IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41125

STATE OF IDAHO,	)	**2015 Unpublished Opinion No. 423**
	)	
Plaintiff-Respondent,	)	**Filed: March 18, 2015**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
MICHAEL CLAY DETWILER,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Lynn G. Norton, District Judge.

Judgment of conviction and sentences for aggravated assault and aggravated battery, affirmed.

Sara B. Thomas, State Appellate Public Defender; Brian R. Dickson, Deputy Appellate Public Defender, Boise, for appellant. Brian R. Dickson argued.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent. Nicole L. Schafer argued.

WALTERS, Judge Pro Tem

Michael Clay Detwiler appeals from his judgment of conviction and sentences for aggravated assault and aggravated battery. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

The following facts were revealed through testimony at trial. Detwiler encountered a group of men at a bar. He tried to engage the men in conversation about his religious beliefs, but the men were not interested. Detwiler then bought the men each a shot of alcohol and the men laughed about the type of alcohol Detwiler bought. Detwiler testified that his feelings were hurt and he became upset. He began yelling racial and homophobic slurs at the men, which were heard by other customers in the bar. Detwiler then removed a knife from his bag and laid it on

the bar. At that point the bartender took the knife and demanded that Detwiler leave. He collected his belongings and was escorted by the bartender out the back door, where Detwiler's vehicle was parked. Several of the bar's customers followed Detwiler outside. After returning to her position inside the bar, the bartender decided Detwiler should not be driving and went outside to offer to call a taxi to drive him home. The bartender was followed by additional bar customers. Detwiler spoke with the bartender but, after refusing her offer, Detwiler slammed the vehicle's door shut, striking the bartender. Detwiler testified that his vehicle was surrounded by a group of men who were yelling for him to get out of his vehicle and that one of them kicked the door of Detwiler's vehicle. Detwiler testified that one of the men attempted to open his door. Detwiler testified that he wanted to remove himself from the situation because he had a prior brain injury and thought further trauma might be fatal. The bartender testified that she did not believe it would have been safe for Detwiler to get out of his vehicle. Detwiler attempted to reverse his vehicle out of the parking space, but was blocked by a person standing in the way. He then accelerated his vehicle forward, over the curb and onto the grass, toward the bartender and one of the customers. The bartender avoided being struck, but the customer was struck by Detwiler's vehicle and thrown to the ground. Detwiler reversed off the grass, away from the bar, and one of the bar customers threw a patio chair at Detwiler's vehicle. During the incident, some of the bar's patio furniture was damaged. Detwiler was charged with aggravated assault, I.C. §§ 18-901(b) and 18-905(a), for driving his vehicle toward the bartender. Detwiler was also charged with aggravated battery, I.C. §§ 18-903(a) and 18-907(b), for striking the customer with his vehicle.[1] A jury found Detwiler guilty of both aggravated battery and aggravated assault.

II.
ISSUES ON APPEAL

Detwiler appeals, contending that three different errors occurred during his trial and sentencing: (1) there was a fatal variance between the charging document and the jury instructions on the aggravated assault charge; (2) the district court failed to give Detwiler's instruction on the necessity defense; and (3) the district court refused to allow Detwiler to challenge the information in the presentence investigation report at the sentencing hearing.

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[1] Detwiler was also charged with malicious injury to property, I.C. § 18-7001, for damage to the bar's patio furniture. Detwiler was acquitted of the malicious injury to property charge.

III.
ANALYSIS

A. Variance

Detwiler argues that he was denied his constitutional right to due process because of a fatal variance between the charging document and the jury instructions. Specifically, Detwiler argues that variance between the assault-by-threat theory charged in the information and the two theories (assault-by-threat and assault-by-attempt) defined in the jury instructions constituted reversible fundamental error.

The existence of an impermissible variance between a charging instrument and the jury instructions is a question of law over which we exercise free review. *State v. Sherrod*, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998). A variance may occur where there is a difference between the allegations in the charging instrument and the proof adduced at trial or where there is a disparity between the allegations in the charging instrument and the jury instructions. *State v. Montoya*, 140 Idaho 160, 165, 90 P.3d 910, 915 (Ct. App. 2004). If it is established that a variance exists, we must examine whether it rises to the level of prejudicial error requiring reversal of the conviction. *State v. Brazil*, 136 Idaho 327, 329, 33 P.3d 218, 220 (Ct. App. 2001). A variance is fatal if it amounts to a constructive amendment. *State v. Jones*, 140 Idaho 41, 49, 89 P.3d 881, 889 (Ct. App. 2003). A constructive amendment, as opposed to a mere variance, occurs if a variance alters the charging document to the extent the defendant is tried for a crime of a greater degree or a different nature. *Id.*; *State v. Colwell*, 124 Idaho 560, 566, 861 P.2d 1225, 1231 (Ct. App. 1993). In other words, a variance between a charging document and a jury instruction requires reversal only when it deprives the defendant of fair notice of the charge against which he or she must defend or leaves him or her open to the risk of double jeopardy. *State v. Wolfrum*, 145 Idaho 44, 47, 175 P.3d 206, 209 (Ct. App. 2007). The notice element requires courts to determine whether the record suggests the possibility that the defendant was misled or embarrassed in the preparation or presentation of his or her defense. *State v. Windsor*, 110 Idaho 410, 418, 716 P.2d 1182, 1190 (1985).

Where, as here, the defendant did not object to the alleged error below, the following three prongs must be met to obtain relief on appeal for fundamental error: (1) the defendant must demonstrate 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 there is a reasonable possibility that the error affected the outcome of the trial. *State v. Perry*, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

Idaho Code Section 18-901(a) defines an assault as:

> An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another.

Idaho Code Section 18-901(b) provides for an alternative definition of assault:

> An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Thus, an individual can commit an assault through either an unlawful threat or an unlawful attempt.

The information accused Detwiler of aggravated assault, specifically citing I.C. §§ 18-901(b) and 18-905(a), and described the charge as follows:

> That the Defendant, MICHAEL CLAY DETWILER, on or about the 9th day of December, 2010, in the County of Ada, State of Idaho, did intentionally, unlawfully and with apparent ability threaten by act to do violence upon the person of [the bartender], with a deadly weapon, to-wit: by intentionally accelerating his Ford Explorer SUV toward [the bartender] and speeding towards her person as she stood in front of the car, which created a well-founded fear in [the bartender] that such violence was imminent.

Detwiler was charged with one theory of assault (assault-by-threat) but the jury was instructed on both theories. The district court instructed the jury on the definition of the crime of assault as follows:

> An "assault" is committed when a person,
> (1) unlawfully attempts, with apparent ability, to commit a violent injury on the person of another; or
> (2) 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.

The district court then instructed the jury that:

> In order for [Detwiler] to be guilty of Aggravated Assault, the state must prove each of the following:
> 1. On or about December 9, 2010,
> 2. in the state of Idaho,

3. the defendant, Michael Clay Detwiler, committed an assault upon [the bartender]
4. by intentionally accelerating his Ford Explorer toward [the bartender] and speeding towards her person as she stood in front of the Ford Explorer; and
5. the defendant Michael Clay Detwiler committed that assault with a deadly weapon or instrument.

Detwiler argues there was variance between the information and the jury instructions because the jury was required to find him guilty if they found either that he threatened harm, as charged in the information, or that he attempted to harm the bartender. The state argues that no variance occurred in this case because the factual basis for the charge was the same from the beginning to end--that Detwiler intentionally drove his vehicle toward the bartender.

The state also argues that, even if a variance existed, Detwiler has not shown that he was prejudiced by the variance. We agree that, even if a variance exists in this case, the variance was not fatal because Detwiler has not shown prejudice. Detwiler has not shown how he was misled or embarrassed in presenting his defense. *See Windsor*, 110 Idaho at 418, 716 P.2d at 1190. Neither has Detwiler shown how any variance caused him to be charged with a crime of greater degree or of a different nature. *See Jones*, 140 Idaho at 49, 89 P.3d at 889. Finally, Detwiler has not shown that he lacked notice that hampered his defense or left him open to the risk of double jeopardy. *See Wolfrum*, 145 Idaho at 47, 175 P.3d at 209. The state presented the attempt theory in opening argument and continued to allude to it through evidence suggesting that Detwiler intended to drive the vehicle at the bartender. Additionally, Detwiler's defense focused on whether he had the requisite intent to strike the bartender with his vehicle. Detwiler testified that he did not intend to harm the bartender, but was only attempting to remove himself from a potentially life-threatening situation. Detwiler's defense was not hampered by any variance because, under either theory of assault, his defense would have been the same--Detwiler did not intend to harm the bartender, whether by threatening or attempting to strike her. Finally, the conduct necessary to prove either theory or assault in this case stemmed from the same conduct, which was that Detwiler accelerated his vehicle at the bartender.

Detwiler claims that a question from the jury to the district court is evidence that he was prejudiced by the variance. During deliberations, the jury asked the district court, "As to Instruction No. 20 [, the definition of assault,] does the intent associated with assault have to be to injure [the bartender]? If we believe that [the bartender] was a bystander and not the intended

target of the vehicle, has the intent portion of the statute been met?" Detwiler argues that the jury's question reveals that at least one of the jurors had reservations about the evidence presented on the aggravated assault charge. However, the jury's question did not indicate that it was struggling with the difference between the attempt and threat theories of assault. Rather, it appears the jury was struggling with the difference between general intent and specific intent to commit an assault. Specifically, whether the general intent to drive in the bartender's direction was sufficient to find Detwiler guilty or whether it was necessary that Detwiler specifically intended to strike the bartender with his vehicle.

We hold that any variance between the information and jury instructions was a mere variance, not a fatal variance, which did not mislead or embarrass Detwiler in his defense of the charge of aggravated assault. Thus, Detwiler has failed to show that the district court violated his constitutional rights.

B. Necessity Jury Instruction

Detwiler argues the district court erred in not giving the jury an instruction on the defense of necessity. The state argues Detwiler failed to meet his burden of providing sufficient evidence to support a necessity instruction.

The question whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Severson*, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993). A defendant is entitled to have the jury instructed on every defense or theory of defense having any support in the evidence. *State v. Hansen*, 133 Idaho 323, 328, 986 P.2d 346, 351 (Ct. App. 1999). However, requested jury instructions should not be given if they lack support in the facts of the case or are erroneous statements of the law. *State v. Babb*, 125 Idaho 934, 941, 877 P.2d 905, 912 (1994); *State v. Bronnenberg*, 124 Idaho 67, 71, 856 P.2d 104, 108 (Ct. App. 1993).

Idaho Code Section 19-2132(a) requires that the trial court provide to the jury "all matters of law necessary for their information" and must give a requested jury instruction if it determines that instruction to be correct and pertinent. Under a four-part test, a requested instruction must be given where: (1) it properly states the governing law; (2) a reasonable view of the evidence would support the party's legal theory; (3) it is not addressed adequately by other jury

instructions; and (4) it does not constitute an impermissible comment as to the evidence. *State v. Fetterly*, 126 Idaho 475, 476-77, 886 P.2d 780, 781-82 (Ct. App. 1995); *see also State v. Evans*, 119 Idaho 383, 385, 807 P.2d 62, 64 (Ct. App. 1991). To meet the second prong of this test, the defendant must present at least some evidence supporting his or her theory and any support will suffice as long as his or her theory comports with a reasonable view of the evidence. *Fetterly*, 126 Idaho at 476-77, 886 P.2d at 781-82; *State v. Kodesh*, 122 Idaho 756, 758, 838 P.2d 885, 887 (Ct. App. 1992). In other words, a defendant must present facts to support each element of a prima facie case for each defense. *State v. Camp*, 134 Idaho 662, 665-66, 8 P.3d 657, 660-61 (Ct. App. 2000). If the defendant fails to provide evidence supporting any one of the necessary elements of a defense, the defendant has failed to meet his or her burden and is not entitled to have the jury instructed on that defense. *Id.*

Detwiler argues that he was justified in driving his vehicle toward the victims because his action was necessary to protect himself from serious injury by a mob surrounding his vehicle. The common-law necessity defense is recognized in Idaho. *State v. Chisholm*, 126 Idaho 319, 321, 882 P.2d 974, 976 (Ct. App. 1994). The necessity defense is based on the premise that "a person who is compelled to commit an illegal act in order to prevent a greater harm should not be punished for that act." *State v. Hastings*, 118 Idaho 854, 855, 801 P.2d 563, 564 (1990). The elements of the defense are: (1) a specific threat of immediate harm; (2) the circumstances which necessitate the illegal act must not have been brought about by the defendant; (3) the same objective could not have been accomplished by a less offensive alternative available to the actor; and (4) the harm caused was not disproportionate to the harm avoided. *State v. Kopsa*, 126 Idaho 512, 520, 887 P.2d 57, 65 (Ct. App. 1994); *see also* I.C.J.I. 1512. When the defense of necessity has been demonstrated, it justifies the defendant's conduct in violating the literal language of the criminal law and so the defendant is not guilty of the crime in question. *State v. Tadlock*, 136 Idaho 413, 414-15, 34 P.3d 1096, 1097-98 (Ct. App. 2001).

There is no entitlement to a jury instruction on the defense of necessity when no reasonable view of the evidence supports the elements of the instruction. *See State v. Howley*, 128 Idaho 874, 879, 920 P.2d 391, 396 (1996). The trial court is required to make the threshold determination of whether a reasonable view of the evidence supports the elements of necessity. *State v. Young*, 157 Idaho 280, 285, 335 P.3d 620, 625 (Ct. App. 2014). In this case, the district court determined that Detwiler was not entitled to have the jury instructed on the defense of

necessity because there was no reasonable view of the evidence to support a finding that the situation was not brought about by Detwiler.

Detwiler argues that there was a reasonable view of the evidence that the confrontation inside the bar had ended and that the confrontation outside was a separate, new confrontation initiated by the bar customers who followed him outside. However, we agree with the district court that no reasonable view of the evidence supports finding that the circumstances were not brought about by Detwiler. While sitting at the bar, Detwiler attempted to share his religious beliefs, but was not received well by some of the other customers at the bar. He then bought three of the other customers shots of alcohol. They accepted the shots, but mocked Detwiler for the variety of alcohol he chose to buy. Detwiler's feelings were hurt and he became confrontational, yelling racial and homophobic slurs at the three customers. Detwiler then removed a knife from his bag and laid it on the bar, which resulted in him being ejected from the bar. Detwiler continued to make offensive comments as he was escorted out. A number of customers, including some who were not the focus of Detwiler's comments, were offended by Detwiler's use of such slurs and followed him out the back door when he was ejected. While outside, Detwiler continued to yell slurs. Several of the customers surrounded Detwiler's vehicle. Detwiler argues that, because his vehicle was surrounded, he was at risk of great bodily harm and that he had to drive forward, in the direction of the bartender and customer, to remove himself from the situation. However, even though Detwiler may have been in a highly dangerous situation constraining him to drive his vehicle toward the bartender and customer, the situation in this case was a continuous string of events, brought about by Detwiler's offensive and provocative behavior inside and outside the bar. Thus, we agree with the district court that no reasonable view of the evidence supports the second required element of the necessity defense--that the circumstances were not brought about by Detwiler. Therefore, the district court did not err in concluding that Detwiler was not entitled to have the jury instructed on the defense of necessity.

C. Challenge to Presentence Investigation Report

Detwiler argues on appeal that the district court erred by refusing to allow Detwiler to correct the information contained in the presentence investigation report (PSI). Detwiler claims that he made several objections to the information in the PSI material and requested that the information be stricken, or red-lined, from the PSI. In support of his position that the district

court abused its discretion, Detwiler quotes the district court, which said "I'm not going to red-line or remove anything at this point. The PSI says what it says." Based upon this quote, Detwiler argues that his sentences should be vacated because the district court failed to provide an adequate opportunity for Detwiler to correct the information in the PSI.

We are not persuaded by Detwiler's argument because the quote upon which he relies was taken out of context and misconstrued. While Detwiler was describing corrections he wished to be made to the PSI, the district court interrupted and explained:

> I'm sorry. If you're going to ask that things be removed from the PSI, then we're going to have to continue the hearing in so that you can go through the entire PSI and tell me what it is specifically that you want removed, so the prosecutor can then have an opportunity to say, well, yes or no. Those are inappropriate to be in the PSI.
>
> And so if you're making that argument, then we need to reset the sentencing, and you go through the PSI in detail because I'm not going to red-line or remove anything at this point. The PSI says what it says. And I'm certainly interested in your arguments as to why certain information in the PSI, that the court should not consider it.

In response, Detwiler initially indicated that he was interested in postponing the hearing, as suggested by the district court. The district court further explained, "the information you're talking about, you know, it doesn't carry particular weight with me," appearing to suggest that it may not have been worthwhile to postpone the sentencing. The district court then reemphasized that Detwiler could, nonetheless, obtain a continuance of the hearing for the district court to consider correcting the PSI or he could go forward with sentencing that day. Detwiler chose to be sentenced at that time.

In context, it is clear that the district court provided Detwiler with an opportunity to correct the information contained in the PSI. The district court suggested several times that Detwiler could postpone the sentencing hearing in order to give both parties an opportunity to address each disputed portion of the PSI. Although Detwiler initially indicated that he wanted a continuance, he later decided to move forward with the sentencing hearing and attempt to persuade the district court to not consider the disputed information, rather than strike the information. The district court provided Detwiler with an opportunity to challenge information in the PSI but, after weighing his options, he elected to proceed with sentencing. A party may not assert as error on appeal any action by the trial court that the party invited, acquiesced in, or consented to. *State v. Owsley*, 105 Idaho 836, 837-38, 673 P.2d 436, 437-38 (1983); *State v.*

Carlson, 134 Idaho 389, 402, 3 P.3d 67, 80 (Ct. App. 2000). Detwiler waived the opportunity to correct the information contained in the PSI. Therefore, Detwiler's claim that the district court erred fails.

IV.

CONCLUSION

To the extent a variance existed, Detwiler has failed to show that he was prejudiced by the variance between the charging document and the aggravated assault jury instruction. In addition, the district court properly determined that Detwiler was not entitled to have the jury instructed on the defense of necessity. Finally, the district court did not deprive Detwiler of the opportunity to correct the information in the PSI as Detwiler waived this opportunity. Therefore, we affirm Detwiler's judgment of conviction and sentences for aggravated assault and aggravated battery.

Judge LANSING and Judge GRATTON, **CONCUR**.