5-26-2017

State v. Bahr Appellant's Brief Dckt. 44311

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44311**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY**
v.	)	**NO. CR 2015-13656**
	)	
BRANDON TYLER BAHR,	)	
	)	
Defendant-Appellant.	)	
_____	)	

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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STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, Brandon Tyler Bahr was convicted of first degree murder, grand theft, and petit theft, and was sentenced to an aggregate term of life imprisonment, with 25 years fixed. Mr. Bahr appeals from his judgment of conviction, raising two claims of error.

First, Mr. Bahr asserts the district court violated his constitutional right to due process when it incorrectly instructed the jury in response to a jury question. The district court instructed the jury that it was for the jury to determine whether the verbalization of a threat to kill is the same as a decision to kill. Mr. Bahr asserts that this instruction was an incorrect statement of law, that the district court should have answered that a threat and decision are not the same, and that the instruction violated his right to due process of law because it relieved the State of its burden to prove the element of premeditation. Because the jury reached its verdict based on an erroneous instruction, Mr. Bahr's first degree murder conviction must be vacated.

Second, Mr. Bahr asserts the State failed to present sufficient evidence to support his conviction for grand theft. Specifically, the State failed to prove intent to deprive or appropriate, at the time Mr. Bahr took the handgun used in the shooting. As such, Mr. Bahr also asserts that this Court must vacate his conviction for grand theft.

Statement of Facts and Course of Proceedings

Mr. Bahr began dating Ryan Havlina in December 2012. (Tr., p.1548, Ls.5-16.) Mr. Bahr and Ms. Havlina broke up in August 2015 and Ms. Havlina began dating Zacheriah Peterson shortly thereafter. (Presentence Investigation Report ("PSI"),

p.601.) Over the course of September 23, 2015, Mr. Bahr exchanged text messages with Ms. Havlina in which he accused her of cheating on him with Mr. Peterson, and threatened her and Mr. Peterson. (Tr., p.932, L.10 – p.937, L.14.) Mr. Bahr arranged, through Ms. Havlina, to meet Mr. Peterson for a fight. (Tr., p.665, L.18 – p.666, L.18, p.1553, Ls.1-25.)

Before the meeting between Mr. Bahr and Mr. Peterson was fully arranged, Mr. Bahr went to his house "to get a gun" because "[he] wanted to point it at [Mr. Peterson] and scare him." (Tr., p.1554, Ls.2-10.) He took a loaded, 9 millimeter Makarov belonging to his mother's boyfriend, Rusty Powell, out of the top drawer of Mr. Powell's nightstand. (Tr., p.1360, Ls.13-21, p.1403, Ls.3-4, p.1555, Ls.13-25.) Both Rusty Powell and his son, Ryan, testified that Mr. Powell had given permission to Ryan to use this gun, but had never given such permission to Mr. Bahr. (Tr., p.1356, L.19, p.1412, Ls.11-19.)

Mr. Bahr and Mr. Peterson first planned to meet at 21st and State Street in Boise. (Tr., p.1561, Ls.15-17.) Ms. Havlina changed the location to the Depot because there were too many police officers at 21st and State Street. (Tr., p.1561, L.21 – p.1562, L.1.) Mr. Bahr was worried "they were planning to do something more than just beat me up." (Tr., p.1562, Ls.2-4.) At some point, Mr. Bahr spoke to Mr. Peterson, who told him "to bring more friends so it would be more enjoyable for him." (Tr., p.1560, Ls.11-16.) Mr. Bahr told Mr. Peterson he was coming alone. (Tr., p.1560, L.24 – p.1561, L.2.) One of Mr. Peterson's friends, Joe Delguidice, who went to the Depot with Mr. Peterson, testified he understood there was going to be a fistfight between Mr. Peterson and Mr. Bahr. (Tr., p.668, Ls.14-25, p.701, Ls.8-25.) Mr. Delguidice's girlfriend, Jasmine

Hamby, who also went to the Depot, testified that she also understood there was going to be a fight. (Tr., p.1450, Ls.4-15.) Mr. Delguidice cautioned Mr. Peterson not to go overboard, just to knock Mr. Bahr out and leave him. (Tr., p.700, Ls.4-9.)

Before going to the Depot, Mr. Bahr went to Walmart and took a black bandana without paying for it. (Tr., p.1196, Ls.12-19.) He testified he wanted "to cover [his] face" to scare Mr. Peterson. (Tr., p.1561, Ls.3-8.) When he arrived at the Depot, Mr. Bahr looked for Mr. Peterson, intending to point the gun at him and scare him. (Tr., p.1565, L.17 – p.1566, L.4.) Mr. Bahr saw two people, and called out, "Are you Zach? Are you Zach?" (Tr., p.677, L.15 – p.678, L.25, p.1566, Ls.5-12.) Mr. Bahr saw Mr. Peterson walking "very aggressively" towards him, and Mr. Peterson said to Mr. Bahr, "You're about to get fucked up." (Tr., p.1568, Ls.7-17.)

