

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36954

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 656
	)	
Plaintiff-Respondent,	)	Filed: October 7, 2011
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
ANDREW J. MUNKEL,	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
Defendant-Appellant.	)	<b>BE CITED AS AUTHORITY</b>
_____	)	

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

Judgment of conviction for battery with intent to commit rape, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

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

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GRATTON, Chief Judge

Andrew J. Munkel appeals his judgment of conviction for battery with intent to commit rape. Munkel argues that the jury was improperly instructed. We affirm.

**I.**

**FACTUAL AND PROCEDURAL BACKGROUND**

Munkel, his girlfriend, and their children, went to the home of his girlfriend’s cousin (T.H.) for Thanksgiving dinner. There were a number of family and friends in attendance, and during the course of the evening a significant amount of alcohol was consumed by the hosts and most guests. Later in the evening after most of the guests had gone home, including Munkel’s girlfriend and children, and T.H.’s husband had gone to bed, Munkel and T.H. went into the garage for a cigarette.

During the trial, T.H. testified that she was drunk when she and Munkel went into the garage and that Munkel grabbed her breast, but she nudged him away. She said that Munkel

then pushed her onto the hood of a car and despite her effort to push back, he held her down by her arms and had sexual intercourse with her. She said Munkel covered her mouth and told her to be quiet when she attempted to scream. Eventually, she said she was able to slide off of the car onto her knees and at that point Munkel then tried to place his penis in her mouth. She crawled out of the garage, into the house, and yelled to her mother-in-law who was still in the house, “Andrew raped me.” A number of photographs of T.H.’s injuries were introduced at trial, which included: bruising on the inside and outside of T.H.’s arms, which she testified came from Munkel holding her down; a bruise on her thigh; a blister on her buttocks from rubbing on the car; and injuries on her knees from crawling on the ground.

Munkel was arrested at his home that night and initially denied having sex with T.H. However, after being interrogated further, he said he was too drunk to remember if they had sex. At trial, Munkel testified that when they were in the garage T.H. was flirting with him and began kissing him. Munkel asserted that T.H. sat on the hood of the car, pulled down her pants, and they engaged in consensual sex until they heard a noise. He then buttoned up his pants and T.H. walked back into the house with her pants still partly down, until she fell and called for her mother-in-law.

The Information charged Munkel with one count of rape. The State requested, and with no objection from Munkel, the trial court instructed the jury on the count of rape and on a count of battery with the intent to commit rape. The jury found Munkel not guilty of rape, but guilty of battery with the intent to commit rape. The court imposed a unified sentence of ten years with three years determinate. Munkel appeals.

## **II.**

### **DISCUSSION**

Munkel argues that the jury instruction on the elements of battery with the intent to commit rape was erroneous. Munkel did not object to the instruction below. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). A narrow exception exists for those issues that rise to the level of fundamental error. *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010):

If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho’s fundamental error doctrine. Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates

one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.

*Id.* at 228, 245 P.3d at 980. Munkel bears the burden of demonstrating that the alleged jury instruction error rose to the level of fundamental error. Munkel must first show that the instruction was erroneous. A jury instruction that omits an essential element of the crime violates a defendant's due process rights. *State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886, 892 (2007).

As noted, Munkel was charged with rape. At trial the district court also instructed the jury on the lesser included offense of battery with intent to commit rape. Munkel was convicted on the lesser offense and acquitted on the rape charge. Munkel does not argue that it was improper to give an instruction on the lesser included offense, only that the instruction given did not include all of the elements necessary to prove battery with intent to commit rape in this case. Munkel points first to the rape charge which, as alleged, required the jury to find that Munkel caused his penis to penetrate T.H.'s vagina and that she resisted, but her resistance was overcome by force or violence. In regard to the battery with intent to commit rape charge, the jury was instructed that it must find that Munkel committed a battery upon T.H. and, when committing the battery, Munkel had the intent to use such force as necessary to cause his penis to penetrate her vagina without her consent. As to the battery, the jury was instructed:

A "battery" is committed when a person:

- (1) willfully and unlawfully uses force or violence upon the person of another; or
- (2) actually, intentionally and unlawfully touches or strikes another person against the will of the other; or
- (3) unlawfully and intentionally causes bodily harm to an individual.

