STATE OF IDAHO)
County of Kootenai)ss

FILED 7/12/18

AT 11:00 O'clock a 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.

RANDY KRIEG,

Defendant.

Case No. **CRM 2017 12746**

MEMORANDUM DECISION AND ORDER ON APPEAL AFFIRMING THE MAGISTRATE JUDGE

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On July 16, 2017, defendant Randy Krieg (Krieg) was arrested for assault upon Dirk King (King), a Kootenai Health Security Officer. According to the police report, Krieg had been argumentative, confrontational, highly agitated, loud, and was using vulgar language "all morning" outside the Kootenai Health hospital. Kootenai Health Security Officer King was interacting with Krieg when Krieg became physically aggressive. Krieg then "reared back" his arm and made a fist as if to strike King, and King felt threatened by this action and was sure he was about to be struck by Krieg before other security staff came and they detained Krieg.

Krieg was convicted of misdemeanor assault following a jury trial held November 1-2, 2017. Magistrate Judge James Combo presided over that trial. On December 14, 2017, Krieg, through his conflict public defender trial attorney, timely filed a Notice of Appeal.

Signed: 7/12/2018 02:05 PM

The sole issue in that Notice of Appeal was "Did the Magistrate error [sic] by denying Defendant's requested jury instruction per the hearing on November 2, 2017?" Notice of Appeal, 2. In his Appellant's Brief, filed March 19, 2018, counsel for Krieg made more specific his issue on appeal as: "The Magistrate erred when it [sic] overruled Defendant's objection to include the Instruction No. 15, namely the 'definition of Assault' to the jury." Appellant's Brief, 2. Counsel for the plaintiff State of Idaho (State) filed Respondent's Brief on April 19, 2018. Counsel for Krieg did not file a reply brief. Oral argument was held on June 7, 2018.

Well in advance of the November 1, 2017, trial, on September 10, 2017, counsel for the plaintiff State of Idaho (State) timely submitted jury instructions. Idaho Criminal Rule 30(b)(1) requires a party requesting an instruction to file such request with the court, "no later than five days before trial." This Court notes that Krieg's attorney failed to timely file any requested jury instructions at any time prior to trial. On the second day of trial, counsel for Krieg apparently submitted (but did not file) two instructions which were referenced by counsel for Krieg during an instruction conference. Tr. 3:22 – 4:4 (Nov. 2, 2017). These appear in the court file as unedited photocopies of the form ICJI 1201 (definition of assault) and the form ICJI 103 (definition of reasonable doubt). As they are both photocopies of the form instruction, they contain citation and comment and thus, could not be submitted to the jury; no corresponding "clean" copy (without citations and comment) was submitted. They were submitted untimely. I.C.R. 30(b)(1).

Counsel for the State submitted plaintiff's requested instruction No. 3, which was an edited version of ICJI 1202, an "elements" instruction for the crime of assault. Idaho Criminal Jury Instruction 1202 reads:

INSTRUCTION NO. ___
In order for the defendant to be guilty of Assault, the state must

prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] committed an assault
4. upon [name of victim]
[5. by (description of conduct alleged in the charging document)].

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.

Plaintiff's requested instruction No. 3 gave the elements for the crime of assault as set forth in ICJI 1202, and added language for element five describing "how" the assault allegedly occurred, "by physically preparing to strike Dirk King making a fist and pulling his arm back." At trial, at the first instruction conference (which apparently occurred on the first day of trial and is thus not part of the record) counsel for Krieg objected to that specific language of subpart five being included. This was reiterated by Judge Combo at the start of the second day of trial at an instruction conference that day. Tr. 6:22 – 7:10. Counsel for the State had no objection to the removal of that language that the State had submitted. *Id.* Accordingly, that language was stricken by Judge Combo in the instructions the Court prepared for the jury. Plaintiff's requested instruction No. 3 (without subparagraph 5) became Instruction No. 14 as prepared by Judge Combo.

Just before the instructions were to be given to the jury, Krieg's counsel then objected to that language of subparagraph 5 not being included. Tr. 4:17 – 5:17. The basis given by Krieg's trial counsel for this new objection is difficult to understand, but Judge Combo summarized the defendant's objection as best he could. Tr. 8:24 – 9:10. Responding to that objection, the Court found that including the specific description of how Krieg committed the assault was not needed; Judge Combo stated:

> Since the time of the jury instruction conference, there has been additional evidence and testimony presented as to the nature of the acts

that occurred that day. The Court finds that including subpart 5 is not accurate in its entirety at this point given the evidence that's been presented. And so the Court will continue to strike subpart 5 from requested instruction No. 3. And will overrule the objection to instruction No. 14.

Tr. 10:4-12.

Counsel for Krieg also objected to the Court giving instruction No. 15, which was the State's requested instruction No. 2, which was taken from ICJI 1201, an instruction which defines the two ways a person may commit an assault. Tr. 4:17 – 5:17. Idaho Criminal Jury Instruction 1201 reads:

INSTRUCTION NO. ___

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 first comment to ICJI 1201 reads:

I.C. § 18–901. This instruction should be used only when the commission of an assault is an element of another crime, e.g., I.C. § 18–909.

It is this comment upon which counsel for Krieg seizes in his appeal. As discussed below, this Court finds Krieg's counsel's argument is completely without merit and is misguided.

II. STANDARD OF REVIEW.

The Idaho Supreme Court has held:

When reviewing jury instructions on appeal, the Court is guided by several well-established general rules of construction. On appeal, the review of jury instructions is generally limited to a determination of whether the instructions, when considered as a whole and not individually, fairly and adequately present the issues and state the applicable law. If the instructions fairly and adequately present the issues and state the law, no reversible error is committed. An erroneous instruction does not constitute reversible error where the instruction taken as whole neither misleads nor prejudices a party. Only instructions which are pertinent to the pleadings and the evidence should be given, but where it appears that

> the giving of the instruction did not result in any substantial injury, though not founded on the issues, the case will not be reversed. Additionally, the giving of an erroneous jury instruction does not generally justify granting a new trial unless the appellant can establish that he or she was prejudiced thereby, and that the error affected the jury's conclusion.

Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co., 153 Idaho 716, 724, 291 P.3d 399, 407 (2012), *citing Robinson v. State Farm Mut. Auto. Ins. Co.,* 137 Idaho 173, 176, 45 P.3d 829, 832 (2002) (citations omitted).

III. ANALYSIS.

A. This Court cannot "presume" error occurred.

Counsel for Krieg claims, "By stating the very broad definition of assault as used against the comment to ICJI 1201, the jury was severely prejudiced to unlawfully find the Defendant guilty for actions that did not constitute assault." Appellant's Brief, 3. That is it. That is the entirety of counsel for Krieg's argument. Counsel for Krieg gives no reason, no argument, and no basis for *why* or *how* his claim might be true. Simply claiming the jury was "severely prejudiced" does not make it so.

By making such an unsupported argument, counsel for Krieg is essentially asking this court to "presume" that Judge Combo committed legal error in not following counsel for Krieg's change of course as to this particular instruction. Without giving any reason as to *why* or *how* his claim might be true, that is all counsel for Krieg is left with, asking this Court on appeal to presume Judge Combo committed legal error in giving an instruction. Where the defendant has not affirmatively shown how he was prejudiced by the court's jury instructions, the court will not presume error. *State v. Walker,* 121 Idaho 18, 20, 822 P.2d 537, 539 (Ct. App. 1991).

This Court finds there was no possible way the jury "was severely prejudiced to unlawfully find the Defendant guilty for actions that did not constitute assault", simply

because Judge Combo gave ICJI 1201 which defines "assault" as set forth in Idaho Code § 18–901. Counsel for Krieg's argument is as follows: the jury, "was severely prejudiced to unlawfully find the Defendant guilty for actions that did not constitute assault", because Judge Combo gave the jury the instruction defining "assault" as approved by the Idaho Supreme Court. Such argument defies all logic.

B. There was no error committed by the trial judge.

Idaho Code § 18–901 is captioned "Assault defined", and ICJI 1201 tracks verbatim with Idaho Code § 18–901. Nothing in Idaho Code § 18–901, or any case in which it is interpreted, specifies that a judge should only use the statutory definition when an "assault" is "an element of another crime." Thus, the Idaho Supreme Court's comment in ICJI 1201 finds no support in the very statute for which it was created, Idaho Code § 18–901. Idaho Criminal Jury Instruction 1201 is the only instruction found within the Idaho Criminal Jury Instructions which defines what constitutes an "assault." Thus, if a jury is to be instructed on what an "assault" is, ICJI 1201 is the only instruction approved by the Idaho Supreme Court. There is no alternative. It would appear that the first comment (use only when assault is an element of another crime) to ICJI 1201 is an erroneous comment made by the Idaho Supreme Court. Even though that comment exists, counsel for Krieg's arguments on appeal have no merit when that comment is taken in context.

The most powerful proof that counsel for Krieg is misguided when he seizes upon the first comment to ICJI 1201 ("This instruction should be used only when the commission of an assault is an element of another crime, e.g., I.C. § 18–909"), is the fact that the first comment to 1202 reads: "I.C. § 18–901. Use with ICJI 1201 which provides a definition of assault." This eviscerates counsel for Krieg's argument that ICJI 1201 should never be used unless "assault is an element of another crime", because in ICJI 1202, the Idaho

Supreme Court specifically tells counsel for Krieg and every attorney and every judge in the state of Idaho that ICJI 1202 should be used in conjunction with ICJI 1201.

Even if the first comment to ICJI 1201 is exactly what the Idaho Supreme Court wished to have happen in all circumstances (that is, "only use this instruction when assault is an element of another crime"), giving ICJI 1201 is not reversible error. "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." *State v. Skunkcap,* 157 Idaho 221, 230, 335 P.3d 561, 570 (2014) (*citing State v. Draper,* 151 Idaho 576, 588, 261 P.3d 853, 865 (2011). This brings us back full circle to counsel for Krieg's claim in his brief on appeal that, "By stating the very broad definition of assault as used against the comment to ICJI 1201, the jury was severely prejudiced to unlawfully find the Defendant guilty for actions that did not constitute assault." Appellant's Brief 3. This unsubstantiated claim has no merit. There is no argument that counsel for Krieg can ethically make that this jury was somehow misled by the giving of ICJI 1201 when that is the only definition provided by the Idaho Supreme Court and that instruction mirrors Idaho Code § 18–901. This Court finds it impossible that the jury "was severely prejudiced to unlawfully find the Defendant guilty for actions that did not constitute assault", simply because Judge Combo gave ICJI 1201 which defines "assault" as set forth in Idaho Code § 18–901.

C. Counsel for Krieg has failed to provide an adequate record on appeal.

There is no transcript of what evidence was presented at trial. Only counsel for Krieg can be blamed for this deficiency. The *only* transcript prepared was for the second day of the jury trial. No evidence was taken on the second day of trial. The only occurrences on the second day were a discussion about the jury instructions, the giving of instructions and closing arguments. Counsel for Krieg has failed his client at two junctures.

Primarily, counsel for Krieg made a mistake in what he requested in his Notice of Appeal filed on December 14, 2017. Counsel for Krieg failed to follow the mandate of I.A.R. 17(h), as he failed to request a transcript. Counsel for Krieg failed to follow the form of the notice of appeal as set forth by the Idaho Supreme Court in I.A.R. 17(o). The Idaho Appellate Rules apply to this appeal under I.C.R. 54(f). Additionally, Idaho Criminal Rule 54(g) specifies what an appellant must do regarding the transcript. Idaho Appellate rule 17(h) requires a party on appeal to designate whether a transcript is requested, and all counsel for Krieg did in his Notice of Appeal was state, "The testimony and proceedings were recorded and said recordings are in the possession of the Court Clerk and his deputies." While that statement satisfies what is required in a Notice of Appeal under I.C.R. 54(d), it in no way satisfies what is required no later than fourteen days later under I.C.R. 54(g). Given his inadequate request, counsel for Krieg is fortunate to have had a transcript of the second day of trial prepared. It is understandable that the Court Reporter prepared a transcript for only the second day of trial as counsel for Krieg's Notice of Appeal only pertains to the jury instruction issue. Had counsel for Krieg followed the form articulated by the Idaho Supreme Court in I.A.R. 17(o) and I.C.R 54(g), he would have been guided through the process of specifying the portions of the reporter's transcript being requested. Secondarily, counsel for Krieg failed his client by not requesting a supplement to the transcript as allowed under I.A.R 17, I.A.R. 19, and I.C.R. 54(k), in the nearly five months from the date the transcript was filed on January 17, 2018, to the June 7, 2018, oral argument. The Idaho Appellate Rules apply to this appeal. M.C.R. 17; I.C.R. 54(o),(q).

D. This Court will not consider issues not raised in the appellate briefing.

At oral argument, Krieg's attorney (a different attorney appeared for oral argument) for the first time raised the possibility that there was other uncharged conduct presented to

the jury upon which the jury could have improperly considered in rendering its verdict, and an argument was made that the charging document, the citation, did not contain any specific conduct.

Neither of these arguments have merit. First, because these issues were not raised in the Notice of Appeal and was not raised in Krieg's Appellant Brief, this Court will not consider such argument raised for the first time at oral argument. An appellate court will not review the actions of a lower court which have not specifically been assigned as error, raised by a party or argued in their briefs. *State v. Hoisington,* 104 Idaho 153,159, 657 P.2d 17, 23 (1983); *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 93, 803 P.2d 993, 999 (1991). Second, even if this Court could reach that issue procedurally (the cases cited immediately above prove that it cannot), this Court has no record from which to make such a determination because Krieg's counsel failed to obtain a transcript of the evidence presented at trial. Finally, at trial, Krieg's counsel failed to move or demand for a sworn complaint as provided by M.C.R. 3(d).

IV. CONCLUSION AND ORDER.

The instructions given by Judge Combo, when considered as a whole and not individually, fairly and adequately present the issues and state the applicable law, and thus, no no reversible error was committed. *Lakeland True Value Hardware, LLC* 153 Idaho at 724, 291 P.3d at 407, *citing Robinson,* 137 Idaho at 176, 45 P.3d at 832 (citations omitted). Even if an erroneous instruction was given, counsel for Krieg has failed to demonstrate how the jury was misled or Krieg was prejudiced. *Id.*

IT IS HEREBY ORDERED THAT all decisions of Judge Combo made at trial regarding jury instructions are **AFFIRMED.**

DATED this 12th day of July, 2018

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of July, 2018 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Doug Pierce dougs@douglaspierce.law
Prosecuting Attorney – Eileen McGovern, CDA City Atty. E.O.
FAX 769-2326 #6485

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY Deputy