1-3-2008

State v. Wright Appellant's Brief Dckt. 34017

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHAEL JORDAN WRIGHT, Defendant-Appellant.	)	NO. 34017 APPELLANT'S BRIEF

BRIEF OF APPELLANT

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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Nature of the Case

Michael Jordan Wright appeals from his judgment of conviction for second degree murder. He asserts that the district court erred by refusing to permit an expert witness to testify regarding the reliability of eye witness identification, by refusing a jury instruction regarding the reliability of eye witness identification, and by imposing an excessive sentence.

Statement of the Facts and Course of Proceedings

On May 22, 2006, Preston James "P.J." Gilmer was shot several times near the corner of Sixth and Grove Streets in Boise. (Presentence Investigation Report (*hereinafter*, PSI), p.2.) Ron Hohowski heard the gunshots from a tattoo parlor near Sixth and Front Street. (Tr., p.165, Ls.14-17.) He stepped outside and saw an African-American male who was wearing jeans and a white t-shirt; he smelled a "strong odor of gunpowder" and believed that this man may have been the individual responsible for the shooting. (Tr., p.167, L.1 – p.169, L.14.) The man reached into his pocket "but something must have jabbed him or there was a quick action to where he – like he said ouch or moved his arm away." (Tr., p.171, L.20 – p.172, L.1.) Mr. Hohowski speculated that this individual may have had a gun in his pocket. (Tr., p.172, Ls.5-8.)

This individual, who turned out to be Ernest Hames, was subsequently found by the Boise Police. (Tr., p.200, Ls.13-14.) Mr. James testified that his cousin, David Martin, Jr., was killed "on New Year's of 2004, 2005 and that Mr. Wright was a friend of his cousin. (Tr., p.292, Ls.13-24.) Laurence Weed was charged in relation to the killing

of Mr. Martin. (Tr., p.529, Ls.23-29.) Mr. Weed and Mr. Gilmer were friends. (Tr., p.530, Ls.8-12.)

Mr. James testified that on the evening in question, he, his girlfriend, Georgette Waldham, and Mr. Wright drove into downtown Boise. (Tr., p.295, Ls.1-14.) They parked in the lot behind the Diggy Bass bar. (Tr., p.295, Ls.24-25.) The three of them went to the China Blue bar; Mr. James had four or five drinks. (Tr., p.297, Ls.4-20.)

According to Mr. James, he and Mr. Wright left the bar to go purchase cigarettes. (Tr., p.298, Ls.21-23.) Mr. James testified that on the way to the convenience store, he and Mr. Wright encountered Mr. Gilmer in front of the Diggy Bass bar. (Tr., p.300, Ls.3-6.) Mr. James claimed that he walked just ahead of Mr. Wright and Mr. Gilmer and then heard gunshots; he turned around and saw Mr. Wright running down the alley. (Tr., p.303, L.22 – p.305, L.5.) According to Mr. James, he just kept walking to the convenience store. (Tr., p.305, Ls.20-22.) Mr. James testified that he was not "sure" that he initially told the police that he was with Mr. Wright, but stated that he eventually told them about Mr. Wright. (Tr., p.307, Ls.7-12.)

Annie Prescott testified that she was downtown with Mr. Gilmer that evening and that just as she was heading downstairs to the Diggy Bass bar, Mr. James and Mr. Wright exited China Blue and came their way. (Tr., p.518, Ls.18-23.) According to Ms. Prescott, Mr. Gilmer asked Mr. James and Mr. Wright if they could get him some cigars. (Tr., p.519, Ls.17-19.) Ms. Prescott proceeded downstairs into the bar but Mr. Gilmer did not follow her. (Tr., p.520, Ls.10-13.)

Kyle Russell was also downtown drinking that evening. (Tr., p.595, Ls.12-13.) He had consumed "four or five Coors Light bottles," and "got a nice buzz, but I wasn't

drunk." (Tr., p.595, Ls.20-23.) At approximately 1:30 a.m., he was in the Diggy Bass bar and "went outside to grab something to eat at a taco stand." (Tr., p.595, Ls.24-25.) He testified that after he purchased his food, he saw three men walking down the sidewalk together. (Tr., p.599, Ls.3-4.) He recognized one of them from the bar. (Tr., p.599, Ls.8-9.) However, no other witness testified that any of the three men ever entered the Diggy Bass bar that evening. He heard one of the men ask, "hey, hook me up with some buds for my blunt"; this caught his attention as he believed he was about to witness a drug transaction. (Tr., p.600, Ls.13-18.) One of the men responded, "I've got your buds right here." (Tr., p.604, Ls.5-8.) The man then reached into his coat pocket, pulled out a gun, and shot Mr. Gilmer. (Tr., p.604, Ls.5-8.) Mr. Russell described the shooter as "wearing a black and red jacket, was wearing black longer shorts, almost pants, the baggy ones, and he was wearing a black hat, black and red hat, and he had cornrows wiry out." (Tr., p.608, Ls.2-5.)

Mr. Russell testified that he made a positive identification of Mr. Wright on the evening of the incident; however, the truth is that on that evening, he signed a document indicating that he had viewed a photo lineup and could not make an identification from the photographs. (Tr., p.620, L.6 – p.621, L.2.) Mr. Russell insisted that he told the detectives that if he was shown a "side shot" rather a "frontal view" he would be able to make an identification because he never saw the shooter face him; he only saw his profile. (Tr., p.621, Ls.1-11.) The detective confirmed that Mr. Russell did not Mr. Wright as the shooter on the evening of the incident. (Tr., p.669, Ls.20-24.)

On December 7, 2005, Mr. Russell was shown another lineup with "side shots," identified Mr. Wright, and stated that he was "100 percent confident" with this identification. (Tr., p.622, Ls.3-19.)

Mr. Wright was charged with first degree murder and was found guilty of second degree murder. (R., pp.51, 235.) Prior to trial, the State moved to exclude any testimony from Roy Malpass, Ph.D., Mr. Wright's proposed expert witness on the reliability of eyewitness identification. Following a hearing in which Dr. Malpass testified, the court excluded his testimony. (R., p.160.) Mr. Wright also requested a jury instruction on the reliability of eye witness testimony. (*See* Defendant's Request for Additional Jury Instructions Regarding Eyewitness Identification.) The court refused to issue the instruction to the jury. (Tr., p.760, Ls.1-11.) Following the conviction, the district court imposed a unified sentence of life, with sixty years determinate. (R., p.240.) Mr. Wright appealed. (R., p.244.) He asserts that the district court erred by excluding Dr. Malpass's testimony, by failing to give the requested jury instruction, and by imposing an excessive sentence.

ISSUES

1. Did the district court abuse its discretion by excluding the testimony of Dr. Malpass regarding eyewitness reliability?

2. Did the district court err by failing to instruct the jury on the factors it could consider in evaluating eyewitness testimony?

3. Did the district court abuse its discretion when it imposed a unified sentence of life, with sixty years fixed, upon Mr. Wright following his conviction for second degree murder?

ARGUMENT

I.

The District Court Erred By Excluding Testimony From Dr. Malpass Regarding The Reliability Of Eyewitness Identification

A. Introduction

Mr. Wright asserts that the district court abused its discretion by excluding the testimony of his proposed expert witness, Dr. Roy Malpass, Ph.D.

B. The District Court Erred By Excluding Testimony From Dr. Malpass Regarding The Reliability of Eyewitness Identification

The decision whether to permit or exclude expert witness testimony is reviewed for an abuse of discretion. *State v. Winn*, 121 Idaho 850, 855, 828 P.2d 879, 884 (1992); *State v. Crea*, 119 Idaho 352, 355, 806 P.2d 445, 448 (1991); *State v. Hopkins*, 113 Idaho 679, 747 P.2d 88 (1987); *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986).

> When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.

State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989) (citing *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987)).

