

7-30-2013

State v. Longee Respondent's Brief Dckt. 40435

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Longee Respondent's Brief Dckt. 40435" (2013). *Not Reported*. 1148.
https://digitalcommons.law.uidaho.edu/not_reported/1148

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.



COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 40435
Plaintiff-Respondent,)	
)	Twin Falls Co. Case No.
vs.)	CR-2012-4950
)	
NICHOLAS JAMES LONGEE,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

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

HONORABLE RANDY J. STOKER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

DAPHNE J. HUANG
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

SPENCER J. HAHN
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEY FOR
DEFENDANT-APPELLANT

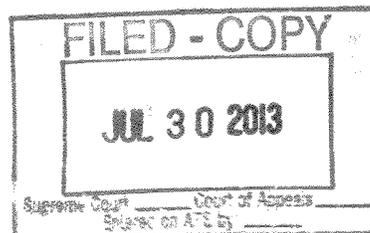


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of Facts and Course of Proceedings	1
ISSUES	5
ARGUMENT	6
I. In Light Of The Record, Longee Has Failed To Establish The District Court’s Jury Instruction In Question Amounted To Fundamental Error	6
A. Introduction.....	6
B. Standard Of Review	6
C. The Record And Instructions As A Whole Fail To Support A Clear Violation Of A Constitutional Right	7
D. Longee Has Failed To Show That Error, If Any, Affected The Outcome Of His Case	9
II. Given Longee’s Admissions And Certified Copies Of His Convictions, Substantial Evidence Established The Essential Elements Of Longee’s Persistent Violator Charge At Trial	11
A. Introduction.....	11
B. Standard Of Review	11
C. The Undisputed Evidence At Trial Established The Essential Elements Of Longee’s Persistent Violator Charge Beyond A Reasonable Doubt	11
CONCLUSION.....	13
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Monahan v. State</u> , 145 Idaho 872, 187 P.3d 1247 (Ct. App. 2008).....	13
<u>State v. Adamcik</u> , 152 Idaho 445, 272 P.3d 417 (2012).....	8
<u>State v. Bowman</u> , 124 Idaho 936, 866 P.2d 193 (Ct. App. 1993).....	7
<u>State v. Brandt</u> , 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986)	12
<u>State v. Calver</u> , ___ P.3d ___, 2013 WL 2396726 (Ct. App. 2013).....	6
<u>State v. Clark</u> , 132 Idaho 337, 971 P.2d 1161 (Ct. App. 1998)	13
<u>State v. Harrington</u> , 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999)	12
<u>State v. Jockumsen</u> , 148 Idaho 817, 229 P.3d 1179 (2010)	6
<u>State v. Mace</u> , 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000).....	11
<u>State v. Perry</u> , 150 Idaho 209, 245 P.3d 961 (2010)	6, 9
<u>State v. Rollins</u> , 152 Idaho 106, 266 P.3d 1211 (Ct. App. 2011).....	9
<u>State v. Skunkcap</u> , 2013 WL 2714563 (Ct. App. 2013).....	7, 8
 <u>STATUTES</u>	
I.C. § 19-2514.....	12

STATEMENT OF THE CASE

Nature of the Case

Nicholas James Longee appeals from a jury verdict finding him guilty of grand theft by possession of stolen property, unlawful possession of a firearm, solicitation of grand theft by disposing of stolen property, and a persistent violator enhancement. Longee argues his judgment of conviction should be reversed because the district court committed fundamental error in an instruction to the jury, and because evidence at trial was insufficient to establish his persistent violator charge.

Statement of Facts and Course of Proceedings

In March 2012, five handguns were stolen from William Tharp's home in Buhl, Idaho. (UPSI, p. 1; Trial Tr., p. 137, L. 9 – p. 138, L. 9; p. 139, L. 20 – p. 145, L. 14; p. 146, L. 20 – p. 147, L. 24.) A couple days after the burglary, Nicholas James Longee phoned Kenneth Worth, who lived in the room next to Longee's in their half-way house. (Trial Tr., p. 186, L. 22 – p. 187, L. 19; p. 188, Ls. 16-24.) Longee asked Worth for help selling five guns that were in a pillowcase in a ditch out in the country. (Trial Tr., p. 189, L. 10 – p. 190, L. 6.) Worth declined. (Trial Tr., p. 189, L. 24 – p. 190, L. 2.) Longee then asked Worth to take him to Omar Padilla's house, and Worth did. (Trial Tr., p. 191, Ls. 4-8.)

Longee knew Padilla because they had served time together in jail. (Trial Tr., p., 216, Ls. 20-25.) Longee asked Padilla to take him to Filer to "pick up some thumpers." (PSI, p. 13; Trial Tr., p. 217, L. 18 – p. 218, L. 1; p. 221, Ls. 7-

13.) Padilla believed “thumpers” referred to car stereo speakers. (Trial Tr., p. 222, Ls. 8-13.) Padilla’s girlfriend, Ashtyn Jones, drove Longee and Padilla to Filer in her car. (PSI, p. 13; Trial Tr., p. 218, Ls. 8-9; p. 221, Ls. 23-25; p. 223, Ls. 3-4; p. 276, Ls. 7-20.) Longee gave driving directions; when Longee said to stop the car, he got out and retrieved a pillowcase from a ditch. (Trial Tr., p. 223, Ls. 4-24; p. 226, Ls. 17-24; p. 230, L. 23 – p. 231, L. 21; p. 277, Ls. 4-11; p. 280, L. 25 – p. 281, L. 3.)

The three drove back to Twin Falls, and Longee said to go to the YMCA so he could show Padilla the “thumpers.” (Trial Tr., p. 230, Ls. 3-9.) At the YMCA, Longee showed Padilla the contents of the pillowcase – five guns. (Trial Tr., p. 230, L. 14 – p. 231, L. 10; p. p. 281, L. 23 – p. 282, L. 5.) The guns were the five that had been stolen from Tharp’s home. (Trial Tr., p. 139, L. 20 – p. 145, L. 14; p. 231, Ls. 11-15.) Jones heard Longee say “45 and 22” and believed he was talking about guns. (Trial Tr., p. 230, L. 23 – p. 231, L. 4; p. 283, Ls. 2-11.) Longee then asked Padilla to sell four of the guns in exchange for keeping the fifth. (Trial Tr., p. 232, Ls. 2-10.)

Padilla told Longee he agreed to the plan, fearing Longee’s reaction if he refused. (Trial Tr., p. 234, Ls. 1-7.) But after dropping Longee off, Padilla told Jones he did not want to “get in trouble for having” the guns. (Trial Tr., p. 235, Ls. 8-10.) Padilla talked to an off-duty police officer whose girlfriend he knew, then led police to the guns. (Trial Tr., p. 237, L. 4 – p. 238, L. 6.) Over the next day or two, Longee called Padilla a number of times about the guns, and eventually, Padilla told Longee he had turned them in to police. (Trial Tr., p. 238,

Ls. 15-25.) Longee told Padilla he had a week to give him \$500, and instructed Padilla to delete their communications from his cell phone, which Padilla did. (Trial Tr., p. 239, Ls. 1-15.)

Longee, representing himself at trial, testified on his own behalf and told a different story. (Trial Tr., p. 378, L. 10 – p. 385, L. 4.) According to Longee, he called Worth for help buying a car stereo. (Trial Tr., p. 379, Ls. 21-25.) Worth put Longee in touch with Padilla, who Longee happened to know from a rider program. (Trial Tr., p. 380, Ls. 1-6.) Longee testified that Padilla said he had car speakers for sale, but they would need to get them in Filer, and Padilla did not want his girlfriend to know what they were doing. (Trial Tr., p. 380, L. 12 – p. 381, L. 4.) Longee testified that Padilla told him where the speakers were; Longee then explained that he knew the area because his mother lives in Filer, therefore he gave Jones directions where to drive. (Trial Tr., p. 381, L. 21 – p. 382, L. 5.)

Longee grabbed the pillowcase out of the ditch, but testified he believed it contained a speaker, not a box with guns in it. (Trial Tr., p. 382, Ls. 12-20.) According to Longee, they returned to town and were driving around in circles, so he suggested they stop at the YMCA pool so he could look at the speakers. (Trial Tr., p. 383, Ls. 5-19.) When Padilla opened the bag, Longee asserts he expressed surprise, saying, “Oh crap. That’s a .22. That’s a .45.” (Trial Tr., p. 384, Ls. 4-5.) Longee testified that Padilla asked him to hold on to the guns for him, and Longee refused. (Trial Tr., p. 384, Ls. 11-15.) Longee then testified that, even though he lived right across the street from the YMCA, Padilla insisted

that Jones give Longee a ride home in her car. (Trial Tr., p. 384, L. 16 – p. 385, L. 1.)

At trial, a jury found Longee guilty of grand theft by possession of stolen property, unlawful possession of a firearm, solicitation of grand theft by disposing of stolen property, and a persistent violator enhancement. (R., pp. 258-61.) The district court sentenced Longee to a term of twenty years with five years fixed on count one, to run concurrently with five-year fixed terms on counts two and three. (R. p. 294.) Longee timely appealed. (R., pp. 306-08.)

ISSUES

Longee states the issues on appeal as:

1. Did the district court commit fundamental error, in violation of Mr. Longee's Fifth, Sixth, And Fourteenth Amendment right to testify at trial, when it instructed the jury that he was not a witness and that nothing he said was evidence?
2. Must the persistent violator finding be vacated because it was not supported by sufficient evidence?

(Appellant's brief, p. 7.)

The state rephrases the issues as:

1. Has Longee failed to establish the district court's jury instruction in question amounted to fundamental error, in light of the record?
2. Given Longee's admissions and certified copies of his convictions, did substantial evidence establish the essential elements of Longee's persistent violator charge at trial?

ARGUMENT

I.

In Light Of The Record, Longee Has Failed To Establish The District Court's Jury Instruction In Question Amounted To Fundamental Error

A. Introduction

Longee argues that the trial court erred in instructing the jury about what was not evidence. Longee did not object to the alleged error at trial, but now asserts the error violated his rights under the Fifth, Sixth, and Fourteenth Amendments. Longee fails to satisfy his burden on appeal.

B. Standard Of Review

Generally, issues must be raised before the trial court to be considered on appeal. State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). An exception applies for unobjected-to error depriving a criminal defendant of due process. Id.; State v. Jockumsen, 148 Idaho 817, 820, 229 P.3d 1179, 1182 (2010). To establish such fundamental error, an appellant must demonstrate: (1) violation of an unwaived constitutional right; (2) that the error is clear and obvious without need to further develop the record; and (3) that the error affected the outcome of the proceedings. Perry, 150 Idaho at 226, 245 P.3d at 978 (2010). This three-prong test applies where the unobjected-to error concerns jury instructions, as here. State v. Calver, ___ P.3d ___, 2013 WL 2396726 at *5 (Ct. App. 2013).

C. The Record And Instructions As A Whole Fail To Support A Clear Violation Of A Constitutional Right

The disputed jury instruction addressed what is not evidence. Although taken from the model jury instructions, the trial court modified it to reflect that Longee was representing himself in lieu of an attorney:

Certain things you have heard and seen are not evidence, including: . . . arguments and statements by lawyers, or in this case, Mr. Longee. The lawyers and Mr. Longee are not witnesses. What they say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence but is not evidence. If the facts as you remember them differ from the way the lawyers or Mr. Longee have stated them, follow your memory . . .

(Trial Tr., p. 469, L. 21 – p. 470, L. 6; p. 476, L. 25 – p. 477, L. 5.¹) According to Longee, this instruction violated his constitutional right to testify at trial. (Appellant’s brief, pp. 9-11.) Noting that he exercised this right, Longee argues the court’s instruction prohibited the jury from considering his testimony “for any purpose other than ‘to help interpret the evidence.’” (Appellant’s brief, p. 11.)

On review of jury instructions, the appellate courts consider “whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law.” State v. Skunkcap, 2013 WL 2714563 at *5 (Ct. App. 2013) (citing State v. Bowman, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993)). The reason for examining jury instructions as a whole is “because an ambiguity in one instruction may be made clear by other instructions, and an instruction that appears incomplete when viewed in isolation may fairly and accurately reflect the law when read together with the remaining instructions.”

¹ See ICJI 202 (Determining Facts From The Evidence And Disregarding Non-Evidence).

Skunkcap, at *5 (citing State v. Adamcik, 152 Idaho 445, 472, 272 P.3d 417, 444 (2012)).

Longee highlights the trial court's ambiguous wording, "The lawyers and Mr. Longee are not witnesses." (Appellant's brief, p. 9; Trial Tr., p. 469, Ls. 24-25.) Longee also cites the instructions immediately before and after the disputed instruction, which would bar consideration of Longee's testimony if Longee is deemed strictly a non-witness. (Appellant's brief, p. 9.) However, in arguing that the instructions violated his rights, he astutely avoids examining the instructions as a whole, instead interpreting isolated phrases without context. Interpreting the instructions as a whole, Longee is a non-witness in the same way that the lawyers are non-witnesses.

The phrase "lawyers, *or in this case*, Mr. Longee" provides the instruction's context; it refers to Longee in his capacity as his own representative. Thus, when acting as his own representative, Longee is not a witness. (See Trial Tr., p. 469, Ls. 24-25.) When acting as his own representative, Longee's "opening statements, closing arguments and [statements] at other times" are not evidence. (See Trial Tr., p. 470, Ls. 1-4.) "Other times" refers to questions of other witnesses posed by Longee, as his own representative, or any other statement by Longee when not testifying as a witness.

Indeed, Longee does not assert that he was prevented from exercising his right to testify. Instead, he argues the instruction erroneously informed the jury that "he was not a witness and that nothing he said was evidence." (Appellant's brief, p. 11.) The record and trial transcript, viewed as a whole, support the

correct and intended meaning of the trial court's instruction. When Longee testified, the trial court explained:

Ladies and gentlemen, it's very awkward for a person who represents themselves to present testimony. So basically, . . . Mr. Longee is going to ask himself a question and then give an answer. And the reason that we do that is so that Mr. Holloway can object if he thinks that the questions are improper.

(Trial Tr., p. 378, Ls. 10-20.) The jury instruction thus informed the jury that Longee's *questions* were not evidence, but his *answers* were. In the state's closing and rebuttal, the prosecution referred to Longee's testimony as evidence supporting the state's case. (Trial Tr., p. 499, Ls. 12-15; p. 500, Ls. 12-16; p. 513, Ls. 21-25.)

Ultimately, it is far from clear that the jurors erroneously understood the instruction as a directive from the court to disregard Longee's testimony. For a court to find that the jurors interpreted the instruction in this way, the record would need to be developed further. Perry, 150 Idaho at 226, 245 P.3d at 978). Longee has not shown a clear error rising to the level of a constitutional violation, thus he fails to establish the first two prongs under Perry.

D. Longee Has Failed To Show That Error, If Any, Affected The Outcome Of His Case

Longee also cannot meet his burden of showing the error affected the outcome of his case. See State v. Rollins, 152 Idaho 106, 113, 266 P.3d 1211, 1218 (Ct. App. 2011). Longee's testimony, as summarized in the statement of facts above, was arguably more damaging than helpful.

According to Longee, it was Padilla who led him out to the countryside, despite that Longee admitted he gave the driving directions to Jones. (Trial Tr.,

p. 380, L. 12 – p. 381, L. 4; p. 381, L. 21 – p. 382, L. 5.) Longee alleged that Padilla had promised car speakers, but inexplicably, retrieved guns instead. (Id.) Longee’s testimony carefully accounted for all the various calls made, so as to match the phone record he admitted into evidence. (Trial Tr., p. 365, L. 23; p. 380, Ls. 5-11, 20-23.) But ultimately, Longee’s testimony was self-serving and incredible, if not implausible.

Responding to Longee’s attempts to discredit Padilla and Worth, the prosecution acknowledged the witnesses’ criminal histories, stating, “I told you from the very beginning that this was a case that . . . didn’t involve choir boys or boy scouts.” (Trial Tr., p. 514, Ls. 14-17.) But Padilla had turned the guns in to the police. (Trial Tr., p. 237, L. 4 – p. 238, L. 6.) As the prosecution noted, there was no evidence of bad blood between Padilla and Longee, thus Longee failed to establish a motive for Padilla to lie to get Longee in trouble. (Trial Tr., p. 514, L. 21 – p. 515, L. 4.)

Testimonies by Jones, Padilla, and Worth were consistent with each other, and consistent with the prosecution’s theory of the case. Longee’s testimony was not. Longee has not shown that, absent the ambiguous jury instruction, the jury would have returned a different verdict. Accordingly, Longee has failed to establish fundamental error.

II.

Given Longee's Admissions And Certified Copies Of His Convictions, Substantial Evidence Established The Essential Elements Of Longee's Persistent Violator Charge At Trial

A. Introduction

Longee argues there was insufficient evidence to support the jury's finding on his persistent violator charge. (Appellant's brief, pp. 13-17.) According to Longee, the only evidence to support his persistent violator enhancement was certified copies of two burglary convictions. (Appellant's brief, p. 13; Trial Tr., p. 327, Ls. 1-17; p. 329, Ls. 4-6, 20-22.) Longee thus argues the enhancement should be vacated. (Appellant's brief, pp. 13-17.)

B. Standard Of Review

Appellate review of issues concerning the sufficiency of evidence is limited in scope. State v. Mace, 133 Idaho 903, 905, 994 P.2d 1066, 1068 (Ct. App. 2000). Judgment entered on a jury's verdict will not be disturbed where there is substantial evidence to support a reasonable determination the state established a crime's essential elements beyond a reasonable doubt. Id. (citations omitted). The appellate court considers the evidence in the light most favorable to the state and will not substitute its judgment for that of the jury regarding witness credibility, the weight given to testimony, or inferences drawn from the evidence. Id.

C. The Undisputed Evidence At Trial Established The Essential Elements Of Longee's Persistent Violator Charge Beyond A Reasonable Doubt

Idaho's persistent violator statute provides that "[a]ny person convicted for the third time of the commission of a felony . . . shall be considered a persistent

violator of law” I.C. § 19-2514. The essential elements of the persistent violator enhancement that the state had to prove beyond a reasonable doubt, were that Longee had two prior felony convictions. As Longee acknowledges, the state introduced certified copies of his felony burglary convictions, which were admitted at trial. (Appellant’s brief, p. 13; State’s exhibits 41, 42; Trial Tr., p. 327, Ls. 1-17; p. 329, Ls. 4-6, 20-22; p. 385, Ls. 13-25; see also PSI, pp. 27, 30.) In addition, Longee admitted pleading guilty to the two prior felony burglaries in his trial testimony. (Trial Tr., p. 418, L. 22 – p. 419, L. 6.) Thus there was ample evidence on which a reasonable fact-finder could determine the necessary elements for a persistent violator enhancement were met.

In arguing the finding should be vacated, Longee attempts to expand the “essential elements” of a persistent violator enhancement under the court’s ruling in State v. Brandt, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986), and its progeny. In Brandt, the court recognized a general rule that felony convictions entered the same day, or charged in the same information, should count as a single conviction for purposes of a persistent violator charge. Id. at 344, 715 P.2d at 1014. “However, the nature of the convictions in any given situation must be examined to make certain that the general rule is appropriate.” Id. This examination is necessary, the Brandt court reasoned, in light of the purpose of the persistent violator statute – “to punish repeat offenders by making their sentences for successive crimes more harsh.” Id.

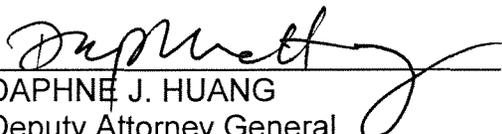
The Brandt analysis – whether to treat prior felony convictions as one – *is conducted by the trial court.* State v. Harrington, 133 Idaho 563, 568, 990 P.2d

144, 149 (Ct. App. 1999). It is not an essential element of the crime to be determined by the jury. The essential elements of the persistent violator enhancement were supported by substantial evidence, thus there is no basis on which to overturn Longee's judgment as to the enhancement. Because Longee has raised no challenge to the district court's decision, as a matter of law, to submit the persistent violator charge to the jury, he may not at this stage assert it. See State v. Clark, 132 Idaho 337, 338, 971 P.2d 1161, 1162 (Ct. App. 1998); Monahan v. State, 145 Idaho 872, 877, 187 P.3d 1247, 1252 (Ct. App. 2008).

CONCLUSION

The state respectfully requests that the Court affirm Longee's judgment of conviction.

DATED this 30th day of July, 2013.



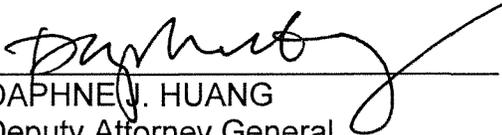
DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of July, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



DAPHNE J. HUANG
Deputy Attorney General

DJH/pm