

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 53425

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	Rexburg, June 2026 Term
	)	
v.	)	Opinion filed: September 25, 2026
	)	
TONY RAPLEY CROMBIE,	)	Melanie Gagnepain, Clerk
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, Bannock County. Javier Gabiola, District Judge.

The judgment of conviction for domestic battery with traumatic injury and the jury's finding that the defendant was a persistent violator are vacated. The case is remanded for entry of a judgment of acquittal on the charge of attempted strangulation.

Erik R. Lehtinen, State Appellate Public Defender, Boise, for Appellant. Stacey M. Donohue argued.

Raúl R. Labrador, Idaho Attorney General, Boise, for Respondent. Neil Peterson argued.

MOELLER, Justice.

This appeal arises from a violent altercation between defendant Tony Rapley Crombie and his ex-girlfriend ("D.D."). Crombie was charged with attempted strangulation, a felony under Idaho Code section 18-923, after D.D. reported to police that he choked her during an argument. The State also alleged that Crombie, having been convicted of two prior felonies, was a persistent violator. I.C. § 19-2514. At the jury trial, the district court instructed the jury as to the charge of attempted strangulation. Over Crombie's objection, the court gave an additional instruction for the crime of domestic battery with traumatic injury as a lesser included felony offense. I.C. § 18-918. The jury acquitted Crombie of attempted strangulation but found him guilty of domestic battery

with traumatic injury. In the second phase of the trial, the jury also found that Crombie had been previously convicted of two other felonies; thus, he qualified as a persistent violator.

Crombie timely appealed. The Idaho Court of Appeals affirmed the judgment of conviction. *State v. Crombie*, No. 51302, 2025 WL 1478219 (Idaho Ct. App. May 23, 2025). Crombie then filed a petition for review with this court, which we granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 9, 2021, Crombie was charged with attempted strangulation following an altercation with D.D., his former girlfriend. Crombie and D.D. were in an on-off romantic relationship between 2019 and 2021. He was living with her until they broke up a few months before the incident. At Crombie's trial, Crombie and D.D. recounted two vastly different accounts of the altercation.

D.D. testified that late on the night of the incident, Crombie showed up to her home uninvited and entered, despite her protests. As they talked, he sat next to her on her couch. When their conversation quickly escalated into an argument, she picked up her phone to call 911. Crombie prevented her from making the call by taking her phone. Crombie then stood in front of her and placed his hands around her throat, choking her to the point that she could not breathe. She testified that she thought he was going to kill her. D.D. stated that to defend herself, she ripped a hemp necklace from Crombie's neck bearing a Buddha figurine and began to beat him with it. Crombie sustained lacerations to his head, neck, and chest.

When Crombie let her go, D.D. found her phone and called 911. She reported that Crombie stood in the doorway before leaving and told her she was "going to regret this." When police arrived, they examined D.D. The police observed injuries on her right hand she claimed came from hitting Crombie; however, she did not have any immediate visible injuries on her neck from the incident. According to the responding officer, who testified at trial, this is not uncommon for victims of strangulation. Thirty-six hours later, petechia¹ appeared around D.D.'s jawline, as shown by follow-up photos taken by an officer.

¹ The responding officer testified and described petechia:

So what we look for when looking for petechia is brown, red, or purple spot. It's spotting. So it'll leave marks usually around the throat area itself, along the jawline. It can creep up into the ears and even in the eyes, depending on how, I guess, violent or how bad the strangulation is. It's usually caused from -- it's caused from minor trauma or even more so -- it ranges from minor trauma to excessive, obviously.

Crombie's version of events differed on a few critical points. He testified that D.D. was the initial aggressor of the physical altercation, that she punched him and hit him with his necklace. Crombie maintained that he did not physically harm D.D. or even touch her at all.

The responding officer testified that even though D.D.'s and Crombie's stories did not match, it was obvious that there was a disturbance. Consequently, he issued citations to both for disorderly conduct. After later observing the petechia around D.D.'s neck during the follow-up visit, which corroborated her story, the State withdrew the disorderly conduct charges and charged Crombie with attempted strangulation. Crombie was also separately charged with violating a preexisting no-contact order between himself and D.D., which was eventually consolidated with this case.