Munkel contends that the jury was improperly instructed in two ways: First, that the above definition of "battery" was not limited to use of "force and/or violence," as the rape count alleged. Second, that the elements instruction required only that Munkel intended to use force to penetrate T.H.'s vagina "without her consent," rather than to overcome resistance by T.H., as alleged in the rape count. Thus, Munkel argues "in order for the jury to find that Mr. Munkel

committed a battery with the intent to commit rape, they must have found that Mr. Munkel used force or violence with the intent to penetrate T.H.’s vagina by overcoming her resistance.”<sup>1</sup>

In essence, Munkel asserts that manner and means by which the rape was alleged to have been committed in the particular case must be the manner and means in which the battery with intent to commit rape was committed. Munkel concedes that battery with intent to commit rape can be a lesser included offense of rape, but *only* if the jury concludes that all elements of rape as charged occurred, except penetration. For this proposition, Munkel relies upon *State v. Bolton*, 119 Idaho 846, 850, 810 P.2d 1132, 1136 (Ct. App. 1991). Bolton was similarly charged with rape through use of force or violence to overcome the victim’s resistance, and the jury was instructed on both rape and the lesser included offense of battery with the intent to commit rape. The jury convicted Bolton on the lesser offense. Bolton argued that because the victim testified that she was raped and he testified they had consensual sex, the jury’s verdict was inconsistent and there was not sufficient evidence to support the verdict. *Id.* at 848-49, 810 P.2d at 1134-35. The language that Munkel relies upon comes from this Court explaining Bolton’s argument:

Bolton acknowledges that assault is a lesser included offense of battery, the difference being that battery requires an unlawful touching. He also acknowledges that assault with the intent to commit rape is a lesser included offense of rape, and he argues that assault with intent to commit rape or battery with intent to commit rape can be shown to be a lesser included offense only by proof of all the elements of rape, except penetration. We agree, and hold that there was a reasonable view of the evidence which would support the jury’s verdict.

*Id.* at 850, 810 P.2d at 1136 (citation omitted). Munkel argues that *Bolton* stands for the proposition that the instruction for battery with the intent to commit rape must exactly mirror the rape instruction, except for the penetration element. Even though the *Bolton* Court agreed, in part, with an argument of the defendant, the issue being addressed and the conclusion drawn by the *Bolton* Court was “that there was a reasonable view of the evidence which would support the jury’s verdict.” Proof of all elements but penetration would support a conviction for the lesser offense. The *Bolton* Court recognized that the legislature, in I.C. § 18-911, defined the elements of battery with intent to commit a serious felony as a battery with the intent to commit any of the

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<sup>1</sup> It should be noted that the challenged instructions are verbatim recitations of the Idaho pattern jury instructions and are, therefore, presumptively valid. *McKay v. State*, 148 Idaho 567, 571 n.2, 225 P.3d 700, 704 n.2 (2010).

statutorily specified felonies, one of which is rape. *Id.* at 849, 810 P.2d at 1135. The State is required to prove that the defendant committed a battery, and that when doing so, had the intent to commit a crime that, if completed, would be a rape. The elements of battery with intent to commit rape, as defined by the legislature, do not change merely because the crime is alleged as an included offense of rape.

Specifically regarding lesser included offenses, the *Bolton* Court held:

A lesser included offense is one which is necessarily committed while committing the crime charged, *or* the essential elements of which are alleged as the manner or means by which the charged offense has been committed. *State v. McCormick*, 100 Idaho 111, 114, 594 P.2d 149, 152 (1979); *State v. Mason*, 111 Idaho 660, 668, 726 P.2d 772, 780 (Ct. App.1986); *State v. Gilman*, 105 Idaho 891, 893, 673 P.2d 1085, 1087 (Ct. App.1983). *Courts cannot look merely to the allegations in the information to determine if an offense is necessarily included in the charged offense*, but also must consider whether the evidence adduced at trial shows that the included offense was committed during the commission of the charged offense. *See State v. Boyenger*, 95 Idaho 396, 400, 509 P.2d 1317, 1321 (1973); *Mason*, 111 Idaho at 668-669, 726 P.2d at 780-781.

*Id.* at 849, 810 P.2d at 1135 (emphasis added). The *Bolton* Court noted that the alleged battery was the “manner or means” by which the rape was accomplished and, thus, the jury was properly instructed. Indeed, battery with intent to commit rape is necessarily committed while committing rape. Just as a rape cannot be perpetrated without commission of an assault, *State v. Garney*, 45 Idaho 768, 772, 265 P. 668, 669 (1928), forcible rape cannot be perpetrated without commission of a battery.

The State correctly contends that, even though the instructions were correct, Munkel’s claim on appeal is actually one of a variance between the jury instructions and the allegations of the charging document. A variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment. *Dunn v. United States*, 442 U.S. 100, 105 (1979). Where the jury instructions allow the jury to convict the defendant of the charged crime, but on one or more alternative theories than alleged in the charging document, a variance occurs. *See State v. Montoya*, 140 Idaho 160, 166, 90 P.3d 910, 916 (Ct. App. 2004); *State v. Sherrod*, 131 Idaho 56, 59, 951 P.2d 1283, 1286 (Ct. App. 1998) The existence of an impermissible variance between a charging instrument and the jury instructions is a question of law over which we exercise free review. *Sherrod*, 131 Idaho at 57, 951 P.2d at 1284. Our task in resolving the issue presented is two-fold. First, we must determine whether there is a variance between the

information used to charge the offense and the instructions presented to the jury. *See State v. Brazil*, 136 Idaho 327, 329, 33 P.3d 218, 220 (Ct. App. 2001). Second, if a variance exists, we must examine whether it rises to the level of prejudicial error requiring reversal of the conviction. *Id.* A variance between a charging instrument and a jury instruction constitutes a due process violation and necessitates reversal only when it deprives the defendant of the right to fair notice or leaves him or her open to the risk of double jeopardy. *State v. Windsor*, 110 Idaho 410, 417-18, 716 P.2d 1182, 1189-90 (1985); *Brazil*, 136 Idaho at 330, 33 P.3d at 221. A defendant is deprived of fair notice only if he was misled or embarrassed in the preparation or presentation of his defense. *State v. Hickman*, 146 Idaho 178, 182, 191 P.3d 1098, 1102 (2008).

Munkel's claim is not that the district court failed to instruct on every element of battery with intent to commit rape, but that the instructions allowed the jury to convict him of battery with intent to commit rape based on means of commission different from, or inconsistent with, the means of commission alleged in relation to the rape charge. Thus, he claims a variance.<sup>2</sup> While fairness requires that a criminal defendant be tried only upon charges of which he has notice, *State v. Gilman*, 105 Idaho 891, 893, 673 P.2d 1085, 1087 (Ct. App. 1983), if an offense is included in the crime charged, a defendant may be fairly said to have constructive notice of the alleged conduct comprising the included charge. *Id.* at 895, 673 P.2d at 1089. As we have noted, an included offense is one which is necessarily committed while committing the crime charged or, the essential elements of which are alleged as the manner or means by which the charged offense has been committed. *State v. Colwell*, 124 Idaho 560, 564, 861 P.2d 1225, 1229 (Ct. App. 1993). An offense may also be deemed an included offense if the evidence adduced at trial shows that such an offense necessarily was committed during the commission of the charged offense. *Id.*

As stated in *Bolton*, battery with intent to commit rape is an included offense of forcible rape. Battery with intent to commit rape is an included offense of the forcible rape charge alleged against Munkel in the Amended Information. Munkel was deemed to have constructive notice of the facts necessary to sustain his conviction for this included offense. A forcible rape charge alleging the unlawful use of force or violence to overcome resistance includes battery by an unlawful touching or striking and/or an unlawful causing of bodily harm. Munkel, charged

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<sup>2</sup> Contrary to Munkel's assertion, this does not amount to a constructive amendment. *See State v. Colwell*, 124 Idaho 560, 566, 861 P.2d 1225, 1231 (Ct. App. 1993).

with using force and/or violence to overcome T.H.'s resistance to sexual penetration, was on notice of the lesser included offense and the means of battery. Munkel has not demonstrated a material variance between the language in the charging document alleging that he committed rape by overcoming T.H.'s resistance, and the instructions that permitted the jury to find him guilty of a battery with intent to commit rape if it found he committed a battery with intent to use force to penetrate T.H.'s vagina, "without her consent." To establish a violation of the due process right to notice, the record must show that the defendant was "misled or embarrassed in the preparation or presentation of his defense." *Montoya*, 140 Idaho at 166, 90 P.3d at 916. The record here does not establish that Munkel was misled or embarrassed in the preparation or presentation of his defense. Munkel has failed to establish a variance of constitutional significance and, thus, has not satisfied the first element of the *Perry* fundamental error analysis.

### **III.**

#### **CONCLUSION**

Munkel failed to show fundamental error because he did not meet his burden of demonstrating constitutional error in giving the pattern jury instruction on battery with the intent to commit rape. Munkel's judgment of conviction is affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**