4-25-2016

State v. Sellers Respondent's Brief Dckt. 42716

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 42716**
Plaintiff-Respondent,	)	
	)	**Power Co. Case No.**
v.	)	**CR-2013-1510**
	)	
CODY SELLERS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF POWER

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STATEMENT OF THE CASE

Nature Of The Case

Cody Sellers appeals from his judgment of conviction for five counts of injury to a child.

Statement Of The Facts And Course Of The Proceedings

The state charged Sellers with five counts of injury to a child with a great bodily injury enhancement. (R., vol. I, pp. 106-10.) The gravamen of the offenses were that on four different days Sellers "inflict[ed] unjustifiable physical pain or mental suffering by an act or acts of physical force" which caused the two-year-old victim to "sustain an abusive head injury" (Counts I-III, V) and on the fourth day also did "willfully cause or permit the child to be placed in a situation endangering her health or person, by failing to obtain medical attention" (Count IV). (R., vol. I, pp. 108-09.)

Prior to trial the district court proffered jury instructions and heard objections. (Tr., vol. I, p. 108, L. 10 – p. 112, L. 12.) Prior to trial there was no objection to the court's proposed elements instructions. (Id.) After the jury returned a verdict of guilty on all five counts the district court submitted the great bodily injury enhancement to the jury. (Tr., vol. III, p. 1649, L. 10 – p. 1652, L. 17; R., vol. II, pp. 340-41, 352.) Immediately after the jury retired to consider the enhancement, Sellers' trial counsel moved to have his client acquitted of the felonies and deemed convicted of five misdemeanors because the instructions omitted the element differentiating misdemeanor and felony injury to a child. (Tr., vol. III, p. 1653, L. 6 – p. 1655, L. 9.) After hearing arguments from both sides,

the district court denied the request for acquittal and instead brought the jury back into court, instructed them on the missing element, and had them find Sellers guilty or not guilty of that element. (Tr., vol. III, p. 1656, L. 3 – p. 1673, L. 12; R., vol. II, pp. 327, 342-43.) The jury found Sellers guilty of that element on four of the five charges (finding him not guilty of the element on Count III). (R., vol. II, pp. 342-43.) The jury ultimately found Sellers guilty of the great bodily injury enhancement as well. (R., vol. II, p. 344.)

After trial, Sellers filed a motion for a new trial. (R., vol. II, pp. 359-63.) The district court denied the motion because it failed to raise any issue allowed by the statute governing new trials. (R., vol. III, pp. 434-54.)

At sentencing, the district court imposed concurrent sentences of one year for the misdemeanor (Count III), 10 years with five years fixed on the non-enhanced felonies (Counts I, II and IV), and 25 years with 10 years determinate on the enhanced felony (Count V). (R., vol. III, pp. 429-33.) Sellers filed a timely notice of appeal. (R., vol. III, pp. 455-58.)

ISSUES

Sellers states the issues on appeal as:

1. "[T]he trial court incorrectly instructed the jury as to the elements of the charged offenses and exacerbated the issue in attempting to correct the instructions."

2. "Sellers argues that the misdemeanor conviction entered by the trial on Count III was not appropriately before the jury, nor were all the elements in Idaho Code § 18-1501(2) proven beyond a reasonable doubt as required by Idaho law."

3. "Sellers argues that the trial court erred in allowing Counts IV and V to be tried separately [sic—the counts were tried in the same trial] as they were part of a single criminal episode, thus violating constitutional double jeopardy protections."

4. "Sellers argues that the trial court improperly denied motions for cause to remove biased jurors."

5. "Sellers asks the Court to correct the illegal sentencing issues raised as to Counts III, IV, and V."

6. "Sellers also argues that the sentence for the convictions were unduly harsh given the circumstances."

7. "Sellers argues that even if not all of the above errors were prejudicial, combined, the errors denied Sellers due process …."

(Appellant's brief, p. 1 (issues extracted from longer statements).)

The state rephrases the issues as:

1. Has Sellers failed to show the district court abused its discretion when it submitted an element originally omitted from the jury instruction for deliberations instead of declaring a mistrial?

2. Has Sellers waived his claim that it was error to enter a judgment on his misdemeanor conviction because it is not supported with cogent argument or applicable legal authority?