The case proceeded to a jury trial. After both parties had rested, the district court held a jury instruction conference. One of the State's proposed jury instructions was: "If your unanimous verdict is that the defendant is not guilty of Attempted Strangulation, you must acquit him of that charge. In that event, you must consider the included offense of Domestic Battery with Traumatic Injury." Crombie's counsel objected, arguing:

Judge, in this one they're moving from attempted strangulation to domestic battery with traumatic injury, assumably because it's a lesser offense. Domestic battery with traumatic injury is not a lesser offense in this case. This case is dealing with one act. The strangulation, there's only been testimony of one touching of [D.D.] around her neck. There cannot be -- if the jury finds that there was no touching of the neck to strangle her, there is no way that they can find that he touched her in order to meet the battery portion of that.

I know that there's this issue with the traumatic injury, but I don't think the traumatic injury is the issue here. The issue is the touching. There was no -- if there's no strangulation, there's no touching. And if there's no touching, there cannot be a felony battery. So I do not believe that there's been evidence adduced, and there cannot be a lesser-included of a felony domestic battery in this case.

The court rejected this argument, citing to *State v. Colwell*, 124 Idaho 560, 564, 861 P.2d 1225, 1229 (Ct. App. 1993), which states that an offense may be an " 'included offense' if the evidence adduced at trial shows that such an offense necessarily was committed during the commission of the charged offense." The court then overruled defense counsel's objection, explaining:

I look at the elements for attempted strangulation, the elements for domestic battery with traumatic injury, and compare those and the facts adduced at trial. The [c]ourt notes that there was testimony from [D.D.] that [Crombie] did choke her and that she had marks on her neck, and also that her voice had changed because of

that. So I find based on that evidence, again, adduced at trial, that the felony domestic battery would be a lesser included offense.

Crombie's counsel later objected to another proposed instruction containing the elements for domestic battery with traumatic injury, arguing that the jury could not find that the elements were met without finding that she was strangled. He stated, "it might be an equal charge to strangulation, but because the testimony there is simply that he, you know, strangled her around the throat, same objection." The court overruled that objection as well. Following deliberations, the jury found Crombie not guilty of attempted strangulation and of violating the no-contact order; however, they found him guilty of domestic battery with traumatic injury.

Because Crombie was convicted of a felony, the persistent violator enhancement was to be presented to the jury during a Phase II trial. Before the court brought the jury back into the courtroom, Crombie's counsel raised an objection, arguing that because one of Crombie's prior felony convictions had been discharged in 2018 pursuant to Idaho Code section 19-2604(1), he did not have two felony prior convictions for purposes of the persistent violator enhancement. The court ruled that, if the jury found that Crombie has two prior felony convictions and, thus, the persistent violator enhancement should apply, it would allow briefing from both parties to determine whether the discharged conviction was a predicate crime. The jury ultimately found that Crombie had pleaded guilty or was found guilty of two prior felonies: injury to a child, in violation of Idaho Code section 18-1501, in 1998, and possession of a controlled substance, in violation of Idaho Code section 37-2732(c)(1), in 2014.

Both parties submitted briefing on the issue. After a hearing, the district court ruled that the jury's determination that Crombie was a persistent violator would stand. On July 13, 2023, Crombie filed a motion to reconsider, which the district court denied. The district court then sentenced Crombie to a unified term of ten years, with the first five years fixed.

Crombie timely appealed. The case was initially assigned to the Idaho Court of Appeals, which affirmed the judgment of conviction. *State v. Crombie*, No. 51302, 2025 WL 1478219 (Idaho Ct. App. May 23, 2025). It reasoned that Crombie failed to preserve his argument that domestic battery with traumatic injury is not a lesser included offense of attempted strangulation based on a statutory or pleading theory. *Id.* at *4–5. The Court of Appeals also determined that even if the issue had been preserved, Crombie did not establish that giving the lesser included instruction was a reversible error. *Id.* at *5. Finally, the Court of Appeals ruled that because Crombie failed to show that there was fundamental error under *State v. Miller*, 165 Idaho 115, 119, 443 P.3d 129, 133

(2019), the unobjected to error could not be reviewed. *Id.* at *6. The Court of Appeals also affirmed Crombie’s persistent violator enhancement after concluding that the plain language of Idaho Code section 37-2732 does not require a judgment of conviction, just proof that the individual was convicted by either pleading guilty or being found guilty. *Id.* at *10–12. Crombie subsequently filed a petition for review to this Court, which we granted.

II. STANDARDS OF REVIEW

“When this Court considers a case on review from the Court of Appeals, we give serious consideration to the views of the Court of Appeals, but will review the district court’s decision directly.” *State v. Eaton*, 175 Idaho 291, 294, 564 P.3d 1224, 1227 (2025).

