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State v. Larson Appellant's Reply Brief Dckt. 40091

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 40091
)	
v.)	BONNER COUNTY NO. CR 2011-1223
)	
RICHARD ALLEN LARSON,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

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

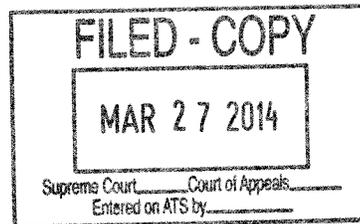
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STATEMENT OF THE CASE

Nature of the Case

Richard Larson was convicted, following a jury trial, of two counts of aggravated assault. On appeal, Mr. Larson contends that the district court erred in allowing the opinion testimony of Detective Johnston as an expert witness. Mr. Larson further contends that the prosecutor improperly misstated the law during closing arguments.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Larson's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto. However, Mr. Larson would like to clarify and correct incorrect or potentially misleading statements contained in the Respondent's Brief.

The State asserted that Ms. Adams "answered, 'no,' and Larson started shooting in Bilsky's direction." (Respondent's Brief, p.3.) Ms. Adams actually testified that she answered "yes" in response to Mr. Bilsky's question of whether she was okay. (Tr., p.243, L.22.) Additionally, the State mischaracterized Mr. Larson's sentence for the two aggravated assault convictions as "a unified five-years sentence with two years fixed," but neglected to mention that this was the sentence on each count, and those counts were ordered to be consecutive to each other, whereby Mr. Larson's aggregate unified sentence is actually ten years, with four years fixed. (Respondent's Brief, p.4; R., p.172.)

ISSUES

1. Did the district court err in allowing the opinion testimony of Detective Johnston as an expert witness as to the science of ballistics?
2. Did the State commit prosecutorial misconduct?

ARGUMENT

I.

The District Court Erred In Allowing Detective Johnston To Testify As A Ballistics Expert

At issue in this case is whether Mr. Larson shot first at Mr. Bilsky or whether he merely shot pell-mell after being hit in the chest by two rounds from Mr. Bilsky's gun. Because the encounter occurred around Ms. Adams' vehicle—Mr. Bilsky and Mr. Larson allegedly stalked each other, circling the vehicle—the directionality of the bullet that went through Ms. Adams' vehicle's side mirror was an issue during the trial. Although trial counsel objected to his qualifications as an expert, Detective Johnston was permitted to testify as to the directionality of the bullet through Ms. Adams' window. Such was error.

The State claims that any error was harmless, however, the trial contained two different stories—one told by the purported victims and one told by Mr. Larson. Because Mr. Larson's credibility was at issue, such error was not harmless and may have served to undercut his credibility with the jury.

II.

The State Committed Prosecutorial Misconduct In Closing Statements

Mr. Larson asserts that his right to a fair trial, guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, was violated when the prosecutor misrepresented the law during closing arguments. Mr. Larson asserts that the prosecutor's closing arguments lowered the State's burden of proof, which requires reversal of his conviction.

The State claims that Mr. Larson's sole defense was self-defense, and that he never claimed that he did not have the intent necessary to commit the assaults. (Respondent's Brief, p.16.) However this is incorrect as the first line of the argument section of Mr. Larson's Appellant's Brief stated, "[a]t issue in this case is whether Mr. Larson shot first at Mr. Bilsky or whether he merely shot pell-mell after being hit in the chest by two rounds from Mr. Bilsky's gun." (Appellant's Brief, p.8.) Mr. Larson took the stand at trial and testified that after he was shot by Mr. Bilsky, he fired his weapon "pell-mell," meaning he was not aiming at any particular target, but was acting instinctively. (Trial Tr., p.680, L.9 – p.681, L.5.)

Subsection (b) of I.C. § 18-901 requires an "intentional" threat by word or act.¹ With respect to the "threat" type of assault proscribed by I.C. § 18-901(b), the Idaho Court of Appeals has held that the offense requires an intent to make a threat, by word or act, to do violence to another. *State v. Dudley*, 137 Idaho 888, 890-91 (Ct. App. 2002).

Here, the State charged Mr. Larson with the "threat" form of assault under subsection (b) for his acts involving Ms. Adams and under both subsection (a) and

¹ Mr. Larson was charged with the aggravated assault of Ms. Adams and Mr. Bilsky under subsection (b) of I.C. § 18-901 which describes assault as:

b) an *intentional*, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

I.C. § 18-901(b) (emphasis added).

subsection (b) for his acts involving Mr. Bilsky.² (R., pp.49-50.) Therefore, it was the State's burden to prove beyond a reasonable doubt that Mr. Larson intended to threaten Ms. Adams and Mr. Bilsky and/or intended to commit a battery on Mr. Bilsky. See *Dudley*, 137 Idaho at 890-91. Further, attempt crimes require a specific showing of the intent to commit the underlying crime. *State v. Luke*, 134 Idaho 294, 300 (2000). That is, "the intent for an assault with a deadly weapon is the intent to attempt to commit a battery." *State v. Bonaparte*, 114 Idaho 577, 580 (Ct. App. 1998) (citation omitted). Therefore, Mr. Larson must have intended to attempt to commit a battery on Mr. Bilsky, and the lack of this intent was a defense.

Mr. Larson, several times, objected to the State's explanation of the meaning of "intent," but the district court allowed the State to argue, erroneously, that it did not have to prove that Mr. Larson intended any threat or injury. Thus the jurors could reasonably have concluded that they were directed by the prosecutor to find Mr. Larson guilty of aggravated assault without finding that he intended to threaten Ms. Adams or Mr. Bilsky and without finding that he intended to commit a battery on Mr. Bilsky.

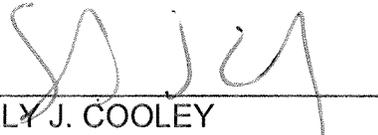
The prosecutor misinformed the jury by likening the intent required to prove aggravated assault to the willful standard utilized in a DUI case. The prosecutor's argument lowered the State's burden of proof and left the jury with the impression that it could convict Mr. Larson even if it found that he did not intend to make a threat or commit a battery.

² While Mr. Larson was charged only with violating subsection (b) of the assault statute for his actions involving Ms. Adams, Mr. Larson was charged under both subsections, (a) and (b), for his actions relating to Mr. Bilsky. (R., pp.49-50.)

CONCLUSION

Mr. Larson respectfully requests that this Court vacate his conviction and remand his case for a new trial.

DATED this 27th day of March, 2014.

A handwritten signature in black ink, appearing to read 'Sally J. Cooley', written over a horizontal line.

SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of March, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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OROFINO ID 83544

STEVE VERBY
DISTRICT COURT JUDGE
E-MAILED BRIEF

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SJC/eas