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State v. Larsen Appellant's Brief Dckt. 47148

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 47148-2019**
Plaintiff-Respondent,	)	
	)	**CANYON COUNTY NO. CR14-18-18114**
v.	)	
	)	
REGGIE JORDAN LARSEN,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE BRADLY S. FORD
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Reggie "Jordan" Larsen contends the district court made two different errors in this case. First, it erred by allowing the State to amend the charging document at trial to allege a new charge of which Mr. Larsen did not have fair notice. As such, this Court should vacate the resulting conviction and remand this case for further proceedings.

Second, it acted unreasonably when it imposed his sentence because it based its decision, in part, on a misreading of the presentence report (PSI). Specifically, the district court said the PSI recommended incarceration when, in fact, the PSI made no specific recommendation in that regard. In fact, the only specific recommendations in the presentence materials actually recommended community-based treatment. As such, this Court should at least vacate Mr. Larsen's sentence and remand this case for a new sentencing hearing.

Statement of the Facts and Course of Proceedings

The complaint Mr. Larsen received in this case alleged that he had committed lewd conduct by manual-to-genital contact. (R., pp.3-4.) While the complaint did not identify the specific facts in that regard, the affidavit of probable cause filed in support of that charge recited allegations made by the alleged victim, A.L., during a CARES interview. (*Compare* R., p.4 *with* R., pp.5-6.) The only lewd act she reported during that interview was that Mr. Larsen allegedly rubbed his hand on her vagina.[1] (*See* R., p.5.)

[1] A.L. alleged additional touching, such as Mr. Larsen rubbing her breasts or tapping her buttocks with his penis, which did not amount to "lewd conduct." (*See* R., pp.5-6; Tr., p.872, L.24 - p.874, L.9 (the prosecutor conceding the district court should grant Mr. Larsen's motion to amend the jury instructions to prevent a fatal variance in that regard); Tr., p.802. Ls.9-13 (the prosecutor moving to dismiss an allegation of anal-genital contact due to lack of evidence).)

Based on that information, Mr. Larsen waived his right to a preliminary hearing and the case proceeded to trial. (*See* R., p.33.) Mr. Larsen requested the district court instruct the jurors, *inter alia*, that, if a person is asleep or unconscious when the act in question is committed, they are to find the defendant not guilty because of a lack of intent. (R., pp.92, 102.) One part of Mr. Larsen's ultimate explanation for the conduct A.L. discussed in the CARES interview was that he had accidentally touched her while asleep or while in the process of waking up. (*See, e.g.,* R., p.6.)

However, in opening arguments, the prosecutor asserted that the jury would also hear that Mr. Larsen allegedly grabbed A.L.'s hand and made her touch his penis. (Tr., p.277, Ls.2-5.) A.L. did, indeed, testify to that conduct in addition to the conduct she had mentioned in the CARES interview. (Tr., p.393, L.21 - p.394, L.1, p.422, L.10 - p.423, L.15; *see generally* Tr., pp.371-423.) She asserted that she had mentioned that particular conduct during her CARES interview, but both the CARES interviewers contradicted her in that respect. (*Compare* Tr., p.423, L.23 - p.424, L.12; *with* Tr., p.551, L.14 - p.552, L.5 (the forensic interviewer also admitting she asked her questions in such a way that could have led A.L. to make such a disclosure); *and* Tr., p.779, Ls.10-14.) In fact, the only other references in the appellate record to that sort of conduct were two third-hand, hearsay assertions by A.L.'s brother and father which were apparently made prior to A.L.'s CARES interview. (*See* Conf. Exh., pp.101, 109, 129; *see generally* R., Conf. Exh.; *but see* Tr., p.551, Ls.14-18 (the forensic interviewer testifying no one ever suggested to her that such an act had occurred).)[2]

[2] Citations to "Conf. Exh." refer to the electronic file "Confidential Exhibits Appeal," which contains the materials collected as part of the presentence process, including the police reports. There is nothing in the record which suggests that the district court was aware of the police reports at the time of the trial.

At the end of his case-in-chief, but before formally resting his case, the prosecutor moved to amend the information to include an allegation of "genital-to-manual" contact, so as to argue the hand-on-penis incident alongside the rubbing-the-vagina incident as bases for conviction without confusing the jury. (Tr., p.802, L.9 - p.803, L.15.) However, the prosecutor asserted that Mr. Larsen had sufficient notice by the fact that the charging document contained the "manual-genital" language. (Tr., p.802, Ls.15-17.) Mr. Larsen objected, asserting he did not, in fact, have notice of the hand-on-penis allegation prior to trial. (Tr., p.804, Ls.13-18.) The district court granted the State's motion without discussing Mr. Larsen's notice objection. (Tr., p.805, Ls.11-17; *see generally* Tr.) At the jury instruction conference, Mr. Larsen renewed his notice objection, stating "I suppose in this case that or they [the jurors] could find that Mr. Larsen mad [A.L.] touch his penis, and that would be -- that would constitute a lewd act, even though, you known, we weren't on -- we were not on notice of that based on the discovery." (Tr., p.868, Ls.20-25.) The district court did not address that renewed objection and instructed the jury consistent with the amended information. (*See* R., p.123; *see generally* Tr.) The jury ultimately found Mr. Larsen guilty as charged.[3] (R., p.146.)

The ensuing PSI ultimately did not offer a recommendation as to prison versus probation, explaining: "Based on the defendant's assessed risks, needs and protective factors, in addition to the fact his psycho-sexual evaluation has not been received, I believe Reggie Larsen's sentencing is best determined by the wisdom of the court." (Conf. Exh., p.18.) However, the PSI provided

[3] Defense counsel had initially requested a special verdict form as part of an objection to the elements instruction based on the fact that it included the language "or any other lewd or lascivious act" in addition to the alleged manual-genital and genital-manual contact, (*See generally* Tr., p.861, L.19 - p.868, L.20.) However, he withdrew the request for a special verdict form when the district court struck the "any other lewd act" language from the instruction. (*See* Tr., p.874, Ls.4-9.) As a result, the verdict form does not provide any additional insight as to which act on which specific act the jury convicted Mr. Larsen. (*See* R., p.146; R., p.126 (the unanimity instruction given to the jury in this regard).)

information showing half the people with similar LSI scores (21 – moderate risk) to Mr. Larsen or with offenses and criminal histories (first felony offense) have received suspended sentences or periods of retained jurisdiction. (Conf. Exh., pp.16-17, 31.) Additionally, the GAIN-I evaluation recommended "Level 1 Outpatient Treatment." (Conf. Exh., p.26; *compare* Conf. Exh., p.16 (the PSI reporting that the GAIN evaluation recommended Level 2 Intensive Outpatient programming).) The psychosexual evaluation (PSE) also expressly recommended "it would be "best with beginning sex offender treatment in a community setting" because Mr. Larsen presented only a Low Risk for reoffending. (Conf. Exh., p.178.) The PSE author also gave specific recommendations regarding supervision of Mr. Larsen in the community. (Conf. Exh., pp.177-80.)

At the sentencing hearing, defense counsel recommended the district court suspend Mr. Larsen's sentence for a period of probation, or alternatively, a period of retained jurisdiction, with a long underlying sentence. (Tr., p.1091, Ls.1-14.) The district court's first observation in discussing the sentence it was imposing was: "The presentence investigation report, which recommends the Court impose a period of incarceration, all the attachments to the presentence report, and they're extensive." (Tr., p.1103, Ls.13-15.) The district court proceeded to impose and execute a unified sentence of sixteen years, with three and one-half years fixed. (Tr., p.1111, Ls.8-18, p.1116, Ls.15-16.) Mr. Larsen filed a notice of appeal timely from the ensuing judgment of conviction. (R., pp.162, 167.)

ISSUES

I. Whether the district court's decision to allow the State to amend the Information during trial infringed on Mr. Larsen's substantial rights of due process and to prepare and present a defense.

II. Whether the district court abused its discretion by basing its sentencing decision on a clearly-erroneous understanding of the presentence materials.

ARGUMENT

I.

The District Court's Decision To Allow The State To Amend The Information During Trial Infringed On Mr. Larsen's Substantial Rights Of Due Process And To Prepare And Present A Defense

A. Standard Of Review

The district court's decision to grant a motion to amend the information is reviewed for an abuse of discretion. *State v. Jeske*, 164 Idaho 862, 870 (2019). The district court abuses its discretion when: (1) it fails to recognize the issue as one of discretion; (2) it acts beyond the outer bounds of its discretion; (3) it acts inconsistently with the applicable legal standards, or (4) it reaches its decision without exercising reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018).

A district court may allow an amendment to the information any time prior to the State resting its case, so long as doing so does not prejudice the defendant's substantial rights. *Jeske*, 164 Idaho at 870; I.C.R. 7(e). This is true even if the amendment merely alleges additional means by which the defendant may have committed the alleged crime. *Jeske*, 164 Idaho at 870.

B. The District Court Erred By Not Ruling On Mr. Larsen's Notice Objection To The Motion To Amend The Information Mid-Trial

As the Idaho Supreme Court has explained, when the district court makes a discretionary decision without addressing a legal question raised in connection with that decision, the appellate court should simply remand the case for the district court to consider the question in the first instance. *Montgomery v. Montgomery*, 147 Idaho 1, 6-7 (2009). Basically, the ruling on the legal question can affect how the trial court weighs the relevant factors in making the ensuing discretionary decision. *See id.* Because the same sort of error occurred in this case – since the

trial court did not rule on the question of notice before granting the decision to amend the information – this case should be remanded for the district court properly make the discretionary ruling after resolving the outstanding legal question of notice.

C. Allowing The Mid-Trial Amendment Was Improper Because It Impacted Mr. Larsen's Substantial Rights To Due Process And To Prepare And Present A Defense

One of the ways a defendant's substantial rights can be violated by a motion to add a new theory of means of commission is if the defendant did not have fair notice of the facts underlying the new theory. *State v. Tapia*, 127 Idaho 249, 253 (Ct. App. 1995). To provide that notice, the charging document "must set forth a concise statement of the facts constituting the alleged offense" that is sufficient to alert the defendant to what allegations he must defend against. *State v. Dorsey*, 139 Idaho 149, 151 (Ct. App. 2003); *State v. Owen*, 129 Idaho 920, 926 (Ct. App. 1997).

When an offense can be committed by a multitude of methods, "mere repetition of the statutory language may *not* be sufficient to satisfy the pleading instrument function of notifying the defendant of the charge which must be defended against." *Dorsey*, 139 Idaho at 151 (emphasis from original). Lewd conduct is one such offense. *See* I.C. § 18-1508 (listing several different types of contact that amount to lewd conduct). In such cases, an actual description of the facts underlying the charge is required to give sufficient notice to the defendant. *Dorsey*, 139 Idaho at 151 (noting this rule also applies to manslaughter and theft). However, when such information is missing in the charging document itself, the due process requirement may still be satisfied if the other information presented by the State in support of the charging document reveals the underlying facts. *Owen*, 129 Idaho at 927-28 (finding no due process violation even though the charging document was not sufficiently specific because the information presented by

the State at the preliminary hearings sufficiently identified the means or manner by which the defendant was alleged to have committed the charged offense); *see also Jeske*, 164 Idaho at 871 (holding there was no notice violation where the defendant knew of the relevant facts and the State's proposed jury instructions indicated its intent to prosecute based on those facts).

The lack of notice in that context is evident, for example, in *State v. Colwell*, 124 Idaho 560 (Ct. App. 1993). In that case, the Information charged a single count of lewd conduct based on a specific act of sexual intercourse with the victim. *Id.* at 563. However, there were other alleged acts in that case which might have also constituted lewd conduct, including an allegation that the defendant had taken the victim's hand and tried to place it on his penis, about which State still presented evidence about them at trial.[4] *Id.* at 563, 566. Unfortunately, the jury instructions in *Colwell* were overbroad and allowed the jury to convict based on those other acts, not just the conduct specifically alleged in the Information. *Id.* at 564-65.

The Court of Appeals held this variance was fatal because it amounted to a constructive amendment because it added allegations of crimes which were separate and distinct from the charged conduct. *Id.* at 566. Alternatively, the *Colwell* Court explained, it would have found the variance fatal because it "prejudiced Colwell's right to fair notice of the charges which he was to defend against." *Id.* Specifically, it held: "While it is evident that Colwell was aware the state would introduce evidence of the additional acts, we find nothing in the record to indicate that the state ever intended to prosecute him for any crime or crimes for which these acts constituted an essential element." *Id.* Thus, the violation in this regard was that Mr. Colwell did not have

[4] In *Colwell*, the other acts occurred on different days from the charged conduct. *See Colwell*, 124 Idaho at 563. However, that fact is of little relevance with respect to Mr. Larsen's case, since the prosecutor in this case asserted each act A.L. described could be charged as a separate and distinct event. (*See* Tr., p.862, Ls.2-7 (the prosecutor asserting he could file a separate charge against Mr. Larsen related to the allegation he rubbed A.L.'s breasts regardless of the outcome of this trial).)

"notice that the state intended to prosecute him and obtain a conviction for these additional acts." *Id.* at 567.

The same lack of notice is apparent in Mr. Larsen's case. In fact, it is more evident here than in *Colwell* because there was not even sufficient notice of the facts underlying the allegation themselves. The charging document in this case recites the statutory language of "manual to genital" contact, but does not include any specific allegations of the facts identifying how that contact occurred. (*See* R., pp.3-4, 41-42.) The only information the State presented in support of that charging document was in the affidavit of probable cause. (*See* R., pp.5-6; *see also* R., p.33 (noting that Mr. Larsen waived his right to a preliminary hearing).) That affidavit only identified the allegations A.L. made during her CARES interview as the basis for the charge; she gave no indication that there was an allegation that Mr. Larsen had made A.L. touch his penis. *Compare, e.g., Owen*, 129 Idaho at 927-28 (where the relevant facts were presented at the preliminary hearing).

In fact, the only scant references to that conduct that appear anywhere in this record were third-hand, hearsay assertions made prior to A.L.'s CARES interview by A.L.'s brother and father. (Conf. Exh., pp.101, 109, 129.) However, those third-hand, hearsay allegations were not sufficient to satisfy the notice requirements because A.L. did not endorse those allegations during her ensuing CARES interview. (*See generally* Conf. Exh., pp.109-11; *cf.* Tr., p.551, L.14 - p.552, L.5, Tr., p.779, Ls.10-14 (the CARES interviewers confirming that fact in their trial testimony).) As such, Mr. Larsen, like Mr. Colwell, did not have sufficient notice of the allegation of an alternative means of committing the alleged offense. Therefore, allowing the amendment to the information in the middle of trial violated his substantial rights.

In evaluating whether fair notice was given, the appellate courts have also looked at whether the amendment impacted the defendant's ability to meaningfully present his defense. *See, e.g., State v. Tapia* , 127 Idaho 249, 253 (1995). Such an evaluation in this case only reaffirms the error in allowing the amendment. Since A.L. did not endorse the third-hand, hearsay allegations, the only possible factual basis for the lewd conduct prosecution was her assertion that Mr. Larsen had rubbed her vagina. (*See* R., pp.5-6.) One major aspect of Mr. Larsen's defense to that particular allegation was that he was asleep or unconscious when that particular alleged touching occurred, and so, could not have acted with the requisite intent. (*See, e.g.,* R., pp.5-6; R., pp. 92, 102 (defense counsel requesting an instruction that, if the jury found he was asleep or unconsciousness at the time of the touching, they should find him not guilty).) However, the new allegation that Mr. Larsen grabbed A.L.'s hand and used it force her to touch his penis falls well outside the scope of that defense because that sort of conduct inherently requires conscious action on his part.

Therefore, as a result of the amendment to allow the jury to convict Mr. Larsen on that new theory of means, he was forced to alter his defense mid-trial – leaving the unconsciousness defense behind by-and-large, and turning his focus instead to "target fixation or cognitive bias" on the part of the investigators. (*See generally* Tr., pp.961-83 (defense counsel's closing arguments); *compare* Tr., pp.213-16 (defense counsel asking the jurors in *voir dire* about people doing things while asleep) *with* Tr., p.969, Ls.5-8 (defense counsel's closing argument regarding unconscious actions).). As such, the record shows that allowing the amendment impacted Mr. Larsen's ability to prepare and present his defense. *Compare Tapia*, 127 Idaho at 253 (finding no error in allowing the amendment because there was no showing that the amendment

compromised the alibi defense being offered by the defendant in that case since his alibi evidence extended to the newly-alleged acts as well as the originally-alleged acts).

Further demonstrating the impact on Mr. Larsen's ability to present a defense, the prosecutor did not make his motion to add this new theory of means at the time A.L. included it in her testimony, or even at the start of trial, when he obviously anticipated making it an issue. (*See* Tr., p.277, Ls.2-5.) Rather, he waited until after the CARES interviewers and the investigating officer had also testified to do so. (*See generally* Tr., p.802, L.9 - p.803, L.18.) That means, at the time Mr. Larsen was forced to change his defense strategy, the witnesses relevant to that new defense to be released from their subpoenas. (*See* Tr., p.578, Ls.4-17, p.800, Ls.17-23.) Therefore, his ability to explore the nature of that defense with them was further hampered by the timing of the prosecutor's motion.

Since allowing the amendment to add a new theory of means violated Mr. Larsen's substantial rights, the district court's decision to allow that amendment was improper. Therefore, this Court should vacate his conviction and remand this case for further proceedings.

II.

The District Court Abused Its Discretion By Basing Its Sentencing Decision On A Clearly-Erroneous Understanding Of The Presentence Materials

A. Standard Of Review

The district court's sentencing decisions are reviewed for an abuse of discretion. *State v. Toohill*, 103 Idaho 565, 567 (Ct. App. 1982). The district court abuses its discretion when: (1) it fails to recognize the issue as one of discretion; (2) it acts beyond the outer bounds of its discretion; (3) it acts inconsistently with the applicable legal standards, or (4) it reaches its decision without exercising reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64 (2018).

B. The District Court Made Its Sentencing Decision In An Unreasonable Manner Because That Decision Was Based On A Clearly-Erroneous Reading Of The Presentence Materials' Recommendation As To The Question Of Prison Versus Probation

The first thing the district court observed with respect to Mr. Larsen's case as it announced its sentencing decision was that it had considered "[t]he presentence investigation report, which recommends the Court impose a period of incarceration . . . ." (Tr., p.1103, Ls.13-15.) That assertion is disproved by the record. The PSI made no recommendations as to prison versus probation at all. (*See generally* Conf. Exh., pp.1-19.) Rather, what the PSI actually said was: "Based on the defendant's assessed risks, needs and protective factors, in addition to the fact his psycho-sexual evaluation has not been received, I believe Reggie Larsen's sentencing is best determined by the wisdom of the court." (Conf. Exh., p.18.) As such, the district court's understanding of the PSI was clearly erroneous.

In fact, the information the PSI author did have showed that more than half the people who had a similar LSI-R score to Mr. Larsen (21 – moderate risk) received a period of probation or retained jurisdiction. (Conf. Exh., pp.16-17.) Likewise, the sentencing database inquiry of people convicted of the same offense with a similar criminal history (no prior felonies) revealed three of the six received periods of retained jurisdiction. (Conf. Exh., p.31.) In fact, the PSI author acknowledged that the GAIN-I evaluation was recommending *outpatient* treatment for Mr. Larsen. (*Compare* Conf. Exh., p.26 (the GAIN evaluation recommending Level 1 Outpatient treatment); *with* Conf. Exh., p.16 (the PSI author reporting the GAIN evaluation recommended Level 2 Intensive Outpatient programming).)

Moreover, the PSE report actually gave a recommendation for a period of probation, explaining that, because Mr. Larsen only presented a Low Risk for reoffending, it would be "best with beginning sex offender treatment in a community setting." (Conf. Exh., p.178.) The PSE

author also offered extensive advice for how to effectively supervise Mr. Larsen in the community. (Conf. Exh., pp.177-80.) Thus, the district court's clearly-erroneous understanding of the PSI means it was actually acting contrary to the information contained in the rest of the presentence materials.

The result of the district court's clearly-erroneous conclusion is that it did not reach its decision to execute Mr. Larsen's sentence (rather than place him on probation or retain jurisdiction over his case) in an exercise of reason. That fundamental misunderstanding of the information provided in the presentence materials means that the district court imposed a sentence without a proper understanding of how best to serve the four goals of sentencing in Mr. Larsen's case, particularly in terms of protection of society and rehabilitation. *See State v. Charboneau*, 124 Idaho 497, 500 (1993) (explaining protection of society is the primary goal the district court should consider); *State v. McCoy*, 94 Idaho 236, 240 (1971) (explaining that rehabilitation should usually be the first means by which the district court attempts to achieve the goal of protection of society), *superseded on other grounds as stated in State v. Theil*, 158 Idaho 103 (2015). Therefore, the district court abused its discretion when it imposed Mr. Larsen's sentence with that fundamental misunderstanding of the presentence materials.

CONCLUSION

Mr. Larsen respectfully requests this Court vacate his conviction and the jury verdict and remand this case for further proceedings. Alternatively, he respectfully requests this Court vacate his sentence and remand his case for a new sentencing hearing.

DATED this 27th day of March, 2020.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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BRD/eas