10-5-2017

State v. Bahr Appellant's Reply Brief Dckt. 44311

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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

HONORABLE PATRICK H. OWEN
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STATEMENT OF THE CASE

Nature of the Case

Mr. Bahr appeals from his judgment of conviction for first degree murder, grant theft, and petit theft, asserting the district court violated his constitutional right to due process when it incorrectly instructed the jury in response to a jury question, and the State failed to present sufficient evidence to support his conviction for grand theft. Mr. Bahr submits this Reply Brief to respond to the State's legal arguments.

Statement of Facts and Course of Proceedings

Mr. Bahr included a statement of facts and course of proceedings in his Appellant's Brief. (*See* Appellant's Br., pp.1-7.) He relies on and incorporates that statement herein.

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

Mr. Bahr argued in his Appellant's Brief that the district court's instruction to the jury, that it was for the jury to determine whether the verbalization of a threat is the same as the decision to kill, violated his 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. (Appellant's Br., pp.9-15.) The State argues to the contrary in its Respondent's Brief, and its argument must be rejected.

The State asserts in its brief that "[t]elling the jury 'that a threat and the decision to kill are not the same,' as [Mr.] 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." (Respondent's Br., pp.7-8.) The State is incorrect. Telling the jury that a threat to kill and the decision to kill are not the same would have been a correct statement of the law, and a proper instruction. A threat to kill may, of course, be evidence of a decision to kill, but it is not, as a matter of law, the same as a decision to kill. The jury should have been instructed that a threat to kill and a decision to kill are not the same thing.

The threats Mr. Bahr made to Mr. Peterson here (via text messages to his ex-girlfriend) read like the preludes to a fight, not a murder. The jury certainly *could* have found that the text messages meant Mr. Bahr made the decision to kill Mr. Peterson at some point prior to their arranged meeting at the Depot, but by no means were the text-messaged threats the same as a decision to kill. Based on the district court's instruction, the jury could have erroneously found

Mr. Bahr guilty of first degree murder simply because he threatened to kill Mr. Peterson, and then later killed him, rather than through the permissible means of finding premeditation – deciding to kill and then acting upon that decision. Therefore, the jury should have been instructed that the verbalization of a threat to kill is *not* the same as a decision to kill.

The State asserts that, even if the district court erred in instructing the jury, the error was harmless because "[t]he evidence also showed that [Mr.] 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." (Respondent's Br., p.9.) These facts *do not* reveal that Mr. Bahr "premeditated the murder," and are entirely consistent with Mr. Bahr's testimony that he intended to scare Mr. Peterson. Mr. Bahr testified he took a gun from his house because "[he] wanted to point it at [Mr. Peterson] and scare him." (Tr., p.1554, Ls.2-10.) He testified he stole a bandana because he wanted "to cover [his] face" to scare Mr. Peterson. (Tr., p.1561, Ls.3-8.) Mr. Peterson did not appear to be scared of Mr. Bahr when Mr. Bahr pointed the gun at him at the Depot and, in the heat of the moment, Mr. Bahr pulled the trigger. As he told his mother afterward in a phone call from jail, "I just went too far." (Ex. 151, at 5:09-15.)

Mr. Bahr is entitled to a new trial because, on the evidence presented, it is not clear beyond a reasonable doubt that a rational jury would have found Mr. Bahr guilty absent the instructional error. *See Neder v. United States*, 527 U.S. 1, 18 (1999) (setting forth the standard for when instructional error is harmless); *State v. Perry*, 150 Idaho 209, 224 (2010) (same). The district court's instruction improperly stated the law on premeditation, and lowered the State's burden of proof. This Court must vacate Mr. Bahr's conviction for first degree murder and remand this case to the district court.

II.

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

Mr. Bahr argued in his Appellant's Brief that the State failed to prove he took the pistol from his mother's boyfriend "with the intent to deprive . . . or to appropriate the property," and thus failed to present sufficient evidence to support his conviction for grand theft. (Appellant's Br., pp.16-26.) In arguing that the evidence was sufficient, the State argues that closing arguments are irrelevant in evaluating a sufficiency of the evidence claim. (Respondent's Br., p.14.) Certainly, Mr. Bahr acknowledges, as he did in the Appellant's Brief, the question of sufficiency of the evidence focuses on the evidence presented and inferences drawn from the evidence. *State v. Herrera-Brito*, 131 Idaho 383, 385 (Ct. App. 1998); *State v. Warburton*, 145 Idaho 760, 761-62 (Ct. App. 2008); *State v. Krommenhoek*, 107 Idaho 188, 189 (Ct. App. 1984). Mr. Bahr did not assert that closing argument directs the analysis of sufficiency of the evidence. Instead, he used the State's closing argument to provide a structure to his challenge of the sufficiency of the evidence. Closing argument presents a summation of the evidence in a case and by using the State's theories as a lens for viewing the issue, Mr. Bahr has addressed not only the State's theories, but the evidence the State presented.

The closing argument presented by the State advanced two possible theories of grand theft. Mr. Bahr maintains that the evidence presented and the reasonable inferences to be drawn therefrom were insufficient to prove that he had the specific intent to deprive or appropriate under either the State's theories or any evaluation of the evidence. (*See* Appellant's Brief, pp.16-27.) 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

For the reasons stated above, as well as those set forth in his Appellant's Brief, 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 5th day of October, 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 5th day of October, 2017, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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AWR/eas