“This Court exercises free review over whether a jury was given proper instructions.” *State v. Severson*, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009). Apropos to this case, “[t]he determination of whether a particular crime is an included offense of the crime charged involves a question of law over which this Court exercises free review.” *State v. Rosencrantz*, 130 Idaho 666, 668, 946 P.2d 628, 630 (1997). If we determine that the lower court erred in giving an instruction, the standard of review depends on whether the defendant objected to the jury instruction below. *See State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). If a defendant properly objected to the instruction, and thus preserved the issue, this Court reviews the district court’s decision for harmless error. *Id.* If the defendant failed to properly object, this Court reviews the instruction for fundamental error. *Id.* at 226, 245 P.3d at 978.

This Court also exercises free review over issues of statutory interpretation because they present questions of law. *State v. Ingraham*, 172 Idaho 30, 39, 528 P.3d 966, 975 (2023). In interpreting a statute, this Court begins with the plain meaning of a statute: “[t]he statute is considered as a whole, and words are given ‘their plain, usual, and ordinary meanings.’ ” *Id.* (quoting *State v. Dunlap*, 155 Idaho 345, 361–62, 313 P.3d 1, 17–18 (2013)). “If the statute’s language is unambiguous, then this Court will give effect to the legislature’s clearly expressed intent.” *Id.*

III. ANALYSIS

A. The district court erred by instructing the jury on domestic battery with traumatic injury and the error was not harmless.

Before his case was given to the jury, Crombie objected to two of the proposed jury instructions treating domestic battery with traumatic injury as a lesser included offense of attempted strangulation. He was overruled by the district court both times. On appeal, Crombie

argues that the district court erred in giving the instructions. During oral argument before this Court, the State agreed that the district court erred in treating domestic battery with traumatic injury as a lesser included offense of attempted strangulation.² However, it insists that Crombie did not preserve this argument for appeal by properly objecting. Thus, the State contends that Crombie must establish fundamental error, which it maintains that he has failed to show. *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010).

This Court recently summarized the standards for preservation and harmless error review for non-objected to jury instructions:

On appellate review from a criminal jury trial, if a defendant properly objected to the law the jury was ultimately instructed on—thereby preserving any assignment of error—this Court applies harmless error review. *State v. Adamcik*, 152 Idaho 445, 472, 272 P.3d 417, 444 (2012). One purpose of this preservation requirement is to “prevent[] the litigant from sandbagging the court, i.e., remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.” *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010) (alteration added) (citation omitted). If a defendant does not object, this Court will still review the jury instructions—but for “fundamental error.” *Id.*

State v. Doe (2021-38), 172 Idaho 292, 297, 532 P.3d 396, 401 (2023) (alteration in original).

First, although the State acknowledges that the jury instruction was erroneous, and has not defended it on review, we will begin by explaining why we agree before turning to the preservation issue. Since it was erroneous, the dispositive inquiry then becomes whether an objection to the instruction was preserved for appeal because that determination dictates the applicable standard of review under *Perry*, 150 Idaho at 224, 245 P.3d at 976. If it was preserved, we must conduct a traditional harmless error analysis; if not, we can only address the merits of Crombie’s appeal if fundamental error is shown.

² During oral argument at BYU-Idaho on June 10, 2026, this Court engaged in the following colloquy with the State’s attorney:

THE COURT: Is the State willing to concede that domestic battery with traumatic injury is not a lesser-included offense of attempted strangulation?

THE STATE: Yeah, I don’t think we get there and so obviously we didn’t take a position on --

THE COURT: So we agree the judge was wrong to give it, [so] it’s whether it’s [harmless] error or not is what we are talking about

THE STATE: Correct, that’s why the merits here would be more appropriately addressed under fundamental error.

1. *The district court erred by giving the jury instruction that treated domestic battery with traumatic injury as a lesser included offense of attempted strangulation.*

For both the harmless error review and fundamental error review, the threshold issue is “whether the jury instruction was erroneous at all.” *State v. Medina*, 165 Idaho 501, 507, 447 P.3d 949, 955 (2019). This Court reviews jury instructions de novo, “not for a perfect recitation of the law—but to determine whether, when considered as a whole, they fairly and adequately present the issues and state the applicable law.” *Doe (2021-38)*, 172 Idaho at 297, 532 P.3d at 401 (internal quotation marks omitted) (quoting *Medina*, 165 Idaho at 507, 447 P.3d at 955). In this case, whether the challenged jury instruction was erroneous depends on whether the district court correctly concluded that domestic battery with traumatic injury constitutes a lesser included offense of attempted strangulation.

An offense may be considered a lesser included offense of a charged offense under either the statutory theory or the pleading theory. *State v. Monroe*, 172 Idaho 838, 844, 537 P.3d 79, 85 (2023). The statutory theory “looks to the statutory definitions and compares the elements of each offense.” *Id.* This Court applies the *Blockburger* test, which provides that an offense is a lesser included offense of another if all of its elements are contained within the greater offense. *Id.* (citing *Blockburger v. United States*, 284 U.S. 299 (1932)). In other words, “an offense is not lesser-included if it is possible to commit the greater offense without committing the lesser.” *Id.* (quoting *State v. McIntosh*, 160 Idaho 1, 5, 368 P.3d 621, 625 (2016)). Under the pleading theory, on the other hand, “an offense is included within another if the charging document alleges facts that, if proven, also necessarily prove the elements of the lesser-included offense.” *Id.* (quoting *McIntosh*, 160 Idaho at 5, 368 P.3d at 625). This theory looks only to the charging documents, rather than the evidence adduced at trial. *Id.*

Attempted strangulation occurs when an individual “unlawfully chokes or attempts to strangle a household member, or a person with whom he or she has or had a dating relationship[.]” I.C. § 18-923(1). A domestic battery with traumatic injury occurs when “[a]ny household member who in committing a battery, as defined in section 18-903, Idaho Code, inflicts a traumatic injury on any other household member” I.C. § 18-918(2)(a). A battery is any “[w]illful and unlawful use of force or violence upon the person of another;” “[a]ctual, intentional and unlawful touching or striking of another person against the will of the other;” or “[u]nlawfully and intentionally causing bodily harm to an individual.” I.C. § 18-903. Both crimes use the same definition of “household member.” See I.C. §§ 18-918(1)(a), 18-923(4).

Under the *Blockburger* test, or statutory theory, domestic battery with traumatic injury is not a lesser included offense of attempted strangulation. Domestic battery with traumatic injury requires proof of a battery *and* a traumatic injury. *See* I.C. § 18-918(2)(a). The attempted strangulation statute does not require a traumatic injury—in fact, the statute expressly does not require any injury at all. I.C. § 18-923(2). This means that the crime of attempted strangulation can be committed without also committing the crime of domestic battery with traumatic injury. Therefore, domestic battery with traumatic injury is not a lesser included offense of attempted strangulation under the statutory theory.

Turning to the pleading theory, the charging document here alleged one count of attempted strangulation:

Tony Rapley Crombie, on or about December 9, 2021, in the County of Bannock, State of Idaho did willfully and unlawfully choke or attempt to strangle the person of [D.D.], to-wit: by placing his hands around her throat and choking her, and where [D.D.] and [Crombie] are household members OR have or had a dating relationship.

The State did not allege that D.D. sustained a traumatic injury, which is an essential element of domestic battery with traumatic injury. Additionally, the State alleged that D.D. was either a household member *or* a person with whom Crombie has/had a dating relationship. Because the allegation was pleaded in the disjunctive, the State could establish attempted strangulation without necessarily proving that D.D. was a household member. Because the charging document did not include all elements of domestic battery with traumatic injury, it cannot be considered a lesser included offense under the pleading theory.

In conclusion, because domestic battery with traumatic injury is not a lesser included offense of attempted strangulation under either the statutory theory or the pleading theory, we agree with the State's assessment—as further demonstrated by its failure to defend the instruction on review—that the district court erred by instructing the jury on domestic battery with traumatic injury as a lesser included offense.

2. *Crombie adequately preserved his challenge to the district court's decision to instruct the jury on domestic battery with traumatic injury as a lesser included offense.*

We next consider whether Crombie's trial counsel properly objected to the jury instructions, thereby preserving the issue for appeal. The State argues that it was not preserved because Crombie's objection was based on the lack of evidentiary support for the lesser included offense instruction, rather than whether the statutory or pleading theories provided a legal basis for the instruction. Conversely, Crombie argues that the issue was preserved because his objection

properly challenged the instruction on the grounds that it was not a lesser included offense to attempted strangulation and the district court relied on the statutory theory in its decision to overrule the objection.

This Court “will not hold that a trial court erred in making a decision on an issue or a party’s position on an issue that it did not have the opportunity to address.” *State v. Gonzalez*, 165 Idaho 95, 99, 439 P.3d 1267, 1271 (2019). To preserve an issue for appellate review, a party must either: (1) raise the issue and present “argument and authority to the trial court below” or (2) obtain an adverse ruling from the trial court. *State v. Miramontes*, 170 Idaho 920, 924–25, 517 P.3d 849, 853–54 (2022). A party’s argument may evolve on appeal, “so long as the substantive issue and the party’s position on that issue remain the same.” *Siercke v. Siercke*, 167 Idaho 709, 715–16, 476 P.3d 376, 382–83 (2020). We have also held that “[f]or an objection to be preserved for appellate review, either the specific ground for the objection must be clearly stated or the basis of the objection must be apparent from the context.” *State v. Sheahan*, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003) (citations omitted).

Here, Crombie’s attorney objected to the proposed jury instruction, explicitly stating: “Domestic battery with traumatic injury is not a lesser offense in this case.” When the district court overruled the objection, it explained:

And again, in looking at [*State v. Colwell*, 124 Idaho 560, 861 P.2d 1225 (Ct. App. 1993)] . . . , the [c]ourt has looked at the included offense analysis set forth in that case, and the specific language that an offense may 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.

I look at the elements for attempted strangulation, the elements for domestic battery with traumatic injury, and compare those and the facts adduced at trial. The [c]ourt notes that there was testimony from [D.D.] that [Crombie] did choke her and that she had marks on her neck, and also that her voice had changed because of that. So I find based on that evidence, again, adduced at trial, that the felony domestic battery would be a lesser included offense.

Looking carefully at both defense counsel’s objection and the trial court’s ruling in response, it is clear that the court and defense counsel disagreed on two key points: (1) whether domestic battery with traumatic injury was a lesser included offense of attempted strangulation, and (2) whether sufficient evidence had been adduced during trial to even support a charge of domestic battery with traumatic injury. Based on the totality of the record, we conclude that Crombie sufficiently preserved the lesser included offense issue.

While we recognize that Crombie’s counsel did not specify whether he was relying on the statutory or pleading theory as the specific grounds for his objection, it is apparent from the context that he was objecting on the basis that domestic battery with traumatic injury is not a lesser offense of attempted strangulation. *See State v. Cuenca*, 171 Idaho 603, 606–07, 524 P.3d 882, 885–86 (2023) (holding that an issue was preserved where the basis for the objection was apparent from the context, even though counsel did not cite the specific constitutional provision). Crombie’s counsel sufficiently objected to the proposed jury instruction by arguing that domestic battery with traumatic injury *is not* a lesser included offense of attempted strangulation. Although defense counsel’s objection may not have contained the nuanced and scholarly analysis of the relative applicability of the pleading and statutory theories that the State now demands, our preservation rules are not quite so stringent. Our rules do not require a trial attorney making a specific objection to expound on every available legal theory when the underlying grounds for the objection are clear from the context. *See State v. Ewing*, 175 Idaho 940, 948, 572 P.3d 706, 714 (2025); *State v. Frias*, 176 Idaho 173, ___, 574 P.3d 795, 805 (2025); *State v. McGarvey*, 176 Idaho 560, ___, 579 P.3d 925, 930 (2025).

The record discloses that the district court understood that the basis for the objection touched on the statutory and pleading theories because it appears to have rejected both. First, the court relied on *Colwell*, which references the pleading theory in its analysis in holding that “[a]n ‘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 at 564, 861 P.2d at 1229. *See McIntosh*, 160 Idaho at 5, 368 P.3d at 625 (“Under [the pleading] theory, an offense is included within another if the charging document alleges facts that, if proven, also necessarily prove the elements of the lesser-included offense.”). The district court also engaged in an analysis under the statutory theory by comparing the elements of attempted strangulation to the elements of domestic battery with traumatic injury. *See State v. Monroe*, 172 Idaho 838, 844, 537 P.3d 79, 85 (2023) (“[T]he statutory theory looks to the statutory definitions and compares the elements of each offense.”).

In sum, the district court decision to overrule the objections constituted an adverse ruling by which the court decided that domestic battery with traumatic injury was a lesser included offense under either the statutory or pleading theories. Accordingly, we conclude that the issue was preserved for appeal.

3. *The error was not harmless because it directly “affected the entire deliberative process.”*

Having determined that the issue was preserved, we turn next to whether the error was harmless. “A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt.” *State v. Perry*, 150 Idaho 209, 222, 245 P.3d 961, 974 (2010). As previously noted, the State has acknowledged that the district court erred in ruling that domestic battery with traumatic injury is a lesser included offense of attempted strangulation. As a result, the burden has shifted to the State to show beyond a reasonable doubt that the error was harmless.

When this Court determines that “the district court’s jury instructions were somehow erroneous,” we must then decide “whether the totality of the record would render such error harmless.” *State v. Campbell*, 168 Idaho 164, 173, 481 P.3d 118, 127 (2021). If the error was not harmless, “reversal is required.” *Id.* (citing *Perry*, 150 Idaho at 224, 245 P.3d at 976). “[I]n instances where erroneous jury instructions were provided at trial, an appellate court must first determine whether an improper jury instruction affected the entire deliberative process.” *Perry*, 150 Idaho at 224, 245 P.3d at 976. “An error in jury instructions only constitutes reversible error when the instruction misled the jury or prejudiced the party challenging the instruction.” *State v. Severson*, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009).

In *State v. Joy*, 155 Idaho 1, 7, 304 P.3d 276, 282 (2013), this Court conducted a harmless error analysis where a district court erroneously refused to give a lesser included offense instruction. We explained that when a jury finds a defendant guilty on a greater offense, it presumably would not have considered a lesser offense based on the instructions given to the jury. *Id.* Therefore, any error in not giving an instruction on a lesser offense is harmless. *Id.* The case before us presents the reverse scenario: the district court wrongly instructed the jury on a purportedly lesser included offense and the jury, after acquitting the defendant of the nominally greater charge, convicted him of the lesser charge. Nevertheless, *Joy* demonstrates that we presume juries will follow the instructions they are given when faced with a decision regarding a lesser included charge. *Id.* Thus, the only reason the jury even considered domestic battery with traumatic injury was because it first concluded that the facts did not support attempted strangulation.

Unlike in *Joy*, where the jury’s guilty verdict on the greater offense demonstrated that the omitted lesser instruction did not affect the outcome, the jury here only convicted Crombie of the

improper lesser included offense. Where the State made no attempt to separately charge Crombie with that offense, an offense that the State now concedes is not a lesser included offense of attempted strangulation, the jury should not have been given the option to consider it at all. Thus, the guilty verdict rendered was directly attributable to the erroneous jury instruction. The instruction affected the outcome of the trial because, absent the instruction, the jury's not guilty verdict on the attempted strangulation charge would have effectively acquitted Crombie of any crime. Accordingly, we must conclude that the error at issue was not harmless.

4. *The proper remedy is to vacate the conviction for domestic battery with traumatic injury and instruct the district court to enter a judgment of acquittal on the attempted strangulation charge.*

Finally, the State asserts that, if Crombie prevails on appeal, the proper remedy is to reduce the conviction to misdemeanor domestic battery and remand for resentencing. It argues that because misdemeanor domestic battery does not require a traumatic injury, the jury necessarily found all the elements. The State provided no authority to support its argument that the proper remedy would be reduction of the conviction rather than an acquittal. "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). While the State cites to the misdemeanor domestic battery statute, it provides no citations as to the proper remedy where an erroneous jury instruction was given.

We conclude that the proper remedy here is to vacate Crombie's conviction for domestic battery with traumatic injury and remand with instructions for the district court to enter a judgment of acquittal on the charge of attempted strangulation. The jury convicted Crombie of an offense it should never have been permitted to consider; thus, the conviction must be vacated. It would make no sense for us to simply reduce that charge to a lesser included version of the same crime. Inasmuch as his conviction for domestic battery with traumatic injury has been vacated, a remand to enter a judgment of acquittal on the only charge properly presented to the jury is the appropriate remedy.

B. Based on our conclusion, it is not necessary for us to address the persistent violator enhancement.

Because we have vacated Crombie's conviction for domestic battery with traumatic injury, which consequently vacates his sentence, it is not necessary for us to address Crombie's argument

that his 2014 conviction for possession of a controlled substance was improperly treated as a prior conviction for purposes of the persistent violator enhancement. I.C. § 19-2514.

IV. CONCLUSION

Crombie's judgment of conviction for domestic battery with traumatic injury and the jury's finding that he is a persistent violator are vacated. His case is remanded for entry of a judgment of acquittal on the charge of attempted strangulation.

Chief Justice BEVAN and Justices BRODY, ZAHN, and MEYER CONCUR.