6-18-2014

Crawford v. State Respondent's Brief Dckt. 41669

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHANE CRAWFORD,	)	
	)	No. 41669
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2013-11891
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

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

Shane Crawford appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

The facts and proceedings of Crawford's conviction for lewd and lascivious conduct, and his direct appeal, are described by the district court as follows:

> In 2010, the State charged 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 victim in Count I was Victim I, A.C., and the victim in the remaining counts was Victim II, A.C.[1] The victims came forward while Crawford was on a retained jurisdiction for a conviction for Lewd and Lascivious with an unrelated victim. Victim I was his biological daughter and Victim II was his step-daughter. However, Crawford was the only father she had ever known.
>
> A jury found Crawford guilty on Count I and Count II and acquitted Crawford on the two remaining counts. The Court imposed concurrent unified terms of twenty-five (25) years, with minimum periods of confinement of six (6) years, for each count. Crawford appealed and argued, among other things, that the Court erred by failing to instruct the jury, in response to a jury question, that the breast area was not a genital for the purpose of finding Crawford guilty of lewd conduct pursuant to I.C. § 18-1508, as to both Count I and Count II. The Court of Appeals ruled in an unpublished decision that the Court did err and that as to Count I, the error was not harmless. The appellate court reversed Crawford's conviction on Count I and remanded it for retrial. The appellate court, however, found that any error was harmless as it applied to Count II and affirmed the jury conviction.
>
> On remand, the State dismissed Count I and chose not to pursue a new trial.

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[1] The state will refer to Victim II as "An.C."

(R., p.324.)

Crawford filed a post-conviction petition, claiming his trial counsel provided ineffective assistance by (1) failing to challenge the sufficiency of the evidence supporting Count II -- lewd conduct against An.C., (2) failing to request the court to answer "yes" to the jury's question of whether, "[i]n order to have committed manual-genital contact, does it require touching the vaginal area?" (and failing to preserve the issue for appeal), and (3) failing to request the court to define "genital" for the jury (and failing to preserve the issue for appeal). (R., p.9.) Crawford also claimed his counsel on direct appeal was ineffective for failing to challenge the sufficiency of the evidence to convict him on Count II because there "were not stronger issues to raise on appeal." (R., p.10.)

The state filed a motion for summary dismissal (R., pp.278-280) and an answer and brief in support of its motion (R., pp.266-277), contending Crawford failed to raise a genuine issue of material fact that would entitle him to relief. Crawford, through counsel, filed a Cross-Motion for Summary Disposition (R., pp.281-282) and a memorandum opposing the state's motion for summary dismissal and supporting his motion for summary disposition (R., pp.283-297). The state responded by filing a memorandum opposing Crawford's Cross-Motion for Summary Disposition (R., pp.297-305), and Crawford filed a reply (R., pp.306-322).

After hearing argument on both parties' motions, the district court issued an Order Granting Summary Dismissal to the State. (R., pp.323-335.) The court subsequently entered a Final Judgment dismissing Crawford's post-conviction petition with prejudice (R., pp.337-338), and Crawford filed a timely appeal (R., pp.339-342).

ISSUES

Crawford states the issues on appeal as:

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?

(Appellant's Brief, p.7.)

The state rephrases the issue on appeal as:

Has Crawford failed to establish error in the district court's summary dismissal of his post-conviction claims?

ARGUMENT

Crawford Has Failed To Establish Error In The District Court's Summary Dismissal Of His Post-Conviction Claims

A. Introduction

Crawford contends the district court erred in summarily dismissing his claims that: (1) his trial and appellate counsel were ineffective for failing to challenge the sufficiency of the evidence supporting Count II, (2) his appellate counsel was ineffective for failing to present the strongest issue on appeal -- the "sufficiency of the evidence" issue, and (3) his trial counsel was ineffective for failing to request an affirmative answer to the jury's inquiry of whether manual-to-genital contact requires touching the "vaginal area," and for failing to ask the court to define the term "genital." (Appellant's Brief, pp.7-19.)

A review of the record shows Crawford has failed to demonstrate any error in the district court's conclusion that he failed to meet his burden of establishing a genuine issue of material fact relative to any of his post-conviction claims.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The Court freely reviews the district court's application of the law. Id. at 434, 835 P.2d at 669. However, the Court is not required to accept either the applicant's mere conclusory allegations,

unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

C. Applicable Legal Standards

Idaho Code § 19-4906(c) authorizes a district court to summarily dismiss a post-conviction petition upon motion by a party if it appears there is "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." In order to survive summary dismissal, a post-conviction petitioner must present evidence in support of his petition sufficient to make "a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999). While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). In other words, bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. Roman, 125 Idaho at 647, 873 P.2d at 901; Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986); Stone v. State, 108 Idaho 822, 826, 702 P.2d 860, 864 (Ct. App. 1985).

In the context of claims of ineffective assistance of counsel, the Idaho Supreme Court has articulated the applicable standards as follows:

> For an application for post-conviction relief based on a claim of ineffective assistance of counsel to survive a summary dismissal, the petitioner must establish that: (1) a material issue of fact exists as to whether counsel's performance was deficient, and (2) a material issue of fact exists as to whether the deficiency prejudiced the applicant's case. . . .
>
> To establish deficient assistance, the burden is on the petitioner to show that his attorney's conduct fell below an objective standard of reasonableness. This objective standard embraces a strong presumption that trial counsel was competent and diligent. Thus, the claimant has the burden of showing that his attorney's performance fell below the wide range of reasonable professional assistance.
>
> To establish prejudice, the claimant must show a reasonable probability that but for his attorney's deficient performance the outcome of the proceeding would have been different. Trial counsel's strategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation.

Baldwin v. State, 145 Idaho 148, 153-154, 177 P.3d 362, 367-368 (2008) (internal citations omitted).

D. Crawford Has Failed To Show Error In The District Court's Summary Dismissal Of His Post-Conviction Claims

Crawford's argument that the district court erred in granting the state's motion for summary dismissal is completely rebutted by the district court's "Order Granting Summary Dismissal To The State," attached as Appendix A, which is incorporated into this Respondent's Brief and relied upon as if fully set forth herein. In addition to the district court's reasoning, the state makes the following argument with regard to Crawford's claim that his trial counsel and direct appeal counsel provided ineffective

assistance by failing to challenge the sufficiency of the evidence to support his conviction on Count II, lewd conduct against An.C.

Count II alleged that Crawford committed lewd conduct upon An.C. by having manual-to-genital contact with her in the kitchen after asking her questions about her "clit."[2] (R., pp.226, 229 (Tr., p.498, Ls.6-19; p.512, Ls.5-9).) Crawford's "sufficiency" arguments are based on An.C.'s response to the prosecutor's question of where Crawford's hands touched her during that incident. An.C. answered: "Outside of my vaginal area." (Appellant's Brief, pp.7-14; R., p.162 (Tr., p.242, Ls.3-11; p.243, Ls.13-16).) Crawford contends An.C.'s testimony that the contact was "outside" the "vaginal area" means he did not have contact with her genitalia. (Appellant's Brief, pp.7-14.) Based on that premise, Crawford argues the evidence was insufficient to sustain a conviction for lewd conduct under Count II, and the district court erred by summarily dismissing his related claims that (1) trial counsel was ineffective for failing to make a motion for judgment of acquittal in regard to Count II under I.C.R. 29, and (2) counsel on direct appeal was ineffective for failing to raise a sufficiency of the evidence claim as to Count II. (Appellant's Brief, pp.7-11.) Crawford's claims fail.

During An.C.'s testimony, the prosecutor asked questions showing the progressive pattern of Crawford's touching of her body. An.C. initially said that Crawford "would touch [her] on [her] upper thigh and it started getting really uncomfortable." (R., p.161 (Tr., p.238, L.19 - p.239, L.7).) An.C. further explained that

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[2] While in the kitchen with An.C., Crawford asked her if she knew what a "clit" was and she told him she did not. (R., p.162 (Tr., p.242, Ls.16-18).) Crawford responded, "Well, let me show you," and as An.C. backed away, he "went to go show [her]," and he touched her "[o]utside of [her] vaginal area" by using his hands to go up her shorts. (R., p.162 (Tr., p. 243, Ls.10-19).)

Crawford touched "[c]lose to my private area[,]" which made her uncomfortable. (R., p.161 (Tr., p.239, Ls.17-23).) An.C. said that when she told her grandmother about the touching, her grandmother said "that it was how [Crawford] shows his affection and to not pay any attention to it." (R., p.161 (Tr., p.240, Ls.1-5).) An.C. finally told her mother that Crawford had been touching her because her mother "was having second thoughts about divorcing him and [An.C.] told her she needs to." (R., p.161 (Tr., p.241, Ls.17-19).) At that point in An.C.'s testimony, the prosecutor advanced beyond the subject of Crawford touching An.C.'s thighs to introduce a more serious level of contact -- Crawford's touching of An.C.'s "privates:"

> [Prosecutor]: Okay. And so let's go back to the touching. Besides the touching when he was rubbing on your leg, *was he getting close to where your underwear was at?*
>
> A. Yes.
>
> Q. *In fact, was he up there to your privates?*
>
> A. *Yes.*

(R., pp.161-162 (Tr., p.241, L.20 - p.242, L.2) (emphasis added).) Both the prosecutor's questions and An.C.'s answers about Crawford touching her "up there to [her] privates" were made without any specific reference to a particular incident. However, it is logical to conclude that such testimony referred to the kitchen incident discussed immediately thereafter.

Prior to testifying that Crawford was "up there to [her] privates[,]" An.C. testified that he made her uncomfortable by touching her upper thigh "[c]lose to [her] private area." (R., p.161 (Tr., p.239, Ls.3-20).) Immediately after An.C. testified that Crawford touched her "up there to [her] privates[,]" the prosecutor asked, "And so do you

remember a time when you were in the kitchen with your dad?" (R., p.162 (Tr., p.242, Ls.2-3).) An.C. then testified about the kitchen incident.[3] While in the kitchen, Crawford offered An.C. an alcoholic drink, but she refused. (R., p.162 (Tr., p.242, Ls.14-15).) Crawford asked An.C. if she knew what a "clit" was and she told him she did not. (R., p.162 (Tr., p.242, Ls.16-18).) Crawford then said, "Well, let me show you," and as An.C. backed away, Crawford "went to go show [her]," and he touched her "[o]utside of [her] vaginal area" by using his hands to go up her shorts. (R., p.162 (Tr., p. 243, Ls.10-19).)

Apart from the TV incident, see n. 2, supra, An.C.'s testimony about the kitchen incident is the only other incident that matches An.C.'s initial testimony that Crawford touched her "up there to [her] privates[.]" (See R., pp.161-162 (Tr., p.241, L.25 - p.242, L.2).) Therefore, a rational juror could have easily concluded that An.C. testified, in effect, that the kitchen incident was one of the times Crawford touched her "up there to [her] privates." Upon hearing such testimony, a rational juror could also have reasonably concluded that Crawford had engaged in manual-to genital contact with An.C. during the kitchen incident.

With regard to Crawford's claim of ineffective assistance of counsel on direct appeal, he argues that the district court "misapplied the rule in *Mintun v. State*, that 'only

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[3] After testifying about the kitchen incident, An.C. testified only about one other incident that can reasonably be viewed as involving her "privates." She explained that when she was living at the Summer Field house and watching TV with Crawford, she had to "remove his hand from around [her] vaginal area or from near [her] vaginal area." (R., pp.162-163 (Tr., p.243, Ls.13-16; p.244, L.17 - p.246, L.14).) The remaining incidents that An.C. testified about do not involve contact near An.C.'s genitals -- Crawford's exposure of his penis to her at Christmas time in 2008 (R., pp.163-164 (Tr., p.248, L.24 - p.251, L.11)), and his grabbing her breast in front of a friend during a UFC party (R., p.164 (Tr., p.251, L.12 - p.253, L.11)).

when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" (Appellant's Brief, p.15; Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007) (quoting Smith v. Robbins, 528 U.S. 259, 288 (2000) (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir., 1986))).) Crawford asserts that 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." (Appellant's Brief, p.15.) The court did no such thing.

In Robbins, the Supreme Court parenthetically quoted Gray v. Greer, 800 F.2d at 646, for the general proposition that "'only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Robbins, 528 U.S. at 288. However, Gray explains that there is more to the analysis than simply gauging whether the "ignored issues are clearly stronger than those presented." See id. Gray made clear that, to establish a claim of ineffective assistance of counsel on appeal, the ignored issue must be "a significant and obvious issue," not merely stronger than those presented, and the failure to raise it must be prejudicial:

> Had appellate counsel failed to raise a significant and obvious issue, the failure could be viewed as deficient performance. If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial. . . . When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. *Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.*

Gray, 800 F.2d at 646 (emphasis added).

Here, although the district court stated that Crawford's counsel presented the strongest issue on direct appeal -- failure to instruct the jury that breasts are not genitals (R., pp.334-335) -- it did not rule that appellate counsel "could not be ineffective for failing to raise other meritorious issues[,]" thereby implying that Crawford's "sufficiency" issue was meritorious.[4] (See Appellant's Brief, p.15.) Rather, the court ruled that Crawford's "sufficiency" based claim was not meritorious, stating, "the evidence gave rise to reasonable inferences of guilt on Count II. Thus, appellate counsel was not ineffective for failing to pursue this issue on appeal." (R., pp.334-335.)

