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State v. Bodenbach Appellant's Brief Dckt. 45599

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ADAM DAVID BODENBACH, Defendant-Appellant.	No. 45599-2017 **Ada County Case No. CR01-17-00419**

BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District

In and for the County of Ada

Honorable Steven J. Hippler, Presiding

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STATEMENT OF THE CASE

An Ada County jury found Adam David Bodenbach guilty of first-degree murder, possession of a controlled substance, and the use of a firearm during the commission of a crime.

This is Mr. Bodenbach's direct appeal from the District Court's Judgment of Conviction imposing a controlling term of life in prison, with the first 25 years fixed.

STATEMENT OF THE FACTS

A new start

Adam Bodenbach and his close friend Jacob Kimsey moved to Boise from Southern California in the spring of 2016. (Tr., p. 1258, ln: 24-25, p. 1259, ln: 22-5.) Adam was then 30 years old and Jacob was a few years younger. (Tr., p. 1258, ln: 22-23.) Adam had struggled with substance abuse to that point in his life, and he wanted a fresh start. (Presentence Investigation Report (PSI), p. 11.) He enjoyed the outdoors – fishing and camping – and Idaho seemed like the perfect place. (Tr., p. 1316, ln: 2-14; PSI, p. 11.) Jacob had similar problems in the past, and he agreed to come with Adam. (Tr., p. 1050, ln: 1-14.)

Jacob and Adam became roommates at the Park Village Apartments in Boise, a small apartment complex near Boise State University. (Tr., p. 1050, ln: 20-21.) Due to its location, Park Village catered to students and other young people. (Tr., p. 952, ln: 21-24.)

There, Adam and Jacob met Ryan Banks, who lived in an apartment next door. (Tr., p. 1052, ln: 6-18.)

Ryan was 20 years old and had recently moved out of his parent's home to be on his own. Ryan was described both as a caring person and someone who, at times, could be aggressive and violent. (Tr., p. 1112, ln: 10-16; p. 1652, ln: 6-11.) Ryan kept a collection of knives in his room, including a machete, a folding pocket knife, and a fixed-blade hunting knife. (State's Ex. 18, 19; Tr., p. 954, ln: 4-21.) Both Jacob and Adam knew that Ryan usually carried the hunting knife on him underneath his clothing. (Tr., p. 1110, ln: 1-4; p. 1111, ln: 1-3; p. 1283, ln: 6-8.)

Adam initially took Ryan under his wing and acted as kind of a mentor to him. (State's Ex. 116, 117.) They hung out, played video games, and went fishing together. (Tr., pp. 1052, ln: 22-23; State's Ex. 116, 117.) He, Jacob, and Ryan became friends over the course of several months. (Tr., pp. 1052, ln: 9-25.)

Over Christmas break in 2016, Adam's room at Park Village was flooded from a leak upstairs. (Tr., p. 1265, ln: 20-22.) Management moved him into a model apartment across a courtyard from his old apartment. (Tr., p. 1266, ln: 5-8.)

A heated argument on a bitterly cold night

January 5, 2017, was unusually cold and snowy in Boise. In fact, the winter of 2016 - 2017 set local records for snowfall. *See e.g.*, IdahoNews.com, "January 4, 2017: A day for the record books," at https://goo.gl/jkb5k5 (last accessed November 14, 2018).

That day, Adam was hunkered down in his apartment watching TV. Jacob was also coming and going.

When Adam first came to Idaho, he was doing well; he got a steady job as an apprentice plumber for Mad River Plumbing. (Tr., p. 1310, ln: 25; p. 1311, ln: 1-8.) By January 5, though, he had fallen off the wagon. He had taken a break from his job around Christmas, and he had started using again. (Tr., p. 1313, ln: 14-19.)

That day, he had purchased cocaine and brought it back to his apartment. (Tr., p. 1268, ln: 14-16.) Somewhere between 8:00 and 10:00 p.m., he and Jacob injected the cocaine. (Tr., p. 1268, ln: 12-13.) Ryan also came over to Adam's apartment, and he and Jacob left in Jacob's car to go get beer. (Tr., p. 1270, ln: 8-13.) Adam stayed behind.

The roads were bad, and Jacob narrowly missed hitting another car on his way to a nearby convenience store, where he bought two 40-ounce beers. (Tr., p. 1059, ln: 4-11.) He and Ryan returned quickly to Park Village and went back to the model apartment where Adam was staying. (Tr., p. 1060, ln: 5-18.) Jacob and Ryan were drinking their beers, and the three of them were generally just hanging out – perhaps making some ramen noodles in the kitchen – when an argument started between Jacob and Adam. (Tr., p. 1062, ln: 11-12.)

Adam had asked to use Jacob's car to go to Walmart. (Tr., p. 1271, ln: 16-20.) At first, Jacob said okay and gave him the keys. (Tr., p. 1271, ln: 2-7.) Adam went outside in

the cold, started the car, and was scraping the windows when Ryan came out and told him that Jacob had changed his mind because of the roads. (Tr., p. 1271, ln: 2-7.)

Once back inside the apartment, Jacob and Adam argued over the use of the car. (Tr., p. 1062, ln: 11-25, p. 1063, ln: 1-25, p. 1064, ln: 1-16.) The argument escalated, and Jacob shoved Adam. (Tr., p. 1065, ln: 24-25, p. 1272, ln: 15-23.)

Ryan got into the mix, pushing Adam into his bedroom and onto the bed. (Tr., p. 1272, ln: 24-25, p. 1273, ln: 1-2.) Ryan was a big guy, over six feet tall and well over 200 pounds. Adam was much smaller, about 5 feet 9 inches and 130 or 135 pounds. Ryan was on top of Adam on the bed with his hands around his throat, choking him. (Tr., p. 1273, ln: 15-24.) Jacob rushed into the room and pulled Ryan off of Adam, getting punched in the face as part of the "crossfire." (Tr., p. 1072, ln: 8-17.)

Jacob steered Ryan out of Adam's apartment and back toward Ryan's apartment across the courtyard. (Tr., p. 1076, ln: 7-13.) After the fracas, Ryan was emotional; he was "hyped from adrenaline" and even was crying, which Jacob perceived to be out of a mixture of anger and sadness. (Tr., p. 1076, ln. 19-23.) Once they reached Ryan's apartment, he was still amped up, breathing heavy and pacing around the living room. (Tr., p. 1079, ln: 6-13; p. 1113, ln: 1-9.) Ryan could get into that type of "hyped" emotional state after he had been drinking. (Tr., p. 1113, ln: 13-18.) Jacob would later tell investigators that Ryan went to his bedroom and "got his knives and collected them up

around him." (Tr., p. 1120, ln: 24-25; p. 1121, ln: 1-3.) Jacob was trying to calm him. (Tr., p. 1080, ln: 7-11.)

Once he thought Ryan had calmed a little, Jacob decided to go back to Adam's apartment to check on him. (Tr., p. 1081, ln: 3-8.) He found Adam still in an agitated state. (Tr., p. 1083, ln: 3-8.) He was flipping the mattress over and throwing his clothes around like a "little tornado." (Tr., p. 1083, ln: 9-11.) He told Jacob that he was looking for his handgun and that he was sure that Ryan had stolen it. (Tr., p. 1082, ln: 13-21.) The gun was one that Adam had purchased about a month before for sporting purposes and for protection. (Tr., p. 1264, ln: 13-16.) Jacob grabbed the beer and left, going back to Ryan's apartment. (Tr., p. 1085, ln: 9-12.)

Meanwhile, one of Ryan's roommates, Kyle Unruh, left his bedroom around 11:00 p.m. to get his glasses out of his car. (Tr., p. 956, ln: 15-24.) He encountered Ryan sitting outside of the apartment in the cold on the walkway in front of Ryan's open bedroom window. (Tr., p. 957, ln: 5-6.) Ryan asked Unruh for a cigarette, and Unruh told him he didn't have one. (Tr., p. 958, ln: 4-6.) In their brief interaction, at least according to Unruh's recollection, Ryan seemed to be in a "good mood." (Tr., p. 958, ln: 8-9.)

Unruh also knew that Ryan owned a hunting knife, which on previous occasions Unruh had seen laying on the window sill of Ryan's bedroom as he passed by. (Tr., p. 954, ln: 19-22.) That night, he did not recall seeing it there. (Tr., p. 981, ln: 1-15.)

When Jacob returned from Adam's apartment, Ryan was still emotional, kind of "sad and teary eyed." (Tr., p. 1086, ln: 2-4.) While Jacob would later testify that he did not see any knives on Ryan at that time, he also testified that Ryan carried a knife "most of the time," that it was "probable" that he had the large hunting knife on him that night, and he even admitted that he had told a police officer that Ryan *did* have a knife on him. (Tr., p. 1115, ln: 22-25; p. 1116, ln: 1-2; p. 1126, ln: 14-16; p. 1127, ln: 9-10.)

Adam goes over to Ryan's apartment

Adam eventually found his gun in his apartment and realized that Ryan had not stolen it after all. (Tr., p. 1277, ln: 11-12.) He then started to assess what had happened that night, and, according to his later trial testimony, he grew concerned about Jacob's safety because he "had never seen [Ryan] act that way." (Tr., p. 1278, ln: 24-25; p. 1279, ln: 1-2.)

Eventually, Adam decided to go over the courtyard to Ryan's place, with the gun in his pocket, to check on Jacob. (Tr., p. 1278, ln: 5-16.) He claimed that he first tried Ryan's phone number but did not get an answer. (Tr., p. 1278, ln: 21-22.)

Adam testified at trial that he next left his apartment, went across the complex, and knocked on the door of Ryan's apartment, identifying himself and announcing that "the Boise Police" were with him. (Tr., p. 1280, ln: 9-17.) He mentioned the police in his announcement because he "was concerned … what Ryan was going to do at that point." (Tr., p. 1280, ln: 19-23.) He knocked on the door a second time, making the same

announcements. (Tr., p. 1281, ln: 1-6.) He waited a bit longer and, receiving no response, started to walk back toward his apartment. (Tr., p. 1281, ln: 7-12.)

In contrast, Jacob claimed that he did not hear any knocking and that he and Adam had simply decided it was time to go outside for a smoke. (Tr., p. 1091, ln: 9-10.) Jacob opened the front door, which opens into the apartment, and Ryan walked out first. (Tr., p. 1092, ln: 1-7.) Ryan paused and looked to his right. (Tr., p. 1093, ln: 18-25; p. 1094, ln: 1.) Jacob couldn't see what he was looking at, until he came around the door frame and also looked to his right, where he saw Adam. (Tr., p. 1094, ln: 10-15.)

At this point, some parts of Jacob and Adam's stories as to what happened next differ.

A second brief scuffle, and then a fatal gunshot

Jacob would later testify that Adam had his arm raised with the gun pointed at them. (Tr., p. 1095, ln: 9-15.) According to Jacob, Adam said something like, "you thought I was fucking kidding. You think I'm a fucking punk." (Tr., p. 1095, ln: 18-20.)

Under both Adam and Jacob's versions, Ryan didn't say anything, but he made a quick movement forward, lunging the few paces between him and Adam. (Tr., p. 1096, ln: 9-11.) Ryan pushed Adam up against a pillar and pinned him there. (Tr. 1096, ln: 7-18.)

To Jacob, it looked like Ryan was trying to grab for the gun. (Tr., p. 1096, ln: 4-11.) Jacob could no longer see the gun because Ryan's back was toward him, but he next

heard a gunshot. (Tr., p. 1097, ln: 3-6.) Ryan fell down, (Tr., p. 1097, ln: 5), and Adam "kind of shocked backed to reality" before running off. (Tr., p. 1098, ln. 3-6.)

Adam, on the other hand, testified at trial that he did not have the gun out of his pocket when Ryan came out of the apartment. (Tr., p. 1281, ln: 23-25.) Seeing Adam, Ryan instead reached down into his waistband with his left hand and pulled out his knife, holding it with the blade facing down. (Tr., p. 1282, ln: 2-4.) Adam told Ryan that "this wasn't a joke and to back off." (Tr., p. 1283, ln: 22-24.) Instead, Ryan charged straight at him and pushed him up against the pillar, pinning him with his right arm. (Tr., p. 1284, ln: 1-25.) Adam was able to get the gun out of his pocket and fire off a shot. (Tr., p. 1284, ln: 16-18.) Ryan fell down. (Tr., p. 1285, ln: 21-25.)

Confusion in the immediate aftermath

Adam ran back to his apartment and put the gun on a table. (Tr., p. 1286, ln: 16-19.) He called 911, telling the operator that he had shot someone in the leg who had tried to stab him. (State's Ex. 1.) He was extremely agitated and anxious, and he took four milligrams of Xanax to calm himself down, which was many times a therapeutic dose. (Tr., p. 1287, ln: 4-25.) He quickly went back to check on Ryan. (Tr., p. 1288, ln: 15-17.)

During that time, Jacob had assisted in moving Ryan into another nearby apartment, either by, according to Jacob, "pulling" the 250-pound Ryan some 30 or 40

feet into that apartment, or, perhaps more consistent with blood drops found on the pavement, assisting him in some other way. (Tr., p. 1101, ln: 6-11.)

When Adam approached the scene of the shooting, Ryan and Jacob were gone. (Tr., p. 1288, ln: 17-22.) But Ryan's roommate, Kyle Unruh, was standing outside the apartment. (Tr., p. 1289, ln: 1-11.)

Unruh had been in his bedroom playing a video game with headphones on just after midnight when he heard a loud bang, followed by a scream and someone yelling, "where's he hit?" and "call 911." (Tr., p. 959, ln: 3-4.) He cautiously went outside to investigate. (Tr., p. 961, ln: 16-19.) After looking around and not seeing anyone, he was on his way back to his apartment when he encountered Adam coming toward him on the exterior walkway. (Tr., p. 964, ln: 9-16.)

Adam told him "that motherfucker tried to kill me." (Tr., p. 968, ln: 12-18.) When Unruh asked to whom he was referring, Adam told him "Ryan." (Tr., p. 968, ln: 24.) Unruh asked Adam where Ryan was, and Adam said he didn't know, but he also stuck his head into the open window of Ryan's bedroom, which was immediately adjacent, and said something like, "is he bleeding?" (Tr., p. 969, ln: 17-21.) He then turned toward Unruh and started to dial his phone. (Tr., p. 987, ln: 1-9.) Unruh did not see anything in Adam's hands other than his phone. (Tr., p. 986, ln: 1-3.)

Adam started walking away and Unruh turned to go back into his apartment when he heard Adam say, "oh, here's his knife." (Tr., p. 973, ln: 6-23.) He turned around

and saw Adam kind of leaning over, holding a knife, and it "looked like he had picked it up off the – just off the path out of the snow." (Tr., p. 975, ln: 1-8.) The area was not near the precise shooting spot, but it was in the vicinity of the path that Jacob and Ryan would have taken into the other apartment after the shooting. (State's Exhibit 8.)

Boise Police had a substation within a few blocks of Park Village and responded very quickly. (Tr., p. 618, ln: 18-22.) They encountered Adam holding the knife and his cell phone, walking down the breezeway. (Tr., p. 620, ln: 16; p. 647, ln: 7-11.) He was ordered to drop the knife and the phone and get on the ground. (Tr., p. 621, ln: 13-18.) He complied and was handcuffed. (Tr., p. 621, ln: 23-25.)

After some initial confusion about where Ryan was, officers found him and Jacob in the neighbor's apartment. (Tr., p. 668, ln: 2-7.) He was not breathing. (*Id*.) Paramedics followed the police into the apartment, and despite their efforts, were not able to revive him. Ryan was pronounced dead. (Tr., p. 668, ln: 15-25; p. 669, ln: 3-6.)

Adam told officers that his neck and back were injured due to the earlier altercation. He was transported to St. Alphonus hospital where he was examined and held for a few hours. (Tr., p. 1139, ln: 10-25; p. 1140, ln: 1-5.) During that time, Boise Police Detective Pietrzak came to the hospital and interviewed him. (Tr., p. 133, ln: 1-25.) Adam would later testify that the Xanax that he had taken earlier was starting to kick in and he later had no memory of this interview. (Tr., p. 13, ln: 1-15.)

His statements in the interview varied and, at times, were not logical. (State's Ex. 116, 117; Clerk's Record (CR), pp. 800-856.) For instance, he had to be reminded that he was at a hospital, and at one point he believes a bee stings him when Detective Pietrzak takes a gun residue test. (Tr., p. 50, ln: 20-25.) He made derogatory comments about Ryan, said things about his parents and others that were untrue or exaggerated, but while the details were not always the same, he consistently claimed that he was defending himself from a knife attack. (State's Ex. 116, 117; CR, pp. 800-856.)

COURSE OF THE PROCEEDINGS

The State charged Adam Bodenbach with one count of premediated first-degree murder, one count of possession of cocaine (found in his apartment), and one count of a sentencing enhancement based on the use of a firearm. (CR, pp. 75-78.) The case was bound over for trial in the District Court, with the Honorable Steven Hippler presiding.

Before trial, defense counsel filed a motion to suppress Mr. Bodenbach's statements to Detective Pietrzak under a theory that he did not knowingly and voluntarily waive of his *Miranda* rights. (CR, pp. 116-121.) The District Court denied the motion in a written opinion. (CR, pp. 201-215.)

The case proceeded to trial. The State presented its case in chief and the defense presented its case in chief without Mr. Bodenbach testifying. After both parties had rested, however, Judge Hippler notified them that he was considering giving an instruction to the jury to the effect that Mr. Bodenbach could not claim self-defense if he

instigated the threat, a type of "first aggressor" instruction. (Tr., p. 1214, ln: 17-21.) Neither the State nor the defendant had offered such a proposed instruction, which is not found in the Idaho Criminal Jury Instructions developed by the Idaho Supreme Court.

The District Court decided that it was going to give an instruction along those lines, and it allowed the defense to reopen its case (Tr., p. 1220, ln: 21-25), during which Mr. Bodenbach then testified. During the instructions conference, defense counsel objected to the giving of the Court's written "first aggressor" instruction. (Tr., p. 1493, ln: 2-4.) When asked whether – given that he objected to the giving of the instruction in the first place – he objected to the language that the Court had come up with, defense counsel replied "no." (Tr., p. 1492, ln: 11-25; p. 1493, ln: 1-10.) The Court provided Instruction No. 28 to the jury. (CR, p. 391; Appendix A to Brief of Appellant.)

The jury found Adam guilty as charged, and the District Court sentenced him to life in prison with 25 years fixed, on the murder and firearm enhancement counts, and to a concurrent seven years with three years fixed for possession of a controlled substance. (CR, pp. 445-448.)

He now appeals.

ISSUES PRESENTED ON APPEAL

I.

The District Court's "first aggressor" instruction, neither initially proposed by the State nor found in the Idaho Criminal Jury Instructions, created reversible error under the facts and circumstances of this case.

II.

The District Court erred in denying Mr. Bodenbach's motion to suppress his in-custody statements to Detective Pietrzak because the State had failed to prove that Mr. Bodenbach knowingly, voluntarily, and intelligently waived his *Miranda* rights.

III.

The district court abused its discretion in sentencing Mr. Bodenbach to a term of life in prison, with 25 years fixed.

ARGUMENT

I.

The District Court's "first aggressor" instruction, neither initially proposed by the State nor found in the Idaho Criminal Jury Instructions, created reversible error under the facts and circumstances of this case.

A. Introduction

After the parties had rested their cases, the District Court indicated that it was going to craft an instruction related to whether Mr. Bodenbach would be entitled to use deadly force if he initiated the fatal confrontation. The Court eventually did so, as Instruction No. 28. Mr. Bodenbach asserts that the instruction was incorrect as a matter of law, confusing, and lowered the State's burden on an essential element of the crime.

B. Standard of Review

A trial court must instruct the jury on all matters of law relevant to their considerations. *State v. Severson*, 147 Idaho 694, 710 (2009); I.C. § 19-2132. Appellate courts exercise free review over whether jury instructions correctly state the applicable law. *State v. Draper*, 151 Idaho 576, 587-88 (2011). This Court reviews the instructions as a whole, rather than individually, to determine whether the district court adequately instructed the jury. *Id*. at 588.

Mr. Bodenbach's attorney objected to the District Court's inclusion of what the Court termed its "first aggressor instruction." (Tr., p. 1493, ln: 2-4.) When pressed by the

Court whether, understanding that general objection, "if I do give a first aggressor instruction, do you have a problem with the language of this one," counsel responded "no." (Tr., p. 1492, ln: 11-25; p. 1493, ln: 1-10.)

When a defendant has objected to an instruction, this Court will apply the harmless error test articulated in *State v. Perry*, 150 Idaho 209, 227 (2010). If the instructions effected the defendant's substantial rights, then the Court must reverse. (*Id*.)

When a defendant has not objected to an instruction, this Court reviews the jury instructions for fundamental error, which requires the defendant to show: "(1) the alleged error violated an unwaived constitutional right; (2) the alleged error plainly exists; and (3) the alleged error was not harmless." *State v. Adamcik*, 152 Idaho 445, 472-73 (2012) (citing *State v. Perry*, 150 Idaho 209, 228 (2010)).

C. Discussion

Mr. Bodenbach now claims that the District Court's "first aggressor" instruction was unnecessary, confusing, misstated Idaho law, and ultimately violated his Fourteenth Amendment right to due process of law by lowering the State's burden to prove that the homicide was unlawful.

Initially, to prove that Mr. Bodenbach committed first-degree murder or any lesser-included offense, the State had to prove beyond a reasonable doubt that Mr. Bodenbach killed Ryan Banks "unlawfully," i.e., without justification. *See* I.C. §§ 18-

4001, 18-4006. One potential justification for the killing was that Mr. Bodenbach acted in self-defense. I.C. §§ 18-4009(3), 18-4010.

Defense counsel submitted standard proposed jury instructions on self-defense, taken from the pattern Idaho Criminal Jury Instructions (ICJI). (CR., pp. 316-326.) He did not include a "first aggressor" instruction. Neither did the State. There is no such instruction in the ICJI, though there is an instruction governing "mutual combat." ICJI 1517. That instruction, citing I.C. § 18-4009(3), reads, in part, that unless self-defense is not available to one who engages in mutual combat "until the person has really and in good faith endeavored to decline further combat, and has fairly and clearly informed the adversary of a desire for peace and that the person has abandoned the contest." (*Id*.)

After Mr. Bodenbach had exercised his right not to testify and both parties had rested their cases, the trial court informed counsel that he had been mulling over whether "there should be some instruction about the right to self-defense in the face of a situation created by the person claiming self-defense." (Tr., p. 1214, ln: 17-21.) He said that he had been doing some research on the issue and cited a case from the Second Circuit that, in turn, cited an old Idaho case from sixty years earlier, *State v. Owen*, 73 Idaho 394 (1953). (Tr., p. 1216, ln: 9-16.).

Defense counsel expressed concern to the trial court that Mr. Bodenbach would not have waived his right to testify had he known that this type of instruction would have been given to the jury. In response, the Court indicated that it would allow the

defense to reopen its case. (Tr., p. 1220, ln: 21-25.) It did so. Mr. Bodenbach then took the stand, testifying similarly to that which has been recited in the Statement of Facts section in this Brief. At the close of the reopened cases, the trial court wrote its own instruction, Instruction 28, which it gave to the jury over defense counsel's objection. Instruction 28 appears to be a combination of the District Court's verbiage on "initial aggressor" standards mixed with some parts of the pattern jury instruction regarding "mutual combat."

The first problem with Instruction 28 is in its first sentence, which reads "[t]o have the benefit of self-defense or defense of another, the circumstances justifying a killing must be such as to render it unavoidable." (CR, p. 391; Appendix A.) There is no requirement that one must retreat under Idaho law before self-defense will justify the use of force. *Cf. State v. Iverson*, 155 Idaho 766, 773-74, 316 P.3d 682, 689-90 (Ct. App. 2014) (recognizing the principle but finding that whether a defendant could have escaped is relevant to the reasonableness of his actions). Yet Instruction 28 suggests that if retreat, *or any other option short of using deadly force*, is available, one must take that path; otherwise the killing was "avoidable." That is not the law. *Inverso*n, 155 Idaho at 775 (citing *State v. McGreevy*, 17 Idaho 453, 467, 105 P. 1047, 1051 (1909) for the principle that a defendant may be found to have acted reasonably under the circumstances even if "[i]t might so happen that, as a matter of fact, he could have done any one of a number of other things, and thereby have avoided the danger and refrained from

committing the homicide.")) It is true that the District Court also gave a "no duty to retreat" instruction in this case, Instruction 26 (CR, p. 389), but the principles set out in that instruction squarely contradict the first sentence of Instruction 28.

Next, the language in the instruction about "rais[ing] the threat or specter" of deadly force coupled with an "apparent" intent to do serious bodily harm is impermissibly unclear and vague. The jury is not given definitional guidance was to what it means to "raise a threat," and what a "specter" of deadly force is.

Finally, Mr. Bodenbach contends that the instruction simply conflicts with the law that is set out in I.C. § 18-4009, the statute that provides the parameters on the use of force that justify homicides. At that time of the relevant events in this case, that statute read as follows:

> Homicide is also justifiable when committed by any person in either of the following cases:
>
> ***
>
> 3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed;

I.C. § 18-4009.

"The interpretation of a statute 'must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute

must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.'" *Verska v. Saint Alphonus Reg'l Med. Ctr.*, 151 Idaho 889, 893 (2011) (quoting *State v. Schwartz*, 139 Idaho 360, 362 (2003)).

It is true that I.C. § 18-4009(3) includes an exception to the use of deadly force for an "assailant" or one who "engaged in mortal combat." But there is no requirement to "withdraw from further aggressive action" or to "communicate[] his withdrawal … by word or act," as included in the District Court's instruction. (CR, p. 391.) Instead, all that is required is that the defendant in good faith "endeavored to decline any further struggle," meaning that he attempted to stop. To the extent that Mr. Bodenbach could be said to be an "assailant" under one view of the evidence, the District Court's instruction was inconsistent with the plain language of the statute and added requirements that are not there.

These errors were plain, misstated the law, and likely confused the jury. Under the Fourteenth Amendment's Due Process clause, the government bears the burden of proving each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It thus follows that jury instructions which serve to lessen the State's burden of proving each element beyond a reasonable doubt violate the defendant's due process rights. *Cool v. United States*, 409 U.S. 100, 100 (1972); *State v. Trowbridge*, 97 Idaho 93, 95 (1975). The errors diluted the State's burden to prove that the

homicide was unlawful beyond a reasonable doubt; that is, that self-defense was inapplicable.

Mr. Bodenbach respectfully asks that this Court reverse.[1]

II.

The District Court erred in denying Mr. Bodenbach's motion to suppress his in-custody statements to Detective Pietrzak because the State had failed to prove that Mr. Bodenbach knowingly, voluntarily, and intelligently waived his *Miranda* rights.

A. Introduction

Detective Jason Pietrzak interviewed Adam Bodenbach not long after the shooting while Mr. Bodenbach was in the hospital for observation, complaining of pain. He made several statements admitting that he shot Ryan Banks, though he claimed it was in self-defense. Mr. Bodenbach would later testify that he had taken a high dose of Xanax, and that he had no memory of his interview with the detective. The totality of the circumstances showed that he did not provide a voluntary, knowing, and intelligent waiver of his Fifth Amendment rights during his interview.

[1] Mr. Bodenbach acknowledges that the Idaho Court of Appeals has held that a misstated jury instruction on the law of self-defense is not a due process violation in *State v. Jimenez*, 159 Idaho 466, 469-71 (Ct. App. 2015), He contends that *Jimenez* was wrongfully decided or should be limited to its facts. The elements of a crime are defined by state law, and Idaho specifically defines murder as an "unlawful" killing. The State therefore bears the burden of proving that it was unlawful beyond a reasonable. If a jury instruction dilutes the burden on that element, it violates due process.

B. Standard of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, this Court accepts the trial court's findings of fact which were supported by substantial evidence, but the Court freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561 (Ct. App. 1996). At a suppression hearing the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106 (1995); *State v. Schevers*, 132 Idaho 786, 789 (Ct. App. 1999).

C. Standards Governing *Miranda* Rights and Waivers

In *Miranda v. Arizona*, the Supreme Court held that the Fifth Amendment requires law enforcement to advise a suspect before custodial interrogation that the suspect has the privilege against self-incrimination and the right to have counsel present. 384 U.S. 436, 444 (1966). A suspect may waive these rights, but a waiver "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege …" *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). A waiver is valid "[o]nly if the `totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension ..." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

Any waiver of *Miranda* rights or the underlying constitutional privilege against self-incrimination must be made knowingly, voluntarily, and intelligently. *State v. Alger*, 115 Idaho 42, 45 (Ct. App. 1988). The state bears the burden of demonstrating that an individual has waived his rights by a preponderance of the evidence. *State v. Doe*, 131 Idaho 709, 712 (Ct. App. 1998).

