12-26-2012

State v. Carver Respondent's Brief Dckt. 39467

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39467
	)	
vs.	)	
	)	
TODD W. CARVER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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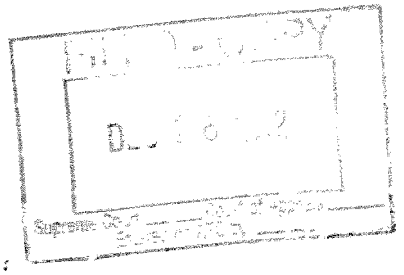

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Nature Of The Case

Todd William Carver appeals from the judgment of conviction entered upon the jury verdict finding him guilty of the first-degree murder of three-year-old D.B.

Statement Of The Facts

Angela and her two sons, three-year-old D.B. and one-year-old J.W. moved in with Carver and his grandmother in mid-January 2011. (Tr., Vol. 3, p.691, L.14 – p.692, L.13.) Carver agreed to watch Angela's children while she worked. (Tr., Vol. 3, p.694, Ls.6-22.) On March 3, 2011, while Carver was home alone with Angela's children, purportedly taking care of them, he called 911 to report that he found D.B. on the floor "rigid" and barely breathing. (Tr., Vol. 1, p.195, L.23 – p.197, L.12.) Carver claimed he had given D.B. some donuts and that D.B. fell off his bed and choked on a donut. (Tr., Vol. 1, p.197, Ls.1-4; Vol. 2, p.258, L.18 – p.260, L.10.) When law enforcement and emergency medical personnel responded, they discovered Carver sitting on the couch inside holding D.B. (Tr., Vol. 2, p.253, Ls.4-9; p.308, Ls.5-8.) D.B. was "bluish" and not breathing. (Tr., Vol. 2, p.255, Ls.5-12; p.310, Ls.18-20.) D.B. was transported to the hospital where he was sent by life-flight to a different hospital at which he died the next day. (Tr., Vol. 2, p.323, Ls.2-4.)

Both the officers on scene and all medical personnel who saw D.B. noted numerous bruises all over D.B.'s body. (Tr., Vol. 2, pp.317-319, 339-40, 364-65, 374-75, 391-93, 444-47.) D.B. had bruises on his face, neck, back, chest, arms,

legs, buttocks, penis, and on his foot. (Tr., Vol. 2, pp.391-93, 444-47; Exhibits 1-22, 39-41.) D.B. had also suffered bilateral subdural hematomas caused by blunt force trauma that ultimately resulted in his brain herniating. (Tr., Vol. 2, p.450, Ls.9-15, p.453, Ls.4-5; Vol. 3, p.594, L.5 – p.595, L.13, p.622, Ls.18-21.) D.B. was pronounced dead on March 4, 2011. (Tr., Vol. 3, p.551, L.14.)

There was substantial evidence contradicting Carver's claims regarding what precipitated his call to 911 on March 3, 2011. Inconsistent with Carver's story that D.B. had been eating donuts was the absence of any food in D.B.'s mouth or evidence that D.B. had eaten donuts in his bedroom, and the fact that Carver's grandmother said Carver was very protective of his sweets and had disciplined D.B. in the past for taking his candy. (Tr., Vol. 2, p.311, L.1 - p.312, L.6, p.314, L.25 – p.316, L.1, p.412, Ls.5-7, p.414, L.22 – p.415, L.12, p.424, L.22 – p.427, L.17.) D.B.'s injuries were also inconsistent with Carver's claim that he fell from his bed and Carver was unable to explain the numerous bruises all over D.B.'s body. (Tr., Vol. 3, p.622, Ls.23-25.) Although Carver provided a few explanations for some of the bruises, his explanations were inadequate to explain the extent of D.B.'s injuries. (Tr., Vol. 3, p.610, L.14 – p.614, L.24.) Moreover, there was evidence that Carver was abusive toward D.B. and, in February 2011, after D.B. began living with Carver, staff at D.B.'s preschool reported concerns about abuse to law enforcement. (Tr., Vol. 1, p.187, L.18 – p.190, L.6; Vol. 2, pp.412-13, 433-35.)

The state charged Carver with first-degree murder. (R., pp.12-13, 37-38.) At Carver's original pretrial conference,[1] defense counsel noted: "the Court had indicated off the record about a week or so ago that mister -- it was aware of a letter that Mr. Carver had sent the Court." (Tr., Vol. 1, p.42, Ls.20-23.) The court stated it was "told there was a letter" but it did not read it and instead sent copies to counsel. (Tr., Vol. 1, p.42, L.24 – p.43, L.2.) Defense counsel advised the court "it was Mr. Carver's attempt to essentially file a motion with the Court asking for different counsel to be appointed in this case." (Tr., Vol. 1, p.43, Ls.7-10.) Specifically, Carver wanted the court to appoint the same attorney to represent him in his murder trial that was appointed to represent him on a parole violation. (Tr., Vol. 1, p.43, Ls.12-17.) Defense counsel further informed the court that Carver did not believe counsel was "presenting an adequate defense or producing adequate evidence." (Tr., Vol. 1, p.43, Ls.17-21.) When asked if that was his opinion, Carver responded, "Yes." (Tr., Vol. 1, p.43, L.23.) Defense counsel represented his disagreement with Carver's position, but admitted he and Carver "ha[d] very different views of this case and how it ought to proceed and what ought to be done." (Tr., Vol. 1, p.43, L.24 – p.44, L.2.) The court advised Carver to file a formal motion and it would "deal with it" or Carver could "hire whoever he wants to hire" if he had the ability to do so. (Tr., Vol. 1, p.44, Ls.6-11.) In the meantime, the court would not address the issue "without a

[1] Carver's trial was originally set to begin on August 8, 2011, with the pretrial conference set for July 26, 2011. (R., p.39.) At the original July 26, 2011 pretrial conference, Carver asked the court to reset the trial to September 19, 2001, the alternative trial date previously identified as a "second setting." (Tr., Vol. 1, p.39, L.20 – p.40, L.16.) The court granted the request. (Tr., Vol. 1, p.41, Ls.6-8.)

formal motion . . . and giving the State an opportunity to look into it and argue it." (Tr., Vol. 1, p.44, Ls.11-14.)

More than one month later, Carver, through counsel, filed a Motion to Dismiss Counsel. (R., p.95.) The motion stated it was made at Carver's "express direction" and was "for reasons [Carver] [would] articulate on the record at the hearing of this motion." (R., p.95.) On September 13, 2011, five days after the motion was filed and the date set for hearing on Carver's motion, defense counsel submitted an affidavit in support of Carver's Motion to Dismiss Counsel. (Ex Parte Affidavit of Gregory C. Dickison in Support of the Defendant's Motion to Dismiss Counsel, Filed Under Seal[2] ("Affidavit").) In his Affidavit, defense counsel stated that, on that same date (September 13, 2011), he met with Carver at the jail and, during that meeting, Carver "became agitated" and said he did not want to discuss his case anymore. (Affidavit, p.1.) Defense counsel averred he "continued to make a point" to Carver and Carver "quickly became more agitated," "shouted" at defense counsel, and "struck the side of his fist hard on the door behind him." (Affidavit, p.1.) Carver also looked at defense counsel in a manner that counsel interpreted as a "menacing glare." (Affidavit, p.1.) Carver eventually "shouted for jail staff to come get him" and was transported back to his cell. (Affidavit, p.1.) While being transported, Carver "continued to make angry comments," "yell," and "strike things." (Affidavit, pp.1-2.) Defense counsel further averred:

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[2] This affidavit was sent to the Idaho Supreme Court as a "Confidential Exhibit" after Carver filed an objection to the record in district court seeking its inclusion along with the presentence report. (Letter from Kathy M. Ackerman, Clerk, dated May 15, 2012 (file folder).)

> When the defendant made his outburst the defendant and I were discussing a fundamental point regarding how the defendant's case should proceed. Ongoing disagreement on that fundamental point is what I believe is the basis for the defendant's motion to dismiss me as his counsel. Although the disagreement has been long-standing, I have not before this seen it as rising to the level of good cause upon which I could base a motion to withdraw, and therefore I continued to work with the defendant in an effort to resolve the case. I now believe that the defendant's behavior is good cause for me to withdraw or to be dismissed.

(Affidavit, p.2.)

Defense counsel explained he believed Carver's behavior constituted "good cause" for the appointment of new counsel because counsel "felt threatened by [Carver's] conduct" such that counsel "fear[ed] for [his] safety should [he] continue to represent" Carver. (Affidavit, p.2.) Based on counsel's review of the discovery and his "previous interactions" with Carver counsel expressed a belief that Carver "is fully capable of doing [him] harm" and he "no longer [felt] safe meeting with [Carver] unless [Carver] is in a cell" and did not "feel safe sitting next to [him] at counsel table unless [Carver] is sufficiently shackled." (Affidavit, p.2.) Counsel concluded:

> I believe the defendant was genuinely angry and that he intended to make me feel threatened. Regardless of his intent, I did feel threatened by his conduct. The defendant's conduct and my fear for my safety will be a distraction to me throughout the trial and any subsequent proceedings, and I will not be able to impartially and zealously represent the defendant or advocate on his behalf.
>
> I therefore request that the court grant the defendant's motion and dismiss me or allow me to withdraw from this case.

(Affidavit, pp.2-3.)

The court conducted a hearing on Carver's Motion to Dismiss Counsel at which the court inquired of Carver, defense counsel, and the transport deputies

involved in Carver's outburst on September 13, 2011. (Tr., Vol. 1, pp.98-114.) After considering the information submitted to it, the court denied Carver's Motion to Dismiss Counsel (Tr., Vol. 1, p.117, Ls.19-20), but advised: "If something else happens between now and Monday we'll look at it" (Tr., Vol. 1, p.122, Ls.24-25). No other issue was raised regarding any further disagreement between Carver and defense counsel and the case proceeded to trial.