At that point, Mr. Bahr pulled out his weapon and pointed it at Mr. Peterson. (Tr., p.1568, Ls.18-22.) Mr. Peterson told Mr. Bahr two or three times, "You better clip it." (Tr., p.1569, Ls.8-13.) Mr. Bahr pulled the slide back, wanting Mr. Peterson to hear it. (Tr., p.680, Ls.5-22, p.681, Ls.13-25, p.1570, Ls.13-21.) Mr. Peterson did not act afraid, but instead continued towards Mr. Bahr. (Tr., p.682, Ls.6-23, p.1571, Ls.15-23.) Mr. Bahr testified that Mr. Peterson looked "very, very angry" and "had his fists up in a fighting position." (Tr., p.1572, Ls.9-12.) Mr. Bahr testified he felt "scared for [his] life." (Tr., p.1573, Ls.7-8.) Ms. Hamby testified that Mr. Peterson appeared to threaten Mr. Bahr after Mr. Bahr displayed the gun:

> Q. What did you see happen [after you saw a gun]?
>
> A. There was an altercation. I heard Brandon Bahr and Zach Peterson arguing whether or not the gun was loaded.
>
> Q. Do you recall what they said to each other? That was what they said?

A. I remember Zach had said, “It’s not really loaded.” And the other voice said, “You want to bet? Try me.”

Q. What happened next?

A. It looked as if Zach reached his arm up to go punch him in the face, and the gun had fired.

(Tr., p.1453, Ls.9-20.) When Mr. Peterson was within arms’ reach of Mr. Bahr, Mr. Bahr pulled the trigger and shot Mr. Peterson one time in the chest. (Tr., p.1573, Ls.20-21.) Ms. Hamby testified Mr. Bahr then pointed the gun at her and ran away. (Tr., p.1454, Ls.1-15.) Mr. Bahr threw the gun into the grass, and drove away from the Depot. (Tr., p.1607, L.21 – p.1608, L.6.) Mr. Bahr testified he intended to go back for the gun later. (Tr., p.1576, Ls.3-8.)

Following two 911 calls, officers were dispatched to the Depot at approximately 8:40 pm, and responded with lights and sirens. (Tr., p.465, Ls.10-14, p.467, Ls.7-8.) They found Mr. Peterson lying on the sidewalk, and Mr. Delguidice performing CPR. (Tr., p.473, Ls.5-17, p.522, Ls.1-7.) Mr. Peterson was transported by ambulance to the hospital, where he was pronounced dead. (Tr., p.608, Ls.6-11, p.814, L.9 – p.815, L.3.) The gun which Mr. Bahr had used to shoot Mr. Peterson was found, with a live round in its chamber, in the bushes at the Depot. (Tr., p.757, Ls.12-24., p.771, Ls.8-19, p.798, Ls.6-11, p.944, Ls.18-20.)

Later that evening, Mr. Bahr was arrested without incident at his house and transported to the police station. (Tr., p.716, Ls.6-19.) He was questioned after waiving his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and confessed that he had made a mistake and killed Mr. Peterson. (Tr., p.949, Ls.9-13, p.942, Ls.8-10.) He also admitted to taking a firearm from his mother’s boyfriend. (Tr., p.942, Ls.16-22.)

The detective who interviewed Mr. Bahr at the police station was asked at trial if Mr. Bahr said he was scared of Mr. Peterson, and he answered, "Absolutely, yeah. That was very clear." (Tr., p.950, Ls.3-5.) At the end of the interview, Mr. Bahr wrote an apology letter, stating he "made the biggest mistake of [his] life" and "[j]ust wanted to scare [Mr. Peterson]." (Tr., p.960, Ls.3-25.) In one of his phone calls to his mother from jail, which was played for the jury at trial, Mr. Bahr said, "I just went too far." (Ex. 151, at 5:09-15.)

Mr. Bahr was charged by Indictment with first degree murder, aggravated assault (based on his alleged act of pointing the gun at Ms. Hamby), a firearm enhancement, grand theft, and petit theft. (R., pp.65-67.) The jury was instructed that, for Mr. Bahr to be guilty of first degree murder, the State had to prove each of the following elements beyond a reasonable doubt:

1. On or about September 23, 2015
2. in the State of Idaho
3. the defendant Brandon Bahr engaged in conduct which caused the death of Zacheriah Neil Peterson,
4. the defendant acted without justification or excuse,
5. with malice aforethought, and
6. the murder was a willful, deliberate, and premediated killing. Premeditation means to consider beforehand whether to kill or not to kill, and then to decide to kill. There does not have to be any appreciable period of time during which the decision to kill was considered, as long as it was reflected upon before the decision was made. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not premeditation.

(R., p.314.) The jury was also instructed on the elements of second degree murder, voluntary manslaughter, and involuntary manslaughter. (R., pp.319, 322, 324.)

During closing argument, the State presented the jury with a PowerPoint slide stating:

> Premeditation means to consider beforehand whether to kill or not to kill. **There does not have to be any appreciable period of time during which the decision to kill was considered, as long as it was reflected upon before the decision was made.** Premeditation is not a mere unconsidered or rash impulse.

(Ct. Ex. A (emphasis in original).) Counsel for Mr. Bahr objected to this slide as misstating the district court's instruction to the jury, and the district court overruled the objection. (Tr., p.1715, Ls.9-16.)

The jury submitted one question to the district court during the course of its deliberations. It asked, "Is the verbalization of a threat 'I'm going to kill you' the same as the decision to kill?" (Ct. Ex. B.) The district court proposed to respond to this question by stating, "This is for the jury to determine." (Tr., p.1793, Ls.24-25.) Defense counsel objected to the district court's proposal, saying, "Your Honor, I think the actual answer to the question is no, and so I would prefer that we answer it in the negative." (Tr., p.1794, Ls.5-7.) The district court overruled this objection and responded to the jury's question by stating, in writing, "This is for you to decide as the jury." (Ct. Ex. B.)

The jury found Mr. Bahr guilty of first degree murder; not guilty of aggravated assault; guilty of grand theft; and guilty of petit theft. (R., pp.346-50.) The district court sentenced Mr. Bahr as follows: for first degree murder, a unified sentence of life imprisonment, with 25 years fixed; for grand theft, a unified sentence of 14 years, with 7 years fixed, to be served concurrently; for petit theft, 180 days in Ada County Jail. (Tr., p.1845, L.23 – p.1847, L.2.) The judgment of conviction was filed on June 27,

2016, and Mr. Bahr filed a timely Notice of Appeal on June 29, 2016. (R., pp.352-56, 358-61.)

ISSUES

I. Was Mr. Bahr's constitutional right to due process violated when the district court incorrectly instructed the jury in response to a question concerning the element of premeditation?

II. Should this Court vacate Mr. Bahr's conviction for grand theft because there was insufficient evidence to support the conviction?

ARGUMENT

I.

Mr. Bahr's Constitutional Right To Due Process Was Violated When The District Court Incorrectly Instructed The Jury In Response To A Question Concerning The Element Of Premeditation

A. Introduction

During deliberations, the jury asked, "Is the verbalization of a threat, "I'm going to kill you," the same as the decision to kill?" (Ct. Ex. B.) In response, the district court instructed the jury that this was for the jury to determine. This instruction violated Mr. Bahr's constitutional right to due process because it misstated the law on premeditation and relieved the State of its burden to prove an essential element of the offense of first degree murder. The jury was allowed to reach its verdict based upon the erroneous instruction, and because premeditation was a contested element, this Court must vacate Mr. Bahr's first degree murder conviction and remand this case to the district court for a new trial on that charge.

B. Standard Of Review

"Whether the trial court properly instructed the jury presents a question of law over which this Court exercises free review." *State v. Blake*, 133 Idaho 237, 239 (1999) (citation omitted). "When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law." *State v. Parsons*, 153 Idaho 666, 669 (Ct. App. 2012). "Typically, under the harmless error test, once the defendant shows that a constitutional violation occurred, the State has the burden of demonstrating beyond a reasonable doubt that the violation did not contribute to the jury's verdict." *State v. Perry*, 150 Idaho 209, 227 (2010). However, there are

exceptions to the general harmless error standard. *Id.* If a "jury reached its verdict based upon erroneous instruction an appellate court shall generally vacate" the conviction and remand the case to the lower court. *Id.* at 228. "However, in the limited instance where the jury received proper instruction on all but one element of an offense, and '[w]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.'" *Id.* (quoting *State v. Lovelace,* 140 Idaho 73, 79 (2004)). Even in this limited circumstance, if a reasonable jury "could have found that the state failed to prove the omitted element then the appellate court shall vacate and remand." *Id.*

C. The District Court's Instruction, In Response To The Jury's Question, Violated Mr. Bahr's Constitutional Right To Due Process Because It Misstated The Law On Premeditation And Relieved The State Of Its Burden To Prove An Essential Element Of The Offense Of First Degree Murder

The Fifth Amendment to the United States Constitution states "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fourteenth Amendment states "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. The Idaho Constitution also guarantees that "[n]o person shall be . . . deprived of life, liberty or property without due process of law." ID. CONST. art. I, §13. The United States Supreme Court has held that "[in criminal trials, 'the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement.'" *State v. Anderson*, 144 Idaho 743, 749 (2007) (quoting *Middleton v. McNeil*, 541 U.S. 433, 437 (2004)). An erroneous instruction that relieves

the State of its burden to prove an element of an offense can be characterized as a violation of the constitutional right to due process. *See id.*; *see also Parsons*, 153 Idaho at 669.

Mr. Bahr confessed to shooting Mr. Bahr shortly after the offense, and testified at trial that he shot and killed Mr. Peterson. (Tr., p.949, Ls.9-13, p.942, Ls.8-10.) Though there was no evidence presented that Mr. Bahr ever threatened Mr. Peterson directly, Mr. Bahr exchanged text messages with his ex-girlfriend, in which he accused her of cheating on him and threatened to kill Mr. Peterson. (Tr., p.932, L.10 – p.937, L.14.) The most direct threat that Mr. Bahr made to Mr. Peterson was a text message he sent to Ms. Havlina saying, "Sure your man wants to do this? Single you're going to be, ho." (Tr., p.665, L.18 – p.666, L.18, p.937, Ls.5-14, p.1553, Ls.1-25.)

