11-5-2014

State v. Detwiler Appellant's Reply Brief Dckt. 41125

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
Plaintiff-Respondent,	)	NO. 41125
v.	)	ADA COUNTY NO. CR 2011-959
MICHAEL CLAY DETWILER,	)	REPLY BRIEF
Defendant-Appellant.	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE LYNN NORTON
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

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
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

TABLE OF AUTHORITIES

Cases

Statutes

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Michael Detwiler appeals, contending that three different errors occurred during his trial and sentencing: (1) there was a fatal variance between the charging document and the jury instructions on the aggravated assault charge; (2) the district court failed to give his appropriately-requested instruction on the necessity defense; and (3) the district court refused to allow him to challenge the information in the presentence investigation report (*hereinafter*, PSI) at the sentencing hearing. The State responds, contending that there was no fatal variance, the requested necessity instruction was not supported by the evidence, and the district court did not abuse its discretion in its decisions surrounding the PSI materials.

However, the State's specific arguments in support of those contentions are not relevant to the appropriate analyses of the issues raised in this appeal. This reply is necessary to refocus on the appropriate analyses for these issues. Because of those three errors, this Court should vacate the judgment and remand this case for a new trial, or, at least, remand this case for new sentencing.

Statement of the Facts and Course of Proceedings

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

ISSUES

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.

ARGUMENT

I.

There Was A Fatal Variance Between The Charging Document And The Jury Instructions As They Related To The Charge Of Aggravated Assault

As the State acknowledges, a variance occurs when "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." (Resp. Br., p.6 (citing *State v. Windsor*, 110 Idaho 410 (1985), and *State v. Montoya*, 140 Idaho 160, 166 (Ct. App. 2004).) Under this rule, since the charging document in this case did not allege that Mr. Detwiler had committed assault under the theory of attempted battery (*see* R., p.51), and the jury was nevertheless instructed on that theory of assault-by-attempt (R., p.240), there was a variance in this case. Thus, the only question remaining is whether this variance is fatal (*i.e.*, constitutes a constructive amendment), and so, demands that Mr. Detwiler receive a new trial.

The State also acknowledges that "[a] constructive amendment occurs if a variance alters the charging document to the extent that the defendant is tried for a crime of greater degree **or a different nature**." (Resp. Br., pp.6-7 (citing *State v. Jones*, 140 Idaho 41, 49 (Ct. App. 2003), and *State v. Colwell*, 124 Idaho 560, 566 (Ct. App. 1993) (emphasis added)).) However, the State goes on to argue that, because the *actus reus* would be the same under either theory of assault, this variance is not a constructive amendment. (Resp. Br., pp.7-9.)

The first problem with the State's argument on this issue is that it ignores a fundamental tenet of criminal law: "In every crime or public offense there *must* exist a union, or joint operation, of act and intent, or criminal negligence." I.C. § 18-114 (emphasis added). To simply say, as the State has in this case, that the alleged conduct would be criminal under either theory because both theories have the same *actus reus* component gives no effect to the intent components of each theory. That is inconsistent with the requirement that both act and intent are necessary to show criminal conduct. In fact, the State's argument is particularly problematic since the State is required to prove the associated intent element beyond a reasonable doubt. *State v. Searcy*, 118 Idaho 632, 636 n.5 (1990) (discussing the State's burden of proof regarding *mens rea* elements of a charged offense). As such, adopting the State's argument and allowing it to ignore the associated intent components of the theories of assault would effectively reduce its burden of proof in such cases, and thus, would violate the Constitutional protections of due process and fair trial. *See, e.g., State v. Keaveny*, 136 Idaho 31, 33 (2000).

The State's argument also fails to recognize that the two theories of assault **are** different in nature because they have different *mens rea* elements. *See, e.g., State v. McDougall*, 113 Idaho 900, 903 (Ct. App. 1988). Since the two theories are different in nature, the variance is fatal. Assault-by-threat requires that the defendant intentionally threaten to do harm which creates a well-founded fear in the victim. I.C. § 18-901(b). Therefore, the requisite *mens rea* is that the defendant acted with "'an actual intention to cause apprehension.'" *McDougall*, 113 Idaho at 903 (quoting 2 W. LaFave & A. Scott, Jr., SUBSTANTIVE CRIMINAL LAW §§ 3.4-3.5 p.316 (1986).) There is no requirement that the defendant ever intend to actually cause any harm to the victim under the assault-by-threat theory of assault. *See id.* On the other hand, assault-by-attempt requires that the defendant attempt "to commit a violent injury on the person of another." I.C. § 18-901(a). Therefore, unlike the assault-by-threat theory, the requisite *mens rea* for the assault-by-attempt theory of assault does require that the defendant act with "'an intent to cause physical injury to the victim." *McDougall*, 113 Idaho at 903 (quoting 2 W. LaFave & A. Scott, Jr., at p.313). Thus, the *mens rea* requirements for the two alternative theories of assault are different and distinct: there is the intention to cause apprehension, and "'the morally worse intention to cause bodily harm.'" *Id.* (quoting 2 W. LaFave & A. Scott, Jr., at p.316); *accord State v. Crowe*, 135 Idaho 43, 46 (Ct. App. 2000). This makes the nature of the two theories of assault very different. Therefore, because the two theories of assault are different in nature, the State's argument that the variance in this case does not require a new trial is erroneous and should be rejected.

Furthermore, the Idaho Supreme Court has specifically discussed this precise question, albeit in *dicta*, and explained that, where the jury instructions add to or alter the intent element identified in the charging document, that constitutes a fatal variance. *State v. Tribe*, 123 Idaho 721, 725 n.5 (1993). In *Tribe*, the information accused the defendant of "having tortured his wife with an intent to cause suffering or to satisfy some sadistic inclination." *Id.* However, the jury instruction provided that one of the elements of the offense was that the defendant "tortured his wife 'with the intent to cause suffering, *to execute vengeance, to extort something from* [*her*] or to satisfy some sadistic inclination.'" *Id.* (emphasis added). The Supreme Court found that instruction to be problematic "because it presented four possibilities to the jury, *any one of which could be the one* upon which the jury reached its verdict. . . . This additional language further muddies the waters as to whether all twelve jurors agreed that Tribe acted with requisite intent." *Id.* (emphasis from original). As a result, the Court found that, by instructing the jury on potential intent elements that were not included in the charging documents, there was "a fatal variance between the instructions and the charge of the prosecutor's amended information." *Id.* This was true even though the associated *actus reus* would have been the same, regardless of which of the four intents the jurors found.

The discussion in *Tribe* regarding variances has since been adopted by a majority of the Idaho Supreme Court: "When the criminal statute provides different ways for committing the crime, the jury instructions should be appropriately tailored to fit the allegations in the charging instrument." *State v. Tiffany*, 139 Idaho 909, 918 (2004) (relying on *Tribe*, 123 Idaho at 731 n.5) (overruled on other grounds by *State v. Suriner*, 154 Idaho 81 (2013)). However, the variance in *Tiffany* was not fatal because no evidence had been presented that could have supported the alternative theory of the crime included in the jury instructions. *Tiffany*, 139 Idaho at 917-18. Therefore, there was no chance that the jury convicted the defendant on the erroneously-instructed theory. *Id.* Contrarily, as the State has argued in this case, the underlying facts speak to both theories of the crime. (Resp. Br., p.13.) Therefore, unlike in *Tiffany*, there was evidence offered on the uncharged alternative theory.

As a result, the failure to appropriately tailor the jury instructions to fit the means alleged in the charging document constitutes a fatal variance. *See Tiffany*, 139 Idaho at 918. The jury instruction in this case allowed the jury to convict Mr. Detwiler on a crime of a different nature than the one alleged in the charging document. *Compare Tribe*, 123 Idaho at 725 n.5. As even the State concedes (Resp. Br., pp.6-7), when that happens, the variance is clear, reversible error.

Additionally, it is clear that the jurors were discussing the *mens rea* and intent components of the alleged crime. (*See* Exhibits, p.28 (the jury's question about the evidence necessary to find the requisite intent for aggravated assault).) As such, there is a reasonable possibility that, had the jurors been properly instructed, their verdict would have been different. Thus, the fact that the district court referred the jurors back to the erroneous instruction when they posed a question specifically about the intent element demonstrates that there is a reasonable possibility that erroneous instruction impacted the verdict in this case. Since that clear error, which touches on Mr. Detwiler's constitutional right to a fair trial, was prejudicial, it is fundamental error. *See State v. Perry*, 150 Idaho 209, 226 (2010). Therefore, this Court should vacate Mr. Detwiler's conviction and remand this case for a new trial.

II.

The District Court Erred By Not Instructing The Jury As To The Necessity Defense

The State's argument as to whether a necessity instruction was required in this case is fundamentally flawed because it is entirely based on the presumption that Mr. Detwiler's version of events may be wholly discounted in the analysis. (*See generally* Resp. Br., pp.11-14.) For example, the State contends that Mr. Detwiler did not present sufficient evidence that he was in danger because, while he testified that there was a group of men at his car trying to attack him, Ms. Haynes had testified that those men were simply "telling [Mr.] Detwiler to leave the area" and Mr. Detwiler was screaming at the men.[1] (Resp. Br., p.13.) Based on that conflicting testimony, the State argues that Mr. Detwiler had not presented sufficient evidence on one of the elements of the necessity defense (that there was a specific threat of imminent harm). (Resp. Br., p.13.) The State also contends that, because there was evidence suggesting that Mr. Detwiler had provoked the situation with the comments he made back inside the bar, he had not presented sufficient evidence on another element of the defense (that he did not cause the threatening situation). (Resp. Br., p.13.) Based on these assertions, the State concludes, "[Mr.] Detwiler failed to make a *prima facie* case on each element of his proposed affirmative defense," and so, the district court properly refused to give the requested instruction. (Resp. Br., p.14.)

The State's arguments are irrelevant to the proper analysis; credibility of the witnesses and weight of the evidence is not part of the consideration of whether an instruction should be given. "It is a well-settled principle of law that, though the court may not believe the testimony of a defendant and witnesses corroborating him, the solemn duty rests upon the court to instruct the jury as fairly and impartially upon the theory of defense as upon the theory of prosecution." *State v. Moultrie*, 43 Idaho 766, ___, 254 P. 520, 523 (1927); *accord State v. Scroggie*, 110 Idaho 103, 110-11 (Ct. App. 1986), *overruled on other grounds in State v. Porter*, 142 Idaho 371, 375 (2005).

---

[1] The State's summary of Ms. Haynes testimony does not square with Ms. Haynes' actual statements. For example, she testified that there was a lot of shouting by the men who were surrounding Mr. Detwiler's car, and she had to tell them to back off. (Tr., Vol.4, p.200, L.25 - p.201, L.22.) In fact, she testified that she did not think it would have been safe for Mr. Detwiler to have gotten out of the car. (Tr., Vol.1, p.260, Ls.12-16.) Thus, the State's assertion that the men were simply telling Mr. Detwiler to leave is inconsistent with the evidence presented. It also does not account for the boot print that was found on the door of Mr. Detwiler's car. (Tr., Vol.4, p.342, Ls.15-17.)

As such, when "[t]here was testimony supporting it and, if believed by the jury, would have required a verdict of not guilty," the requested instruction should have been given. *State v. White*, 46 Idaho 124, ___, 266 P. 415, 418-19 (1928) (citing *Moultrie*, 43 Idaho 766); *accord State v. Pearce*, 146 Idaho 241, 247-48 (2008). Thus, the appropriate rule is: "'A defendant is entitled to an affirmative instruction applicable to his testimony based upon the hypothesis that it is true, when his testimony affects a material issue of the case.'" *State v. Huskinson*, 71 Idaho 82, 88 (1951) (quoting *Dismore v. State*, 44 P.2d 894, 895 (Okla. Crim. App. 1935)).

The idea that a defendant should be afforded an instruction "based on the hypothesis that it is true" is, of course, premised on the fact that he has presented evidence speaking to all the elements of the proposed defense. *See, e.g., State v. Camp*, 134 Idaho 662, 665-66 (Ct. App. 2000). Therefore, upon presenting such evidence, the defendant is entitled to an instruction if, given the hypothesis that his evidence is true, there is a possibility that the jury could have returned a not guilty verdict.[2] *See Huskinson*, 71 Idaho at 88; *cf. State v. Mojica*, 95 Idaho 326, 327 (1973) (pointing out "[*w*]*hile the defendant presented evidence sufficient for the jury to consider his defense of entrapment*, [the jurors] were entitled to disbelieve the defendant and to rely on the agent's testimony and find for the State on the issue of guilt") (emphasis added). Where the district court fails to properly instruct the jury in such cases, the Idaho Supreme Court has held: "Since no other instructions were given presenting the

[2] This is true even if the jury might ultimately not believe the defendant's evidence, or find contradictory evidence more credible. The determination of whether or not to give an affirmative defense instruction is assessed presuming that the defendant's evidence will be believed. *Huskinson*, 71 Idaho at 88.

theory of appellant's defense, we conclude that it was reversible error to deny appellant's request to give the [requested] instructions." *State v. McGlochlin*, 85 Idaho 459, 466-67 (1963) (quoting *Moultrie*, 254 P. at 523).

In this case, Mr. Detwiler's testimony, combined with the other evidence in the case (for example, the boot mark on his door and the testimony that it would not have been safe for Mr. Detwiler to exit the car) which reinforced Mr. Detwiler's testimony that he was being assaulted while he was in his car, was sufficient to allow him to present a necessity defense to the jury. There was a *reasonable view* of the evidence (*i.e.*, if the jurors had believed Mr. Detwiler over Ms. Haynes) that supported the requested instruction. (*See* App. Br., pp.12-15 (discussing in detail the evidence presented that speaks to each element of the necessity defense).) The State's argument – that, because the jury might have believed Ms. Haynes, and so ultimately rejected the defense – is simply not a valid reason for the district court to have refused to give the instruction in the first place. *See, e.g., Moultrie*, 254 P. at 523. So long as a *reasonable view* of the evidence would support the instruction (*i.e.*, given the hypothesis that Mr. Detwiler's evidence is true), the district court is *required* to give the instruction. *State v. Howley*, 128 Idaho 874, 878 (1996); *State v. Tadlock*, 136 Idaho 413, 414 (Ct. App. 2001).

Similarly, just because there are alternative explanations as to who or what triggered the confrontation at the car does not mean that Mr. Detwiler did not present sufficient evidence to justify getting the instruction. Rather, there was evidence that Ms. Haynes had managed to quell the situation in the bar and Mr. Detwiler was packing up his things, preparing to leave, which suggests that, when the people inside the bar followed Mr. Detwiler outside, they were initiating a new confrontation which Mr. Detwiler did not instigate. (*See* App. Br., pp.13-14.) It is the jury's job to determine which evidence is ultimately credible, but given the hypothesis that Mr. Detwiler's evidence was true, that evidence supports his assertion that he did not cause the threatening situation, and therefore, he presented sufficient evidence to merit the necessity instruction. *Huskinson*, 71 Idaho at 88; *see also Mojica*, 95 Idaho at 327.

The State makes another, related argument directed specifically at Mr. Detwiler's assertions about the "least offensive means" element of the necessity defense. Specifically, it contends that Mr. Detwiler could have driven safely away, rather than driving forward (and thus, towards the alleged victim), and so, Mr. Detwiler failed to present sufficient evidence that his actions were the least offensive means to escape the potential harm. (Resp. Br., pp.13-14.) In making that argument, the State completely ignores, rather than tries to mitigate against, Mr. Detwiler's testimony. As before, that sort of argument is irrelevant to whether the necessity instruction was appropriate.

Mr. Detwiler testified that he did, in fact, try to drive in reverse and leave the parking lot, but that doing so did not free him from the threatening situation:

> As soon as [Ms. Haynes] left the area of my car, walked over towards the tree, this black guy came up and he opened my car door. And he said, "Get the [expletive deleted] out of the car. You're going to get out of the car." And he had the door open . . . . **And I put the car in reverse, and he started to come closer into my car**. . . . So I was thinking that [going] forward would break this guy away from my door and give me enough chance to lock the doors, which is what I did.

(Tr., Vol.4, p.386, L.9 - p.387, L.2 (emphasis added).) Ms. Haynes' testimony supports Mr. Detwiler's assertion that he had initially backed up, and then drove forward.

(Tr., Vol.4 p.204, Ls.19-23; Tr., Vol.4, p.275, Ls.3-9.) Therefore, contrary to the State's assertion, there was evidence indicating that Mr. Detwiler had tried to back out and it was unsuccessful in resolving the threatening situation. As a result there is evidence that Mr. Detwiler's actions were the "least offensive means" available.

Since the jury could have believed Mr. Detwiler's account, there was a reasonable view of the evidence which supported the instruction. As before, it does not matter whether or not the jurors would have ultimately believed Mr. Detwiler's account; he was still entitled to have the jury consider his defense based on the evidence presented at trial. *E.g. Huskinson*, 71 Idaho at 88; *Moutrie*, 254 P. at 523. Therefore, the State's argument on the "least offensive means" element is similarly irrelevant and should be rejected. Because Mr. Detwiler presented sufficient evidence to merit a necessity instruction, the district court erred by not giving that instruction. As such, this Court should vacate the judgment of conviction and remand for a new trial where the jury is properly instructed.

III.

<u>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</u>

The State contends that the district court provided Mr. Detwiler with an opportunity challenge the contents of the PSI at a continued hearing, and thus, because defense counsel decided not to take advantage of that opportunity, the district court did not abuse its discretion by not allowing Mr. Detwiler to challenge the contents of the PSI at the sentencing hearing. (Resp. Br., pp.15-18.) That argument ignores the rule clearly articulated by the Idaho Court of Appeals: "it is at the sentencing hearing—and not beyond—that the defendant is given the opportunity to object to [the PSI's] contents."[3] *State v. Person*, 145 Idaho 293, 296 (Ct. App. 2007). The district court made it very clear that it was not going to entertain objections to the contents of the PSI at the sentencing hearing: "I'm not going to red-line or remove anything at this point. The PSI says what it says," and "I'm not removing anything at this point from the PSI." (Tr., Vol.5, p.27, Ls.12-14; Tr., Vol.5, p.28, Ls.15-16.) In taking that position, the district court allowed unreliable information to remain in the PSI. That position is directly contrary to the rule from *Person*, and so, it constitutes an abuse of the district court's discretion.

As such, even if continuing the sentencing hearing were an appropriate option under *Person*, the fact that the district court refused to make note of Mr. Detwiler's challenges at the sentencing hearing which actually took place is still not acceptable. Therefore, the State's argument on this issue is meritless and should be rejected. Because the district court abused its discretion at the sentencing hearing which actually occurred, Mr. Detwiler's sentence should be vacated and the case remanded for a new sentencing with a proper PSI. *See, e.g., State v. Mauro*, 121 Idaho 178, 183 (1991); *State v. Molen*, 148 Idaho 950, 961 (Ct. App. 2010).

[3] The State has not argued that this rule is erroneous or otherwise contended that it should be abandoned. (*See generally* Resp. Br.) In fact, it has not acknowledged that rule at all. (*See generally* Resp. Br.)

CONCLUSION

Mr. Detwiler respectfully requests that this Court vacate his judgment of conviction and remand this case for a new trial. Alternatively, he requests that this Court vacate his sentence and remand the case for a new sentencing hearing with an instruction to allow him an adequate opportunity to challenge the information in the PSI materials.

DATED this 5th day of November, 2014.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of November, 2014, 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:

MICHAEL CLAY DETWILER
120 S MOUNTAIN AVE
ASHLAND ID 97520

LYNN NORTON
DISTRICT JUDGE
E-MAILED BRIEF

BRIAN MARX
ADA COUNTY PUBLIC DEFENDER'S OFFICE
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

BRD/eas