

**BOISE, TUESDAY, FEBRUARY 11, 2020, AT 10:30 A.M.**

**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 46397**

**STATE OF IDAHO,** )  
 )  
 **Plaintiff-Respondent,** )  
 )  
 **v.** )  
 )  
 **ROY W. ROBERTS,** )  
 )  
 **Defendant-Appellant.** )  
 )  
 \_\_\_\_\_ )

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Caribou County. Hon. Mitchell W. Brown, District Judge.

Fyffe Law LLC; Robyn Fyffe, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

Roy W. Roberts was charged with, among other things, aggravated assault and eluding a police officer after shooting at his neighbor and fleeing the scene. The jury was instructed that it could find Roberts guilty of aggravated assault under Idaho Code § 18-901(b) for pointing a firearm at the victim with the intent to threaten; though the charging documents only relayed a violation of I.C. § 18-901(a), which is attempting to violently injure a victim by shooting at him. The jury returned a guilty verdict and Roberts was sentenced to a concurrent unified term of five years with one and one-half years determinate for each charge.

On appeal, Roberts contends the discrepancy between the instructions and the charging information (pointing with the intent to threaten as opposed to shooting with the intent to injure) created a fatal variance which violated his right to due process. Roberts claims he was only prepared to defend the charge specified in the information, attempting to violently injure the victim by shooting him under I.C. § 18-901(a).

The State asserts Roberts' argument was not preserved by a specific objection below and argues that even if the argument was preserved, there was no variance because firing a gun at an individual necessitates pointing a gun, similar in nature to a lesser included offense. It additionally argues if there was a variance it was not fatal because the record shows Roberts was not surprised or prejudiced in his trial preparation by the additional instruction. Moreover, any error by the district court was harmless because the evidence was overwhelming.

Roberts asks this Court to reverse the judgment of conviction and remand for a new trial.