

FILED _____

AT _____ O'Clock _____ M
CLERK OF 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)
)
)
 Plaintiffs,)
)
 vs.)
)
 BRUCE J. LARSON)
)
)
 Defendants.)
 _____)

Case No. **CR 2002 15480**

**MEMORANDUM OPINION AND
ORDER ON APPEAL**

I. IDAHO CRIMINAL RULE 29 AND SUFFICIENCY OF EVIDENCE.

The first issue on appeal, as stated in appellant’s brief, is “Was the evidence sufficient to support Larson’s conviction for resisting and obstructing certain personnel?” Appellant’s Brief, p. 7.

At the conclusion of the State’s case, Appellant/Defendant made a motion for judgment of acquittal under I.C.R. 29. Tr. Vol. I, p. 154, L. 23 – p. 155, L. 7. However, that motion was based on the mistaken ground that there was no evidence at trial that the crime occurred in Kootenai County. *Id.* That motion was denied by the trial court. Tr. Vol. I, p. 159, L. 25. Appellant’s Notice of Appeal lists as an issue: “C. Whether the trial court erred in failing to grant the defendant’s I.C.R. 29 motion at the close of the state’s case.” Notice of Appeal, p. 2.

That basis for appeal lacks any merit, Officer Mason testified this happened in Kootenai County. Tr. Vol. I, p. 55, Ll. 10–19.

Appellant’s brief argues many other claims of insufficiency of the evidence, other than that stated in the I.C.R. 29 motion. However, no I.C.R. 29 Motion is required to preserve an appeal based on insufficient evidence. The purpose of Rule 29 is to test the sufficiency of the evidence against a defendant and avoid the risk that a jury may find the defendant guilty when there is not legally sufficient evidence. 2A Wright, Federal Practice and Procedure ¶ 461 (Criminal 3d ed. 2000), (discussing the similar Federal Rule of Criminal Procedure 29, Motion for Judgment of Acquittal). In *State v. Faught*, the Idaho Supreme Court held that it is not necessary to move for a judgment of acquittal under I.C.R. 29 before the case is submitted to the jury or after the jury returns a verdict, in order to preserve the right to later challenge the conviction in an appeal asserting that there was insufficient evidence to support the conviction. *State v. Faught*, 127 Idaho 873, 877, 908 P.2d 566, 570 (1995), citing *State v. Ashley*, 126 Idaho 694, 889 P.2d 723 (Ct. App. 1994).

A defendant who puts on evidence after a trial court denies a motion for directed verdict at the close of the State’s case does waive his right to limit appellate review of sufficiency to the evidence to that presented up to the close of the State’s case. *Id.*, citing *State v. Watson*, 99 Idaho 694, 587 P.2d 835 (1978). In the present case, defendant and his brother testified after the State rested and defendant made their I.C.R. 29.

II. TERRY V. OHIO IS NOT APPLICABLE.

Appellant does not argue *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), but respondent, State of Idaho does. Response Brief, pp. 2-3. This Court finds *Terry* not applicable to this appeal.

A *Terry* stop is typically investigative in nature, a minimally intrusive stop when reasonable suspicion exists and further investigation is warranted. That was simply not the case here, Larson slammed the door in the officer's face. This amounts to a willful act to delay or obstruct a public officer in the discharge of his duty. ICJI 1260. Larson was subject to arrest at that time, the offense was complete, *Terry* is not relevant. When Larson slammed the door he committed a public offense in the presence of an officer and was subject to arrest at that time. I.C. § 9-603.

III. THERE IS SUFFICIENT EVIDENCE TO SUPPORT LARSON'S CONVICTION FOR RESISTING OR OBSTRUCTING CERTAIN PERSONNEL.

Three Idaho cases offer some insight into what type conduct amounts to resisting, obstructing, or delaying.

In *State v. Anderson*, 138 Idaho 359, 63 P.3d 485 (Ct. App. 2003), officers attempted to contact Anderson after observing him on his bicycle and noting that he had outstanding warrants. *Id.*, at 360, 63 P.3d at 486. Anderson rode off on the bicycle. *Id.* Anderson was found in a bedroom closet in a residence (a person at the house gave officers permission to enter) and arrested on the warrants and also charged with resisting an officer. *Id.*, at 360-61, 63 P.3d at 486-87. The Idaho Court of Appeals referred to this as overwhelming evidence that Anderson resisted, delayed or obstructed a public officer. *Id.*, at 363, 63 P.3d at 489.

