

Uldaho Law

## Digital Commons @ Uldaho Law

---

Not Reported

Idaho Supreme Court Records & Briefs

---

1-31-2019

### State v. Giltz Appellant's Brief Dckt. 45712

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

#### Recommended Citation

"State v. Giltz Appellant's Brief Dckt. 45712" (2019). *Not Reported*. 4995.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/4995](https://digitalcommons.law.uidaho.edu/not_reported/4995)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 45712
	)	
v.	)	ADA COUNTY
	)	NO. CR01-16-43527
WILLIAM PATRICK GILTZ,	)	
	)	
_____	)	

\_\_\_\_\_  
**REPLY BRIEF OF APPELLANT**  
\_\_\_\_\_

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

\_\_\_\_\_  
**HONORABLE RICHARD D. GREENWOOD**  
District Judge  
\_\_\_\_\_

**ERIC D. FREDERICKSEN**  
State Appellate Public Defender  
I.S.B. #6555

**ANDREA W. REYNOLDS**  
Deputy State Appellate Public Defender  
I.S.B. #9525  
322 E. Front Street, Suite 570  
Boise, Idaho 83702  
Phone: (208) 334-2712  
Fax: (208) 334-2985  
E-mail: documents@sapd.state.id.us

**ATTORNEYS FOR  
DEFENDANT-APPELLANT**

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**ATTORNEY FOR  
PLAINTIFF-RESPONDENT**

**TABLE OF CONTENTS**

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case .....	1
Statement of Facts and Course of Proceedings .....	1
ISSUES PRESENTED ON APPEAL .....	2
ARGUMENT .....	3
I. The District Court Abused Its Discretion In Ruling The State Could Impeach Mr. Giltz With His Two Prior Felony Convictions For Burglary .....	3
A. Introduction .....	3
B. This Court Cannot Conclude That The District Court “Implicitly” Conducted The Necessary Balancing Test.....	3
C. The State Cannot Show Beyond A Reasonable Doubt That The District Court’s Error Was Harmless.....	4
II. The District Court Erred In Instructing The Jury It Was Not Necessary For It To Decide Whether Mr. Giltz Struck The Victim With An Open Or Closed Fist .....	6
A. Introduction .....	6
B. This Issue Is Preserved For This Court’s Review Because It Was Directly Addressed By The District Court.....	6
C. Mr. Giltz Was Deprived Of Fair Notice Of The Charge Against Him On Account Of The Variance Between The Information And The District Court’s Instruction To The Jury.....	7
CONCLUSION.....	9
CERTIFICATE OF SERVICE .....	9

**TABLE OF AUTHORITIES**

Cases

*Northcutt v. Sun Valley Co.*, 117 Idaho 351 (1990).....6

*State v. DuValt*, 131 Idaho 550 (1998).....6

*State v. Johnson*, 126 Idaho 892 (1995).....6

*State v. Perry*, 150 Idaho 209 (2010) .....4, 6

*State v. Rodgers*, 119 Idaho 1066 (Ct. App. 1990).....4

*State v. Thompson*, 132 Idaho 628 (1999).....3

Rules

Idaho Rule of Evidence 609(a) .....3

## STATEMENT OF THE CASE

### Nature of the Case

Mr. Giltz appeals from his judgment of conviction for domestic violence, arguing the district abused its discretion in ruling the State could impeach him with his two prior felony convictions for burglary, and erred in instructing the jury it was not necessary for it to decide whether he struck the complainant with an open or closed fist. He submits this Reply Brief to respond to the State's legal arguments on these issues.

### Statement of Facts and Course of Proceedings

Mr. Giltz included a statement of facts and course of proceedings in his Appellant's Brief, which he relies on and incorporates herein. (*See* Appellant's Br., pp.1-3.)

## ISSUES

- I. Did the district court abuse its discretion in ruling the State could impeach Mr. Giltz with his two prior felony convictions for burglary?
- II. Did the district court err in instructing the jury it was not necessary for it to decide whether Mr. Giltz struck the victim with an open or closed fist?

## ARGUMENT

### I.

#### The District Court Abused Its Discretion In Ruling The State Could Impeach Mr. Giltz With His Two Prior Felony Convictions For Burglary

##### A. Introduction

Mr. Giltz argued in his Appellant's Brief that the district court abused its discretion in ruling the State could impeach him with his two prior felony convictions for burglary because it failed to consider whether the probative value of this evidence outweighed its prejudicial impact. (Appellant's Br., pp.5-11.) In response, the State acknowledges the district court "did not expressly engage in the weighing process prescribed by Rule 609" but argues "it appears the court implicitly considered" whether the probative value of Mr. Giltz's prior convictions outweighed their prejudicial impact. (Respondent's Br., pp.17-18.) The State is incorrect, as it is by no means "implicit" in the district court's ruling that it conducted the required balancing test. The State is also incorrect in arguing that the district court's error in permitting this evidence was harmless. (*See* Respondent's Br., pp.19-21.)

