11-15-2011

State v. Curry Appellant's Brief Dckt. 38127

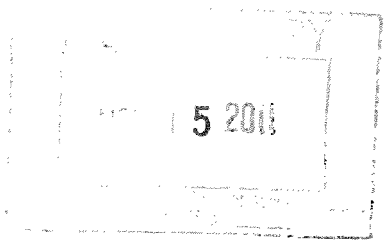
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Respondent,	)	
	)	S.Ct. No. 38127
vs.	)	
	)	
DAVID LOREN CURRY,	)	
	)	
Appellant.	)	
	)	

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho In and For the County of Kootenai

HONORABLE LANSING HAYNES
District Judge



Deborah Whipple
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Idaho Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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A. Nature of the Case

This is an appeal from convictions for burglary, aggravated assault, and unlawful possession of a firearm. R pgs. 230-33. Relief should be granted for three reasons: 1) because the evidence was insufficient to prove the offenses; 2) because the request for a self-defense instruction should have been granted; and 3) because the new trial motion should have been granted.

B. Procedural History

Appellant David Curry was charged by Information with:

Count I - burglary, I.C. § 18-1401. The Information alleged that Mr. Curry entered a garage with the intent to commit the crime of witness intimidation and/or aggravated assault;

Count II - aggravated assault, I.C. §§ 18-901, 18-905. The Information alleged that Mr. Curry threatened Travis Escudero with a handgun, which created a well-founded fear in Mr. Escudero that violence was imminent;

Count III - unlawful possession of a firearm, I.C. § 18-3316. The Information alleged that Mr. Curry possessed a handgun knowing that he had been convicted of two prior felonies.

Count IV - malicious injury to property, I.C. § 18-7001. The Information alleged that Mr. Curry had maliciously injured a door and a car.

Part II of the Information alleged that Mr. Curry was a persistent violator.

R pgs. 56-58, 110-112.

Counts I and II were tried to a jury, Count III was tried to the court, and Mr. Curry entered a guilty plea to the misdemeanor charged in Count IV and an admission to being a persistent violator. R pgs. 107-09, 206, 223-226; Tr. p. 237, ln. 24 - p. 238, ln. 10.

Concurrent sentences were imposed: Count I, 13 years with 4 fixed; Count II, 15 years with 5 fixed; and Count III, 13 years with 4 fixed. R pgs. 223-226.

C. Statement of Facts

1. *Trial*

Mr. Escudero, age 23, recently returned to North Idaho, after serving 16 months in Iraq as an Army sniper. Tr. p. 34, ln. 2-24. As a sniper, Mr. Escudero was trained to assume, if he could not see someone's hands, that the person was carrying a weapon. Tr. p. 49, ln. 1-5.

Mr. Escudero testified that about 6:00 p.m., on February 20, 2010, a cold winter night, when it was getting dark, he and his fiancee, Marlisa Gordon, were sitting in Ms. Gordon's open garage on a couch behind a coffee table, a place where they smoke and hang out. Tr. 41, ln. 12 - p. 42, ln. 15.

As background, Ms. Gordon was Melissa Ferra's cousin and Ms. Ferra had been dating Mr. Curry. Mr. Escudero, Ms. Gordon, Ms. Ferra, and Mr. Curry often would all hang out together. However, Ms. Ferra had recently broken up with Mr. Curry. About 5:30 p.m., Mr. Escudero had answered a call on Ms. Gordon's phone. Although the caller did not identify himself, Mr. Escudero believed it was Mr. Curry and that he said, "All right. I'm coming for you, buddy." Tr. p. 35, ln. 21 - p. 38, ln. 24. Mr. Escudero told Ms. Ferra about the call, and Ms. Ferra left the house to run an errand. Tr. p. 40, ln. 1-10. Mr. Escudero and Ms. Gordon decided to go sit in the open garage and smoke. Tr. p. 41, ln. 5-7.

While they were sitting in the garage, Ms. Ferra said someone was walking up the driveway. When Mr. Escudero looked up he saw Mr. Curry with a bag of clothes "in his hands." Mr. Escudero testified as follows:

> Well, we went outside to smoke a cigarette, just to try to talk to see what's going on – me and Marley [Gordon]. Marley had told me someone was walking up the driveway. I didn't realize anything at all. It was kind of dark. It was 6:00. When I looked up David [Curry] was there. He had a bag of clothes in his hands. That's when everything just started going. People started yelling and screaming. The coffee table was kicked over. And then I stood to – after the coffee table was kicked over, I was kind of worried that the situation was escalating. I have children there. So I stood up, and I grabbed a pole because I didn't want anything else to happen. And when I grabbed the pole, Mr. Curry had his hand in his pocket the whole time since I was there. He didn't brandish a weapon to me. He just made a gesture. And I saw a black piece of something, which at the time I thought it was a pistol. Brandished that. Didn't show me the whole weapon or anything if there even was one. I was very frightened and told Marlisa to get into the house. David started to yell and scream. There was kind of a big argument. And then me and Marlisa went inside and called the police.
>
> . . .
>
> Yeah. When he came in he was yelling all kinds of things to us, threw the clothes. And then when I got that pole it was right by my couch. I picked up the pole. He kind of lunged up, just pulled his hand out and said: "Do you want to go?" And that's why I took it as a threat of a pistol is because if you have a hand in your pocket, just from what I've been trained and stuff, I observe peoples' hands. And there was a gesture of, you know, of what could you have in your pocket that would stop a pole?
>
> . . .
>
> Like I said, I just saw a piece of metal. I didn't see the whole pistol in any way. But the way that he portrayed himself and the way that the actions were given to me was that he had a pistol on him.

Tr. p. 42, ln. 11 - p. 43, ln. 23.

Later, Mr. Escudero again testified that he could not be 100% sure that Mr. Curry had a pistol. Tr. p. 49, ln. 18-21. He also testified that he just did not know whether if he had not

picked up the pole, there would have been any violence. And, he told the police officer who responded that Mr. Curry might have only had a water pistol. In his words, "[I]t could have been anything." Tr. p. 50, ln. 21-p. 51, ln. 23.

The pole Mr. Escudero grabbed was 1½ - 2 feet long and made of solid metal. Tr. p. 44, ln. 24-25.

Mr. Escudero testified that everything stopped when Mr. Curry gave everyone the finger and just walked away. Tr. p. 46, ln. 12-17.

Ms. Gordon testified that she was sitting on the couch in the garage with Mr. Escudero, smoking and drinking a beer, when Mr. Curry came in, tossed Ms. Ferra's clothes to her and "just kind of freaked out." He yelled and jumped around, kicked the table, and talked about $100 she had borrowed from him but failed to pay back. Tr. p. 53, ln. 10 - p. 64, ln. 12.

Ms. Gordon testified that she never saw anything, let alone a gun, in Mr. Curry's hand. Tr. p. 65, ln. 5-7; p. 67, ln. 14-15. She further testified that it was cold enough in the garage that a person might keep his hands in his pockets. Tr. p. 67, ln. 11-13. The whole event made Ms. Gordon angry and she told Mr. Curry that because of the way he was acting, she was going to call the police. He just walked away. The whole episode lasted under five minutes. Tr. p. 65, ln. 23-p. 66, ln. 10.

Mr. Curry's mother, Lora Beauchamp testified that she lived with Mr. Curry, his brother and her elderly mother. Prior to his death, her father also lived in the household. And, her father had a .22 Ruger handgun from the Korean War which she had taken from him and hidden in a box filled with tax papers and kept in the back of her closet. Tr. p. 110, ln. 4 - p. 111, ln. 23; p. 112, ln. 1-7.

On February 23, 2010, her son James called to tell her that the police were searching the house. By the time Ms. Beauchamp got home, the police were gone. Tr. 113, ln. 8-15. In her absence, eight trained officers had searched the house for one and a half hours, but found no gun. Tr. p. 147, ln. 20 - p. 175, ln. 12.

After hearing about the search, Ms. Beauchamp called Detective Gunderson and told him about her father's old gun hidden in the box in the closet, and the detective returned to the house and collected it from the box in the back left of her bedroom closet. The gun was unloaded, but the clip was with it and the clip was loaded. Tr. p. 114, ln. 12-p. 117, ln. 1. Although Ms. Beauchamp had often opened the box to get out tax papers, the gun had always been there undisturbed and she had no reason to believe that Mr. Curry knew it was in the house. Tr. p. 118, ln. 6-120, ln. 3. In seizing the gun, Detective Gunderson did not photograph the box or test either the box or the gun for fingerprints. Tr. p. 175, ln. 13 - p. 178, ln. 1.

James Curry testified that on February 22, 2010, he overheard David Curry say the word "gun" on the telephone. James did not hear anything else. Tr. p. 137, ln. 1-25.

Detective Gunderson testified that he interviewed Mr. Curry and Mr. Curry told him that he had been returning a bag of clothes that belonged to Ms. Ferra and discussing money owed to him. Mr. Curry told the detective that he did not display a gun and that he had simply turned around and walked away to end the encounter. Tr. p. 160, ln. 19 - p. 161, ln. 1.

When Detective Gunderson asked Mr. Curry about his grandfather's gun, Mr. Curry said that he had last seen it years ago. Tr. p. 182, ln. 4-9.

Prior to trial, the state filed an IRE 404(b) notice that it intended to present evidence that Mr. Curry had written the word "snitch" on Ms. Gordon's door and poured an oily substance on

her car and that Ms. Ferra had seen him with a gun about a month prior to the charged events. Augmented Record, Notice of Intent to Use 404(b) Evidence. Mr Curry objected to admission of this evidence. Tr. p. 23, ln. 13 - p. 25, ln. 20

The court held that it would allow the state to introduce both evidence of Mr. Curry writing "snitch" on the door and pouring an oily substance on a car because that was not uncharged misconduct. Rather, those were the acts that underlay the malicious injury to property charge and therefore were not subject to IRE 404(b). Tr. p. 29, ln. 1-22. (The court later gave the jury a limiting instruction that evidence that Mr. Curry admitted to writing "snitch" and pouring oil on the car could only be considered for purposes of establishing motive for the charged offenses. Tr. p. 135, ln. 4-11.)

