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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 48633-2021**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-19-21037**
	)	
CLARENCE EDWARD LANCASTER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Clarence Edward Lancaster appeals from his conviction for burglary and grand theft. On appeal he challenges the denial of his motion to suppress his statements to police officers.

Statement Of The Facts And Course Of The Proceedings

Over the course of a month, three ATM machines were stolen in the Boise area. (R., pp. 100-01, 113, 115, 119-20, 129-30.) The car used in one of the thefts was a car rented to Lancaster and security videos recording the thefts captured his image. (R., pp. 101, 121, 152-57.) The detective working the case alerted patrol officers with information regarding Lancaster. (R., pp. 101, 121, 153.) That same day a patrol officer encountered Lancaster and took him into custody for questioning. (R., pp. 101-03, 121.) Detectives questioned Lancaster about the ATM thefts and he admitted his involvement. (R., pp. 103-05, 121-23, 125-26.) Lancaster was then formally arrested on three counts of burglary. (R., pp. 105, 123, 126.) Lancaster's statements led police to recover the stolen and broken-into ATM machines and other evidence. (R., p. 133.)

The state charged Lancaster with seven counts of burglary (three of which were related to the ATM thefts and four for entry of other buildings) and three counts of grand theft. (R., pp. 29-31.) Lancaster moved to suppress "evidence seized and obtained by an unlawful arrest." (R., pp. 87-91.) He argued that "the refusal of officers to inform him as to the basis of his arrest renders this seizure of his person unlawful" under Article I, § 17 of the Idaho Constitution and that his "statements" and "all evidence … discovered as a result of his unlawful detention" must therefore be suppressed. (R., p. 89.) The state

objected to the motion to suppress, arguing that Lancaster was not arrested when detained for questioning and that he was informed of the reasons for his arrest after the interview. (R., pp. 99-109.)

The district court denied the motion to suppress. (R., pp. 171-90.) The district court reasoned that Lancaster was arrested when handcuffed and brought to the police station, that he was not informed of why he was arrested at that time, that failing to inform him of the reason for the arrest violated I.C. § 19-608, but there was no violation of Article I, § 17. (R., pp. 175-190.)

Lancaster pled guilty to one count of burglary and one count of grand theft, preserving the right to appeal the denial of his suppression motion. (R., pp. 219-23; Tr., p. 14, Ls. 3-21.) Lancaster objected to portions of the PSI and the district court ruled on that objection. (R., pp. 237-47, 263, 265-68; Tr., p. 16, L. 24 – p. 48, L. 8.) One of his objections was a request to strike a 2009 Utah pre-sentence report attached to the PSI (PSI, pp. 524-47) because the 2009 report had an "inaccurate criminal history" (R., p. 243; Tr., p. 41, L. 23 – p. 42, L. 20). The district court denied the motion to strike but ruled that it would not consider the criminal history insofar as it was inconsistent with the criminal history in the federal pre-sentence investigative report, which the court determined was "authoritative." (Tr., p. 42, L. 21 – p. 43, L. 7.)

The district court entered judgment and Lancaster timely appealed. (R., pp. 280-82, 287-88.)

ISSUES

Lancaster states the issues on appeal as:

> I. Whether the Framers would have considered a violation of I.C. § 19-608's territorial counterpart to also violate Article I, Section 17 of the Idaho Constitution.
>
> II. Whether the district court erred by not striking the Utah PSI, which it acknowledged contained unreliable information.

(Appellant's brief, p. 11.)

The state rephrases the issues as:

I. Has Lancaster failed to show error in the district court's conclusion that failure to timely inform Lancaster of the grounds for his arrest did not violate his constitutional rights?

II. Did Lancaster fail to show error in the district court's refusal to strike the 2009 Utah pre-sentence report?

ARGUMENT

I.
Lancaster Has Failed To Show Error In The District Court's Conclusion That Failure To Timely Inform Lancaster Of The Grounds For His Arrest Did Not Violate His Constitutional Rights

A. Introduction

The district court concluded that failure to notify Lancaster of the reasons for arrest at the time of his *de facto* arrest did not violate Lancaster's rights under the Idaho Constitution. (R., pp. 171-90.) Lancaster contends that the district court erred, and he had a constitutional right to be notified of the grounds for his arrest that rendered his *de facto* arrest illegal, which requires suppression of evidence gathered as a result of his arrest. (Appellant's brief, pp. 12-38.) Review of applicable legal standards shows that Lancaster's argument is without merit.

B. Standard Of Review

"Generally, the federal framework is appropriate for analysis of state constitutional questions unless the state constitution, the unique nature of the state, or Idaho precedent clearly indicates that a different analysis applies." CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 383, 299 P.3d 186, 190 (2013). Although interpretation of Idaho constitutional standards is not bound by interpretation of their federal counterparts, "this Court has found there is 'merit in having the same rule of law applicable within the borders of our state, whether an interpretation of the Fourth Amendment or its counterpart—Article I, § 17 of the Idaho Constitution—is involved.'" State v. Donato, 135 Idaho 469, 471, 20 P.3d 5, 7 (2001) (quoting State v. Charpentier, 131 Idaho 649, 653, 962 P.2d 1033, 1037 (1998)). Such consistency "makes sense." Id. (quotation marks omitted).

C. There Is No Requirement Of An Announcement Of Intention, Cause, And Authority To Make A Constitutionally Valid Arrest

It is well established that an arrest is "considered lawful" if it is "based on probable cause." State v. Bishop, 146 Idaho 804, 816, 203 P.3d 1203, 1215 (2009). See also State v. Martinez-Gonzalez, 152 Idaho 775, 779, 275 P.3d 1, 5 (Ct. App. 2012) ("Without a warrant, a lawful arrest may be made upon probable cause that a crime has been or is being committed in the officer's presence, and any evidence from an ensuing search is generally admissible."); State v. Veneroso, 138 Idaho 925, 928, 71 P.3d 1072, 1075 (Ct. App. 2003) ("An arrest is lawful when based upon probable cause."). "In the context of the Federal Constitution and its interpreting case law, an arrest is 'lawful' if 'officers have probable cause to believe that a person has committed a crime in their presence' even if such an arrest does not comply with state statutes governing arrests." State v. Green, 158 Idaho 884, 887, 354 P.3d 446, 449 (2015) (quoting Virginia v. Moore, 553 U.S. 164, 174-78 (2008)), abrogated in part by State v. Clarke, 165 Idaho 393, 446 P.3d 451 (2019). "[N]either the Sixth Amendment nor the Fourth Amendment provide[a suspect] the right to be informed of the reason for his arrest." Kladis v. Brezek, 823 F.2d 1014, 1018 (7th Cir. 1987). Because the Fourth Amendment does not require any statement of authority to make an arrest lawful, such would be required under Article I, § 17, of the Idaho Constitution only if "the state constitution, the unique nature of the state, or Idaho precedent clearly indicates that a different analysis applies." CDA Dairy Queen, Inc., 154 Idaho at 383, 299 P.3d at 190.

Generally, a statute in place at the time of the adoption of the Idaho Constitution is not a constitutional standard absent "a historical, pre-constitution source of the currently codified principles." Green, 158 Idaho at 892, 354 P.3d at 454. Thus, "preexisting statutes

and the common law may be used to help inform our interpretation of the Idaho Constitution, but they are not the embodiment of, nor are they incorporated within, the Constitution." Clarke, 165 Idaho at 397, 446 P.3d at 455 (limiting the holding in Green). The requirements of announcing authority to arrest embodied in I.C. § 19-608 are not constitutional standards violated in this case for four reasons.

First, the question presented in this case is answered by a case decided after the district court entered its order in this case. In State v. Sutterfield, 168 Idaho 558, ___, 484 P.3d 839, 845-47 (2021), the Court directly addressed the question of whether the officer's failure to state the authority under which he was conducting the arrest (as agent of a citizen making a citizen's arrest) violated the Idaho Constitution. The Court specifically found that the officer did not comply with the requirements of I.C. § 19-608. Id. at ___, 484 P.3d at 845-46. However, "the failure to fully comply with the statutory notice requirements here does not rise to the level of a constitutional violation" and "suppression of evidence is not the appropriate remedy" for the statutory violation. Id. at ___, 484 P.3d at 847 (citing Green, 158 Idaho at 886, 892, 354 P.3d at 448, 454). The analysis in Sutterfield controls in this case and demonstrates the district court did not err.

Second, the district court's analysis provides additional reasons for concluding I.C. § 19-608 is not a constitutional standard. The district court rejected Lancaster's argument that his *de facto* arrest was illegal "because he wasn't told the basis for his arrest until after he confessed," reasoning that I.C. § 19-608's requirement that anyone making an arrest must generally "inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it" was not a constitutional standard mandating suppression. (R., pp. 174, 181-90.) Specifically, the district court determined that arrest

notification standards such as set forth in I.C. § 19-608 were not uniform, but "varied from state to state." (R., pp. 183-85.) Moreover, the English common law did not make announcement requirements such as found in I.C. § 19-608 a prerequisite to a valid arrest. (R., pp. 185-86.) Jurisdictions that had requirements similar to those of I.C. § 19-608 did not make suppression of evidence a remedy for violation of those standards. (R., pp. 186-90.) Finally, suppression for violation of I.C. § 19-608 would have pernicious consequences where, as here, the officer did not intend to make an arrest, only to effect an investigative detention, but a court later concludes a *de facto* arrest occurred. (R., p. 190.) All of these reasons are supported in the district court's opinion, are persuasive, and the state adopts them on appeal.

Third, all the rationales for concluding that informing a suspect of the grounds for the arrest is not a prerequisite to a constitutionally lawful arrest, articulated in Sutterfield and by the district court in this case, are bolstered by an understanding of I.C. § 19-608's purpose. Specifically, the requirement that the arresting officer or citizen inform the suspect of the reason for the arrest is (and was) to terminate the right to resist the arrest and, correspondingly, initiate the officer or citizen's right to use of force to effectuate the arrest. This point is illustrated by People v. Nash, 1 Idaho 206 (1868), a case decided by Idaho's territorial supreme court. Nash was charged with "resisting an officer while in the discharge of his official duty, by assaulting him with a pistol." Id. at 206. The facts were that Crutcher, the sheriff, entered Nash's house to arrest Watson for a felony when Nash assaulted him. Id. at 213. The trial court instructed the jury that "'if the defendant knew Crutcher was the sheriff it was not necessary for him to announce his office' when he came to make the arrest at the time of the resistance." Id. at 214. In rejecting Nash's claim of

error in the instruction, the Court noted that "[t]he statute requires that an officer should inform a party of his office and his purpose when he is in the execution of process, but this becomes an idle formality when the officer is known." Id. "The law does not require a useless parade of official pedigree to a party already knowing it." Id. The common law, quoting Blackstone, was: "'The officer must give notice to the party of his authority to bring himself within the protection of the law; unless indeed the party already knows it.'" Id. The purpose of I.C. § 19-608, and similar statutes and the common law, was to bring law enforcement officers within the protection of the law by eliminating the right to protect self or property from the officer's actions. See also Williams v. State, 35 So. 2d 567, 567-68 (Ala. 1948) (addressing propriety of instructions on whether officer properly informed arrestee of basis for arrest in trial for manslaughter where officer killed suspect in process of resisting that arrest); Burnell v. State, 139 So. 435, 436 (Ala. Ct. App. 1932) (defendant's failure to inform victim of intent to arrest and of charges negated defense of lawful arrest to charge of assault on victim); People v. Pool, 27 Cal. 572, 574-80 (1865) (compliance with requirement of informing of cause for attempted arrest relevant to asserted self-defense in killing officer); Cross v. United States, 30 F. Cas. 1067 (C.C.D.D.C. 1857) ("defendant had a right to resist" officers who refused to inform him of the cause of his arrest); Jones v. State, 640 So. 2d 204, 206 (Fla. Dist. Ct. App. 1994) ("the issue of whether the arrest was effected" in accordance with the requirement that the officer inform of the basis for the arrest "would, at most, constitute a defense" to the charge of resisting arrest); Wolf v. State, 19 Ohio St. 248, 251-52 (1869) (officers could be guilty of manslaughter for killing a man resisting arrest where they mistakenly omitted notifying the arrestee of the charge of arrest); State v. Parker, 81 Tenn. 221, 223-24 (1884) (addressing adequacy of

jury instructions on defense that shooting an arresting officer was justified by officer's alleged failure to inform of cause of arrest); Tiner v. State, 44 Tex. 128, 129 (1875) (officer's compliance with law of arrest relevant to defendant's claim he shot the officer in self-defense as opposed to doing so to resist arrest). The statute still fulfills its intended function of reducing the chances of violence associated with arrest and determining the legalities of either resistance to arrest or the use of force in effectuating an arrest without elevating it to constitutional significance. Indeed, given the original understanding that the statute addressed whether resistance to arrest was justified or the use of force to overcome that resistance was reasonable, there is no reason to believe the state constitutional drafters saw this statute as in any way addressing the constitutionality of an arrest or of using evidence seized as a result of an arrest at a subsequent trial.

Finally, although the district court declined to address the question (R., p. 176, n. 4), I.C. § 19-608 does not apply to *de facto*, as opposed to formal, arrests. A "*de facto* arrest" occurs "when an investigatory detention has become an arrest" either because prolonged beyond the limited needs of an investigative stop, or where the intrusiveness of the stop exceeds that necessary to ensure the safety of officers, e.g., State v. Buti, 131 Idaho 793, 796, 964 P.2d 660, 663 (1998) (handcuffing and other restrictions in course of 45 minute stop was *de facto* arrest), State v. Pannell, 127 Idaho 420, 424-25, 901 P.2d 1321, 1325-26 (1995) (handcuffing changed investigative stop into *de facto* arrest). Where, as here, officers complied with the mandates of I.C. § 19-608 when they made the *formal* arrest, the requirements of that statute are met. There is no ground for invalidating a prior *de facto* arrest or suppressing evidence.

In arguing that the district court erred, Lancaster first contends the reasoning of Sutterfield does not control this case or that it should be overruled. (Appellant's brief, pp. 13-18.) This argument is without merit.

Lancaster argues that Sutterfield should have no precedential value because "the parties did not argue the issue" of whether a violation of I.C. § 19-608 was also a constitutional violation. (Appellant's brief, pp. 15-16.) First, the state disputes Lancaster's claim that the officer's compliance with I.C. § 19-608 and the legal significance of any failure to do so was not argued by the parties. Even if true, however, this argument is without any legal support and must be rejected. "We will not consider an issue not supported by argument and authority in the opening brief." Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (quotation marks omitted). Although Lancaster cites authority for the completely unobjectionable claim that a reviewing court should not decide cases on unraised issues (Appellant's brief, pp. 15-16), he cites none for his claim that a decision so deciding a case is of no or questionable precedential value. To the contrary, whether the parties briefed the issue is not among the bases for overruling precedent. Greenough v. Farm Bureau Mut. Ins. Co. of Idaho, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006) (precedent must be followed unless "manifestly wrong," "unjust or unwise," or contrary to "plain, obvious principles of law"). Lancaster's claim that Sutterfield has no precedential value because it decided an issue not raised by the parties is factually and legally bereft of merit.

Lancaster also argues Sutterfield was "manifestly wrong because it was expressly based on an abrogated rationale." (Appellant's brief, pp. 16-24.) Specifically, he asserts that the Sutterfield Court "relied on the abrogated rationale from *Green*." (Appellant's

brief, p. 17.) However, the part of Green abrogated by Clarke, 165 Idaho at 397, 446 P.3d at 455, was language that the Idaho Constitution "'incorporated the principles regarding arrest in the Idaho statutory and common law in 1890 when the constitution was adopted.'" (quoting Green, 158 Idaho at 888, 354 P.3d at 450 (emphasis omitted).) Green "should stand for the principle that preexisting statutes and the common law may be used to help inform our interpretation of the Idaho Constitution, but they are not the embodiment of, nor are they incorporated within, the Constitution." Clarke, 165 Idaho at 397, 446 P.3d at 455. The Court in Sutterfield did not employ the abrogated part of Green when it held that I.C. § 19-608 did not establish a constitutional standard. Indeed, Lancaster's argument that it did makes no logical sense. Lancaster has failed to show that Sutterfield should be overruled.

Even if this Court were not bound by principles of *stare decisis* to follow Sutterfield as precedent, an independent analysis shows that I.C. § 19-608 does not establish a constitutional standard. Lancaster first argues that because "knock and announce" is both statutory and constitutional so must the notice requirement of I.C. § 19-608 also be constitutional because both are forms of announcement. (Appellant's brief, pp. 18-21 (citing State v. Rauch, 99 Idaho 586, 586 P.2d 671 (1978)).) However, the knock and announce rule is a requirement of the Fourth Amendment because it was well established in the common law of search and seizure. Wilson v. Arkansas, 514 U.S. 927, 930-31 (1995). Such is not true of notice of arrest requirements, where the only constitutional requirement is probable cause. Moore, 553 U.S. at 174-78; Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without

violating the Fourth Amendment, arrest the offender."). There is no reason to conclude that the constitutional requirements for an arrest are equivalent to those that govern entrance into a home.

Lancaster next contends that I.C. § 19-608 is important to when an "arrestee might be able to resist the attempted arrest without being subject to prosecution for doing so." (Appellant's brief, pp. 21-22.) As set forth above (*supra* pp. 7-9), however, that the adopters of the Idaho Constitution would have viewed the requirement of notification of authority for an arrest as cutting off any right to resist the arrest, rather than invalidating a subsequent interrogation, *supports* the rationale of Sutterfield and the district court in this case.

Finally, Lancaster argues that under the Idaho Constitution suppression is meant to be a "broad remedy," applicable to "deter" unlawful police conduct, "preserve judicial integrity," and avoid making courts "accomplices" in illegality. (Appellant's brief, pp. 23-25.) In making this argument, Lancaster relies heavily on McNabb v. United States, 318 U.S. 332 (1943). In that case officers held several defendants incommunicado for days while interrogating them, in violation of statutes requiring that arrested persons be brought "immediately" before a judicial officer. Id. at 341-42. "The purpose of this impressively pervasive requirement of criminal procedure" of bringing persons in custody before a judicial officer "is plain." Id. at 343. "It aims to avoid all the evil implications of secret interrogation of persons accused of crime." Id. at 344. Evidence of the statements obtained in flagrant disregard for these protections was excluded under the Court's authority to "formulate[] rules of evidence to be applied in federal criminal prosecutions." Id. at 341. See also Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("prosecution may not use

statements … stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination").

The flaw in Lancaster's argument is that even if this Court were to create a remedy for a violation of I.C. § 19-608, there would be no reason to make it suppression of subsequent voluntary statements and physical evidence. The most straight-forward application of the statute is to the legality of any resistance by a defendant or use of force by an officer to overcome that resistance. Unlike procedures preventing "secret interrogation of persons accused of crime," the violation of which results in evidence arising from the very practices proscribed, I.C. § 19-608 is designed to prevent violence and facilitate submission to lawful authority, not secure evidence. Excluding evidence basically at random, rather than evidence secured as a result of the violation, is an unjustified overreach.

An arrest involves restraining a person's liberty and transporting them against their will, possibly by force. I.C. §§ 19-601, 19-602. If conducted without legal authority it would be kidnapping. See I.C. § 18-4501. An act of kidnapping may be resisted, possibly by force. I.C. §§ 18-4009, 19-201, 19-202. The announcement of an arrest and the legal authority therefore terminates the right to self-defense. (*Supra*, pp. 7-9.) As determined by the district court, at the time of adoption of the Idaho Constitution the amount of notice required to terminate the right of self-defense was not uniform or engrained into the common law. (R., pp. 183-86.) Indeed, Idaho precedent from before statehood held that "[t]he law does not require a useless parade of official pedigree to a party already knowing it." Nash, 1 Idaho at 214 (assault on officer attempting to arrest another person not excused

by officer's failure to announce himself where defendant was aware person assaulted was an officer). Moreover, because the purpose of notification statutes is to terminate the right of self-defense, no remedy for failure to notify was specified by statute or common law precedent. (R., pp. 186-90.) Indeed, knowing that an arrestee without notification may lawfully resist arrest, and that any force used to overcome such resistance would in turn be unlawful, creates a powerful incentive for officers to provide notification that needs not be supplemented by remedies such as suppression of evidence. The district court correctly determined, and this Court in Sutterfield correctly held, that the notification standards of I.C. § 19-608 did not establish constitutional prerequisites to a lawful arrest.

II. Lancaster Has Failed To Show Error In The District Court's Refusal To Strike The 2009 Utah Pre-Sentence Report

A. Introduction

Lancaster's objection to the PSI stated, in part:

> 32. Page 14 of the PSI, sixth paragraph, last sentence should be stricken from the PSI as well as the referenced 2009 Utah PSI as that report has inaccurate criminal history and the 22 months sentence was vacated by court order. See FPSI, paragraph 85 and Paragraph 21 above.
>
> …
>
> 35. Page 15 of the PSI, second whole paragraph, second sentence refences [sic] the 2009 Utah PSI should be stricken as mentioned in paragraph 32, above, as well as the 2009 Utah PSI should be stricken from the report.

(R., p. 243 (hereinafter objection 32 and objection 35).) The paragraph in the PSI objected to in objection 35 set forth an investigation of Lancaster for a series of burglaries on the Utah State University campus. (PSI, p. 15.)

At sentencing the district court specifically asked defense counsel to elaborate on objection 32 and counsel stated the objection was to a reference to a sentence of 22 months imposed that was subsequently vacated. (Tr., p. 38, L. 16 – p. 39, L. 7; see also p. 38, Ls. 1-9.) The following colloquy then ensued:

THE COURT: So you just want that sentence stricken, *and that's it*?

[DEFENSE COUNSEL]: Yes.

(Tr., p. 39, Ls. 8-10.) When the state did not object the district court granted the objection and struck the sentence as requested in objection 32. (Tr., p. 39, Ls. 11-14; see PSI, p. 14 (showing striking of sentence objected to).)

The district court also inquired as to objection 35. (Tr., p. 41, Ls. 10-14.) The state objected. (Tr., p. 41, Ls. 16-22.) The court invited argument "beyond what is made" in the motion. (Tr., p. 41, Ls. 23-24.) Defense counsel argued that the Utah PSI was "unreliable" because information in it was contradicted by the federal PSI. (Tr., p. 41, L. 25 – p. 42, L. 10.) The basis for the objection was "primarily that the 2015 federal PSI should be relied upon and not the 2009 Utah PSI." (Tr., p. 42, Ls. 8-10.) The district court asked if the contradiction was limited to the criminal history. (Tr., p. 42, Ls. 11-12.) Defense counsel acknowledged that the only contradiction was in relation to the criminal history. (Tr., p. 42, Ls. 13-20.) The district court denied the request to strike the paragraph in the PSI or the Utah PSI based on the discrepancy, but ruled that it would rely on the federal PSI as "authoritative" on Lancaster's criminal history. (Tr., p. 42, L. 21 – p. 43, L. 7.)

On appeal, Lancaster argues that "[b]ecause [the district court] determined the Utah PSI contained inaccurate or unreliable information, the applicable legal standards required

that it strike that PSI, and the references to it, from the new Idaho PSI." (Appellant's brief, p. 34.) Lancaster has failed to show an abuse of discretion.

B. Standard Of Review

The decision to strike portions of the PSI is reviewed for an abuse of discretion. State v. Carey, 152 Idaho 720, 721-22, 274 P.3d 21, 22-23 (Ct. App. 2012). Abuse of discretion review looks at whether the trial court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." State v. Herrera, 164 Idaho 261, 270, 429 P.3d 149, 158 (2018).

C. Lancaster Has Failed To Show The District Court Erred When It Declined To Strike The 2009 Utah PSI Attached To The PSI

"The presentence report may include information of a hearsay nature where the presentence investigator believes that the information is reliable, and the court may consider that information." I.C.R. 32(e)(1). Furthermore, "conjecture and speculation should not be included in the presentence report." Id. It is "well settled" that hearsay information may be included in a PSI. State v. Mauro, 121 Idaho 178, 183, 824 P.2d 109, 114 (1991). "*However, hearsay information must be disregarded if there is no reasonable basis to deem it reliable, as where the information is simply conjecture.*" Id. (emphasis original). "[W]hen the trial court concludes information in the PSI is incorrect or unreliable, the trial court should cross out or redline that information from the PSI and send a corrected copy of the PSI to the Idaho Department of Correction." State v. Golden, 167 Idaho 509, 511, 473 P.3d 377, 379 (Ct. App. 2020). However, the duty to disregard and

strike unreliable evidence does not extend to "any statement that the defendant disputes." Carey, 152 Idaho at 722, 274 P.3d at 23. "If disputed portions of the PSI are not facially unreliable, the defendant must supply a sufficient basis for the trial court to make an independent determination on the reliability of the disputed information." State v. Hanchey, No. 47979, 2021 WL 3870701, at *3 (Idaho Ct. App. Aug. 31, 2021).

In the district court, Lancaster merely pointed out that the criminal history in a 2009 Utah PSI did not correspond to the criminal history in his 2015 federal PSI. (Compare PSI, pp. 529-30 (criminal history in 2009 Utah PSI) with pp. 379-81 (criminal history in 2015 federal PSI).) The district court concluded that to the extent they conflicted, it would view the federal PSI as authoritative. (Tr., p. 43, Ls. 1-7.) The district court did not err by denying the motion to strike the 2009 Utah PSI because of differences between the criminal history in that report and the criminal history in the 2015 federal PSI. The record shows only that the district court was presented different evidence of Lancaster's criminal history and found some of that evidence more reliable than other. The district court did not find that the criminal history in the Utah PSI was unreliable hearsay, conjecture, or speculation that must not be included in a PSI. I.C.R. 32(e)(1). Lancaster was not entitled to strike evidence from the PSI merely because the district court found other evidence, in some ways conflicting, more persuasive. Lancaster has failed to show that refusing to strike evidence in a PSI merely because other, more persuasive and in some ways conflicting evidence is presented.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction.

DATED this 19th day of October, 2021.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of October, 2021, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KKJ/dd