Moreover, courts must also determine whether there is a reasonable probability that, but for counsel's unprofessional errors, the petitioner would have prevailed on appeal. Robbins, 528 U.S. at 285. Even assuming Crawford's sufficiency claim was not frivolous, the evidence presented at trial was, as the district court concluded, sufficient to support his conviction for lewd conduct. Accordingly, Crawford has failed to show a reasonable probability that, but for counsel's errors, the result of the direct appeal would have been different. Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984). Crawford has failed to demonstrate any error in the district court's summary dismissal of that claim.

Based on the district court's "Order Granting Summary Dismissal To The State" (Appendix A), and the above supplemental argument, Crawford has failed to show any error in the district court's summary dismissal of his post-conviction claims.

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[4] Crawford argues that the "strongest" issue presented on direct appeal -- the failure to inform the jury that breasts are not genitals -- had no relevance to Count II, lewd conduct against An.C. (Appellant's Brief, pp.15-16.) Regardless, inasmuch as Crawford's "sufficiency" issue has no merit, it does not meet either the deficient performance prong or prejudice prong of Strickland.

CONCLUSION

The state respectfully requests that this Court affirm the district court's summary dismissal of Crawford's petition for post-conviction relief.

DATED this 18th day of June, 2014.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of June, 2014 I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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APPENDIX A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SHANE CRAWFORD,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

CASE NO. CV-PC-2013-11891

ORDER GRANTING SUMMARY DISMISSAL TO THE STATE

On July 2, 2013, the Petitioner, Shane Crawford, filed a Petition for Post-Conviction Relief, alleging ineffective counsel assistance of trial counsel for failing to move for acquittal, failing to request the Court define genital and answer "yes" to one of the jury's questions, and failing to "preserve" the issue for appeal. Crawford also complains that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence supporting Crawford's conviction on Count II. Crawford attached copies of those documents he claimed supported his Petition.

The State answered on July 9, 2013, and moved for summary disposition. Crawford opposed and filed a cross motion for summary disposition.

The Court heard argument on both motions on October 23, 2013, and took the matter under advisement on October 28, 2013.

After reviewing the evidence and pleadings before it, the Court finds that no purpose would be served by any further proceedings and finds, as a matter of law, that Crawford is entitled to none of the post-conviction relief requested. *Repp v. State,* 136 Idaho 262, 32 P.3d 156, 157-58 (Ct. App. 2001). Therefore, the Court grants the State's motion for summary dismissal and denies Crawford's motion for summary disposition. The Court, therefore, dismisses Crawford's Petition. The Court further finds that no evidentiary hearing is necessary.

BACKGROUND

In 2010, the State charged 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 victim in Count I was Victim I, A.C., and the victim in the remaining counts was Victim II, A.C. The victims came forward while Crawford was on a retained jurisdiction for a conviction for Lewd and Lascivious with an unrelated victim. Victim I was his biological daughter and Victim II was his step-daughter. However, Crawford was the only father she had ever known.

A jury found Crawford guilty on Count I and Count II and acquitted Crawford on the two remaining counts. The Court imposed concurrent unified terms of twenty-five (25) years, with minimum periods of confinement of six (6) years, for each count. Crawford appealed and argued, among other things, that the Court erred by failing to instruct the jury, in response to a jury question, that the breast area was not a genital for the purpose of finding Crawford guilty of lewd conduct pursuant to I.C. § 18-1508, as to both Count I and Count II.

The Court of Appeals ruled in an unpublished decision that the Court did err and that as to Count I, the error was not harmless. The appellate court reversed Crawford's conviction on Count I and remanded it for retrial. The appellate court, however, found that any error was harmless as it applied to Count II and affirmed the jury conviction.

On remand, the State dismissed Count I and chose not to pursue a new trial. Crawford filed this Petition.

ANALYSIS

A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claims are based. A petition for post-conviction relief can be filed at any time within one year from the expiration of the time for appeal or from the determination of a proceeding following appeal, whichever is later. I.C. §19-4902. Crawford appealed and the Court of Appeals ruled as follows:

> 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.

The remittitur was filed August 23, 2012. Thus, Crawford's Petition is timely.

Idaho Code §19-4906 authorizes disposition of a petition for post-conviction relief pursuant to motion of a party. Idaho Code §19-4906(c) provides as follows:

> (c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The State moved for summary dismissal. Crawford opposed and moved the Court for summary disposition in his favor.

Crawford never filed any affidavits creating a dispute of material fact, and he requested no evidentiary hearing. However, the Court is not required to accept mere conclusory allegations, unsupported by admissible evidence, or his conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). An application for post-conviction relief is in the nature of a civil proceeding, entirely distinct from the underlying criminal proceeding. *Ferrier v. State,* 135 Idaho 797, 798, 25 P.3d 110, 111 (2001). An application for post-conviction relief differs from a complaint in an ordinary civil action, however, because an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *Hernandez v. State*, 133 Idaho 794, 797, 992 P.2d 789, 792 (Ct. App. 1999). Finally, a petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claims are based. I.C.R. 57(c).[1]

[1] I.C.R. 57(c). Burden of Proof. The petitioner shall have the burden of proving the petitioner's grounds for relief by a preponderance of the evidence.

Thus, the question is whether the application, affidavits and other evidence supporting the application allege facts which entitles Crawford to relief. *Berg v. State*, 131 Idaho 517, 960 P.2d 738, 740 (1998); *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 492 (Ct. App. 1995).

In this case, the Court summarily dismisses Crawford's Petition based on the arguments presented by the State and those made by Crawford and denies his motion for summary disposition in his favor. *Kelly v. State*, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). When a trial court summarily dismisses an application for post-conviction relief based in part on the arguments presented by the State, this is sufficient to meet the notice requirements. *See Workman v. State,* 144 Idaho 518, 524, 164 P.3d 798, 804 (2007); *see also Buss v. State,* 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct.App.2009) ("When a district court summarily dismisses a post-conviction application relying in part on the same grounds presented by the state in its motion for summary dismissal, the notice requirement has been met.")

All of Crawford's claims against either trial counsel or appellate counsel are ineffective assistance of counsel claims. In order to succeed on a claim of "actual ineffective assistance of counsel," Crawford must meet the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984); *State v. Payne*, 146 Idaho 548, 199 P.3d 123 (2008); *Mitchell v. State,* 132 Idaho 274, 277, 971 P.2d 727, 730 (1998). To prevail on these claims, Crawford must demonstrate (1) each counsel's *performance* fell below an objective standard of reasonableness, and (2) there was a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland,* 466 U.S. at 687-88, 692; *Gilpin-Grubb v. State,* 138 Idaho 76, 81, 57 P.3d 787, 792 (2002); *Mitchell,* 132 Idaho at 277, 971 P.2d at 730.

However, there is a strong presumption that counsel's performance falls within the wide range of "professional assistance" and will not be second-guessed on appeal or on post-conviction. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Moreover, in order to survive summary dismissal of a petition for post-conviction relief based on a claim of ineffective assistance of counsel, Crawford must establish by a preponderance of the evidence: (1) a material issue of fact exists as to whether counsel's performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced petitioner's case. *See Raudebaugh v. State*, 135 Idaho 602, 604, 21 P.3d 924, 926 (2001); *Pratt v. State*, 134 Idaho 581,

583, 6 P.3d 831, 833 (2000) (citing *Berg v. State*, 131 Idaho 517, 518-19, 960 P.2d 738, 739-40 (1998)).

When evaluating an ineffective assistance of counsel claim, a court does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief *unless* the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *Pratt v. State,* 134 Idaho 581, 584, 6 P.3d 831, 834 (2000). "There is a strong presumption that counsel's performance fell within the wide range of professional assistance." *State v. Hairston,* 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999) (internal quotations omitted) (quoting *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)). The Supreme Court has made it clear that the standard is very high.

> "'Surmounting *Strickland*'s high bar is never an easy task.' *Padilla v. Kentucky,* 559 U.S. ----, ---- [130 S.Ct. 1473, 1485, 176 L.Ed.2d 284] (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* 466 U.S., at 689-690 [104 S.Ct. 2052]. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to ' second-guess counsel's assistance after conviction or adverse sentence.' *Id.,* at 689 [104 S.Ct. 2052]; *see also Bell v. Cone,* 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. *Strickland,* 466 U.S., at 690, 104 S.Ct. 2052.

Premo v. Moore, __ U.S. __, 131 S.Ct. 733, 739-40 (2011). Likewise, in another recent United States Supreme Court case, the court emphasized again how deferential a reviewing court should be to trial counsel because:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* 466 U.S., at 689–690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of

> materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone,* 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland,* 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 787 -788 (2011).