With respect to first degree murder, the jury was instructed that "[p]remeditation means to consider beforehand whether to kill or not to kill, and then decide to kill." (R., p.314.) The jury was also instructed that "[a] mere unconsidered and rash impulse, even though it includes an intent to kill, is not premeditation." (R., p.314.) Despite receiving these instructions, the jury was confused about whether a threat to kill constituted a decision to kill. (Ct. Ex. B.) The jury asked, "Is the verbalization of a threat, "I'm going to kill you," the same as the decision to kill?" (Ct. Ex. B.) This question, which was the only question asked by the jury, reveals that the jury was struggling with the question of whether the killing of Mr. Peterson was premeditated. The district court told the prosecutor and counsel for Mr. Bahr that it proposed to respond to the jury's question by stating, "This is for the jury to determine." (Tr., p.1793,

Ls.24-25.) Defense counsel objected, stating "the actual answer to the question is no." (Tr., p.1794, Ls.5-7.) The district court overruled this objection, explaining:

> The reason I propose that answer is that the jury is to determine the meaning and the weight to be given to any statement made, not me. And that is a question that goes to the meaning to something that was said, and that's for the jury to determine.

(Tr., p.1794, Ls.8-12.) The district court then responded to the jury's question by stating, "This is for you to decide as the jury." (Ct. Ex. B.) This was an improper instruction as it misstated the law on premeditation. While a threat to kill may be evidence of a decision to kill, the district court should have instructed the jury that a threat and the decision to kill are not the same.

Under Idaho law, an unlawful killing constitutes first degree murder only if it is "accompanied with a deliberate and clear intent to take life" and "[t]he intent to kill must be the result of deliberate premeditation . . . formed upon the pre-existing reflection, and not upon a sudden heat of passion." *State v. Snowden*, 79 Idaho 266, 273-74 (1957) (quoting *State v. Shuff*, 9 Idaho 115, __, 72 P.664, 668 (1903)). Premeditation is defined in Black's Law Dictionary as "[c]onscious consideration and planning that precedes an act (such as committing a crime); the pondering of an action before carrying it out." BLACK'S LAW DICTIONARY (10th ed. 2014). While a jury can determine whether a defendant had an intent to kill when he made a verbal threat, a verbal threat is not, as a matter of law, the same as deliberate premeditation formed upon pre-existing reflection.

Based on the district court's instruction, the jury could have believed—falsely—that it could determine that the verbalization of a threat to kill is, *ipso facto*, the same as a decision to kill. In other words, the jury could have found Mr. Bahr guilty of first

degree murder because he threatened to kill Mr. Peterson, and then later killed him. The district court's instruction relieved the State of its burden to prove premeditation, which is a defined and necessary element of first degree murder. *See* I.C. § 18-4003 (setting forth degrees of murder); *see also Carey v. State*, 91 Idaho 706, 709-10 (1967) (noting the distinction between first and second degree murder "probes the killer's intent"). By misstating the law on premeditation and lowering the State's burden, the district court's instruction violated Mr. Bahr's constitutional right to due process, and permitted the jury to find Mr. Bahr guilty of first degree murder absent sufficient evidence of premeditation. *See, e.g.*, *State v. Folk*, 151 Idaho 327, 341-42 (2011) (concluding district court's answer to jury's question was error because it would have permitted the jury to find defendant guilty of conduct that did not constitute the crime charged).

D. Mr. Bahr's First Degree Murder Conviction Be Vacated

The only question the jury asked during its deliberations concerned the question of premeditation, and the district court erred in instructing the jury that it was for the jury to determine whether a threat to kill is the same as a decision to kill. As previously noted, if a jury reached its verdict based upon an erroneous jury instruction and the element addressed was contested or not supported by overwhelming evidence, this Court must vacate the conviction. *Perry*, 150 Idaho at 228. In the case at hand, the element of premeditation was highly contested and was not supported by overwhelming evidence.

Whether the killing of Mr. Peterson was premeditated was the critical question in this case. The jury heard that Mr. Bahr sent threatening text messages to Ms. Havlina

on the day of his arranged meeting with Mr. Peterson. (Tr., p.932, L.10 – p.937, L.14.) But the jury also heard evidence that Mr. Bahr was afraid of Mr. Peterson, intended only to scare him, and never intended to kill him. (Tr., p.1554, Ls.2-10, p.1565, L.17 – p.1566, L.4, p.950, Ls.3-5, p.960, Ls.3-25.) Mr. Bahr was extremely upset when he learned from the detectives that Mr. Peterson had died from his injuries, and wrote in an apology letter that he "made the biggest mistake of [his] life" and "[j]ust wanted to scare [Mr. Peterson]." (Tr., p.960, Ls.3-25.) In one of his phone calls to his mother from jail, which was played for the jury at trial, Mr. Bahr said, "I just went too far." (Ex. 151, at 5:09-15.) The jury was instructed on the elements of first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter, and could easily have found Mr. Bahr guilty of a lesser offense due to the lack of evidence on premeditation. (R., pp.314, 319, 322, 324.) Because the element of premeditation was contested, this Court must vacate Mr. Bahr's first degree murder conviction and remand the case for a new trial.

Even if this Court decides that it should apply a harmless error test, because Mr. Bahr objected to the district court's erroneous instruction, the State has the burden of demonstrating the error was harmless. *Perry*, 150 Idaho at 227. The State cannot meet its burden because the error in instruction concerned the element of premeditation. Because Mr. Bahr had admitted that he caused Mr. Peterson's death, premeditation was the critical issue in determining which level of criminal homicide was applicable to Mr. Bahr's actions.[1]

[1] Mr. Bahr argued the theory of self-defense at the trial. However, the jury did not accept this theory and Mr. Bahr has no grounds upon which to challenge this jury determination.

The State's closing argument compounded the error in the jury instructions. In closing, the State presented the jury with a PowerPoint slide stating:

> Premeditation means to consider beforehand whether to kill or not to kill. **There does not have to be any appreciable period of time during which the decision to kill was considered, as long as it was reflected upon before the decision was made.** Premeditation is not a mere unconsidered or rash impulse.

(Ct. Ex. A (emphasis in original).) Counsel for Mr. Bahr objected to this slide as misstating the district court's prior instruction to the jury, and the district court overruled the objection. (Tr., p.1715, Ls.9-16.) The district court said, "For the most part it is worded identically. There's a slight change that does not change the meaning or the content of the last sentence." (Tr., p.1715, Ls.13-15.) The "slight change" did indeed change the meaning and content of the last sentence. The jury had been instructed by the district court that "[a] mere unconsidered and rash impulse, even though it includes an intent to kill, is not premeditation." (R., p.314.) Additionally, the slide's first sentence was also inaccurate. The slide omitted the words, found in instruction number 17, "and then decide to kill." These changes and omissions in the slide muddled the premeditation requirement. The district court's erroneous instruction to the jury, that it was for the jury to determine whether Mr. Bahr's threats towards Mr. Peterson were the same as a decision to kill, was compounded by the State's use of this misleading slide in closing argument.

The district court's instruction lowered the State's burden, in violation of Mr. Bahr's constitutional right to due process, and the error was not harmless. This Court should vacate Mr. Bahr's first degree murder conviction and remand this case to the district court for a new trial on that charge.

II.

This Court Should Vacate Mr. Bahr's Conviction For Grand Theft Because There Was Insufficient Evidence To Support The Conviction

A. Introduction

Mr. Bahr asserts that the evidence presented at trial was insufficient to support the jury's guilty verdict for the crime of grand theft. The State failed to prove that, at the time of the taking, Mr. Bahr had the specific intent to permanently deprive or appropriate. The State presented evidence that Mr. Bahr took the handgun, but failed to prove his intent at the time of the taking. As such, the State's evidence was insufficient to prove Mr. Bahr committed grand theft.

B. Standard Of Review

The sufficiency of the evidence presented to sustain a conviction can be raised for the first time on appeal. *State v. Faught*, 127 Idaho 873, 877-878 (1995).

> Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt.

State v. Warburton, 145 Idaho 760, 761-62 (Ct. App. 2008).

When reviewing the sufficiency of the evidence, the Court will conduct an independent review of the evidence in the record to determine whether a reasonable mind could conclude that each material element of the offense was proven beyond a reasonable doubt. *Willard*, 129 Idaho at 828. "For evidence to be substantial, it must be of sufficient quality that reasonable minds could reach the same conclusion." *State v. Johnson*, 131 Idaho 808, 809 (Ct. App. 1998) (citing *Bott v. Idaho State Bldg.*

Auth., 128 Idaho 580, 586 (1996)). This Court does not substitute its view of the evidence for that of the jury with regard to matters of the credibility of the witnesses, the weight to attach to the testimony, or the reasonable inferences that may be drawn from the evidence. *State v. Herrera-Brito*, 131 Idaho 383, 385 (Ct. App. 1998). Additionally, the Court will construe all of the evidence in favor of upholding the verdict. *State v. Glass*, 139 Idaho 815, 818 (Ct. App. 2003).

C. The Evidence Presented At Trial Was Insufficient To Support The Jury's Verdict Finding Mr. Bahr Guilty Of Grand Theft

Mr. Bahr asserts that the State's evidence was insufficient to support the jury's verdict for grand theft and that his conviction must be vacated. He was charged, in Count III of the Indictment, with the crime of grand theft. (R., pp.65-66.) Specifically, the charge was as follows:

> That the Defendant, BRANDON TYLER BAHR, on our about the 23rd day of September, 2015, in the County of Ada, State of Idaho, did wrongfully take a firearm, to-wit: a semi-automatic handgun from another with the intent to appropriate to himself certain property of another and/or deprive another of property.

(R., pp.65-66.)

On the night of September 23, 2015, Mr. Bahr took a semi-automatic handgun from the nightstand of his mother's boyfriend, Rusty Powell. (Tr., p.1555, Ls.13-17.) Mr. Bahr has never denied taking the handgun, and testified during trial that he had done so. (Tr., p.942, Ls.16-22, p.1041, Ls.22-25, p.954, Ls.19-21, p.1554, Ls.1-13, p.1555, Ls.13-23, p.1557, Ls.19-23, p.1590, Ls.12-20.) It is equally clear that Mr. Bahr did not have permission to take the handgun from Rusty Powell or his son, Ryan

Powell, who occasionally had possession and control over the handgun. (Tr., p.1412, Ls.11-19, p.1356, Ls.5-19, p.1364, Ls.17-24, p.1590, Ls.21-22.)

However, Mr. Bahr asserts that he did not have the requisite intent for grand theft because when he took the handgun, he did not specifically intend to either deprive Mr. Powell of the handgun or to appropriate the handgun, permanently or for an extended period of time. Mr. Bahr testified that his plan when he took the handgun was "to take it back home and put it back." (Tr., p.1558, Ls.4-9.) Tragically, the handgun was used by Mr. Bahr and as a result Mr. Peterson passed away. (Tr., p.1591, Ls.5-7.) Mr. Bahr's plan to immediately return the handgun was impacted by the stress of the confrontation with Mr. Peterson and he tossed the gun into some bushes or grasses at the Depot. (Tr., p.1575, Ls.5-23, p.1670, L.21 – p.1608, L.4.) Nonetheless, he was still planning on retrieving the handgun and returning it to the house, a plan he testified to during trial and informed detectives about during his interrogation. (Tr., p.996, L.24 – p.997, L.6, p.1575, L.24 – p.1576, L.9, p.1591, Ls.8-22; State's Exhibit 149.) During his interrogation, Mr. Bahr also informed officers where he had left the handgun and it was later located in this general location. (Tr., p.771, L.3 – p.772, L.12, p.786, Ls.6-20, p.944, L.8 – p.945, L.16, p.990, Ls.10-17.)

The jury found Mr. Bahr guilty of grand theft. (R., p.349.)

1. The State's Intent Theories

Recognizing that the grand theft charge was not the primary focus of this trial, the presentation of evidence and argument regarding the alleged grand theft was understandably limited. Due to the lack of direct evidence on the topic, closing arguments provided the only insight as to the State's theory about Mr. Bahr's alleged

intent. The State's limited closing argument on the grand theft charge focused primarily on the intent to permanently deprive. (Tr., p.1724, L.13 – p.1726, L.4.) Yet, the State never specifically argued that Mr. Bahr had formed the intent to permanently deprive or appropriate at the time of the taking:

> The intent to permanently deprive. Yesterday on the stand the defendant testified that it was his plan to go back and get the murder weapon.
>
> In his flight, when he fled after shooting and killing Zacheriah Peterson, you know he throws that loaded weapon.
>
> . . .
>
> The defendant leaves it there, flees the scene, and yet he's telling you it was his plan to somehow sneak back to the train depot, a crime scene surrounded by police officers, he said he heard someone else say, Call 911, he knew the police were going to be there; he was going to go back and get that gun, a murder weapon and put it back in Rusty Powell's nightstand. Does that make sense? Is that reasonable?
>
> The intent to permanently deprive is defined in Instruction 38 that you will have with you back in the jury room.
>
> The intent to dispose of the property in such a manner or under such circumstances as to render it unlikely that an owner will recover such property.
>
> That's what the defendant did in this case. He stole that gun to carry out his plan to make his pain go away; to get rid of Zach, to get rid of Ryan, to make his pain go away.
>
> He had the intent to dispose of that semi-automatic pistol in such a manner or under such circumstances as would render unlikely the owner will ever recover the Makarov.
>
> . . . The defendant had the intent to permanently deprive. It is not reasonable to believe that he planned to go back and get that weapon.
>
> He's guilty of grand theft, proven beyond a reasonable doubt.

(Tr., p.1724, L.19 – p.1726, L.4.)

Because the closing argument is vague and imprecise, it arguably provides for two competing theories regarding intent: either (1) Mr. Bahr developed the intent to appropriate or deprive after he took the handgun, near the time of disposal, or (2) the disposal of the handgun at the crime scene was Mr. Bahr's plan from the beginning. Both of these theories are problematic. The first theory is legally invalid and the second is supported neither by direct evidence nor reasonable inferences therefrom.

a. If Mr. Bahr Developed The Intent To Appropriate Or Deprive After The Taking, He Cannot Be Guilty Of Grand Theft Because The Requisite Intent Must Exist At The Time Of The Taking

Grand theft is a specific intent crime. *State v. Owen*, 129 Idaho 920, 927 (Ct. App. 1997). Under I.C. § 18–2403(1), "a person ... commits theft when, with intent to deprive another of property or to appropriate the same to himself ..., he wrongfully takes, obtains or withholds such property from an owner thereof." To "deprive" another of property means permanently to withhold the property from the owner or dispose of it in such a way that it unlikely the owner will recover the property. I.C. § 18–2402(3)(a)-(b). To "appropriate" to oneself the property of another means permanently to exercise control over it or to dispose of the property "for the benefit of oneself." I.C. § 18–2402(1)(a)-(b).

Since at least 1902, it has been "well settled that the felonious intent must exist at the time of the taking." *State v. Riggs*, 8 Idaho 630, 951 (1902). In *Riggs*, the trial court provided the following instruction: "If the defendant wrongfully and unlawfully, and without the knowledge and consent of the owner, . . . but as a tresparser and wrongdoer, took . . . the property described in the information, not then intending to steal the same, but that thereafter, while still in such wrongful possession of said

property, he feloniously appropriated the same to his own use, such taking and appropriation constitute upon the part of the defendant the crime of larceny as fully and completely as though such felonious intention had existed in the defendant at the first taking of such property." *Id.* at 951. Defense counsel objected to the instruction and requested that the jury be instructed that: "If the jury believe from the evidence that the defendant had no felonious intent to steal the property at the time he took it, then you must acquit, even if you believe he subsequently conceived the intent to appropriate it." *Id.* at 951. The Idaho Supreme Court found it was error to both provide the first instruction and to deny the defense's requested instruction because the intent to deprive or appropriate must exist at the time of the taking. *Id*. The Court based the decision on a number of similar holdings:

> In Martinez v. State, 16 Tex. App. 122, that court says: "Property that is lost, equally with other property, may be the subject of theft. To constitute theft of lost property, however, the fraudulent intent, which is the gist of the offense, must exist in the mind of the taker at the time of the taking, and in lost property the time of the taking is the time of the finding of the property. If the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft." Warren v. State, 17 Tex. App. 207, holds to the same principle. In Beckham v. State, 14 South. 859, that court says: "Where defendant found a hog in a swamp at high water, and took it home, an instruction that, unless the felonious intent existed at the time of the taking, defendant was not guilty, should have been given." Clark, Cr. Law, at page 262: "In addition to the taking and removal of the property by trespass, there must be an intent to permanently deprive the owner of his property therein, and the intent must exist at the time of the taking. This is absolutely essential." See, also, Rev. St. § 6341; State v. Rechnitz (Mont.) 52 Pac. 264; McClain, Cr. Law, § 571. A number of other authorities have been called to our attention bearing on this question, but, as they all have the same tendency, we deem it unnecessary to discuss the question further.

Id.

In the case at hand, the jury received the following instruction:

INSTRUCTION NO. 37

In order for the defendant to be guilty of Grand Theft, the state must prove each of the following:

1. On or about September 23, 2015

2. in the State of Idaho

3. the defendant Brandon Bahr wrongfully took property to wit: a Makarov semiautomatic pistol;

3. from an owner,

5. with the intent to deprive an owner of the property or to appropriate the property. . . .

(R., p.334.) Mr. Bahr asserts that this instruction conforms to the historically noted intent requirements. Although it does not specifically state that the intent had to be formed contemporaneously to the taking, the plain language of the instruction provides that Mr. Bahr had to possess the requisite intent at the time of the taking.

The State's first theory, that Mr. Bahr developed the intent to appropriate or deprive at the scene of the altercation, well after the handgun had been taken, is not a legally viable theory. Mr. Bahr acknowledges that the direct evidence and reasonable inferences therefrom may support the conclusion that he became flustered or frightened after his altercation with Mr. Peterson and, only at that time, formed the intent to dispose of the weapon by throwing it in the grasses or bushes. The State's closing argument suggests that Mr. Bahr's action of throwing the gun into the grasses illustrated his intent at that exact moment in time, not at the time of the taking as is required for a grand theft conviction. While this formation of intent theory is supported by the evidence, it is insufficient for a grand theft conviction. The State had a duty to prove each element

beyond a reasonable doubt, including the specific intent element, and under this theory, it failed to meet its burden.

b. Mr. Bahr Did Not Have The Requisite Intent At The Time Of The Taking

Additionally, the evidence at trial did not indicate that, at the time of the taking, Mr. Bahr had formed the intent to dispose of the handgun at the crime scene, as suggested by the State's second theory.

The State failed to prove that Mr. Bahr had the requisite intent, at the time of the taking, either through direct evidence or reasonable inferences. Intent is established "by the commission of the acts and surrounding circumstances connected with the offense." I.C. § 18–115. "The element of intent need not be shown by direct evidence but may be inferred from circumstantial evidence." *State v. Krommenhoek*, 107 Idaho 188, 189 (Ct. App. 1984). As the jury was instructed, at the time of the taking, Mr. Bahr must have had the specific intent to deprive or appropriate to be guilty of grand theft:

INSTRUCTION NO. 38

The phrase "intent to deprive" means:

a. The intent to withhold property or cause it to be withheld from an owner permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to such owner; or

b. The intent to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

The phrase "intent to appropriate" means:

a. The intent to exercise control over property, or to aid someone other than the owner to exercise control over it, permanently or for so

extended a period of time or under such circumstances as to acquire the major portion of its economic value or benefit; or

b. The intent to dispose of the property for the benefit of oneself or someone other than the owner.

(R., p.336.)

There was no direct evidence that Mr. Bahr intended to either appropriate or deprive at the time of the taking. Mr. Bahr's plan when he took the handgun was "to take it back home and put it back." (Tr., p.1558, Ls.4-9.) Despite the fact that he ultimately tossed the gun into some bushes or grasses at the Depot (Tr., p.1575, Ls.5-23, p.1670, L.21 – p.1608, L.4), he was still planning on retrieving the handgun and returning it to the house (Tr., p.996, L.24 – p.997, L.6, p.1575, L.24 – p.1576, L.9, p.1591, Ls.8-22). No direct evidence to the contrary was presented. Additionally, the requisite intent could not be reasonably inferred from the evidence presented.

The State's second theory appears to be that, at the time of the taking, Mr. Bahr planned to dispose of the handgun at the crime scene. However this is not a reasonable inference. Instead, logic dictates that this could not have been Mr. Bahr's plan from the beginning. It is ridiculous to think that a person would steal a handgun with the specific plan to dispose of it at the crime scene, the location most likely to be thoroughly searched. The mere fact that this is what actually occurred does not prove that this was the intention at the time of the taking.

The State supports this theory with the notion that it is unreasonable to believe that Mr. Bahr would be able to go back to the crime scene to retrieve the gun. Mr. Bahr asserts this is merely a red herring. Whether or not Mr. Bahr would actually be able to retrieve the handgun after he disposed of it is irrelevant; the relevant concern is his

intent at the time of the taking.[2] Further, this argument does not lend any credence to a finding that Mr. Bahr had formed the intent to dispose of the weapon at the crime scene at the time of the taking. A reasonable interpretation of the evidence, based upon the disposal of the handgun and the disposal location, shows that Mr. Bahr formed the intent to dispose of the handgun at the crime scene, only after using it at the Boise Depot.

Further, there is no evidence to support other inferences that Mr. Bahr had the intent to permanently deprive Mr. Powell of the handgun or appropriate the same at the time of the taking. Instead, it is clear that Mr. Bahr's intent at the time of the taking was for the depravation of the handgun to be temporary, not permanent. This is not only based upon his testimony to that fact, but also the inferences to be drawn therefrom.

Mr. Bahr took the handgun to use for the limited purpose to either threaten or, under the State's theory, to injure. His need for the handgun was for a very limited time,

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[2] For the sake of argument, there is no evidence that Mr. Bahr would not have attempted to later retrieve the handgun. It may be naive for Mr. Bahr to believe he would be able to go back to a crime scene to retrieve a weapon, but we cannot know if he may have actually tried, if given the opportunity. He was taken into custody less than three hours after the altercation, at 11:28 p.m. on September 23, 2015. (Tr., p.845, L.25 – p.846, L.23.) The quick arrest did not allow for any opportunity to retrieve the handgun. This is in stark contrast to the facts *State v. Hart*, 112 Idaho 759 (1987). In *Hart,* the defendant testified that his intent at the time he took the relevant items, was only to temporarily pawn them until he received some money from his mother. *Hart*, 112 Idaho at 761. He asserted that when he received the money on April 17th he went to retrieve the items and return them, but that the police had prevented such action. *Id.* However, the State was able to produce evidence that the property hold was not placed on the items until April 18th and that the defendant did not know of police involvement until that time. *Id.* The Court found that there was sufficient evidence to show that the defendant did not return to retrieve the items, that he never intended to do so, and that, as a result, he had the requisite intent for grand theft. *Id*. Unlike the defendant in *Hart*, Mr. Bahr never had an opportunity to follow-through with his plan to retrieve the handgun from the crime scene and the same intent inferences cannot be drawn under these facts.

an altercation lasting no more than a few minutes. In short, he had only a temporary need for the handgun. If his plan, from the time of the taking, was to dispose of the gun after the temporary use, it is only logical that he would have revealed this intent by disposing of it a location where it would be difficult to find, not throwing it in the crime scene grasses or bushes in a panic. He also would have likely disposed of the extra clip, found in his center console. (State's Ex. No. 96.)

Additionally, none of the typical inferences drawn to uphold a grand theft conviction apply in this case. Mr. Bahr did not steal the handgun to obtain a monitory gain by selling or trading it. There was no evidence that he had any continuing use for a gun or a continuing desire to possess a gun. In fact, he testified he had only fired a gun on one previous occasion, as an eleven-year-old boy scout. (Tr., p.1554, L.24 – p.1555, L.5.) As such, Mr. Bahr had nothing to gain through a permanent deprivation or appropriation. Instead, all reasonable inferences lead to finding that his intent was merely to temporarily use the handgun or borrow it without permission.

The State had a duty to prove each element beyond a reasonable doubt, including the specific intent element. There was no direct evidence nor reasonable inferences from the evidence presented that proves that Mr. Bahr acted with the intent to deprive or appropriate, at the time of the taking. As such, the State failed to meet their burden to prove the intent element.

D. This Court Must Vacate Mr. Bahr's Conviction

The Due Process Clause of the United States Constitution precludes conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *See In re Winship*, 397 U.S. 358 (1970); *see*

also State v. Gittins, 129 Idaho 54 (Ct. App. 1996). Because the State failed to present substantial and competent evidence that proved, beyond a reasonable doubt, that Mr. Bahr committed grand theft, this Court must vacate his conviction.

CONCLUSION

Mr. Bahr respectfully requests that this Court vacate his murder conviction and remand this case for a new trial. Additionally, he respectfully requests that this Court vacate his grand theft conviction and remand with instructions to enter an acquittal for that charge.

DATED this 26th day of May, 2017.

_____/s/_____
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of May, 2017, 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:

BRANDON TYLER BAHR
INMATE #119695
IMSI
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PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

BRIAN C MARX
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas