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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 40289
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2011-16633
)	
DEREK EDWARD MOAD,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

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

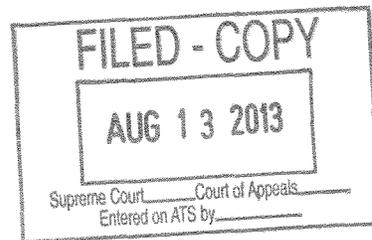
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STATEMENT OF THE CASE

Nature of the Case

Derek Edward Moad appeals from the judgment of conviction imposed upon the jury's verdicts finding him guilty of rape, battery with the intent to commit rape or the infamous crime against nature, and misdemeanor battery.

Statement of Facts and Course of Proceedings

Moad was incarcerated at the Idaho Correctional Center where he shared a cell with L.T. (Tr.¹, p.145, L.13 – p.147, L.17.) A communication placed in an inmate concern box and letters discovered upon a subsequent search of Moad's and L.T.'s cell prompted prison officials to interview Moad and L.T. about an altercation. (Tr., p. 103, L.16 - p.106, L.12; p.116, L.13 – p.121, L.15.)

Moad and L.T. both told investigators that Moad sexually battered L.T. on approximately June 8 and 10, 2011. (State's exhibits 2, 4; Tr., p.121, L.12 – p.129, L.25.) On June 8, near their cell door, Moad struck L.T. with his fists, knees, head, and elbows, choked him with his forearm, and pushed him to his knees. (State's exhibits 2, 4; Tr., p.123, Ls.11-20; p.155, L.17 – p.156, L.18.) Moad then forced L.T. to perform oral sex on him. (State's exhibits 2, 4; Tr., p.123, Ls.21-22; p.156, L.11 – p.157, L.21.) Following this, Moad told L.T. to move to the bottom bunk in the cell, where he placed L.T. face down, pulled his pants down, applied lotion to his penis, and rubbed his erect penis in L.T.'s buttocks area. (Tr., p.124, Ls.7-18; p.158, L.4 – p.161, L.11.) On June 10, Moad

¹ In its Respondent's brief, the state cites only to the transcript that contains the jury trial and sentencing hearing. The state refers to this transcript as "Tr."

again struck L.T. in the face several times with his fists, elbow and head, and also hit L.T. in the face several times with his erect penis. (State's exhibits 2, 4; Tr., p.162, L.13 – p.165, L.11.)

A grand jury indicted Moad for rape (Count I) and battery with the intent to commit rape or the infamous crime against nature (Count II) for his June 8 attacks on L.T. (R., pp.12-14.) The grand jury also indicted Moad on a separate count of battery with the intent to commit rape or the infamous crime against nature (Count III) for his June 10 attack. (Id.) After a trial, the jury found Moad guilty as charged on both Counts I and II. (R., pp.123-124.) The jury acquitted Moad as charged on Count III, but convicted him of the lesser included offense of misdemeanor battery. (R., pp.125-126.)

The district court imposed a unified life sentence with 10 years fixed for rape, a concurrent indeterminate 10-year sentence for battery with intent to commit rape or the infamous crime against nature, and a concurrent 6 month jail term for misdemeanor battery. (R., pp.136-138.) Moad timely appealed. (R., pp.140-143.)

ISSUES

Moad states the issues on appeal as:

1. Whether the punishment for both Counts I and II violated Mr. Moad's constitutional right to be free from double jeopardy.
2. Whether there was insufficient evidence to support the guilty verdict against Mr. Moad for battery with the intent to commit rape or the infamous crime against nature.

(Appellant's brief, p.4)

The state rephrases the issues as:

1. Did Moad fail to preserve his claim that the district court's sentence violates double jeopardy?
2. Has Moad failed to demonstrate fundamental error in the jury instructions?
3. Has Moad failed to demonstrate that the evidence presented was insufficient to support his conviction for battery with the intent to commit rape?

ARGUMENT

I.

Moad Has Failed To Preserve His Claim That The District Court's Sentence Violates Double Jeopardy

A. Introduction

For the first time on appeal, Moad contends that his right against double punishment under the Double Jeopardy Clauses of the United States and Idaho Constitutions was violated because he was punished for both rape and battery with intent to commit rape or the infamous crime against nature. (Appellant's brief, pp.5-18.) Specifically, he contends that he was punished twice for a single, continuing criminal attack on L.T. (Appellant's brief, pp.6-11.) Moad's claim fails because he failed to preserve his argument that the district court imposed an illegal sentence. Even if Moad had preserved this claim, his contention fails because his rape of L.T. near the prison cell door was a separate and distinct criminal act from his subsequent attack on L.T. on the cell bunk bed.

B. Standard Of Review

Whether a defendant's prosecution complies with the constitutional protection against double jeopardy is a question of law subject to free review. State v. Santana, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000).

C. Moad Has Failed To Preserve His Claim That The District Court's Sentence Violates Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be

twice put in jeopardy of life or limb.” U.S. Const. amend. V. This clause protects a defendant against multiple criminal punishments for the same offense. Schiro v. Farley, 510 U.S. 222, 229 (1994); State v. McKeeth, 136 Idaho 619, 622, 38 P.3d 1275, 1278 (Ct. App. 2001).

Idaho Criminal Rule 35 allows the trial court to correct a sentence that is illegal from the face of the record at any time, on the motion of either party, and either party may appeal from the trial court’s ruling. I.C.R. 35; State v. Hernandez, 122 Idaho 227, 229, 832 P.2d 1162, 1164 (Ct. App. 1992). A double jeopardy claim asserting that a court imposed multiple punishments for the same offense clearly presents a challenge to the legality of a particular sentence which may be addressed pursuant to I.C.R. 35. State v. McKinney, 153 Idaho 837, 841, 291 P.3d 1036, 1040 (2013) (“a double jeopardy claim may properly be brought in a [I.C.R. 35] motion.”); see also State v. Alsanea, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003) (“An illegal sentence . . . is one in excess of a statutory provision or otherwise contrary to applicable law.”); State v. Pratt, 125 Idaho 546, 553-560, 873 P.2d 800, 807-815 (1993) (double jeopardy claim analyzed pursuant to Pratt’s I.C.R. 35 motion to correct an illegal sentence presented to the district court); State v. Jensen, 138 Idaho 941, 944 n.2, 71 P.3d 1088, 1091 n.2 (Ct. App. 2003) (a double jeopardy challenge may be raised “by a motion under I.C.R. 35 to correct an illegal sentence”). Further, a claim of an illegal sentence may not be raised for the first time on appeal without the trial court having first had an opportunity to consider the legality of the terms of the sentence. State v. Lavy, 121 Idaho 842, 845, 828 P.2d 871, 874 (1992) (court

declined to consider claim of illegal sentence because defendant presented it for first time on appeal, notwithstanding the fact that the record clearly demonstrated that sentence was illegal); State v. Martin, 119 Idaho 577, 578-79, 808 P.2d 1322, 1323-24 (1991).

There is no indication in the record that Moad challenged the legality of his sentence to the district court by way of an I.C.R. 35 motion,² or by any other means. He thereby deprived the district court of the opportunity to correct any alleged error. Therefore, Moad failed to preserve the issue for appellate review, and this Court must decline to address it absent a showing of fundamental error. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010) (re-articulating Idaho fundamental error review standard)

In this case however, no fundamental error review is necessary because the policies implicated by the fundamental error doctrine are simply not present. Most trial errors must be objected to before the district court and raised on direct appeal or a criminal defendant forfeits his opportunity to challenge the alleged error. The doctrine of fundamental error affords a defendant the right to appellate review that would otherwise not exist. However, I.C.R. 35 specifically provides an avenue for pursuing relief from an allegedly illegal sentence at any

² According to the Idaho Repository, Moad filed an I.C.R. 35 motion on November 23, 2012, after the clerk's record was lodged in this case. The district court denied that motion on December 18, 2012. Neither Moad's I.C.R. 35 motion, nor the district court's order denying it, are a part of the appellate record. Further, Moad did not reference this motion in his Appellant's brief. Therefore, it is unclear whether Moad utilized I.C.R. 35 merely to request leniency and a reduced sentence, or whether he raised a double jeopardy challenge to his sentence.

time, so if this Court declined to consider the issue, Moad would not be precluded from having his double jeopardy claim considered by the district court. Consistent with these policies, Idaho appellate courts have declined to perform fundamental error analysis where a defendant raises an illegal sentence claim for the first time on appeal. Lavy, 121 Idaho at 845, 828 P.2d at 874; Martin, 119 Idaho at 578-79, 808 P.2d at 1323-24; State v. Dorsey, 126 Idaho 659, 662, 889 P.2d 93, 96 (Ct. App. 1995); Hernandez, 122 Idaho at 229; 832 P.2d at 1164. The district court must be given an opportunity to correct its alleged errors, after which Moad may appeal if he is not satisfied with the district court's decision.

Because Moad failed to raise his double jeopardy claim below, and could still raise it as an illegal sentence claim pursuant to I.C.R. 35, this Court must decline to consider this issue for the first time on appeal.

D. Even If This Court Analyzes Moad's Double Jeopardy Claim For Fundamental Error, Moad Has Failed To Establish Such Error

"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). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. Perry, 150 Idaho at 227, 245 P.3d 961 at 979. Review under the fundamental error doctrine requires Moad to demonstrate the error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure

to object was a tactical decision); and (3) was not harmless.” Id., at 228, 245 P.3d at 980.

In Blockburger v. United States, 284 U.S. 299, 304 (2011), the United States Supreme Court set forth the applicable test for double jeopardy as follows:

[W]here the *same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

(Emphasis added.)

Under the “pleading theory” occasionally utilized by the Idaho appellate courts, a lesser included offense is one “alleged in the information as a means or element of the commission of the higher offense.” State v. Anderson, 82 Idaho 293, 301, 352 P.2d 972, 977 (1960); McKinney, 153 Idaho at 841, 291 P.3d at 1040; see also State v. Corbus, 151 Idaho 368, 374, 256 P.3d 776, 782 (Ct. App. 2011).

By its very terms, application of the Blockburger test for double jeopardy is conditioned on there being multiple offenses which stem from the “same act or transaction.” Blockburger, 284 U.S. at 304. If, however, multiple charges are based on different acts, double jeopardy protections cannot be violated and neither the Blockburger test, nor the pleading theory have any application. See State v. Bush, 131 Idaho 22, 33-34, 951 P.2d 1249, 1260-1261 (1997) (analyzing whether Bush committed two distinct criminal offenses for which he could be punished separately, rather than utilizing the Blockburger or pleading theory tests to determine whether the charged conduct constituted the “same crime” for

double jeopardy purposes); see also People v. Siewkiewicz, 802 N.E.2d 767, 771 (Ill. 2003) (“Prior to applying the *Blockburger* test, we must decide whether defendant's reckless homicide prosecution is based on a different act than his reckless driving conviction”); Vick v. State, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999) (“Because the offenses at issue involve separate acts, we need not determine whether those offenses would be considered the ‘same’ under the Blockburger test because the precondition for employing the test (that the two offenses involve the same conduct) is absent”).

While battery with the intent to commit rape is a lesser included offense of forcible rape under the Blockburger test, see State v. Bolton, 119 Idaho 846, 848-850, 810 P.2d 1132, 1134-1136 (Ct. App. 1991), in this case, there was no double jeopardy violation because Moad's oral rape of L.T. near the prison cell door was a separate and distinct criminal act from his subsequent sexual battery of L.T. that took place on the cell bunk.

In State v. Major, 111 Idaho 410, 414, 725 P.2d 115, 119 (1986), the Idaho Supreme Court addressed the issue of whether a course of criminal conduct constitutes one offense or several. The Court held that it depends on “whether or not the conduct constituted separate, distinct and independent crimes.” Id.; see also Bush, 131 Idaho at 33-34, 951 P.2d at 1260-1261 (1997). This determination further requires an inquiry into the “circumstances of the conduct” and consideration of the “intent and objective of the actor.” Major, 111 Idaho at 414, 725 P.3d at 119.

In Bush, the Idaho Supreme Court specifically addressed whether two acts of sexual assault constituted one continuous crime or separate distinct crimes. Bush, 131 Idaho at 33-34, 951 P.2d at 1260-1261. The Court held that Bush committed two distinct criminal offenses when he first battered the victim on his bed; and then pulled the victim off of the bed and moved him to a couch, where he tied the victim's arms behind his back with a cord, and then committed a second sexual battery. Id.

Similarly, in this case, Moad's rape and subsequent battery of L.T. were separate and distinct by time, and by location within the prison cell. Moad also formulated separate criminal intents in carrying out each of the two acts. Moad forcibly raped L.T. near the prison cell door by striking him and forcing him to perform oral sex. (State's exhibits 2, 4; Tr., p.123, Ls.11-20; p.155, L.17 – p.157, L.21.) The crime of rape was completed at this point. As in Bush, several events and a passage of time then occurred prior to Moad's second attack. Moad ordered L.T. to a different part of the prison cell, the bottom bunk, where Moad pulled L.T.'s pants down and applied lotion to his own penis. (Tr., p.124, Ls.7-18; p.158, L.4 – p.161, L.11.) Then, Moad rubbed his erect penis on L.T.'s buttocks. (Id.) This attack on the bottom cell bunk constituted a new and separate criminal act, and involved Moad's new and separate intent to rape L.T. a second time.

Moad's completed rape of L.T. near the cell door was a separate and distinct criminal act from his subsequent battery of L.T with the intent to commit rape or the infamous crime against nature on the cell bunk bed. The Double Jeopardy clauses of the United States and Idaho constitutions did not preclude

Moad's convictions and punishments for these two separate crimes. Moad has therefore failed to establish any constitutional error with regard to this claim, let alone plain error and prejudice that would warrant a reversal of his conviction under the Perry fundamental error test.

II.

Moad Has Failed To Demonstrate Fundamental Error In The Jury Instructions

A. Introduction

Moad contends the jury instructions violated his constitutional rights because they permitted the jury to find he was guilty of battery with intent to commit rape or the infamous crime against nature based on conduct that occurred immediately prior to his oral rape of L.T. (Appellant's brief, pp.15-18.) This prior conduct, Moad asserts, constituted the same act as the oral rape, and therefore, punishment for both the rape and the pre-rape battery would violate his double jeopardy rights. (Id.) Moad is precluded from raising this issue on appeal due to the doctrine of invited error. Alternatively, Moad has failed to establish fundamental error in the jury instructions.

B. The Jury Instructions Fairly And Accurately Reflected The Applicable Law

When reviewing jury instructions, the appellate court asks whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. State v. Bowman, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993).

As discussed above, “[I]n cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant’s unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, 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, meaning (in most instances) that it must have affected the outcome of the trial proceedings.” Perry, 150 Idaho at 226, 245 P.3d at 978.

In this case, with regard to the attacks of June 8, the indictment alleged that Moad committed rape by “us[ing] his penis to penetrate the oral opening of [L.T.], a male person, which was done for the purpose of sexual arousal, gratification, or abuse, and where [L.T.] was prevented from resistance by threats of immediate and great bodily harm accompanied by the apparent power of execution, to wit: by physically beating and choking [L.T.]” (R., pp.12-13.) The indictment also alleged that Moad committed battery with the intent to commit rape or the infamous crime against nature on or about June 8th by “willfully and unlawfully us[ing] force or violence upon the person of [L.T.] by punching, elbowing, kneeing and/or kicking [L.T.] multiple times, with the intent to commit rape and/or the infamous crime of nature.” (Id.) The corresponding jury instruction on these two charges substantially tracked the indictment. (R., pp.109-110).

The facts adduced at trial showed that Moad battered L.T. twice - once before forcing him to perform oral sex on him near the cell door, and then again

after ordering L.T. to move to the cell bunk. (See generally Tr.) Moad's initial, pre-rape battery of L.T. was one of the elements of the charged rape. (R., pp.12-13.) For the first time on appeal, Moad contends that the jury instructions were flawed because they permitted the jury to convict him of battery with the intent to commit rape or the infamous crime against nature for either of the two instances of battery, and that a conviction for the initial battery would result in unconstitutional multiple punishments for the same conduct. (Appellant's brief, pp.15-18.) Moad's claim is precluded by the invited error doctrine, and in any event, Moad has failed to establish fundamental error.

1. Moad's Claim Of Error Is Barred By The Invited Error Doctrine

"The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error." State v. Norton, 151 Idaho 176, 187, 254 P.3d 77, 88 (Ct. App. 2011) (citing State v. Atkinson, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993)). The purpose of the invited error doctrine is to prevent a party who "caused or played an important role in prompting a trial court" to take a particular action from "later challenging that decision on appeal." State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). "One may not complain of errors one has consented to or acquiesced in." Norton, 151 Idaho at 187, 254 P.3d at 88 (citing State v. Caudill, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); State v. Lee, 131 Idaho 600, 605, 961 P.2d 1203, 1208 (Ct. App. 1998)).

In this case, while Moad raised the potential instructional issue prior to the jury's deliberations, he did not object to the indictment or instructions. (Tr., p.203, L.9 – p.205, L.11.) Instead, Moad told the court that he did not know whether the potential confusion could be better addressed by an additional jury instruction, or during closing argument. (Tr., p.203, Ls.9-21.) The district court responded that the jury instructions properly stated the elements of the charge, and that any potential confusion could be addressed at closing argument. (Tr., p.205, Ls.2-10.) Moad replied, "fair enough." (Tr., p.205, Ls.2-10.)

By suggesting to the court that any potential confusion in the jury instructions could be alleviated at closing argument, and by consenting and acquiescing to the district court's suggestion to pursue that course, Moad invited any error related to such potential confusion. Moad is therefore precluded from raising this issue on appeal.

2. Moad Has Failed To Establish Fundamental Error With Regard To His Claim of Instructional Error

Even if this Court chooses not to apply the invited error doctrine, Moad's claim of error is still precluded because he has failed to establish fundamental error under Perry. Specifically, he has failed to establish either plain error or prejudice.

As suggested by Moad himself and by the district court, Moad had and took the opportunity to address any potential confusion regarding the jury instructions during his closing argument. During closing argument, Moad's counsel specifically informed the jury that "the conduct in Count II is not any

batteries or any alleged attacks before the oral sex incident. It comes from the battery related to the [subsequent] buttocks incident.” (Tr., p.249, Ls.14-18.) Moad’s counsel went on to argue that the state failed to prove that Moad’s post-rape battery was accompanied by the requisite intent to rape because this second attack did not result in penetration of any kind, and because several prior altercations between Moad and L.T. did not result in sexual interactions. (Tr., p.250, L.3 – p. 253, L.3.) In its own closing argument, the state also discussed the acts charged in Count II as occurring after the oral rape. (Tr., p.238, Ls.20 – 24) (“And in Count II, we pick up the story after the oral rape. Mr. Moad wasn’t done. He pushed [L.T.] and instructed him to go to his bunk and lay face down. This is where the attack continued or a new attack starts.”) Both Moad and the state thus presented the case to the jury as consisting of two separate alleged attacks, one occurring near the cell door, and the other occurring on the bottom cell bunk. Additionally, the trial court instructed the jury that “Each count charges a separate and distinct offense.” (R., p.105.)

While the jury instruction and facts adduced at trial created the theoretical possibility that the jury could have found Moad guilty of battery with intent to commit rape based on the pre-rape battery that was an element of the rape charge, Moad cannot demonstrate that the jury actually did so in light of the nature of the parties’ closing arguments, the jury instructions (to which he did not object), and the evidence presented. Instead, it is exceedingly more likely that the jury analyzed the case the way it was framed to them by both parties and the trial court’s instructions – as two separate alleged batteries occurring on or about

June 8, one occurring near the cell door, and the occurring on the cell bunk bed. Moad therefore has failed to meet his burden under Perry to demonstrate plain constitutional error in the context of the available record.

For the same reasons, Moad has also failed to meet the third prong of the Perry fundamental error analysis, because he has failed to demonstrate that he was prejudiced by any error. He cannot show that the jury actually acted in such a way as to deprive him of his constitutional rights.

Because Moad has failed to establish fundamental error, this Court must affirm his conviction for battery with intent to commit rape or the infamous crime against nature.

C. Even If Moad Has Demonstrated Fundamental Error With Regard To His Claims, He Is Entitled Only To A Reversal Of His Conviction For Battery With Intent To Commit Rape Or The Infamous Crime Against Nature

Moad has requested that this court vacate his convictions for rape, and battery with the intent to commit rape or the infamous crime against nature. (Appellant's brief, p.20.) Even if Moad had demonstrated fundamental error with regard to his double jeopardy or instructional error claims, his remedy would be limited to a reversal of his conviction and sentence for battery with the intent to commit rape or the infamous crime against nature. See State v. Eby, 136 Idaho 534, 540, 37 P.3d 625, 631 (Ct. App. 2001) (holding that defendant's conviction and sentence for attempted robbery should have been vacated and merged into his conviction and sentence for felony murder, upon the jury's verdicts of guilty to both counts); State v. Pizzuto, 119 Idaho 742, 756-758, 810 P.2d 680, 694-696

(1991), overruled on other grounds by State v. Card, 121 Idaho 425, 432, 825 P.2d 1081, 1088 (1991); see also Williams v. Singletary, 78 F.3d 1510, 1516-1517 (11th Cir. 1996) (After determining that the trial court violated double jeopardy by cumulatively sentencing the defendant for burglary and the lesser included offense of assault, holding that the defendant was not entitled to the “windfall” of dismissal of the greater burglary count, but only the vacating of the lesser-included assault charge.)

If this Court does consider Moad’s unpreserved double jeopardy and jury instruction claims, and concludes that Moad is entitled to relief, it should vacate only his conviction and sentence for battery with intent to commit rape or the infamous crime against nature, and remand the case to the district court.

III.

Moad Has Failed To Show That The Evidence Presented Was Insufficient To Support His Conviction For Battery With Intent To Commit Rape

A. Introduction

Moad contends that the state presented insufficient evidence to support his conviction for battery with intent to commit rape or the infamous crime against nature. (Appellant’s brief, pp.18-20.) Specifically, Moad contends that the evidence failed to demonstrate that he possessed the requisite intent to rape L.T. a second time while he battered him on the prison cell bed. (Id.) Moad’s argument fails because the positioning of L.T. face down on the bed, and Moad’s acts of pulling L.T.’s pants down, lubricating his own penis with lotion, and rubbing his erect penis on Moad’s buttocks area constitute substantial evidence

from which a rational jury could conclude that Moad possessed the requisite intent to rape L.T. at the time he battered him.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. Miller, 131 Idaho at 292, 955 P.2d at 607; Hart, 112 Idaho at 761, 735 P.2d at 1072

C. The Evidence Presented Was Sufficient To Support Moad's Conviction For Battery With Intent To Commit Rape

A conviction pursuant to I.C. § 18-911 as alleged in Count II in this case required the state to prove that Moad battered L.T. with the intent to commit rape or the infamous crime against nature. (R., pp.12-14, 110.) The state met its burden of proving Moad guilty of this offense beyond a reasonable doubt.

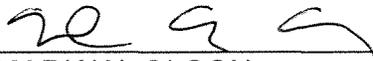
The evidence in this case demonstrated that Moad ordered L.T. to go to the lower bunk in the prison cell, where Moad pulled L.T.'s pants down, applied lotion to his own penis, and rubbed his penis on Moad's buttocks area. (Tr., p.124, Ls.7-18; p.158, L.4 – p.161, L.11.) After L.T. asked Moad to stop, Moad eventually ceased the attack. (Tr., p.159, L.20 – p.160, L.9.)

On appeal, Moad contends that his sudden cessation of his attack demonstrated that he lacked the intent to rape L.T. (Appellant's brief, pp.18-20.) Moad argues that evidence that previous physical altercations between himself and L.T. also ended only when Moad chose to end them demonstrated that if Moad possessed any intent to rape L.T., he would have. (Id.) This defense theory however, while proper for closing argument, does not establish that the evidence was insufficient. A rational jury could infer that Moad struck L.T., pulled L.T.'s pants down, lubricated his own penis with lotion, and then rubbed L.T.'s buttocks area with his penis as a prelude to an intended rape, but that he then simply changed his mind and declined to complete the act. Moad may have declined to carry out the rape out of sympathy, guilt, fatigue, fear of getting caught, or some other reason. The state was not required to prove that Moad declined to rape L.T. a second time for any particular reason, only that Moad possessed the requisite intent as the battery was occurring. The state presented sufficient evidence from which the jury could conclude the state met that burden. Moad has failed to show otherwise.

CONCLUSION

The state respectfully requests this Court to affirm Moad's convictions rape, battery with intent to commit rape or the infamous crime against nature, and misdemeanor battery.

DATED this 13th day of August, 2013.



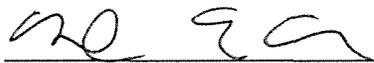
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of August, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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



MARK W. OLSON
Deputy Attorney General

MWO/pm