8-25-2017

State v. Bahr Respondent's Brief Dckt. 44311

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44311**
Plaintiff-Respondent,	)	
	)	**Ada Co. Case No.**
vs.	)	**CR-2015-13656**
	)	
BRANDON TYLER BAHR,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

Brandon Tyler Bahr appeals from the judgment entered upon the jury verdicts finding him guilty of first degree murder, grand theft, and petit theft. Bahr claims the district court committed instructional error and that there was insufficient evidence to support his conviction for grand theft.

Statement Of Facts And Course Of Proceedings

Bahr dressed in dark clothing, stole a 9 mm Makarov semiautomatic pistol from his mother's boyfriend, stole a bandana from Wal-Mart to conceal his face, parked in a different location (Taco Time), hid in some bushes at the Boise Train Depot, waited for his ex-girlfriend, Ryan, and her new boyfriend, Zacheriah Peterson, and, after they arrived, Bahr shot Zacheriah once in the chest, killing him. (Tr., p.677, L.5 – p.683, L.15, p.1402, L.2 – p.1403, L.17, p.1590, L.14 – p.1591, L.7, p.1596, L.25 – p.1598, L.19, p.1599, L.20 – p.1603, L.5, p.1610, Ls.10-23; Exhibit 70.) Ryan's friend, Jasmine Hamby, who was standing nearby, testified that after Bahr murdered Zacheriah, Bahr pointed the 9 mm at her and said, "You're next, Ryan." (Tr., p.1454, Ls.1-3.) When Jasmine responded, "I'm not Ryan," Bahr ran away. (Tr., p.1545, Ls.1-6.) After murdering Zacheriah, Bahr stopped to buy some cigarettes, and then went back to his mother's house where he was later arrested. (Tr., p.1576, L.10 – p.1577, L.13; Exhibit 121.)

A grand jury indicted Bahr for first degree murder, aggravated assault with a deadly weapon enhancement for pointing the 9 mm gun at Jasmine, grand theft for

stealing the 9 mm handgun, and petit theft for stealing the bandana from Wal-Mart. (R., pp.65-67.) Bahr testified at trial and admitted he was "angry" and "jealous" and that he threatened Zacheriah and Ryan in a series of angry texts and emails exchanged prior to murdering Zacheriah. (Tr., p.1583, L.21 – p.1587, L.2, p.1588, L.13 – p.1589, L.3; see also Exhibit 59.) Although Bahr never met Zacheriah before the night he murdered him, he testified that he planned to meet him and Ryan that night because he was "angry," and "jealous," and "wanted to make them pay." (Tr., p.1549, Ls.13-19, p.1584, L.4 – p.1587, L.20, p.1588, L.13 – p.1589, L.19.) Although the "plan" was to meet for a "fist fight," Bahr had another plan. (Tr., p.1589, Ls.12-19.) Bahr testified his plan was to steal the 9 mm, which he claimed he was going to return later, steal a bandana to conceal his identity, and point a loaded gun at Zacheriah in order to "scare him." (Tr., p.1590, L.1 – p.1591, L.25, p.1596, L.25 – p.1598, L.19, p.1599, L.20 – p.1603, L.5, p.1610, Ls.10-23, p.1605, Ls.3-4.) But, instead of just "scaring" Zacheriah, Bahr, wearing his disguise, pointed a loaded gun at Zacheriah, aimed it at "center mass" where he knew Zacheriah's heart and lungs were, and pulled the trigger. (Tr., p.1610, Ls.13-23.) Bahr testified he shot Zacheriah instead of "scaring" him because he thought Zacheriah's fists were "registered weapons," because Zacheriah allegedly threatened to "crack [his] skull open and watch [his] brains leak out," and because Bahr "wanted to make the pain go away" because he was jealous, and he was angry. (Tr., p.1605, L.9 – p.1606, L.22; see also Exhibit 149 at 52:00 ("I just wanted the pain to go away."), 1:02:35 ("I just wanted the pain to go away."), 1:07:40 ("I just wanted to make the pain go away."), 1:08:00 ("I just wanted the pain to go away."), 1:08:10 (claiming he did not want to fight Zacheriah because of his "registered fists").)

During trial, the jury asked the following question: "Is the verbalization of a threat 'I'm going to kill you,' the same as the decision to kill?" (Court Exhibit B; Tr., p.1793, Ls.15-20.) The court advised the parties that it intended to respond to the question by writing, "This is for the jury to determine." (Tr., p.1793, Ls.24-25.) Bahr stated that he thought "the actual answer to that question is no," and that he "prefer[red]" that it be answered "in the negative." (Tr., p.1794, Ls.5-7.) The court declined to respond "in the negative," and instead instructed the jury it was for the jury to decide. (Tr., p.1794, Ls.16-18; Court Exhibit B.)

The jury found Bahr guilty of first degree murder, grand theft and petit theft, but acquitted him of aggravated assault. (R., pp.346-350; Tr., p.1795, L.19 – p.1797, L.1.) The court imposed a unified life sentence, with 25 years fixed, for first degree murder, a concurrent unified 14-year sentence with seven years fixed for grand theft, and a 180-day jail sentence for petit theft, with credit for 180 days served. (R., pp.353-355.) Bahr filed a timely notice of appeal. (R., pp.358-360.)

ISSUES

Bahr states the issues on appeal as:

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?

(Appellant's Brief, p.8.)

The state rephrases the issues on appeal as:

1. Does Bahr's claim of instructional error fail because the district court correctly told the jury it was for the jury to decide whether "the verbalization of a threat 'I'm going to kill you [is] the same as the decision to kill"?

2. Did the state present sufficient evidence from which the jury could conclude, beyond a reasonable doubt, that Bahr was guilty of grand theft for stealing the 9 mm handgun he used to murder Zacheriah, notwithstanding Bahr's testimony that he intended to return the gun after the murder even though he threw it in the bushes?

ARGUMENT

I.
Bahr Has Failed To Establish The Court Committed Instructional Error When It Told The Jury It Was For The Jury To Decide Whether The Verbalization Of A Threat Is The Same As The Decision To Kill

A. Introduction

Bahr asserts the district court erred in telling the jury, in response to a question, that it was for the jury to decide whether the verbalization of a threat to kill is the same as the decision to kill. (Appellant's Brief, pp.9-15.) According to Bahr, the court's response "misstated the law on premeditation," and "the district court should have" instead "instructed the jury that a threat and the decision to kill are not the same." (Appellant's Brief, p.12.) It is Bahr's proposed response that was an erroneous statement of the law. Bahr has failed to show the district court committed instructional error or erred in responding to the jury's question.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which this Court exercises free review. State v. Severson, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009).

C. The District Court's Response To The Jury's Question Correctly Informed The Jury That It Was For The Jury To Decide Whether The Verbalization Of A Threat Is The Same As The Decision To Kill

During deliberations, the jury asked: "Is the verbalization of a threat, 'I'm going to kill you,' the same as the decision to kill?" (Tr., p.1793, Ls.17-19.) The district court proposed the following response: "This is for the jury to determine." (Tr., p.1793, Ls.24-25.) Bahr advised the court that he would "prefer" the court answer the question "in the

negative" because he thought the "actual answer to that question is no," after which the court explained:

> The reason I propose that answer is that the jury is to determine the meaning and the weight to be given 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.5-12.) The court then asked if there were further objections, and Bahr answered, "No, Your Honor, I understand." (Tr., p.1794, Ls.13-14.) The court thereafter responded to the jury's question as follows: "This is for you to decide as the jury." (Tr., p.1794, Ls.16-18.) The jury found Bahr guilty of first degree murder. (Tr., p.1796, Ls.4-6.)

The district court's first degree murder instruction – Instruction No. 17 - advised the jury that, in order to find Bahr guilty, the state must prove that

> 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 premeditated 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 (Instruction No. 17).)

Instruction No. 17 is the pattern instruction for first degree murder with malice aforethought, and, as such, it is presumptively correct. ICJI 704; 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 creating unnecessary grounds for appeal."). Bahr does not claim otherwise. Instead, Bahr argues that, despite the court's inclusion of the pattern language on premeditation in the elements instruction, the court "misstated the law on premeditation" when it responded to the jury's question asking whether "the verbalization of a threat 'I'm going to kill you,' is the same as the decision to kill," by answering "This is for you to decide as the jury." (Appellant's Brief, p.12.) Bahr is incorrect because the court's response to the jury's question was correct and consistent with the pattern first degree murder instruction.

