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State v. Hansen Appellant's Reply Brief Dckt. 34701

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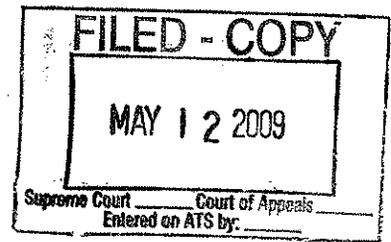
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff/Respondent,)
)
 vs.)
)
 ERIC JASON HANSEN,)
)
 Defendant/Appellant.)
 _____)

S.Ct. No. 34701



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 MIKE WETHERELL
Presiding Judge

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II. ARGUMENT IN REPLY

A. **There was Insufficient Evidence to Support the Verdicts.**

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. Such facts fail to support a finding that Mr. Hansen intended to threaten violence with the firearm or that Matt and Olivia could have reasonably believed such a threat was imminent. Accordingly, insufficient evidence supported the jury's verdict and Mr. Hansen's convictions should be vacated.

In arguing to the contrary, the state notes that Mr. Hansen "apparently pursued Matt and Olivia to the mall, looking for them throughout the mall while having what appeared to be a gun struck in the waistband of his pants." Respondent's Brief, p. 16. This conduct cannot be construed as a threat to do violence with a firearm and the state did not assert that Mr. Hansen's conduct in the mall constituted assault. Thus, that Mr. Hansen may have wandered the mall with a gun in his pants is not relevant to whether he committed the aggravated assault some time earlier while driving on Milwaukee. *See* IRE 404(b) (evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith). Rather, whether Mr. Hansen carried a firearm in the mall was relevant to the charge that he unlawfully possessed a firearm.

The state was obligated to prove that Mr. Hansen threatened to do violence to Olivia and Matt with the firearm and that they reasonably believed such violence was imminent. The evidence introduced at trial was insufficient as a matter of law to establish either of those elements. Accordingly, there was insufficient evidence to support the jury's guilty verdicts and Mr. Hansen's conviction must be vacated. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979).

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.

The “threat based” assault defined in I.C. § 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). Here, in order for the assault to be aggravated, the state was required to prove that Mr. Hansen intended to make a threat to do violence to Matt and Olivia with the firearm. *See* I.C. § 18-905(a); R. 23.

Because Section 901(b) sets forth a state of mind – to threaten – that is an element of the crime, a “threat based” assault is 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). However, 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. JI No. 32; *see also* JI No. 34 (wilfully simply implies a purpose or willingness to commit the act). These instructions were erroneous when applied to the elements instruction because the state was required to prove that Mr. Hansen intended to threaten to do violence to Matt and Olivia with the firearm and, thus, that he intended to commit assault. Accordingly, the jury instructions, taken as a whole, misstated the law and misled the jury.

The state contends that Mr. Hansen invited error because he “proposed that the district court instruct the jury with the very instructions he now complains of.” Respondent’s Brief, p. 11. However, Mr. Hansen’s proposed jury instructions did not include an instruction regarding

general intent as set forth in Jury Instructions Numbers 32 and 34. Thus, the doctrine of invited error is inapplicable to the argument presented on appeal – that it was error to instruct the jury on general intent where the crime at issue required specific intent.

The state also contends that it was not required to prove that Mr. Hansen intended to threaten Olivia and Matt with a firearm and, instead, it was required to prove “he intended to threaten his victims, and did so with a firearm.” Respondent’s Brief, p. 12. However, the state accused Mr. Hansen of committing an assault upon Matt and Olivia by “threatening them with a firearm.” R. 23. The state was therefore obligated to prove that Mr. Hansen intended to threaten Matt and Olivia with a firearm.

Regardless of whether the state was required to prove that Mr. Hansen intended to threaten violence *with* the firearm, the threat based assault as charged by the state required proof of the specific intent to threaten violence. Where the jury could conclude that the general intent instructions applied to the elements instruction of a specific intent crime, fundamental error has occurred. *See State v. Rolon*, 146 Idaho 684, 691, 201 P.3d 657, 664 (Ct. App. 2008) (the court erred in creating the impression that only a general intent was required to find defendant guilty of conspiracy to traffic in controlled substances by giving instructions that purported to explain the concepts of “intent” and “willfully” as they related to the general conspiracy instructions). The jury in this case could have applied the general intent jury instructions to the instructions setting forth the elements of aggravated assault and, therefore, the instructions constituted fundamental error.

The state contends that because the instructions were each correct statements of the law they cannot be erroneous. However, jury instructions must be read as a whole, and not

individually. *See Rolon*, 146 Idaho at 689, 201 P.3d at 662 (question when reviewing jury instructions is whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law). The jury was informed that an assault was a threat to do violence but that, under Idaho's intent law, the state was not required to prove that Mr. Hansen intended to commit an assault. *See* JI Nos. 26, 32. Instead, the jury was informed that "intent is an intent to knowingly perform the act committed." JI No. 32; *see also* JI No. 34.

Read with the general intent instruction, the elements instructions and the definition of assault could have led the jury to believe that the state was only required to prove Mr. Hansen intended to do the act that resulted in Matt and Olivia feeling threatened, regardless of whether Mr. Hansen intended to threaten violence. Contrary to the state's argument, the instructions did not direct the jury that the state was required to prove that Mr. Hansen intended to threaten Matt and Olivia. Instead, the jury was instructed to find Mr. Hansen guilty if he committed an assault by threatening with a firearm. The instructions taken as a whole erroneously negated the specific intent element and, therefore, constituted fundamental error.

The state notes that the general intent instructions would have been properly applied to the lesser-included offense of disturbing the peace. However, the jury was not told that Instructions Numbers 32 and 34 only applied to the lesser included offense, and it thus would have applied those instructions to the elements instruction of aggravated assault.

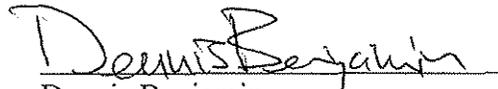
As instructed, the jury was permitted to find Mr. Hansen guilty based on its conclusion that Mr. Hansen intended to fire the gun, regardless of whether he intended to threaten violence in so doing. As a result of the defects in the instructions, the state was relieved of its burden to prove the element of intent beyond a reasonable doubt, which qualifies as a clear instance of

manifest injustice. Mr. Hansen contested at trial his intent to threaten Olivia and Matt with the firearm, and evidence was introduced which could have rationally led the jury to find in his favor or have a reasonable doubt as to the state's proof 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. *Chapman v. California*, 386 U.S. 18, 23 (1967).

III. 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 12th day of May, 2009


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May 2009, I caused two true and correct copies of the foregoing to be mailed to:

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