With regard to the evidence that Ms. Ferra told the police that she had seen Mr. Curry with a gun, the court held that possession of a gun is not a character trait, but is an act, and so is not subject to IRE 404(b). Further, the court held that the gun related evidence was being offered to prove whether Mr. Curry in fact had a gun in his possession in the relevant time frame. Tr. p. 29, ln. 23 - p. 30, ln. 11.

Based upon these rulings, the jury heard the following evidence.

Ms. Gordon testified that on February 18, 2010, she discovered that the word "snitch" had been written on her front door in black Sharpie and that black oily stuff was on the hood of her car. Tr. p. 58, ln. 1 - p. 59, ln. 21. In response, Ms. Gordon called the police. Tr. p. 60, ln. 9-12.

Ms. Ferra testified that in February 2010 her car was found wrecked and she told the police that she thought that Mr. Curry had been the person driving. However, another witness gave different information, so she could not be certain, and no one was ever charged with any

offense. Tr. p. 70, ln. 17 - p. 72, ln. 11.

The next night, she stayed at Ms. Gordon's house and in the morning they discovered the word "snitch" written on the door and the oily substance on the Ms. Gordon's car. Tr. p. 72, ln. 12-20. However, prior to this, Ms. Ferra had not spoken to Mr. Curry about what she had told the police about the car wreck. Tr. p. 73, ln. 8-10.

A few days later, she was at Ms. Gordon's house when Mr. Escudero answered the phone call he believed was from Mr. Curry, and she decided to leave to get a an alcoholic energy drink and cigarettes. When she returned, the police were there. Tr. p. 73, ln. 12 - p. 74, ln. 7.

During her testimony, the prosecutor asked Ms. Ferra if she remembered talking to Detective Gunderson and telling him that she was afraid of Mr. Curry. Over a hearsay objection, Ms. Ferra testified only that she remembered telling him that "it could be Dave that did that." She testified that she could not remember saying anything about being afraid of Mr. Curry and that she was using drugs at the time she spoke to the police and could not remember much about her statements to them. Tr. p. 75, ln. 1 - p. 76, ln. 22.

Later, Ms. Ferra testified that she had never seen Mr. Curry with a gun or heard him talk about possessing a gun, or talk about a gun being present in his house. Tr. p. 98, ln. 13-24. Ms. Ferra denied that she had ever told Detective Gunderson that she had been at Mr. Curry's house 30 days earlier and that he showed her a dark-colored revolver. She then clarified her testimony that she just did not remember having such a conversation. But, she then testified that while she did not remember, it was possible that she had told the detective that Mr. Curry had said the gun belonged to his grandfather. Tr. p. 102, ln. 8-23. Ms. Ferra also testified that she did not remember telling Officer Chapman that she had seen Mr. Curry with a black revolver on prior

occasions. Tr. p. 104, ln. 15-25. She lastly testified that she could not remember telling Detective Gunderson that the gun he showed her on February 23, was the same gun she had seen at Mr. Curry's house. Tr. p. 106, ln. 12 - p. 107, ln. 2. She testified that during that time she was on drugs and lied to people and forgot things. Tr. p. 107, ln. 4-14.

Mr. Curry's brother testified that Mr. Curry had admitted to him writing the word snitch on the door and pouring oil on the car. Tr. p. 135, ln. 14-15.

To impeach Ms. Ferra, the state called Officer Chapman who testified that she had told him that she had seen Mr. Curry with a small caliber, black-colored revolver on prior occasions. Tr. p. 147, ln. 8-16. The court gave the jury a limiting instruction regarding this testimony telling them that they "[could not] consider what Ms. Ferra said to this witness as being the truth of the matter, only how much you believe Ms. Ferra's testimony and what weight you give it at this time. That is the limited purpose of that." Tr. p. 148, ln. 18 - p. 149, ln. 1.

Officer Chapman also testified that Ms. Ferra told him that she was afraid of Mr. Curry. A relevancy objection was sustained and the jury was instructed to disregard this testimony. Tr. p. 147, ln. 19 - p. 148, ln. 1.

However, on redirect, Officer Chapman again testified that Ms. Ferra was fearful, and, again, an objection was made. Again, the jury was instructed. The court stated:

> And, Members of the Jury, whether Ms. Ferra was fearful or not is not relevant evidence. I'm going to strike that portion of the answer and instruct you to disregard. It's simply not something you should be considering in this matter. So don't think about it or talk about it. The rest of the answer will stand.

Tr. p. 140, ln. 2-11.

The state also called Detective Gunderson who testified:

> I was speaking to Melissa Ferra regarding a weapon. And she said that he, David Curry, did have, approximately 30 days prior, a weapon in his possession. She described it as a pistol – um – she described it as being black. She wasn't very familiar with firearms, but she had indicated that she was at his house, like I say, approximately, 30 days prior. They were in the basement of the house. And there was another person that was present, apparently, a friend of his which she didn't want to identify to me. She said that David had left the basement, she thought to go to the garage. And he returned back with this pistol in his hand. And he's showing it off claiming that it was his grandfather's pistol. And she said that was the first time she had seen that particular gun in his possession.

Tr. p. 154, ln. 19 - p. 155, ln. 9.

Again, the court gave a limiting instruction telling the jury that it could not consider this testimony for the truth of what Ms. Ferra said, but only in terms of assessing her credibility. Tr. p. 154, ln. 20 - p. 155, ln. 15.

Detective Gunderson further testified that when he showed Ms. Ferra the gun he found with Ms. Beauchamp's help, Ms. Ferra said, "That's the gun." Tr. p. 171, ln. 1-6. And, again, the jury was cautioned that it could consider the evidence "only in terms of whether you believe and how much you believe of Ms. Ferra's testimony. It cannot be considered by you for the truth of what she stated to the detective." Tr. p. 171, ln. 9-15. Following this admonition, the state had Detective Gunderson testify again that when he showed Ms. Ferra the gun she said, "That's the gun." Tr. p. 171, ln. 17-20.

On cross-examination, the defense attempted to mitigate Detective Gunderson's testimony about the gun by asking him to describe the circumstances surrounding its seizure and display to Ms. Ferra. Tr. p. 173, ln. 8 - p. 183, ln. 13.

Following Detective Gunderson's testimony, the state rested. Tr. p. 213, ln. 10.

2. *Rule 29 Motion*

At the end of the state's case, Mr. Curry moved for a judgment of acquittal.

The burglary charge had been pled as entry with intent to commit the crime of either aggravated assault or witness intimidation. However, given there was no criminal proceeding pending against him at the time Mr. Curry entered the garage, he could not have intended to commit witness intimidation. Further, even if there had been a criminal proceeding, there was nothing in the record to show that he believed that either Mr. Escudero or Ms. Gordon were potential witnesses. And, if aggravated assault was Mr. Curry's intent, he would not have waited until Mr. Escudero picked up the pipe to do anything besides throw laundry and talk about money owed to him. Tr. p. 198, ln. 10 - p. 202, ln. 11.[1]

With regard to aggravated assault, the state had failed to present any evidence that a handgun was displayed. Rather, Mr. Escudero testified that he picked up a pipe and Mr. Curry pulled his hand an inch out of his pocket, whereupon Mr. Escudero thought he saw something that was black and metal and he assumed there was a gun, while, Ms. Gordon testified that she never saw any gun. Tr. p. 202, ln. 12 - p. 203, ln. 20.

The court denied this motion. Tr. p. 205, ln. 13 - p. 207, ln. 3.

3. *Self Defense Instruction*

At the instructions conference, the court refused Mr. Curry's requested self-defense instruction. The court first noted that the defense had not proffered a written self-defense instruction but remarked that the defense may not have proffered the written instructions because the court had already told counsel that it would not give such an instruction. Tr. Jury Instructions

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[1] At sentencing, the state argued that the intent in the burglary was to intimidate Ms. Ferra. Tr. p. 263, ln. 7-12.

Conference, p. 20, ln. 9-17.

The court next noted that Mr. Curry had determined to exercise his Fifth Amendment rights and therefore had offered no testimony nor had he made any statements to the police that he was afraid of Mr. Escudero. The court stated that a subjective fear as well as an objective fear are required to obtain a self-defense instruction and given no evidence of a subjective fear, no instruction would be given. Tr. Jury Instructions Conference p. 19, ln. 17 - p. 22, ln. 17.

4. *Jury Inquiry and Verdict*

During deliberations, the jury sent out an inquiry: "We need someone to explain witness intimidation, [Instruction] No. 14. What are they classifying as a witness (the difference) between who's involved in the case?" Tr. p. 216, ln. 16-21. In response, the court told the jury that it could give no further explanation. Tr. p. 218, ln. 6-21.

Thereafter, the jury returned a guilty verdict on the two counts submitted to it, Counts I (burglary) and II (aggravated assault). R 206. Based upon that verdict, but without conceding that the verdict was supported by sufficient evidence or legally sound, Mr. Curry admitted that he had a prior felony, whereupon the court found him guilty of Count III and further found persistent violator status. Tr. p. 234, ln. 23 - p. 235, ln. 1; p. 237, ln. 24 - p. 238, ln. 10.

5. *New Trial Motion*

Following the verdict, Mr. Curry made a timely motion for a new trial pursuant to ICR 34 and I.C. §§ 19-2404, *et. seq.* Mr. Curry argued that the verdict was contrary to law and evidence because the jury was overwhelmed with evidence inadmissible for the truth of the matters asserted intended to impeach Ms. Ferra's testimony that she had not previously seen Mr. Curry with a firearm. This evidence included testimony that Ms. Ferra had stated that she was afraid of

Mr. Curry. While repeat limiting instructions had been given, Mr. Curry argued that they were futile and therefore he did not receive a fair trial and therefore a new trial should be granted. Augmented Record Motion for New Trial filed 7/28/10; Tr. p. 241, ln. 14 - p. 256, ln. 20.

The district court denied the motion. In making its ruling, the court noted that it had been "a little alarmed" by the officer testimony that Ms. Ferra had previously said she had seen Mr. Curry with a gun and was afraid of him; however, the jury was amply instructed regarding the evidence and there was other evidence in the record from which the jury could conclude that Ms. Ferra was afraid of Mr. Curry. The court also noted, "And I have to make the presumption that the appellate courts have told we trial judges to make **sure** that jurors follow the limiting instructions of this Court." Tr. p. 251, ln. 5 - p. 256, ln. 13.

III. ISSUES PRESENTED ON APPEAL

1. Was the evidence sufficient to support the convictions?
2. Was a self-defense instruction improperly denied?
3. Was the new trial motion improperly denied?

IV. ARGUMENT

A. The Evidence Was Not Sufficient to Prove the Elements of the Offenses Beyond a Reasonable Doubt

The convictions of burglary and aggravated assault must be reversed and acquittals entered because the evidence was insufficient. And upon the reversal of those convictions, the conviction for felon in possession of a firearm and the finding of persistent violator status must also be reversed and acquittal entered.

Due process requires that no person be convicted except upon proof beyond a reasonable

doubt of every element of the offense. *In re Winship,* 397 U.S. 358, 361 90 S.Ct. 1068, 1071 (1970); *Jackson v. Virginia,* 443 U.S. 307, 315-6, 99 S.Ct. 2781, 2787 (1979).

In an appeal challenging the sufficiency of the evidence, a guilty verdict will be overturned when there is not substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained the burden of proving the essential elements beyond a reasonable doubt. *State v. Warburton,* 145 Idaho 760, 761-2, 185 P.3d 272, 273-4 (Ct.App. 2008), citing *State v. Herrera-Brito,* 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct.App. 1998); *State v. Knutson,* 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct.App. 1991). The appellate court does not substitute its view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Id.,* citing *Knutson,* 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker,* 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct.App. 1985). And, the evidence is considered in the light most favorable to the state. *Id.,* citing *Herrera-Brito,* 131 Idaho at 385, 957 P.2d at 1101; *Knutson,* 121 Idaho at 104, 822 P.2d at 1001. However, if the evidence is not sufficient to support the conviction, the defendant is entitled to an acquittal. *Herrera-Brito, supra.*

In this case, to sustain the burglary charge, the state was required to prove that Mr. Curry entered the garage with the intent to commit witness intimidation and/or aggravated assault. I.C. § 18-1401, R 111. To sustain the aggravated assault charge, the state was required to prove that Mr. Curry committed assault with a deadly weapon. I.C. § 18-905(a), R 111.

With regard to the burglary charge, the state's first theory was that Mr. Curry entered the garage with the intent to commit witness intimidation against Ms. Ferra. (See state's argument at sentencing, "What would have happened if she'd [Ms. Ferra] still been there, who was apparently

the person he meant to threaten with this gun." Tr. p. 263, ln. 16-18.)

To prove burglary through proving entry with the intent to commit witness intimidation, the state had to prove that Mr. Curry intended "by direct or indirect force, or by threats to any person or property, or by any manner [to] willfully intimidate, influence, impede, deter, threaten, harass, obstruct, or prevent a witness, or any person who may be called as a witness, or any person he believes may be called as a witness in any criminal proceeding from testifying freely, fully, and truthfully in that criminal proceeding." R 190, Jury Instruction on Witness Intimidation. I.C. § 18-2604.

While Mr. Curry may have entered the garage in anger, anger is not witness intimidation. Witness intimidation requires both a belief in a criminal proceeding and a belief that the person against whom the defendant acts is, will be, or has been a witness in that proceeding. *State v. Mercer,* 143 Idaho 123, 125-7, 138 P.3d 323, 325-7 (Ct.App. 2005). In this case, there was no criminal proceeding pending against Mr. Curry. And, there was no testimony that anyone - police officer, Ms. Ferra, or otherwise - had ever advised Mr. Curry that a criminal proceeding might be pending. And, most telling, Ms. Ferra was not in the garage. Had Mr. Curry's intent been to intimidate Ms. Ferra, he would have gone to a place where she was present. The state's evidence simply was not sufficient to prove its first theory of burglary.

The state's second theory was that Mr. Curry entered the garage with the intent to commit aggravated assault. However, to support that theory, the state needed to prove that Mr. Curry was carrying a gun when he entered the garage. R 193, Jury Instruction on Aggravated Assault. I.C. § 18-905. And, as discussed on the next page, the state did not prove the presence of a gun.

Given the failure of proof of the required intent for burglary, the burglary conviction must

be reversed. *Winship, supra*; *Jackson, supra. See State v. Culbreth,* 146 Idaho 322, 193 P.3d 869 (2008), reversing a conviction for burglary because state failed to prove intent to commit theft in entering animal shelter and taking defendant's own impounded dog.

With regard to the aggravated assault charge, the state was required to prove beyond a reasonable doubt that Mr. Curry committed an assault with a deadly weapon. I.C. § 18-905. However, the state failed to present sufficient evidence that a deadly weapon was present. Mr. Escudero testified that Mr. Curry "didn't brandish a weapon," Tr. p. 42, ln. 24; that Mr. Curry never showed him a "whole weapon or anything if there even was one, " Tr. p. 43, ln. 2-3; that he "can't be 100 % sure that it was" a pistol, Tr. p. 49, ln. 20; that "it could have been anything," apparently up to and including a water pistol, Tr. p.51, ln. 23; and that he "took it as a threat of a pistol is because if you have a hand in your pocket, just from what I've been trained and stuff, I observe people's hands, " Tr. p. 43, ln. 14-16. Ms. Gordon testified that she never saw anything, let alone a gun. Tr. p. 65, ln. 5-7.

Mr. Escudero's testimony was, taken most favorably to the state, that he thought there was a pistol. However, the law requires that there be a deadly weapon, not just that a witness jumped to the conclusion that there was a deadly weapon. I.C. § 18-905(a).

A deadly weapon is not established by 'a mere pocket bulge.' *Lawless v. Commonwealth,* 323 S.W.3d 676, 679 (Ky. 2010). "[W]ithout the instrument being seen, an intimidating threat, albeit coupled with a menacing gesture, cannot suffice" to prove beyond a reasonable doubt the existence of a gun. *Id., citing Swain v. Commonwealth,* 887 S.W. 2d 346 (Ky. 1994); *Williams v. Commonwealth,* 721 S.W.2d 710 (Ky. 1987). *See also, People v. Banks,* 563 N.W.2d 200, 201 (Mich. 1997), "To convict, the fact finder must make the determination that . . . the assailant was

in fact armed with something and not just that the victim thought he was armed. The determination must be based on the evidence." "No amount of intent or intimidation . . . can turn a toy gun, or a stick, or a finger in the pocket" into a gun. *Lawless, supra,* citing *Wilburn v. Commonwealth,* 312 S.W.3d 321 (Ky. 2010).

Here, Mr. Escudero was candid in his testimony that he never saw a gun, "if there even was one." Rather, he testified that he was trained in the military to assume that when he cannot see people's hands that they are armed. And, in the garage, he made this assumption. Even just minutes after the event, Mr. Escudero told the police who responded to the 911 call that Mr. Curry might have had only a water pistol. And, the only other witness, Ms. Gordon, who was there throughout the event, testified that she never saw any gun.

This evidence was not proof beyond a reasonable doubt that Mr. Curry had a deadly weapon. *In re Winship, supra*; *Jackson v. Virginia, supra.* Therefore, an acquittal of aggravated assault is required. *Herrera-Brito, supra.*

Likewise, based upon the failure of proof, the conviction for unlawful possession of a firearm and the finding of being a persistent violator must be reversed. *In re Winship, supra*; *Jackson v. Virginia, supra.*

The charge of unlawful possession of a firearm was tried to the court, not the jury. Mr. Curry admitted to the court that he had prior felony convictions. However, he did not admit that he had possessed a firearm. Based upon the admission to prior felony convictions and the jury's finding that he possessed a firearm in committing an aggravated assault, the court found him guilty of unlawful possession of a firearm. In addition, the court found that Mr. Curry was a persistent violator.

Because the evidence was not sufficient to support the jury's verdict of aggravated assault, insofar as the proof was not sufficient to prove possession of a weapon, the evidence also is not sufficient to support either the conviction of illegal possession of a firearm, or the finding of persistent violator status and reversal is required there also. *In re Winship, supra*; *Jackson v. Virginia, supra*; *Herrera-Brito, supra*.

B. Refusal of a Self-Defense Instruction Was Reversible Error

Reversal and acquittal is required because the evidence was insufficient to meet the state's burden of proof. Alternatively, reversal and remand for a new trial is required because the district court erred in refusing to give a self-defense instruction.

Mr. Curry's request for a self-defense instruction was denied because the district court found that there was no evidence of subjective fear on Mr. Curry's part. This denial was based upon an erroneous understanding of the law and is reversible error.

The question of whether the jury has been properly instruction is a question of law subject to free review. *State v. Beavers,* ___ Idaho ___, ___ P.3d ___, 2010 WL 4963009 *2 (Ct.App. 2010), citing *State v. Severson,* 147 Idaho 694, 710, 215 P.3d 414, 430 (2009). *See also, State v. Cochran,* 149 Idaho 688, 690, 239 P.3d 793, 795 (Ct.App. 2010), and *State v. Wall,* 149 Idaho 548, 549, 237 P.3d 17, 19 (Ct.App. 2010). *But see, State v. Howley,* 128 Idaho 874, 878, 920 P.2d 391, 395 (1996), holding that the question of whether there is a reasonable view of the evidence that supports a necessity instruction is a matter of discretion.

A defendant is entitled to have the jury instructed on every defense having any support in the evidence. *State v. Hansen,* 133 Idaho 323, 328, 986 P.2d 346, 351 (Ct.App. 1999), citing *State v. Kodesh,* 122 Idaho 756, 758, 838 P.2d 885, 887 (Ct.App. 1992); *State v. Evans,* 119

Idaho 383, 807 P.2d 62 (Ct.App. 1991); *State v. Spurr,* 114 Idaho 277, 279, 755 P.2d 1315, 1317 (Ct.App. 1988); *State v. Mason,* 111 Idaho 660, 669, 726 P.2d 772, 781 (Ct.App. 1986); *State v. Allen,* 113 Idaho 676, 679, 747 P.2d 85, 88 (Ct.App. 1987); *State v. Pennell,* 108 Idaho 669, 701 P.2d 289 (Ct.App. 1985).

The failure to give a self-defense instruction when supported by the evidence is reversible error because it denies the defendant the constitutional right to present a defense. *State v. Evans, supra.* U.S. Const. Amends. 6 and 14, Idaho Const. Art. 1, Sec. 13. *See also, State v. Mason, supra.*

In this case, whether free review or an abuse of discretion standard is applied, error occurred.

The district court held that it would not give a self-defense instruction because there was no evidence in the case of Mr. Curry's subjective fear. However, subjective fear is not required for self-defense.

The right to self-defense arises from the Idaho Constitution and several Idaho statutes. Article I, § 1 of the constitution establishes that the defense of life and protection of property is an inalienable right. Idaho Code § 19-201 provides that lawful resistance to the commission of a public offense may be made by the party about to be injured or by other parties. Section 19-202 states that resistance sufficient to prevent the offense may be made by the party about to be injured to prevent an offense against his person. And, Section 19-202A provides that no person shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary. No where in these statutes is there a requirement of a subjective fear on the part of the person acting in self-defense.

Similarly, the Idaho pattern jury instructions on self-defense do not include a requirement of a subjective fear on the part of the defendant. See ICJI 1517, 1518, 1519 and 1520.

And, Idaho case law does not support such a requirement. As set out in *State v. Woodward,* 58 Idaho 385, 393-95, 74 P.2d 92, 96-97 (1937) (quoting *State v. Goering,* 106 Iowa 636, 77 N.W.2d 327 (1898)) :

> 'The rule is elementary that one unlawfully assailed may, in self-protection, repel force with force. The extent to which he may go is to be measured by the character of the assault; but the right, as we have stated it, exists under any and all circumstances.'
>
> . . .
>
> No man has a right to lay hostile, threatening hands on another, except when he is armed with legal authority to do so; and the man who does so acts at the risk of being met with sufficient superior force and violence to overcome such assault.
>
> . . .
>
> The law does not require anyone to submit meekly to indignities or violence to his person, - he may lawfully repel them or it with as much of such character of necessary resistance as is at the time available to him.

See also, State v. Hansen, 133 Idaho at 328, 986 P.2d at 351. Again, there is no requirement of a subjective fear on the part of the defendant.

In this case, the evidence was that Mr. Escudero picked up a metal pipe and that it was only in response to this that Mr. Curry made the movements that the state maintained amounted to an aggravated assault. As Mr. Escudero testified, Mr. Curry did not move his hand out of his pocket until Mr. Escudero grabbed a solid metal pipe, "And there was a gesture of, you know, what could you have in your pocket that would stop a pole?" Tr. p. 43, ln. 16-17.

This evidence was sufficient to support a self-defense instruction. The district court's

belief that such an instruction could only be given if there was evidence that Mr. Curry was subjectively afraid of Mr. Escudero was simply incorrect.

State v. Hansen, supra. is instructive. In *Hansen,* the evidence was that the unwanted touching occurred when the defendant pushed the alleged victim onto a couch after she had slapped him twice. The Court of Appeals found error in refusing to instruct on self-defense because there was evidence such that a jury could infer that the pushing was to prevent another slap. The *Hansen* court did not impose a requirement that Hansen be afraid of the victim or of being slapped. Rather, the court reversed and remanded for a new trial.

In this case, there was evidence in the record that the acts alleged to have constituted an aggravated assault were taken only in self-defense after Mr. Escudero grabbed a metal pipe thereby threatening Mr. Curry with violence. The failure to give a requested self-defense instruction was therefore error which requires reversal of the aggravated assault conviction. If this court applies a free review standard, it may simply apply the law to the facts and find that a self-defense instruction was required. *Id.* In the alternative, if this court applies an abuse of discretion standard, an abuse of discretion exists because the district court did not recognize the scope of its discretion, believing that evidence of subjective fear was required to support a self-defense instruction. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

And, upon the reversal of the aggravated assault conviction, the burglary conviction must be reversed because the indictment alleged that the entry was made with the intent to commit aggravated assault and if there was no assault because any actions taken were in self-defense, there can be no burglary. Likewise, the conviction for illegal possession of a firearm must be

reversed because the conviction was based upon the jury's finding of guilt of aggravated assault and cannot stand absent the aggravated assault conviction. And, given the failures of the convictions, the persistent violator finding must also be reversed.

C. A New Trial Should Have Been Granted

Mr. Curry's convictions must be reversed because of the lack of sufficient evidence and because of the error in denying a self-defense instruction. In addition, the convictions must be reversed because Mr. Curry's new trial motion should have been granted as the verdict was contrary to the law and evidence. I.C. § 19-2406(6).

A motion for a new trial is reviewed for an abuse of discretion. Because the motion involves mixed questions of law and fact, "an abuse of discretion will be found if the trial court's findings of fact are not supported by substantial evidence or if the trial court does not correctly apply the law." *State v. Ellington,* 151 Idaho 53, 71, 253 P.3d 727, 745 (2011), citing *State v. Stevens,* 146 Idaho 139, 144, 191 P.3d 217, 222 (2008).

In reaching its decision to deny a new trial, the district court stated that it had been alarmed by the testimony that Ms. Ferra had stated that she was afraid of Mr. Curry and that she had seen him with a gun on previous occasions. However, the court further stated that it had no choice but to apply the presumption that the jury followed the limiting instructions.

This acceptance of this presumption was an abuse of discretion.

The district court was correct that, in general, it is presumed that jurors will follow instructions. *See, State v. Owens,* 101 Idaho 632, 619 P.2d 787 (1979); *State v. Urie,* 92 Idaho 71, 437 P.2d 24 (1968); *State v. Howard O. Miller, Inc.,* 93 Idaho 314, 460 P.2d 739 (1959). However, the court failed to recognize that the presumption may be overcome. *See State v.*

White, 97 Idaho 708, 551 P.2d 1344 (1976) (remedial instruction to disregard any expression of opinion by the court on the evidence was not sufficient to cure the prejudice created when the judge expressed the belief that evidence critical to the defense was not present); *State v. Wrenn,* 99 Idaho 506, 584 P.2d 1232 (1978) (presumption of the efficacy of cautionary instructions overcome when parties and court were clearly concerned that certain evidence could be prejudicial and the evidence of guilt was not strong); *State v. Simonsen,* 112 Idaho 451, 732 P.2d 689 (1987) (cautionary instruction to disregard statement by any witness referring to any prior proceedings was not sufficient to remedy an improper reference by a witness to a withdrawn guilty plea).

And, in fact, a large body of social science research from the past 20 years demonstrates that jurors' abilities to follow limiting instructions are limited. Peter J. Smith, *New Legal Fictions,* 95 Geo. L.J. 1435, 1450-2 (2007), citing Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence,* 6 Psychol. Pul. Pol'y & L. 677, 686 (2000); Laurence J. Severance & Elizabeth Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 Law & Soc'y Rev. 153, 176 (1982); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt,* 9 Law & Hum. Behav. 37, 47 (1984). The research suggests that not only are limiting instructions ineffective, but that they actually have a "backfire effect" wherein jurors pay greater attention to evidence after it has been ruled inadmissible. Smith, *supra,* at 1451, citing Liberman and Arndt, *supra,* at 689.

On appeal, a three part test is applied to determine whether a lower court has abused its discretion: 1) whether the court correctly perceived the issue as one of discretion; 2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and 3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Center, Inc. v. Idaho Power Co., supra.*

In this case, the denial of the new trial motion was an abuse of discretion because the district court failed to recognize that the presumption that a jury can and will follow instructions is rebuttable. *White, supra*; *Wrenn, supra*; *Simonsen, supra*; *Sun Valley Shopping Center, supra.*

Here, as in *Wrenn,* the court was concerned about the prejudicial nature of the evidence subject to both instructions to disregard (evidence that Ms. Ferra told police she was afraid of Mr. Curry) and limiting instructions (evidence that Ms. Ferra told police she had previously seen Mr. Curry with a gun). And, the evidence subject to instructions to disregard and to consider only to judge Ms. Ferra's credibility in her testimony before the jury was copious. Not only was there a lot of this evidence, but it was evidence that went beyond that needed to impeach Ms. Ferra's trial testimony. Ms. Ferra testified she had never known Mr. Curry to possess or talk about possessing guns and that she could not remember telling the police otherwise. Yet, the state brought in evidence not only that she had made statements to the police about Mr. Curry previously possessing a gun, but also evidence that she was afraid of him. Furthermore, as discussed above, the evidence of guilt in this case was not strong. Mr. Escudero could not testify that there even was a gun; Ms. Gordon testified that she did not see a gun.

The district court abused its discretion in not understanding the scope of its discretion to determine whether the presumption that the jury could follow the instructions was overcome.

And, as in *Wrenn,* a new trial should have been granted, because the presumption was overcome and the evidence of guilt was not strong.

V. CONCLUSION

The convictions in this case must be reversed and acquittals entered because the evidence was not sufficient. In the alternative, the convictions must be reversed and the case remanded for a new trial because the denial of a self-defense instruction was erroneous. In the second alternative, relief must be granted because the new trial motion was inappropriately denied.

Respectfully submitted this 15th day of November, 2011.

Deborah Whipple
Attorney for David Curry

CERTIFICATE OF SERVICE

I CERTIFY that on November 15, 2011, I caused two true and correct copies of the foregoing document to be:

✓ mailed

___ hand delivered

___ faxed

to: The Office of the Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple