9-21-2015

State v. Melvin Respondent's Brief Dckt. 42295

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 42295
Plaintiff-Respondent,	)	
	)	Idaho Co. Case No.
vs.	)	CR-2013-55497
	)	
THOMAS T. MELVIN, JR.,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

HONORABLE MICHAEL J. GRIFFIN
District Judge

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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STATEMENT OF THE CASE

Nature Of The Case

Thomas T. Melvin, Jr. appeals from the judgment entered upon the jury verdict finding him guilty of lewd conduct. Melvin claims, for the first time on appeal, that the prosecutor committed misconduct during closing argument by allegedly misstating the evidence. Melvin also claims the district court abused its sentencing discretion.

Statement Of Facts And Course Of Proceedings

The state charged Melvin with lewd conduct with a minor under 16 for having genital-to-genital contact with ten-year-old Z.G. (R.[1], pp.8-9, 20-21.) Melvin pled not guilty and the case proceeded to trial. (R., pp.22, 31-39.) The jury found Melvin guilty of lewd conduct and the court imposed a unified 12-year sentence with five years fixed, but retained jurisdiction.[2] (R., pp.43, 63-64.) Melvin timely appealed from the judgment. (R., pp.66-67.)

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[1] Page citations to the record in this case correspond to the electronic page number, not the handwritten page number.

[2] At the conclusion of the review period, the court relinquished jurisdiction and ordered Melvin's sentence executed. (Order Relinquishing Jurisdiction and Imposing Sentence, filed January 9, 2015 (file folder).)

ISSUES

Melvin states the issues on appeal as:

1. Did the prosecutor commit misconduct, rising to the level of fundamental error, by arguing facts not in evidence?

2. Did the district court abuse its discretion when it imposed upon Mr. Melvin a sentence that is excessive given any view of the facts?

(Appellant's Brief, p.6.)

The state rephrases the issues on appeal as:

1. Has Melvin failed to show prosecutorial misconduct, much less misconduct rising to the level of fundamental error?

2. Has Melvin failed to show the district court abused its discretion in imposing a unified 12-year sentence, with five years fixed, upon the jury verdict finding Melvin guilty of lewd conduct?

ARGUMENT

I.
Melvin Has Failed To Show Fundamental Error With Respect To His Unpreserved Claim Of Prosecutorial Misconduct

A. Introduction

For the first time on appeal Melvin argues that the prosecutor made statements during closing argument that constituted prosecutorial misconduct and amounted to fundamental error. Specifically, he contends that the prosecutor committed misconduct by arguing facts that were not in evidence. (Appellant's Brief, pp.7-11.) This claim is without merit. A review of the challenged remarks shows no misconduct, much less misconduct rising to the level of fundamental error.

B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989).

C. Melvin Has Failed To Show Any Prosecutorial Misconduct, Much Less Misconduct Amounting To Fundamental Error

An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to remedy that error is strictly circumscribed to cases where the error results in the

defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Id. at 226, 245 P.3d at 978.

Melvin argues that the prosecutor committed misconduct rising to the level of fundamental error by using the words "grabbed" and "led" during closing argument. (Appellant's Brief, pp.7-9.) Melvin, however, has failed to show error, much less fundamental error. Indeed, a review of the record and the applicable law shows that the arguments singled out are entirely proper and, as such, Melvin has failed to satisfy even the first prong of the fundamental error analysis.

A prosecutor has considerable latitude in closing argument, and is entitled to argue all reasonable inferences from the evidence in the record. State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009). If a prosecutor "attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial," and may be reviewed for

fundamental error. State v. Beeks, 2015 WL 4079448 (Idaho App. July 7, 2015) (quoting Perry, 150 Idaho at 227, 245 P.3d at 979).

In this case, Melvin contends the prosecutor misstated the evidence by using the words "grabbed" and "led" during his closing argument. (Appellant's Brief, pp.7-11.) According to Melvin, such language misstated the evidence and evidences the prosecutors "clear" efforts "to prove the intent element based on evidence that was not in the record." (Appellant's Brief, pp.7-9.) Melvin is incorrect.