The jury found Carver guilty of first-degree murder and the court imposed a fixed life sentence. (R., pp.146, 153-56.) Carver filed a timely notice of appeal. (R., pp.158-161.)

ISSUES

Carver states the issue on appeal as:

> 1. Did the district court err when it did not conduct an adequate inquiry into the conflict of interest identified by defense counsel, and when it denied defense counsel's motion to withdraw despite a clear conflict of interest?
>
> 2. Did the district court deprive Mr. Carver of his constitutional rights to due process and a jury trial when it failed to instruct the jury that, before it could find him guilty of felony murder by aggravated battery of a child under twelve years of age, it was required to find that he had the specific intent to commit the crime of aggravated battery and cause great bodily harm to Dominick?
>
> 3. Did the district court abuse its discretion when, in light of mitigating circumstances, including Mr. Carver's relative youth, and its incorrect conclusion that aggravating factors were present, it imposed a fixed life sentence following his conviction for felony murder?

The state rephrases and the issues as:

1. Has Carver failed to establish either that the district court's inquiry into the alleged conflict was inadequate or that the court erred in declining to appoint substitute counsel?

2. Has Carver failed to show that the elements instructions, which comport with established law, resulted in error, much less fundamental error?

3. Has Carver failed to show that imposition of a fixed life sentence for the beating death of a three-year-old boy is unreasonable under any view of the facts?

ARGUMENT

I.
Carver Has Failed to Establish That The District Court's Inquiry Into The Alleged Conflict Of Interest Was Inadequate Or That The Court Erred In Failing To Appoint Substitute Counsel

A. Introduction

Carver asserts "the district court erred when it did not conduct an adequate inquiry into the conflict of interest identified by defense counsel, and when it denied defense counsel's motion to withdraw from the case due to his conflict of interest." (Appellant's Brief, p.10.) Application of the relevant legal standards to the facts shows the court's inquiry was adequate and the court did not err in declining to appoint substitute counsel. Carver has failed to establish otherwise.

B. Standard Of Review

A trial court may appoint substitute counsel for an indigent defendant upon a showing of good cause; such decision lies within the sound discretion of the trial court. State v. Severson, 147 Idaho 694, 702, 215 P.3d 414, 422 (2009) (citing State v. Nath, 137 Idaho 712, 714-715, 52 P.3d 857, 859-860 (2002)). "Whether substitute counsel should provided is a decision that lies within the sound discretion of the trial court and will be reviewed on appeal for an abuse of discretion." Id. An abuse of discretion will only be found if the denial of such a motion results in the abridgment of the accused's right to counsel. Id.

The adequacy of a court's inquiry into an alleged conflict of interest is a constitutional issue over which this Court exercises free review. Severson, 147 Idaho at 704, 215 P.3d at 424 (citation omitted).

C. The Court Conducted An Adequate Inquiry Into The Alleged Conflict

1. The Alleged Conflict And The Court's Inquiry

As Carver notes, there were two grounds offered in support of his Motion to Dismiss Counsel and counsel's related request to withdraw. (Appellant's Brief, p.12.) Carver wanted counsel dismissed because he did not believe counsel was adequately representing him. (Tr., Vol. 1, p.99, L.15 – 101, L.9.) In his Affidavit, counsel argued dismissal or withdrawal was appropriate because his relationship with Carver had deteriorated to the point that he felt fearful of Carver. (Affidavit.) On appeal, Carver only challenges the court's actions in relation to counsel's asserted basis for the appointment of substitute counsel. (Appellant's Brief, p.12.)

With respect to counsel's Affidavit that was filed the same day of the hearing, the court noted it had not yet reviewed the Affidavit and asked counsel whether it was "in support of Mr. Carver's motion for substitute counsel, or . . . in support of a motion to withdraw[.]" (Tr., Vol. 1, p.102, Ls.15-19.) Counsel stated it was "more in the nature of a support -- in support of a motion to withdraw" and acknowledged the affidavit was not provided to the state because it was his opinion that it would "compromise Mr. Carver's position with the State." (Tr., Vol. 1, p.102, Ls.20-25.) Although the court did not review the Affidavit prior to the hearing, it is apparent from the court's questions at the hearing that it was

reviewing the Affidavit during the course of the hearing.[3] (See, e.g., Tr., Vol. 1, p.104, Ls.10-11 (court inquires whether either of the officers present were the ones that removed Carver from the attorney visiting room).)

Regarding the allegations in the Affidavit, the court inquired of the deputies currently in the courtroom about what they observed in terms of Carver's behavior after his meeting with counsel that morning. (Tr., Vol. 1, p.104, Ls.16-20.) The deputies confirmed that Carver was angry and hit walls, but the only word they heard him say was, "enough." (Tr., Vol. 1, p.104, L.20 – p.105, L.21.) When asked whether they heard Carver make any comments they "would consider to be a threat toward [defense counsel]," only one deputy responded, stating: "He was definitely angry when he left. But I don't -- nothing verbally except for enough." (Tr., Vol. 1, p.106, L.22 – p.107, L.3.)

After hearing from the deputies, the court advised Carver that, while certain decisions were within his sole control, such as whether to proceed to trial and whether to testify, the presentation of evidence and trial strategy were ultimately counsel's decisions. (Tr., Vol. 1, p.107, L.4 – p.108, L.19.) The court then engaged in the following exchange with Carver.

> THE COURT: I am concerned that -- and I've had clients who are angry at me, too. It comes with the job. But is this a situation where, I mean, you're just trying to get another attorney who's going to turn around and tell you the same thing that Mr. Dickison is and you're going to be mad at them?
>
> [CARVER]: No. I believe that they would actually put in a little more effort. I don't feel he's doing anything. He's not even trying to defend me. He's basically agreeing with everything the prosecutor

[3] To the extent Carver attempts to imply otherwise (see, e.g., Appellant's Brief, p.9), the implication is not supported by the record.

said. I haven't heard one thing on his own behalf that supports me pretty much. It's all, well [the prosecutor] said this. We're going off this. Well, I think this, too. So basically like he's a prosecutor prosecuting me as well.

THE COURT: I understand that's your point of view. That's not necessarily Mr. Dickison's point of view because that's not what he gets paid to do. He's not a prosecutor. But I am concerned about the outbursts, something the words of enough, in other words, does that mean that you're not talking to Mr. Dickison and refuse to talk to him about anything?

[CARVER]: Yep.

THE COURT: You understand, obviously, if we go to trial next Monday and you're not talking to your attorney it's not going to be any good.

[CARVER]: Yeah. Well, this morning's thing was more of I tried to end it. He wouldn't allow me to end it. So I ended it myself.

THE COURT: Okay. Well, you need to understand that the only person that can relieve Mr. Dickison from his representation is me.

[CARVER]: Yeah.

THE COURT: You don't get to fire him, and he doesn't get to withdraw or quit without my permission, and it has to be for good cause. I'm not sure I'm seeing good cause yet. You can represent yourself, if you want to, and Mr. Dickison can act as stand-by counsel. There's a lot of potential dangers with doing that. Of course, you always have the right to hire your own attorney if you had some sort of family help or funds to do that. Is that going to happen?

[CARVER]: I don't have the funds to be able to hire one for this.

THE COURT: Your family is not going to help you there?

[CARVER]: Can't afford it.

THE COURT: You want to represent yourself?

[CARVER]: I do not want to represent myself.

> THE COURT: Your actions, this morning, the words that you said, hitting the wall or whatever you did, what was the purpose of all that?
>
> [CARVER]: I just had enough. It seems like every time he comes and visits me it's the same thing. We start arguing over and over about the same thing. I'm not going to plead guilty to something I didn't do even if it is a lesser crime. I don't care how far down it goes I'm not going to admit any guilt to something I did not do.
>
> THE COURT: . . . If you're not guilty you should plead not guilty. So if we proceed on Monday with a not guilty plea how do you see your being able to work with Mr. Dickison?
>
> [CARVER]: I guess if that's what has to be, but as far as I know told [sic] there's nothing presented in my behalf because I don't have a defense. I thought that's what a defense attorney was for.

(Tr., Vol. 1, p.108, L.19 – p.111, L.20.)

The court explained that defense attorneys can present a defense without calling witnesses, reminded Carver it was his decision whether to testify, and asked defense counsel what witnesses he intended to call. (Tr., Vol. 1, p.111, L.25 – p.112, L.16.) Defense counsel declined to respond, stating he was "not comfortable disclosing that information" but noted he had disclosed potential witnesses to the state. (Tr., Vol. 1, p.112, Ls.17-18, p.113, Ls.13-25.)

The court then directly asked Carver whether it was his intent to threaten defense counsel that morning. (Tr., Vol. 1, p.114, Ls.1-3.) Carver responded: "At that moment, yes." (Tr., Vol. 1, p.114, L.4.) The court inquired whether it was intended as a physical threat, and Carver said, "Not physically, no." (Tr., Vol. 1, p.114, Ls.5-6.) The court next asked defense counsel whether he wanted to be "heard on [his] motion to withdraw any further[.]" (Tr., Vol. 1, p.114, Ls.7-8.)

Counsel responded: "No, Your Honor. I have nothing further to add." (Tr., Vol. 1, p.114, Ls.9-10.)

After hearing the state's position on the issue, which was that current counsel should remain because it appeared Carver was just frustrated (Tr., Vol. 1, p.114, L.20 – p.116, L.22), the court asked defense counsel: "[D]o you feel that you can and would be prepared for trial on Monday?" (Tr., Vol. 1, p.116, Ls.23-24). Counsel answered, "Yes." (Tr., Vol. 1, p.116, L.25.) The court followed-up:

> THE COURT: Even if Mr. Carver chooses not to -- cooperate is the wrong word, but anyway not to communicate with you in any way, shape or from between now and then?
>
> MR. DICKISON: I would still be prepared to proceed to trial on Monday. It would hamper things.
>
> THE COURT: Obviously, yeah. Mr. Carver, if Mr. Dickison is not permitted to withdraw and if we go to trial on Monday what's your position? Are you just going to withdraw inside yourself and not communicate with Mr. Dickison, or are you going to try and continue to try and talk to him, work with him.
>
> [CARVER]: I guess I'll try to continue to work with him because apparently everything is out of my control.
>
> THE COURT: Three things are not out of your control[4]. Everything else is --seems like it's out of your control, put it that way, but obviously you have some input. The motion to withdraw will be denied at this point.

(Tr., Vol. 1, p. 117, Ls.1-20.)

[4] The three things the court was referring to related back to his earlier discussion with Carver regarding the decisions Carver had complete control of – how to plead, whether to have a jury trial, and whether to testify. (See Tr., Vol. 1, p.107, Ls.6-12.)

2. The Court Conducted An Adequate Inquiry Into The Alleged Conflict And Carver Has Failed To Establish Error In The Court's Decision Not To Appoint Substitute Counsel

The state and federal constitutions guarantee an indigent defendant the right to court-appointed, conflict-free counsel. Wood v. Georgia, 450 U.S. 261, 271 (1981); State v. Lovelace, 140 Idaho 53, 60, 90 P.3d 278, 285 (2003). When a trial court has reason to believe a conflict exists, the court has a duty to inquire about the conflict. Cuyler v. Sullivan, 446 U.S. 335, 347 (1980); Severson, 147 Idaho at 703, 215 P.3d at 423. "A trial court's failure to conduct an inquiry, under certain circumstances, will serve as a basis for reversing a defendant's conviction." Severson, 147 Idaho at 703, 215 P.3d at 423. "[O]nce a defendant raises a timely objection to a conflict, the trial court is constitutionally obligated to determine whether an actual conflict of interest exists." Id. (citations omitted). "A court's failure to make a proper inquiry after a defendant's timely objection will result in the automatic reversal of the defendant's conviction." Id.

In addressing what constitutes an adequate inquiry, the Idaho Supreme Court has stated: "The court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust, or concern." Severson, 147 Idaho at 704, 215 P.3d at 424 (citation and quotations omitted). "[I]n determining whether a conflict exists, trial courts are entitled to rely on representations made by counsel." Id. (citation omitted). "A court may inquire further into facts, but is under no original or continuing obligation to do so." Id. (citation and quotations omitted).

As detailed above, the court in this case held a hearing on the motion, considered information from deputies who were aware of the situation, and allowed both Carver and counsel to address the potential conflict. This inquiry into the information contained within counsel's Affidavit was more than adequate. See Severson, 147 Idaho at 705, 215 P.3d at 425. Carver's contention otherwise lacks merit.

Carver argues the court's inquiry was inadequate because the court "did not inquire into defense counsel's ability to provide competent and diligent representation (which is different than simply being ready to participate at trial on a given date)," and "did not inquire as to whether Mr. Carver had provided written consent for defense counsel to continue representing him despite the conflict of interest." (Appellant's Brief, pp.14-15.) According to Carver, both inquiries were required by I.R.P.C. 1.7. Carver's reliance on I.R.C.P. 1.7 is misplaced. The analytical framework applicable to Carver's conflict claim is the Sixth Amendment, not I.R.P.C. 1.7. While Rule 1.7's prohibition against concurrent conflicts of interest may embody certain constitutional principles when applied to criminal cases, it does not define the Sixth Amendment, nor does the National Association of Criminal Defense Lawyers' Ethics Advisory Committee's ("NACDL Committee") interpretation of ABA's similar Model Rule of Professional Conduct 1.7. (Appellant's Brief, pp.12-13.) Carver's own argument reveals why his reliance on I.R.P.C. 1.7 would be inappropriate in addressing whether he was afforded the conflict-free counsel guaranteed by the Sixth Amendment.

According to Carver, the court's inquiry into the conflict was inadequate because the court did not "satisfy" "two of the four requirements that must be satisfied to qualify for an exception" under I.R.P.C. 1.7. (Appellant's Brief, p.14.) Specifically, Carver notes the court did not ascertain whether defense counsel believed he would be able to "provide competent and diligent representation to" carver, I.R.P.C. 1.7(b)(1), or get "informed consent" from Carver "in writing," I.R.P.C. 1.7(b)(4). (Appellant's Brief, p.14.) Exactly how Carver could constitutionally consent to counsel's alleged conflict in this case is a mystery. If counsel, in fact, could not diligently represent Carver within the meaning of the Sixth Amendment as a result of any fear of Carver, the correct response under the Sixth Amendment would be to appoint substitute counsel, not to have Carver give "informed consent" to be represented by counsel. Carver's claim that the court's inquiry was inadequate for failing to "satisfy" the criteria under I.R.P.C. 1.7(b) fails as no such inquiry was appropriate, much less required.