As the court's answer indicates, it was for the jury to decide whether and when Bahr "decide[d] to kill." (See R., p.314.) In other words, it was for the jury to decide whether the "verbalization of a threat" was the same as Bahr's "decision to kill." See State v. Marsh, 141 Idaho 862, 867, 119 P.3d 637, 642 (Ct. App. 2004) (citations omitted) ("The intent of the accused is a question of fact for the jury to determine. Direct evidence of intent is not required. A jury may infer intent from the commission of acts and the surrounding circumstances."). The question certainly could not be answered as a matter of law as Bahr suggested at trial when he told the court "the actual answer to that question is no" (Tr., p.1794, Ls.5-7), and as he argues now when he claims that "a verbal threat is not, as a matter of law, the same as deliberate premeditation formed upon pre-existing reflection." (Appellant's Brief, p.12.) Telling the jury "that a threat and the decision to kill are not the same," as Bahr claims the court was required to do, would be

tantamount to telling the jury it could not conclude that the verbalization of a threat was not evidence of the decision to kill. Such an instruction would be an incorrect statement of the law, inconsistent with Instruction No. 17, and an improper comment on the evidence. See State v. Fetterly, 126 Idaho 475, 476-477, 886 P.2d 780, 781-782 (Ct. App. 1994) (a requested instruction is proper if it correctly states the law, is based on a reasonable view of the evidence, is not addressed by other instructions, and is not an impermissible comment on the evidence).

The correct response to the jury's question was the one given by the court, and that response was consistent with the first degree murder instruction, *i.e.*, that it was for the jury to decide whether the verbalization of a threat was the same as the decision to kill. As the district court correctly noted, it was for the jury "to determine the meaning and the weight to be given any statement made." (Tr., p.1794, Ls.9-10.) Bahr has failed to show otherwise.

Even assuming the court erred in answering the jury's question as it did, rather than answering it "no" as Bahr preferred, any error was harmless. An instructional error is harmless where it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder v. United States, 527 U.S. 1, 18 (1999); see also State v. Perry, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Applying this standard to the facts of this case, this Court can easily conclude beyond a reasonable doubt that, had the jury been told that verbalization of a threat, "I'm going to kill you" is not "the same as the decision to kill," the jury still would have found Bahr guilty of first degree murder.

There can be no question that Bahr engaged in conduct which caused the death of Zacheriah and that he did so with malice aforethought and without justification or excuse. The evidence also showed that Bahr premeditated the murder by stealing a gun, stealing a bandana in order to disguise himself, parking elsewhere, hiding in the bushes, and lying in wait. Assuming that the jury's question regarding the verbalization of a threat related to the premeditation requirement for first degree murder, even if the jury had been told that the verbalization of a threat, "I'm going to kill you" is not the same as the decision to kill, Bahr's *actions* were evidence of premeditation. Furthermore, Bahr's threats, even if not the same as the decision to kill, were evidence that Bahr considered whether to kill beforehand even if he had not decided to kill the same moment he made the threats. Any one of Bahr's many threats could also be considered evidence of Bahr's decision to kill Zacheriah. The threats included Bahr's text messages stating, "he comes to my house, he will end up on the news," "You and faggariah gonna pay bitch," "Sure your man wants to do this?," and "Single your going to be hoe." (Exhibits 59, 61, 65 (verbatim).) There was also evidence that Bahr threatened to put Zacheriah and Ryan "in a body bag" and threatened to shoot them.[1] (Tr., p.665, L.25 – p.666, L.4, p.1014, Ls.17-21.)

It is "clear beyond a reasonable doubt that a rational jury would have found [Bahr] guilty" even if it was told that "verbalization of a threat, 'I'm going to kill you,'" was not the same as Bahr's decision to kill.

[1] The state did not find any evidence that Bahr ever used the words, "I'm going to kill you" as used in quotations in the jury's question. It appears that Bahr agrees with this review of the record. (Appellant's Brief, p.11 ("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.'").)

II.
Bahr Has Failed To Show The Evidence Was Not Sufficient To Support His Conviction For Grand Theft

A. Introduction

Bahr challenges the sufficiency of the evidence supporting his conviction for grand theft. (Appellant's Brief, pp.16-27.) Specifically, he contends the state failed to present sufficient evidence from which the jury could find beyond a reasonable doubt that at the time he stole the 9 mm gun he "had the specific intent to permanently deprive or appropriate." (Appellant's Brief, p.16.) Bahr's argument fails. Application of the correct legal standards to the evidence presented shows the state presented sufficient evidence from which the jury could find Bahr was guilty of grand theft. Bahr has failed to show he is entitled to an acquittal on the grand theft charge.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of

upholding the jury's verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997); Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. The State Presented Sufficient Evidence To Prove The Essential Elements Of Grand Theft

The state presented sufficient evidence from which the jury could conclude that Bahr was guilty of grand theft for stealing the 9 mm he used to murder Zacheriah. The district court instructed the jury that, in order to find Bahr guilty of grand theft, it was required to find, beyond a reasonable doubt, that:

> 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;
>
> 4. from an owner,
>
> 5. with the intent to deprive an owner of the property or to appropriate the property.

(R., p.334 (punctuation original) (Instruction No. 37).)

The district court further instructed the jury on the meaning of the phrases "intent to deprive" and "intent to appropriate" as follows:

> 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.335 (Instruction No. 38).)

The evidence showed that Bahr wrongfully took the 9 mm Makarov semiautomatic from its owner, his mother's boyfriend, Rusty Powell, and used it on September 23, 2015, to murder Zacheriah. (Tr., p.1402, L.2 – p.1403, L.17, p.1412, Ls.11-17; Exhibit 149 at 56:50.) Indeed, Bahr admitted to detectives that he "stole" the gun and "threw it" "somewhere in the bushes" after he murdered Zacheriah. (Exhibit 149 at 56:50.) The gun was later recovered by law enforcement from the bushes where Bahr "threw it." (Tr., p.771, Ls.3-14, p.786, L.6 – p.787, L.2.) This evidence was more than sufficient to support the jury's verdict finding Bahr guilty of grand theft.

On appeal, Bahr argues the evidence was insufficient. More specifically, Bahr claims, "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." (Appellant's Brief, p.18.) In support of this argument, Bahr cites his testimony that "his plan when he took the handgun was 'to take it back home and put it back,'" but "[t]ragically, the handgun was used by [him] and as a result [Zacheriah] passed away."[2] (Appellant's Brief p.18 (citing Tr., p.1558, Ls.4-9, p.1591, Ls.5-7).) Bahr further argues that his "plan to

[2] The tragedy in this case is Zacheriah's death, not Bahr's "use" of a gun.

immediately return the handgun was impacted by the stress of the confrontation with [Zacheriah] and he tossed the gun into some bushes or grasses at the Depot." (Appellant's Brief, p.18 (citing Tr., p.1575, Ls.5-23, p.1670 [sic], L.21 – p.1608, L.4).)

Much like the jury was free to reject Bahr's self-serving claim that his "plan" was only to "scare" Zacheriah, it was also free to reject Bahr's self-serving claim that he had a "plan" to return the stolen gun after he murdered Zacheriah with it. Marsh, 141 Idaho at 867, 119 P.3d at 642 ("The intent of the accused is a question of fact for the jury to determine.") Bahr's request that this Court reach a different conclusion based on his testimony is nothing more than a request for the Court to substitute its view for that of the jury. Such a request is contrary to the applicable standard of review. Knutson, supra. Applying the correct standard, the evidence was sufficient to support the jury's determination that Bahr stole the 9 mm with the intent to deprive or appropriate the gun.

In addition to relying on his testimony about his "plan" to return the gun, Bahr relies on the prosecutor's closing argument in support of his sufficiency of the evidence claim. (Appellant's Brief, pp.18-20.) Bahr contends the prosecutor's closing argument supports his claim because the state "never specifically argued that [he] had formed the intent to permanently deprive or appropriate at the time of the taking" and because, he claims, "the closing argument is vague and imprecise, [and] arguably provides for two competing theories regarding intent." (Appellant's Brief, pp.19-20.) Bahr describes those theories as (1) he "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 [his] plan from the beginning." (Appellant's Brief, p.20.) Bahr claims the "first theory is legally invalid and the second is supported neither by direct evidence nor

reasonable inferences therefrom." (Appellant's Brief, p.20.) Bahr's closing argument based claims lack merit for several reasons.

First, the state's closing *argument* is irrelevant to whether the *evidence* is sufficient. While closing arguments provide the opportunity for the parties to discuss, "from their respective standpoints, the evidence and the inferences to be drawn therefrom," closing arguments are not evidence, nor is the jury bound by the arguments contained therein. State v. Lovelass, 133 Idaho 160, 168, 983 P.2d 233, 241 (Ct. App. 1999). The jury was instructed accordingly:

INSTRUCTION NO. 11

> As members of the jury it is your duty to decide what the facts are and apply those facts to the law that I give you. You are to decide the facts from all the evidence presented in the case.
>
> The evidence you are to consider consists of:
>
> 1. sworn testimony of witnesses;
>
> 2. exhibits which have been admitted into evidence; and
>
> 3. any facts to which the parties have stipulated.
>
> Certain things you have heard or seen are not evidence, including:
>
> 1. anything you may have seen or heard when the court was not in session;
>
> 2. testimony that has been excluded or stricken, or which you have been instructed to disregard; and
>
> 3. arguments and statements by lawyers. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is included to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them follow your memory.

(R., p.308; see also R., pp.300-301 ("Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. . . . In determining the facts you may consider only the evidence admitted in this trial," which "consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts."); p.307 ("If anyone states a rule of law different from any I tell you, it is my instruction that you must follow.").)

The only relevant inquiry on a sufficiency of the evidence claim is whether the *evidence* supports the jury's verdict. Bahr has cited no authority to support his assertion that the prosecutor's closing argument informs the analysis. See Murray v. State, 156 Idaho 159, 168, 321 P.3d 709, 718 (2014) (quoting State v. Zichko, 129 Idaho 259, 263, 923 P.3d 966, 970 (1996)) (noting an issue will not be considered if "either authority or argument is lacking" and declining to consider appellant's claim because he failed to "provide[] a single authority or legal proposition to support his argument").

Even if the prosecutor's closing argument was pertinent to Bahr's sufficiency of the evidence claim, the state was not required to specifically argue when Bahr formed the requisite intent, as Bahr suggests. (Appellant's Brief, p.19 ("the state never specifically argued that Mr. Bahr had formed the intent to permanently deprive or appropriate at the time of the taking").) Nor is Bahr correct in his assertion that the state's argument "provides for" a "theory" that Bahr "developed the intent to appropriate or deprive after he took the handgun, near the time of disposal." The state specifically argued that Bahr's testimony that he intended to retrieve the "murder weapon" and "put it back in Rusty

Powell's nightstand" from where he stole it did not "make sense" and was not "reasonable." (Tr., p.1724, L.19 – p.1725, L.9, p.1726, Ls.1-2.) The prosecutor referred the jury to the intent to deprive instruction, quoted the language from the definition of intent to deprive in Instruction No. 38, and asserted "that's what the defendant did in this case." (Tr., p.1725, Ls.10-16; see also p.1725, L.20 – p.1726, L.2.)

To the extent the Court agrees with Bahr that the prosecutor's closing argument can be interpreted as "provid[ing]" a theory that Bahr "developed the intent to appropriate or deprive after he took the handgun, near the time of disposal," and agrees with Bahr that the prosecutor's argument is even relevant to the sufficiency of the evidence claim, the Court need not address Bahr's assertion that such a "theory" is "legally invalid" because Bahr acknowledges that the prosecutor's argument also "provides for" a "theory" that Bahr intended to dispose of the gun "from the beginning." (Appellant's Brief, p.20.) While Bahr disagrees that the evidence of this alternate "theory" was sufficient, the basis of his disagreement is contrary to law because the state is not required to present "direct evidence" of intent. Marsh, 141 Idaho at 867, 119 P.3d at 642 ("Direct evidence of intent is not required."). Rather, "[a] jury may infer intent from the commission of acts and the surrounding circumstances." Id. For the reasons already stated, the jury could infer, based on Bahr's actions and the surrounding circumstances, that Bahr had the required intent "from the beginning." While Bahr offers alternative explanations for his actions, the jury was not required to accept those, which he did not argue below,[3] nor was the jury

[3] Bahr's argument at trial regarding the intent to deprive element of grand theft was that he did not have such intent because he said he was "going to go back and get it" and "put it back." (Tr., p.1766, L.17 – p.1768, L.8.) This argument was not, however, binding on the jury, just as the prosecutor's argument was not.

required to construct those explanations on its own, especially given that they are not reasonable inferences from the evidence. Those explanations are:

> 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. 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.
>
> . . . [I]t is clear that Mr. Bahr's intent at the time of the taking was for the depravation [sic] 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.[4] His need for the handgun was for a very limited time, 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 [sic] 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.

[44] The state's actual theory was that Bahr "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," *i.e.*, with the intent to kill. (Tr., p.1725, Ls.16-19.)

(Appellant's Brief, pp.25-26 (footnote omitted[5]).)

Contrary to Bahr's claim, "logic" does not "dictate" that Bahr could not have planned to dispose of the gun at the crime scene "from the beginning" because to do so would be "ridiculous" knowing the crime scene would be "thoroughly searched" and the gun would not be "difficult to find." This argument is based upon at least two flawed premises. The first flawed premise is that Bahr is incapable of doing something "ridiculous" when much of the evidence suggests he was quite capable of such. The second flawed premise is that the gun was easy to find. As Bahr acknowledges, he threw the gun in the bushes where it would be concealed; he did not just drop it in an open space. And, in fact, the gun was not easily located. Officer Steve Bonas testified that he used his canine in an effort to locate the gun, but was unsuccessful. (Tr., p.711, L.9 – p.712, L.7.) Officer Michelle Havens testified that she and Detective Chad Wigington "did an area search of the south side of the train depot behind the train tracks in the bushes in the surrounding buildings" and testified that "Detective Wigington wanted to get a metal detector because the bushes were thick and [they] were having a hard time looking in them." (Tr., p.768, Ls.13-17, p.771, Ls.3-5.) Officer Havens eventually located the gun in "grassy weeds" quite a distance away from where Bahr murdered

[5] In his footnote Bahr notes, "[f]or the sake of argument," that "there is no evidence that [he] would not have attempted to later retrieve the handgun" and notes that it may have been "naïve" for him to believe he could, but he assures the Court that he "may have actually tried, if given the opportunity," which he was deprived of because "[h]e was taken into custody less than three hours after the altercation," *i.e.,* murder. (Appellant's Brief, p.25 n.2.) It is true that "we cannot know if [Bahr] may have actually tried" to retrieve the gun if he had not been arrested for murder. It is equally true that it ultimately does not matter that he claims he would have because the jury was entitled not to believe him.

Zacheriah. (Tr., p.771, Ls.6-7, p.1311, L.20 – p.1134, L.6; Exhibit 145; see also Exhibits 40-44.)

Moreover, Bahr's "plan" did not have to be to specifically throw the gun in the bushes at the crime scene in order for the jury to find an intent to deprive at the time of the taking. He could have "planned" to dispose of the gun anywhere. That Bahr claims to have "panicked" and thrown it in the bushes does mean the jury could not conclude he had the intent to deprive or appropriate at the time of the taking.

Bahr also offers this explanation of his behavior as evidence of his intent:

> 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 [sic] 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. 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.

(Appellant's Brief, p.26 (transcript citation omitted).)

Again, the jury was not required to adopt Bahr's theory. The state is also unfamiliar with the proposition that grand theft convictions are generally upheld based on "typical inferences." Whether Bahr had something "to gain through a permanent deprivation or appropriation" is not the question. The question is whether there was evidence from which the jury could find an intent to deprive or appropriate; there was. Even if something "to gain" were required, surely disposing of a murder weapon would constitute a gain; it is of no import that the gun was ultimately found and not sold, traded, or used for another purpose.

Bahr has failed to meet his burden of establishing the evidence was insufficient to support the jury's verdict finding him guilty of grand theft.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdicts finding Bahr guilty of first degree murder, grand theft, and petit theft.

DATED this 25th day of August 2015.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of August 2017, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ELIZABETH A. ALLRED
ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDERS

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

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General