In order to provide context, the prosecutor's comments must be reviewed in light of the entire trial. During opening statements, the prosecutor told the jury that Z.G. would testify

> that on July 18th, 2013, about 1:00 a.m., Mr. Melvin came into her bedroom and asked her to go somewhere, and he takes her -- leads her out of the bedroom. They start to leave the house. He tells her to get a blanket, which you'll see later was a Tinkerbell children's blanket. She grabbed her blanket, and they left their house. You'll hear her state also that when they left the house it was dark outside. That Mr. Melvin led her across the street, through an alley, over to an unfinished home in Grangeville, probably, oh, two, 300 feet away from their home. That Mr. Melvin led [her] into this unfinished home where – where you'll hear testimony nobody was living there. It was unfinished. It was under construction. That he leads her into the home, up some steps, into a room in this unfinished home. That he then lays down a tent, just a regular camping tent, pretty good size tent, lays that down on the floor of one of the unfinished rooms and leads [Z.G.] over to that area. She'll then testify that he took his clothes off -- all of his clothes, and then took all of her clothes off, and that then he places her on top of him. She'll testify that, again, they were both naked. That her vagina touched his penis for about a minute, and then she asked him to get off – get off from being on top of her. He did.

(Supp. Tr.[3], p.62, L.5 – p.63, L.5.)

Defense counsel responded to the prosecutor's opening statement by agreeing that the testimony the jury would hear would be "exactly what" the prosecutor said and indicated that he did not "dispute that the witnesses in this case are going to say what [the prosecutor] said." (Supp. Tr., p.69, Ls.11-14.)

Consistent with what the prosecutor outlined in his opening statement, and what defense counsel agreed would be said, Z.G. testified that Melvin led[4] her across the street to an unfinished home and engaged in lewd conduct with her. On direct examination, Z.G. testified:

> Q. Was there a time on -- sometime in the morning of July 18th, 2013, that . . . Mr. Melvin came to your bedroom?
>
> A. Yes.
>
> Q. And do you remember about what time that was?
>
> A. No.
>
> Q. Would it be in the early morning?
>
> A. Yeah.
>
> Q. And what did he do when he came into your bedroom?
>
> A. He got me up, and then he told me to get a blanket, so I did. And then I went out to . . . the front room. He grabbed the tent and some other stuff, and then he took me out of the house.

---

[3] There are two transcripts included in the record on appeal. The transcript including the evidence presented at trial and the sentencing hearing will be referred to as "Tr.," and the transcript containing the opening statements, closing arguments, as well as other proceedings will be referred to as "Supp. Tr."

[4] Because the word "lead" fairly and accurately describes what Melvin did in relation to removing Z.G. from the home, the state will continue to use the word "led" despite Melvin's position that the word is objectionable on the facts of this case.

Q. Okay. So, did he ask you to get a blanket?

A. Yes.

Q. And then he took a tent with him, right?

A. Yes.

Q. And then when he took you outside where did you go?

A. Across the road.

Q. And then after you crossed the road where did you go?

A. Into this unfinished house.

Q. It was being built; is that right?

A. Yes.

Q. And did your -- did Mr. Melvin take you into that unfinished house?

A. Yes.

Q. And did he take you into one of the rooms?

A. Yes.

Q. What happened when he took you into one of the rooms?

A. He laid out . . . the part that you put under the tent, and he laid it down, and the he told me to lay down. So, I got my blanket down, and then I covered up under it, and then he took off my clothes, and then he took off his.

Q. At any point did you get on top of him, or did he get on top of you?

A. He got on top of me.

(Tr., p.10, L.19 – p.12, L.10.)

Z.G. then testified that Melvin touched his penis to her vagina, for about one minute, until Z.G. told him to get off of her. (Tr., p.12, L.11 – p.13, L.16.)

Z.G. told Melvin she wanted to go home because it was cold and dark, but Melvin did not want to go, so Z.G. stayed for a while longer, but eventually left at which time she encountered an officer who was searching for her because her mother reported her and Melvin missing. (Tr., p.14, Ls.3-20, p.32, L.18 – p.34, L.11, p.74, L.11 – p.76, L.25.) Z.G. also testified that, before the abuse occurred, Melvin took her to "an area to get a drink" of water and told her to stay by a van while he took a handful of pills that he got from some prescription bottles he had with him. (Tr., p.13, L.17 – p.14, L.2, p.30, L.14 – p.31, L.15, p.43, Ls.6-25.)

During closing argument, the prosecutor discussed the evidence that supported a finding, beyond a reasonable doubt, that Melvin touched Z.G. with sexual intent. (Supp. Tr., p.97, L.14 – p.101, L.1.) The prosecutor stated:

> First of all, let's look at the time that this happened. 1:00 a.m. in the morning Mr. Melvin goes into [Z.G.'s] bedroom to get her up, and then he -- before he leaves he asks her to get a blanket. Well, what was his intent there? You decide. Why does he want her to bring a blanket over there? Also, he bring[s a] tent. He brings – he brings this tent that was laid out. Does that go to his intent? I would argue that it does. Why does a person bring a tent over to a secluded home? It goes to what his intent was. He takes [Z.G.] to a secluded location, an unfinished home, a home under construction, where nobody is living. It's not finished. The testimony was it was dark, dark in there. He takes her -- he takes her, I would submit, to a place that nobody can see what's going on. That goes to his intent, his intent to arouse his sexual desires. Once he gets to the secluded room he puts the tent on the floor. He gets -- he takes his clothes off, and he takes [Z.G.'s] clothes off. What does that show? That shows his intent, his intent to commit a sexual act with [Z.G.], an intent to arouse his sexual desires. What other meaning could that have, to take your clothes off and take [Z.G.'s] clothes off? There is no other purpose for that other than the intent to arouse your desires. He lays on top of her. What does that go to? I mean, he's naked. She's naked. He lays on top of her. I mean, what other intent, a naked man laying on a 10 or an

> 11-year-old child, what other intent is there? It's clear. And he lays on top of her not just for a second, for a minute. Her testimony was for a minute. That he lays on top of her, and not just lays on top of her, his penis touches her vagina for that minute. That was the testimony . . .. What does that show you? What intent does that show to you? And I would ask you to use your own common sense, your own -- your own learning in life, what you know about life, you know, use that. What does all these [sic] things show? It show what his intent was. This wasn't an accident, I would submit to you. It wasn't an accident that he took his clothes off. It wasn't an accident that he took her clothes off. It wasn't an accident that he laid on top of her for a minute. It wasn't an accident that his penis touched her vagina for a minute. That's not an accident.
>
> Another factor, Exhibit No. 22, this is what's called KY Jelly. And you heard -- you heard [an officer] state what that is; that that's a personal lubricant for sexual activity, basically, is what he testified to. I would ask you to look at these when you go back to the jury room. The purple one says mine, and then underneath that it says for her. The blue one says yours, for him, personal lubricant. You can read what the purpose is for that, and I would submit to you, why does – why does an adult male bring this personal sexual lubricant with him to a secluded home in the dark and do all these things and have that? . . .
>
> I would submit to you, any one of these -- I've told you 10 different circumstances which indicate intent, and I would submit to you, any one of those shows what his intent was on its own. And you add all 10 of those together, it's just -- it's overwhelming what the circumstantial evidence is regarding his intent, what as in his mind when he does all these things. *It's -- there's no other explanation for it, and you have no other explanation. It can only mean one thing, and that's he led her over there, did all these things, brought the lubricant, to arouse his sexual interest, his sexual desires.*

(Supp. Tr., p.97, L.21 – p.101, L.1 (emphasis added).)

Melvin's claim of misconduct is based, in part, on the italicized sentence above, cited without context, with an emphasis on the phrase, "he led her over there." (Appellant's Brief, p.8.) Melvin relies on this sentence in conjunction with three other snippets from the prosecutor's closing remarks as evidence of the

prosecutor's alleged malfeasance. The other snippets Melvin cites are detailed below.

In discussing Instruction No. 12 regarding voluntary intoxication, the prosecutor explained:

> But the only evidence was that [Z.G.], at one point I believe they had gone across the street and he had gotten a drink of water, and she said that he picked up some pills and took those pills, a handful of pills. But there's one – I think some interesting points about that. My recollection of [Z.G.'s] testimony -- there was actually two parts to that. *On direct examination she testified that Mr. Melvin took -- basically took her, led her over to the house, or they walked together over to the house with the tent and the blanket, and when they get to the house they go inside.* He puts the tent down. He does all these things that I've already described, that you've heard. He gets on top. Has the genital to genital contact. She says to get off after about a minute, and he does. My recollection of her testimony on direct examination was, that then at that point they both walk over, back over to were her house is. And I believe it was either her house or a neighbor's house. He goes to a hose. Gets a drink out of the hose. Takes the handful of pills, but what's important about that testimony is that that happened, him taking the pills happened after the genital to genital contact already happened. So, it happened right from the very beginning. So, any effect those pills -- the pills were taken after the act, so they wouldn't have had any effect on his mind anyway.
>
> Now, I think on cross-examination, I think there was a little bit of a change to that, where she said – she clarified that she believed that they had gone to the house the first time, I believe, and then went over across the street and he had the -- he took a drink from the hose, then took the handful of pills. Then went right back -- right back to the home, and then that's when the act occurred. So, there was a little bit of difference there, but I would submit to you either version from her on that testimony still shows that any pills that he took wouldn't have any effect on him, because if you believe the version that was brought up in cross-examination, that they went to the home and them Mr. Melvin decided he wanted to go get a drink. . . . And he went and got the drink, and then they immediately . . . went back to the home, and then the sexual act occurred . . .. So, if you believe that version -- again, the taking of the pills happened within a minute or two of the commission of the sexual act. So, use your own common sense, life experiences,

whether you think the pills would have any effect on him within a minute or two of taking them.

(Supp. Tr., p.103, L.20 – p.105, L.21 (emphasis added).)

At the conclusion of his closing, in asking the jury to return a guilty verdict, the prosecutor stated:

> I would ask you to please look at those instructions when you go back there. I think obviously the intent issue here is probably the main issue. Please consider -- consider everything that you heard yesterday regarding the intent and all these things and the KY Jelly and all the things Mr. Melvin did. *When you think about this, it was planned out. This was planned. You grab a child. You take her in the dark.* You got to a secluded home. You do all these things. You get naked. You get her naked. You get on top of her. It's all planned. Is he able to physically do all these things? Yes. No problems whatsoever. Is he able to instruct her to go get a blanket? Yes. No problems. It's all planned. It's all clear, and it's beyond any doubt. Based upon all that, ladies and gentlemen, I would ask you to find Mr. Melvin guilty of lewd conduct with a minor child.

(Supp. Tr., p.108, L.11 – p.109, L.2 (emphasis added).)

Finally, in rebuttal, in response to defense counsel's argument that Melvin lacked intent because he was "sleepwalking" during the incident, the prosecutor said:

> Use your common sense. Can you do all the things that Mr. Melvin did. Wake up [at] 1:00 a.m. Go to your stepdaughter's bedroom. Get her up. Go – and as you – before you leave the house you tell this child, get a blanket, the Tinkerbell blanket. [Z.G.], get a blanket. He didn't mumble when he said that. He didn't trip over his words. He said, go get a blanket. She goes. She gets a blanket. Is that planning? He says there's no evidence that was planning. This is what they call circumstantial evidence. Use your own common sense, life experiences. Is it planning to [say], [Z.G.], go get a blanket? He grabs this tent from the house. Is that planning? Yes, that's planning. That goes -- is that important? It goes to intent. What was his intent in doing all these things? Can you do this sleepwalking? Grab the tent. Tells [Z.G.] to get the blanket. Grab the fly, which was not attached to the tent when they

found it. Carry those. Bring the black case with the KY Jelly. Why is that over there? Does that go to intent? Absolutely. Is that planning? Absolutely.

You'll be able to take these photos back to the jury room. *He takes the girl, leads her down the steps. Can you do that sleepwalking? Leads her across the street, though a gravel alleyway, over to a rocky area where she said she was scared.* There was big rocks. Then there were smaller walks [sic]. That she was scared where she was walking. It was dark. She was scared she would trip. Walk through those rocks, this rocky area. Walk into this garage of this unfinished home. Walk up these stairs, all in the dark. Walk into this room. Take the tent, lay the tent on the ground. Not sure where the blanket was. The KY is down by his feet in a case. Take all your clothes off. . . . Take [Z.G.'s] clothes off. Get on top of her for a minute. Put your penis on her vagina for a minute until she finally says, stop. You only have your common sense, your life experiences. Can you do all that sleepwalking? And does that show intent? Absolutely, that shows intent.

(Supp. Tr., p.120, L.22 – p.122, L.12 (emphasis added).)

In arguing that "none of th[e] statements" italicized above "were supported by evidence adduced at trial," Melvin relies on the following excerpts from defense counsel's cross-examination of Z.G.:

Q. And where did you get the blanket from?

A. My bed.

Q. Your bed. Okay, and did he tell you where to go with the blanket?

A. No.

Q. Okay. But you went to the front room?

A. Yes.

Q. Okay. Did he push you into the front room, pull you in -- hold your hand?

A. No, I walked.

(Tr., p.23, L.20 – p.24, L.7 (cited in Appellant's Brief, pp.8-9).)

Q. Okay. And at that point you left the house; is that right?

A. Yes.

Q. Okay, and did [Melvin] tell you where you were supposed to go?

A. No.

Q. Okay. Did he lead you by the hand?

A. No.

Q. Push you in a direction?

A. No.

(Tr., p.25, Ls.11-20 (cited in Appellant's Brief, p.9).)

Melvin contends, for the first time on appeal, that because Z.G. denied Melvin "pushed her, led her, told her where to go, or held her hand," the prosecutor could not use the words "led" or "grab" in his closing arguments. (Appellant's Brief, p.8.) Melvin's argument ignores what is obvious from the context of the prosecutor's statements as well as the actual definition of the word "lead" (or "led"). The definition of the word "lead" includes "to guide on a way especially by going in advance"; "to direct on a course or in a direction"; "to guide someone or something along a way"; "to be first." www.merriam-webster.com/dictionary/lead. Both a common understanding of the word lead in the manner the prosecutor used it and the word's definition support the conclusion that it was an appropriate word to describe Melvin's behavior in this case. That Melvin has decided on appeal that the prosecutor intended some other meaning is unsupported by the record and his assertion that the

prosecutor's use of the word deprived him of his right to a fair trial is, at best, disingenuous. See State v. Severson, 147 Idaho 694, 719, 215 P.3d 414, 439 (2009) (appellate courts will not "lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

Melvin's argument that the prosecutor's single use of the word "grab" in referring to Z.G. constitutes misconduct also fails. Reading the prosecutor's statements as a whole does not support Melvin's assertion that the prosecutor used the word "grab" in some nefarious way in order to prove intent. Although Z.G. did not testify that Melvin physically grabbed her, it is apparent from the context that the prosecutor was not arguing such. Rather, the word was used in the non-literal sense to communicate that Melvin took, or led, Z.G. out of the house and across the street where he engaged in lewd conduct. Melvin's claim that the prosecutor "attempted to convince the jury" that Melvin "had specific intent to sexually abuse Z.G." by misstating the evidence is without merit.

Even if Melvin could satisfy the first prong of Perry, his argument does not survive scrutiny under the second or third prongs because the error he complains of is not clear on the record and the alleged error, if any, is harmless. With respect to the second prong, the error is not plain from the record because, contrary to the applicable legal standards, it requires the Court to interpret the prosecutor's word choice in the most damaging way. Severson, supra. Further, it assumes there was no strategic reason for counsel not to object even though

there are several reasons counsel may have declined to do so. For example, counsel may have elected not to object because he did not assign the most damaging meaning to the prosecutor's word, or because the prosecutor's choice of words did not undermine Melvin's sleepwalking defense, or because defense counsel did not think an objection was warranted under the circumstances. On appeal, Melvin offers no substantive argument that he met his burden under the second prong of Perry. Instead, he asserts, in conclusory fashion: "[t]hese due process violations are apparent from the face of the record and are clear violations of well-established law." (Appellant's Brief, p.10.) Stating the error is "clear" does not make it so, and falls far short of Melvin's burden of showing the error he alleges is "clear or obvious" "without the need for any additional information" including information "as to whether the failure to object was a tactical decision." Perry, 150 Idaho at 226, 245 P.3d at 978.

Finally, Melvin has failed to meet is burden of showing the statements he complains of affected the outcome of the proceedings. First, the court instructed the jury that "[t]he arguments and statements of the attorneys are not evidence" (Supp. Tr., p.87, Ls.9-10), which cured any alleged error. State v. Abdullah, 158 Idaho 386, ___, 348 P.3d 1, 59 (2015). Second, as Melvin concedes on appeal, his "entire defense" was premised on his claim that he was sleepwalking and, therefore, did not have the requisite intent. (Appellant's Brief, p.10.) The jury obviously rejected this defense and, based on the evidence presented, would have done so with or without the prosecutor's use of the words "led" or "grab" in relation to Z.G. Further, the prosecutor's discussion of intent did not hinge solely

on the assertion that Melvin led and/or grabbed Z.G. and took her across the street. The prosecutor catalogued a number of actions taken by Melvin, which Melvin did not dispute, that supported a finding that he had the requisite intent. These actions included telling Z.G. to bring a blanket with her, and Melvin bringing a tent and KY Jelly, taking Z.G. to a secluded area outside of the home in the middle of the night, telling Z.G. to remove her clothes, taking off his own clothes, and putting his penis on Z.G.'s vagina until she told him to stop. (Supp. Tr., p.120, L.11 – p.122, L.24.) This conduct, even without using the words "led," "lead," or "grab" support the jury's finding that Melvin was guilty of lewd conduct.

A review of the record shows Melvin has failed to meet his burden of showing error under any prong of Perry.

II.
Melvin Has Failed To Establish The District Court Abused Its Sentencing Discretion

A. Introduction

Melvin contends the district court abused its discretion in imposing a unified 12 year sentence with five years fixed. (Appellant's Brief, p.11.) More specifically, Melvin argues his sentence is excessive given his "relatively minor criminal history," "mental illness," the "unusual" facts of this case, and "the fact that his psychosexual evaluation places him at a moderate low risk to reoffend." (Appellant's Brief, pp.11-12.) To the contrary, the district court acted well within its discretion and consistent with the objectives of sentencing; Melvin has failed to meet his burden of showing otherwise.

B. Standard Of Review

A district court's sentence is reviewed for an abuse of discretion. State v. Hanington, 148 Idaho 26, 27, 218 P.3d 5, 7 (Ct. App. 2009).

C. The District Court Acted Well Within Its Sentencing Discretion In Imposing A Unified 12-Year Sentence, With Five Years Fixed, Upon The Jury Verdict Finding Melvin Guilty Of Lewd Conduct

In order to demonstrate an abuse of the district court's sentencing discretion, Melvin must "establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing." State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). Melvin cannot meet his burden in this case.

In imposing sentence, the district court recited the objectives of sentencing and indicated it considered "everything" in deciding what sentence to impose. (Tr., p.174, Ls.4-17, p.175, Ls.3-4.) On appeal, Melvin claims the district court imposed an excessive sentence given his "relatively minor criminal history," "mental illness," the "unusual" facts of this case, and "the fact that his psychosexual evaluation places him at a moderate low risk to reoffend." (Appellant's Brief, pp.11-12.) All of this information was, however, before the district court and considered by the court in imposing sentence, and none of the information compels a lower sentence. That Melvin disagrees with how the district court weighed the evidence and balanced the objectives of sentencing

does not show an abuse of discretion. See State v. Windom, 150 Idaho 873, 879, 253 P.3d 310, 316 (2011) ("In this case, Windom essentially asks this Court to re-weigh the evidence presented to the district court and reach a different conclusion . . .. However, our role is not to reweigh the evidence considered by the district court; our role is to determine whether reasonable minds could reach the same conclusion as did the district court.").

Based on the nature of the offense, Melvin's character, and the objectives of sentencing, a unified 12-year sentence with five years fixed is not excessive under any reasonable view of the facts.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Melvin guilty of lewd conduct.

DATED this 21st day of September, 2015.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of September, 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

KIMBERLY E. SMITH
STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General

JML/dd