Although the state submits I.R.P.C. 1.7(b) does not govern the analysis, the state concedes a court should inquire as to whether counsel is capable of representing a defendant when counsel has indicated that he cannot do so due to his fear of the defendant. However, the court satisfied that obligation in this case. After hearing the representations from the deputies that Carver did not actually threaten defense counsel, allowing Carver to voice his concerns, and clarifying that Carver did not intend any of his comments or actions as a physical threat, the court asked defense counsel if he had anything to add. Counsel said he did not and subsequently advised the court that he felt he could and would be

prepared to proceed to trial. (Tr., Vol. 1, p.114, Ls.7-10, p.116, Ls.23-25.) That Carver chooses to interpret counsel's responses as insufficient to show any sort of retraction from the position stated in the Affidavit does not mean that defense counsel did not determine, based on Carver's comments and demeanor at that hearing, that he *could* zealously represent Carver at trial despite the earlier interaction. (Appellant's Brief, p.14.) And it certainly does not mean the court's inquiry was inadequate because the court did not ask the precise questions Carver claims on appeal should have been asked. See Severson, 147 Idaho at 704, 215 P.3d at 424 ("Although the court did not ask the specific questions [Carver] now claims were necessary, [Carver] was given the opportunity to draw the trial court's attention to his specific concerns, but failed to do so.").

"Once a court conducts an inquiry, it must determine whether a conflict actually exists." Severson, 147 Idaho at 704, 215 P.3d at 424 (citation omitted). Carver, quoting the NACDL Committee's interpretation of ABA Model Rule of Professional Conduct 1.7, asserts "a threat of bodily harm by a client against a lawyer creates a personal conflict of interest." (Appellant's Brief, p.13.) Carver's reliance on this principle, even if relevant to the Court's analysis, is unwarranted because there is no evidence that Carver threatened defense counsel with bodily harm. Indeed, the evidence establishes the opposite. Thus, there was no conflict based on a threat of bodily harm.

The fact that defense counsel felt threatened at the conclusion of his meeting with Carver on September 13, 2011, also does not necessarily result in a conflict that required the court to appoint substitute counsel; at best it triggers

an inquiry by the court, which is precisely what happened. As noted, the court's inquiry included asking defense counsel for further input and if he could and would be prepared for trial. At no time during the hearing on the motion did counsel state that, despite the information presented to the court, he remained too fearful to represent Carver. Defense counsel is not a potted plant; if he believed his concerns regarding his safety were not adequately addressed or alleviated at the hearing, he could have said as much. Instead, he told the court he was prepared to represent Carver at trial and he never expressed any subsequent concern despite the court's invitation that he could do so.[5] (Tr., Vol. 1, p.122, Ls.24-25.)

Because Carver has failed to establish that the district court did not satisfy its duty of inquiry, he has failed to demonstrate he is entitled to reversal of his conviction on this basis, and he has otherwise failed to show error in the court's decision not to appoint substitute counsel.

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[5] Carver also argues that defense counsel demonstrated in his Affidavit that his "personal interests controlled over those of his client when he asserted that he would not feel comfortable appearing in court with Mr. Carver unless he was 'sufficiently shackled.'" (Appellant's Brief, pp.13-14.) Carver further argues, "No defense attorney acting in his client's interests would request that a trial court shackle his client during trial." (Appellant's Brief, p.14.) While counsel did indicate in his Affidavit that he would not "feel safe" unless Carver was "sufficiently shackled" (Affidavit, p.2), he never actually asked the court to have Carver restrained either at the hearing on the Motion to Disrniss Counsel conducted on September 13, 2011, or at the hearing held on September 15, 2011, when the court, on its own, stated Carver would have "ankle chains," which was "normal[ ]," but no "belly chains." (Tr., Vol. 1, p.142, Ls.12-13.) The court also noted a requirement that there be an officer present "when a person is incarcerated," and directed the officers where to sit. (Tr., Vol. 1, p.142, Ls.20-23.) Notably, counsel did not, at any point during this discussion, mention the need for additional or different security measures due to any ongoing fear he was experiencing.

II.

Carver Has Failed To Show Fundamental Error In The Elements Instruction

A. Introduction

For the first time on appeal, Carver argues that the district court erred by failing to properly instruct the jury regarding the elements of first-degree murder. (Appellant's Brief, pp.15-26.) Carver has failed to establish the elements instruction resulted in fundamental error.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587, 261 P.3d 853, 864 (2011). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." Id. (citations omitted).

C. Carver Has Failed To Carry His Burden Of Establishing Fundamental Error With Respect To The Elements Instruction

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). This same principle applies to alleged errors in jury instructions. See I.C.R. 30(b) ("No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection."). Absent a timely objection, the appellate courts of this state will only review an alleged

error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Review under the fundamental error doctrine requires Carver to demonstrate that each error he alleges: "(1) violates one or more of [his] 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." Perry, 150 Idaho at 228, 245 P.3d at 980. Application of this three-prong test to Carver's claim of instructional error shows that Carver has failed to meet his burden.