"The issue of the admissibility of expert witness testimony on the reliability of memory and perception is an area of some controversy and question under our rules of evidence." *State v. Pacheco*, 134 Idaho 367, 371, 2 P.3d 752, 756 (Ct. App. 2000) (citing *State v. Hoisington,* 104 Idaho 153, 165, 657 P.2d 17, 29 (1983) (a case decided

prior to the adoption of the Idaho Rules of Evidence in which the Idaho Supreme Court ruled that the trustworthiness of eyewitness observations is not beyond the ken of the jurors and thus found no error in the trial court's refusal to admit the testimony of Dr. Loftus, a nationally renowned expert in the field, whose opinions would have concerned the reliability of eye witness identification), and *State v. Alger,* 115 Idaho 42, 50-51, 764 P.2d 119, 127-28 (Ct. App. 1988) (suggesting that findings of social science experts' research which provide insight into the reliability of eyewitness identification may be of assistance to the jury in particular cases)). In *Pacheco*, the Court of Appeals acknowledged that, "in appropriate circumstances such testimony [the reliability of eyewitness identification], properly circumscribed, may be of assistance to the jury regarding eyewitness identification and the factors to be considered in determining the accuracy of such identification." *Id.*, 134 Idaho at 371 n.2, 2 P.3d at 756 n.2 (citing *People v. Wright,* 45 Cal.3d 1126, 248 Cal. Rptr. 600, 755 P.2d 1049 (1988); CALJIC 2.92 (5th ed. 1996 Rev.).

Idaho Rule of Evidence 702 governs testimony by experts. It states, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." I.R.E. 702. In the present case, Mr. Wright asserts that the district court abused its discretion when it excluded Dr. Malpass's testimony because the court failed to act consistently with the legal standards applicable to the choice of whether to allow expert testimony.

Dr. Malpass testified at the hearing on the motion in limine. He testified that he was a professor of psychology and criminal justice at the University of Texas El Paso, had a Ph.D from Veracruz University, and had "been researching this question and related aspects of it since 1969." (Tr., p.11, Ls.11-17.) He began publishing in the field of eyewitness identification in 1969 and his "most recent publication, a pair of publications, [was] an examination of the research literature and the thinking about sequential and simultaneous line-ups." (Tr., p.12, Ls.21-25.) He was on the editorial board of the Journal of Law and Human Behavior, "which is arguably the primary publication and primary journal in this field." (Tr., p.13, Ls.5-7.) He had worked with the Department of Justice on "the development of model procedures for eye witness identification" and had worked with the State of Illinois on an "evaluation program comparing simultaneous and sequential line-ups." (Tr., p.13, Ls.11-16.) He had previously testified in federal court and had testified in state courts in California, New Mexico, Texas, New York, Delaware, and Florida. (Tr., p.13, Ls.22-25.)

In conducting experiments on eye witness identification, Dr. Malpass followed the "control procedures of scientific investigations," meaning "that different observers observing the same thing," using the "experimental method." (Tr., p.14, L.17 – p.15, L.13.) Dr. Malpass acknowledged that, "I can't see inside the witness's head," and that "I can talk in more general terms about the effect of various events. The jury as the finders of fact are in the unfortunate position, I think, of having to make decisions about what the person saw, how good of quality of information the witness probably had." (Tr., p.27, L.20 –p.28, L.10.)

Dr. Malpass discussed a number of factors that can influence an eye witness identification. He testified that "the error rate would be 50 percent greater when viewing a cross-race identification rather than an own-race identification." (Tr., p.30, Ls.18-20.) Further, if a "subject's photograph is made available in the press . . . there will be an enhancement of the likelihood that the same person will be chosen at a subsequent identification procedure." (Tr., p.34, Ls.10-23.) "The presence of a weapon in the vision of the witness has an effect that decreases the accuracy of the verbal description of the offender . . ." (Tr., p.33, Ls.13-17.) Dr. Malpass testified that "confidence [in an identification] is easily manipulated" by witness feedback about the accuracy of the identification. (Tr., p.35, Ls.22-25.)

