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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46015-2018**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2017-25703**
	)	
RICHARD GENE VICTORY,	)	
	)	
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

HONORABLE RICHARD D. GREENWOOD
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JEFF NYE
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

PAUL E. RIGGINS
Riggins Law, P.A.
380 S. 4th Street, Ste. 104
Boise, Idaho 83702
(208) 344-4152
E-mail: rigginslaw@gmail.com

ATTORNEY FOR DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Richard Gene Victory appeals from the district court's judgment entered after a jury found Victory guilty of battery, two counts of aggravated assault, and resisting an officer. Victory argues that the state presented insufficient evidence on the two counts of aggravated assault and challenges the sentence imposed by the district court.

Statement Of The Facts And Course Of The Proceedings

The state charged Richard Gene Victory with aggravated battery, two counts of aggravated assault, and resisting an officer. (R., pp.27-28.) The first count of aggravated assault alleged that Victory assaulted Tamara Moyer with a knife. (R., p.28.) The second count of aggravated assault alleged that Victory assaulted Moyer's daughter, Harley Moyer ("Harley"), with a knife. (R., p.28.) The state also filed an Information Part II seeking a persistent violator enhancement. (R., pp.41-42.) The case went to trial. (R., pp.59-70.)

At trial, Moyer testified as follows: She had been Victory's friend for about a year before the assault. (Tr., p.43, Ls.22-25.[1]) On July 2, 2017, she was with Harley in Harley's bedroom along with Harley's boyfriend, Connor Lathim, and Moyer's friend, Allan Ward. (Tr., p.41, L.10 – p.42., L.11.) They were all working on fixing a chair. (Tr., p.41, L.24 – p.42, L.6.) Victory walked into the bedroom. (Tr., p.45, L.16 – p.46, L.5.) "[H]e was seriously angry." (Tr., p.46, Ls.6-12.) He demanded that Harley return his Xanax and marijuana that he had left in Harley's bedroom. (Tr., p.46, L.13 – p.47, L.2.) He sounded like "he got the devil speaking out of his voice, and so [Moyer] began to pray." (Tr., p.46, L.13 – p.47, L.2.) Victory pulled a knife out of

[1] All transcript citations refer to the trial transcript unless otherwise indicated.

his pocket. (Tr., p.48, Ls.12-17.) He told Moyer and Harley that "he was going to take [them] both out" and that "he was going to cut [them] up into little pieces and put [them] in barrels." (Tr., p.48, Ls.1-8.) Moyer was "very scared" and afraid that Victory might cut her. (Tr., p.49, L.22 – p.50, L.4.) Victory tried to stab Moyer but Ward "blocked it with his right arm" resulting in a cut on Ward's arm. (Tr., p.50, Ls.13-23.)

Harley testified as follows: On July 2, 2017, she was in her bedroom with Moyer and Lathim trying to fix a chair. (Tr., p.64, L.1 – p.67, L.8.) Victory came into the bedroom looking for his medication. (Tr., p.68, L.9 – p.69, L.8.) Harley gave him his medication, but Victory claimed that Harley had more that she was not giving him. (Tr., p.69, L.9 – p.70, L.2.) Victory became "[s]eriously angry" and "was very upset." (Tr., p.70, Ls.3-8.) "He pulled out a knife . . . ." (Tr., p.70, Ls.13-15.) Victory told Harley, "'I can kill you. I know how to use this knife.'" (Tr., p.71, Ls.4-22.) He also told Moyer that he "'kn[ew] how to cut [them] up and put [them] in a freezer.'" (Tr., p.71, Ls.4-22.) Harley "was scared" that Victory might cut her. (Tr., p.72, L.18 – p.73, L.6.) At some point during the dispute, Ward took a protective stance in between Moyer and Harley on one side and Victory on the other. (Tr., p.74, Ls.20-24.) Harley could not see what happened at that point because she could not see past Ward and Moyer. (Tr., p.74, L.25 – p.75, L.5.) After Victory, Ward, and Moyer left the room, Harley locked the door and called 911. (Tr., p.75, L.14 – p.76, L.8.) The police arrived within ten minutes. (Tr., p.76, Ls.12-14.)

Lathim testified as follows: On July 2, 2017, he was with Harley and Moyer in Harley's bedroom. (Tr., p.25, L.18 – p.28, L.6.) Victory "entered the room very, very angrily." (Tr., p.29, Ls.10-14.) He kept saying that they had something of his. (Tr., p.29, Ls.15-19.) Ward entered the room and got in between Victory and everyone else in the room. (Tr., p.30, Ls.16-20.) Victory pulled out a knife. (Tr., p.30, Ls.16-23.) He started making threats along the lines of "'I can end

you all. You don't even know what I'm capable of. I haven't even shown you the real me yet.'" (Tr., p.31, Ls.10-16.) At some point, Victory cut Ward's arm. (Tr., p.33, Ls.5-13.) Lathim described the overall situation as "terrifying." (Tr., p.34, Ls.4-6.)

Officer Nate Davis testified that he responded to Harley's 911 call. (Tr., p.98, Ls.11-20.) The state introduced bodycam video from Officer Davis. (See State's Ex. 1.) The video starts with Officer Davis standing in the front door and Victory standing at the top of the stairs. (State's Ex. 1 at 0:00 – 0:05.) Officer Davis asks Victory to "come here." (State's Ex. 1 at 0:00-0:01.) Victory responds, "I ain't doing shit motherfucker." (State's Ex. 1 at 0:02-0:03.) Officer Davis tells Victory to drop the knife, and Victory responds, "Or what? These scissors?" and then drops a pair of scissor and a belt down the stairs. (State's Ex. 1 at 0:04-0:10.) Victory continues to mock and curse at Officer Davis until he eventually walks down the stairs. (State's Ex. 1 at 0:09-0:28.) Officer Davis tells Victory to lay down, and Victory responds, "I'm not laying down; you lay down motherfucker." (State's Ex. 1 at 0:27-0:30.) Officer Davis starts to tell Victory to get on the ground, and Victory responds, "or what?" (State's Ex. 1 at 0:30-0:31.) Officer Davis then grabs Victory and wrestles him to the ground. (State's Ex. 1 at 0:30-1:00.) The officers place him in handcuffs. (State's Ex. 1 at 1:00-1:10.) Victory then unleashes a profanity-laced tirade against Moyer. (E.g., State's Ex. 1 at 2:05-2:10 ("Fuck you. Fuck your kid.").) When Officer Davis places Victory in his patrol car, Victory says, "I'm so fucking excited to go deal with these bitches. I'm going to stab every motherfucking one of them." (State's Ex. 1 at 3:55-4:00.)

The officer who processed Victory at the jail testified that he found "a silver folding knife, approximately, three to four inches long in [Victory's] back right pocket" after conducting a pat-down search of Victory at the jail. (Tr., p.94, L.17 – p.95, L.20; see State's Ex. 4.) The state also

showed the jury two photographs taken the night of the assaults, both of which showed Ward's arm with a cut from a knife. (See State's Ex. 2; State's Ex. 3.)

Victory testified too. (Tr., p.123, Ls.5-7.) He admitted that he was in the bedroom with Moyer, Harley, Lathim, and Ward and that he believed they had taken his marijuana. (Tr., p.127, Ls.8-13, p.128, Ls.2-25.) He testified that Ward put his hands on Victory, and so he knocked Ward's hands off. (Tr., p.129, Ls.15-23.) He testified that he did not threaten anybody and that he did not pull out a knife. (Tr., p.132, Ls.14-23.) He also told the jury he did not know how Ward got cut. (Tr., p.134, L.22 – p.135, L.6.) Victory also confessed that he did not cooperate with the officers. (Tr., p.132, Ls.2-5.)

The jury convicted Victory of battery, two counts of aggravated assault, and resisting an officer. (R., pp.108-111.) The district court imposed sentences of six months for the battery, one year for resisting an officer, and twenty years with ten years fixed for each aggravated assault. (R., p.124.) The district court ran all sentences concurrently. (R., p.124.)

Victory timely appealed. (R., pp.127-128.)

ISSUES

Victory states the issues on appeal as:

1. Whether the appellant's convictions for Aggravated Assault should be overturned based on insufficient evidence? [sic]

2. Whether the district court abused its discretion by sentencing Mr. Victory to an excessive sentence? [sic]

(Appellant's brief, p.5.)

The state rephrases the issues as:

I. Has Victory failed to show the state presented insufficient evidence of aggravated assault?

II. Has Victory failed to show the district court abused its sentencing discretion?

ARGUMENT

I.
The State Presented Sufficient Evidence On Both Counts Of Aggravated Assault

A. Introduction

The state presented sufficient evidence that Victory committed aggravated assault against Moyer and Harley. The state only had to prove that Victory used a knife to threaten violence against Moyer and Harley and that Victory's threat created a well-founded fear of imminent violence in Moyer and Harley. Moyer, Harley, and Lathim all testified that Victory pulled out a knife and threatened to hurt or kill Moyer and Harley, and Victory actually used the knife to cause injury to Ward. In addition, Moyer and Harley both testified that they were afraid Victory might cut them with the knife. That is sufficient evidence that Victory committed aggravated assault against Moyer and Harley.

B. Standard Of Review

"This Court 'will uphold a judgment of conviction entered upon a jury verdict so long as there is substantial evidence upon which a rational trier of fact could conclude that the prosecution proved all essential elements of the crime beyond a reasonable doubt.'" State v. Kralovec, 161 Idaho 569, 572, 388 P.3d 583, 586 (2017) (quoting State v. Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009)). This Court "view[s] the evidence in the light most favorable to the prosecution in determining whether substantial evidence exists" and "will not substitute [its] own judgment for that of the jury on matters such as the credibility of witnesses, the weight to be given to certain evidence, and the 'reasonable inferences to be drawn from the evidence.'" Severson, 147 Idaho at 712, 215 P.3d at 432 (quoting State v. Sheahan, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003)).

"Evidence is substantial if a 'reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven.'" Id. (quoting State v. Mitchell, 130 Idaho 134, 135, 937 P.2d 960, 961 (Ct. App. 1997) (brackets omitted)). "Substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence." State v. Southwick, 158 Idaho 173, 178, 345 P.3d 232, 237 (Ct. App. 2014).

C. The State Presented Substantial Evidence To Support Both Convictions Of Aggravated Assault Because A Reasonable Juror Could Have Found All Of The Required Elements

The state presented sufficient evidence on both counts of aggravated assault. "An 'assault' is committed when a person intentionally and unlawfully threatens by word or act to do violence to the person of another, with an apparent ability to do so, and does some act which creates a well-founded fear in the other person that such violence is imminent." (R., p.94.; see ICJI 1201.) Because the state charged Victory with *aggravated* assault, it also had to prove that Victory used a deadly weapon, such as a knife, to commit the assault. (R., pp.92-93; see ICJI 1205.)

A rational trier of fact could conclude that Victory committed aggravated assault against Moyer and Harley based on the evidence presented by the state. Moyer, Harley, and Lathim all testified that they were present when Victory pulled out a knife during a confrontation in Harley's bedroom. (Tr., p.30, Ls.16-23, p.48, Ls.12-17, p.70, Ls.13-15.) All three witnesses also testified that Victory threatened violence against Moyer and Harley with the knife. (Tr., p.31, Ls.10-16 (testifying that Victory said "I can end all of you"); Tr., p.48, Ls.1-8 (testifying that Victory said "he was going to cut [them] up into little pieces and put [them] in barrels"); Tr., p.71, Ls.4-22 (testifying that Victory said "I can kill you[;] I know how to use this knife").) Moyer testified that she was "very scared" and afraid that Victory would cut her. (Tr., p.49, L.22 – p.50, L.4.) And Harley testified that she "was scared" that Victory would cut her. (Tr., p.72, L.18 – p.73, L.6.) Their fears of imminent violence were well-founded given Victory's erratic behavior, violent

threats, and attempt to stab Moyer, which was blocked by Ward causing a laceration to his arm. (Tr., p.50, Ls.13-23; State's Ex. 2; State's Ex. 3.) That is substantial evidence that Victory committed aggravated assault against both Moyer and Harley. (See R., pp.92-93.)

Victory attacks the testimony of the witnesses by pointing out minor inconsistencies or inaccuracies. For example, he points out that Lathim inaccurately described Victory's knife, that Moyer was unable to identify the knife, and that Harley "provided a different description of the knife allegedly involved in the offense." (Appellant's brief, pp.9-12.) But the appearance of the knife is irrelevant to the elements of aggravated assault. (R., pp.92-93.) All that matters is that Victory used *a* knife, and all three witnesses unequivocally testified that he did. (Tr., p.30, Ls.16-23, p.48, Ls.12-17, p.70, Ls.13-15.) The state corroborated that testimony by presenting evidence that Victory had a knife on him when the police arrested him. (Tr., p.94, L.17 – p.95, L.20; see State's Ex. 4.) More importantly, all of Victory's nitpicking over minor inconsistencies in the witnesses' testimony is, in effect, nothing more than an attack on the credibility of the witnesses. And "[t]his Court will not second-guess the jury's determination on credibility or the weight to be given to witnesses' testimony." State v. Allen, 129 Idaho 556, 558, 929 P.2d 118, 120 (1996).

Victory also attacks the credibility of Moyer on the basis that Moyer had a medical issue that affected her memory. (Appellant's brief, p.10.) Moyer testified on direct examination that she has a "tumor behind [her] right eye" that was "pushing on [her] memory lobe." (Tr., p.44, L.23 – p.45, L.1.) Moyer confirmed, however, that if she forgot anything that happened that night, she would let the jury know instead of trying to make something up. (Tr., p.45, Ls.10-15.) And Moyer did exactly that, such as when she freely admitted that she could not remember the appearance of Victory's knife. (Tr., p.48, Ls.18-23.) Victory was, of course, free to probe Moyer's medical issue on cross-examination—and he did. (Tr., p.56, Ls.5-21.) But the jury was free to

accept or reject Moyer's testimony—and this Court must not "second-guess the jury's determination" on appeal. Allen, 129 Idaho at 558, 929 P.2d at 120.

Victory also argues that the state was missing "crucially important" evidence because "the alleged victim of the stabbing, Allan Ward, did not testify." (Appellant's brief, p.13.) But the state did not need Ward's testimony to prove Victory stabbed Ward. The state proved that Victory stabbed Ward through the testimony of Moyer and Lathim and the photographs of Ward's arm. Moreover, the state did not need to prove that Victory stabbed Ward at all to prove aggravated assault. The victims of the aggravated assault were Moyer and Harley, and aggravated assault requires only threats of violence, not actual violence. (R., pp.92-93.)

Finally, Victory argues that the state did not present sufficient evidence that Victory created a well-founded fear of imminent violence in Moyer and Harley because, in his view, Moyer and Harley testified "that they did not believe Mr. Victory intended to hurt anyone." (Appellant's brief, p.13.) But Victory is reading those statements out of context.

Moyer testified that, at the time of the trial, she did not "think [Victory] meant to hurt either one of us" and that she "just [thought] he was very upset." (Tr., p.58, Ls.6-9.) But she clarified "that doesn't mean [she] [wasn't] afraid that he was going to hurt [her]." (Tr., p.62, Ls.1-3.) And she testified that, at the time of the confrontation, she "was very scared" and that she went into "survival mode" in order "to protect [her] daughter" and she was "afraid that based on his threats and his actions, he might cut [Moyer]." (Tr., p.49, L.22 – p.50, L.7.) Given all of Moyer's testimony, a reasonable juror could have found that Victory created a well-founded fear in Moyer that violence was imminent.

Similarly, Harley testified that she did not "think [Victory] had intentions to really cut anybody." (Tr., p.73, Ls.7-15.) But later in her testimony she was given an opportunity to clarify her answer:

> Q. And so when you said that you didn't think that [Victory] wanted to hurt anyone, what did you mean by that?
>
> A. I mean, like when he came in [to the bedroom], I don't necessarily think that his intention was to come in and hurt anybody. Like I said earlier, usually when that happens, they just come in and hurt someone.
>
> Q. Yeah.
>
> A. And he definitely came in trying to talk it out first, and then it just progressively just kept getting worse until he was so upset or angry, either or both. And just reached a point where I was like, "I am scared, and, you know, he has a weapon, and I'm going to end up calling the police at some point."
>
> Q. Yeah. So uh – would it be fair to say that initially you didn't think he was going to hurt someone, but then it developed into a fear—
>
> A. Yes.
>
> Q. – that he was?

(Tr., p.83, L.7 – p.84, L.2.) Harley also stated earlier in her testimony that she "was scared" that Victory might cut her. (Tr., p.72, L.18 – p.73, L.6.) Given all of Harley's testimony, a reasonable juror could have found that Victory created a well-founded fear in Harley that violence was imminent. Thus, "view[ing] the evidence in the light most favorable to the prosecution," Severson, 147 Idaho at 712, 215 P.3d at 432, the state presented sufficient evidence that Victory committed aggravated assault against Moyer and Harley.

II.
Victory Has Failed To Show That The District Court Abused Its Sentencing Discretion

A. Introduction

Victory asserts the sentence imposed by the district court is excessive. (Appellant's brief, pp.17-18.) The record supports the sentence imposed.

B. Standard Of Review

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008).

C. The District Court Did Not Abuse Its Sentencing Discretion

The district court did not abuse its sentencing discretion. It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (holding district court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds

might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, "[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court." Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The district court did not abuse its sentencing discretion when it imposed an aggregate sentence of twenty years with ten years fixed. (R., p.124.) Victory concedes that his sentence falls within the statutory maximums. (Appellant's brief, p.14.) And the district court "considered all of the factors in *State versus Toohill*." (4/17/2018 Tr., p.149, Ls.4-11.) After reading the presentence investigation report, the district court determined "that [Victory] do[es] present a danger to the community." (4/17/2018 Tr., p.149, Ls.4-11, p.151, Ls.7-10.) Specifically, the district court found Victory is "a dangerous person because of [his] attitude and [his] lifestyle, both of which [he] decline[s] to give up." (4/17/2018 Tr., p.150, Ls.7-14.)

The district court's conclusion that Victory is "a dangerous person" was supported by the presentence investigation report. (4/17/2018 Tr., p.150, Ls.7-14.) This is Victory's third felony conviction. (Conf. Docs., p.28.) The other two were both for robbery. (Conf. Docs., pp.27-28.)

In the 2005 robbery, Victory parked his car in the road forcing the victim to stop his car behind Victory. (Conf. Docs., p.178.) Victory "exited the car with a gun and pointed it at [the victim] requesting everything he had." (Conf. Docs., p.178.) While on parole for the 2005 robbery, Victory robbed two other people. (Conf. Docs., pp.141, 144.) Victory "pointed a small black revolver at [one victim's] head and told him to give him all of his cash" and then said "'you know this things [sic] loaded, I'll blow your head off, I'll blow your fucking head off.'" (Conf. Docs., p.141.) The experience left one of the victims "shaking violently, crying, and having trouble focusing." (Conf. Docs, p.141.)

Victory was on parole for the second robbery when he committed the instant offense. (Conf. Docs., p.29.) Victory's parole officer reported that "Victory was a challenge to supervise" at least in part because he has "a bad habit of possessing weapons (eg. large knives)." (Conf. Docs., p.29.) Victory also "has a habit of threatening . . . his friends and family." (Conf. Docs., p.29.) "He has a track record[] of repeated violent behavior" and, "[d]uring his time on parole, he committed a staggering amount of offenses." (Conf. Docs., p.29.) The district court correctly concluded, based on this information and the instant offense, that Victory is "a dangerous person" who "present[s] a danger to the community." (4/17/2018 Tr., p.150, Ls.7-14, p.151, Ls.7-10.)

Victory argues that his sentence was excessive because he "did not cause any injury to any person." (Appellant's brief, p.17.) That is demonstrably false. Victory stabbed Ward causing a laceration on his arm. (See State's Ex. 2; State's Ex. 3.) Victory's insistence that he did no harm only accentuates his continued refusal to take responsibility for his actions. (See 4/17/2018 Tr., p.135, L.17 – p.136, L.5, p.149, L.23 – p.150, L.6.)

Victory also argues for a reduced sentence on the basis that the "victims did not even bother to submit victim-impact statements to the district court for sentencing, suggesting that they were not seriously injured and were not seeking any punishment or retribution for Mr. Victory's actions." (Appellant's brief, p.17.) But Victory's most severe sentences were for aggravated assault, which does not require any injury, let alone serious injury. (R., pp.92-93.) Moreover, just because the victims did not submit victim-impact statements does not mean they did not want to see Victory punished. The prosecutor explained the victims' absence at the sentencing hearing:

> And so, you know, the fact that they aren't here today does not believe – does not mean that they are aren't [sic] interested. We've been in touch with them. They are interested in the outcome. But at the end of the day, like I said, they are really, really scared and for good reason.

(4/17/2018 Tr., p.139, L.20 – p.140, L.1.) In any event, the primary objective in determining the appropriate sentence is the protection of the *community*, not the thoughts or desires of the victim. See McIntosh, 160 Idaho at 8, 368 P.3d at 628.

Victory also believes his past difficulties, including mental health issues and drug abuse issues, should have resulted in shorter sentences. (Appellant's brief, pp.17-18.) But all of the difficulties Victory cites were addressed in the presentence investigation report, and the district court read the presentence investigation report before deciding the appropriate sentences. (4/17/2018 Tr., p.149, Ls.4-5.) The district court also expressly recognized that "Mr. Victory has mental health issues that contributed to the events in question compounded by the use of drugs and an adamant refusal to quit using drugs and a failure to follow mental health prescriptions in the past." (Tr., p.149, Ls.12-17.) The district court thus properly considered all of the past difficulties raised by Victory on appeal, and none of those past difficulties required the district court to impose shorter sentences. In sum, the district court did not abuse its sentencing discretion.

CONCLUSION

The state respectfully requests this Court affirm the district court's judgment entered after a jury found Victory guilty of battery, two counts of aggravated assault, and resisting an officer.

DATED this 20th day of August, 2019.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of August, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

PAUL E. RIGGINS
RIGGINS LAW, P.A.
rigginslaw@gmail.com

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

JN/ah