In *State v. Quimby*, 122 Idaho 389, 834 P.2d 906 (Ct. App. 1992), the Idaho Court of Appeals found there was probable cause to arrest for obstructing a police officer when the defendant verbally harassed officers and failed to follow instructions while the defendant's brother was being arrested. *Id.*, at 390, 834 P.2d at 907. The defendant's behavior and proximity were "clearly intrusive". *Id.* After Quimby repeatedly failed to back away and stay

away from the officers during an on going arrest, and after Quimby made obscene gestures and shouted an obscene phrase at the officers he was advised that he was under arrest. *Id.*, at 391, 834 P.2d 908. Quimby fled, was tackled and arrested. *Id.* In discussing whether or not there was probable cause to arrest Quimby for resisting arrest the Court of Appeals said:

The question before us is whether there was probable cause to place Quimby under arrest for obstructing a police officer. A peace officer may make a warrantless arrest when a person has committed a public offense in the presence of the peace officer. I.C. § 19-603(1). Reasonable or probable cause for an arrest exists where the officer possesses information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. *State v. Kysar*, 116 Idaho 992, 993, 783 P.2d 859, 860 (1989); *State v. Loyd*, 92 Idaho 20, 23, 435 P.2d 797, 800 (1967).

Quimby, 122 Idaho at 391, 834 P.2d at 908. Quimby did not touch the officers, he placed himself in their path, forced them to push him out of the way, and ignored the officers verbal requests to stay back. *Id.* The Court of Appeals noted that there was “no question that the officers had probable cause to arrest Quimby for obstructing”. *Id.*

The third case examined is *State v. Wight*, 117 Idaho 604, 790 P.2d 385 (Ct. App.1990). Wight was a passenger in a vehicle driven by his wife. When the vehicle was stopped, the officer told Wight to get out of the vehicle and place his hands on the hood. 117 Idaho at 606, 790 P.2d at 387. Wight refused to comply with the officer’s order. The officer was concerned that Wight may have been armed and attempted to place Wight’s hands on the vehicle’s hood. *Id.* Wight pushed back, causing the officer to lose his balance. *Id.* Wight was arrested for obstructing and delaying an officer in the discharge of his duties. *Id.*

Wight was aware that the officer was discharging his duties, he refused to obey the officer’s orders to keep his hands away from the bulge in his jacket, and then continued to shout at the officers in a threatening manner. 117 Idaho at 607, 790 P.2d at 388. When the officers attempted to pat Wight down and use reasonable force to place his hands on the hood of the

vehicle Wight resisted, pushing the officer. *Id.* The Idaho Court of Appeals was convinced the officer had probable cause to arrest Wight for obstructing and delaying. *Id.*

In the present case Larson's behavior seems to rise to the level "that would lead a person of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty of resisting or obstructing certain personnel," ONLY because they told defendant they needed to talk to a responsible party about the noise. *Quimby*, 122 Idaho at 391, 834 P.2d at 908. Compare the record of the present case with jury instruction 1260:

In order for the defendant to be guilty of [Resisting] [Delaying] [or] [Obstructing] an Officer, the state must prove each of the following:

1. On or about [date]

[August 14, 2002. Tr. Vol. I, p. 53, Ll. 4-5.]

2. in the state of Idaho

[Tr. Vol. I, p. 55, L. 18.]

3. the defendant [name] willfully

[Per ICJI 340 willfully means done on purpose. Larson attempted to slam the door in the officers' face when told that the officers' needed to talk to a responsible party about the noise. Tr. Vol. I, p. 61, Ll. 10-18 (emphasis added).]

3. [resisted] [delayed] [obstructed]

[Again, after Larson was told the officers' needed to talk to a responsible party about the noise, Larson committed his willful act of slamming the door.]

5. [name of officer], a public officer,

[In this case the officer was John Mason. Tr. Vol. I, p. 52, L. 9.]

6. in the discharge, or attempt to discharge, any duty of [name of officer's] office.

[The officer was attempting to answer a noise complaint. Tr. Vol. I, p. 54, Ll. 17-20. The officer told Larson that he needed to talk to a responsible party about the complaint. Tr. Vol. I, p. 61, Ll. 2-18.]

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

ICJI 1261 was given in this case along with ICJI 1260. ICJI 1261 reads:

In order to show that the offense of [Resisting] [Delaying] [or] [Obstructing] a Public Officer was committed "wilfully," the state must prove that the defendant knew:

(1) that the person the defendant [resisted,] [delayed,] [or] [obstructed] was a public officer; and

[Larson was told the police were at the door. Tr. Vol. I, p. 59, Ll. 16-17. Larson's comments later made it clear that he knew he was dealing with the police. Tr. Vol. I, p. 95, Ll. 8-11.]

(2) that the public officer was attempting to perform, or was engaged in the performance of, some official duty.

[Officer Mason informed Larson that he was there in regards to noise and fireworks. Tr. Vol. I, p. 61, Ll. 2-18.]

The word "duty" includes only the lawful and authorized acts of a public officer.

The standard of review for the sufficiency of evidence is set out in *Anderson*:

Appellate review of the sufficiency of the evidence is limited in scope. A judgment of conviction, entered upon a jury verdict, will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct.App.1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct.App.1991). We will not substitute our view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct.App.1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

State v. Anderson, 138 Idaho 359, 363, 63 P.3d 485, 489 (Ct. App. 2003). Given the evidence on the record in this case and the standard of review which requires that the evidence be considered in the light most favorable to the prosecution, Larson's conviction does not fail for sufficiency of evidence.

Defendant / appellant argues the threshold of a residence cannot be entered without a warrant, citing *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980), and other cases. Appellant's Brief, pp. 9-12. However, the threshold of a residence door is not an absolute barrier when an officer has articulable suspicion to warrant a *Terry* stop, or when a party retreats during an arrest.

In *State v. Hinson*, the Idaho Supreme Court held that when an officer responding to a call at a residence had a valid purpose for going to the residence and then developed a reasonable, articulable suspicion to warrant a *Terry* stop while the defendant was standing in the threshold of the open doorway of the residence, the officer did not violate the defendant's fourth (4th) Amendment rights by entering the residence to perform a further investigation. *State v. Hinson*, 132 Idaho 110, 112, 967 P.2d 724, 726 (1998), citing *State v. Manthei*, 130 Idaho 237, 939 P.2d 556 (1997).

A *Terry* stop is a recognized investigative method under the Idaho Constitution. *State v. Johns*, 112 Idaho 873, 877, 736 P.2d 1327, 1331 (1987) (Under *Terry* and Idaho law, limited stops can be made for investigative purposes.). Such an investigative stop is an "intermediate response" that allows an officer, who lacks probable cause to make an arrest, to actively investigate possible criminal behavior. *Cook*, 106 Idaho at 214, 677 P.2d at 527.

State v. Ferreira, 133 Idaho 474, 481, 988 P.2d 700, 707 (Ct. App. 1999).

Under *Terry* and under Idaho law, limited stops can be made for investigative purposes and to enhance the safety of the police officer who is conducting an investigation. If the officer's suspicions are confirmed or further aroused, the stop may be prolonged and the scope of the investigative stop enlarged. See *State v. Burgess*, 104 Idaho 559, 661 P.2d 344 (Ct.App.1983). The standard of proof which a state must satisfy

in order to justify an investigatory stop is to be judged by a "totality of the circumstances." *State v. Haworth*, 106 Idaho 405, 679 P.2d 1123 (1984). See *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *State v. Cowen*, 104 Idaho 649, 662 P.2d 230 (1983); *State v. Post*, 98 Idaho 834, 573 P.2d 153 (1978).

State v. Johns, 112 Idaho 873, 877, 736 P.2d 1327, 1331 (1987).

In *Manthei* the Nampa Police officer went to a residence to serve a summons. *State v. Manthei*, 130 Idaho 237, 939 P.2d 556 (1997). When the officer knocked on the door Bradley Manthei (not the party to be served) answered and identified himself as Brad Martell. *Id.* During this encounter the officer noticed a syringe in Manthei's shirt pocket. *Id.* at 238, 939 P.2d at 557. The officer called for backup and told Manthei to step out ("Brad step out."). Manthei attempted to slam the door then retreated into the residence. *Id.* at 238, 939 P.2d at 557. The officer followed Manthei into the residence where evidence was recovered and Manthei was arrested for possession of methamphetamine. *Id.* at 238, 939 P.2d at 557.

The Idaho Supreme Court held that: 1) the officer had reasonable, articulable suspicion that a crime was being committed or was about to be committed and had authority to detain Manthei under *Terry*, *Id.* at 239, 939 P.2d at 558; 2) the officer legally entered the residence to complete the detention of Manthei under *Terry*, *Id.* at 240, 939 P.2d at 559. The second part of the holding was based in part on *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406 (1976). In *Santana* the suspect was standing in the threshold of her home when officers approached to make an arrest for possession of heroin with the intent to distribute. *Id.* As the officers approached, Santana retreated into the foyer of her home where the officers caught up with her and she was arrested. *Id.* at 40-41, 96 S.Ct 2408-09.

The *Santana* decision is based in part on *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). In *Watson* the United States Supreme Court held that a warrantless arrest of an individual in a public place upon probable cause was not a Fourth Amendment

violation. *Santana*, 427 U.S. at 42, 96 S.Ct. at 2409. The United States Supreme Court in *Santana* held that a suspect may not defeat an arrest that has been set in motion in a public place, and is therefore proper under *Watson* by escaping to a private residence. *Santana*, 427 U.S. at 43, 96 S.Ct. at 2410. The logic behind this decision is simple. A person has no expectation of privacy in areas exposed to the public, even in his own house or office. *Id.* Those exposed areas are not afforded Fourth Amendment protection. *Id.*, citing *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). *Santana*, standing in the threshold of her house was visible to the public, and was exposed as if she was standing completely outside her house. When the police sought to arrest her and had proper probable cause to do so, they were simply attempting to perform a function that had been approved in *Watson*. *Id.* The retreat into the house created an immediate chase by police, a ‘hot pursuit’ that ended almost immediately. *Santana*, 427 U.S. at 43, 96 S.Ct. at 2410. The retreat did not thwart an otherwise proper arrest. *Santana*, 427 U.S. at 42, 96 S.Ct. at 2409.

IV. CONCLUSION ON THE CLAIMS OF INSUFFICIENCY OF THE EVIDENCE.

In this case *Terry* is not an issue. When the officer arrived and found Larson at the threshold, Larson was in a public place with no reasonable expectation of Fourth Amendment protections. There is no known requirement to actively volunteer to assist an officer in the completion of his official duties. The facts here show that Larson took the affirmative step of obstructing, resisting or delaying the officers in their response to the noise and fireworks complaint. This affirmative act, attempting to slam the door, amounted to the commission of a misdemeanor in the presence of the officer. Until Larson attempted to slam the door in the officer’s face the officer apparently had no articulable suspicion that a crime was in progress or that criminal activity was afoot. *Hinson*, 132 Idaho 110, 967 P.2d 724, (1998); *State v. Manthei*,

130 Idaho 237, 939 P.2d 556 (1997); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), Tr. Vol. I, p. 61, Ll. 10-17; p. 65 L. 3 to p. 67, L. 14. If Larson had simply quit talking and returned to his party it seems clear that officer Mason had no articulable suspicion upon which a *Terry* stop could be based. Larson instead acted and committed a misdemeanor in the presence of the officer and at that instant *Terry* became irrelevant.

Larson was subject to a warrantless arrest at that moment and his retreat into the residence did not provide him with any sort of legal sanctuary to protect him from that arrest. The trial court is affirmed on the issue of insufficient evidence.

V. THE TRIAL COURT DID NOT REFUSE TO ADMIT EVIDENCE THAT THE OFFICERS DID NOT HAVE A SEARCH WARRANT WHEN THEY ENTERED LARSON'S HOME.

The defendant notes that Officer Mason was cross examined by the defendant's attorney and asked, "did you have a warrant for Mr. Larson?" Tr. Vol. I, p. 100, L. 24. Later Officer Mason was asked was asked, "did you at anytime go and seek a warrant to go into that house?" Tr. Vol. I, p. 103, Ll. 5-6. The trial court sustained the state's objection to both of these questions based on relevance. Tr. Vol. I, p. 101, L. 2; p. 103, L. 9. Defendant claims that court erred in sustaining the state's objections. Appellant's Brief, p. 13.

If an error concerns evidence omitted at trial, the test for harmless error is whether there is a reasonable possibility that the lack of excluded evidence might have contributed to the conviction. *State v. Harris*, 132 Idaho 843, 847, 979 P.2d 1201, 1205 (1999). Questions about relevancy of evidence are reviewed *de novo*, other questions concerning the admission of evidence are reviewed for an abuse of discretion. *State v. MacDonald*, 131 Idaho 367, 369, 956 P.2d 1314, 1316 (Ct. App. 1998). Issues only mentioned in an appellate brief which the appellant fails to argue or support with authority are not addressed on appeal. *Grube v. State*,

134 Idaho 24, 34, 995 P.2d 794, 804 (2000), (Foot note 1); *Davis v. Parish*, 131 Idaho 595, 599, 961 P.2d 1198, 1202 (1998); *Smith v. Parson*, 127 Idaho 937, 945, 908 P.2d 1244, 1252 (1996).

In the present case the defendant asserts that the court erred in sustaining the state's objections. Appellant's Brief, p. 13. No argument in addition to the simple conclusory statement was offered to support the defendant's assertion. In fact the question of whether the officers had warrants had already been asked and answered. Defendant's attorney asked officer Mason, "Mr. Mason, did you have a warrant when you went in that house?" Tr. Vol. I, p. 100, Ll. 2-4. Officer Mason responded, "No." Tr. Vol. I, p. 100, L. 4. While the question was not, "did you have a **search** warrant", but only "did you have a warrant", the defendant offers no argument that there is a reasonable possibility that the lack of evidence may have contributed to the conviction. *State v. Harris*, 132 Idaho at 847, 979 P.2d at 1205.

The appellant failed to offer any argument to support the claim that refusing to admit the evidence of whether or not the officers had a warrant was reversible error. This issue not being further supported by argument or authority will not be considered on appeal. The trial court is affirmed on that issue.

VI. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVER LARSON'S REQUESTED JURY INSTRUCTION NUMBER 9.

The defendant argues that by excluding proposed instruction 9 which states that; "an officer's warrantless entry into a residence is presumptively unreasonable . . .", the court erred. Appellant's Brief, p. 13. It is claimed that exclusion of the defense's proposed instruction 9 excluded a proper statement of law. Appellant's Brief, p. 14. The defendant states that excluding proposed defense instruction 9 resulted in the jury not being adequately apprised of the law applicable to Larson's theory of the case.

Whether or not the jury was properly instructed is a question of law that the appellate court freely reviews. *State v. Suiter*, 138 Idaho 662, 669, 67 P.3d 1274, 1281 (Ct. App. 2003). When reviewing jury instructions the court should ask whether the instructions as whole and not individually, fairly and accurately reflect the applicable law. *Id.*

When a jury instruction is requested the court must: 1) determine if the theory presented in the instruction applies to the case and then; 2) determine if the instruction is a correct statement of the law. *State v. Eastman*, 122 Idaho 87, 90 831 P.2d 555, 558 (1992).

The defense's proposed instruction 9 does contain a correct statement of the law supported by citation to several cases including: *U.S. v. Shaibu*, 920 F.2d 1423, 1425 (9th Cir. 1990); *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *State v. Curl*, 125 Idaho 224, 225, 869 P.2d 224, 225 (1993); and *State v. Abeyta*, 131 Idaho 704, 963 P.2d 387 (Ct. App. 1998). A further examination of *Abeyta* makes it clear that proposed instruction 9 contains a correct statement of law, it is an incomplete statement of law. *Abeyta*, in discussing warrantless entry into a residence states:

This presumption is strong and may be overcome only under limited, well-recognized exceptions, such as an entry based upon probable cause and exigent circumstances or consent. *Payton v. New York*, 445 U.S. 573, 589-90, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *State v. Yeates*, 112 Idaho 377, 380-81, 732 P.2d 346, 349-50 (Ct.App.1987)."

Abeyta, 131 Idaho at 707, 963 P.2d at 3909.

When reviewed as a whole, the instructions do clearly state the law. Proposed instruction 9 did not fairly and accurately reflect the applicable law as required by *Suiter*. Proposed instruction 9 is a correct statement, it is not a complete statement. The trial court did not err in refusing to give proposed instruction 9.

ORDER

It is hereby ordered, the decision of the trial court is AFFIRMED, and this case is remanded to Magistrate's Division for action consistent with this order.

Entered this _____ day of August, 2004.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2004, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Marty Raap	208-446-1833	Fred Loats	208-664-3644
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Secretary