Pursuant to I.C. § 18-4003(d), the state charged Carver with first-degree murder "committed in the perpetration of, or attempt to perpetrate the crime of Aggravated Battery, on a child under twelve (12) years of age." (R., p.37.) With respect to this charge, the jury received the following instructions:

INSTRUCTION NO. 4

In order for the defendant to be guilty of First Degree Murder in the perpetration of an aggravated battery upon a child under twelve (12) years of age, the state must prove each of the following:

1. On or about March 3, 2011,
2. in the state of Idaho[,]
3. Todd William Carver committed an aggravated battery upon [D.B.,]
4. Which caused [D.B.] great bodily harm,
5. From which bodily harm [D.B.] died, and

6. That [D.B.], at the time of his death, was under twelve (12) years of age.

To prove Todd William carver guilty of first degree murder in this way, the state does not have to prove that the defendant intended to kill [D.B.], but the state must prove that during the perpetration of an aggravated battery on a child under twelve (12) years of age, the defendant killed [D.B.].

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of first degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of first degree murder.

(R., p.190 (bold and capitalization original).)

INSTRUCTION NO. 5

An "aggravated battery" is a "battery" that causes great bodily harm,

A "battery" is committed when a person:

(1) willfuly [sic] 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.

An act is "willful" or done "willfully" when done on purpose. One can act willfully without intending to violate the law, without intending to injure another or without intending to acquire any advantage.

(R., p.191 (bold and capitalization original).)

Carver concedes he did not object to the elements instructions, which accurately reflect the pattern jury instructions,[6] but contends he is entitled to relief

[6] Compare ICJI 704C ("felony murder"), 1203 (battery defined), 1207 (aggravated battery).

under the fundamental error doctrine because, he argues, the instructions "omitted an essential element of the crime for which he was charged." (Appellant's Brief, pp.16, 23.) Specifically, Carver claims that, in order to convict him of first-degree murder, the jury had to find he "had the requisite mental state to commit an aggravated battery" and find "that he had the specific intent to cause great bodily harm to [D.B.]." (Appellant's Brief, p.20 (emphasis omitted).) Carver further asserts the jury was instead "specifically told that it did not have to find that [he] had any intent to commit a murder, commit aggravated battery, or cause physical harm to [D.B.] in order to find [him] guilty of first degree murder." (Appellant's Brief, p.16.) Carver has failed to show any error, much less fundamental error, that would entitle him to relief.

Idaho law is clear that, in order to prove a defendant is guilty of first-degree murder resulting from the perpetration of an aggravated battery on a child under 12, "the state does not have to prove that the defendant intended to kill," but only has to prove "that during the perpetration or attempt to perpetrate" the aggravated battery, the victim died. (ICJI 704C and comments.) Instruction No. 4 accurately restates ICJI 704C and the state's burden of proof. As such, it was not error to give the instruction. See McKay v. State, 148 Idaho 567, 571 n.2, 225 P.3d 700, 704 n.2 (2010) ("The I.C.J.I. are presumptively correct. Trial courts should follow the I.C.J.I. as closely as possible to avoid create unnecessary grounds for appeal.").

Instruction No. 5 also incorporates the relevant I.C.J.I, and is an accurate statement of the law as explained in State v. Grove, 151 Idaho 483, 493-95, 259

P.3d 629, 639-41 (Ct. App. 2011), *review denied*, State v. Carlson, 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000). That Carver disagrees with the holdings in Grove and Carlson falls far short of establishing fundamental error. Quite the contrary, that the district court followed the law and that defense counsel did not object to the court doing so show there was no error and certainly no plain error. Indeed, Carver's disagreement with established precedent is "irrelevant in the context of fundamental error where the error must be plain under *current* law." Grove, 151 Idaho at 494, 259 P.3d at 640 (emphasis original).

Carver's claim of instructional error, raised for the first time on appeal, fails.

III.
Carver Has Failed To Establish The District Court Abused Its Discretion In Imposing A Fixed Life Sentence For The First-Degree Murder Of Three-Year-Old D.B.

A. Introduction

Carver argues the district court abused its discretion in imposing a fixed life sentence, asserting the court "failed to give sufficient consideration to the mitigating factors present in this case" and erroneously "concluded that aggravating factors were present when they were not." (Appellant's Brief, p.27 Carver's arguments lack merit. Application of well-established sentencing standards to the facts presented to the district court reveals Carver has failed to meet his heavy burden of establishing the district court abused its sentencing discretion.

B. Standard Of Review

"Where the sentence imposed by a trial court is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion." State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (quotations and citations omitted). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." Id.

C. Carver Has Failed To Establish The District Court Abused Its Discretion In Imposing Sentence

"[T]he most fundamental requirement [of sentencing] is reasonableness." Miller, 151 Idaho at 834, 264 P.3d at 941 (quotations and citation omitted). "When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, "having regard to the nature of the offense, the character of the offender and the protection of the public interest." Id. A review of the record demonstrates that a fixed sentence for the death of a three-year-old child was reasonable in light of the nature of the offense, the character of the offender, and the goals of sentencing. Carver has failed to establish otherwise.

The four objectives of sentencing are well-established. They are "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution." State v. Knighton, 143 Idaho 318, 319-320, 144 P.3d 23, 24-25 (2006) (quotations and citations omitted). "A sentence need not serve all sentencing goals; one may be sufficient." State v. Sheahan, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003)

(citing State v. Waddell, 119 Idaho 238, 241, 804 P.2d 1369, 1372 (Ct. App. 1991)).

In imposing sentence on Carver, the district court considered all of the information before it, including the presentence report, prior rehabilitative efforts, Carver's age, history of drug use, treatment of D.B. and lack of emotion toward D.B.'s condition and ultimate death, and the arguments of counsel. (R., pp.153-155.) The court also considered the objectives of sentencing and concluded the nature of the offense and Carver's history, which indicates he is not amenable to rehabilitative efforts, warranted a fixed life sentence. (R., pp.155-156; Tr., Vol. 4, p.810, L.13 – p.813, L.4.)

Carver claims the court abused its discretion in imposing a fixed life sentence, asserting the court "failed to give sufficient consideration to the mitigating factors present in his case, including [his] relative youth, and when it concluded that aggravating factors were present when they were not." (Appellant's Brief, p.27.) The record supports the sentence imposed.

With respect to mitigating factors, Carver specifically identifies his "relative youth" and claims this was the "most obviously-ignored mitigating factor." (Appellant's Brief, p.28.) This assertion is contradicted by the record. Not only did defense counsel specifically emphasize Carver's age in presenting argument at sentencing (Tr., Vol. 4, p.806, Ls.11-22), the district court specifically noted Carver's age as a consideration (R., p.153). To the extent Carver believes the court "ignored" his age because it did not accept, as Carver wanted him to, that his age necessarily meant he could be rehabilitated and should therefore be

sentenced to a term less than fixed life, the court was not required to do so. it was well within the court's discretion to conclude Carver did not have good rehabilitative potential given Carver's abysmal record in this regard. More importantly, rehabilitation is only one sentencing consideration and it is subservient to the primary goal of protecting society, which was a critical component to the court's sentencing decision. (R., p.156 ("The court concluded that in order to protect society the defendant must be incarcerated without parole.").)

As for Carver's claim that the district court relied on aggravating factors that were not present, it appears this assertion is based on the court's dim view of Carver's rehabilitative potential and his "purported lack of emotion." (Appellant's Brief, p.35.) As noted, the district court was not required to share Carver's view of his prospects for rehabilitation and the fact that the court did not share those views does not mean the factor was "not present." With respect to Carver's lack of emotion, the court noted:

> From the moment the police arrived at the defendant's residence in response to a 911 call and found the 3 year old victim not breathing and without a heart beat the defendant has not shown any concern or emotion for the little boy or the boy's family. It would be normal for a person, even if he continues to maintain his innocence, to feel sorry that the boy died and feel sorry for the boy's family. Mr. Carver has not shown any such empathy or concern. Mr. Carver was at the hospital in Grangeville and Spokane, Washington when medical personnel were trying to save the little boy, but Mr. Carver never displayed any concern for the boy or his condition.

(R., p.155.)

Carver asserts that he "has not made a public spectacle of emotion is not indicative of whether he felt grief about [D.B.'s] death." (Appellant's Brief, p.35.)

Carver also argues that because D.B.'s mother also failed to "display[ ] her emotions . . . reveals that there is nothing particularly significant about [his own] lack of a public emotional display." (Appellant's Brief, p.35 and n.16.) Carver also tries to claim that he "wept" during his interviews with law enforcement. (Appellant's Brief, pp.35-36.) According to Carver, the district court "appears to have confused the concept of 'displaying emotion' with 'expressing remorse for criminal conduct'" and, he asserts, "the district court's requirement that [he] express remorse . . . would require him to stop maintaining his innocence." (Appellant's Brief, p.36.) All of Carver's arguments on this point lack merit.

Carver's suggestion, made for the first time on appeal, that he expresses grief in ways other than making a "public spectacle of emotion," is unsupported by anything in the record and neither William Shakespeare's nor Voltaire's views on grief mean Carver himself feels any sort of empathy or concern for the fact that a child died in his care. (Appellant's Brief, p.35.) And, the sad fact that D.B.'s mother may have shared some of Carver's behaviors does not make either of their actions insignificant.

Carver's claim that he "wept" due to the emotion he felt about D.B. is also disingenuous. While there was undoubtedly testimony that he "cried" when he was confronted by law enforcement with the fact that they did not believe his story, those officers clarified that they saw no actual tears and the court was certainly not required to conclude that any emotion displayed by Carver was attributable to grief over D.B. as opposed to emotion related to the fact that he was a suspect in D.B.'s death and was going to have his parole revoked. (Tr.,

Vol. 2, p.287, L.14 – p.288, L.2; Vol. 3, p.665, L.16 – p.666, L.9.) Finally, the record clearly reflects the district court was not "confused" on this issue; the court specifically noted that it was not a mutually exclusive proposition to maintain innocence or show concern for the loss of life. (R., p.155.) Carver's claim otherwise represents another disingenuous assertion in support of his sentencing argument.

The district court considered the information presented to it and imposed a reasonable sentence. Carver has failed to show otherwise.

CONCLUSION

The state respectfully requests that this Court affirm Carver's judgment of conviction.

DATED this 26th day of December 2012.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of December 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General

JML/pm