

10-22-2013

## State v. Longee Appellant's Reply Brief Dckt. 40435

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 40435
	)	
v.	)	TWIN FALLS COUNTY NO. CR 2012-
	)	4950
NICHOLAS JAMES LONGEE,	)	
	)	REPLY BRIEF
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

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

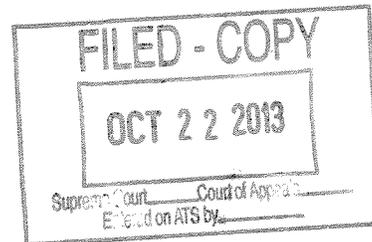
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## STATEMENT OF THE CASE

### Nature of the Case

On appeal, Mr. Longee argues that the district court committed fundamental error when it instructed the jury that nothing Mr. Longee, who was *pro se* and testified at trial, could be considered as evidence, and that the evidence was insufficient to support the jury's persistent violator finding because no evidence was presented that Mr. Longee's two prior convictions resulted from separate and distinct offenses.

In response, the State argues, *inter alia*, that the jury instructions, as a whole, and the closing and rebuttal arguments of the prosecutor provided adequately informed the jury that it could consider Mr. Longee's testimony as evidence. With respect to Mr. Longee's other claim, the State argues that Mr. Longee cannot challenge the sufficiency of the evidence as to the persistent violator enhancement because whether prior convictions are the result of separate and distinct offenses is a legal question, not an element of the enhancement.

This Reply Brief is necessary to the State's arguments identified *supra*. With respect to any other issues or arguments, Mr. Longee will rely upon the arguments and authorities set forth in his Appellant's Brief.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Longee's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference.

## ISSUES

1. Did the jury instructions as a whole and the prosecutor's closing and rebuttal arguments adequately inform the jury that it could consider Mr. Longee's testimony as evidence?
2. Can Mr. Longee challenge the sufficiency of the evidence supporting the persistent violator enhancement with respect to whether the evidence established the existence of two distinct prior felony convictions?

## ARGUMENT

### I.

#### The Jury Instructions As A Whole And The Prosecutor's Closing And Rebuttal Arguments Did Not Adequately Inform The Jury That It Could Consider Mr. Longee's Testimony As Evidence

In opposing Mr. Longee's argument that the district court violated his constitutional rights by instructing the jury that nothing he said was evidence, the State argues, *inter alia*, that the instructions as a whole and the prosecutor's closing and rebuttal arguments served to adequately inform the jury that it could consider Mr. Longee's testimony as evidence. For the reasons set forth *infra* neither of the State's arguments is convincing.

With respect to the State's argument that the prosecution's having "referred to Longee's testimony as evidence supporting the state's case," helped resolve any ambiguity in the district court's instruction that nothing Mr. Longee said was evidence, Mr. Longee notes that the following instruction, given prior to the State's closing and rebuttal arguments renders the State's position untenable:

My duty is to instruct you as to the law. You must follow the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. *If anyone states a rule of law different from any I tell you, it is my instruction that you must follow.*

(Trial Tr., p.468, Ls.10-18 (emphasis added).)<sup>1</sup>

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<sup>1</sup> It is worth noting that if the State's argument is adopted, then any incorrect statement of law made by a prosecutor during closing argument would be grounds for a successful appeal, no matter how clear the trial court's instructions were.

The State's other argument is that the "ambiguous" instruction makes perfect sense when "[t]he record and trial transcript, viewed as a whole" are examined, specifically arguing,

When Longee testified, the trial court explained:

Ladies and gentlemen, it's very awkward for a person who represents themselves [sic] to present testimony. So basically, . . . Mr. Longee is going to ask himself a question and then give an answer. And the reason 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.

(Respondent's Brief, pp.8-9 (brackets added) (ellipsis and emphasis in original).)

Nothing in the district court's statement that preceded Mr. Longee's testimony indicates that his questions were not to be considered evidence but that anything he said was to be considered evidence. Furthermore, the district court's later, specific instruction that the jury could only decide the facts of the case from the evidence, which included "sworn testimony of witnesses," and that Mr. Longee was "not [a] witness[]" contradicted this general statement. (Trial Tr., p.469, L.13 – p.470, L.6.) Additionally, immediately following the district court's admonition that Mr. Longee was not a witness and that nothing he said was evidence, and *within the same instruction*, the district court instructed the jury that it could not consider "testimony that has been excluded or stricken *or which you have been instructed to disregard.*" (Trial Tr., p.469, L.21 – p.470, L.8 (emphasis added).)

## II.

### Mr. Longee Can Challenge The Sufficiency Of The Evidence Supporting The Persistent Violator Enhancement With Respect To Whether The Evidence Established The Existence Of Two Distinct Prior Felony Convictions

In opposing Mr. Longee's argument that the evidence presented at trial on the persistent violator enhancement was insufficient to support applying the enhancement because no evidence was presented that the two prior convictions were the result of separate and distinct criminal episodes, the State argues:

The Brandt<sup>[2]</sup> 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).

(Respondent's Brief, pp.12-13 (emphasis in original).)

The first problem with the State's argument is that it ignores the fact that, in order to overcome the presumption that convictions entered on the same day represent a single prior conviction, the State must present evidence to show that the incidents upon which the convictions are based were committed at different times, in different locations, or in some way allow a reviewing court to conclude that the offender "had time to reform his actions between crimes." Clark, 132 Idaho at 340.

The second problem with the State's argument is that a challenge to the sufficiency of the evidence *is* inherently a question of law. See Martel v. Bulotti, 138

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<sup>2</sup> See State v. Brandt, 110 Idaho 341 (Ct. App. 1986).

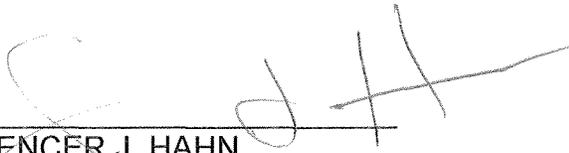
Idaho 451, 453 (2003) (“Determining the meaning of a statute *or applying law to undisputed facts constitute matters of law.*”) (emphasis added) (citation omitted). The facts at issue in Mr. Longee’s sufficiency claim are undisputed: the State presented no evidence that the burglary convictions, entered on the same day, were committed in a manner that allowed Mr. Longee “time to reform his actions between crimes.” (Appellant’s Brief, p.16 (“[T]here is no indication that Mr. Longee’s prior convictions involved separate victims, separate incidents, separate locations, or different dates. (State’s Exhibit Nos. 41 and 42.)”; Respondent’s Brief, pp.11-13 (advancing no alternative argument that, assuming appellate review of Mr. Longee’s sufficiency claim is appropriate, the evidence was nevertheless sufficient to conclude that the two prior convictions were separate incidents). Nothing in the cases cited to by the State indicates that the *only* way in which to challenge whether prior convictions entered on the same day for which no other information is known is by making a motion to the trial court prior to the issue being submitted to the jury. This is unsurprising given the fact that the “general rule” adopted in *Brandt* is that convictions entered on the same day “should count as a single conviction for purposes of establishing habitual offender status.” *Brandt*, 110 Idaho at 344.

Finally, the State’s argument is at odds with the Idaho Supreme Court’s holding in *State v. Faught*, 127 Idaho 873 (1995), that a defendant is not precluded from seeking appellate review of a sufficiency claim by having failed to make a motion for acquittal prior (or subsequent) to submission of the case to the jury. *Faught*, 127 Idaho at 877-78.

CONCLUSION

For the reasons set forth herein and in his Appellant's Brief, Mr. Longee respectfully requests that this Court vacate the judgment of conviction and remand this matter for a new trial. Additionally, he respectfully requests that this Court vacate the persistent violator finding, and, depending on this Court's ruling on the first issue, either remand the matter for resentencing without the enhancement or prohibit the State from seeking the enhancement at the retrial.

DATED this 22<sup>nd</sup> day of October, 2013.

  
\_\_\_\_\_  
SPENCER J. HAHN  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of October, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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