3. Has Sellers failed to show the district court erred by concluding that Count IV (charging neglect for failing to obtain medical help for the victim) and Count V (for physically abusing the victim and inflicting a head injury) were not the "same offense" for purposes of double jeopardy?

4. Has Sellers failed to show he was tried by a biased jury?

5. Has Sellers failed to show an abuse of sentencing discretion?

6. Has Sellers failed to show cumulative error because he has failed to show errors to cumulate?

ARGUMENT

I.
Sellers Has Failed To Show That Bifurcation Of Jury Deliberations On The Elements Of The Charges Violated Any Right

A. Introduction

After realizing that the elements instructions submitted to the jury did not include an element of the crime, and rejecting Sellers' contention that he was entitled to acquittals on the felonies and entry of judgment on misdemeanors, the judge submitted additional instructions and a verdict form for the jury to deliberate and address the missing element. (Tr., vol. III, p. 1653, L. 6 – p. 1673, L. 12; R., vol. II, pp. 327, 342-43.) The jury found Sellers guilty on that element in four of the five counts. (R., vol. II, pp. 342-43.)

On appeal, Sellers has abandoned the claim that the error in omitting an element of the crime from the instructions entitled him to an acquittal, and instead argues that the district court erred by not declaring a mistrial or otherwise granting a new trial after the error in the elements instructions was called to its attention. (Appellant's brief, pp. 2-13.) Thus, the parties agree that the elements instructions initially erroneously omitted a necessary element, but dispute only the adequacy and appropriateness of the remedy granted. Because Sellers did not request a mistrial below, he must show that failing to grant him one *sua sponte* was fundamental error. Application of the relevant law to the record shows that the district court did not abuse its discretion by correcting the error by instructing the jury to deliberate on and decide the omitted element, rather than grant a mistrial or a new trial.

B. Standard Of Review

The decision to declare a mistrial is within the discretion of the district court, and such a determination will only be reversed when that discretion has been abused. State v. Talmage, 104 Idaho 249, 254, 658 P.2d 920, 925 (1983).

C. Sellers Has Failed To Show Fundamental Error For Not Declaring A Mistrial

At trial, Sellers did not request a mistrial, but rather requested a termination of the trial with entry of convictions for misdemeanors. (Tr., vol. III, p. 1653, L. 6 – p. 1655, L. 9.) His argument on appeal that he should have been granted a mistrial or a new trial was not preserved by a timely objection.[1]

Claims of error not preserved by timely objection are reviewed using a three-part test:

> (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.

[1] Sellers later moved for a new trial claiming it was error for the court to submit the omitted element to the jury after it had returned its first verdict. (R., vol. II, pp. 362-63.) The district court denied the motion, reaching the merits. (R., vol. III, pp. 447-53.) The state submits that because Sellers did not request a mistrial, and requested the remedy of a second trial only after the first trial was completed in a manner unsatisfactory to him, he failed to assert a timely objection and therefore must show fundamental error. It is the state's position that he has failed to show error under any standard, fundamental or otherwise.

State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). Application of this test shows no fundamental error.

First, Sellers has not provided any authority that there is a constitutionally required remedy for the omission of an element in jury instructions. He has thus failed to show clear constitutional error in the remedy of having the undischarged trial jury deliberate the omitted element. Second, it is quite clear from the record that Sellers' trial counsel tactically timed his objection and requested remedy of a conviction on misdemeanors. Thus, not moving for a mistrial was a tactical decision. Finally, Sellers has failed to show that not simultaneously considering all the elements changed the outcome of the jury's decisions. Sellers' argument that the jury entered into consideration of that last element having already concluded the other elements had been proven is not legitimate because the conclusion that the other elements had been proven was based on the evidence provided at trial. There is no plausible theory that the order in which the jury considered the elements changed the jury's weighing of the evidence. Sellers' has therefore failed to show prejudice on the record.[2]

[2] Sellers' claim also fails if the claim was preserved. He has simply failed to show that bifurcating consideration of the elements violated due process or was otherwise error. Even if it was error, the error was necessarily harmless because the Court can conclude beyond a reasonable doubt that the bifurcation of deliberations did not change the jury's view of what the evidence proved. I.C.R. 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); State v. Parker, 157 Idaho 132, 140, 334 P.3d 806, 814 (2014) ("To establish harmless error, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

Sellers did not by timely objection preserve the claim that the proper remedy for omission of an element of the crime was to declare a mistrial or otherwise grant a new trial, and that the remedy provided—submitting the omitted element to the jury for consideration—was error. He thus has the appellate burden of showing fundamental error on the face of the record. On appeal he has failed to show any element of the fundamental error test. Therefore, he has failed to show reversible error.

II.
Sellers Has Waived His Claim That It Was Error To Enter A Judgment On His Misdemeanor Conviction Because It Is Not Supported With Cogent Argument Or Applicable Legal Authority

The jury convicted Sellers on Count III of the elements constituting misdemeanor injury to a child, but acquitted him of the element that would have made the crime a felony. (R., vol. II, pp. 340, 342.) The district court thereafter entered judgment on Count III as a misdemeanor. (R., vol. III, p. 430.) On appeal Sellers argues that entering judgment on misdemeanor injury to a child after the jury found him guilty of the elements of misdemeanor injury to a child was fundamental error. (Appellant's brief, pp. 13-15.) It is well settled, however, that the appellate courts of Idaho "will not consider an issue which is not supported by cogent argument and authority." In re Doe, 156 Idaho 103, 109, 320 P.3d 1262, 1268 (2014) (internal quotations omitted). Because Sellers' argument is unsupported by cogent argument or relevant authority, it is not properly before this Court for consideration on appeal.

III.
The Act Of Injuring The Victim And The Omission Of Securing Medical Care For The Victim Are Not The "Same Offense" For Purposes Of Double Jeopardy

A. Introduction

Count V of the information charged Sellers with inflicting "physical pain or mental suffering by an act or acts of physical force" causing "an abusive head injury." (R., vol. I, p. 109.) Count IV charged Sellers with causing or permitting the child to be in a situation endangering her health or person "by failing to obtain health care." (Id.) Prior to trial, Sellers moved to dismiss either Count IV or Count V because infliction of injuries and then failing to get medical help for those injuries "appear to be part of a singular [sic] episode or continuing event." (R., vol. I, pp. 128-33.) The district court denied the motion. (R., vol. I, pp. 177-80.)

On appeal Sellers argues the district court erred because the two offenses arose out of the "same criminal episode." (Appellant's brief, pp. 16-22.) Application of the law to the record in this case shows no error.

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. Sellers Has Failed To Show Legislative Intent That He Be Punished Only Once For Both Injuring A Child And Then Neglecting That Child

The United States Constitution prevents more than one jeopardy "for the same offense." U.S. Const., amend. V. The main protection of the Double Jeopardy Clause is "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." Burks v. United States, 437 U.S. 1, 11 (1978) (internal quotations omitted). It also, however, "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

"With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 365 (1983). See also Jones v. Thomas, 491 U.S. 376, 381 (1989) ("in the multiple punishments context" the interest protected by the Double Jeopardy Clause is "limited to ensuring that the total punishment did not exceed that authorized by the legislature") (internal quotations omitted)). To determine legislative intent:

> "The applicable rule is that where 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."

Albernaz v. United States, 450 U.S. 333, 337 (1981) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

Counts IV and V did not charge the "same offense" or create a risk of punishment beyond that authorized by the legislature. First, they did not charge

the "same act or transaction." Count IV charged neglect for failing to obtain needed medical care. Count V charged abuse for inflicting a head injury. Because the two counts charge entirely different acts (or, more accurately, charge an act constituting abuse and a different omission constituting neglect) they are not the same or included offenses. Because the underlying act and omission are not the same "act or transaction," there is no plausible ground for concluding they are the "same offense" and that the legislature intended only one punishment for a defendant who commits an act of abuse on a child, causing an injury, and then neglects a child by not getting necessary medical care.

Second, even if both counts had arisen from the "same act or transaction," each requires proof of a fact the other does not and is therefore not the "same offense" for purposes of double jeopardy. To prove Count V the state had to prove that Sellers "inflict[ed] … unjustifiable pain or mental suffering." I.C. § 18-1501(1). To prove Count IV the state had to prove Sellers, having care or custody of the child, "caus[ed] or permit[ted] [the] child to be placed in such situation that its person or health is endangered." I.C. § 18-1501(1). To prove the former did not require proof of the latter, and vice-versa. If these crimes had been committed by different people instead of the same person, there is no doubt that proof of one's guilt would not establish the other's guilt as well. This is so because each requires proof of a fact not required to prove the other. Because the legislature has required proof of different facts for abuse and neglect, application of the Blockburger test requires the conclusion that abuse and neglect are not the "same offense" for purposes of double jeopardy.

Application of the relevant legal standards shows that punishing Sellers for injuring the victim and also punishing him for neglecting the victim by failing to obtain medical care for her injuries did not impose greater punishment than the legislature intended. The district court correctly concluded that mere temporal proximity did not render the charged crimes, one addressing an affirmative act and the other a criminal failure to act, the "same crime" for double punishment purposes.

Sellers argues that Count IV and Count V charged the "same offense" because they both arose out of the "same criminal episode." (Appellant's brief, pp. 17-19.) For this proposition he relies on State v. Moffat, 154 Idaho 529, 300 P.3d 61 (Ct. App. 2013). (Appellant's brief, pp. 17-19.) Review of that opinion refutes Sellers' argument.

During a dispute with his girlfriend, Moffat "grabbed her by the hair, grabbed her around the throat, threw her around the room, pushed her into objects, and pushed her to the ground." Moffat, 154 Idaho at 530, 300 P.3d at 62. The state charged Moffat with misdemeanor domestic battery by citation, and later charged him with felony attempted strangulation. Id. He pled guilty to the misdemeanor and moved to dismiss the felony. Id.

In deciding whether double jeopardy barred the second prosecution the Court of Appeals applied a two-step analysis. First, it reviewed whether both crimes contained an element not found in the other, determined that strangulation was a form of battery, and concluded that although the strangulation charge contained an element not found in the battery charge, the

battery charge contained no additional element not found in the strangulation charge. Id. at 530-32, 300 P.3d at 62-64. Thus, review of the elements showed domestic battery was a lesser included offense of attempted strangulation. Id. Second, it made "the factual inquiry of whether Moffat's crimes were part of one continuing event or transaction," ultimately concluding they were. Id. at 532-33, 300 P.3d at 64-65. Because the domestic battery, for which Moffat had already suffered jeopardy, was both legally and factually a lesser included offense of the charged attempted strangulation, Moffat could not be put at a second jeopardy on the attempted strangulation charge. Id.[3]

As set forth above, applying this two-part test shows no double jeopardy violation. Because Count IV contains a neglect element not found in Count V, and Count V contains an abuse element not found in Count IV, these charges pass the elements test and are thus proper subjects of double punishment *even if they arose out of the same act or transaction.* Moreover, as stated above, they also pass the "continuing event or transaction" test because the medical neglect

[3] The state submits that if Moffat had involved a single jeopardy instead of successive jeopardy, and thus limited the issue to only whether multiple convictions allowed greater punishment than the legislature intended, the outcome of that case would have been different. Specifically, if in a single charging document the state had charged three counts of domestic battery—one for pulling hair, another count for pushing her into objects, and a third for pushing her to the floor—and a fourth count charging attempted strangulation for the strangulation, such would not have run afoul of legislative intent on punishment. See, e.g., State v. Brazil, 136 Idaho 327, 33 P.3d 218 (Ct. App. 2001) (evidence of other acts of violence against the victim during single attack not included offenses of charged offenses). Because the issue in this case is not a second jeopardy but only double punishment—and therefore limited to determining what punishments the legislature intended—the proper analysis is even more limited than that used in Moffat.

was not merely a continuation of the physical abuse. See, e.g., State v. Moad, 156 Idaho 654, 330 P.3d 400 (Ct. App. 2014) (although battery with intent to commit rape normally merges into completed rape conviction, battery with intent to commit rape committed after successful rape is a new offense). The analysis of Moffat does not assist Sellers because it does not show that punishing Sellers for both abusing and then neglecting the child exceeded the punishment authorized by the legislature.

Sellers proposes reading Moffat so broadly as to incorporate two repudiated double jeopardy legal standards for a "single criminal episode" test. First, the legal standard proposed by Sellers is indistinguishable from the "one criminal episode" test proposed by Justice Brennan, but which never garnered support of more than three justices. See, e.g., Brown v. Ohio, 432 U.S. 161, 169 (1977) (concurring opinion espousing test requiring state to "join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction"); Ashe v. Swenson, 397 U.S. 436, 454 (1970) (same); Waller v. Florida, 397 U.S. 387, 395-96 (1970). The Supreme Court of the United States has consistently refused to adopt a "single criminal episode" test: "We have steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." Garrett v. United States, 471 U.S. 773, 790 (1985) (rejecting an argument for Justice Brennan's test).

The importance of the rejection of this standard is demonstrated by Morris v. Mathews, 475 U.S. 237 (1986). Mathews was involved in a robbery where his partner was shot to death while the two men tried to avoid capture. Id. at 238-39.

Because the coroner initially ruled the death a suicide, the state charged Mathews with aggravated robbery but not murder, and he pled guilty. Id. at 239-40. When additional evidence showing that the partner had been murdered came to light, the state charged Mathews with aggravated murder, and Mathews was convicted after a trial. Id. at 240-42. The Ohio appellate court concluded (on remand from the Supreme Court of the United States) that because the robbery was an element of the aggravated murder, double jeopardy prohibited the state from subjecting Mathews to a second jeopardy for aggravated murder. The court reduced the conviction from aggravated murder to murder, because the latter charge did not include participation in the robbery as an element. Id. at 242-43.

The only issue addressed by the Supreme Court was "whether reducing respondent's conviction for aggravated murder to a conviction for murder is an adequate remedy for the double jeopardy violation." Id. at 245. The Court held that "when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense." Id. at 246-47.

The significance of this is that Justice Brennan dissented, stating he "adhere[d] to [his] view that the Double Jeopardy Clause requires that except in extremely limited circumstances not present here, all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or

transaction be prosecuted in one proceeding" and barred any further legal proceedings arising out of the criminal episode. Id. at 257 (Brennan, J. dissenting) (internal quotes omitted). The rejection of Justice Brennan's same episode or transaction test meant that, although double jeopardy barred a second jeopardy for the robbery, it did not bar jeopardy for the murder, *even though both crimes arose from the same criminal episode*. Sellers' advocacy for a "single criminal episode" test should be rejected as incompatible with Supreme Court precedent.

The second rejected legal standard Sellers seeks to resurrect is the repealed Idaho statutory double jeopardy standard. Idaho Code § 18-301, repealed in 1995, provided:

> An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

This provision "constrain[ed] punishment or prosecution for different crimes based on the same conduct." State v. Lynch, 126 Idaho 388, 390, 883 P.2d 1080, 1082 (1994) (holding that I.C. § 18-301 prohibited prosecution for both failure to maintain lane and DUI).

> The protection afforded by this statute is broader than that created by the double jeopardy clause of the Fifth Amendment to the U.S. Constitution. The Fifth Amendment prohibits double jeopardy for the "same offense," while Section 18–301 proscribes double punishment or prosecution for the same "act or omission." Thus, in the constitutional arena the inquiry is whether the charged crimes involve separate elements, whereas our inquiry under I.C. § 18–301 is whether the charged crimes are based upon separate acts.

State v. Castaneda, 125 Idaho 234, 235, 869 P.2d 234, 235 (Ct. App. 1994). See also Lynch, 126 Idaho at 390, 883 P.2d at 1082. The standard required by this repealed statute, which exceeded the scope of constitutional protections, is indistinguishable from the "single criminal episode" test proposed by Sellers:

> The applicability of section 301 depends upon whether a *separate* and *distinct* act can be established as the basis for each prosecution, regardless of whether the offenses require proof of differing elements. The term "act," as defined by the statute, refers to that term in its ordinary sense, but also includes a course of conduct of such a nature as to amount to a single act, that is, a course of conduct which does not consist of divisible transactions. *Compare Garrett v. United States,* 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985) (rejecting a single-transaction test for purposes of applying former jeopardy protection contained in the fifth amendment).
>
> In determining whether a defendant's conduct is divisible into separate, distinct events, we employ a "temporal test"-a test of time. Under this test, if one of the offenses was completed prior to the commission of the second crime, then the two cannot be said to arise from the "same act," and the provisions of section 18-301 do not apply.

State v. Smith, 121 Idaho 20, 23-24, 822 P.2d 539, 542-43 (Ct. App. 1991) (footnotes and citations, with one exception, omitted, emphasis original). Sellers' attempt to resurrect the repealed extra-constitutional standard in I.C. § 18-301 should be rejected.

Sellers next argues that the Idaho Constitution (unlike the Constitution of the United States) employs a "pleading theory" that he asserts should result in a finding of a double jeopardy violation because the abuse resulting in a head injury "was the means" by which the neglect for failing to obtain medical care was accomplished. (Appellant's brief, pp. 19-20.) This standard, however, is

completely incompatible with established double jeopardy law regarding multiple *punishment.*

The standard applicable to multiple punishment claims under the federal constitution is clear: "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Hunter, 459 U.S. at 365. It is impossible to reconcile this standard with the "pleading theory." Clearly the prosecutor may not alter legislative intent by how he or she pleads a case. The state submits that the "pleading theory" is inapposite to the relevant inquiry.

If the Court applies the "pleading theory" it is clear the abuse was not the "means" by which Sellers accomplished the neglect, nor vice-versa. See State v. Flegel, 151 Idaho 525, 529, 261 P.3d 519, 523 (2011) (crime may be lesser included offense if it was the means by which the other crime was committed). Indeed, if one person committed the abuse of the victim and inflicted the head injury and another person with care or custody of the child neglected the victim and refused to get medical assistance, each would be independently guilty of separate and different crimes. Neither crime was the "means" by which the other crime was committed.

The crime of abusing the child and injuring her and the crime of neglecting her by failing to obtain needed medical care are separate crimes under any and all double jeopardy theories. Sellers has therefore failed to show error in the denial of his motion to dismiss either Count IV or Count V.

IV.
Sellers Has Failed To Show He Was Tried By A Biased Jury

A. Introduction

During voir dire, one of the questions asked by the district court was whether any of the prospective jurors or their close family members had been a victim of child abuse. (Tr., vol. I, p. 167, Ls. 19-22.) Prospective juror number 10 informed the court that her daughter had been physically abused by a babysitter 36 years ago, and that her step-grandson had been physically abused by a stepfather. (Tr., vol. I, p. 175, L. 17 – p. 176, L. 24; p. 178, Ls. 19-25.) She stated that she would decide the case on the evidence and find the defendant not guilty if that was what the evidence indicated. (Tr., vol. I, p. 177, Ls. 4-12, 22-25.) During the parties' voir dire she acknowledged that child abuse was an "iffy subject" for her and the defense probably would not want her as a juror because of her experience, but reaffirmed that she would make any ultimate decision of guilt based on the evidence. (Tr., vol. I, p. 179, L. 8 – p. 180, L. 25.) Sellers challenged this juror for cause, but the district court accepted her statement that she would decide the case based on the evidence and rejected the challenge. (Tr., vol. I, p. 208, L. 14 – p. 210, L. 12.)

The district court also asked whether the prospective jurors knew the prosecutor. (Tr., vol. I, p. 153, L. 25 – p. 154, L. 8.) Prospective juror number 20 indicated in the positive and stated he trusted the prosecutor's judgments, but also stated that he could decide the case based only on the evidence. (Tr., vol. I, p. 154, L. 11 – p. 155, L. 1.) Sellers also challenged this potential juror for cause,

but the district court denied the challenge. (Tr., vol. I, p. 251, L. 17 – p. 253, L. 10; p. 345, L. 7 – p. 346, L. 11.)

The parties excused 16 potential jurors using peremptory challenges, including potential juror 20 but not potential juror 10, who sat on the jury. (Tr., vol. I, p. 346, L. 19 – p. 348, L. 4; R., vol. II, pp. 349-50.)

On appeal Sellers claims error in the district court's denial of his for-cause challenges to potential jurors 10 and 20. (Appellant's brief, pp. 24-31.) He has failed to show error because the district court was within its discretion to accept the potential jurors' representations that they would decide the case based on the evidence. Moreover, he has failed to show error in relation to potential juror 20 because he did not sit as a juror and therefore could not have caused the jury to be biased.

B. Standard Of Review

"The determination whether a juror can render a fair and impartial verdict is directed to the sound discretion of the trial court and will not be reversed absent a showing of abuse of discretion." State v. Hauser, 143 Idaho 603, 609, 150 P.3d 296, 302 (Ct. App. 2007) (citations omitted).

C. Sellers Has Failed To Show That The District Court Abused Its Discretion Because The Potential Jurors Both Stated They Could Decide The Case Based On The Evidence

"A criminal defendant has a constitutional right to trial by an impartial jury." State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011) (citing U.S. Const., amends. V, VI, XIV; Idaho Const. art. 1, §§ 7, 13). Unless a prospective juror

indicates an inability to "lay aside his impression or opinion and render a verdict based on the evidence presented in court," it is presumed the prospective juror is impartial. Id. (quoting State v. Hairston, 133 Idaho 496, 506, 988 P.2d 1170, 1180 (1999)). As explained by the United States Supreme Court:

> [T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

Ross v. Oklahoma, 487 U.S. 81, 86 (1988) (quoting Lockhart v. McCree, 476 U.S. 162, 184 (1986)). Consistent with these principles, "a trial court does not abuse its discretion by refusing to excuse for cause jurors whose answers during voir dire initially give rise to challenges for cause but who later assure the court that they will be able to remain fair and impartial." Morris v. Thomson, 130 Idaho 138, 141, 937 P.2d 1212, 1215 (1997), quoted in Nightengale v. Timmel, 151 Idaho 347, 353, 256 P.3d 755, 761 (2011); see also Ellington, 151 Idaho at 70, 253 P.3d at 744 (citation omitted) ("Although not always dispositive, the trial judge is entitled to rely on assurances from venire persons concerning partiality or bias."). In addition, where "a party uses one of its peremptory challenges to remove a juror it argues should have been removed for cause, the party must show on appeal that 'he was prejudiced by being required to use a peremptory challenge to remove the juror.'" Nightengale, 151 Idaho at 354, 256 P.3d at 762 (quoting State v. Ramos, 119 Idaho 568, 570, 808 P.2d 1313, 1315 (1991)) (brackets omitted).

The record in this case shows that both challenged jurors represented to the district court that they could decide the case based on the evidence. (Tr., vol. I, p. 154, L. 17 – p. 155, L. 1; p. 177, Ls. 4-12, 22-25; p. 180, Ls. 10-25; p. 345, L. 19 – p. 346, L. 9.) In both instances the district court accepted those representations. (Tr., vol. I, p. 210, Ls. 6-12; p. 253, Ls. 4-10; p. 345, L. 19 – p. 346, L. 11.) Moreover, potential juror 20 did not sit on the jury. (Tr., vol. I, p. 346, L. 19 – p. 348, L. 4; R., vol. II, pp. 349-50.) The record does not support an abuse of discretion by the district court under the applicable law.

Relying on State v. Abdullah, 158 Idaho 386, 348 P.3d 1 (2015), Sellers claims that, after "admit[ting] bias" potential juror 10 gave "no unequivocal assurance of the ability to be impartial despite several efforts by the court or counsel to elicit such assurance." (Appellant's brief, pp. 27-28.) This argument is unsupported in the record.

First, the juror did not admit bias. She conveyed that two of her family members had been physically abused as children. At no time did she state that her experience would cause her to be biased against the defendant. Moreover, every time she was asked whether she could decide the case based on the evidence, including acquitting the defendant if the evidence did not prove his guilt, she stated she could. (Tr., vol. I, p. 177, Ls. 9-25; p. 180, Ls. 10-25.) Even Sellers' trial counsel found eight potential jurors he wanted on the jury less than juror 10 and excused them with peremptory challenges. This strongly indicates that Sellers' trial counsel had confidence in potential juror 10's representation she would render a verdict based on the evidence.

Actual bias is "'the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which, in the exercise of a sound discretion on the part of the trier, leads to the inference that he will not act with entire impartiality.'" Abdullah, 158 Idaho at 421-22, 348 P.3d at 36-37 (quoting I.C. § 19-2019(2)). The mere fact the juror had a child and grandchild who were physically abused did not alone show actual bias. Moreover, even a potential juror who has expressed bias need not be excused "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. at 422, 348 P.3d at 37 (internal quotations and citations omitted). Here the juror repeatedly stated she could render a verdict on the evidence presented in court. Thus, Sellers has failed to show any abuse of discretion.

Sellers next argues that failing to excuse potential juror 20 for cause made his jury unfair because potential juror 10 was on it. (Appellant's brief, pp. 28-30.) This argument is meritless. Sellers has failed to show that having potential juror 10 sit on the case rendered his jury biased. If he had shown that having potential juror 10 on the jury rendered it biased he is entitled to a new trial. In neither case would the ruling on the motion to excuse juror 20 for cause be relevant.

The district court rejected the motion to excuse for cause prospective juror 10 after she repeatedly stated she could lay aside her impression or opinion and render a verdict based on the evidence presented in court. The record shows no abuse of discretion.

V.

Sellers Has Failed To Show An Abuse Of Sentencing Discretion

For the conviction on Count V, injury to a child enhanced by the great bodily harm enhancement, the district court imposed a sentence of 25 years with 10 years determinate. (R., vol. III, p. 432.) For the other convictions the district court imposed shorter, concurrent sentences. (R., vol. III, pp. 430-32.) In imposing these sentences the district court considered the jury's finding of guilt, mitigating factors such as lack of any criminal history and support of family and friends, applied the relevant legal standards, and concluded that the seriousness of the crime required the substantial sentence it was imposing. (Tr., vol. III, p. 1845, L. 11 – p. 1860, L. 19.)

"Sentencing decisions are reviewed for an abuse of discretion." State v. Anderson, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)). Where a sentence is within statutory limits, an appellant is required to establish that the sentence is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden, the appellant must show that his sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable if appropriate to achieve the primary objective of protecting society, and any or all of the related sentencing goals of deterrence, rehabilitation, or retribution. State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). The Court reviews the whole sentence on appeal and presumes 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 387, 391 (2007). In deference to the trial judge, the Court will not substitute its view of a reasonable sentence where reasonable minds might differ. State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Sellers contends the district court abused its discretion citing the same considerations specifically articulated and addressed by the district court at sentencing, such as the evidence supporting the jury's verdict, his lack of history, and family support. (Appellant's brief, pp. 22-23.) Because the district court specifically considered all such factors Sellers' argument fails. Sellers also argues that his sentence should be based on the median sentence for all injury to child cases. (Appellant's brief, pp. 23.) This argument fails as a matter of law, because comparative sentencing is not an appropriate standard. See State v. Pederson, 124 Idaho 179, 183, 857 P.2d 658, 662 (Ct. App. 1993) ("It is well settled that not every offense in like category calls for identical punishment; there may properly be a variation in sentences between different offenders, depending on the circumstances of the crime and the character of the defendant in his or her individual case." (Citations omitted.)). It also fails factually because Sellers ignores the enhancement he was convicted of and has not shown that half of the defendants convicted of injury to a child deserved a sentence longer than his.

The sentences imposed by the district court are appropriate considering the facts of the crime and the character of the offender. Sellers has failed to show any abuse of sentencing discretion.

VI.
Sellers Failed To Show Cumulative Error

Under the doctrine of cumulative error, a series of trial errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the cumulative error doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). In addition, cumulative error analysis does not include errors not objected to unless those errors are found to be fundamental. Perry, 150 Idaho at 230, 245 P.3d at 982. As set forth above, Sellers has failed to show any error or fundamental error. There are, therefore, no errors to cumulate.

Moreover, Sellers has failed to present a viable theory of cumulative error. One of the errors he claims is a double jeopardy violation for double punishment. If Sellers were correct, and Count IV was a lesser included offense of Count V, it was not error to try both the lesser and the greater included offenses in the same trial. His remedy would not be a new trial, but instead a merger of the two convictions and sentences. Even if Sellers were correct on his claim that Count IV and V were the same offense (which he is not) such could not have caused any trial prejudice to cumulate.

In addition, his claim of a biased jury is incompatible with cumulative error review. If the jury was biased, the error could not be harmless. Because the cumulative error doctrine cumulates only harmless error, inclusion of this claim of error in the cumulative error analysis is logically impossible.

The only alleged error Sellers has asserted that could even potentially be found harmless is Sellers' claim of instructional error. Because only one error could be held harmless and is therefore even theoretically subject to analysis under the cumulative error rule, there is no potentially viable claim that there are two errors to cumulate.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment of conviction.

DATED this 25th day of April, 2016.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of April, 2016, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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KKJ/dd