1-2-2009

State v. Hansen Appellant's Brief Dckt. 34701

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

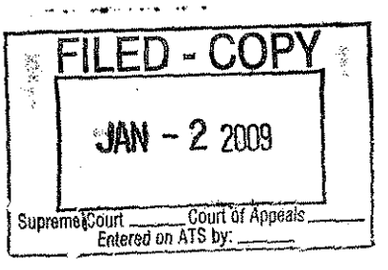
Plaintiff/Respondent,

vs.

ERIC JASON HANSEN,

Defendant/Appellant.

S.Ct. No. 34701



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 MIKE WETHERELL
Presiding Judge

Dennis Benjamin
Robyn Fyffe
NEVIN, BENJAMIN, McKAY
& BARTLETTLLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Lawrence Wasden
IDAHO ATTORNEY GENERAL
Stephen Bywater
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from Mr. Eric Jason Hansen's judgment of conviction and sentences for two counts of aggravated assault, enhanced by possession of a firearm during the commission of the offenses, and unlawful possession of a firearm.

B. General Course of Proceedings

At approximately 5:30 p.m. on a weekday in late September 2006, Olivia and her older brother Matt were waiting to cross Milwaukee at its intersection with Franklin Road on their way to the Boise Towne Square ("the mall"). Tr. p. 208, ln. 18 to p. 209, ln. 4; p. 210, ln. 10-20; p. 250, ln. 17 to 251, ln. 2. Mr. Hansen was the passenger of a vehicle waiting to turn north onto Milwaukee from the left turn lane on Franklin. Tr. p. 259, ln.13-24. The driver of the vehicle yelled at Olivia and a verbal exchange between Matt and the driver ensued. Tr. p. 224, ln. 19-21; p. 251, ln. 3-19; p. 253, ln. 1-14; p. 275, ln. 3-18. The vehicle turned north on Milwaukee and Olivia and Matt crossed to the eastside of Milwaukee and walked north towards the mall. Tr. p. 212, ln. 5-20; p. 214, ln. 1-8; p. 254, ln. 2-20. The vehicle turned around and returned south on Milwaukee towards Olivia and Matt. Tr. p. 215, ln. 2-15. Tr. p. 215, ln. 21-24. As the vehicle came parallel with where Matt and Olivia were on the sidewalk, Mr. Hansen shot a gun into the air. Tr. p. 216, ln. 5-8; p. 258, ln. 12-21; p. 259, ln. 8-11; p. 288, ln. 10-14.

The state charged Mr. Hansen with two counts of aggravated assault for allegedly threatening to do violence to Matt and Olivia with a firearm, which created a well-founded fear that such violence was imminent. R. 22-25. The state also alleged that Mr. Hansen displayed a firearm during the commission of the offenses for purposes of the sentencing enhancement set

forth in I.C. § 19-2520. *Id.* The state further alleged that, because Mr. Hansen had been previously convicted of a felony, he unlawfully possessed a firearm. *Id.*

A jury found Mr. Hansen guilty of both counts of aggravated assault, the firearm enhancement and being a felon in possession of a firearm. R. 122-25. The district court sentenced Mr. Hansen to a determinate five year term of confinement on the first count of aggravated assault. For the second count of aggravated assault enhanced by the use of a firearm, the district court imposed a consecutive unified term of twenty years with a minimum period of confinement of five years. For unlawful possession of a firearm, the district court imposed a consecutive, indeterminate term of five years. R. 149. This timely appeal follows.

III. ISSUES PRESENTED ON APPEAL

A. Was there sufficient evidence to support the verdicts?

B. Must Mr. Hansen's judgment of conviction be vacated because the jury instructions failed to require the state to prove the element of intent and there was evidence that could have rationally led the jury to conclude Mr. Hansen did not specifically intend to threaten to commit violence on Olivia and Matt with a firearm?

IV. ARGUMENT

A. There was Insufficient Evidence to Support the Verdicts

This Court will set aside a jury's finding of guilt where the state failed to present substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Horejs*, 143 Idaho 260, 263, 141 P.3d 1129, 1132 (Ct. App. 2006); *State v. Medina*, 128 Idaho 19, 27, 909 P.2d 637, 645 (Ct.App.1996). This Court views the evidence in the light most favorable to the prosecution. *Medina*, 128 Idaho at

27, 909 P.2d at 645; *State v. Reyes*, 121 Idaho 570, 572, 826 P.2d 919, 921 (Ct. App. 1992).

The state alleged that Mr. Hansen committed an aggravated assault by threatening to do violence to Matt and Olivia with a firearm, which created a well-founded fear that such violence was imminent. *See also* I.C. §§ 18-901(b), 18-905(b). Thus, the state was not simply obligated to prove that Mr. Hansen threatened Olivia and Matt with *violence* and, instead, it was obligated to prove that he threatened to do violence *with* the firearm. However, construing the facts in the prosecution's favor, Mr. Hansen fired a gun into the air while looking at Matt and Olivia across at least two lanes of traffic during rush hour. These circumstances are insufficient to support a finding that Mr. Hansen intended to threaten to shoot Matt or Olivia or that they could have reasonably believed such a threat was imminent.

From their place on the sidewalk, Olivia and Matt were closest to northbound traffic whereas the vehicle was headed south at the time a shot was fired into the air. Thus, two busy lanes of traffic, a turn lane and the vehicle's driver were between Mr. Hansen and where Olivia and Matt stood on the sidewalk. Tr. p. 285, ln. 17 to p. 286, ln. 8. No words were spoken prior to the shots being fired. Tr. p. 259, ln. 6-7. Neither Matt nor Olivia indicated that Mr. Hansen pointed the gun at them. The vehicle was still moving at the time the shots were fired. Tr. p. 218, ln. 1-5. Matt was frightened but did not testify he believed he was in danger of getting shot. Tr. p. 260, ln. 17-19.

The evidence introduced at trial was insufficient as a matter of law to establish that Mr. Hansen threatened to do violence to Olivia and Matt with the firearm or that Matt or Olivia reasonably believed such violence was imminent. Accordingly, there was insufficient evidence to support the jury's guilty verdicts of aggravated assault and Mr. Hansen's conviction must be

vacated.

B. Mr. Hansen's Judgment of Conviction must be Vacated Because the Jury Instructions Failed to Require the State to Prove that Mr. Hansen Intended to Threaten to do Violence to Olivia and Matt with a Firearm and there was Evidence that could have Rationally Led the Jury to Conclude Mr. Hansen did not Intend to Threaten to Harm Olivia and Matt with the Firearm

1. Facts Pertaining to Argument

The district court instructed the jury to find Mr. Hansen guilty if it concluded he committed an assault on Matt and Olivia by threatening them with a firearm. Jury Instructions[1] (JI) Nos. 16, 21. The jury was informed that:

> Assault is committed when a person:
>
> (1) unlawfully attempts, with apparent ability, to commit a violent injury on the person of another; or
>
> (2) intentionally and unlawfully threatens by word or act to do violence to the person of another, with an apparent ability to do so, and does some act which creates a well-founded fear in the other person that such violence is imminent.

JI No. 26. The district court informed the jury that "intent under Idaho law is not an intent to commit a crime but is merely the intent to knowingly perform the act committed." JI No. 32. The district court further instructed the jury that: "'Wilfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to." JI No. 34.

2. Why Relief Should be Granted

To prove that Mr. Hansen committed aggravated assault as charged by the state, the state was required to prove that he specifically intended to threaten Olivia and Matt with the firearm.

---

[1] The jury instructions are an exhibit to the record. R. 186-87.

However, the district court's instructions permitted the jury to find Mr. Hansen guilty of aggravated assault based on a general, rather than specific, intent standard. Accordingly, the jury instructions violated Mr. Hansen's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 13 of the Idaho Constitution because they relieved the state of its burden to prove the intent element beyond a reasonable doubt. *See In re Winship,* 397 U.S. 358, 364 (1970).

The omission of an essential element from a jury instruction is not harmless if the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. *Neder v. United States*, 527 U.S. 1, 19 (1999); *State v. Hickman*, 146 Idaho 178, 178, 191 P.3d 1098, 1101 (2008). The district court's error is therefore reversible because the evidence could have rationally led the jury to conclude that Mr. Hansen did not intend to do violence to Olivia and Matt with the firearm and that by firing into the air he was simply showing off.

a. assault under Section 901(b) requires specific intent to threaten and therefore the district court committed fundamental error by instructing the jury on general intent

Whether the jury has been properly instructed is a question of law over which this Court exercises free review. *State v. Nevarez*, 142 Idaho 616, 619, 130 P.3d 1154, 1157 (Ct. App. 2005). Mr. Hansen's trial attorney failed to object to the jury instructions. *See* Tr. pp. 548-53. Nevertheless, fundamental error – including jury instruction error – is reviewable for the first time on appeal. *Hickman*, 146 Idaho at 178, 191 P.3d at 1101; *State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886, 892 (2007). An error is fundamental when it so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due

process. *Anderson*, 170 P.3d at 891; *State v. Lavy*, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992).

Where the trial court fails to instruct the jury that commission of the crime requires specific intent, there is constitutional error because the jury did not have the opportunity to find each element of the crime beyond a reasonable doubt. *United States v. Gracidas-Ulibarry,* 231 F.3d 1188, 1196 (9th Cir. 2000); *United States. v. Fei Lin*, 139 F.3d 1303, 1309 (9th Cir. 1998). Jury instructions that fail to require the state to prove every element of the offense violate due process and, thus, rise to the level of fundamental error. *Anderson*, 144 Idaho at 749, 170 P.3d at 892; *see also Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

Idaho statute defines two modes of committing an assault: (1) an "attempt based" assault as defined in I.C. § 18-901(a) and (2) a "threat based" assault as defined in I.C. § 18-901(b), which is committed when a person makes a threat to do violence to another, has the apparent ability to do so and creates a well-founded fear in another person that such violence is imminent. *See also State v. Crowe*, 135 Idaho 43, 45, 13 P.3d 1256, 1259 (Ct. App. 2000). Here, the state accused Mr. Hansen of committing a "threat based" assault by threatening to do violence to Matt and Olivia with the firearm.

The "threat based" assault defined in Section 901(b) requires the state to prove that the defendant intended to make a threat to do violence to another. *State v. Pole*, 139 Idaho 370, 373, 79 P.3d 729, 732 (Ct. App. 2003); *State v. Dudley*, 137 Idaho 888, 891, 55 P.3d 881, 884 (Ct. App. 2002). Thus, Section 901(b) requires a state of mind – to threaten – which in part defines and is an element of the crime. Accordingly, Section 901(b) defines a specific intent crime. *See State v. Fox*, 124 Idaho 924, 926, 866 P.2d 181, 183 (1993) (a specific intent requirement refers

to that state of mind which in part defines the crime and is an element thereof).

Conversely, the district court instructed the jury that intent is not an intent to commit a crime but is merely the intent to knowingly perform the act committed and that wilfully simply implies a purpose or willingness to commit the act. JI Nos. 32, 34. These instructions describe "general intent." *Fox*, 124 Idaho at 926, 866 P.2d at183 (general criminal intent requirement satisfies if it is shown that the defendant knowingly performed the proscribed acts). The general intent instructions were inconsistent with and contrary to Section 901(b)'s requirement that the state prove that the defendant intended to threaten and, thus, intended to commit assault. As instructed, the jury was not required to conclude that Mr. Hansen intended to threaten to do violence to Olivia and Matt with the firearm by firing the gun into the air and, instead, was permitted to find him guilty based on its conclusion that Mr. Hansen intended to fire the gun, regardless of his intentions in so doing.

As a result of these defects in the instructions, the state was relieved of its burden to prove the element of intent beyond a reasonable doubt. *See Fei Lin*, 139 F.3d at 1309. Because "such circumstances qualify as a clear instance of manifest injustice," the error was fundamental. *Anderson*, 170 P.3d at 892.

b. the jury instruction error was not harmless because there was evidence that could have rationally led the jury to conclude Mr. Hansen did not specifically intend to threaten to harm Olivia and Matt with the firearm when he shot into the air

An error implicating the due process guarantee of the Fourteenth Amendment is reversible unless the court is convinced that the error was harmless beyond a reasonable doubt. *Neder*, 527 U.S. at 7; *Anderson*, 170 P.3d at 892. In deciding whether an error is harmless, courts must evaluate whether there is a reasonable possibility that the evidence complained of

might have contributed to the conviction. *Anderson*, 170 P.3d at 892. A defendant is prejudiced when a jury is not instructed as to an element of an offense and the record contains evidence that could rationally lead to a finding in favor of the defendant with respect to the omitted element. *Neder*, 527 U.S. at 19; *State v. Thompson*, 143 Idaho 155, 158, 139 P.3d 757, 760 (Ct. App. 2006). Thus, an error is not harmless when the defendant contested the omitted element and raised evidence sufficient to support a contrary finding. *Neder*, 527 U.S. at 19.

"The reviewing court must ever bear in mind that criminal defendants have a constitutional right to have a jury, not appellate court judges on review, decide guilt or innocence." *State v. Johnson*, 98 P.3d 998, 1003 (N.M. 2004). Thus, the court conducting the harmless-error inquiry does not "become in effect a second jury to determine whether the defendant is guilty." *Neder*, 527 U.S. at 19, *citing* R. Traynor, The Riddle of Harmless Error 50 (1970). "It is imperative that a reviewing court be guided not by its own assessment of the guilt or innocence of the defendant – a matter which is irrelevant to the question whether the constitutional error might have contributed to the jury's verdict – but rather by an objective reconstruction of the record of evidence the jury either heard or should have heard absent the error and a careful examination of the error's possible impact on that evidence." *Johnson*, 98 P.3d at 1003; *see also Arizona v. Fulminate*, 499 U.S. 279, 296 (1991) (harmless error analysis requires the court to determine that the error did not contribute to the conviction); *Chapman v. California*, 386 U.S. 18, 23 (1967) (whether there is a reasonable possibility that the error might have contributed to the conviction); *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) (same). Accordingly, the focus of the harmless error inquiry is not whether there was overwhelming evidence to support the verdict but, rather, whether the omitted element was contested and

whether the defendant raised sufficient evidence to support a finding in his favor with respect to that element. *See Neder*, 527 U.S. at 19; *see also Chapman*, 386 U.S. at 23 (noting California court's "overemphasis" on its view of overwhelming evidence); *Johnson*, 98 P.3d at 1004 (strength of prosecution's case but one factor with central focus of inquiry on whether error might have affected verdict).

Here, the state alleged that Mr. Hansen committed an assault by threatening Olivia and Matt "with a firearm." However, the jury could have rationally concluded that, although Mr. Hansen intended to fire the gun, he did not do so with the intent to threaten to harm Matt and Olivia with the firearm. Indeed, the underlying circumstances suggest it was highly unlikely that Mr. Hansen would have targeted Olivia and Matt with the gun. The encounter between the vehicle and Olivia and Matt occurred during rush hour traffic in one the busiest areas of Boise. Three lanes and extensive traffic sat between Mr. Hansen and Olivia and Matt. Tr. p. 255, ln. 6-9, p. 227, ln. 16-25, pp. 285, ln. 23 to 286, ln. 8. Neither Olivia nor Matt testified that any words were spoken prior to the shot being fired. *See* Tr. p. 217, ln. 1-22; p. 259, 6-7. This evidence was sufficient to support a finding that Mr. Hansen did not intend to threaten to harm Olivia and Matt with the firearm and, instead, intended to shoot the gun into the air to show off or to initiate a fist fight, which although illegal, would not constitute an *aggravated* assault.

Mr. Hansen contested his intent to threaten Olivia and Matt with the firearm at trial and evidence was introduced which could have rationally led the jury to find in his favor on that element. Accordingly, it is not possible to say that the erroneous jury instruction did not contribute to the verdict and Mr. Hansen's judgment of conviction and sentences must be vacated.

V. CONCLUSION

Mr. Hansen respectfully asks that this Court vacate his judgment of conviction and sentences and either enter a judgment of acquittal or remand for a new trial.

Respectfully submitted this 2nd day of January, 2009

Dennis Benjamin
Attorney for Eric J. Hansen

Robyn Fyffe
Attorney for Eric J. Hansen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of January 2009, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.

Robyn Fyffe