##### B. This Court Cannot Conclude That The District Court "Implicitly" Conducted The Necessary Balancing Test

In determining whether evidence of a prior conviction should be admitted under Idaho Rule of Evidence 609(a), "(1) the court must determine whether the fact or nature of the conviction is relevant to the witness' credibility; and (2) if so, the court must determine whether the probative value of the evidence outweighs its prejudicial impact." *State v. Thompson*, 132 Idaho 628, 630 (1999) (citation omitted). In its brief, the State quotes the district court at length, and then argues, without citing to any authority, that the district court "implicitly" conducted the necessary balancing test. (Respondent's Br., p.19.)

The State asserts:

However, after discussing the relevance factor, the court explained the danger inherent in admitting a prior felony into evidence, which, combined with its decision to admit the fact of the felony convictions, shows that the court implicitly found the probative value of the evidence outweighed any prejudice.

(Respondent's Br., p.19.) It appears the State is asking this Court to conclude the district court conducted the necessary balancing test because it discussed the dangers of admitting a prior felony into evidence, and then ruled in the State's favor. The district court did not consider any of the relevant factors, and did not conduct the necessary balancing test. *See State v. Rodgers*, 119 Idaho 1066, 1073 (Ct. App. 1990) (affirming district court's admission of prior felony conviction into evidence after considering "the impeachment value of the prior crime, the remoteness of the prior conviction, the witness's criminal history, the similarity between the past crime and the crime charged, the importance of the witness's testimony, the centrality of the credibility issue, and the nature and extent of the witness' criminal record as a whole"). The district court abused its discretion.

C. The State Cannot Show Beyond A Reasonable Doubt That The District Court's Error Was Harmless

Because the error was objected to below, the State has the burden of demonstrating the error was harmless beyond a reasonable doubt. *See State v. Perry*, 150 Idaho 209, 221-22 (2010). It cannot make this showing.

The State fails to mention in its Respondent's Brief that the prosecutor argued to the jury in closing that Mr. Giltz was less credible because of his prior felony convictions. (Tr., p.387, Ls.14-17.) This was extremely prejudicial to Mr. Giltz, as this was largely a "he said, she said" case regarding the circumstances leading up to a domestic dispute. The jury heard Mr. Giltz's story, but then heard it was not supposed to believe Mr. Giltz because of his prior felony

convictions. This was harmful—and even more so because the jury did not hear that the complainant also had prior felony convictions. (*See* PSI, p.11; *see also* IDOC Offender Search Details for Inmate no. 71518.)<sup>1</sup>

The State argues “the serious injuries [the complainant] sustained completely belie any assertion that Giltz used reasonable force against her—even assuming, *arguendo*, some degree of self-defense was warranted.” (Respondent’s Br., p.20.) But whether the amount of force Mr. Giltz used against the complainant was reasonable is a question for the jury. Mr. Giltz testified that he acted in self-defense after the complainant swung at him, and after she injected methamphetamine into her neck. (Tr., p.298, Ls.1-11, p.300, L.18 – p.301, L.1.) The jury appeared to doubt Ms. Bilquist’s account of the events, as the only question it asked during its deliberations concerned whether it had to find Mr. Giltz struck Ms. Bilquist with a closed fist, as she specifically testified. (R., p.140.)

Considering the evidence presented at trial and the significance of Mr. Giltz’s credibility as a witness, the State cannot show beyond a reasonable doubt that the district court’s error in allowing the admission of Mr. Giltz’s prior convictions was harmless.

---

<sup>1</sup> The IDOC’s publically available website indicates the complainant has two prior felony convictions—the first in a 2011 case, with a sentence satisfaction date of July 7, 2020, and the second in a 2012 case, with a sentence satisfaction date of July 7, 2026. (IDOC Offender Search Details, Inmate 71518.)

## II.

### The District Court Erred In Instructing The Jury It Was Not Necessary For It To Decide Whether Mr. Giltz Struck The Victim With An Open Or Closed Fist

#### A. Introduction

In his Appellant's Brief, Mr. Giltz argued the district court erred in instructing the jury, over his attorney's objection, that "it is not necessary for you to decide whether the defendant struck with an open or closed fist" because this instruction created a fatal variance, depriving him of his right to fair notice of the charge against him. (Appellant's Br., pp.12-16.) In response, the State argues Mr. Giltz failed to preserve this issue for appeal and, if the issue is considered, failed to show he was deprived of his right to fair notice. (Respondent's Br., pp.21-31.) This Court must reject the State's arguments.

#### B. This Issue Is Preserved For This Court's Review Because It Was Directly Addressed By The District Court

As a general rule, Idaho's appellate courts will not consider error not preserved for appeal through objection at trial. *State v. Perry*, 150 Idaho 209, 224 (2010); *State v. Johnson*, 126 Idaho 892, 896 (1995). However, the Idaho Supreme Court applies an exception to this rule "when the issue was argued to or decided by the trial court." *State v. DuValt*, 131 Idaho 550, 553 (1998); *see also Northcutt v. Sun Valley Co.*, 117 Idaho 351, 357 (1990) ("On occasion we have allowed an issue that was not formally raised below to be considered on appeal when the issue was implicitly before the lower tribunal, and was considered and passed on by that tribunal.") Thus, in *DuValt*, the Idaho Supreme Court considered an issue on appeal that "was directly addressed by the trial court below." *DuValt*, 131 Idaho at 553. Like in *DuValt*, this Court should consider this issue on appeal because it was directly addressed by the trial court below.

During deliberations, the jury asked how important the “closed fist” wording was in its instructions, and whether it had to determine whether the initial hit or secondary hits were done with a closed fist, and whether a closed fist is equivalent to an open fist. (R., p.140.) In discussing with counsel how to respond, the district court properly recognized “the issue is clearly a variance between the exact language in the information . . . and the two different versions of the same thing that happened at the time that nobody disputes.” (Tr., p.434, Ls.11-18.) Counsel for Mr. Giltz objected to the district court’s proposed response to the jury, and the district court said, “[Y]ou’re talking about a variance between the pleadings and the proof, essentially.” (Tr., p.436, Ls.23-25.) Defense counsel responded by saying he thought “the jury instructions are clear as they sit.” (Tr., p.437, Ls.3-4.)

The district court recognized the jury was “confused about . . . an instruction that . . . recites the language in the information.” (Tr., p.438, Ls.4-6.) The district court concluded the language contained in the Information regarding the closed fist was not a necessary element of the crime. (Tr., p.438, Ls.6-12.) The district court thus instructed the jury, “For the purposes of this case, it is not necessary for you to decide whether the defendant struck with an open or closed fist.” (Tr., p.439, Ls.20-25.) The district court provided this additional instruction, knowing it differed—varied—from the language in the Information and the original instructions. The issue of whether the district court’s additional instruction created a fatal variance was directly addressed by the district court, and is thus preserved for appeal.

C. Mr. Giltz Was Deprived Of Fair Notice Of The Charge Against Him On Account Of The Variance Between The Information And The District Court’s Instruction To The Jury

The State correctly recognizes a variance between the charging document and the jury instructions constitutes a due process violation, if it deprives the defendant of fair notice of the

charges against him by misleading or embarrassing him in the preparation or presentation of his defense. (Respondent's Br., p.27.) The State contends Mr. Giltz cannot show a fatal variance, however, because he "was not, and could not have been, surprised or embarrassed by the fact that he could have been convicted for using an open hand to batter [the complainant]." (Respondent's Br., p.29.) The State asserts "Giltz's self-defense claim indicates that he understood he could be convicted of felony domestic battery even if the jury believed he struck [the complainant] with an open palm." (Respondent's Br., p.30.) This is not true.

Mr. Giltz believed he needed to defend against a charge that he, without justification, punched his long-time girlfriend "in the face with a closed fist." (R., pp.130, 13.) He entered a plea of not guilty, and proceeded to trial, because he struck his girlfriend with an open palm, in self-defense, believing he was in imminent danger of bodily harm. He explained this to the jury on direct and cross-examination at trial, and to the presentence investigator prior to sentencing. (Tr., p.297, L.24 – p.304, L.9, p.321, L.4 – p.326, L.7; PSI, pp.4-5.) He understood the State's theory of the case relied on the jury finding he struck the complainant with a closed fist, as charged in the Information. (R., pp.5-51.) He was, indeed, surprised and embarrassed when the jury was allowed to convict him without finding he struck the complainant with a closed fist. The variance between the Information and the supplemental jury instruction was fatal, and Mr. Giltz is entitled to a new trial.

CONCLUSION

For the reasons stated above, as well as those set forth in his Appellant's Brief, Mr. Giltz respectfully requests that this Court vacate his judgment of conviction and remand this case to the district court for further proceedings.

DATED this 31<sup>st</sup> day of January, 2019.

/s/ Andrea W. Reynolds  
ANDREA W. REYNOLDS  
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31<sup>st</sup> day of January, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

AWR/eas