UIdaho Law
Digital Commons @ UIdaho Law

Not Reported
Idaho Supreme Court Records & Briefs

9-20-2013

State v. Huff Appellant's Brief Dckt. 40635

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

Recommended Citation
"State v. Huff Appellant's Brief Dckt. 40635" (2013). *Not Reported*. 1257.
https://digitalcommons.law.uidaho.edu/not_reported/1257

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. 40635
Plaintiff-Respondent,	)	
	)	BONNEVILLE COUNTY
v.	)	NO. CR 2012-11872
	)	
KIRK ALLEN HUFF,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE JOEL E. TINGEY
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

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

ATTORNEY FOR
PLAINTIFF-RESPONDENT

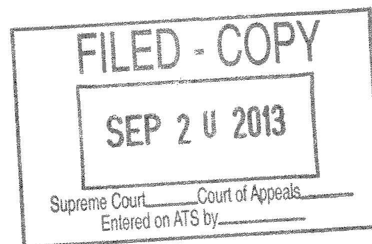


TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 1

ISSUES PRESENTED ON APPEAL 4

ARGUMENT 5

I. The District Court Denied Mr. Huff His Constitutional And Statutory Rights To A Unanimous Jury Verdict When It Failed To Give The Jury A Unanimity Instruction 5

A. Introduction 5

B. Because Separate And Distinct Incidents Of Criminal Conduct Could Provide A Basis For The Jurors' Finding Of Guilt On The Attempted Burglary Charge, The Trial Court Erred When It Failed To Instruct The Jury That It Must Unanimously Agree On The Specific Incident Constituting The Offense 6

C. The District Court's Failure To Give A Necessary Jury Instruction Is Fundamental Error 13

II. The State Failed To Present Substantial, Competent Evidence To Support Mr. Huff's Conviction For Attempted Burglary 16

III. The District Court Abused Its Discretion When It Imposed An Aggregate Sentence Of Three Years, With One Year Fixed, Upon Mr. Huff Following His Conviction For Attempted Burglary 20

CONCLUSION 24

CERTIFICATE OF MAILING 25

TABLE OF AUTHORITIES

Cases

Andres v. United States, 333 U.S. 740 (1948) 14

Hollon v. State, 132 Idaho 573 (1999).......... 22

Miller v. State, 135 Idaho 261 (Ct. App. 2000) 7, 8, 9, 12

State v. Alberts, 121 Idaho 204 (Ct. App. 1991).......... 23, 24

State v. Allen, 143 Idaho 267 (Ct. App. 2006).......... 18

State v. Bush, 131 Idaho 22 (1997).......... 9

State v. Cotton, 100 Idaho 573 (1979) 20

State v. Crawford, 130 Idaho 592 (Ct. App. 1997) 17

State v. Fabeny, 132 Idaho 917 (Ct. App. 1999).......... 17

State v. Gain, 140 Idaho 170 (Ct. App. 2004) 7, 12

State v. Glass, 139 Idaho 815 (Ct. App. 2003).......... 18

State v. Grinolds, 121 Idaho 673 (1992) 10

State v. Jackson, 130 Idaho 293 (1997).......... 20

State v. Johnson, 145 Idaho 970 (2008) 7

State v. Knutson, 121 Idaho 101 (Ct. App. 2001).......... 16, 17

State v. Luke, 134 Idaho 294 (2000).......... 13

State v. Mack, 132 Idaho 480 (Ct. App. 1999) 6

State v. Major, 111 Idaho 410 (1986).......... 8, 14

State v. Marsh, 141 Idaho 862 (Ct. App. 2004).......... 18

State v. Mitchell, 130 Idaho 134 (Ct. App. 1997).......... 17

State v. Montoya, 140 Idaho 160 (Ct. App. 2004) 7, 12

State v. Nastoff, 124 Idaho 667 (Ct. App. 1993) 18

State v. Nice, 103 Idaho 89 (1982) 21, 22

State v. Osborn, 102 Idaho 405 (1981) 23

State v Otto, 102 Idaho 250 (1981) 17, 18

State v. Perry, 150 Idaho 209 (2010) 13

State v. Reinke, 103 Idaho 771 (Ct. App. 1982) 20

State v. Severson, 147 Idaho 694 (2009) 6, 8

State v. Shideler, 103 Idaho 593 (1982) 21, 23, 24

State v. Taylor, 59 Idaho 724 (1939) 14

State v. Willard, 129 Idaho 828 (Ct. App. 1997) 17

Constitutional Provisions

Idaho Const. art. 1, § 13 .... 9, 12, 13, 14

U.S. Const.amend. V 9, 14

Statutes

I.C. § 18-306 17

I.C. § 19-2132 6

I.C. §§ 19-2316 and 19-2317 .... 12, 13

Rules

Idaho Criminal Rule 31 .... 12, 13

Additional Authorities

Criminal Procedure, § 19.2(e), p. 457 .... 9, 14

Jury Instruction No. 21 .... 5, 10

Perkins, Criminal Law 557 (2d ed.1969) 18

STATEMENT OF THE CASE

Nature of the Case

After a jury trial, Kirk Allen Huff was convicted of one count of attempted burglary. He received a unified sentence of three years, with one year fixed. On appeal, Mr. Huff contends that the district court erred by failing to instruct the jury that they must be unanimous in their determination of which of the alleged acts Mr. Huff engaged in constituted attempted burglary. Mr. Huff further contends that there was insufficient evidence to convict him of attempted burglary, and further contends that his aggregate sentence represents an abuse of the district court's discretion, as it is excessive given any view of the facts.

Statement of the Facts and Course of Proceedings

On January 25, 2012, Mr. Huff was observed standing in the alley near the back of his neighbor's house. (Tr., p.82, Ls.8-10.) While in the alley, he picked up a piece of wood approximately two feet long by four by four inches wide. (Tr., p.106, Ls.17-23, p.112, Ls.17-19; State's Ex. 2.) It had several nails sticking out of it. (Tr., p.97, Ls.4-5.) He then allegedly struck the board against the door of a utility trailer owned by Ward 4 of the Latter Day Saints church that was used for Boy Scout camp-outs. (Tr., p.100, Ls.3-14.) The trailer was being stored by Mr. Huff's neighbor a few doors down, Chad Nelson. (Tr., p.87, Ls.3-6, p.100, Ls.10-12.) Mr. Nelson observed what appeared to be Mr. Huff hitting the trailer, confronted him, and then he watched Mr. Huff walk, then run, away. (Tr., p.96, Ls.6-25, p.98, L.25 - p.99, L.15.) Mr. Huff was later found hiding in some bushes in the alleyway. (Tr., p.101, Ls.2-12.) Mr. Huff appeared to be intoxicated during the incident. (Tr., p.137, Ls.7-14.)

Mr. Huff was charged by information with attempted burglary. (R., pp.32-33.)

At trial, the owner/caretaker of the trailer, Mr. Nelson, testified that around 8:00 p.m., one of his children came into his house and told him that there were two men trying to break into his utility trailer parked at the back of his property. (Tr., p.82, L.8 – p.83, L.1.) Mr. Nelson and his wife went outside to see if they could see the two men, but there was nobody there. (Tr., p.83, Ls.1-4, p.88, Ls.1-8.) Mr. Nelson observed a great amount of damage to the trailer—the two top corners of the door were destroyed, as was the bottom left-hand corner and the left-hand locking mechanism was also destroyed. (Tr., p.83, Ls.10-13, p.86, Ls.19-23.) The two men who purportedly damaged the locking mechanism were not identified; however, during both his opening and closing remarks the prosecutor referred to this incident.

During his opening argument, the prosecutor stated that he would be showing the jury that Mr. Huff attempted to commit burglary using: the video and the damage to the trailer, particularly to the padlock, the statements of Mr. Huff and the fact that he hid in the bushes:

> And so, again, the things we're going to show you in our argument that he attempted to commit burglary are the video, the damage to the trailer, particularly to the padlock. On that video you'll hear loud sounds. You'll see a picture of the four-by-four, which is just two two-by-fours. The statements that Mr. Huff makes and also the fact that he's hiding in the bushes after the police get called.

(Trial Tr., p.74, Ls.3-10.)

In his closing argument, the prosecutor implied that it was Mr. Huff who initially caused the damage to the locking mechanism:

> So what the Defense is trying to suggest, that coincidentally some unknown people caused the majority of this damage and then Mr. Huff showed up soon thereafter and, unbeknownst to him, these other two people had tried to break in and that he just thought, "I'm going to commit some vandalism right now and commit this vandalism, and then I was

caught." What a coincidence. We have these two unknown burglars in the area at the same time Mr. Huff was trying to just vandalize the lock of the trailer. That is not reasonable to believe that. So rely on your common sense in making this decision. That's what it means to – that's what reasonable doubt's all about is that common sense.

(Tr., p.175, Ls.3-16.)

The jury was instructed on the elements of attempted burglary:

> In order for the defendant to be guilty of Attempted Burglary, the state must prove each of the following:
>
> 1. On or about July 25, 2012
> 2. in the state of Idaho
> 3. the defendant Kirk Huff did some act which was a step towards committing the crime of burglary, and
> 4. at the time of said act, the defendant had the specific intent to commit the crime of theft.
>
> If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(Jury Instruction No. 21, attached to the Motion to Augment filed on August 14, 2013.)

The jury found Mr. Huff guilty of attempted burglary. (R., p.71) The district court imposed a unified sentence of three years, with one year determinate and retained jurisdiction over Mr. Huff. (Tr., p.186, Ls.19-25; R., pp.76-78.) Mr. Huff appeals from the judgment of conviction.[1] (R., pp.80-83.)

[1] Mr. Huff also filed a Rule 35 motion, seeking leniency, which was denied by the district court. (Motion to Reduce Sentence, attached to the Motion to Augment filed on August 14, 2013; Minute Entry denying Rule 35 motion, attached to the Motion to Augment filed on August 14, 2013.) In light of the relevant standards of review, Mr. Huff does not raise the issue of the district court's denial of his Rule 35 motion in this appeal.

ISSUES

1. Did the district court err by failing to instruct the jury on unanimity?

2. Was there substantial competent evidence to support Mr. Huff's conviction for attempted burglary?

3. Did the district court abuse its discretion when it imposed a unified sentence of three years, with one year fixed, upon Mr. Huff following his conviction for attempted burglary?

ARGUMENT

I.

The District Court Denied Mr. Huff His Constitutional And Statutory Rights To A Unanimous Jury Verdict When It Failed To Give The Jury A Unanimity Instruction

A. Introduction

Some members of the jury could have found that the act of hitting the locking mechanism was committed by Mr. Huff and constituted the attempt, while other members of the jury may have felt that Mr. Huff's act of picking up the piece of wood was an attempt. Ultimately, Mr. Huff could have been convicted of attempted burglary either by the actions of the two unknown individuals in the alley who damaged the latching mechanisms on the trailer, or by the act of picking up the board and/or by hitting the trailer with the board or perhaps even by hiding in the bushes that night.

Jurors in Idaho must unanimously agree on a guilty verdict. Under the facts and circumstances of this case, the district court was required to instruct the jurors that they must unanimously agree on which act or acts constituted the attempted burglary. In failing to give the obligatory unanimity instruction, the district court denied Mr. Huff's constitutional and statutory rights to a unanimous verdict, thereby committing both reversible and fundamental error.

The jury was instructed on the elements of attempted burglary – the jury was instructed that the State must prove, *inter alia*, that "the defendant Kirk Huff did *some act* which was a step towards committing the crime of burglary, and at the time of *said act*, the defendant had the specific intent to commit the crime of theft."[2] (Jury Instruction

---

[2] Jury Instruction No. 21 provided:

No. 21, attached to the Motion to Augment the Record, filed on August 14, 2013 (emphasis added).) Because the jury was informed that it need only find that Mr. Huff committed "some act" and that at the time of "said act, the defendant has the specific intent to commit the crime of theft", the district court failed to protect jury unanimity because where the jury was never instructed as to which act alleged by the State constituted the attempted burglary, the district court was therefore required to instruct the jurors that they must unanimously agree on which of the alleged acts constituted the alleged attempted burglary. This Court should vacate Mr. Huff's conviction.

B. Because Separate And Distinct Incidents Of Criminal Conduct Could Provide A Basis For The Jurors' Finding Of Guilt On The Attempted Burglary Charge, The Trial Court Erred When It Failed To Instruct The Jury That It Must Unanimously Agree On The Specific Incident Constituting The Offense

Jurors must be instructed on all of the matters of law necessary for their consideration, including "instructions on rules of law that are 'material to the determination of a defendant's guilt or innocence.'" *State v. Severson*, 147 Idaho 694, 710 (2009) (citing I.C. § 19-2132 and quoting *State v. Mack*, 132 Idaho 480, 483 (Ct. App. 1999)). Idaho law requires a trial court to instruct the jury that they must unanimously agree on the defendant's guilt in order for the defendant to be convicted.

In order for the defendant to be guilty of Attempted Burglary, the state must prove each of the following:

1. On or about July 25, 2012
2. in the state of Idaho
3. the defendant Kirk Huff did some act which was a step towards committing the crime of burglary, and
4. at the time of said act, the defendant had the specific intent to commit the crime of theft.

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

Id. at 711 (citing *Miller v. State*, 135 Idaho 261, 267-268 (Ct. App. 2000).) In order to preserve the right to a unanimous jury verdict, a unanimity instruction must be given "when it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *State v. Gain*, 140 Idaho 170, 172 (Ct. App. 2004).

> Where the evidence indicates that separate and distinct incidents of criminal conduct could provide a basis for a juror's finding of guilt on the criminal charge in any count, the trial court must instruct the jury that it must unanimously agree on the specific incident constituting the offense in each count....

Id. at 172-73. "A unanimity instruction is used to tell the jury that they must find a defendant guilty beyond a reasonable doubt based on a single agreed upon incident, thus ensuring the defendant has a unanimous jury verdict." *State v. Montoya*, 140 Idaho 160, 167 (Ct. App. 2004).

However, "[a]n instruction that the jury must unanimously agree on the facts giving rise to the offense ... is generally not required." *Id.* There is an important exception to this general principle "when a defendant commits several acts, each of which would independently support a conviction for the crime charged." *Id.*

The Idaho Supreme Court distinguished the facts in *State v. Johnson*, 145 Idaho 970, 977 (2008), from the line of cases in which the Idaho Court of Appeals held that when "several distinct criminal acts support one count, jury unanimity must be protected by the state's election of the act upon which it will rely for conviction <u>or</u> by a clarifying instruction requiring the jurors to unanimously agree that the same underlying criminal act has been proven beyond a reasonable doubt." *Johnson*, 145 Idaho at 977 (quoting *Gain*, 140 Idaho at 173 (emphasis in original).) The *Johnson* Court distinguished the facts in *Johnson* from those in cases such as *Gain*, 140 Idaho 170, *Montoya*, 140 Idaho

at 167-168; *Miller*, 135 Idaho at 267-268, finding that in *Johnson*, there was no evidence of more criminal acts that had not been charged. *Id.* In *Johnson*, only one criminal act was charged—first-degree murder—and no evidence was presented of additional criminal acts. *Id.*

Similarly, in *Severson*, the defendant was alleged to have murdered his wife by alternative means - either by suffocating her or by poisoning her. *Severson*, at 701. The defendant argued that the district court was required to instruct the jury that they must be unanimous in determining the means by which he allegedly committed the murder. *Id.* at 710. In rejecting Severson's argument, the Idaho Supreme Court found "the trial court in this case was not required to instruct the jury that it must unanimously agree on the means by which Severson killed his wife" because he "was charged with the single act of murdering his wife." *Id.* at 712. Furthermore, the Court reasoned,

> Although the evidence showed that Severson could have murdered his wife by either overdosing her or suffocating her, it did not indicate that separate incidents involving distinct unions of *mens rea* and *actus reus* occurred. The very nature of the crime of murder eliminates this possibility. Absent evidence of more than one instance in which Severson engaged in the charged conduct, the jury was not required to unanimously agree on the facts giving rise to the offense.

Id. The Court recognized that the defendant could not be convicted of the single charge of murdering his wife on more than one occasion; thus, the district court did not err by failing to give a unanimity instruction. *Id.*

However, Idaho Courts have long recognized that a unanimity instruction is necessary where separate crimes, requiring proof of distinct unions of *mens rea and actus reus*, are alleged, even where the separate crimes are alleged in one count. The ultimate question is whether each alleged incident was part of a single course of conduct. *State v. Major*, 111 Idaho 410, 414 (1986). As the *Major* Court noted, the

distinction between whether a course of conduct constitutes one or multiple offense is important as,

> to charge a defendant with two offenses when only one was committed violates the defendant's right against double jeopardy, U.S. Const. amend. V, Idaho Const. art. 1, § 13; conversely, to charge a defendant with one offense when more than one was committed can prejudice the defendant "in the shaping of evidentiary rulings, in producing a conviction on less than a unanimous verdict as to each separate offense, in sentencing, in limiting review on appeal, and in exposing the defendant to double jeopardy." *Criminal Procedure,* § 19.2(e), p. 457.

Id. (emphasis added).

In *Miller v. State*, 135 Idaho 261 (Ct. App. 2000), the Idaho Court of appeals held that the "act or acts" language contained in Idaho Code § 18-1508 ("Lewd conduct with a minor child under sixteen"), does not "allow for a continuing course of conduct element. Rather, the legislature's use of the plural is a recognition that a series of sexual contacts by different means which occur as a part of a single incident, i.e., a continuous transaction without significant breaks, are to be charged as a single count of lewd conduct." *Id.* at 266. Based upon the evidence presented at trial, the *Miller* Court found that the defendant was alleged to have committed six separate acts of manual to genital contact and that trial counsel was deficient in failing to request a unanimity instruction (although the court found there was no prejudice). *Id.* at 267-269.

Furthermore, in *State v. Bush*, 131 Idaho 22, 33-34 (1997), the Idaho Supreme Court rejected the defendant's argument that his double jeopardy rights were violated based upon his being charged with and convicted of both lewd conduct and infamous crime against nature, as each act of fellatio performed on the victim were separate and distinct. The Court found,

> The first sexual assault took place on J.S.'s bed. The second assault took place on J.S.'s couch. The amended information clearly required proof of these different facts. Further, other events occurred in between these acts

> of sexual assault. After the first assault, J.S. was pulled off the bed and thrown onto the couch where Bush told J.S. he wanted J.S. to engage in fellatio. J.S. refused and was pushed to his knees and Bush tied a t-shirt around J.S.'s face. Bush again placed J.S. on the couch and tied his arms behind his back with a cord. It was after these events that the second act of sexual assault occurred. Bush then again placed J.S.'s penis in his mouth for five to ten minutes. These facts appear to demonstrate that there were two separate and distinct sexual assaults committed on J.S.

Id. at 34. Similarly, in *State v. Grinolds*, 121 Idaho 673 (1992), the Court found no double jeopardy violation where the defendant was convicted of two counts of rape, as the evidence showed that despite the fact that each act occurred in the same bedroom, the defendant left the bedroom between each act and jury was properly instructed they had to consider each alleged act separately. *Id.* at 675.

Thus, while Idaho law does not generally require jury unanimity of the underlying facts supporting an element of the crime, where a crime is alleged to have been committed by alternative means and where the defendant is alleged to have committed separate and distinct criminal acts, Idaho law requires unanimity even if the acts are alleged in a single count.

Here, Mr. Huff was charged with one count of attempted burglary. (R., pp.60-61.) The jury instruction which set forth the elements of an attempt told the jury that it need only find that Mr. Huff did "some act;" however, the jury was never instructed what that act was. (Jury Instruction No. 21, attached to the Motion to Augment the Record, filed on August 14, 2013.) Thus, faced with this ambiguity, the jury was essentially free to find that <u>any</u> act of Mr. Huff's constituted an attempt, and further there was no requirement that they had to agree what that act was.

Even the opening and closing statements by the State did not clarify what act the State was trying to prove constituted an attempt. During his opening argument, the prosecutor stated that he would be showing the jury that Mr. Huff attempted to commit

burglary using: the video and the damage to the trailer, particularly to the padlock, the statements of Mr. Huff and the fact that he hid in the bushes:

> And so, again, the things we're going to show you in our argument that he attempted to commit burglary are the video, the damage to the trailer, particularly to the padlock. On that video you'll hear loud sounds. You'll see a picture of the four-by-four, which is just two two-by-fours. The statements that Mr. Huff makes and also the fact that he's hiding in the bushes after the police get called.

(Trial Tr., p.74, Ls.3-10.) Thus the State listed several acts which could possibly have constituted an attempt. The jurors could possibly have found any one of these acts constituted an attempt. The district court failed to identify which act it was asking the jury to find was or was not an attempt.

Further, there was also testimony and evidence admitted that the trailer had previously been damaged, prior to Mr. Nelson's observations of Mr. Huff, including damage to the locking mechanisms of the trailer. Mr. Nelson testified that he observed damage to the locking mechanisms by two unknown persons before he allegedly saw Mr. Huff pick up the piece of wood and presumably hit the back of the trailer with it. (Tr., 83, Ls.10-13, p.86, Ls.19-23.) In his closing argument, the prosecutor implied that it was Mr. Huff who initially caused the damage to the locking mechanism:

> So what the Defense is trying to suggest, that coincidentally some unknown people caused the majority of this damage and then Mr. Huff showed up soon thereafter and, unbeknownst to him, these other two people had tried to break in and that he just thought, "I'm going to commit some vandalism right now and commit this vandalism, and then I was caught." What a coincidence. We have these two unknown burglars in the area at the same time Mr. Huff was trying to just vandalize the lock of the trailer. That is not reasonable to believe that. So rely on your common sense in making this decision. That's what it means to – that's what reasonable doubt's all about is that common sense.

(Tr., p.175, Ls.3-16.)

Some members of the jury could have found that the act of hitting the locking mechanism was committed by Mr. Huff and constituted the attempt, while other members of the jury may have felt that Mr. Huff's act of picking up the piece of wood was an attempt. Ultimately, Mr. Huff could have been convicted of attempted burglary either by the actions of the two unknown individuals in the alley who damaged the latching mechanisms on the trailer, or by the act of picking up the board and/or by hitting the trailer with the board or perhaps even by hiding in the bushes that night.

This is not the unanimous jury verdict contemplated by the Idaho Constitution,[3] I.C. §§ 19-2316 and 19-2317 and Idaho Criminal Rule 31. *See Montoya*, 140 Idaho at 167 (requiring a finding of the "defendant guilty beyond a reasonable doubt based on a single agreed upon incident...."); *Gain*, 140 Idaho at 173 (requiring the jury to unanimously agree "on the specific incident constituting the offense in each count.") *Miller*, 135 Idaho at 268 (holding that defendant was entitled to an instruction requiring that the jury find him guilty, beyond a reasonable doubt, of a single agreed upon incident). Because separate and distinct incidents of criminal conduct in this case could provide a basis for the jurors' finding of guilt on the criminal charges of attempted burglary, the trial court erred when it failed to instruct the jury that it must unanimously agree on the specific incident constituting the offense.

---

[3] In Idaho, in all criminal cases, the jury's verdict must be a unanimous verdict. *See* I.C. §§ 19-2316, 19-2317, Idaho Criminal Rule 31. Furthermore, the Idaho Constitution provides that in a felony criminal trial a jury's verdict must be unanimous. *See* IDAHO CONST. art. I, §7. Although section seven does not specifically state that felony trials require a unanimous verdict, that conclusion is inescapable from the provision's language. "The right of a trial by jury shall remain inviolate; but in civil actions, three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict." *Id.* By failing to provide for less than a unanimous verdict in felony cases, but providing for such in other types of cases, the Idaho constitution guarantees the right to a unanimous jury verdict in all felony criminal cases.

Thus it is impossible to tell whether the jury reached a unanimous verdict on any of the separate and distinct acts that could potentially constitute an attempt to burglarize. Because it is impossible to tell whether the jury correctly reached its verdict unanimously, or incorrectly reached its verdict based upon divergent theories, this Court must vacate the conviction and remand the case for a new trial. *See State v. Luke*, 134 Idaho 294, 301 (2000).

C. The District Court's Failure To Give A Necessary Jury Instruction Is Fundamental Error

Mr. Huff acknowledges that no objection was made to the omitted jury instruction on unanimity. Therefore, the claim raised is one of fundamental error. The Idaho Supreme Court has set forth the standard of appellate review of unobjected-to error. *See State v. Perry*, 150 Idaho 209 (2010). Under the three-part test for fundamental error as set forth in *Perry*, a defendant must demonstrate that: 1) one or more of his unwaived constitutional rights were violated; 2) there was a clear and obvious error without the need for additional information not contained in the appellate record; and 3) the error affected the defendant's substantial rights, meaning that there is a reasonable probability that the error affected the outcome of the trial proceedings. *Id.* at 226. Mr. Huff meets all the prongs of this test.

First, the alleged error is a violation of Mr. Huff's right to a unanimous jury verdict and right to be free from double jeopardy. The right to a unanimous jury verdict in a felony criminal trial is so fundamental to the citizens of Idaho that it has been expressed in both the constitution and in statutes. *See* IDAHO CONST. art. I, §7, I.C. §§ 19-2316, 19-2317 and Idaho Criminal Rule 31.

The Sixth Amendment to the United States Constitution provides, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...." Similarly, Article I, section 7 of the Idaho Constitution provides, "The right of trial by jury shall remain inviolate...." Idaho Const. art. I, § 7. This section "guarantee[s] the right to a trial by jury, which means a jury which has not been mislead by erroneous instructions to a defendant's prejudice...." *State v. Taylor*, 59 Idaho 724, ___, 87 P.2d 454, 460 (1939). *See also Andres v. United States,* 333 U.S. 740, 748 (1948) (Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply, "In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury.").

The Double Jeopardy Clause of the Fifth Amendment is the constitutional guarantee protecting a defendant against multiple punishments for the same offense, and is the right implicated when a unanimity instruction is at issue. U.S. CONST. amend. V. In *State v. Major*, the Idaho Supreme Court held that charging a defendant with one crime when more were in fact committed exposes the defendant to double jeopardy:

> Whether a course of conduct constitutes one offense or several can be a troublesome question. The distinction is important: to charge a defendant with two offenses when only one was committed violates the defendant's right against double jeopardy, U.S. Const.amend. V, Idaho Const. art. 1, § 13; conversely, to charge a defendant with one offense when more than one was committed can prejudice the defendant "in the shaping of evidentiary rulings, in producing a conviction on less than a unanimous verdict as to each separate offense, in sentencing, in limiting review on appeal, and in exposing the defendant to double jeopardy." *Criminal Procedure,* § 19.2(e), p. 457.

State v. Major, 111 Idaho 410, 414 (1986) (holding that a new trial was necessary as it was impossible to determine whether the jury convicted the defendant solely on the

basis of the alleged possession on the reservation, or for both alleged possessions occurring both on and off the reservation where there was no unanimity instruction).

Here, the jurors could reasonably have concluded that they were directed to find Mr. Huff guilty of attempted burglary if they found that he performed any of a variety of acts which could each constitute the crime of attempt. The jurors were not instructed as to what theory of liability the State was proceeding on—that is, what act or acts the State alleged constituted attempted burglary, nor was the jury instructed that they must unanimously agree on what act constituted an attempted burglary. Such an interpretation misled the jury and deprived Mr. Huff of his right to a unanimous verdict and implicated his right to be free from double jeopardy; thus, the jury instructions in this case were unconstitutional. The error implicates Mr. Huff's unwaived constitutional rights.

Second, the error is clear and obvious from the record. The law is clear that a defendant as a right to a unanimous verdict. The Double Jeopardy Clause clearly prohibits multiple punishments for the same offense, providing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The jury instructions are in the record, so there is no need for additional information outside the record. Further, there is no evidence that the failure to object to the instruction was a strategic decision, as Mr. Huff gained absolutely no strategic advantage by giving the jury an opportunity to convict him of "an act" which could include any of the following: the damage to the locking mechanism of the trailer by unknown persons in the alley earlier that day, loitering near the trailer, holding a piece of wood with a nail in it, hitting the trailer with the piece of wood, or hiding in some bushes. Further, trial counsel strenuously argued in his closing remarks to the jury that none of the acts Mr. Huff was

alleged to have committed constituted attempted burglary. (Tr., p.168, L.6 – p.172, L.24.)

Third, there is a reasonable probability that the error affected the outcome of the proceedings. While the jury heard evidence that Mr. Nelson saw Mr. Huff's feet and heard noises in the direction of the trailer (Trial Tr., p.145, Ls.20-23), the jury also heard evidence that the damage to the locking mechanisms of the trailer was present prior to Mr. Nelson confronting Mr. Huff at the trailer, and had possibly been done earlier that day, by two unknown persons. (Tr., p.111, Ls.3-9.) Even the prosecutor alternated between differing theories as to what act constituted attempted burglary, and ultimately failed to clarify which act the jury should find was an attempt. Thus, due to the lack of a unanimity jury instruction, the jury was misled as it was left with the impression that it could convict Mr. Huff if it found that he committed any of a various litany of acts. There was no instruction that the jurors agree as to what act or acts constituted the attempt.

Because the failure of the district court to give the jury this instruction violated Mr. Huff's right to a unanimous verdict and right to be free from double jeopardy, and because he meets all three prongs of Idaho's fundamental error test, Mr. Huff's conviction must be vacated.

II.

The State Failed To Present Substantial, Competent Evidence To Support Mr. Huff's Conviction For Attempted Burglary

The State failed to provide sufficient evidence to prove Mr. Huff guilty of attempted burglary because it failed to prove that he attempted to enter the trailer with the intent to commit theft. An appellate court's review of the sufficiency of the evidence to support a conviction is limited in scope. *State v. Knutson,* 121 Idaho 101, 104

(Ct. App. 2001). The reviewing court will not set aside the judgment of conviction following a jury verdict, if "there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt." *State v. Crawford*, 130 Idaho 592, 594 (Ct. App. 1997).

When reviewing the sufficiency of the evidence, the Court will conduct an independent review of the evidence in the record to determine whether a reasonable mind could conclude that each material element of the offense was proven beyond a reasonable doubt. *State v. Willard,* 129 Idaho 827, 828 (Ct. App. 1997); *Knutson,* 121 Idaho at 104. The Court will not substitute its views for that of the jury when determining "the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence." *Crawford,* 130 Idaho at 595. Furthermore, the Court will consider the evidence in the light most favorable to the prosecution. *Id.* In *State v. Mitchell*, 130 Idaho 134 (Ct. App. 1997), it was noted that, "[e]vidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proved." *Id.* at 135.

The attempt statute, Idaho Code § 18-306, provides that "[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof" is subject to punishment for an attempted commission of that crime.

Idaho courts have held that an attempt consists of two elements: (1) an intent to do an act or bring about certain consequences which would in law amount to a crime, and (2) an act in furtherance of that intent which goes beyond mere preparation. *See State v Otto*, 102 Idaho 250, 251 (1981); *State v. Fabeny*, 132 Idaho 917, 923 (Ct. App. 1999). The preparatory phase of a crime consists of "devising or arranging the means

or measures necessary for the commission of the offense." *Otto*, 102 Idaho at 251 (quoting Perkins, Criminal Law 557 (2d ed.1969)). "To go beyond mere preparation, the actions of the defendant must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation of the crime." *State v. Glass*, 139 Idaho 815, 818 (Ct. App. 2003) (internal quotation marks and citations omitted).

"The intent of the accused is a question of fact for the jury to determine. Direct evidence as to intent is not required. A jury may infer intent from the commission of acts and the surrounding circumstances." *State v. Marsh*, 141 Idaho 862, 867 (Ct. App. 2004) (citations omitted); *State v. Nastoff*, 124 Idaho 667, 671 (Ct. App. 1993) (holding that there was no substantial evidence in the record upon which the jury could have found beyond a reasonable doubt that the defendant intentionally started the fire).

Here, the State failed to prove that Mr. Huff had the requisite intent to take something from the trailer. It is the responsibility of the parties to ensure that their respective positions and arguments are in the record for appellate review. *See State v. Allen,* 143 Idaho 267 (Ct. App. 2006) ("An appellate court can know only what is revealed on the record and it is therefore incumbent upon the respective attorneys to clearly and unambiguously state the entire plea agreement on the record.")

Mr. Huff asserts that the evidence was insufficient to support a conviction for attempted burglary, because there was no substantial evidence that would have proven the essential element of intent beyond a reasonable doubt. There was no evidence or testimony at trial that Mr. Huff was trying to enter the trailer, and further, there was no evidence that Mr. Huff intended to commit the crime of theft. There was simply no evidence or testimony at all that Mr. Huff intended to commit theft. Although intent can

be inferred, there was no evidence that Mr. Huff was trying to enter the trailer at all. Mr. Nelson testified that he had observed what he thought was Mr. Huff twice hitting the trailer with a piece of wood. No juror could then have found beyond a reasonable doubt that there existed substantial evidence that Mr. Huff was trying to enter the trailer to take whatever was inside the trailer.

Even if the jury disbelieved Mr. Huff's explanation to Mr. Nelson that he was trying to break the nails off of the piece of wood by striking it against the trailer (Tr., p.97, Ls.1-6), there was still no evidence or testimony as to what he was trying to do. He was an intoxicated man striking a trailer with a piece of wood. It was not reasonable to infer that he was trying to break into the trailer to steal something.

Ultimately there was absolutely no evidence that Mr. Huff was attempting to enter the trailer, and there was no evidence that he was trying to enter the trailer for the purpose of taking what was inside the trailer. At most, Mr. Huff was intending to commit malicious injury to property, although there was no testimony or evidence that his actions actually inflicted harm on the trailer. Instead, there was an appalling lack of evidence that Mr. Huff was actually trying to get into the trailer. Further, there was no basis for the jury to infer that he intended to take anything from the trailer, once he gained access. There were no such facts or evidence submitted at trial. No statement by Mr. Huff as to his intent was ever admitted, no evidence, circumstantial or direct, was ever introduced that his intent in striking the trailer with a piece of wood was anything other than what he told Mr. Nelson—that the was trying to get the nails out of the wood. Thus Mr. Huff's conviction for attempted burglary cannot be upheld.

The record contains no evidence that Mr. Huff was trying to inflict damage to the locking mechanism of the trailer, there was no evidence that Mr. Huff was trying to gain

access to the trailer, and therefore the jury could not reasonably infer that he was trying to enter the trailer to commit the crime of theft. Thus, insufficient evidence exists to support his conviction for attempted burglary.

III.

The District Court Abused Its Discretion When It Imposed An Aggregate Sentence Of Three Years, With One Year Fixed, Upon Mr. Huff Following His Conviction For Attempted Burglary

Mr. Huff asserts that, given any view of the facts, his aggregate sentence of three years, with one year fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Huff does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Huff must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of Mr. Huff's rehabilitative potential, the district court abused its discretion in retaining jurisdiction over Mr. Huff instead of placing him on probation. The district

court failed to consider the fact that Mr. Huff was aware of his alcohol problem, was interested in seeking treatment for his addiction, and that, with programming, Mr. Huff could likely be successful in the community. (Presentence Investigation Report (*hereinafter*, PSI), pp.17-18.)

Mr. Huff has not had an easy life. He began drinking alcohol and using marijuana at age twelve, and his childhood included exposure to physical abuse, instability, and a great deal of family alcohol abuse. (PSI, p.11, 16, 18.) Mr. Huff reported that his mother and his grandparents drank a lot and he and his siblings would steal their alcohol and drink it.[4] (PSI, p.11.)

Mr. Huff has a good work history. He was regularly employed as a cook prior to his incarceration. (PSI, p.14.) Idaho recognizes that good employment history should be considered a mitigating factor. *See State v. Nice,* 103 Idaho 89, 91 (1982); *see also State v. Shideler,* 103 Idaho 593, 595 (1982).

Another consideration that should have received the attention of the district court is the fact that Mr. Huff has strong support from his family members. *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts). Mr. Huff has a long-time girlfriend, Linda Hurt, who he has been with for over five years. (PSI, p.12.) They "take care of each other." (PSI, p.12.)

The Idaho Supreme Court has recognized that military service is considered a mitigating factor at sentencing. In *Nice*, the Court found the defendant's honorable discharge from the military to be a factor in mitigation of sentence. *State v. Nice*, 103

[4] Mr. Huff's grandparents helped raise him and his siblings as his father left the family when he was approximately three months old. (PSI, p.11.)

Idaho 89, 90 (1982). Mr. Huff is a veteran of the U.S. Army, where he served for two years and was honorably discharged. (PSI, p.13.)

Mr. Huff has serious medical problems. Mr. Huff's medical problems are so serious, that he was taken to the emergency room during his trial. (Tr., p.53, Ls.4-7.) Mr. Huff suffers from ulcers and tumors in his colon, and takes four medications several times daily, including hydrocodone for pain. (PSI, p.15.) Mr. Huff also suffers from a traumatic brain injury and foot pain after his right foot was crushed in an accident. (PSI, p.15.)

Mr. Huff has been diagnosed with bipolar disorder and multiple traumatic brain injuries. (PSI, p.15.) The Idaho Supreme Court has recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). While Mr. Huff was previously taking medications to manage his mental health conditions, he ceased taking the medications in 2011. (PSI, p.15.) Mr. Huff still suffers from mood swings and does believe that he is in need of a mental health evaluation. (PSI, p.15.) Even the presentence investigator concluded that Mr. Huff would benefit from mental health evaluation. (PSI, p.19.) The presentence investigator noted that Mr. Huff was also diagnosed with depression during his substance abuse evaluation. (PSI, p.19.)

The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing the defendant to commit the crime and the suggested alternatives for treating the problem."

Id. at 91. Additionally, the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414 (1981). Mr. Huff began drinking alcohol around the age of 12 years old and drinks all day, every day. (PSI, p.16.) Mr. Huff becomes intoxicated almost every time he drinks. (PSI, p.16.) However, Mr. Huff realizes that he is in need of a drug and alcohol treatment program. (PSI, p.17.) He is aware that his drug and alcohol use has caused him problems with the law, his family, his employment and his health. (PSI, p.17.) Mr. Huff wants to turn his life around. (PSI, p.17.) Mr. Huff is a severe alcoholic who is physically dependent on alcohol, thus he will require stabilization of his co-occurring severe bio-medical conditions and severe withdrawal problems.[5] (PSI, p.17.) Mr. Huff is hopeful for the future—his goals are to stop drinking, get healthier, and get his life back. (PSI, p.18.)

Further, Mr. Huff expressed remorse for his acts. Mr. Huff, in his PSI Questionnaire, wrote that he felt "stupid" for the attempted burglary incident. (PSI, p.18.) He also wanted the court to know that he realized that he had a drinking problem and that he wanted to receive help for his drinking problem as well as his health problems. (PSI, p.18.) Idaho recognizes that some leniency is required when a defendant expresses remorse for his conduct and accepts responsibility for his acts. *State v. Shideler*, 103 Idaho 593, 595 (1982); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991). For example, in *Alberts*, the Idaho Court of Appeals noted that some leniency is required when the defendant has expressed "remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive

---

[5] Mr. Huff is so physically dependent on alcohol that his treating physician prescribed him a beer. (PSI, pp.17, 42.)

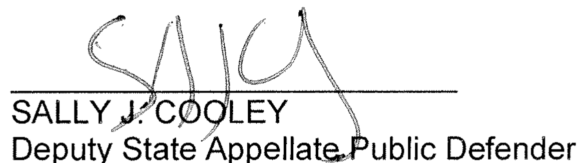
attributes of his character." *Alberts*, 121 Idaho at 209. In *Shideler,* Idaho Supreme Court ruled that the prospect of Shideler's recovery from his poor mental and physical health, which included mood swings, violent outbursts, and drug abuse, coupled with his remorse for his actions, was so compelling that it outweighed the gravity of the crimes of armed robbery, assault with a deadly weapon, and possession of a firearm during the commission of a crime. *Shideler,* 103 Idaho at 594-95. Therefore, the court reduced Shideler's sentence from an indeterminate term not to exceed twenty years to an indeterminate term not to exceed twelve years. *Id.* at 593.

Based upon the above mitigating factors, Mr. Huff asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his family support, work history, and remorse, it would have placed him on probation. Alternatively, the district court should have imposed a less severe sentence.

CONCLUSION

Mr. Huff respectfully requests that this Court vacate his conviction for attempted burglary and remand that case for a new trial. Alternatively, he requests that this Court reduce his sentence as it deems appropriate or remand his case to the district court for a new sentencing hearing.

DATED this 20th day of September, 2013.



SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

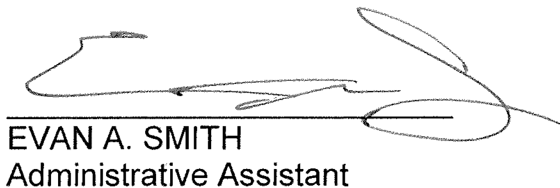
I HEREBY CERTIFY that on this 20th day of September, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KIRK ALLEN HUFF
INMATE #105978
NICI
236 RADAR RD
COTTONWOOD ID 83522

JOEL E TINGEY
DISTRICT COURT JUDGE
E-MAILED BRIEF

JOHN THOMAS
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SJC/eas