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Crawford v. State Appellant's Brief 1 Dckt. 41669

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHANE CRAWFORD, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	No. 41669 CV-PC-2013-11891 (Ada County)

OPENING 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 CHERI C. COPSEY,
District Judge

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II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal from the summary dismissal of a post-conviction petition.

B. *Procedural History and Statement of Facts*

1. Introduction

Shane Crawford was charged in Ada County Case No. CR-FE-2010-7100 with two counts of Lewd Conduct with a Minor Child Under Sixteen ("Counts I and II") and two counts of Sexual Abuse of a Child Under Sixteen. (CR 5.) Mr. Crawford entered not guilty pleas to the four charges and was represented at trial by attorney Matt Roker. (*Id.*) He was found guilty by a jury of the two lewd conduct counts and not guilty of the two sexual abuse counts. He was sentenced to concurrent sentences of twenty-five-years with six years fixed on each count. (CR. 4-5.)

2. Testimony at the trial

The state's first witness was As.C. She was the alleged victim in Count I. As.C. testified that she is Mr. Crawford's daughter and that in 2009 she was living in a home with him and the rest of her family. (T pg. 196, ln. 1 – pg. 198, ln. 5.)[1] A few months before July of 2009, As.C. and Mr. Crawford were watching a movie while laying on the couch in the living room. (T pg. 198, ln. 6 – pg. 199, ln. 19.) As.C. testified that while lying on the couch, Mr. Crawford "started reaching up my shirt and groping my breasts and then he started going down into my panties and began touching my vagina." (T pg. 199, ln. 21 – 25.) As.C. elaborated that Mr. Crawford's hand

[1] Mr. Crawford attached a copy of the trial transcript to his petition and asked that the court take judicial notice of it. (CR 11, 257.) The court granted the motion. (Transcript Post Conviction Proceedings (8/7/2013) pg. 11, ln. 12-16.)

was over her bra feeling her breasts and that "he was feeling down into my crotch area." (T pg. 200, ln. 12 – pg. 201, ln. 7.) As.C. thought the entire event lasted about 30 minutes and when "he was going onto my vagina" she left to go play video games upstairs. (T pg. 201, ln. 18-25.)

The next witness was Tracy Crawford, Mr. Crawford's ex-wife. (T pg. 218, ln. 7 – pg .219, ln. 3.) Ms. Crawford testified about the family relationships and the divorce, and was allowed to testify about both An.C. and As.C. making disclosures to her regarding being sexually touched by Mr. Crawford. (T pg. 218, ln. 12 – pg. 234, ln. 6.)

An.C. was the next witness. An.C. was the victim in Count II. An.C. testified that she is also Mr. Crawford's daughter. (T pg. 238, ln. 8-16.) She claimed that when she was in 8th grade, Mr. Crawford offered her an alcoholic drink and asked her if she knew what a clit was. (T pg. 242, ln. 17-18.) An.C. responded that she "did not know what that was." *Id.* An.C. then testified that "He said, 'Well let me show you,' and then was going to show me and I, like, backed away when he was going to show me." (T pg. 243, ln. 10-12.) When the prosecutor asked "So, did his hand touch you?", An.C. responded "Yeah." (T pg. 243, ln. 10-16.) But when asked "Where did he touch you?", An.C. testified, "Outside of my vaginal area." (T pg. 243, ln. 15-16.)

The state argued to the jury and later confirmed to the Court that the "clit incident" was the incident which constituted Count II. (T pg. 498, ln. 5-14; pg. 545, ln. 8 - pg. 546, ln. 6.)

On another occasion, when An.C. was about 13 years old, she was on the couch with Mr. Crawford and he was rubbing her leg up toward her privates, outside of her bikini line. (T pg. 244, ln. 20 – pg. 245, ln. 21.) Around Christmas of 2008, Mr. Crawford allegedly pulled out his penis and tried to show it to An.C., but she looked away. (T pg. 248, ln. 24 – pg. 251, ln. 11.) At

a party, Mr. Crawford allegedly grabbed An.C.'s breast in front of others in a joking way. (T pg. 251, ln. 12 – pg. 253, ln. 11.) Another time, while on the phone with her grandfather, Mr. Crawford began rubbing An.C.'s stomach and moving his hand toward her shirt; she kept batting it away before he could touch any private areas. (T pg. 254, ln. 1 – pg. 257, ln. 2.)

The state then presented the testimony of the detective assigned the case and a counselor specializing in counseling sexually abused children. (T pg. 274, ln. 22 – pg. 335, ln. 7.) The state's last witness was Sharon Crawford, Mr. Crawford's mother, who noted that the girls had disclosed that Mr. Crawford had been touching them in a way that made them uncomfortable, but saw nothing sexual about the touching they reported. (T pg. 346, ln. 1-16; pg. 351, ln. 22 – pg. 352, ln. 4.)

Mr. Crawford called his son, Nolan Crawford. (T pg. 405, ln. 5-12.) Nolan testified that his father had a good relationship with his family, that he knew that An.C. had walked in on her father in states of undress in the bathroom and had walked in on her parents having sex. (T pg. 407, ln. 8 – pg. 413, ln.19; pg. 415, ln. 18 – pg. 416, ln. 4.) George Crawford, his other son, testified similarly. (T pg. 429, ln. 1 – pg. 435, ln. 18.) The defense then rested. (T pg. 462, ln. 6-7.)

The state then recalled An.C. who testified that she had walked in on her parents having sex in their bathroom. (T pg. 465, ln. 3 – pg. 467, ln. 5.) The state then rested. (T pg. 469, ln. 4.) No I.C.R. 29 motion for judgment of acquittal was made by defense counsel.

The jury was instructed and excused to deliberate. (T pg. 482, ln. 7 – pg. 492, ln. 7, pg. 534, ln. 12.) During deliberations, the jury sent a number of questions to the judge. (T pg. 542, ln. 6 – pg. 546, ln. 2.) Question number three had two parts, as follows:

> [1.] In order to have committed manual – genital contact does it require touching the vaginal area?
>
> [2.] Does touching of breast-area constitute manual-genital contact?

In response to part two, defense counsel stated that the answer was "no." (T pg. 544, ln. 21.) The district court stated that it was "not going to define for them manual-genital." (T pg. 544, ln. 21-24.) The state asked that the jury just be informed that they needed to reread the instructions. (T p. 545, ln. 6-7.) The district court noted:

> Well, if the jury – I do not feel comfortable defining, and, in fact, there is case law that says not only should you default to the standard instructions, but that while – while it may see – it's tempting to want to define every single word, that it's inappropriate for the court to do so and that the jurors have to apply their understanding – their common ordinary understanding to it. And, therefore, I'm just going to tell them to reread the instructions.

(T p. 545, ln. 8-18.) The jury was then specifically informed, "Please re-read all the instructions." (CR 68.)

The jury returned a guilty verdict on Counts I and II after being so instructed. (CR 8.)

Mr. Crawford appealed. (CR 5.) Elizabeth Allred of the State Appellate Public Defender's Office represented Mr. Crawford on appeal. (*Id.*) On June 27, 2012, the Court of Appeals vacated the conviction on Count I, but affirmed on Count II and also affirmed the sentence with respect to Count II. *State v. Crawford*, No. 38587, 2012 Unpublished Opinion No. 538. The Court of Appeals vacated Count I because the trial court failed to adequately answer the second part of jury inquiry #3: "Does touching of the breast area constitute manual-genital contact?" The Court of Appeals found that the Court's failure to clarify that the breast was not a genital for purposes of the lewd conduct statute was error, but also that only Count I involved an incident where there were allegations of breast touching. Thus, the error was harmless as to

Count II. (A true and correct copy of the Court's opinion is attached hereto as Exhibit A.)

The Remittitur in the appeal was filed in the district court on August 23, 2012. (CR 6.) On September 14, 2012, the state moved to dismiss Count I. On October 3, 2012, the district court granted the motion to dismiss, leaving only the judgment and sentence as to Count II remaining. (CR 6.)

3. Proceedings upon post-conviction petition

On July 2, 2013, Mr. Crawford filed a petition for post-conviction relief as to Count II alleging that his trial counsel and appellate counsel were ineffective. (CR 4.) He alleged that trial counsel was ineffective for failing to move for a judgment of acquittal under I.C.R. 29(a) due to insufficiency of the evidence as to Count II. He alleged that there was insufficient evidence to support the conviction on Count II as a matter of law because An.C. did not testify that Mr. Crawford touched her genitalia and the state did not present any other evidence that Mr. Crawford touched An.C.'s genitalia at that time. (CR 6-10.)

He also alleged that trial counsel was ineffective during jury deliberations. Mr. Crawford alleged that trial counsel's performance was deficient because a reasonably competent attorney would have requested that the Court answer "yes" in response to the first part of the jury's question: "In order to have committed manual-genital contact, does it require touching the vaginal area?" or have asked the court to define the word "genital." He also alleged that trial counsel's deficient performance prejudiced Mr. Crawford because, had the court instructed the jury on the definition of "genital," or instructed the jury that it had to find that Mr. Crawford manually touched the vaginal area of As.C. (in Count I) and/or An.C. (in Count II), the jury would have acquitted Mr. Crawford of Count II because there was no evidence of manual-genital

touching to support a conviction on that count. (CR 9-10.)

Mr. Crawford also alleged that he was prejudiced because appellate counsel could not raise the issue of whether the trial court should have instructed the jury as to the definition of "genital" or that it should have instructed the jury that it had to find that Mr. Crawford manually touched the vaginal area of A.C. (in Count I) and/or An.C. (in Count II) because trial counsel failed to preserve that issue for appeal. Had the issue been preserved for appeal, the Court of Appeals would have reversed the conviction on Count II due to the trial court's jury instruction error. (CR 10.)

Finally, Mr. Crawford alleged that appellate counsel's performance was deficient because a reasonably competent appellate attorney would have raised a sufficiency of the evidence claim as to Count II given the insufficiency of proof, especially as there were not stronger issues to raise on appeal as to Count II. He also alleged appellate counsel's deficient performance prejudiced Mr. Crawford because had she raised an insufficiency of the evidence challenge as to Count II on appeal, the Court of Appeals would have vacated the conviction and ordered that a judgment of acquittal enter as to that count. (CR 11.)

In support of the petition, Mr. Crawford attached as Exhibits the trial transcripts, the Appellant's and Respondent's Briefs in the direct appeal and the Court of Appeals' unpublished opinion. (CR 11.) The Court later took judicial notice of the trial transcripts. (TPCP (8/7/2013) pg. 12, ln. 12-16.)

The state filed an Answer and a Motion for Summary Disposition. (CR 266, 278.) Mr. Crawford filed a Cross-Motion for Summary Disposition. (CR 281.) After briefing and a hearing, the court denied Mr. Crawford's motion, granted the state's motion and dismissed the

case (CR 323, 337.)

A timely notice of appeal was filed. (CR 339.) On March 24, 2014, a Corrected Final Judgment was filed by the district court.

III. ISSUES PRESENTED FOR REVIEW

A. Did the trial court err in finding trial and appellate counsels' performances were not deficient because there was sufficient evidence in the trial record to support the conviction on Count II? If so, was the error prejudicial?

B. Did the trial court misapply the Court of Appeals' opinion in *Mintun v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007), when dismissing the ineffective assistance of appellate counsel claim, as the sufficiency of the evidence claim was the strongest issue which could have been raised with regard to Count II?

C. Did the trial court err in finding that trial counsel's failure to request an affirmative answer to the jury's inquiry or to request the court to define the word "genitalia" was not deficient performance? If so, was the error prejudicial?

IV. ARGUMENT

A. *The Trial Court Erred in Finding Trial and Appellate Counsels' Performances Were Not Deficient. There Was Insufficient Evidence in the Trial Record to Support the Conviction on Count II. The Error Prejudiced Petitioner.*

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama*, 287 U.S. 45, 73 (1932). The Equal Protection and Due Process Clauses of the Fourteenth Amendment guarantee the right to counsel on appeal. *Douglas v.*

California, 372 U.S. 353 (1963). This right to counsel includes the right to effective assistance of that counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Idaho law also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852.

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668 (1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.* An ineffective assistance of appellate counsel claim is judged under the standards set forth in *Strickland. See e.g., Mintun v. State*, 144 Idaho at 658, 168 P.3d at 42.

The Due Process Clauses of the United States and State Constitutions preclude conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970).

> In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979). In the case where a properly instructed jury has convicted, even though no rational trier of fact could have found guilt beyond a reasonable doubt, that conviction cannot constitutionally stand. *Jackson*, 443 U.S., pg. 318.

Upon a challenge to the sufficiency of the evidence, the Court will determine, based upon

its independent consideration of the evidence, whether there was substantial and competent evidence to support the verdict. *State v. Hollon*, 136 Idaho 499, 501, 36 P.3d 1287, 1289 (Ct. App. 2001). Put in constitutional terms: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S., pg. 319.

1. Trial counsel

Trial counsel was ineffective because he failed to move for a judgment of acquittal as to Count II.

Here is the testimony from An.C regarding Count II:

Q. And so do you remember a time when you were in the kitchen with your dad?

A. Yes.

. . . .

Q. Okay. So what were you doing in the kitchen?

A. He was offering me an alcoholic drink and I told him I didn't want any alcohol. And I don't know how the conversation got brought up, but he asked me what a clit was and I told him I didn't know what that was.

. . . .

Q. And then what did he do?

A. He said, Well, let me show you," and then went to show me, and I, like, backed away when he was going to show me.

Q. Okay. So did his hands touch you?

A. Yeah.

Q. Where did they touch you?

A. Outside of my vaginal area.

(T pg. 242, ln. 3 - pg. 243, ln. 16.) After her testimony about being touched outside of her vaginal area, An.C testified as follows:

Q. Okay. So was he going down, like down from your shorts or was he going up?

A. Up.

(T pg. 243, ln. 13-19.)

An.C. testified that Mr. Crawford was reaching up her shorts and he touched outside her vaginal area. It makes sense that he was not able to reach her vaginal area in light of An.C's testimony that she "backed away when he was going to show me." (T pg. 243, ln. 11-12.) However, being touched "outside of my vaginal area" is not sufficient to prove the allegation in Count II, which alleged manual-genital touching. (CR 67).

An.C's trial testimony that she was touched outside of her vaginal area is corroborated by her prior statements to Detective Ellis. The detective testified:

> Q. Yeah, on the day that the alcohol use was involved. I believe there was an allegation by [An.C] that the father had brought up the issue of do you know what a clit is.
>
> A. Correct.
>
> Q. Do you remember that?
>
> A. Right. That was the day in the kitchen where he --
>
> Q. Yes.
>
> A. Yes
>
> Q. And did [AC] [verbatim] tell you what her response was when she indicated that her father had made a quick move toward her to show her what a clit was?

A. Yes, she indicated that he had reached his hand up the pant leg of her shorts.

Q. Okay.

A. He was *trying* to get her - get his hand inside of her underwear and she stepped away from him and told him no.

(T pg. 284, ln. 24 - pg. 285, ln. 18.) (Emphasis added.) An.C did not tell Detective Ellis that she was touched on her vaginal area. An.C told the detective that Mr. Crawford touched under her pant leg in an attempt to get his hand inside her underwear, but she avoided that contact by stepping away. An.C's prior statement confirms her trial testimony that she was touched outside of her vaginal area.

There was insufficient evidence to support Count II because the state did not produce any evidence that Mr. Crawford touched the genitals of An.C. during the "clit incident." The evidence was only that he touched outside of her vaginal area. Consequently, it was ineffective assistance of trial counsel to fail to move the court for a judgment of acquittal under I.C.R. 29.

The trial court rejected Mr. Crawford's argument writing as follows:

> Crawford attempts to reinterpret what the victim meant. However, applying ordinary meanings, the vagina is an internal organ. It is defined and understood to be "the passage from the vulva to the womb in woman." *See* OXFORD AMERICAN PAPERBACK DICTIONARY 1027 (1980). Thus, the external genitalia are "outside" the vaginal area. Outside is defined as "the outer side of a surface." *Id.*, at 634. A jury could reasonably understand her testimony to be referring to the external genitalia (or outside the vaginal area) which is what is required under the statute for a conviction. Therefore, this testimony, especially combined with the jury's determination of her credibility, is sufficient to sustain the conviction.

(CR 330-331). The court's analysis is in error and should be rejected for several reasons.

First, the court's analysis is illogical. Even if one assumes that An.C meant to say that she was not touched on the vagina but elsewhere, as the court finds, that is still not sufficient

evidence. Being touched somewhere other than the vagina does not mean the touching occurred on genitalia, as required for conviction.

Second, the testimony was that An.C. was touched outside her "vaginal area" not outside of her "vagina" and the term "vaginal area" means the area containing all of the external female genitalia. Genitalia is defined as "the organs of the reproductive system; especially: the external genital organs." http://www.merriam-webster.com/dictionary/genitalia. "The female internal genitalia are the ovaries, Fallopian tubes, uterus, cervix, and vagina. The female external genitalia are the labia minora and majora (the vulva) and the clitoris." http://www.medterms.com/script/main/art.asp?articlekey=11372.

In interpreting a statute, the words used "should be given their plain, usual and ordinary meaning." *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011), q*uoting, Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009); *see also McLean v. Maverik County Stores, Inc.* 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). The term "vaginal area" is regularly used as a synonym of female external genitalia in Idaho case law. *See, e.g., State v. Cardell*, 132 Idaho 217, 220, 970 P.2d 10, 13 (1998) ("The issue whether Cardell deliberately touched R.S.'s vaginal area was a material and disputed issue concerning the crime charged. Although Cardell did not deny that he gave R.S. a massage, which included nipple manipulation and massaging the upper thighs of R.S., he testified he never massaged R.S.'s vaginal area. Instead, Cardell testified that he never rubbed the victim's genitals and that as he massaged the inner thigh his hand would have been touching the outside of the vaginal area but at no time did he directly touch R.S.'s vagina."); *State v. Lewis*, 126 Idaho 77, 79, 878 P.2d 776, 778 (1994) (Lewd Conduct with a Minor Under Sixteen case where the state's evidence was that "both

the victim and her brother testified that Lewis had kissed the victim's vaginal area."); *State v. McGuire*, 135 Idaho 535, 536, 20 P.3d 719, 720 (Ct. App. 2001) (In a Sexual Abuse of a Minor Case: "McGuire put his arms on S.M.'s thighs and then began touching S.M.'s hips and rubbing her stomach just above her vaginal area. McGuire rubbed S.M. in this manner for 'quite a while.' McGuire also rubbed S.M.'s inner thigh near her vaginal area during this incident."); *State v. Pepcorn*, 37314, 2011 WL 1366779 (Ct. App. 2011) *aff'd in part, rev'd in part*, 152 Idaho 678, 273 P.3d 1271 (2012). ("The State's evidence vis-à-vis A.J. was that Pepcorn had committed . . . committed lewd and lascivious conduct by placing his hand on her vaginal area and bottom and massaging there while he lifted her up onto a horse."). It is also a synonym in common usage. *See, e.g., State v. Weimer*, 133 Idaho 442, 446, 988 P.2d 216, 220 (Ct. App. 1999) ("Officer Murphy stated that the subject, a young teenage girl, 'was in some lingerie, women's lingerie, posing in a sexually explicit position. I could tell by the picture she had no pubic hair around her vaginal area.'") *and State v. Jones*, 154 Idaho 412, 299 P.3d 219, 222 (2013) (Testimony of complaining witness: "He apparently didn't get the reaction he wanted, and he moved down to my vaginal area.... He started touching me outside, and then he started putting his fingers inside me really hard."). When An.C. testified she was touched outside of her vaginal area she was testifying that she was not touched on her genitalia.

An.C. never claimed there was penetration of her genitalia, which would be required in order to touch her vagina, consequently, the state was required to prove manual touching of An.C.'s external genitalia. This required the state to prove that Mr. Crawford touched An.C.'s "vaginal area," where the external female genitalia is located. But all it proved was that he touched her "outside [her] vaginal area," *i.e.,* not on her vaginal area, but elsewhere, *e.g.*, the inner

or upper thigh, leg, or hip. Being touched outside the vaginal area cannot constitute manual-genital touching and the trial court's conclusion that the state's evidence was sufficient is erroneous. As all the external female genitalia is within the vaginal area, manual touching of An.C's vaginal area is a fact the state needed to, but did not, prove at trial.

Since a Rule 29 motion would have or should have been granted at trial, it was deficient performance for trial counsel to not make the motion.

2. Appellate counsel

Appellate counsel was also ineffective because she failed to raise the sufficiency of the evidence claim as to Count II on appeal. The trial court, however, dismissed the appellate counsel claim reasserting that "the evidence gave rise to reasonable inferences of guilt on Count II." (CR 334.) The court's argument in this regard fails for the reasons set forth above.

Appellate counsel's deficient performance was prejudicial because had the sufficiency of evidence issue been raised on appeal, the Court of Appeals would have vacated the conviction and remanded the case for the entry of a judgment of acquittal.

3. Conclusion

In sum, had trial counsel raised the sufficiency issue, the trial court would have found or should have found there was insufficient evidence to sustain the conviction on Count II. Had appellate counsel raised the issue, the Court of Appeals would have found that there was insufficient evidence to sustain the conviction on Count II. Therefore, Mr. Crawford was prejudiced under *Strickland*'s definition by trial and appellate counsels' failure to raise the issue.

B. ***The Trial Court Erred in Finding Appellate Counsel's Performance Was Not Deficient. The Sufficiency Argument Was the Strongest Issue to Raise on Appeal Applicable to Count II. Petitioner Was Prejudiced.***

Moreover, the court, in dismissing the appellate counsel claim, misapplied the rule in *Mintun v. State*, that "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." 144 Idaho at 661, 168 P.3d at 45, quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000) *citing Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). The district court took this rule to mean that since "[a]ppellate counsel raised the strongest issue on appeal – that the Court erred as a matter of law in instructing the jury," counsel could not be ineffective for failing to raise other meritorious issues. (CR 334-335.) That, however, is not what *Mintun* holds. The fact that one issue raised is arguably stronger than another issue does not *per se* excuse the failure to raise the second issue. Further, appellate counsel raised an issue which was clearly weaker than the sufficiency of the evidence issue, *i.e.*, the claim that the sentence was clearly excessive.

There could not have been a strategic reason to not to raise the sufficiency of the evidence issue. The remedy for the claim, a judgment of acquittal, was more favorable to Mr. Crawford than the remedy for the jury instruction issue, a new trial. In addition, the issue was clearly stronger that the jury instruction issue because that issue was only applicable to Count I and appellate counsel did not raise any meritorious issue challenging the validity of Count II. The sufficiency of the evidence issue was the strongest issue with regard to Count II and it was deficient performance to discard it in favor of the issues actually raised. In fact, prevailing on appeal on the jury instruction issue turned out to be a pyrrhic victory for Mr. Crawford. Upon remand, the state simply moved to dismiss Count I leaving the concurrent sentence for Count II

in place. Mr. Crawford did not receive any tangible benefit from the appeal as the time he was sentenced to was not reduced. As Mr. Crawford's sentence could only be reduced by defeating the convictions for both counts, appellate counsel's failure to raise the strongest issue attacking Count II was deficient performance which prejudiced Mr. Crawford.

C. *The Trial Court Erred in Finding That Trial Counsel's Failure to Request an Affirmative Answer to the Jury's Inquiry or to Request the Court to Define the Word "Genitalia" Was Not Deficient Performance. The Error Prejudiced Petitioner.*

Mr. Crawford also argued that trial counsel was ineffective in failing to ask the court, in response to the first part of question #3, to either tell the jury that manual contact with the vaginal area was required or to define "genital." Had trial counsel made a proper request, the district court would have given the jury proper instructions and the jury would have acquitted him of both Counts I and II. (CR 9-10.)

Due to trial counsel's failure to object, appellate counsel was not able to raise the jury instruction error regarding that particular jury question. "Generally Idaho's appellate courts will not consider error not preserved for appeal through an objection at trial." *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Had the issue been preserved, the Court of Appeals would have vacated the conviction on Count II under the same reasoning it vacated the conviction on Count I. *State v. Crawford*, pg. 4.

The trial court dismissed this aspect of the ineffective assistance of trial counsel claim for the following reasons:

> [1.] It has long been the rule in Idaho that ordinary words used in the sense in which they are generally understood need not be defined in jury instructions. It is not error to refuse to define ordinary words. The term "genital" is commonly understood and requires no further explanation. Therefore, it was not error to not request the Court to define the term.

> [2.] Moreover, a "yes" answer would not have been accurate. As Crawford recognizes, genitalia consists of both internal and external organs. As discussed above, the vagina and the vaginal area technically refer to the internal organs. The external genitalia are "outside" the vaginal area. Outside is defined as "the outer side of a surface." Therefore, the answer "yes" may have further confused the jury.
>
> [3.] Finally, because the victim clearly testified Crawford touched the "outside of the vaginal area[,]" a jury could reasonably understand her testimony to be referencing the external genitalia which is what is required under the statute for a conviction.

(CR 332.) (Citations omitted.) The court's analysis, however, is in error on all three points.

Addressing the court's third reason first: An.C. did not testify that she was touched on "the 'outside of the vaginal area.'" (*Id.*) She testified that she was touched, "Outside of my vaginal area." (T pg. 242, ln. 3 - pg. 243, ln. 16.) The court's inadvertent insertion of the article "the" totally changes An.C's actual testimony. The court's misquotation caused it to misunderstand the actual testimony. A jury, however, could not reasonably understand being touched outside of the vaginal area as meaning An.C. was touched upon her external genitalia. Plainly, this misquote is in error and does not support the trial court's ruling.[2]

Second, the court had a duty to further instruct the jury. This is made clear by the Court of Appeals in the direct appeal where it wrote, "if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity, or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are

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[2] The Court of Appeals made the same error when wrote that An.C. testified that Mr. Crawford "put his hand up her shorts and touched the outside of her vaginal area," (Exhibit A, pg. 2.) Trial and appellate counsel are to blame that the Court of Appeals did not have a correct understanding of the record. Had either counsel argued that the evidence was insufficient to show manual-genital touching, the Court of Appeals would have set forth the actual testimony verbatim.

reasonably necessary to alleviate the jury's doubt or confusion." *State v. Crawford*, Exhibit A, pg. 4, *citing State v. Sheahan,* 139 Idaho 267, 282, 77 P.3d 956, 971 (2003). *Sheahan*, in turn, relied upon *Dawson v. Olson*, 97 Idaho 274, 543 P.2d 499 (1975), where the Supreme Court wrote, "There may be situations in which a trial judge may decline to answer questions put by the jury, but where a jury returns on its own motion indicating confusion, the court has the duty to give such additional instruction on the law as the court may think necessary to clarify the jury's doubt or confusion." 97 Idaho at 281, 543 P.2d at 507, *quoting Worthington v. Obertuber*, 125 A.2d 621 (Penn. 1966). In addition, I.C. §§ 19-2132(a) and 19-2204 provide that the trial court must instruct the jurors on all matters of law necessary for their information.

Just as the jury's second question ("Does touching of the breast area constitute manual-genital contact?") imposed upon the trial court a "duty to give additional instructions on the law reasonably necessary to alleviate the jury's doubt or confusion," the jury's first question ("In order to have committed manual-genital contact, does it require touching the vaginal area?") showed that the jury was confused about whether the evidence on Count II, *i.e.*, that Mr. Crawford touched An.C. "Outside of [her] vaginal area" was sufficient to sustain the conviction. (T pg. 243, ln. 15-16.) Trial counsel should have asked the trial court to give additional instructions on this issue.

Finally, a "yes" answer to the jury's first question would have been accurate and would not have confused the jury. Under the facts of the case, the "clit incident" was the basis for Count II. There was no allegation of any penetration or touching of the internal genitalia during that incident. To the contrary, An.C. testified that she was moving away from Mr. Crawford in order to avoid his touch. The jury could not have been wondering whether there had to be

internal touching of the genitalia. The jury's second question makes it clear that it understood external touching was sufficient as it was wondering whether the touching of An.S.'s breasts was sufficient to support Count I. The jury in the first question knew that external touching within the vaginal area, *i.e.*, the external genitalia, was sufficient, but was confused over whether being touched outside the vaginal area was sufficient to prove Count II because that was all An.C. testified to.[3]

As the jury was confused on this point of law and the answer to the question was "yes," and there was no evidence that An.C was touched on her vaginal area, a reasonably competent attorney would have requested the court answer the above question in the affirmative or asked the court to define the word "genital," so the jury could come to the same answer on its own. Thus, trial counsel's performance was deficient under *Strickland v. Washington, supra.*

Had the jury question been answered properly, the jury would have acquitted Mr. Crawford. But even if the trial court had denied defense counsel's request, the request would have preserved the issue for appeal and alerted appellate counsel to the issue. The Court of Appeals would have reversed the conviction on Count II due to the Court's jury instruction error. Thus, trial counsel's deficient performance was prejudicial under *Strickland* and the trial court erred in summarily dismissing this aspect of the ineffective assistance of trial counsel claim.

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[3] While the trial court noted that one definition of "outside," is "the outer side of a surface," it is not the only definition. An.C. used the more common meaning of the word, *i.e.*, "a place or region beyond an enclosure or boundary." www.merriam-webster.com/dictionary/outside.

V. CONCLUSION

The district court erred in denying Mr. Crawford's motion for summary disposition and in granting the state's motion. This Court should reverse both orders and remand with directions that the petition be granted and that a judgment of acquittal be entered with regard to Count II.

Respectfully submitted this 4th of April, 2014.

Dennis Benjamin
Attorney for Shane Crawford

CERTIFICATE OF SERVICE

I CERTIFY that on April 4, 2014, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Office of the Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin
Dennis Benjamin

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38587

STATE OF IDAHO,	)	**2012 Unpublished Opinion No. 538**
	)	
Plaintiff-Respondent,	)	**Filed: June 27, 2012**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
SHANE ERICK CRAWFORD,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Judgment of conviction and concurrent unified sentences of twenty-five years, with minimum periods of confinement of six years, for two counts of lewd conduct with a minor under the age of sixteen, affirmed in part, vacated in part, and remanded.

Sara B. Thomas, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Shane Erick Crawford appeals from his judgment of conviction and sentences for two counts of lewd conduct with a minor under the age of sixteen. For the reasons set forth below, we affirm in part, vacate in part, and remand for a new trial.

I.

FACTS AND PROCEDURE

In 2010, the state filed a complaint charging Crawford with two counts of lewd conduct with a minor under the age of sixteen, I.C. § 18-1508, identified as Count I and Count II. The state also charged Crawford with two counts of sexual abuse of a child under the age of sixteen (Counts III and IV). The alleged victim in Count I was Victim I and the alleged victim in the remaining counts was Victim II. Crawford was found guilty of Count I and Count II and

EXHIBIT A

acquitted of the two remaining counts. The district court imposed concurrent unified terms of twenty five years, with minimum periods of confinement of six years, for Count I and Count II. Crawford appeals.

II.

ANALYSIS

Crawford argues that the district court denied his right to due process by failing to instruct the jury, in response to a jury question, that the breast area is not a genital for the purpose of finding Crawford guilty of lewd conduct pursuant to I.C. § 18-1508. Crawford also argues that the district court imposed excessive sentences.

A. Jury Question

Idaho Code Section 18-1508 provides:

> Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

Here, in Count I, the state alleged that Crawford committed lewd conduct with Victim I by having manual-genital contact with her with the intent to appeal to and or gratify his sexual desire. Likewise, the state alleged in Count II that Crawford committed lewd conduct with Victim II by having manual-genital contact with her with the intent to appeal to and or gratify his sexual desire.

At trial, Victim I testified that, while she was lying on a couch in a living room and watching a movie with Crawford, Crawford reached up her shirt and groped her breasts and then moved his hand into her underwear and touched her vagina. Victim II testified that, while she was in a kitchen with Crawford, Crawford asked her "what a clit was." Victim II testified that, when she responded that she did not know, Crawford said, "Well, let me show you;" approached her as she backed away; and put his hand up her shorts and touched the outside of her vaginal area. Victim II also testified that, on another occasion, she was on a couch with Crawford and he

rubbed her upper thigh and moved up toward her "bikini line." Victim II further testified that, on a different occasion, Crawford exposed his penis and tried to show it to her but she looked away. Additionally, Victim II testified that Crawford grabbed her breast in front of others at a party in a joking way. Finally, Victim II testified that, while she was on the phone on one occasion with her grandfather, Crawford began rubbing her stomach and moving his hand toward her breast, but she kept pushing Crawford's hand away.

During closing argument, the prosecutor stated to the jury:

> At the end of the day and at the end of your deliberations, I'm going to ask you to come back and return a verdict of guilty against [Crawford], guilty of [Count I] involving [Victim I] on the sofa for rubbing her tummy, going up to her breasts and down into her vagina.
>
> . . . . [Count II] is [Victim II] and this is the episode where [Victim II] testified [Crawford] asked her if she knew what her clit was and he put her fingers up. That's what [Count II] is referring to.
>
> [Count III] refers to when [Crawford] pulled his penis out, he exposed it and nudged [Victim II] and told her to look and talked about how he groomed it. That's [Count III].
>
> And [Count IV] is when [Crawford] grabs [Victim II's] breasts and also when he's rubbing up toward her panty line getting closer and closer.

During deliberations, the jury submitted a question to the district court asking, "In order to have committed manual-genital contact, does it require touching the *vaginal* area? Does touching of the breast-area constitute manual-genital contact?" Outside the presence of the jury, Crawford's counsel indicated that he believed the answer was "no." The district court stated, "No, the answer is reread the instructions. I'm not going to define for them manual-genital contact." The state agreed with the district court. The district court concluded:

> Well, if the jury--I do not feel comfortable defining, and, in fact, there's case law that says not only should you default to the standard instructions, but that while--while it may seem--it's tempting to want to define every single word, that it's inappropriate for the court to do so and that the jurors have to apply their understanding--their common ordinary understanding to it. And, therefore, I'm just going to tell them to reread the instructions.

Thus, the district court informed the jury to "re-read all the instructions." During deliberations, the jury also asked the district court to confirm that:

> [Count I]-[Victim I] on couch incident
> [Count II]-[Victim II] being asked about "clit"
> [Count III]-Penis exposure to [Victim II]
> [Count IV]-[Victim II] on phone [with] grandfather [and] touching her

In response, the district court informed the jury that the alleged victim in Count I was Victim I, the alleged victim in the remaining counts was Victim II, and the jury was to rely on its memory of the evidence.

As noted above, Crawford argues that the district court denied his right to due process by responding to the jury's question without clarifying that the breast area is not a genital for the purpose of finding Crawford guilty of lewd conduct pursuant to I.C. § 18-1508. In general, it is within the trial court's discretion to determine whether, and the manner in which, to respond to a question posed by the jury during deliberations. *State v. Sheahan*, 139 Idaho 267, 282, 77 P.3d 956, 971 (2003); *State v. Pinkney*, 115 Idaho 1152, 1154, 772 P.2d 1246, 1248 (Ct. App. 1989). This grant of discretion is premised on the assumption that the instructions as given are clear, direct, and proper statements of the law. *Sheahan*, 139 Idaho at 282, 77 P.3d at 971. Consequently, if a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury, but it is under no duty to do so. *Id.* However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *Id.*

Here, Crawford was charged with two counts of lewd conduct pursuant to I.C. § 18-1508. Jury instruction thirteen informed the jury that, in order to find Crawford guilty of lewd conduct as charged in Count I, the jury had to find that the state proved Crawford committed an act of manual-genital contact upon or with the body of Victim I. Jury instruction fourteen instructed the jury in the same manner with respect to Count II and Victim II. By asking, "In order to have committed manual-genital contact, does it require touching the *vaginal* area? Does touching of the breast-area constitute manual-genital contact?" the jury expressed doubt or confusion on a point of law not adequately covered in the jury instructions and pertinent to this case, thereby revealing a defect, ambiguity, or gap in the instructions. Thus, the district court had the duty to give additional instructions on the law reasonably necessary to alleviate the jury's doubt or confusion. In *State v. Kavajecz*, 139 Idaho 482, 487, 80 P.3d 1083, 1088 (2003), the Idaho Supreme Court held that the act of touching of a minor's chest area does not fall within those acts specifically enumerated in I.C. § 18-1508 and a defendant cannot be convicted under the

statute for such contact. Therefore, *as a matter of law*, touching a child's breast area does not amount to manual-genital contact. By answering the jury's question regarding whether touching of the breast area constitutes manual-genital contact with the instruction to "re-read all the instructions" and by not informing the jury of the Court's holding in *Kavajecz*, the district court erred.

However, error is harmless and not reversible if the reviewing court is convinced beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Perry*, 150 Idaho 209, 221, 245 P.3d 961, 973 (2010). Thus, we examine whether the alleged error complained of in the present case was harmless. *See State v. Lopez*, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005).

Crawford argues that it is impossible to discern whether the jury reached its verdict with respect to Count I and Count II on a valid theory of law because the jury heard testimony from both Victim I and Victim II that Crawford had touched their breast area. Therefore, Crawford asserts that, pursuant to *State v. Townsend*, 124 Idaho 881, 888, 865 P.2d 972, 979 (1993), his judgment of conviction and sentences must be vacated and his case remanded for a new trial.

In *Townsend*, the jury was instructed that it could convict Townsend of aggravated battery if it found that Townsend's use of either his vehicle or his hands during the battery constituted use of a deadly weapon as proscribed by the statute. However, the instruction that the jury could find Townsend guilty of aggravated battery by considering his hands deadly weapons was legally incorrect because hands do not constitute deadly weapons under the statute. *Id.* at 887, 865 P.2d at 978. The jury verdict did not specify whether the jury found that the aggravated battery was committed with Townsend's vehicle, his hands, or both. Thus, the Court was unable to discern whether the jury based its verdict on a valid or an invalid legal theory. The Court determined that the appropriate disposition, in view of the holding that one of the theories of criminal liability given to the jury (use of the vehicle as a deadly weapon) was legally valid and the other theory by which the jury was instructed it could find Townsend guilty of aggravated battery (use of his hands as deadly weapons) was legally invalid, was to vacate the conviction and sentence and remand the case for a new trial. *Id.* at 888, 865 P.2d at 979.

The state argues that, even if the district court erred by not instructing the jury that touching of a minor's chest area does not fall within those acts specifically enumerated in I.C. § 18-1508 in response to the jury question, such error was harmless regarding Count II because

that count did not involve any testimony or allegation that Crawford touched Victim II's breasts. We agree. As noted above, during closing argument, the state argued what conduct Crawford allegedly committed that constituted the offense of lewd conduct charged in Count II. Specifically, the state informed the jury that Count II involved the episode where Crawford allegedly asked Victim II "if she knew what her clit was and he put her fingers up." Defense counsel, during closing argument, referred to Count II as involving the same incident. Additionally, during deliberations, the jury asked the district court to *confirm* that the alleged conduct related to Count II was Victim II "being asked about 'clit'." Thus, we are convinced beyond a reasonable doubt that, with respect to Count II, the jury did not consider Victim II's testimony regarding Crawford's touching of her breast area at other times and reached its verdict on a valid legal theory. Therefore, even though the district court erred by not instructing the jury that touching of a minor's chest area does not fall within those acts specifically enumerated in I.C. § 18-1508 in response to the jury question, such error was harmless regarding Count II.

However, with respect to Count I, the episode in which the state alleged Crawford committed lewd conduct included his touching of both Victim I's breast and vaginal areas. Specifically, the state alleged that Count I involved Victim I "on the sofa for rubbing her tummy, going up to her breasts and down into her vagina." Further, the jury asked the district court to confirm that the alleged conduct related to Count I was Victim I "on couch incident." Instruction provided to the jury must not permit the defendant to be convicted of conduct that does not constitute the type of crime charged. *State v. Folk*, 151 Idaho 327, 342, 256 P.3d 735, 750 (2011). Because of the district court's lack of instruction to the jury that touching of a minor's chest area did not fall within those acts specifically enumerated in I.C. § 18-1508 in response to the jury question, the jury could have found Crawford guilty of lewd conduct on Count I based on an invalid legal theory--that Crawford committed manual-genital contact with Victim II by touching her breast area. Because it is impossible to discern what theory the jury based its verdict on, we are not convinced beyond a reasonable doubt that the district court's error did not contribute to the jury's verdict with respect to Count I. Thus, the error was not was harmless. As in *Townsend*, the appropriate disposition is to vacate Crawford's conviction and sentence with respect to Count I and remand the case for a new trial.

B. Excessive Sentences

Crawford also argues that the sentences imposed by the district court are excessive. Because we vacate Crawford's judgment of conviction and sentence with respect to Count I, we need only address Crawford's claim with respect to Count II.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable and, thus, a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

At the sentencing hearing in this case, the district court noted that it wanted to make sure Crawford's sentence fulfilled the objectives of protecting the community and the victims. The district court also noted that it did not believe Crawford was amenable to rehabilitation in the short term. The district court detailed six disciplinary actions taken against Crawford while he was incarcerated on an unrelated matter. The district court further commented that it was surprised that, having been in the military, Crawford had difficulty following the rules. The district court determined that Crawford's inability to follow rules did not make him a good candidate for being out in the community. In addition, the district court noted the findings in the psychosexual evaluation that Crawford was a moderate risk to reoffend and tended to manage emotions through repression and denial, which seemed to influence his engaging in inappropriate sexual behavior. The district court also noted the findings in the psychosexual evaluation that Crawford was not amenable to sex offender treatment due to his lack of acknowledgement of

inappropriate sexual behavior. The district court determined that, because Crawford was not amenable to treatment, he needed to be incarcerated for a significant period of time. In light of the foregoing, the district court imposed a unified term of twenty five years, with a minimum period of confinement of six years, for Count II.

After an independent review of the record and having regard for the nature of the offense, the character of the offender and the protection of the public interest, we conclude that the sentence imposed by the district court with respect to Count II was reasonable upon the facts of this case. Thus, the district court did not abuse its discretion by sentencing Crawford to a unified term of twenty-five years, with a minimum period of confinement of six years, for Count II.

III.

CONCLUSION

The district court erred by answering the jury's question regarding whether touching of the breast area constitutes manual-genital contact pursuant to I.C. § 18-1508 with the instruction to "re-read all the instructions" and by not instructing the jury that the act of touching a minor's chest area does not fall within those acts specifically enumerated in the statute. While such error was harmless with respect to Count II, the error was not harmless with respect to Count I. The district court did not abuse its discretion by imposing Crawford's sentence for Count II. Accordingly, we affirm Crawford's judgment of conviction and sentence with respect to Count II, but we vacate Crawford's judgment of conviction and sentence with respect to Count I and remand for a new trial.

Chief Judge GRATTON and Judge LANSING, **CONCUR.**