In other words, it is not sufficient for counsel on post-conviction to merely argue that trial counsel conducted the trial differently than post-conviction counsel would have done. It is not even good enough to point out that trial counsel committed a mistake in the law or the facts. Instead, post-conviction counsel must establish that trial counsel's representation fell below an objective standard of reasonableness, the defendant was prejudiced, and that the outcome of the trial would have been different but for the deficient performance.

As the United States Supreme Court observed, judicial scrutiny of trial counsel's performance must be highly deferential because it is too easy for a court examining trial counsel's defense after that defense has proven to be unsuccessful to conclude that a particular act or omission was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, (1982).

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 690-691 (emphasis added).

The Court finds Crawford fails on all counts.

I. **Allegations against trial counsel fail.**

Crawford makes several claims against trial counsel. He argues that trial counsel should have moved for acquittal pursuant to I.C.R. 29. He also complains that trial counsel should have "preserved" the issue of whether substantial evidence existed to support the conviction of Lewd and Lascivious on Count II. Finally, he argues that his trial counsel should have requested the Court to define terms for the jury or answered "yes" in response to its question. Crawford is simply wrong.

A. The failure to move for acquittal is not a basis for relief.

Contrary to Crawford's claim, defense counsel is not required to raise every conceivable issue. *Aragon*, 114 Idaho at 765, 760 P.2d at 1181. Where the asserted deficiency on the part of counsel consists of a failure to pursue a particular issue, which even if pursued would not have afforded a basis for relief, the court will reject any ineffective assistance of counsel claim. *Id.*; *Huck*, 124 Idaho at 158-59, 857 P.2d at 637-38.

1. A Rule 29 motion would have failed.

A Rule 29(a) motion for acquittal will not be granted when the evidence is sufficient to sustain a conviction. *State v. Holder*, 100 Idaho 129, 131, 549 P.2d 639, 650 (1979) (overruled on other grounds). The test of sufficiency is whether there is substantial and competent evidence to support a conviction-the same standard applied in appellate review of convictions. *State v. Horn*, 101 Idaho 192, 197, 610 P.2d 551, 556 (1980); *State v. Erwin*, 98 Idaho 736, 740, 572 P.2d 170, 174 (1977). The standard of review for a motion for judgment of acquittal under I.C.R. 29(c) is whether there was substantial evidence upon which a trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hoyle*, 140 Idaho 679, 684, 99 P.3d 1069, 1074 (2004).

> "Where there is competent although conflicting evidence to sustain the verdict, this court cannot reweigh that evidence or disturb the verdict." *Merwin,* 131 Idaho at 644–45, 962 P.2d at 1028–29. "In reviewing a motion for judgment of acquittal ... all reasonable inferences on appeal are taken in favor of the prosecution." *Kuzmichev,* 132 Idaho at 545, 976 P.2d at 471; *Grube,* 126 Idaho at 386, 883 P.2d at 1078.

State v. Hoyle, 140 Idaho 679, 684, 99 P.3d 1069, 1074 (2004).

While Crawford claims that there was "no" evidence of manual-genital touching to sustain a conviction on Count II, he is simply wrong. There was *substantial* evidence to support the jury's verdict and a motion to acquit would have failed. The Idaho Supreme Court has clearly described what is necessary to support a jury verdict on appeal and what is meant by "substantial evidence".

> Evidence is substantial if a "reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been prove[n]." *State v. Mitchell,* 130 Idaho 134, 135, 937 P.2d 960, 961 (Ct.App.1997). On appeal from a defendant's conviction, we view the evidence in the light most favorable to the prosecution in determining whether substantial evidence exists. *Sheahan,* 139 Idaho at 286, 77 P.3d at 975. We will not substitute our own judgment for that of the jury on matters such as the credibility of witnesses, the weight to be given to certain evidence, and "the *reasonable inferences to be drawn from the evidence.*" *Id.* (quoting *State v. Allen,* 129 Idaho 556, 558, 929 P.2d 118, 120 (1996)). Accordingly, *substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence. State v. Stevens,* 93 Idaho 48, 50–51, 454 P.2d 945, 947–48 (1969); *State v. Stefani,* 142 Idaho 698, 704, 132 P.3d 455, 461 (Ct.App.2005). In fact, *even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt. State v. Slawson,* 124 Idaho 753, 757, 864 P.2d 199, 203 (Ct.App.1993).

State v. Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009) (emphasis added).