The district court excluded Dr. Malpass's testimony. (R., p.160.) The court concluded that Dr. Malpass could not offer any opinions about particular witnesses in this case and that he limited his testimony by using terms such as "might indicate," "possibly," and "could be" and admitted that there were few real studies of "actual eye witness identifications." (R., p.162.) Further, because many of the studies described by Dr. Malpass involved graduate students and were not conducted under circumstances involving "actual crime" the court questioned the reliability of the scientific principles upon which Dr. Malpass relied. (R., p.163.) The district court concluded that Dr. Malpass was no more qualified than the average juror to determine the credibility of a particular witness's testimony. (R., p.165.) The district court erred in coming to this conclusion.

Dr. Malpass has been studying the reliability of eye witness identification since 1969. While it is true that he spoke of "probabilities" and could not say for certain that

any particular witness's identification was inaccurate, he could have informed the jury of the factors that, generally, impact an eye witness's accuracy, such as the presence of a weapon, the viewing of a subject's photograph in the press, feedback from the authorities, and the rate of inaccuracy that stems from a cross-racial identification. Further, the fact that he could not testify to a particular witness's identification did not warrant the exclusion of his testimony. Recently, in *State v. Pearce*, ___ Idaho ___, ___ P.3d ___, 2007 WL 1544152l (Ct. App. 2007) (not yet final), the Court of Appeals approved of the use of an expert witness regarding eyewitness identification. In *Pearce*, he district court expressed its concern that "any opinion Dr. Honts might offer concerning the particular witness identifications in this case, including, e.g., suggestibility or tainted memories, begins to tread into impermissible ground: the credibility of the witness identification, which is the absolute province of the jury as the finders of fact." 2007 WL at *5. The Court of Appeals concluded, "[t]his reasoning, however, did not necessarily warrant such a broad exclusion of Dr. Honts's testimony. **Such a rationale does not support disallowing Dr. Honts' testimony about procedures and problems associated with lineups and resulting identifications in the abstract**." *Id.* "[T]o testify as to general procedures, there is no requirement that the specialized knowledge of an expert witness include the facts of the case. Further, as stated in *State v. Hopkins,* 113 Idaho 679, 681, 747 P.2d 88, 90 (Ct. App. 1987), "[t]he lack of direct experience is not fatal to [the proposed expert's] qualification but it may affect the weight given his testimony." *Id.* "Thus, the district court's reasoning concerning Dr. Honts's familiarity with the facts of the present case is largely irrelevant in regard to his testimony on eyewitness identifications generally ..." *Id.* Expert

witnesses on eyewitness identification, therefore, need not be limited solely to the identification being made in a particular case; they may testify on the problems inherent in eyewitness identification in the abstract.

Dr. Malpass was sufficiently qualified to testify about problems associated with eyewitness testimony. The district court abused its discretion when it refused to permit him to testify in Mr. Wright's defense in this case.

II.

The District Court Erred When It Refused To Give Mr. Wright's Requested Jury Instruction Concerning Eyewitness Identification

A. Introduction

Mr. Wright asserts that the district court erred by failing to give his requested instruction on eyewitness identification.

B. The District Court Erred When It Refused To Give Mr. Wright's Requested Jury Instruction Concerning Eyewitness Identification

When reviewing jury instructions, an appellate court must first ask whether the instructions as a whole fairly and accurately reflect the applicable law. *State v. Row*, 131 Idaho 303, 310, 955 P.2d 1082, 1089 (1998) (*citing State v. Enno*, 119 Idaho 392, 405, 807, P.2d 610, 623 (1991); *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993)).

The appellate courts exercise free review when considering the propriety of jury instructions, and reversible error occurs when under the circumstances the instructions "have misled the jury or prejudiced the complaining party." *State v. Young*, 138 Idaho

370, 372, 64 P.3d 296, 298 (2002); *State v. Row*, 131 Idaho 303, 310, 955 P.2d 1082, 1089 (1998).

