STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

MICHAEL SHAWN SOUTH,

Defendant.

Case No. **CRF 2010 21954**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS, AND DENYING DEFENDANT'S MOTION TO RELEASE MEDICAL RECORDS

I. FACTUAL BACKGROUND.

Defendant Michael Shawn South (South) moves this Court to dismiss the Information in this matter claiming substantial evidence on each element of the crime was not adduced at the Preliminary Hearing, pursuant to ICR 5.1. Motion to Dismiss, p. 1. This matter originally came before Magistrate Judge Clark Peterson on December 9, 2010, for a Preliminary Hearing Status Conference. A disagreement about requested medical records was addressed, and Judge Peterson stated that the parties could seek a protective order regarding disclosure of the documents if need be. The matter was continued and a preliminary hearing was scheduled. The matter next came for preliminary hearing before Magistrate Judge Robert Caldwell, on December 10, 2010, and testimony was given by the witnesses, but the hearing was interrupted when the power went out and was continued to

a later date. After Judge Caldwell entered an Order of Voluntary Disqualification, the matter once again came before Judge Peterson on February 3, 2011. At this hearing, Judge Peterson discussed the disclosure of medical records and again stated that parties could seek a protective order if so desired.

At the preliminary hearing, Judge Peterson found that there was a factual question to be heard by the jury, found probable cause existed and bound the matter over to District Court. Tr. p. 200, Ll. 3-4. The Information charging South with Aggravated Assault against Miranda Zitting (Zitting) was filed on February 9, 2011. South timely filed his Motion to Dismiss on March 14, 2011. South entered his plea of not guilty on April 1, 2011. On May 27, 2011, South filed Defendant's Authority in Support of Motion to Dismiss Information. The State responded on June 13, 2011, with Plaintiff's Response to Defendant's Motion to Dismiss. South filed his Defendant's Reply to Plaintiff's Response on June 15, 2011. Oral argument was held on June 16, 2011. This matter is currently scheduled for a four-day jury trial commencing on August 1, 2011.

II. STANDARD OF REVIEW.

State v. Pole, 139 Idaho 370, 79 P..3d 729 (Ct.App. 2003), reiterates the appropriate standard of review for this Court. A magistrate's finding of probable cause that a defendant has committed a public offense should be overturned only upon a showing that the magistrate abused its discretion. *State v. Phelps,* 131 Idaho 249, 251, 953 p.2D 999, 1001 (Ct.App. 1998); *State v. Gibson,* 106 Idaho 54, 57, 675 P.2d 33, 36 (1983). A finding of probable cause must be based upon substantial evidence as to every material element of the crime charged. I.C.R. 5.1(b). This may be satisfied through circumstantial evidence and reasonable inference to be drawn from that evidence by the committing magistrate. *State v. Munhall,* 118 Idaho 602, 606, 798 P.2d 61, 65 (Ct.App. 1990). A reviewing Court will not substitute its judgment for that of the magistrate as to the weight of

the evidence. *Id. State v. Pole,* 139 Idaho 370, 372, 79 P..3d 729, 731 (Ct.App. 2003).

III. ANALYSIS.

A. Motion to Excuse Defendant's Appearance at Hearing.

As a preliminary matter, on June 13, 2011, South's attorney filed an "Ex Parte Motion to Excuse Defendant's Appearance at Hearing", requesting this Court excuse South from attending the June 16, 2011, hearing on his Motion to Dismiss, citing I.C.R. 43(c)(3). This motion was not ruled upon as the motion was unnecessary for two reasons. First, I.C.R. 43(c)(3) actually reverses the situation in that it requires the Court to issue an order if the Court wishes to have a defendant present "at a conference or argument upon a question of law." Second, South was present at the conference.