The jury in this case had the opportunity to observe the second victim's demeanor, her obvious reluctance to testify or to even describe what had happened to her. She testified that Crawford asked her "if she knew what her clit was." She also clearly testified that when she responded that she did not know, Crawford said, "Well, let me show you" and approached her in an effort to physically show her as she backed away from him. She then testified he touched her "outside of her vaginal area."

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 leading from the vulva to the womb in women." *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 referencing 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.[2] As the Supreme Court recognizes, "even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt." *Severson*, 147 Idaho at 712, 215 P.3d at 432 (citing *State v. Slawson,* 124 Idaho at 757, 864 P.2d at 203). Thus, applying the standard that all inferences should be construed in favor of the State's evidence, the Court would have denied a motion to acquit.

Because a motion to acquit would have failed, Crawford cannot establish either that the failure to make the motion fell below an objective standard or that Crawford suffered prejudice from that failure. Crawford is denied relief on this ground.

2. A motion to acquit is not necessary to preserve the sufficiency of the evidence for appeal.

Crawford also complains that by failing to move to acquit, the issue of the sufficiency of the evidence was not preserved for appeal. He is wrong. It has long been the law in Idaho that "no I.C.R. 29 Motion is required to preserve an appeal based on insufficient evidence." *State v. Faught,* 127 Idaho 873, 877, 908 P.2d 566, 570 (1995), citing *State v. Ashley,* 126 Idaho 694, 889 P.2d 723 (Ct.App.1994). The purpose of Rule 29 is to test the sufficiency of the evidence against a defendant and avoid the risk that a jury may find the defendant guilty when there is not legally sufficient evidence. 2A WRIGHT, FEDERAL PRACTICE AND PROCEDURE ¶ 461 (Criminal 3d ed.2000), (discussing the similar Federal Rule of Criminal Procedure 29, Motion for Judgment of Acquittal). In fact, Crawford himself recognizes this has long been the law and cites these cases in his verified petition at page 10.

Because, as Crawford recognizes, a motion to acquit was unnecessary to preserve the issue for appeal, Crawford cannot prove either that the failure to make the motion fell below an objective standard or that he suffered prejudice from that failure. Crawford is denied relief on this ground.

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[2] A touching outside the vaginal area through clothing is sufficient; bare skin need not even be touched. *State v. Madrid*, 74 Idaho 200, 205-07, 259 P.2d 1044, 1047-48 (1953).

B. The failure to request the Court either define genitals or to answer the jury question related to touching the vaginal area "yes" does not support post-conviction relief.

Crawford also claims that his trial counsel was ineffective by failing to request the Court either define the term "genital" or to answer the jury's question related to touching the vaginal area "yes" in response to their question. The Court disagrees.

The jury asked several questions during deliberations, including the following question relevant to the claim presented by Crawford in his Petition: "In order to have committed manual-genital contact, does it require touching the vaginal area?" In response to that question, the Court instructed the jury to re-read the instructions. There is nothing to suggest that this decision was in error.

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. *See State v. Draper*, 151 Idaho 576, 589, 261 P.3d 853, 866 (2011); *State v. Zichko,* 129 Idaho 259, 264, 923 P.2d 966, 971 (1996); *State v. Gonzales,* 92 Idaho 152, 158, 438 P.2d 897, 903 (1968); *State v. Caldwell*, 140 Idaho 740, 742, 101 P.3d 233, 235 (Ct. App. 2004); *State v. Gomez,* 126 Idaho 700, 706, 889 P.2d 729, 735 (Ct. App. 1994); *State v. Greensweig,* 102 Idaho 794, 799, 641 P.2d 340, 345 (Ct. App. 1982). It is not error to refuse to define ordinary words. *Id.* The term "genital" is commonly understood and requires no further explanation. *See e.g. State v. Merrifield*, 478 A.2d 1131, 1133 (Me. 1984). Therefore, it was not error to not request the Court to define the term.

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. *See* OXFORD AMERICAN PAPERBACK DICTIONARY 1027 (1980). The external genitalia are "outside" the vaginal area. Outside is defined as "the outer side of a surface." *Id.* at 634. Therefore, the answer "yes" may have further confused the jury.

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.

Therefore, Crawford cannot prove either that the failure to request a definition of genitals or to request the Court answer "yes" fell below an objective standard or that Crawford suffered prejudice from that failure. In addition, the failure to preserve the issue for appeal did not fall below an objective standard. Crawford is denied relief on these grounds.

II. Allegations against appellate counsel fail.

Crawford claims his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence supporting Crawford's conviction on Count II. He claims "[t]here were not stronger issues to raise on appeal." He is wrong.

Claims that a petitioner was denied the effective assistance of counsel because appointed counsel should have raised certain additional issues on appeal are subject to the standards set forth in *Strickland*, and Crawford therefore must show that his appellate counsel's performance was deficient and caused prejudice in the outcome of the appeal. The Court of Appeals succinctly noted that

> " . . . [I]t is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."

Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007) (citations omitted). Therefore, an indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all non-frivolous arguments that the defendant wishes to pursue. As the Court of Appeals observed "the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being the evidence of incompetence, is the hallmark of effective appellate advocacy." *Id.*

In *Mintun*, the Court of Appeals also recognized that certain issues should not be addressed in a direct appeal when the record on appeal is not complete enough to appropriately and adequately address the merits of the claim. *Id.* at 662, 168 P.3d at 46. Additionally, a claim of ineffective assistance of appellate counsel for failing to appeal decisions of the defense counsel regarding evidence or other potential errors is difficult to sustain because the record on direct appeal rarely discloses trial strategy and tactical decision-making. *See Id.*

Challenging the sufficiency of the evidence on appeal is a difficult hurdle for appellate counsel when there is some evidence supporting the conviction. The test of sufficiency is whether there is substantial and competent evidence to support a conviction. *State v. Horn*, 101 Idaho 192, 197, 610 P.2d 551, 556 (1980); *State v. Erwin*, 98 Idaho 736, 740, 572 P.2d 170, 174 (1977).

> "Where there is competent although conflicting evidence to sustain the verdict, this court cannot reweigh that evidence or disturb the verdict." *Merwin,* 131 Idaho at 644–45, 962 P.2d at 1028–29.

State v. Hoyle, 140 Idaho 679, 684, 99 P.3d 1069, 1074 (2004). In this case, as discussed above, there was substantial evidence to support the jury's verdict.

> Evidence is substantial if a "reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been prove[n]." *State v. Mitchell,* 130 Idaho 134, 135, 937 P.2d 960, 961 (Ct.App.1997). On appeal from a defendant's conviction, we view the evidence in the light most favorable to the prosecution in determining whether substantial evidence exists. *Sheahan,* 139 Idaho at 286, 77 P.3d at 975. We will not substitute our own judgment for that of the jury on matters such as the credibility of witnesses, the weight to be given to certain evidence, and "the *reasonable inferences to be drawn from the evidence.*" *Id.* (quoting *State v. Allen,* 129 Idaho 556, 558, 929 P.2d 118, 120 (1996)). Accordingly, *substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence. State v. Stevens,* 93 Idaho 48, 50–51, 454 P.2d 945, 947–48 (1969); *State v. Stefani,* 142 Idaho 698, 704, 132 P.3d 455, 461 (Ct.App.2005). In fact, *even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt. State v. Slawson,* 124 Idaho 753, 757, 864 P.2d 199, 203 (Ct.App.1993).

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The jury had the opportunity to observe the second victim's demeanor, her reluctance to testify or to even describe what had happened to her. She clearly testified that Crawford asked her "if she knew what her clit was." She also clearly testified that when she responded that she did not know, Crawford said, "Well, let me show you" and approached her to show her as she backed away. She testified he touched her "outside of her vaginal area."

As discussed above, the evidence gave rise to reasonable inferences of guilt on Count II. Thus, appellate counsel was not ineffective for failing to pursue this issue on appeal. Appellate counsel raised the strongest issue on appeal – that the Court erred as a matter of law in instructing

the jury. Significantly, appellate counsel convinced the Court of Appeals and the court vacated his conviction on Count I.

Thus, this claim fails as well and the Court dismisses his claim.

CONCLUSION

After reviewing the evidence and pleadings before it, the Court finds that no purpose would be served by any further proceedings and finds, as a matter of law, that Crawford is entitled to none of the post-conviction relief requested. *Repp v. State,* 136 Idaho 262, 32 P.3d 156, 157-58 (Ct. App. 2001). Having reviewed the Petition and any evidence in a light most favorable to Crawford, the Court finds that it is satisfied that Crawford is not entitled to post-conviction relief. I.C. §19-4906(2). The Court further finds there is no dispute of material fact and no purpose would be served by any further proceedings. Therefore, the Court dismisses Crawford's Petition.

IT IS SO ORDERED.

Dated this 12th day of November 2013.

Cheri C. Copsey
District Judge