

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37374

STATE OF IDAHO,)	2011 Unpublished Opinion No. 467
)	
Plaintiff-Respondent,)	Filed: May 11, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
MARK ANTHONY JOLLEY,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Owyhee County. Hon. Gregory M. Culet, District Judge.

Judgment of conviction for two counts of aggravated assault, affirmed.

Nicholas V. Vieth, Coeur d’Alene, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Mark Anthony Jolley appeals from his judgment of conviction for two counts of aggravated assault. He argues that the district court erred in not holding hearings on his motions in limine, in not allowing him to elicit impeachment testimony from a State witness, and in failing to instruct the jury on the lesser included offense of simple assault. We affirm.

**I.
BACKGROUND**

Jolley’s convictions arise from an incident that occurred in the early morning hours of December 9, 2008. On that date, two repossession men drove onto Jolley’s property to take possession of Jolley’s daughter’s car for failure to make the required payments. Upon waking to a disturbance, Jolley armed himself with a gun and walked outside to investigate. Jolley confronted the repossession men, who testified at trial that they identified themselves, their purpose, and gave Jolley paperwork in the form of an “affidavit of repossession.” Jolley ordered them to unload the car, pulled out his gun, and held it to each of the men’s heads in turn. Jolley

testified that the men did not identify themselves or give him paperwork and it was not until one of the men hit him on the shoulder as Jolley was attempting to get around the man that Jolley pulled his gun and ordered them to unload the car. Jolley also asserted that he saw a metallic object in one of the men's hands and thought it was a weapon. The repossession men testified that one of them attempted to call the police but that Jolley put the gun to his head and told him to disconnect. Once the car was unloaded, Jolley ordered one of the men to drive off his property and walked the other man, at gunpoint, alongside the vehicle to the property line and forced the man to read a "no trespassing" sign out loud to Jolley.

After leaving the property the repossession men called the police. Deputy Aaron Streibel responded to Jolley's property. Jolley confronted Deputy Streibel and ordered Streibel off his property. During Jolley's heated exchange with Deputy Streibel he admitted to pointing the gun at the repossession men but said he had done so to protect his property. Deputy Streibel thereafter arrested Jolley, who was charged with two counts of aggravated assault, Idaho Code §§ 18-901 and 18-905.

Prior to trial, Jolley filed a motion to dismiss based on a theory that he acted in self-defense and, in the alternative, motions to exclude from trial a video taken by Deputy Streibel on the night of the incident and to include at trial a self-defense jury instruction. After voir dire but before the evidentiary portion of the trial, the trial court heard argument on the motion to exclude the video. The court preliminarily ruled that the video was likely admissible but reserved final ruling until a foundation had been established at trial. The court later determined the video was admissible. The court never held a formal hearing on the motion to dismiss but determined that the case would go to trial after it noted at a pretrial hearing that self-defense was a factual issue to be determined at trial by a jury and that Jolley had not filed a notice of hearing on the motion.

At trial, Jolley obtained testimony from one of the repossession men that after the incident they went back on the property and repossessed the vehicle. Then Jolley told the court he would like to inquire into specific conversations that the repossession men had with Jolley's wife and daughter at which point the jury was excused. Jolley then elicited from the witness outside the presence of the jury that he had told Jolley's wife and daughter he would not pursue charges against Jolley if they gave him the keys to the car. Jolley requested that the court allow the admission of this testimony as a specific instance of conduct that is probative of untruthfulness of the witness as the witness had failed to honor his representation. The court

determined that because there was no subsequent inconsistent statement and because the witness had no authority to “pursue charges” as such is within the purview of the State, the testimony was not probative of the witness’s truthfulness and denied Jolley’s request to admit the testimony.

Jolley also requested at trial that the court instruct the jury on the lesser included offense of simple assault. The court denied Jolley’s request because, as Jolley did not contest that he pointed a firearm at the two repossession men, the court determined that no reasonable view of the evidence would support a simple assault conviction. If there was any assault at all, the court reasoned, it was with a deadly weapon and therefore aggravated assault by its very nature.

The jury found Jolley guilty of two counts of aggravated assault. He now timely appeals his judgment of conviction. Jolley argues that the district court erred in not holding hearings on his motions in limine, in not allowing him to elicit impeachment testimony from the repossession man, and in failing to instruct the jury on the lesser included offense of simple assault. Jolley also argues that these errors cumulatively deprived him of his right to a fair trial.

II.

ANALYSIS

A. **Did the District Court Err in Failing to Conduct a Hearing on Jolley’s Motions in limine Pursuant to Idaho Criminal Rule 12?**

Jolley argues that the district court erred in not holding a hearing on Jolley’s pretrial motions, and therefore not ruling on the motions before trial, because Idaho Criminal Rule 12 requires a trial court to hold a hearing on any pretrial motions within fourteen days after the motion is filed or forty-eight hours before trial.

This Court exercises free review over the application and construction of statutes and rules. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the language of a statute or rule is plain and unambiguous, this Court must give effect to the language as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Knutsen*, 138 Idaho 918, 920, 71 P.3d 1065, 1067 (Ct. App. 2003); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute or rule is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219.

Idaho Criminal Rule 12(d) states that pretrial motions:

. . . must be filed within twenty-eight (28) days after the entry of a plea of not guilty or seven (7) days before trial whichever is earlier. In felony cases, such motions must be brought on for hearing within fourteen (14) days after filing or forty-eight (48) hours before trial whichever is earlier. The court in its discretion may shorten or enlarge the time provided herein, and for good cause shown, or for excusable neglect, may relieve a party of failure to comply with this rule.

The plain language of this rule sets out time deadlines *for the parties*, and authorizes the court to excuse any lack of compliance *by the parties*. That it is the moving party's burden, not the court's, to initiate a hearing on his or her own motion is also supported by the plain language of I.C.R. 45(c), which specifies a time deadline for serving a notice of hearing for a written motion. The record shows that a hearing on the motion was scheduled by the court, *sua sponte*, for April 27, 2009, but was vacated because of a conflicting trial on the court's schedule. Thereafter, the record shows Jolley did not notice his motion for a hearing and therefore was the actual cause of the lack of hearing. Jolley's reliance on Idaho case law to show that the court had a duty to *sua sponte* schedule and hold a hearing on Jolley's motions is misplaced. Neither *State v. Dice*, 126 Idaho 595, 887 P.2d 1102 (Ct. App. 1994) nor *State v. Ruperd*, 146 Idaho 742, 202 P.3d 1288 (Ct. App. 2009) stand for the proposition that a trial court must conduct a hearing on a pretrial motion in a situation similar to this case, that is, where the record indicates that a hearing was never requested. Additionally, the record does not reflect that Jolley objected to the lack of a hearing, even when at a pretrial conference the court indicated that the case would be going to trial partly because the motion had not been "noticed up." Issues not raised below cannot be brought for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992).

Even if we were to accept Jolley's argument that by scheduling a hearing *sua sponte* and then vacating that hearing, the district court somehow relieved Jolley of his burden to notice up his motions, it would not lead us to grant relief on appeal. Jolley could not obtain appellate relief from the denial of his motion to dismiss because once a defendant has been convicted following a fair trial, an appellate court will not examine preliminary motions to dismiss based on sufficiency of the evidence issues. *See State v. Sibley*, 138 Idaho 259, 261-62, 61 P.3d 616, 618-19 (Ct. App. 2002); *State v. Nelson*, 131 Idaho 210, 214-15, 953 P.2d 650, 654-55 (Ct. App. 1998); *State v. Maylett*, 108 Idaho 671, 672, 701 P.2d 291, 292 (Ct. App. 1985). In civil cases, we have similar restrictions on appellate review of orders denying pretrial motions to dispose of

a case on the merits. As we said in response to an appellate challenge to an order denying summary judgment taken after a full and fair trial:

[B]y entering an order denying summary judgment, the trial court merely indicates that the matter should proceed on its merits. The final judgment in a case can be tested upon the record made at trial, not the record made at the time summary judgment was denied. Any legal rulings made by the trial court affecting that final judgment can be reviewed at that time in light of the full record. This will prevent a litigant who loses a case, after a full and fair trial, from having an appellate court go back to the time when the litigant had moved for summary judgment to view the relative strengths and weaknesses of the litigants at that earlier stage. Were we to hold otherwise, one who had sustained his position after a fair hearing of the whole case might nevertheless lose, because he had failed to prove his case fully on the interlocutory motion.

Evans v. Jensen, 103 Idaho 937, 942, 655 P.2d 454, 459 (Ct. App. 1982). *Accord Garcia v. Windley*, 144 Idaho 539, 542, 164 P.3d 819, 822 (2007).

Jolley's motion to dismiss is analogous to the preliminary motions in the above-cited cases because it is premised on a factual issue that was fully heard and resolved at a subsequent trial. Jolley's motion to dismiss was founded on his claim that he used reasonable force to defend himself, his family, and his property. The jury was instructed that to find Jolley guilty it must conclude beyond a reasonable doubt that Jolley's actions were not justified as self-defense, defense of others, and/or defense of property. The jury rejected Jolley's defense theories and found him guilty on both counts. Because Jolley had the opportunity to present a full evidentiary record on the defenses presented by his motion to dismiss and the jury ultimately resolved those issues presented,¹ his claim that it was error for the court not to hear a preliminary motion to dismiss based on those same defenses could not lead to relief on appeal.

With respect to Jolley's motion in limine to exclude the video made by Deputy Streibel, Jolley's argument fails for lack of factual support in the record. The court did in fact entertain oral argument and rule on the motion shortly after the jury was empanelled. Jolley does not challenge the merits of the court's ruling on the motion.

B. Did the District Court Err in Prohibiting Jolley from Eliciting Impeachment Testimony From a State Witness?

Jolley argues that he attempted to, but was prohibited from, eliciting from one of the repossession men testimony that although the repossession men told Jolley and Deputy Streibel

¹ Jolley does not challenge the sufficiency of the evidence to support the jury's verdict.

that they would not go back on the property, they did return that night to repossess the car and that the repossession men promised Jolley's wife and daughter that they would not "press charges" against Jolley if they surrendered the keys to the car. Jolley should have been allowed to inquire about these two incidents, he asserts, because it was proper impeachment evidence pursuant to Idaho Rule of Evidence 608(b) in the form of prior inconsistent statements. Jolley also complains that the court took argument in chambers and consequently there is no record from which this Court can determine whether the lower court conducted the proper test, balancing the probative value of the impeaching information against the possibility of unfair prejudice to the State.

We will review a lower court's decision on whether to admit evidence pursuant to I.R.E. 608(b) for an abuse of discretion. *State v. Downing*, 128 Idaho 149, 152, 911 P.2d 145, 148 (Ct. App. 1996). When a trial court's discretionary decision is reviewed on appeal we ask whether the lower court correctly perceived the issue as discretionary, acted within the boundaries of such discretion and consistently with applicable legal standards, and reached its decision by an exercise of reason. *Berg v. Kendall*, 147 Idaho 571, 576, 212 P.3d 1001, 1006 (2009); *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

Idaho Rule of Evidence 608(b) states:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the credibility, of the witness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning (1) the character of the witness for truthfulness or untruthfulness, or (2) the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Contrary to Jolley's assertion, Jolley was in fact able to elicit testimony that the repossession men went back onto the property and repossessed the vehicle after Jolley was arrested. Furthermore, the testimony concerning the repossession men's assertions that they would not pursue charges against Jolley is not "probative of truthfulness or untruthfulness" as required by I.R.E. 608(b). Jolley's argument is that because charges were brought against him, the repossession men must have lied when promising not to pursue charges, and therefore that instance of lying should have been admitted for purposes of showing their propensity for untruthfulness. However, it was not the repossession men who could decide whether charges

against Jolley would be filed; that is a decision for the prosecutor. Thus the statement that they would not pursue charges is not probative of those witnesses' truthfulness. Therefore, such testimony was not probative and not admissible pursuant to I.R.E. 608(b).

Jolley's argument that the district court erred in not putting its reasoning on the record also fails for lack of factual support. Although there was a reference to a conference "in chambers" and a side bar conversation off the record (a practice which this Court does not encourage as it impedes appellate review), Jolley was given an opportunity to present the relevant testimony outside the presence of the jury, and both parties made arguments regarding the testimony's admissibility on the record. The court also stated the basis of its decision on the record. The court reasoned that the evidence was not admissible under I.R.E. 608(b) because it was not probative of the repossession men's truthfulness inasmuch as the decision to prosecute was not within their power. Therefore, there was no need for the court to conduct a balancing test. The Court is thus unpersuaded by Jolley's argument that there is an insufficient record upon which we can conduct an appellate review of this issue, and we hold that the district court did not err in holding that the testimony was not admissible pursuant to I.R.E. 608(b).

C. Did the District Court Err in Failing to Instruct the Jury on the Lesser Included Offense of Simple Assault?

Lastly, Jolley argues that the court erred in failing to instruct the jury on simple assault because the charging document contained language sufficient to charge simple assault.

An appellate court exercises free review over a trial court's refusal to give a jury instruction regarding a lesser included offense. *State v. Young*, 138 Idaho 370, 373-74, 64 P.3d 296, 299-300 (2002). Idaho Code requires a court to instruct the jury on a lesser included offense if a party requests the instruction and there is a reasonable view of the facts supporting a finding that the defendant committed the lesser offense but not the greater offense. I.C. § 19-2132(b); *State v. Drennon*, 126 Idaho 346, 352, 883 P.2d 704, 710 (Ct. App. 1994).

The State does not dispute that Jolley requested the lesser included offense instruction nor that assault is a lesser included offense of aggravated assault. Rather, the question for this Court is whether any reasonable view of the facts presented at trial supports a finding that Jolley committed assault without having committed aggravated assault. Jolley was charged with a violation of I.C. § 18-901(b), which prohibits: "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." Such

an assault may be elevated to aggravated assault if it is committed “with a deadly weapon or instrument without intent to kill.” I.C. § 18-905(a). A deadly weapon includes a firearm. I.C. § 18-905(d).

Based on the definition of the offense, Jolley could have been found guilty of assault, but not aggravated assault, only if he had not used his gun in making a threat to do violence upon the repossession men. However, it was uncontested at trial that Jolley did point his gun at both repossession men during the entire confrontation, thereby threatening by the act of pointing his gun to do violence upon them. There was no testimony from Jolley or the repossession men that Jolley made any threats, either by word or act, that did not include brandishing and pointing his gun. Therefore, there is no reasonable view of the facts that would support a finding that Jolley committed assault without using a deadly weapon. It follows that the district court did not err in denying Jolley’s request to instruct the jury on simple assault.

III.

CONCLUSION

We find the district court did not err by failing to hold hearings on Jolley’s motions in limine, excluding testimony regarding the repossession men’s representations that they would not pursue charges against Jolley, or declining to instruct the jury on simple assault. Jolley’s judgment of conviction is therefore affirmed.

Chief Judge GRATTON and Judge GUTIERREZ **CONCUR.**