Mr. Wright offered the following instruction:

> Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime charged. In determining the weight to be given eyewitness testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
>
> The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;
>
> The stress, if any, to which the witness was subjected at the time of the observation;
>
> The witness' ability, following the observation, to provide a description of the perpetrator of the act;
>
> The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;
>
> The cross-racial nature of the identification;
>
> The witness' capacity to make an identification;
>
> Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;
>
> Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;
>
> The period of time between the alleged criminal act and the witness' identification;
>
> Whether the witness had prior contacts with the alleged perpetrator;
>
> The extent to which the witness is either certain or uncertain of the identification;
>
> Whether the witness' identification is in fact the product of his own recollection;

> And any other evidence relating to the witness' ability to make an identification.

(Defendant's Request For Additional Jury Instructions Regarding Eyewitness Identification.) The district court refused the instruction, informing counsel that counsel could simply argue the reliability of the eyewitness identification during closing arguments. (Tr., p.760, Ls.1-11.) The court erred by doing so because a criminal defendant is entitled to an instruction where there is a reasonable view of the evidence presented in the case that would support the instruction. *State v. Eastman,* 122 Idaho 87, 90, 831 P.2d 555, 558 (1992).

The California Supreme Court has held, "a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence." *People v. Wright*, 755 P.2d 1049, 1058 (Cal. 1988). The court held that such an instruction "should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence." *Id.* at 1059. This standard has been cited with approval in Idaho. *See State v. Sanchez,* 142 Idaho 309, 322 n.5, 127 P.3d 212, 225 n.5 (Ct. App. 2005); *State v. Pacheco*, 134 Idaho 367, 371 n.2, 2 P.3d 752, 756 n.2 (Ct. App. 2000).

In the instant case, identification was a crucial issue and there is no substantial corroborative evidence. While several witnesses place Mr. Wright with Mr. James and Mr. Gilmer at the scene of the incident, it is Kyle Russell, and Kyle Russell alone, who testified that he saw Mr. Wright shoot Mr. Gilmer. Mr. James did not testify that he saw Mr. Wright shoot Mr. Gilmer, and in any event, Mr. James is the individual who was

seen running from the scene smelling like gunpowder, whose cousin had recently been killed by Mr. Gilmer's friend. Furthermore, the proposed instruction lists the relevant factors for the jury to consider and does so in a neutral manner. Considering this state of the evidence, Mr. Wright asserts that the district court erred by refusing to give this instruction to the jury.

III.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Life, With Sixty Years Fixed, For Second Degree Murder

A. Introduction

Mr. Wright asserts that the district court abused its discretion by imposing a unified sentence of life, with sixty years fixed, because the court based its sentence on the finding that the murder was "cold-blooded" despite the fact that the jury found that the State had not proved premeditation.

B. The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Life, With Sixty Years Fixed, For Second Degree Murder

Mr. Wright asserts that, given any view of the facts, his unified sentence of life, with sixty years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of

the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294, 939 P.2d 1372, 1373 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577, 602 P.2d 71, 75 (1979)). Mr. Wright does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Wright must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991) (*overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992))). The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978)).

The Eighth Amendment of the United States Constitution and Article I, Section 6 of the Idaho Constitution prohibit sentences that constitute cruel and unusual punishment. In *State v. Brown,* the Idaho Supreme Court recognized the proportionality test under the Eight Amendment. *State v. Brown,* 121 Idaho 385, 394, 825 P.2d 482, 491 (1992). The *Brown* Court stated:

> We limit our proportionality analysis to death penalty cases and, under the Idaho Constitution as contemplated in *State v. Evans,* to those cases which are "out of proportion to the gravity of the offense committed" in the cruel and unusual punishment setting similar to the "grossly disproportionate" analysis of the eighth amendment urged by Justices Kennedy, O'Connor, and Souter in *Harmelin.* The lack of objective standards for evaluating differing terms of imprisonment, *see Harmelin,* 111 S.Ct. at 2704-05, gives proportionality review outside these two limited areas the potential of essentially allowing, if not requiring, this Court to second guess the trial court's discretionary determination of the criminal sentence that best fits the criminal defendant and the crime within the reasonable limits of the sentencing options.

Brown, 121 Idaho at 394, 825 P.2d at 491. Therefore, the first step is to compare the crime committed and the sentence imposed to determine if the sentence leads to an inference of gross disproportionality. *State v. Jensen,* 138 Idaho 941, 946, 71 P.3d 1088, 1093 (Ct. App. 2003).

Mr. Wright must make such a showing in order to present his proportionality claim that the sentence that he received was disproportionate to the penalties imposed within the same jurisdiction for similar crimes. *See Harmelin v. Michigan*, 501 U.S. 957, 962, 1005 (1991). Once such a showing has been made, a comparative analysis of other sentences imposed in that jurisdiction may be relevant to validate the judgment that a sentence is grossly disproportionate to the crime. *Id.* at 1005.

When reviewing a claim of cruel and unusual punishment, this Court only applies a proportionality analysis to those cases where the sentence imposed is "out of proportion to the gravity of the offense committed." *State v. Brown*, 121 Idaho 385, 393-94, 825 P.2d 482, 490-91 (1992). The Court compares the crime committed and the sentence imposed to determine whether the sentence is grossly disproportionate. *State v. Grazien*, 144 Idaho 510, 517, 164 P.3d 790, 797 (2007).

Here, the district court, in contravention of the findings of the jury, imposed a sentence based on the court's belief that the event was a "cold-blooded killing. It was a cold-blooded murder." (Tr., p.833, Ls.24-25.) This finding is in contravention of the jury's determination that Mr. Wright was only guilty of second degree murder and not first degree murder. (R., p.235.)

The district court may not lawfully substitute its view for that of the jury. *See State v. Merwin*, 131 Idaho 642, 645, 962 P.2d 1026, 1029 (1998) (improper for

trial court to substitute its view of the facts for that of the jury where the finding of the jury is supported by substantial evidence). *Cf. Schaefer v. Ready*, 134 Idaho 378, 380, 3 P.3d 56, 58 (Ct. App. 2000). In this case, the jury was instructed that, in order to find Mr. Wright guilty of first degree murder, they would have to find that the murder was a "willful, deliberate, and premeditated killing." (Tr., p.767, Ls.18-19.) The court also explained that if the jury unanimously found that Mr. Wright was guilty of murder, but that the special circumstance of premeditation was not proved beyond a reasonable doubt, the jury was required to find that Mr. Wright was guilty of second degree murder. (Tr., p.768, Ls.3-8.)

This Court generally presumes that the jury follows the instructions provided by the district court. *See State v. Sanchez*, 142 Idaho 309, 317, 127 P.3d 212, 220 (Ct. App. 2005). In light of the verdict reached by the jury in this case of second degree murder, and the instructions provided by the district court, it is apparent that the jury considered and rejected the assertion that Mr. Wright acted with premeditation or deliberation. Moreover, it is the *exclusive* province of the trier of fact, in this case the jury, to determine what facts and circumstances sufficiently demonstrate a reasonable foundation from which to infer premeditation or deliberation. *See State v. Johnson*, 136 Idaho 701, 704, 39 P.3d 641, 644 (Ct. App. 2001).

Despite this finding by the jury, the district court at sentencing proceeded to treat Mr. Wright as though the jury had made the finding of premeditation or deliberation. The jury verdict unequivocally states that the jury found Mr. Wright not guilty of murder in the first degree. (R., p.150.) Because willfulness, deliberation, or premeditation was the single fact that distinguished between first degree and second degree murder in this

case, the jury's finding precludes the district court from proceeding to treat Mr. Wright's case at sentencing as though he had been convicted of first degree murder.

First degree murder is a more serious offense than second degree murder. I.C. § 18-4004. In the context of a homicide, the generally understood definition of "cold blooded" is "a killer's state of mind when committing a willful and premeditated homicide." BLACK'S LAW DICTIONARY 278 (8th ed. 2004). The district court's statements regarding Mr. Wright acting intentionally and "cold-bloodedly" effectively ignored the jury's verdict that Mr. Wright did not commit first degree murder, supplanted its view of the evidence for that of the jury, and treated Mr. Wright's case at sentencing as though he was being sentenced for the offense of first degree murder rather than second degree murder. On this basis, the sentence imposed by the district court was not proportionate to the less serious offense of which he was convicted.

While Mr. Wright does have a criminal history, it consists mostly of juvenile offenses. (Presentence Investigation Report (*hereinafter*, PSI), pp.11-15.) Mr. Wright's mother wrote a letter to the presentence investigator, stating, "many of Michael's charges as a juvenile were because I turned him in to his probation officer. If he decided to stay overnight at someone's house and did not tell me, I would file runaway charges on him. He never officially ran away." (PSI, p.18.) His only prior felony conviction was for grand theft. (PSI, p.14.)

Further, Mr. Wright still had significant family support. His mother wrote that she would be attending sentencing and that Mr. Wright was "so young and wants to raise his son to be a good boy and a fine, upstanding man. I cannot fathom how this baby will grow up without his father. I saw the struggles that my sons went through without their

father, and it breaks my heart." (PSI, p.19.) Mr. Wright was adopted and his adoptive father was arrested for sexually abusing four women at the hospital where he worked. (PSI, p.18.) He served over six years for the offense. (PSI, p.18.) Mr. Wright's family became homeless; "Michael took it all very hard and started acting up when he was an adolescent." (PSI, p.18.)

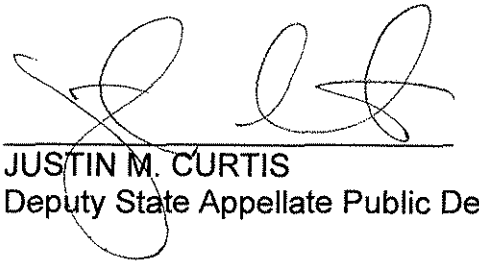
Mr. Wright's mother wrote that Mr. Wright had tried to reach out to his brothers to help them grow up "since my ex-husband takes no interest in our sons." (PSI, p.19.) She stated that Mr. Wright was "wonderful around children ...and especially his son. He is loving, gentle, playful, and helpful. He loves to teach his son new things and so want to be with him always." (PSI, p.19.) Considering the seriousness of the crime, counsel for Mr. Wright requested a sentence of life, with twenty years fixed. (Tr., p.832, Ls.23-25.) "That gives him an incentive to do the best while he is in penitentiary and while ruminating on what happened that night." (Tr., p.833, Ls.6-8.)

Considering this information, Mr. Wright submits that the district court abused its discretion when it imposed a unified sentence of life, with sixty years fixed.

CONCLUSION

Mr. Wright requests that his conviction for second degree murder be vacated and his case remanded for further proceedings. Alternatively, he requests that this Court reduce his sentence as it deems appropriate or remand the case for a new sentencing hearing.

DATED this 3rd day of January, 2008.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of January, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MICHAEL JORDAN WRIGHT
INMATE # 66753
IMSI
PO BOX 51
BOISE ID 83707

CHERI C COPSEY
DISTRICT COURT JUDGE
ADA COUNTY DISTRICT COURT
200 WEST FRONT STREET
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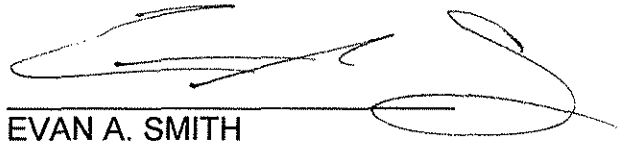
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court



EVAN A. SMITH
Legal Secretary

JMC/eas