

**SUMMARY STATEMENT**  
*State of Idaho v. Tony Rapley Crombie*  
Docket No. 51302

Tony Rapley Crombie appeals from his judgment of conviction for domestic battery with traumatic injury and a persistent violator sentencing enhancement. Crombie was charged with attempted strangulation after an altercation with his ex-girlfriend. At trial, the jury was instructed that they could find Crombie guilty of domestic battery with a traumatic injury as a lesser included offense of attempted strangulation. The jury found Crombie guilty of domestic battery with traumatic injury and of being a persistent violator.

Crombie argues domestic battery with traumatic injury is not a lesser included offense of attempted strangulation under the statutory and pleading theory. Crombie alternatively argues the district court committed fundamental error by instructing the jury on domestic battery with traumatic injury because he was never charged with that offense. Finally, Crombie argues the persistent violator enhancement is inapplicable because one of his previous felony convictions had been discharged pursuant to Idaho Code § 19-2604(1) and therefore could not be considered as a prior conviction for purposes of an enhanced sentence.

The State argues Crombie failed to preserve his argument of instructional error because the objection made at trial was limited to an evidentiary objection, i.e., whether there was a sufficient factual basis for the instruction, not whether domestic battery with traumatic injury was a lesser included offense under either the statutory or pleading theory. The State argues the district court did not commit fundamental error because Crombie failed to establish two of the three elements necessary for a finding of fundamental error. Finally, the State argues the district court correctly considered both of Crombie's prior convictions for purposes of the persistent violator sentencing enhancement.

The Court of Appeals held that Crombie failed to preserve his argument that domestic battery with a traumatic injury is not a lesser included offense of attempted strangulation because Crombie objected on evidentiary grounds in the trial court, not on the theories argued on appeal. The Court of Appeals also held that Crombie could not establish fundamental error because there was no variance regarding the term "household member," as that term was included in both the charging document and the jury instructions. As to the term "traumatic injury," although that was a variance between the charging document and the jury instructions, the variance was not fatal,

and as a result, there was no violation of Crombie's unwaived constitutional right. Thus, Crombie failed to establish the first prong of the fundamental error analysis. Crombie also failed to establish the second prong of the fundamental error analysis because the record did not establish trial counsel did not make a tactical decision regarding which terms to challenge. Finally, the Court of Appeals held that Crombie's 2013 felony conviction for violating I.C. § 37-2732(c)(1) was a valid conviction for purposes of the persistent violator statute despite that conviction being dismissed pursuant to I.C. § 19-2604(1), because the plain language of I.C. § 37-2732(c)(1) established a conviction occurred at the time Crombie entered a guilty plea to the offense, not the form of judgement.

\*\*\*This summary constitutes no part of the opinion of the Court but has been prepared by court staff for the convenience of the public.\*\*\*