B. South's Motion to Release Medical Records Must be Denied.

On May 13, 2011, South's attorney filed a "Motion to Release Medical Records", requesting to have this Court order that "…the records subpoenaed by counsel, which have been filed with the Court pursuant to I.C. § 9-420 on behalf of Kootenai Urgent Care aka North Idaho Immediate Care" be released to South's attorney. At oral argument on June 16, 2011, South's attorney specified these records were under seal in the Court's possession, and specifically, South was only interested in medical records of the victim from Kootenai Urgent Care aka North Idaho Immediate Care for the week either side of the September 18, 2010, date of the alleged aggravated assault on the victim. At the June 16, 2011, hearing, the Court *in camera* reviewed the records under seal in the court file, and determined that while there were some records of the alleged victim, no such records existed from that provider during that time period. Accordingly, South's Motion to Release Medical Records was denied at the June 16, 2011, hearing.

There are additional reasons this motion must be denied. This matter originally came before Judge Peterson during the February 3, 2011, for Preliminary Hearing Status

Conference and was heard prior to the evidentiary portion of the hearing. Second Protective Order Regarding Medical Records and Further Orders, p. 1. Three sets of medical records were subject to potential disclosure. *Id.* Judge Peterson followed the previous order stating that the Kootenai Medical Center (KMC) Records would be released under specific terms and conditions, which included the term that the Defendant would not be provided with the records. *Id.,* pp. 1-2. Dirne Clinic records were also ordered to be released under the same terms as the KMC records. *Id.*

The Urgent Care records, however, were viewed *in camera,* and Judge Peterson denied the request to release those records. *Id.,* pp. 2-3. Additionally, Judge Peterson stated that, "neither party shall either use or reference either the records themselves or any of the contents of any such records disclosed pursuant to this Order at any hearing without further order of the court following a motion, notice and hearing." Second Protective Order Regarding Medical Records and Further Orders, p. 5. Also, Judge Peterson stated in his Order that "any such excepted motion" filed in regard to the medical records had to have been filed under seal with the court. *Id.,* p. 5. [During a conversation with Judge Peterson, he stated that his main purpose in instructing that the motion be filed under seal was if the motion contained materials found in the records; however, he reiterated that this court could read this Order however it saw fit.] Finally, Judge Peterson ordered that any future release of records would only be permitted upon "proof of service of said motion and notice of any hearing regarding said motion on Ms. Zitting." *Id.* This was stipulated in order to assure that Zitting had ample opportunity to request a protective order pursuant to I.C.R. 16(k).

South's Motion to Release Medical Records shows no evidence that his motion was served on Zitting or that she was put on notice regarding the hearing on the motion to release of the records, as required by Judge Peterson's order. If Zitting has not received

notice of the Motion to Release, then she has not been given an opportunity to file a protective order. Further, South's Motion to Release Medical Records was not filed with the court under seal. Depending on how Judge Peterson's Order is read, the Motion referencing the medical records should have been filed under seal.

C. South's Motion to Dismiss Must be Denied.

At the June 16, 2011, hearing, the Court heard oral argument on South's Motion to Dismiss. At that hearing, the Court had not had the opportunity to read South's "Defendant's Reply to Plaintiff's Response", which was filed on June 15, 2011, the day before the June 16, 2011, hearing. Accordingly, the Court had to take South's Motion to Dismiss under advisement, cognizant of the August 1, 2011, jury trial.

Essentially, South's argument is that witness testimony at the preliminary hearing was inconsistent, therefore, perjured, and thus, should be disregarded, leaving the magistrate with no evidence from which to have found probable cause that the crime charged occurred, and the case be must be dismissed under I.C. § 19-815A or I.C.R.48(2). Authority in Support of Motion to Dismiss, p. 1. Two preliminary hearings occurred in this case. The first was before Magistrate Judge Robert Caldwell on December 10, 2010, which ended before completion due to a power outage. The preliminary hearing was rescheduled, but before the continued hearing could be held, Judge Caldwell disqualified himself pursuant to I.C.R. 25(d) on February 1, 2011. Magistrate Judge Clark Peterson presided over the preliminary hearing held February 3, 2011. All the testimony from the earlier hearing was repeated; Judge Peterson did not simply resume where the earlier hearing had left off. Thus, some witnesses testified twice. South contends the inconsistencies in the testimony prove the testimony was perjured, and thus, Judge Peterson lacked substantial evidence to find probable cause. South also argues the proof shows no choking of the victim occurred at the hands of South.

South's argument fails for a host of reasons.

1. No red marks, no bruises, no problem.

Even assuming there were no red marks or bruising on the victim, South's logic is faulty. South argues to this Court:

> Ms. Zitting testified that she could not breathe at all. She testified that Michael South had his hands around her neck so hard that she felt pressure all over. If this is true, then one would think there would surely be some form of red mark or bruise.

Authority in Support of Motion to Dismiss, p. 17. South writes: "The substantive issue is whether Mr. South, as alleged, choked Ms. Zitting." Defendant's Reply to Plaintiff's Response, p. 2. Essentially, South's argument is choking must result in red marks and bruising, and, since no red marks or bruising, then no choking occurred. No medical evidence has been submitted by South that choking necessarily results in red marks or bruising. No case law has been submitted that would support such a proposition. Such an argument also ignores the fact that Judge Peterson, in viewing the exhibits submitted to him, noted that the photographs showed some redness. Tr. p. 198, Ll, 8-10. South seems to confuse the elements of Aggravated Assault, with which he is charged, with the elements of the crime of battery.

2. No choking, no problem.

Another reason South's logic is faulty is choking is not a required element of this crime. South is simply wrong in arguing: "The substantive issue is whether Mr. South, as alleged, choked Ms. Zitting." Defendant's Reply to Plaintiff's Response, p. 2. South is charged with Aggravated Assault, allegedly committed as follows:

> That the defendant, MICHAEL SHAWN SOUTH, on or about the 18th day of September, 2010, in the County of Kootenai, State of Idaho, did unlawfully and with apparent ability, attempt to commit a violent injury upon the person of Miranda Zitting by a means or force likely to produce great bodily harm, to wit: by grabbing her about the throat and applying pressure, all of which is contrary to the form force and effect of the statute

> in such case made and provided for and against the peace and dignity of the People of the State of Idaho.

Information, pp. 1-2. While "grabbing her about the throat and applying pressure" is certainly descriptive of choking, choking itself is not alleged as an element of the crime.

3. South ignores the elements of the crime with which he is charged.

What has to be proven in this case is as follows: Assault is committed when either 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. ICJI 1201. In order for that assault to be "aggravated", the assault must be committed with 1) a deadly weapon or instrument, or, 2) by means or force likely to produce great bodily harm, or 3) with any vitriol corrosive acid, or a caustic chemical of any kind. Obviously, 1 and 3 are not alleged or at issue here. Thus, South's alleged assault must have been "by means or force likely to produce great bodily harm". ICJI 1205. Great bodily harm is not defined in the instructions. It is crucial to note, that *no violent injury has to have occurred* in order for the crime to have been committed. *No bodily harm* need occur. All that need occur is a person either 1) unlawfully *attempts* to commit a violent injury on another with the apparent ability to do so, or 2) *threaten* by word or act to do violence to another with the apparent ability to do so and create a well-founded fear in that person that violence is imminent, and, under either of those to methods, the *attempt* or *threat* to commit violent injury must be by a means or force likely to produce great bodily harm. Thus, if said with enough conviction to produce a well-founded fear that the violence is imminent, simply uttering the *threat*: "I'll choke you to death", is an aggravated assault. Also, merely *attempting* to choke a person is aggravated assault. Attempting to choke a person and in doing so the perpetrator utterly

fails to produce any harm (including no red marks, no bruising) is an aggravated assault because choking, *if* done successfully (even if it was not done successfully in the present case), would likely produce great bodily harm.

Thus, the evidence before Judge Peterson need not have shown that choking occurred. Judge Peterson soundly appreciated that fact. Judge Peterson held:

> And in this case, the offense charged is aggravated assault, which initially the Court thought that was perhaps an unusual charge. But I think in the end I think that's the more appropriate charge, at least to have gone forward on.
>
> The question is whether or not the State's met its burden.
>
> An aggravated assault's an assault with a deadly weapon or instrument without intent to kill. That's not present here.
>
> I think the proceedings under subsection (b) by any means or force likely to produce great bodily harm.
>
> And then that, also requires the definition of an assault, with comes from 901, which is an unlawful attempt coupled with apparent ability to commit a violent injury on the person of another or an intentional unlawful threat by word or act to do violence to the person of another coupled with an apparent ability to do so.
>
> I don't think this is the threat with the ability. This isn't a subsection (b) assault under 901 as the Court views it.
>
> This is a subsection (1), it's an attempt coupled with an apparent ability.
>
> Under the State's pleading, it matches the State's pleading, which is the attempt to strangle Miss Zitting, which would, the Court finds, be great bodily harm.
>
> So, the act, if believed, is sufficient to constitute the crime charged.

Tr. p. 196, L. 6 – p. 197, L. 8. Judge Peterson then had a discussion about the evidence presented. Tr. p. 197, L. 8 – p. 200, L. 7.

4. Inconsistencies do not create a lack of substantial evidence.

Nearly all of South's extensive briefing points out: inconsistencies within the testimony of the witnesses who testified at both preliminary hearings, inconsistencies between the witnesses' testimony and the written statements to police, and inconsistencies between witnesses. South's briefing contains nine pages of what South considers to be "perjured testimony of witnesses called by the State." Authority in Support of Motion to

Dismiss, pp. 5-13.

It is nothing new for there to be inconsistencies between different witnesses. That happens in virtually all cases.

As for inconsistencies between a witness' written statement and that same witness' testimony under oath, that inconsistency does not create perjury.

Finally, as to inconsistencies between a witness' testimony under oath on one occasion, compared to testimony under oath on a different occasion, that, without more, is not perjury. One would need to know which of the two versions was the truth. The other version, the false version, could be perjury if the witness knew such testimony under oath was false. Idaho Code § 18-5401. But what South is essentially doing is asking this Court, which did not hear the testimony as given by the witness, did not see the witness' demeanor, and did not (and cannot) make credibility determinations, to now choose the ***one*** of two purportedly inconsistent statements made under oath that South wishes the Court to choose, and give that ***one*** version that South prefers the imprimatur of absolute truth and the other version the imprimatur of absolute falsehood, and in this way, find Judge Peterson's findings of probable cause to be unsupported by substantial evidence. This is a reach of epic proportion. This is a reach this Court simply cannot make.

The very case cited by South makes the point against South's position. South cites the recent Idaho Supreme Court decision in *State v. Ellington,* Docket No. 33843, 2011 Opinion No. 68 (May 27, 2011). Defendant's Reply to Plaintiff's Response, p. 5. The following is a quote from *Ellington*: "In Idaho, a prior inconsistent statement can also be used as substantive evidence, so long as the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement was given under oath at a prior proceeding." Opinion No. 68, p. 28. Thus, even if Judge Peterson relied on one specific statement made under oath that was contradicted by another, his decision is still supported

by substantial evidence.

South claims Zitting committed perjury and in South's briefing South sets forth Zitting's testimony on December 10, 2010, and on February 3, 2010. Authority in Support of Motion to Dismiss, pp. 5-9. The Court has read and re-read these two excerpts, and finds them not only to be not perjury, but not inconsistent as to the red marks, and later bruising, where they were located and when they appeared. The only possible inconsistency was at the second hearing Zitting testified that the bruising started off black and blue (Tr. p. 94, L. 24 – p. 95, p. 17), where at the earlier hearing she described red marks initially. Tr. p. 13, L. 14. – p. 14, L. 9. Even that is not an inconsistency as Zitting was asked about red marks and bruising at the earlier hearing, and at the second hearing Zitting was only asked about "injuries" (to which a bruise would be more akin compared to red marks), and Zitting said her bruises started out black and blue (not her red marks), which one would think would be an accurate description. Perhaps most telling is the fact that South's attorney at the second hearing cross-examined Zitting with her testimony from the first hearing on certain matters (time she went to sleep, Tr. p. 97, Ll. 24-25; medications taken, Tr. p. 104, Ll. 9-11; what she yelled when she entered the door, Tr. p. 106, Ll. 16-23), but *did not cross-examine Zitting at all as to her prior testimony on the subject of her neck injuries!* If the testimony of Zitting was as inconsistent as claimed in South's briefing, South certainly did nothing to bring that to the attention of Judge Peterson.

South claims Ralph Pentland committed perjury. Authority in Support of Motion to Dismiss, pp. 9-11. Ralph Pentland testified at the first hearing that Zitting's neck was red initially (Tr. p. 39, Ll. 12-23), and at the second hearing he testified Zitting has bruising on her neck the night in question. Tr. p. 117, Ll. 4-20. Again, at the second hearing Ralph Pentland was cross examined by South's attorney as to his testimony on other issues from

the first hearing (that he read his statement to police, Tr. p. 122, L. 22 –p. 124, L. 14; that Zitting stormed out the door, Tr. p. 127, Ll. 3-7; as to when his wife arrived, Tr. p. 127, Ll. 13-15), but *no cross-examination of Paul Pentland at all as to his prior testimony on the subject of neck injuries!* If there were inconsistencies, South's attorney did not bring that to Judge Peterson's attention.

South claims Barbara Pentland committed perjury. Authority in Support of Motion to Dismiss, pp. 11-13. Barbara Pentland did not testify at the earlier hearing, but only as to preliminary matters prior to the courthouse losing power. Tr. p. 52, L. 24 – p. 55, L. 11. South claims her perjury comes from her inconsistencies in her police report compared to her testimony at the second preliminary hearing. Barbara Pentland apparently told police she saw South with his knee in Zitting's abdomen with Zitting on her back, and that she couldn't tell if South had his hands around Zitting's neck, and at the preliminary hearing he was leaning over Zitting with his hands around her throat and his knee in her chest. Tr. p. 140, L. 25 – p. 141, L. 2. At the second preliminary hearing, South's attorney actually cross-examined Barbara Pentland as to what she told police regarding what she saw as to South's hands being around Zitting's neck:

> Q. [by Linda Payne] Okay. And do you recall telling the police that um, you could not—that you could only see Michael's back and Miranda on the floor?
> A. I don't remember that, but if I said it, then it's so.

Tr. p. 152, Ll. 12-16. That is not perjury. If Barbara Pentland was confused about the hands around Zitting's neck, that confusion was discussed in cross-examination before Judge Peterson. Confusion does not equate to perjury. And confusion about seeing South's hands does not impeach Barbara Pentland's consistent testimony about the red marks after the events in question which later turned into bruising.

For South's counsel to accuse the alleged victim Zitting, witnesses Barbara Pentland and Paul Pentland, each with the crime of perjury is unsupportable,

unprofessional (see Idaho Rules of Professional Conduct 3.1 “Meritorious Claims and Contentions”; 3.3 “Candor Toward the Tribunal”; 3.4 “Fairness to Opposing Party and Counsel”), and certainly not persuasive.

Finally, Judge Peterson clearly considered the inconsistencies that South is wont to elevate to the lofty status of “perjury.” Judge Peterson gave a very reasoned discussion of the contradictory evidence he heard:

> So, the act, if believed, is sufficient to constitute the crime charged. The question is the evidence that was presented.
>
> And had Miss Zitting been the only one to testify, the Court doesn’t know quite how it would rule; but in this case, not only did I hear from Miss Zitting, but I heard from the Pentlands. Further, the defense actually presented evidence in this case. And while I cannot construe the defendant’s silence against him in anyway or his failure to produce evidence in anyway, once evidence is presented I can certainly consider it.
>
> For the record, we’re marking Defense A, which is a statement, not admitted.
>
> THE COURT: But I did consider the other documents and, as well, the audio tape that was submitted here.
>
> The trial court is, also, entrusted with the issue of weighing demeanor and credibility. And I think reviewing courts (inaudible)…the trial court, because I get to actually see and hear the people that testify and judge their credibility in part that way.
>
> In this instance, for many reasons, I believe that a factual question has been created for a jury to determine.
>
> And for that reason I’m going to bind the defendant over.
>
> And I’ll give a little bit of explanation.
>
> First of all, in the photographs regarding the neck, which are B, I note some redness. However, I’ll note this, these are apparently computer printed out uh, pictures, which never have the same resolution really or color as the originals. But be that as it may, for me to believe the State’s theory, I could believe that the Pentlands are mistaken on when they saw the bruising. And to me that wouldn’t be uncommon.
>
> However, the defendant’s statement to the police officer is that Miss Zitting was never on the floor. I simply can’t embrace that version of the events. Because that evidence would require me to believe that not only that people are mistaken, but that they’re actively lying to the Court. And while that demeanor might be consistent with the demeanor of not being truthful and being consistent with the demeanor I heard from the defendant on the audio tape, that was certainly the consistent demeanor with someone who is trying to lie and badger his way out of being talked to the police.
>
> That’s not the demeanor I judged. And I would be shocked

> candidly, if any jury judged that the Pentlands were not telling the truth. They may be mistaken in small ways and the Court is willing to accept that. But the Court certainly – to not bind over I would have to believe that the Pentlands were lying. And I simply find that to be an incredible suggestion.
>
> Additionally, I don't believe that the evidence was consistent with these elderly people, as you called them, Miss Payne, trying to stop Miss Zitting, because they were somehow worried Miss Zitting might go on a violent rampage. It's the – quite the contrary. I believe the Pentlands were concerned that Miss Zitting herself might be injured if she left. So, their attempt to stop her was not to save others, it was to prevent her from an anticipated injury at the hands of the defendant, which is exactly what occurred.
>
> Not only is the evidence corroborated by other witnesses regarding the injury to the neck, but I think what's most important is that Miss Pentland, when she came into the room, she saw the physical position of the individuals, which is consistent with the description of Miss Zitting and is completely inconsistent with the statement of the defendant during his angry tirade with the police officer on the phone where he suggested that she was never on the floor at all.
>
> That said, this is a matter for a jury to consider.
>
> I will hold the defendant to answer.

Tr. p. 197, L. 7 – p. 200, L. 4.

South argues the Court erred in finding that the State proved by substantial and competent evidence that South choked Zitting. Defendant's Authority in Support to Dismiss Information, p.17. Error is not enough. South must show Judge Peterson abused his discretion. *State v. Phelps,* 131 Idaho 249, 251, 953 p.2D 999, 1001 (Ct.App. 1998); *State v. Gibson,* 106 Idaho 54, 57, 675 P.2d 33, 36 (1983). The above reasoning vividly shows Judge Peterson far from abusing his discretion, gave detailed, logical analysis of the evidence in finding probable cause.

South contends that if he had choked Zitting in the manner she claims, the State would have been able to set forth sufficient evidence of this choking by red marks or bruising on Zitting's neck. Defendant's Authority in Support to Dismiss Information, p.17. Such argument ignores the fact that Judge Peterson looked at the photographs and found there to be redness.

There were differences in the testimony at the two preliminary hearings. Officer Clement's testimony, however, did not differ. Clement stated that upon arriving at the scene, he was unable to identify any marks or bruising on Zitting's neck, but that she was red and flushed in the face and neck, which he suggested was the result of her being upset and crying. Incident Report, p. 4. Officer Clement also testified that there were no red marks or bruising the following days. *Id*. Although, Officer Clement did not see any visible marks, he requested that South be charged with Aggravated Assault because he believed that Zitting could have potentially suffered great bodily harm. *Id*. Officer Clement understands the elements of the crime of Aggravated Assault. South seems to want to ignore those elements.

South's argument, based on this divergent testimony, is that because the testimony of the witnesses changed between the first and second preliminary hearing, this testimony amounts to perjury. Defendant's Authority in Support of Motion to Dismiss Information, p. 20. It follows then, South argues, that perjured testimony cannot qualify as substantial and competent evidence to support probable cause. *Id.* Further, South suggests that the testimony of the Pentlands is not credible based on the relationship between them and Zitting. *Id.* at 17.

Regarding the discrepancy within and between the testimony, it is within Judge Peterson's discretion to determine the credibility of testimony and whether testimony is perjured. *State v. Munoz*, 149 Idaho 121, 128, 233 P.3d 52, 59 (Ct.App. 2010) (The trial judge is in a much better position to weigh the demeanor, credibility, and testimony of witnesses and to determine persuasiveness of all evidence.) Judge Peterson determined that the discrepancy between the Pentlands' testimony could be a negligent mistake, but did not believe that they were "actively lying" to the court at the time of testimony. Tr., p. 198, Ll. 12-21. Although the Pentlands were friends with Zitting, Judge Peterson

determined that Barbara Pentland was still credible as to the positions of South and Zitting during the altercation and that the audio tape of South was incriminating. Tr., p. 198, Ll. 21-25. Based on these findings, Judge Peterson determined there remained a factual question to be heard by the jury. Tr., p. 198, Ll. 3-6.

A finding of probable cause by a magistrate may be challenged by filing a motion to dismiss in district court. I.C. § 18-815A. A defendant challenging the sufficiency of evidence presented at the preliminary hearing must demonstrate the State failed to present substantial evidence as to every material element of the offense charged. Idaho Criminal Rule 5.1(b). Evidence is considered substantial, "if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proved." *State v. Mitchell,* 130 Idaho 134, 135, 937 P.2d 960, 961 (Ct.App. 1997). Reviewing courts will not substitute their judgment for that of the magistrate as to the weight of evidence and a probable cause finding will not be disturbed if any reasonable view of the evidence, including permissible inferences, support that the offense occurred and the accused committed it. *State v. Pole,* 139 Idaho 370, 372, 79 P.3d 729, 731 (Ct.App. 2003) (citing *State v. Holcomb,* 128 Idaho 296, 299, 912 P.2d 664, 667 (Ct.App. 1995)).

It is South's contention that, in light of the testimony of Zitting and the Pentlands (the variations in the statements about the bruising and red marks on her neck and sternum), the State has failed to produce substantial evidence that South choked Zitting. Authority in Support of Motion to Dismiss, p.17. According to South, Judge Peterson only believed the testimony of the Pentlands and Zitting; and has not believed the testimony of Officer Clement who stated that there were no visible marks on Zitting's neck. *Id.*

South cites numerous cases in his Defendant's Reply to Plaintiff's Response, which state if a conviction is found at trial based on false or perjured testimony it is not valid and should be vacated. Defendant's Reply to Plaintiff's Response, p. 4. However, this

argument is based on a *conviction at trial,* and Judge Peterson's determination to bind the case over to trial was not a determination of guilt or innocence, but a matter of whether a material question existed for the trier of fact to decide. Therefore, South's legal arguments extrapolated from a jury trial case are misplaced as this case was at the preliminary hearing stage.

Judge Peterson had the benefit of observing the witnesses' testimony. It is his province to evaluate the credibility of the witnesses before him and to weigh the evidence. *See State v. Bush,* 131 Idaho 22, 33, 951 P.2d 1249, 1260 (1997) (reviewing courts' function is to examine supporting evidence, not reweigh to specific evidence); *State v. Owens,* 101 Idaho 632, 640, 619 P.2d 787, 795 (1979) ("In Idaho the credibility of a witness is to be considered by the trier of fact in its determination of the weight to be given the testimony of the witness").

It is not this Court's position to agree or disagree with Judge Peterson's findings. This Court must determine simply whether Judge Peterson abused his discretion. It is patently clear he did not. Here, Judge Peterson stated on the record, "I believe [there is a] factual question for [the] Jury…I do not believe that the Pentlands are actively lying to the court…the demeanor of the audio tape is the demeanor of [a defendant] who would be trying to get out of something." February 3, 2011 Prelim. Tr., p. 198, L. 3 – p. 199, L. 1. There has been no showing of perjury. As to material (keeping in mind what the elements of Aggravated Assault actually are) issues, the testimony is not that inconsistent. Judge Peterson made credibility findings. While South disagrees with those findings, they are supported by substantial evidence. There simply has been no showing made by South that Judge Peterson abused his discretion by believing the testimony of the Pentlands and Zitting.

IV. ORDER.

IT IS HERBY ORDERED THAT MICHAEL SHAWN SOUTH's Motion to Dismiss **DENIED**.

IT IS FURTHER ORDERED THAT MICHAEL SHAWN SOUTH's Motion to Release Medical Records is **DENIED.**

DATED this 22nd day of June, 2011

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of June, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Linda J. Payne
Prosecuting Attorney – Bryant Bushling/Donna Gardner
Hon. Clark Peterson
Hon. Robert Caldwell

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy