

6-27-2014

# Crawford v. State Appellant's Reply Brief Dckt. 41669

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SHANE CRAWFORD, )  
 )  
 Petitioner-Appellant, )  
 vs. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

S.Ct. No. 41669  
(Ada Co. No. CV-PC-2013-11891)

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District of the State of Idaho  
In and For the County of Ada

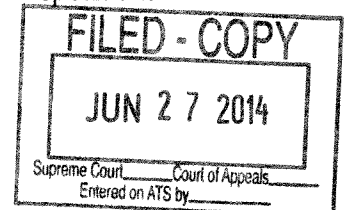
HONORABLE CHERI C. COPSEY,  
District Judge

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**TABLE OF CONTENTS**

I. Table of Authorities ..... ii

II. Argument in Reply ..... 1

    A. Trial Counsel Was Ineffective for Failing to Move for a Judgment of Acquittal on  
    Count II ..... 1

    B. Appellate Counsel Was Ineffective for Failing to Raise the Strongest Issue  
    Applicable to Count II ..... 4

    C. 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 Ineffective Assistance  
    of Counsel ..... 5

III. Conclusion ..... 5

**I. TABLE OF AUTHORITIES**

**STATE CASES**

*Mintun v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007) ..... 5

## II. ARGUMENT IN REPLY

The state begins its response by claiming that Mr. Crawford's arguments are "completely rebutted" by the district court's order. State's Brief, pg. 6. That assertion, however, is not correct, as shown by the arguments demonstrating the district court's errors set forth in the Opening Brief. As to the state's "additional argument," Mr. Crawford replies as follows.

**A. *Trial Counsel Was Ineffective for Failing to Move for a Judgment of Acquittal on Count II***

The state argues that An.C.'s affirmative response to the prosecutor's question, "In fact, he was up there to your privates?" is sufficient evidence to show manual-genital contact with regard to Count II. However, the state glosses over the fact that the prosecutor was talking about a different, uncharged event occurring prior to the event charged as Count II. Thus, An.C.'s affirmative response was also in response to uncharged conduct.

The state bases its argument on the following:

Q. 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.

(T pg. 241, ln. 20 - pg. 242, ln. 2.)

What this shows is that An.C.'s response actually refers to her prior testimony where she said that "[h]e would touch me on my upper thigh and it started getting real uncomfortable." (T pg. 239, ln. 3-4.) At that time, the prosecutor asked: "What was the difference? Why did it make you uncomfortable?" An.C. answered: "Because certain places were okay and other places

weren't and the places that he was touching me I knew were not okay." (*Id.*, ln. 13-17.) An.C. continued that the touching "[w]as close to my private area." (*Id.*, ln. 20.) This is the incident to which the "[i]n fact he was up there to your privates?" question refers. (T pg. 241, ln. 35 - pg. 242, ln. 2.) This testimony does not refer to the "clit incident" as claimed by the state. It refers to the previously testified to thigh-touching incidents.

When the prosecutor asks, "Besides the touching when he was rubbing your leg, was he getting close to where your underwear was at," she is trying to elicit additional information about the same incident. She does not ask, "Besides *the time* he was rubbing your leg," which would mean a different incident, she is asking whether there was other touching at *that* time besides the thigh touching. The prosecutor then asks the leading question, "In fact, he was up there to your privates"" in order to 'seal the deal' on that incident before she moved on to the charged incident. It is illogical "to conclude," as the state does, "that such testimony referred to the kitchen incident discussed immediately thereafter." State's Brief, pg. 8. That testimony refers to an entirely different incident.

After getting An.C. to agree that Mr. Crawford had gotten "up there to your privates" previously, the prosecutor began her questioning about the allegations in 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.)

Again, the “outside of my vaginal area” incident is not the same as the “up there to your privates” incident. No rational trier of fact could find otherwise. The “up there” touching was what made An.C. uncomfortable during the thigh-touching incident, both of which occurred before the charged incident.

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.) Thus, the testimony is Mr. Crawford was reaching up her shorts and he touched outside her vaginal area. It make 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.) Indeed, An.C. told Detective Ellis 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. (T pg. 284, ln. 24 - pg. 285, ln. 18.)<sup>1</sup>

The evidence as to Count II was insufficient to show manual-genital touching. Consequently, as set forth in the Opening Brief, trial counsel was ineffective for failing to move the trial court for a judgment of acquittal.

**B. *Appellate Counsel Was Ineffective for Failing to Raise the Strongest Issue Applicable to Count II***

As demonstrated above, the sufficiency of the evidence issue as to Count II is meritorious. Had it been raised on appeal, this Court would have reversed the conviction and entered a judgment of acquittal. Thus, it was, by definition, the strongest issue which could be raised on appeal as to Count II. The issue actually raised could only have resulted in a new trial. Moreover, as strongly argued by the state's attorney in the direct appeal, the issue raised by appellate counsel was clearly harmless error as to Count II.<sup>2</sup> Thus, in practical effect, appellate counsel did not raise any issue attacking the validity of Count II when there was a significant and obvious issue which was ignored. This was ineffective assistance of appellate counsel under

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<sup>1</sup> The state notes in a footnote that "An.C. testified only about one other incident that can reasonably be viewed as involving her 'privates'." State's Brief, pg. 9 ft. 1. The importance of the number of such incidents is not clear as the state elected the "clit incident" as the incident charged in Count II, to the exclusion of all others. (T pg. 498, ln. 5-14; pg. 545, ln. 8 - pg. 546, ln. 6.)

<sup>2</sup> State's counsel wrote in the direct appeal that, "[t]he record unequivocally demonstrates that any question the jury may have had as to whether breasts are considered genitals was not relevant to, and could not have affected Count II. Because there was no allegation in the charging document, no testimony, and no argument even hinting that Crawford may have touched An.C.'s breasts in regard to Count II, any error by the district court in response to the jury's third question was harmless as to that count." R 58. Plainly, the state cannot now credibly claim the instructional argument was the best argument to be raised regarding Count II.



*Mintun v. State*, 144 Idaho 656, 168 P.3d 40 (Ct. App. 2007).


C. *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 Ineffective Assistance of Counsel*

The state does not address this issue in its briefing. As Mr. Crawford has already set forth why the trial court erred in his Opening Brief, no further discussion is required.

**III. 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 27<sup>th</sup> of June, 2014.

  
Dennis Benjamin  
Attorney for Shane Crawford

CERTIFICATE OF SERVICE

I CERTIFY that on June 27, 2014, I caused two true and correct copies of the foregoing document to be:

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