsel submitted a proposed limiting instruction. Idaho Criminal Jury Instruction 303 specifically addresses this issue:

> Evidence has been introduced for the purpose of showing that the defendant committed [crimes] [wrongs] [acts] other than that for which the defendant is on trial.
>
> Such evidence, if believed, is not to be considered by you to prove the defendant's character or that the defendant has a disposition to commit crimes.
>
> Such evidence may be considered by you only for the limited purpose of proving the defendant's [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] or [absence of mistake or accident]

In balancing the probative value, this Court finds the victim's credibility and corroboration evidence to prove that credibility is of extremely high probative value. This Court finds that evidence of Lewis' motive, intent, plan, knowledge, absence of mistake or accident with D.M.P., is of extremely high probative value. The risk of unfair prejudice, without a limiting instruction, is high as well. However, with a limiting instruction, the risk of unfair prejudice is low. The probative value of H.T.'s testimony is not substantially outweighed by the risk of unfair prejudice, confusion of the issues or misleading the jury, given a limiting instruction against the use of propensity evidence.

B. TESTIMONY OF STATE'S WITNESSES OTHER THAN H.T.

1. Witnesses Who Will Contradict Lewis' Claims of Monogamy.

Much of the remainder of the State's proposed I.R.E. 404(b) evidence, is primarily for impeachment purposes. It is clear that even if the reason for introduction of evidence of prior crimes or wrongs is for impeachment purposes, the Court must still balance the probative value versus the danger of unfair prejudice. *State v. Doe,* 140 Idaho 873, 880, 103 P.3d 967, 974 (Ct.App. 2004); *State v. Eytchison,* 136 Idaho 210, 216, 30 P.3d 988,

993 (Ct.App. 2001).

When Post Falls Police detective David Beck interviewed Lewis, he indicated he had been completely monogamous during his marriage, and he stated he had never had a sexually transmitted disease. The State has several witnesses it claims would show he was not monogamous during his marriage, and that he has a sexually transmitted disease. The alleged victim in the present case tested positive for Chlamydia shortly after the incident with Lewis, and the State asserts that she will testify that she could not have contracted it from anyone other than Lewis. Memorandum in Support of 404(b), p. 5. The State claims Lewis tested positive for Chlamydia. *Id.,* p. 6.

Idaho Rule of Evidence 404(b) specifies that evidence of a person's character is not admissible to prove that they acted in conformance with that character, but it is admissible, under I.R.E. 404(a)(3), to establish their character. Additionally, although not listed in I.R.E. 404(b), admission of evidence of other crimes or wrongs is permissible when relevant for impeachment purposes. *State v. Arledge,* 119 Idaho 584, 808 P.2d 1329 (Ct.App. 1991). The Court would still have to evaluate this evidence for relevance and balance its probative value and unfair prejudice, but if it passes that test, it is admissible. *State v. Hairston,* 133 Idaho 496, 501, 988 P.2d 1170, 1175 (1999).

Counsel for the State was charged at the July 16, 2009, hearing, to explain why the plaintiff thought Lewis' statement to the investigating officer, that he was in a monogamous relationship with his wife (for which there are a plethora of witnesses to impeach such testimony), would come in as evidence in the first instance, especially if Lewis did not testify in this case. Counsel for the State has stated in subsequent briefing that such statements would be self serving and not admissible. State's Brief on 404(b) and Motion in Limine, p. 22. If Lewis testifies, his claims of monogamy to the investigating officer may

come in. If Lewis testifies that what he told the investigating officer about being in a monogamous relationship with his wife, was a lie, that is the end of the inquiry. If Lewis claims that what he told the investigating officer about being in a monogamous relationship with his wife, was the truth, then certainly the testimony of these various witnesses becomes very relevant for impeachment. However, there is no reason to allow all the State's witnesses on this subject to testify. The State will need to choose four witnesses on this subject. Beyond that, further testimony would be cumulative. The State will need to present the testimony of those witnesses before the Court, outside the presence of the jury, just as this Court requires the State to do with H.T. If this Court determines that there is sufficient evidence to establish the other crime or wrong (infidelity, promiscuity) as fact, then the evidence will come in. This Court has stated above that such is relevant for impeachment purposes. In balancing, the probative value is high, and the danger of unfair prejudice is low. Infidelity and promiscuity within a marital relationship are, unfortunately, all too common. If there is any unfair prejudice, this Court finds it can be cured by a limiting instruction. The probative value of these witnesses are not substantially outweighed by the risk of unfair prejudice, confusion of the issues or misleading the jury, given a limiting instruction against the use of propensity evidence.

2. Evidence That Lewis Tested Positive for Chlamydia.

The State wishes to present evidence that Lewis tested positive for Chlamydia, a sexually transmitted disease. Memorandum in Support of 404(b), p. 6-7. The State claims such is relevant as D.M.P. also contracted such disease, that she could have contracted such disease from no one other than Lewis, and thus, this would corroborate her claim that Lewis had sexual intercourse with her. *Id.,* p. 7. Assuming a foundation can be laid for the test results, the test result will come in as evidence. This Court does not find the test

results to be I.R.E. 404(b) evidence. This is because simply carrying the disease is certainly not a crime, and not a "wrong" in the sense of the rule. If such results are I.R.E. 404(b) evidence (that is, having Chlamydia is a "wrong"), those results would still come in because they would be relevant for corroboration, the probative value is high, and the danger of unfair prejudice is low. Certainly, such evidence would tend to make it more probable that Lewis had sexual contact with his alleged victim in the present case. While the fact of Lewis' having Chlamydia may also impeach Lewis' statements to police (if those statements are allowed in), the fact of Lewis' having Chlamydia is very relevant to prove sexual contact with his alleged victim. From the standpoint of unfair prejudice, sexually transmitted diseases are not uncommon. If there is any unfair prejudice, this Court finds it can be cured by a limiting instruction. The probative value of this testing is not substantially outweighed by the risk of unfair prejudice, confusion of the issues or misleading the jury, given a limiting instruction against the use of propensity evidence.

3. Evidence That "Amber E" Tested Positive for Chlamydia.

The State has retrieved two text messages from Lewis' cell phone, from "Amber E", later determined to be eighteen years old. One message reads: "You need to get checked", the other reads: "You beta not have had anything and jus didn't tell me." Memorandum in Support of 404(b), p. 7. Amber E had unprotected sex with Lewis at his home in later November or early December, 2008. Either on the date of the text messages on February 2, 2009, or shortly before, Amber E discovered she had contracted Chlamydia and suspected defendant as the person who gave it to her. *Id.* This testimony would corroborate D.M.P.'s testimony that Lewis is the person who gave her Chlamydia. Thus, the evidence is relevant, highly probative, and as stated above, sexually transmitted diseases are not uncommon, and if there is any unfair prejudice, this Court finds it can be

cured by a limiting instruction. There is also the risk of unfair prejudice due to promiscuity and infidelity of Lewis. As stated above, infidelity and promiscuity within a marital relationship are, unfortunately, all too common. If there is any unfair prejudice as a result of infidelity and promiscuity, this Court finds it can be cured by a limiting instruction. The probative value of Amber E's testimony is not substantially outweighed by the risk of unfair prejudice, confusion of the issues or misleading the jury, given a limiting instruction against the use of propensity evidence.

4. Testimony That Lewis Provided Alcohol and Marijuana to Females.

The State wishes to introduce evidence that Lewis, within a year of the charged offenses, provided alcohol to female minors and provided marijuana to females. Memorandum in Support of 404(b), p. 3. All State witnesses who are age eighteen or older, to whom Lewis has allegedly supplied alcohol and/or marijuana, would not be relevant. Lewis is charged with providing alcohol and marijuana to two minors in the present case, D.M.P. and K.C.P. What Lewis may have done in the past with women at or over the age of consent, is simply not relevant.

However, the State's witnesses who have observed Lewis providing alcohol and/or marijuana to other minors, would be relevant to corroborate the testimony of D.M.P. and K.C.P. Such testimony would also be relevant to prove Lewis' motive, intent, plan, knowledge, absence of mistake or accident with D.M.P. If believed, Lewis' conduct with D.M.P. was "grooming" conduct, and providing alcohol and/or marijuana to other minor females, is evidence of such grooming conduct. Evidence of Lewis allegedly providing alcohol and/or marijuana to other minor females, is of extremely high probative value. The risk of unfair prejudice, without a limiting instruction, is somewhat high. However, with a limiting instruction, the risk of unfair prejudice is low. The probative value of H.T.'s

testimony is not substantially outweighed by the risk of unfair prejudice, confusion of the issues or misleading the jury, given a limiting instruction against the use of propensity evidence. These witnesses would include "Lisa" Howard and "Melissa" Main. Memorandum in Support of 404(b), pp. 11-12.

Lewis claims:

> In this case, the evidence that Mr. Lewis provided young women with alcohol and marijuana is irrelevant to whether he had sexual contact with D.P. Furthermore, the probative value of such evidence is substantially outweighed by its unfair prejudice.

Defendant's Brief in Support of Objection to State's Use of 404(b) Evidence, p. 5. This argument seems to ignore the fact that Lewis is also charged with Delivery of a Controlled Substance (marijuana) to a Minor, and Dispensing alcohol to minors. No motion to sever (actually a motion for improper joinder under I.C.R. 8(b)), has been made by Lewis. It would be Lewis' burden to prove such. *State v. Caudill,* 109 Idaho 222, 706 P.2d 456 (1985); *State v. Cook,* 144 Idaho 784, 790, 171 P.3d 1282 (2007).

C. Testimony Regarding What Took Place Prior to Sexual Intercourse With D.M.P.

The State is unclear in what it claims is evidence admissible as part of the "*res gestae*" of the charged crimes. State's Brief on 404(b) Motion in Limine, pp. 15-21. The State claims: "The evidence will show that late in the evening prior to the morning that the charged sex offense was committed, defendant attempted to commit an act of lewd conduct wit the named victim." *Id.,* p. 15. If the State is referring to Lewis' suggestion to D.M.P. that they make noises like they were having sex, such would certainly seem to be part of the *res gestae* of the charged crime, but is such activity in and of itself "lewd conduct"? If the State is referring to other conduct of Lewis, then there is likely a lack of notice pursuant to I.R.E. 404(b).

The State also argues that Lewis' giving alcohol and marijuana to these two prior victims is part of the *res gestae* of these crimes, but, similar to Lewis in the section above, also seems to ignore that Lewis has been charged with the crimes of providing alcohol and marijuana to these minors.

DATED this 3rd day of August, 2009.

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Staci Anderson
Prosecuting Attorney – Donna Gardner

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy