9-26-2014

State v. Detwiler Respondent's Brief Dckt. 41125

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 41125
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-2011-959
	)	
MICHAEL CLAY DETWILER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

Michael Clay Detwiler appeals from his jury convictions for aggravated assault and aggravated battery.

Statement of the Facts and Course of the Proceedings

Detwiler was removed from a bar for being disruptive, calling fellow bar patrons racial slurs, and for having a knife in the bar. (JT Tr., p.191, L.3 – p.196, L.17; p.297, L.21 – p.301, L.4.) Once outside, Detwiler drove his SUV toward the bartender who removed him, Ashley Haynes, and Kalani Storch, a customer of the bar. (JT Tr., p.204, L.19 – p.14; p.307, L.5 – p.308, L.5.) Ms. Haynes "scattered" and got out of Detwiler's way. (JT Tr., p.206, Ls.9-11.) Storch, not as fortunate, was hit by Detwiler's SUV before hitting the ground. (JT Tr., p.308, L.1 – p.309, L.4.)

The state charged Detwiler with aggravated assault, aggravated battery, and malicious injury to property. (R., pp.50-51.) A jury convicted Detwiler of aggravated assault and aggravated battery. (JT Tr., p.534, L.2 – p.535, L.11; R., pp.218-200.) The court sentence Detwiler to three-years fixed followed by two-years indeterminate for aggravated assault and a concurrent three-years fixed with 12 years indeterminate for aggravated battery. (Sent. Tr., p.40, Ls.21-25; R., pp.262-265.)

The court re-entered Detwiler's judgment of conviction following a post-conviction relief action, and Detwiler timely appealed from that judgment. (R., pp.281-288.)

ISSUES

Detwiler states the issues on appeal as:

1. Whether there was a fatal variance between the charging document and the jury instructions as they related to the charge of aggravated assault.

2. Whether the district court erred by not instructing the jury as to the necessity defense.

3. Whether the district court abused its discretion by refusing to allow Mr. Detwiler to challenge the information in the PSI, and by refusing to redline information improperly included therein.

(Appellant's brief, p.7.)

The state rephrases the issues as:

1. Has Detwiler failed to show fundamental error entitling him to review of his unpreserved claim of instructional error?

2. Has Detwiler failed to show error in the district court's refusal to instruct the jury on the affirmative defense of necessity where Detwiler failed to produce sufficient evidence to support the giving of that instruction?

3. Has Detwiler failed to establish the district court abused its discretion offering Detwiler a postponed sentencing hearing in order to address his concerns in the PSI?

ARGUMENT

I.
Detwiler Has Failed To Show Fundamental Error In The District Court's Instructions To The Jury

A. Introduction

For the first time on appeal, Detwiler argues that a fatal variance existed between the state's charging document and the district court's instructions to the jury. (Appellant's brief, pp.8-11.) Detwiler's unpreserved variance claim is not properly before this Court for review. Detwiler has failed to demonstrate from the record that the instructions actually create a variance, much less that his claimed error rises to the level of fundamental error.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587-88, 261 P.3d 853, 864-65 (2011) (citation omitted). Whether there is a variance between a charging document and the jury instructions at trial, and whether such variance is fatal to the conviction, are also questions of law given free review on appeal. State v. Sherrod, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." State v. Shackelford, 150 Idaho 355, 373-74, 247 P.3d 582, 600-01 (2010) (citation omitted).

C. There Was No Variance Between The Charging Document And The District Court's Instructions To The Jury

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000); see also Draper, 151 Idaho at 588, 261 P.3d at 865 ("An error generally is not reviewable if raised for the first time on appeal.") (citing State v. Sheahan, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003)). This same principle applies to alleged errors in jury instructions. See I.C.R. 30(b) ("No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection."); Draper, 151 Idaho at 588, 261 P.3d at 865. Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. Id.; see also State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Detwiler did not object to the jury instructions below. Thus, to prevail on appeal, Detwiler must show that the complained of instruction rises to the level of fundamental error. Review under the fundamental error doctrine requires Detwiler to demonstrate that the error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980. Correctly applying this

three-prong test to Detwiler's claim, he has failed to show fundamental error entitling him to review of this unpreserved issue.

For the first time on appeal, Detwiler asserts that the district court erred by giving jury instructions that varied from the state's charging document. (Appellant's brief, pp.8-11.) Detwiler has failed, however, to show any variance. "A variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment." Dunn v. United States, 442 U.S. 100, 105 (1979). A variance also occurs where the jury instructions given at trial allow the jury to convict the defendant of the charged crime, but on one or more alternative theories than alleged in the charging document. See, e.g., State v. Windsor, 110 Idaho 410, 716 P.2d 1182 (1985); State v. Montoya, 140 Idaho 160, 166, 90 P.3d 910, 916 (Ct. App. 2004).

If it is established that a variance exists, the appellate court must examine whether it rises to the level of prejudicial error requiring reversal of the conviction. See State v. Brazil, 136 Idaho 327, 329, 33 P.3d 218, 220 (Ct. App. 2001). A variance is fatal if it amounts to a "constructive amendment" or "deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy." State v. Jones, 140 Idaho 41, 49, 89 P.3d 881, 889 (Ct. App. 2003) (citations omitted); see also State v. Adamcik, 152 Idaho 445, 479, 272 P.3d 417, 451 (2012) (variance requires reversal "only where it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy") (citation omitted). A constructive amendment occurs if a variance alters the charging document to the extent the defendant is tried for a crime of a greater degree or a

different nature. Jones, 140 Idaho at 49, 89 P.3d at 889; State v. Colwell, 124 Idaho 560, 566, 871 P.2d 1225, 1231 (Ct. App. 1993).

There was no variance in this case because the factual basis for the charge was the same from beginning to end. The state charged Detwiler with aggravated assault, alleging:

> That the Defendant, MICHAEL CLAY DETWILER, on or about the 9th day of December, 2010, in the County of Ada, State of Idaho, did intentionally, unlawfully and with apparent ability threaten by act to do violence upon the person of Ashley Haynes, with a deadly weapon, to wit: by intentionally accelerating his Ford Explorer SUV toward Ashley Haynes and speeding towards her person as she stood in front of the car, which created a well-founded fear in Ashley Haynes that such violence was imminent.

(R., p.51.) The prosecutor began in his opening statement at trial by telling the jury that the evidence would show that on December 9, 2010, Detwiler assaulted Ms. Haynes by intentionally driving his vehicle toward her. (JT Tr., p.140, L.15 – p.141, L.15.) The state then spent the trial proving that case: Ms. Haynes testified that Detwiler intentionally accelerated and drove, "launch[ing] forward" toward her. (JT Tr., p.204, L.19 – p.206, L.11.) Detwiler's actions scared Ms. Haynes and she "scattered" to avoid being hit by his car. (JT Tr., p.206, Ls.10-11.) Another of Detwiler's victims, Kalani Storch, confirmed Ms. Haynes' version of events, testifying Detweiler "looked right over at [Ms. Haynes and himself], popped it in drive, and pulled right back out." (JT Tr., p.308, Ls.3-5.) At the close of trial, the district court instructed the jury:

> In order for the defendant to be guilty of Aggravated Assault, the state must prove each of the following:
>
> 1. On or about December 9, 2010

2. in the state of Idaho,

3. the defendant Michael Clay Detwiler committed an assault upon Ashley Haynes

4. by intentionally accelerating his Ford Explorer toward Ashley Haynes and speeding towards her person as she stood in front of the Ford Explorer; and

5. the defendant Michael Clay Detwiler committed that assault with a deadly weapon or instrument.

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; R., p.241.) To convict Detwiler of aggravated assault, the jury had to find that Detwiler intentionally accelerated and drove toward Ms. Haynes, which was the same theory of the case presented by the state at trial, and the same factual basis for the charge of aggravated assault. Therefore there was no variance in this case.

On appeal, Detwiler asserts that the district court created a variance by giving the jury the stock instruction on the definition of assault, which explains that an assault occurs when a defendant either attempts to harm a victim or threatens to harm a victim. (Appellant's brief, pp.8-11; see also R., p.240 (instruction defining assault).) Detwiler argues that the information charged only the threat of violence so introducing an attempt to harm theory was error. (Appellant's brief, pp.8-11.) This is not a clear variance, but even if it were, it would not be fatal because the crime articulated in the jury instructions—

assault—was not of a greater degree or different nature than the crime charged, and the underlying factual nature of that crime—accelerating and driving toward Ms. Haynes—was unaltered.

Detwiler's alleged variance creates no risk of double jeopardy. Whether he attempted or threatened harm, it would still be assault when Detwiler intentionally accelerated his vehicle in Ms. Haynes' direction. Even if the theories were mutually exclusive, which they are not, had Detwiler been acquitted on either theory the state would not have been able to bring a second prosecution on the other. In order to acquit Detwiler, the jury would necessarily have to find that he did not intentionally accelerate and drive toward Ms. Haynes, which was the central element of the crime.

Additionally, the alleged variance does not create any clear notice issues for Detwiler's defense. Detwiler was given notice that he was facing trial for committing assault by intentionally accelerating and driving his Ford Explorer toward Ms. Haynes, and that is the act for which he stood trial. Detwiler argues a jury question during deliberation illustrates his contention that there was a fatal variance in the aggravated assault instruction given to the jury and the charge. (Appellant's brief, p.11.) This argument is not persuasive. The jury sent a question to the trial court regarding the aggravated assault charge:

> As to Instruction No. 20, does the intent associated with assault have to be to injure Ashley? If we believe that Ashley was a bystander and not the intended target of the vehicle, has the intent portion of the statute been met?

(Exhibits, un-numbered p.28.) The court's response was to "read all instructions that ha[d] been given" to the jury as they "determine[d] the facts and appl[ied] the

law as set forth in the instructions." (Exhibits, un-numbered p.27.) The jury was instructed to read the instructions as a whole and apply them to the facts as presented at trial. Detwiler's claim is "the jurors asked if they could convict Mr. Detwiler of aggravated assault if they believed that Mr. Detwiler was not intending to threaten or trying to hit Ms. Haines." (Appellant's brief, p.11.) The question posed by the jury dealt with Detwiler's intent as he accelerated forward and was not inconsistent with the language of the charging document (R., p.51), the elements instruction (R., p.241), or the state's case as presented to the jury (JT Tr., p.204, L.19 – p.206, L.11; p.206, Ls.10-11; p.308, Ls.3-5). Contrary to Detwiler's claim on appeal, there was no variance depriving him of sufficient notice.

Detwiler was not tried for a crime of a greater degree or a different nature from the one with which he was charged—assault by intentionally accelerating and driving his vehicle toward Ms. Haynes. Because the district court's instructions did not put Detwiler at risk of double jeopardy and did not create any notice issues for his defense, even if using the stock instruction to define assault for the jury constituted a variance, it could not be fatal.

The state charged Detwiler with committing the crime of assault by intentionally accelerating and driving his Ford Explorer toward Ms. Haynes. The jury convicted Detwiler of that same crime—assault—on the same factual basis—by intentionally accelerating and driving his Ford Explorer towards Haynes. Because the jury convicted Detwiler of the same crime on the same factual basis as that charged by the state, there was no variance in the district

court's instructions. Detwiler has failed to show error, much less fundamental error, entitling him to review of this unpreserved issue.

II.
Detwiler Has Failed To Show Error In The District Court's Refusal To Give An Instruction To The Jury Which Was Not Supported By The Evidence

A. Introduction

Detwiler contends that the district court erred by not instructing the jury as to the necessity defense. (Appellant's brief, pp.11-18.) Application of the correct legal standards to the facts of this case shows no error in the court's refusal to give the requested instruction because Detwiler was not entitled to the instruction.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587-88, 261 P.3d 853, 864-65 (2011) (citing State v. Humphreys, 134 Idaho 657, 659, 8 P.3d 652, 654 (2000)).

C. Detwiler Was Not Entitled To His Proposed Necessity Instruction

A trial court may properly refuse a requested instruction which is not supported by the evidence. State v. Johns, 112 Idaho 873, 881, 736 P.2d 1327, 1335 (1987); State v. Mason, 111 Idaho 660, 669-70, 726 P.2d 772, 781-82 (Ct. App. 1986) (self-defense instruction not supported by evidence). A defendant is not entitled to a jury instruction that is an erroneous statement of the law, is not

supported by the evidence, is an impermissible comment on the evidence, or is adequately covered by other instructions. Johns, 112 Idaho at 881, 736 P.2d at 1335; State v. Turner, 136 Idaho 629, 632-33, 38 P.3d 1285, 1288-89 (Ct. App. 2002); State v. Camp, 134 Idaho 662, 665-66, 8 P.3d 657 (Ct. App. 2000). To be entitled to an instruction on an affirmative defense, a defendant must "present facts sufficient to make out a *prima facie* case relevant to [the] defense." Camp, 134 Idaho at 665-66, 8 P.3d at 660-61. Whether a reasonable view of the evidence supports an instruction is a matter within the trial court's discretion. State v. Bush, 131 Idaho 22, 32, 951 P.2d 1249, 1259 (1997); State v. Howley, 128 Idaho 874, 878, 920 P.2d 391, 395 (1996).

On appeal, Detwiler argues that the district court erred by refusing to give his requested necessity instruction. (Appellant's brief, pp.11-18.) Detwiler's claim fails because he did not meet his burden of establishing that a necessity instruction was supported by the evidence.

To be entitled to an instruction on the necessity defense, Detwiler had to show: (1) a specific threat of immediate harm; (2) the circumstances that necessitated the illegal act were not caused by the defendant; (3) the same objective could not have been accomplished by a less offensive alternative available to the defendant; and (4) the harm caused was not disproportionate to the harm avoided. State v. Hastings, 118 Idaho 854, 855, 801 P.2d 563, 564 (1990); see also I.C.J.I. 1512. Reviewing the record, the district court properly rejected the requested necessity instruction because "the evidence [did] not support the necessity defense instruction." (JT Tr., p.433, Ls.22-23.)

On appeal, Detwiler argues that the district court "needed to give that instruction" because "there was a reasonable view of the evidence supporting the necessity defense." (Appellant's brief, p.15.) Detwiler failed to satisfy all of the essential elements of a necessity defense before the district court. Those essential elements include the requirement that there be a specific threat of immediate harm. Hastings, 118 Idaho at 855, 801 P.2d at 564. Although Detwiler claims on appeal "that a group of men had approached his car and were trying to get him out of the car (implication being that they wanted to fight him)" (Appellant's brief, p.13), Ms. Haynes testified that although there were men around Detwiler's car while Detwiler was screaming racial slurs at them, the men were telling Detwiler to leave the area (JT Tr., p.201, Ls.1-5).

Contrary to Detwiler's claims that he "did not bring about the actions leading to the necessity" (Appellant's brief, p.13), the testimony clearly showed Detwiler started problems inside the bar by being confrontational, using racial slurs, and pulling out a knife and pounding it onto the table in front of him (JT Tr., p.195, L.11 – p.196, L.5; p.300, L.9 – p.304, L.3), causing Ms. Haynes to kick him out of the bar (JT Tr., p.196, L.5 – p.197, L.20) where Detwiler proceeded to scream and yell racial slurs at bar patrons outside of the building (JT Tr., p.200, L.18 – p.201, L.5).

Another of the essential elements of a necessity defense is a showing that the same objective could not have been accomplished by a less offensive alternative available to the defendant. Hastings, 118 Idaho at 855, 801 P.2d at 564; I.C.J.I. 1512. Detwiler claims on appeal the only way he could remove

himself from the situation was to drive away, and backing up was not an option that would allow him to "escape the threatened harm" from a "group of assailants." (Appellant's brief, p.14.) The testimony at trial showed Detwiler had a means of exiting the situation without having to drive his vehicle into people. There was no one behind Detwiler's vehicle to prevent him from leaving by backing up and turning onto the street. (JT Tr., p.204, Ls.4-14; 205, L.23 – p.2-6, L.3.) Additionally, Ms. Haynes had helped clear the people away who Detwiler had been screaming at and offered to get him a cab. (JT Tr., p.201, L.17 – p.202, L.3; p.323, L.14 – p.324, L.1.) Instead, Detwiler continued to scream, slammed the car door on Ms. Haynes and then proceeded to back up his car and then accelerate towards Ms. Haynes and Storch. (JT Tr., p.202, L.4 – p.205, L.14; p.305, L.11 – p.308, L.5.)

Because Detwiler failed to make a *prima facie* case on each element of his proposed affirmative defense, the trial court did not err by declining to give Detwiler's proposed instruction which was not supported by the evidence. Detwiler has failed to show an abuse of the trial court's discretion.

III.
Detwiler Has Failed To Establish The District Court Erred In Failing To Strike Portions Of The Presentence Report Without Having A Separate Hearing To Address All Of Detwiler's Concerns

A. Introduction

Detwiler argues on appeal that the district court "abused its discretion by not red-lining or otherwise removing the improperly included information from the PSI at the sentencing hearing." (Appellant's brief, p.19.) Because the court did

in fact provide Detwiler with an opportunity to address his concerns with perceived mistakes in the PSI, and he declined the opportunity, Detwiler's argument fails.

B. Standard Of Review

The district court has broad discretion in determining what evidence is to be admitted at a sentencing hearing. State v. Burdett, 134 Idaho 271, 275, 1 P.3d 299, 303 (Ct. App. 2000); State v. Viehweg, 127 Idaho 87, 92, 896 P.2d 995, 1000 (Ct. App. 1995). It is presumed that a sentencing court was able to ascertain the relevancy and reliability of the broad range of information and material which was presented to it during the sentencing process, to disregard the irrelevant and unreliable evidence, and to properly weigh the remaining evidence which may be in conflict. State v. Pierce, 100 Idaho 57, 58, 593 P.2d 392 (1979); State v. Campbell, 123 Idaho 922, 925, 854 P.2d 265 (Ct. App. 1993); State v. Holmes, 104 Idaho 312, 314, 658 P.2d 983 (Ct. App. 1983).

"A district court's denial of a motion to strike or delete portions of a PSI is reviewed on appeal for an abuse of discretion." State v. Mole, 148 Idaho 950, 961, 231 P.3d 1047, 1058 (Ct. App. 2010) (citing Idaho Criminal Rule 32(e)(1); State v. Rodrigues, 132 Idaho 261, 263, 971 P.2d 327, 329 (Ct. App. 1998).).

C. Detwiler Has Failed To Show Any Error In The Trial Court's Refusal To Strike Portions Of The Presentence Report Without A Hearing

Idaho Criminal Rule 32 provides:

> The presentence report may include information of a hearsay nature where the presentence investigator believes that the information is reliable, and the court may consider such information.

> In the trial judge's discretion, the judge may consider material contained in the presentence report which would have been inadmissible under the rules of evidence applicable at trial. However, while not all information is a presentence report need be in the form of sworn testimony and be admissible in trial, conjecture and speculation should not be included in the presentence report.

Idaho Criminal Rule 32(e)(1). The application of I.C.R. 32 has been examined extensively by Idaho courts:

> Under these rules, a sentencing court is free to consider the results of a presentence investigation if the reliability of the information contained in the report is insured by the defendant's opportunity to present favorable evidence, to examine all the materials contained in the report, and to explain or rebut adverse evidence. The court may consider hearsay evidence, evidence of previously dismissed charges against the defendant, or evidence of charges which have not yet been proved, so long as the defendant has the opportunity to object to, or to rebut, the evidence of his alleged misconduct. It is error, however, for the court to consider such information if there is no reasonable basis to deem it reliable, as where the information is simply conjecture or speculation. On appeal, we presume that a sentencing court is able to ascertain the relevancy and reliability of the broad range of information and material which is presented to it during the sentencing process, to disregard the irrelevant and unreliable evidence, and to properly weigh the remaining evidence which may be in conflict.

State v. Campbell, 123 Idaho 922, 926, 854 P.2d 265, 269 (Ct. App. 1993) (internal citations omitted).

On appeal, Detwiler argues the court abused its discretion by failing to strike or red-line information from the PSI. In fact, the court gave Detwiler the opportunity to go through the contested information at a separate hearing and he declined, instead indicating he would argue the weight of the information before the court. Detwiler indicated at the beginning of his sentencing argument to the court that he had "some issues with how the PSI was put together." (Sent. Tr.,

p.24, Ls.13-14.) After Detwiler addressed some specific concerns in the PSI, the following discussion took place between the court and counsel for Detwiler:

> THE COURT: I'm sorry. If you're going to ask that things be removed from the PSI, then we're going to have to continue the hearing in so that you can go through the entire PSI and tell me what it is specifically that you want removed, so the prosecutor can then have an opportunity to say, well, yes or no. Those are inappropriate to be in the PSI.
>
> And so if you're making that argument, then we need to reset the sentencing, and you go through the PSI in detail because I'm not going to red-line or remove anything at this point. The PSI says what it says. And I'm certainly interested in your arguments as to why certain information in the PSI, that the court should not consider it.
>
> MR. BEAVER: Okay.
>
> Well, Your Honor, given that there are approximately four or five other PSIs referenced in this, I guess, then, we'd have to ask for that. I can reference exact pages and quotes and comments in my arguments. I have them all written down, but we're asking for that.
>
> THE COURT: Okay. Then that will require a hearing, just in and of itself, to determine what is admissible and what is not admissible. The PSI contains general information. The information you're talking about, you know, it doesn't carry particular weight with me. I mean, what I'm interested in is his prior criminal history before he has a head injury. He has a head injury. His history since then, and his propensity for violence, committing violent crimes, so I mean, there's a lot in there. I mean, you're asking me to go through and red-line stuff. Okay. That's going to take, probably and [sic] hour or so of a hearing, in which you're going to have to argue each one of those, and Mr. Stellmon has the opportunity to respond.
>
> So if you want to go that route, then that's fine. We can go that route. Is that what you're asking to do, or do you want to go forward today? Otherwise I'm not removing anything at this point from the PSI. I'm listening to your arguments as to why you think the court should not be putting weight on those.

MR. BEAVER: Okay. Your Honor, I would argue that they should not be given weight then.

(Sent. Tr., p.27, L.3 – p.28, L.20.)

Although given the opportunity to continue the sentencing to work through the specific items Detwiler felt should be red-lined from his PSI, Detwiler opted to go forward and instead argue what weight certain information in the PSI should be given. (Sent. Tr., p.28, L.22 – 37, L.25.) Detwiler has failed to show an abuse of the court's discretion in offering an additional hearing on the contents of the PSI.

CONCLUSION

The state respectfully requests this Court to uphold Detwiler's judgments of conviction and sentences.

Dated this 26th day of September, 2014.

NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of September, 2014, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

BRIAN R. DICKSON
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.

Dated this 26th day of September, 2014.

NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm