

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

12-17-2019

State V. Jackson Appellant's Brief Dckt. 47217

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State V. Jackson Appellant's Brief Dckt. 47217" (2019). *Not Reported*. 6225.
https://digitalcommons.law.uidaho.edu/not_reported/6225

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	SUPREME COURT 47217-2019
)	
Plaintiff/Respondent,)	
)	APPELLANT'S OPENING BRIEF
)	
THERRAL E. JACKSON,)	
)	
Defendant/Appellant.)	
)	

**Appeal from the District Court of the Second Judicial District of the State of Idaho,
in and for the County of Lewis (Case No. CV31-18-0255)**

**THE HONORABLE CARL KERRICK, PRESIDING
District Judge**

**JONATHAN D. HALLY, residing at Lewiston, Idaho for Appellant
LAWRENCE WASDENI, residing at Boise, Idaho for Respondent**

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ii

STATEMENT OF THE CASE 1

 Nature of the Case 1

 Statement of the Facts 1

 Course of Proceedings 1

ISSUES PRESENTED ON APPEAL 3

ARGUMENT 3

I. The District Court Committed Reversible Error by Providing Erroneous
 Jury Instructions Regarding the Crime of Battery on an Officer Which
 Inaccurate Instructions Prejudiced Mr. Jackson. 3

 A. Standard of Review 3

 B. The Court Improperly Instructed the Jury as to the State’s Burden
 of Proof for Felony Battery on an Officer. 3

 C. The Court Failed to Instruct the Jury as to the Defendant’s Right to Use Force
 to Defend Himself If Law Enforcement Used Excessive Force. 5

II. Mr. Jackson’s Due Process Was Violated as a Result of a Fatal Variance Between
 the Jury Instructions and the Charging Document. 7

CONCLUSION 10

CERTIFICATE OF MAILING 11

TABLE OF CASES AND AUTHORITIES

Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) 8

State v. Bernal, 164 Idaho 190, 194, 427 P.3d 1, 5 (2018) 7

State v. Draper, 151 Idaho 576, 588, 261 P.3d 853, 865 (2011). 3,4

State v. Folk, 151 Idaho 327, 342, 256 P.3d 735, 750 (2011) 7,8,9

State v. Garner, 159 Idaho 896, 367 P.3d 720, 721 (2016). 3

State v. Halbesleben, 75 P.3d 219, 223, 139 Idaho 165, 169 (Idaho App.,2003) 5

State v. Hartwig, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987) 6

State v. Miller, 165 Idaho 115, 443 P3d 129 (2019) 7,8

State v. Spurr, 114 Idaho 277, 279, 755 P.2d 1315, 1317 (Ct. App. 1988). 5,6

State v. Windsor, 110 Idaho 410, 418, 716 P.2d 1182, 1190 (1985)). 25,27,29

STATUTES/RULES

Idaho Code §18-915(3)(b) 4

Idaho Code §18-903 4,5

STATEMENT OF THE CASE

Nature of the Case

Mr. Jackson appeals from the District Court's entry of Judgment of Convictions for Battery on a Law Enforcement Officer, a felony, and for Resisting, Obstructing or Delaying an Officer, a misdemeanor.

Course of Proceedings

Mr. Jackson was charged by way of Information for Battery Against a Police officer, a felony in violation of Idaho Code §18-915(3)(b) and Resisting and Obstructing, a misdemeanor, in violation of Idaho Code §18-705. Mr. Jackson pleaded not guilty to the charges and a jury trial was held on February 14 -15 of 2019. The jury found the Defendant Guilty of both Counts. (R. p. 117). A Judgment of Conviction Order of Suspending Sentence and Order of Probation was filed on June 26, 2019. (R. p. 127). Mr. Jackson timely filed a Notice of Appeal on July 22, 2019. (R. p. 144).

Statement of the Facts

On June 12, 2018, Idaho County Deputies Keith Olson and Hernandez responded to a call of a vehicle crash that occurred in Kamiah, Lewis County, Idaho. (Tr. p. 124, Ls. 22-23; P. 126 Ls. 1- p. 127 L. 1.) Upon arriving, Officer Olson contacted both drivers involved in the accident and obtained insurance, driver's license and registration. (Tr. p. 129 L. 19- L. 25.) He learned that the driver of the motorcycle involved in the crash possessed a weapon. Deputy Olson removed the firearm and secured it in his police vehicle. (Tr. p. 131, Ls. 19-21.) Officer Olsen then observed the

driver of the motorcycle speaking with the Mr Jackson. (Tr. p. 132 Ls. 13-14.) Mr. Jackson, in turn, had owned and operated a towing service for over 52 years. Tr. p. 211 Ls. 3-9. He had received a call about the possible need for towing/wrecker service so he went to the scene of the accident. (Tr. p. 213, Ls. 3-6.) Mr. Jackson then began to speak with the driver of a motorcycle to determine if he needed a wrecker service. (Tr. p. 213, L. 16-23.)

After securing the weapon, Officer Olson approached Mr. Jackson and overheard him say something to the effect that Olson was from Idaho County and he was not sure why he was there. He then heard Mr. Jackson say “asshole”. Olson then engaged Mr. Jackson, telling him that he needed to leave. (Tr. p. 134, Ls. 19-24.) Officer Hernandez then approached nearby. (Tr. p. 135 L. 2.) Deputy Olson again told Mr. Jackson to leave and then placed Mr. Jackson under arrest when Mr. Jackson failed to do so. (Tr. p. 138 Ls. 11-12.)

Officers Olson and Hernandez both grabbed Mr Jackson and a struggle ensued as the officers were forcing Mr. Jackson’s arms behind his back and tried to force him to the ground. (Tr. p. 138 L. 14.) During the struggle, the officers fractured Mr. Jackson’s elbow and Officer Olson kneed Mr. Jackson in the stomach or groin area. (Tr. p. 143, l. 12-13; p. 217 Ls. 12-16) During the struggle, Officer Olson claimed he was struck in the ear by Mr. Jackson but was not sure if it was with an open or closed hand. (Tr. p. 139 Ls. 18-22.)

Mr. Jackson was charged with Battery on an Officer, a felony, in violation of § 18-915(3)(b) and Resisting and Obstructing or Delaying an officer, a misdemeanor, in violation of Idaho Code §

ISSUE PRESENTED ON APPEAL

Did the District Court Committed Reversible Error by erroneously instructing the jury on the elements of the crimes for which Mr. Jackson was charged?

ARGUMENT

I. The District Court Committed Reversible Error by Providing Erroneous Jury Instructions Regarding the Crime of Battery on an Officer Which Inaccurate Instructions Prejudiced Mr. Jackson.

A. Standard of Review.

Whether a jury has been properly instructed is a question of law over which the Court exercises free review. When reviewing jury instructions, the Court asks whether the instruction as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Garner*, 159 Idaho 896, 367 P.3d 720, 721 (2016). An erroneous instruction will not constitute reversible error unless the instruction as a whole misled the jury or prejudiced a party. *State v. Draper*, 151 Idaho 576, 588, 261 P.3d 853, 865 (2011).

B. The Court Improperly Instructed the Jury as to the State's Burden of Proof for Felony Battery on an Officer.

The District Court improperly instructed the jury as to the conduct that could constitute the crime of felony battery on an officer by including unlawful touching as described in section

18-903(b). In doing so, the District Court reduced the State's burden of proof which constitutes reversible error. *Draper*, 151 Idaho at 588.

Mr. Jackson was charged with felony battery on an officer in violation of § 18-915(3)(b) which states, in states, in relevant part,

For committing a violation of the provisions of sections 18-903, Idaho Code, **except unlawful touching as described in section 18-903(b)**, Idaho Code, against the person of a former or present peace officer, sheriff or police officer: (a) Because of the exercise of official duty or because of the victim's former or present official status; or (b) While the victim is engaged in the performance of his duties and the person committing the offense knows or reasonably should know that such a victim is a peace officer, sheriff or police officer; the offense shall be a felony...

®. p. 25.) Despite the fact that the unlawful touching provision of 18-903(b) is expressly excluded from the elements of felony battery on an officer, the District Court included that provision within its definition of battery. More particularly, Instruction No. 13 identified the elements needed for the State to prove felony battery on an officer which included proof that the "defendant THERRAL E. JACKSON committed a battery". ®. p. 101.) The Court then defined battery by simply restating Idaho Code 18-903, including section 18-903(b). Instruction No. 14 provided as follow:

A "battery" is committed when a person:

- (1) willfully and unlawfully uses force or violence upon the person of another; or
- (2) **actually, intentionally and unlawfully touches** or strikes another person against the will of the other; or
- (3) unlawfully and intentionally causes bodily harm to an individual.

®. p. 102.)

By including “unlawful touching” within the definition of battery, the District Court instructed the jury that it could find Mr. Jackson guilty of battery on an officer based upon conduct that Idaho Code Section 18-915(3)(b) specifically excluded from criminal culpability. In doing so, the Court improperly expanded the type of conduct for which the Jury could find the defendant guilty. A jury instructions that lightens the prosecution's burden of proof and are impermissible and an instructional error requires reversal of a judgment of conviction if the instruction misled the jury or prejudiced the defendant. *State v. Halbesleben*, 75 P.3d 219, 223, 139 Idaho 165, 169 (Idaho App.,2003). Without question, the Court’s inclusion of the unlawful touching provision of 18-903(b) mislead the jury and prejudiced the defendant. As such, the District Court committed reversible error.

C. The Court Failed to Instruct the Jury as to the Defendant’s Right to Use Force to Defend Himself If Law Enforcement Used Excessive Force.

Mr. Jackson was entitled to a self defense instruction which informed the jury that he could use force if the officers Olson and Hernandez used excessive force against him. The Court’s failure to include such an instruction constitutes fundamental error. In Idaho, a trial judge must charge the jurors with all matters of law necessary for their information. A defendant is entitled to have the jury instructed on all points of the law applicable to a defense theory that there was a justification or excuse for commission of the offense. *State v. Spurr*, 114 Idaho 277, 279, 755 P.2d 1315, 1317 (Ct. App. 1988).

In *State v. Spurr*, the defendant was found guilty of obstructing a police officer and committing a battery upon a police officer. The Court, however, found that a person has a constitutional right not to be subjected to excessive force by law enforcement officers in the performance of their duties. As such, a defendant has the right to defend himself against the use of excessive force by an officer. *State v. Hartwig*, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987). The determination of whether excessive force has been used is a question of fact for the jury. *Spurr*, 114 Idaho at 279.

In *Spurr*, the Court held that the trial court erred in failing to instruct the jury that if the arresting officer used excessive force, Spurr had a right to reasonably defend himself. Because there was evidence from which the jury could have found that the arresting officer used force to an excessive degree, the omission of that jury instruction was deemed reversible error. *Id.*

In the case at bar, there was clear evidence that the Officers used force during their arrest of Mr. Jackson which included kneeling him in the stomach or groin and using such force as to fracture Mr. Jackson's elbow. Accordingly, the jury should have been instructed that Mr. Jackson had a right to use reasonable force to defend himself against the officers' use of excessive force.

Compounding the problem with the failure to provide the self defense instruction was the Court's inclusion of the instruction that informed the jury that a person has duty to refrain from using force in resisting arrest. More specifically, Instruction No. 19, specifically prohibited the

use of force, stating that “If a person has reasonable ground to believe he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest.” R. P. 107

It is beyond fair debate that Mr. Jackson was prejudiced by the District Court’s inclusion of Instruction No. 19 that prohibited the use of force while not including a self-defense instruction that would have informed the jury that Mr. Jackson had a right to use force to defend himself against excessive force. Accordingly, in reading the jury instructions as a whole, the instructions constituted fundamental error as they prejudiced Mr. Jackson.

II. Mr. Jackson’s Due Process Was Violated as a Result of a Fatal Variance Between the Jury Instructions and the Charging Document.

Mr. Jackson’s due process rights were violated as a result of a fatal variance existing between the charging language contained within the jury instruction and the actual charging document for the crime of Resisting, Obstructing or Delaying an Officer. Accordingly, the Defendant’s conviction should be vacated.

Jury instructions should match the allegations in the charging document as to the means by which a defendant is alleged to have committed the charged crime.” *State v. Bernal*, 164 Idaho 190, 194, 427 P.3d 1, 5 (2018) “Failure to do so creates a variance.” *Id.* (citing *State v. Folk*, 151 Idaho 327, 342, 256 P.3d 735, 750 (2011)). “A variance becomes fatal when it violates due process.” *Id.* This Court discussed fatal variance in *State v. Miller*, 165 Idaho 115, 443 P3d 129

(2019) wherein the Court stated that,

The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

Id. 443 P.3d at 134 (quoting *Berger v. United States*, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314 (1935))

Applying this standard presents a two-step process. *State v. Gas*, 161 Idaho 588, 592, 388 P.3d 912, 916 (Ct. App. 2016)). First, the appellate court determines whether there was a variance between the information used to charge the crime and the instruction presented to the jury. *Miller*, 443 P.3d at 134. Second, if a variance does exist, then the court examines whether it rises to the level of prejudicial error requiring reversal of the conviction, i.e., whether it is fatal. *Id.* Even if there is a variance between the charging instrument and the jury instruction, reversal is only necessary when the variance “deprives the defendant of the right to fair notice or leaves him or her open to the risk of double jeopardy.” *Id.* As to notice, this Court must determine whether the defendant was misled or surprised “in the preparation or presentation of his or her defense.” *Id.*, citing *State v. Windsor*, 110 Idaho 410, 418, 716 P.2d 1182, 1190 (1985)).

In *State v. Folk*, 151 Idaho 327, 342, 256 P.3d, 735, 750 (2011) this Court found a fatal variance existed when a jury instruction permitted a jury to find the defendant guilty of crimes not charged in the information. *Folk*, 151 Idaho at 342, 256 P.3d at 750.

A review of the criminal charge and the jury instruction in the case at bar clearly establishes the existence of a variance. Within Count II, the Criminal Information specifically identified the conduct that gave rise to the charge of Resisting and Obstructing. (R. p. 26) More particularly, Count II specifically stated that the charge was the result of Mr Jackson refusing to “clear the scene of an ongoing investigation after having been requested to do so by Cpl. Keith Olsen, Idaho County Sheriff’s Office.” @. p. 26) Jury Instruction 17, however, did not include any of the specific conduct that was listed within the charging document. @. p. 105) Instead, it provided as follows

In order for the defendant to be guilty of Resisting, Obstruction, or Delaying an officer, the state must prove each of the following:

1. On or about the 12th June, 2018
2. In the state of Idaho
3. The defendant THERRAL E. JACKSON
4. Resisted, delayed, or obstructed
5. KEITH OLSEN, a peace officer,
6. In the discharge, or attempt to discharge, any duty of Keith Olsen’s office.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(R. p. 105)

Here the charging document is far mor restrictive as to what conduct the state must prove for the jury to find Mr. Jackson guilty of Obstruction than the jury instruction. This variance is fatal because the jury instruction permitted a jury to find the defendant guilty of Obstruction based upon conduct other than failing to clear the scene when requested. Thus, it permitted a

jury to find Mr. Jackson guilty of Obstruction based upon conduct that had not been charged.

Like in *Folk*, this Court should find the existence of a fatal variance.

Without question, the erroneous instruction was prejudicial to the Defendant as it misstated the law and significantly diminished the conduct that was needed for the jury to convict the Defendant.

CONCLUSION

For the reasons stated above, Mr. Jackson respectfully request this Court to vacate the convictions of felony battery on an officer and the misdemeanor charge of obstruction.

RESPECTFULLY SUBMITTED this 17day of December 2019.

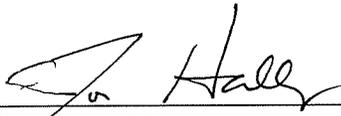
By:  _____
Jonathan D. Hally, a member of the firm
Attorneys for Defendants/Appellants Jackson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17 day of December 2019, I caused to be served a true and correct copy of the foregoing document, by the following:

State of Idaho
Office of Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010

Icourt File and Serve: ecf@ag.idaho.gov

By: 
Jonathan D. Hally