D. Discussion

There was no dispute that Mr. Bodenbach was in custody when Detective Pietrzak interviewed him. Mr. Bodenbach had been arrested in handcuffs at the Park Village Apartments. Because he had complained of pain, he was taken to the hospital, where he was restrained to a hospital bed. He was not free to leave. Thus, the detective had an obligation to ensure that Mr. Bodenbach waived his rights under *Miranda.*

The custodial interview took place well into the early morning hours after an extremely traumatic event. At the time, Mr. Bodenbach had recently ingested cocaine and had a long history of drug abuse.[2] He also testified that he had taken 4 milligrams of Xanax immediately after the shooting to calm himself down.[3]

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[2] At sentencing, the District Court pointed out that there was abundant evidence in the record by that time that when Mr. Bodenbach has been using drugs and is under the influence, he can be "delusional," "wired," "anxious," irrational," among other things. (Tr., p. 1699, ln: 2-7.) His behavior at the hospital that night is consistent with those descriptions.

[3] The District Court was skeptical that Mr. Bodenbach had ingested Xanax and claimed that Bodenbach was relying solely on his testimony. (CR, pp. 212-23.) Yet the hospital took a sample of his blood, which easily could have been tested by the police and

The audio (State's Ex. 116, 117) of the interview, and transcripts (CR., pp. 800 – 851), show an alternatively amped up person and, especially as the interview progressed, someone who is getting very slowed down and lethargic. Throughout, Mr. Bodenbach frequently complained of being hungry, thirsty, and in pain. At times, he tells a logical coherent story, yet at other times he even has to be reminded that he's in the hospital. At one point, he believes that he has been stung by a bee when Detective Pietrzak is simply putting gauze testing material on him for a gun residue test.

At the suppression hearing, Mr. Bodenbach testified that he could not remember the interview. (Tr., p. 13, ln: 1-15.) This was consistent with a previous experience that he had after ingesting a high quantity of Xanax, which similarly resulted in bizarre behavior form him. (Tr., p. 10, ln: 15-19.) It is also not inconsistent with the State's pharmacologist's testimony regarding "blackouts" from substances. (Tr., p. 119, ln: 16-25.) That is, the person may appear to be interacting somewhat normally in the moment, but the substance prevents the brain from storing memories properly, hence the failure of memory the next day. (Tr., p. 120, ln: 4-14.)

Mr. Bodenbach respectfully contends that the District Court erred in concluding under totality of these circumstances, that the State had proven his waiver was knowing, voluntary, and intelligent. In the absence of a valid waiver, the introduction

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confirmed Bodenbach's testimony, but due to the failure of the police to retrieve that sample within the requisite time, it was destroyed. (Tr., p. 1428, ln: 14-21.)

of these out of court custodial statements violated his Fifth Amendment privileged against self-incrimination.

III.

The District Court abused its discretion in sentencing Mr. Bodenbach to a term of life in prison, with 25 years fixed.

A. Introduction

The District Court imposed a sentence of life in prison, with 25 years fixed, for murder enhanced by the use of a firearm. The District Court ignored or heavily discounted significant mitigating evidence in this case, primarily Mr. Bodenbach's life-long struggles with addiction and his generally positive and pro-social traits when he is not abusing substances, before imposing an unreasonable sentence.

B. Standard of Review

Where the sentence imposed by a trial court is within statutory limits, the appellant must show that the lower court abused its discretion. *State v. Stevens*, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). This Court must resolve whether the trial court correctly perceived the issue as one of discretion, acted within the outer boundaries of its discretion, and reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. *State v. Oliver*, 144 Idaho 722, 726 (2007).

This Court does not supplant the views of the trial court with its own. *Broadhead*, 120 Idaho 141, 145 (1991). An appellant must establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment: (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. *State v. Stover*, 140 Idaho 927, 933 (2005).

C. Discussion

Adam Bodenbach grew up in a stable environment in southern California to separated but amicable parents. (PSI, pp. 10-11.) He had a normal and relatively happy childhood, hanging out with friends, going to the beach, and skateboarding. (*Id*.) He is described in the numerous letters in support attached to the PSI as a good and helpful kid, and a good adult with positive traits when he is clean and sober. (PSI, pp. 29-56.) He has dozens of friends and family that support and love him. (*Id*.)

In his middle teen years, though, his life was derailed by experimenting with substances, and from there it just tumbled down until the day that Ryan Banks was killed. It appears that by then Mr. Bodenbach had long since graduated from taking narcotic pills to using heroin, in addition to cocaine, methamphetamine and other substances on frequent occasions. (PSI, pp. 13-15.) He was deep into addiction, a hard-core drug user, and he couldn't shake it.

In spite of that, he had no real criminal record to speak of, aside from a few arrests the law related to drug possession, use, and behavior while under the influence. (PSI, p. 9.) He had no prior felony convictions. (*Id*.)

If this case had ended in a different way, with Mr. Bodenbach overdosing, say, and with Ryan Banks living, Mr. Bodenbach would be a tragic and sympathetic figure who fits neatly within the current dialogue surrounding the opioid epidemic in this country. Most of us know of someone who has struggled in that way. The consensus has moved toward viewing drug addiction not as a choice or a moral failure, but as a disease that is difficult for the sufferer to control or cure.

Of course, this situation didn't end with Mr. Bodenbach's overdose. The jury concluded that he did kill Ryan Banks without legal justification, and he must be punished for that act.

The District Court treated the jury's verdict as a finding that Mr. Bodenbach had "killing on his mind" as he left his apartment and went across the apartment complex. (Tr., p. 1695, ln: 12.) That is unlikely, even under Jacob Kimsey's testimony and viewing the case through the lens of the State's evidence presented at trial. It seems much more likely that a view of the evidence supporting the verdict is that Mr. Bodenbach went to the apartment, at most, to threaten or frighten Ryan Banks and then shot him in an instant when Ryan tried to disarm him. This was far from a carefully planned and

premediated homicide over the course of many hours or days. It was heated, spontaneous, and tragic.

The District Court noted how senseless Ryan Banks's death was because none of the other typical motivations for murder were present, like robbery, revenge, or a contract killing. (Tr., p. 1695, ln: 1-5.) And there is no doubt that it was senseless.

But, as the District Court acknowledged, it was "fueled on emotion, drugs and the culmination of a lifetime spent in that mix, in that lifestyle ..." (Tr., p. 1695, ln: 6-8.) In making these remarks, though, the District Court treated Mr. Bodenbach's battles with addiction as an *aggravating* circumstance rather than a *mitigating* one. It would seem from the lower court's comments that a clear-headed robbery or a cold-blooded contract or revenge killing would be *less* aggravating and worthy of a lighter sentence because it is at least explainable in some logical way. That can't be right.

The question here, as in any case, is how long is enough? How long is enough to protect the public and serve as an adequate punishment, deter the individual and others, while allowing for the possibility of rehabilitation? Twenty-five years fixed is too harsh. There is a duality to Adam Bodenbach. Judge Hippler correctly remarked that the "bender" side of Adam was manipulative, erratic, irresponsible, immature, and aggressive (Tr., p. 1698, ln: 21-25; p. 1699, ln: 1-7) – which is unfortunately not unlike most addicts. But there is another Adam; the clean and sober Adam, who is described by those who know him best as helpful, polite, caring, and generally a good person. The

key to a reasonable sentence, then, would be to incapacitate Adam for as long as necessary for sobriety to take hold and to reduce the risk of substance abuse to a very low level, while imposing a long enough term also to serve as a punishment and deterrent for crime, but still giving a clean and sober Adam a reasonable opportunity to rejoin society when he's no longer a risk. Something more than 10 years fixed but much less than 25 years, with a life tail, would have been a reasonable sentence in this case.

Adam Bodenbach can be good person when he's not in the depths of drug addiction. He is not a cold-blooded psychopath or murderer. He can be rehabilitated and live a productive life. A sentence of 25 years fixed is excessive under any view of the facts. Mr. Bodenbach respectfully contends that the District Court abused its discretion and requests that the matter be remanded for resentencing.

CONCLUSION

For all of these reasons, Adam Bodenbach requests that the Court vacate the District Court's Judgment and remand for a new trial. Short of a new trial, he requests that this Court remand for a new sentencing hearing.

Respectfully submitted on this 16th day of November, 2018.

Craig Durham
Attorney for Petitioner

CERTIFICATE OF SERVICE

This Brief has been served on the following, who is registered to receive service electronically, on this 16th day of November 2018, by filing with the Idaho Supreme Court's e-filing system:

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ATTACHMENT A

INSTRUCTION NO. 28

To have the benefit of self-defense or the defense of another, the circumstances justifying a killing must be such as to render it unavoidable. If you believe from the evidence, and beyond a reasonable doubt, that the defendant was the initial aggressor to raise the threat or specter of deadly force with the apparent intent to take the life of the said deceased or to do him such serious bodily injury as might result in death, then he would not be permitted to excuse the killing on the ground of self-defense or the defense of another, even though he should thereafter have been compelled to act in his own defense or the defense of another, unless you find all of the following occurred:

1. The defendant, in good faith first, withdraws from further aggressive action, and;

2. The defendant communicates his withdrawal from further aggressive action to the victim by word or act.

The "initial aggressor" is the person who first acts in such a manner that creates a reasonable belief in another person's mind that deadly force is about to be used on that other person. The actual striking of the first blow or inflicting of the first wound, however, does not necessarily determine who the initial aggressor was. Arguing, using abusive language, calling a person names or the like unaccompanied by physical threats or acts does not make a person an initial aggressor and does not justify physical force.