Electronically Filed
12/28/2018 3:33 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45599**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2017-419**
	)	
ADAM DAVID BODENBACH,	)	
	)	
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

HONORABLE STEVEN J. HIPPLER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

CRAIG H. DURHAM
Ferguson Durham, PLLC
223 N. 6th St., Ste. 325
Boise, Idaho 83702
(208) 345-5183
E-mail: chd@fergusondurham.com

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature Of The Case

Adam David Bodenbach appeals from his convictions and sentences for first-degree murder, with a weapons enhancement, and possession of cocaine.

Statement Of The Facts And Course Of The Proceedings

The state charged Bodenbach with the first-degree murder of Ryan Harrison Banks, with a firearm enhancement, and possession of cocaine. (R., pp. 75-76.) Bodenbach filed a motion to suppress statements he made in a police interview, claiming that he was under the influence of drugs at the time, such that his statements and rights waiver were involuntary. (R., pp. 116-21.) The district court denied the motion, finding that Bodenbach made a voluntary waiver and statement. (R., pp. 201-14.)

The case proceeded to trial. (R., pp. 254-55, 259-62, 266-69, 304-08, 327-31, 339-47, 350-58.) The evidence at trial showed that, after an argument and physical altercation, Bodenbach got his gun, went outside Banks' apartment where Banks was to smoke, and fatally shot Banks. (Tr., p. 722, L. 22 – p. 729, L. 13; p. 950, L. 6 – p. 976, L. 11; p. 1048, L. 20 – p. 1107, L. 7; p. 1258, L. 9 – p. 1292, L. 3.) The evidence of the specific sequence of events was contradictory, with eye witness Jacob Kimsey testifying that Bodenbach approached with his gun in his hand and pointed at Banks and Kimsey when Banks grabbed for the gun and Bodenbach shot him (Tr., p. 1091, L. 18 – p. 1098, L. 5), and Bodenbach testifying the gun was in his pocket until Banks attacked him with a knife (Tr., p. 1278, L. 5 – p. 1286, L. 4).

In conjunction with self-defense instructions, the district court gave an instruction that self-defense does not apply where "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," unless he withdrew "from further aggressive action" and "communicat[ed] his withdrawal from further aggressive action." (R., pp. 386-91.) The jury convicted Bodenbach of first-degree murder, the firearm enhancement, and possession of cocaine. (R., pp. 408-09.)

The district court imposed concurrent sentences of life with 25 years determinate for the enhanced first-degree murder conviction and seven years with three years determinate for possession of cocaine. (R., pp. 445-48.) Bodenbach filed a timely notice of appeal. (R., pp. 441-43.)

ISSUES

Bodenbach states the issues on appeal as:

> 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.

(Appellant's brief, p. 13 (verbatim).)

The state rephrases the issues as:

1. Has Bodenbach failed to show fundamental error in the jury instruction that an initial aggressor may not claim self-defense unless he ceased his aggression and communicated that to the victim?

2. Has Bodenbach failed to show clear error in the district court's finding that his waiver of rights preceding his police interview was knowing and voluntary?

3. Has Bodenbach failed to show that the district court abused its discretion in sentencing him to life with 25 years determinate upon his conviction for first-degree murder with a firearm enhancement?

ARGUMENT

I.
Bodenbach Has Failed To Show Fundamental Error In The Jury Instruction That An Aggressor May Not Claim Self-Defense Unless He Ceases The Aggression And Communicates That To The Victim

A. Introduction

After the presentation of evidence, the district court requested the parties to address whether it should give an instruction regarding application of self-defense where the defendant "initiates a violent crime … that results in a fatal shooting." (Tr., p. 1214, L. 6 – p. 1218, L. 1 (internal quotation omitted).) The district court pointed out that there was evidence that Bodenbach pointed a gun at Banks, and that Banks "may have used a knife in defense of that." (Tr., p. 1219, L. 7 – p. 1220, L. 11.) The defense provided no input on whether to give the instruction. (Tr., p. 1214, L. 6 – p. 1221, L. 6.)

The district court subsequently provided a proposed instruction and invited the parties to provide input. (Tr., p. 1492, Ls. 11-14.) At this point defense counsel did state a general objection to giving the instruction, although he did not object to the language of the proposed instruction. (Tr., p. 1493, Ls. 2-14; p. 1499, L. 9 – p. 1500, L. 17.) The objection, as articulated to the district court, was as follows:

> [Defense Counsel]: I just -- I haven't -- this law dates back to 1953 or something, and I haven't seen a pattern instruction, I haven't seen a statute, I haven't seen anything that talks about it. So that's my objection.
>
> THE COURT: Just the oldness of the cases that do talk about it, the antiquity of those?
>
> [Defense Counsel]: Yeah, and that our Supreme Court hasn't seen fit to gin up a pattern instruction that deals with it. I don't know that they think it's therefore applicable ….

(Tr., p. 1499, L. 21 – p. 1500, L. 6.) The district court overruled the objection. (Tr., p. 1500, L. 20 – p. 1503, L. 11.)

On appeal Bodenbach argues the district court erred by instructing the jury that a defendant who introduced the threat of deadly force may not claim self-defense. (Appellant's brief, pp. 14-20.) Specifically, he claims the instruction erroneously includes a requirement of retreat (Appellant's brief, pp. 17-18), includes language that is "unclear and vague" (Appellant's brief, pp. 18-19), and lessens the state's burden of proof (Appellant's brief, pp. 19-20). Review shows that under Idaho law an initial aggressor may not claim self-defense unless he ceased the aggression and communicated that cessation to the victim. Bodenbach has failed to show that giving the instruction was fundamental error.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587-88, 261 P.3d 853, 864-65 (2011) (citing State v. Humphreys, 134 Idaho 657, 659, 8 P.3d 652, 654 (2000)). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." State v. Shackelford, 150 Idaho 355, 373-74, 247 P.3d 582, 600-01 (2010) (citing Kuhn v. Proctor, 141 Idaho 459, 462, 111 P.3d 144, 147 (2005)). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. Draper, 151 Idaho at 588, 261 P.3d at 865; see also State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). To prevail under the fundamental error doctrine, Bodenbach must demonstrate that the error he alleges: "(1) violates one or more of his unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record,

including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980.

C. Bodenbach Has Failed To Claim, Much Less Show, Fundamental Error In The Jury Instruction Regarding When Aggressors May Claim Self-Defense

A person claiming self-defense, "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(3) (1972).[1] Pursuant to this statute, a defendant "is not entitled to claim self-defense or justify a homicide when he or she was the aggressor or the one who provoked the altercation in which another person is killed, unless such person in good faith first withdraws from further aggressive action." State v. Turner, 136 Idaho 629, 634-35, 38 P.3d 1285, 1290-91 (Ct. App. 2001) (citing State v. Owen, 73 Idaho 394, 413-14, 253 P.2d 203, 213-14 (1953), *overruled on other grounds by* State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971)).

The facts of this case are remarkably similar to the facts in Turner. In that case, after a series of arguments and physical conflicts, Pratt, the victim, was sitting on a couch and called Turner a "fucking liar." Turner, 136 Idaho at 634, 38 P.3d at 1290. Turner went to the next room, obtained a gun, returned, and pointed the gun at Pratt. Id. Pratt then made a verbal threat and an aggressive motion, and Turner shot him. Id. Under these facts "Turner had a good faith obligation to retreat from any confrontation with Pratt before resorting to deadly force." Id. at 635, 38 P.3d at 1291. Because "Turner presented no

[1] The statute was amended in 2018; the subsection was re-numbered but the relevant language left unchanged. 2018 Idaho Sess. Laws, ch. 222, sec. 1, p. 500.

reasonable view of the evidence which justified killing Pratt," he "was not entitled to a self-defense instruction." Id.

The primary difference between this case and Turner is that in this case there was conflicting evidence regarding when in the sequence of events Bodenbach pointed his gun at Banks. If Bodenbach pointed the gun at Banks before Banks charged him, Bodenbach, like Turner, was not entitled to claim self-defense. Id. at 634-35, 38 P.3d 1285, 1290-91.

Bodenbach acknowledges that if he was "the assailant or engaged in mortal combat," to assert self-defense under I.C. § 18-4009(3) (1972) he was required to "really and in good faith have endeavored to decline any further struggle before the homicide was committed," but argues that the language of the instruction imposed a greater duty than that imposed by the statute and thereby may have confused the jury and misstated the law. (Appellant's brief, pp. 17-19.) This argument fails.

First, this argument was not made to the district court. Bodenbach did not request that the jury be instructed with the statutory language or assert that the language misstated applicable law. (Tr., p. 1493, Ls. 2-14; p. 1499, L. 9 – p. 1500, L. 17.) Bodenbach's "objection on one ground" did not preserve for appeal the "separate and different basis for objection not raised before the trial court" that he asserts on appeal. State v. Armstrong, 158 Idaho 364, 367, 347 P.3d 1025, 1028 (Ct. App. 2015). He therefore has the burden of showing fundamental error. State v. Hall, 163 Idaho 744, 803, 419 P.3d 1042, 1101 (2018) ("When a defendant fails to object to a jury instruction, we will review the jury instruction for fundamental error." (internal quotation and ellipses omitted)). Having failed to claim, much less demonstrate, fundamental error, Bodenbach has not met his burden.

Second, even if this Court addresses the unraised claim of fundamental error, review of the record shows no fundamental error in the instruction. The statute provides that if the person claiming self-defense "was the assailant or engaged in mortal combat," a condition of self-defense is that he "must really and in good faith have endeavored to decline any further struggle before the homicide was committed." I.C. § 18-4009(3) (1972). The model instruction based on this language provides that a person engaged in mutual combat may not assert self-defense "unless and 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." I.C.J.I. 1521.[2] Only after the defendant has "endeavored to decline further combat, and has fairly and clearly informed the adversary of a desire for peace" will the actions of the victim to "continue[] the combat" be considered a "new assault" against which the defendant may defend himself. Id. The instruction given by the district court, which requires that for self-defense to apply to an initial aggressor defendant he must "withdraw from further aggressive action" and "communicate his withdrawal" (R., p. 391), mirrors the approved instruction.

Bodenbach's claims of vague language do not show a clear and prejudicial violation of his constitutional rights. See, e.g., State v. Jimenez, 159 Idaho 466, 470-71, 362 P.3d 541, 545-46 (Ct. App. 2015). To the contrary, read in its entirety and in the context of the rest of the instructions on self-defense, the instruction merely and correctly informed the

[2] It is unclear why the model instruction speaks only of mutual combat and not of where the defendant is the initial aggressor even though both are included in the language of the statute. At a minimum, the same requirements to withdraw from mutual combat would apply to abandonment of an initial assault.

jury that if Bodenbach pulled his gun first, he could not claim he was defending himself even if the victim's response was to charge him with a knife.

II.
Bodenbach Has Failed To Show Clear Error In The District Court's Finding That His Waiver Of Rights Preceding His Police Interview Was Knowing And Voluntary

A. Introduction

The district court denied Bodenbach's motion to suppress his statements to police, which motion was based on the allegation he had taken a large amount of Xanax which rendered his rights waiver invalid. (R., pp. 201-14.) The district court made extensive findings that, during his interview with police, Bodenbach was not impaired but was functioning and oriented; expressed himself linearly, clearly and in detail; and showed no signs of incapacity. (R., pp. 202-10.) The district court concluded Bodenbach "was not under the influence of Xanax" as he claimed, and "[e]ven assuming Defendant did ingest Xanax or some similar substance, the evidence belies any assertion that he was too intoxicated to effectuate a knowing and intelligent waiver of his *Miranda* rights." (R., pp. 210-14 and n.17.)

On appeal Bodenbach argues that "under [the] totality of these circumstances" his waiver of rights was not proven knowing and voluntary. (Appellant's brief, pp. 20-24.) The flaw in his argument is that the "circumstances" he claims on appeal are the factual claims specifically rejected by the district court. Bodenbach's argument fails because he neither claims nor shows clear error in the district court's factual findings.

B. Standard Of Review

"The trial court's conclusion that a defendant made a knowing and voluntary waiver of his *Miranda* rights will not be disturbed on appeal where it is supported by substantial and competent evidence." State v. Luke, 134 Idaho 294, 297, 1 P.3d 795, 798 (2000). See also State v. Varie, 135 Idaho 848, 851-52, 26 P.3d 31, 34-35 (2001); State v. Person, 140 Idaho 934, 937, 104 P.3d 976, 979 (Ct. App. 2004); State v. Salato, 137 Idaho 260, 267, 47 P.3d 763, 770 (Ct. App. 2001). "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." Person, 140 Idaho at 937, 104 P.3d at 979. See also State v. Dunn, 134 Idaho 165, 169, 997 P.2d 626, 630 (Ct. App. 2000); State v. Nobles, 122 Idaho 509, 835 P.2d 1320 (Ct. App. 1991). The appellate court applies all presumptions in favor of the trial court's exercise of that power, and the trial court's findings on such matters will be upheld if they are supported by substantial evidence. Nobles, 122 Idaho at 512, 835 P.2d at 1323.

C. The District Court's Conclusion Is Supported By Substantial And Competent Evidence, And Bodenbach Does Not Claim Otherwise

"Any waiver of *Miranda* rights or the underlying constitutional privilege against self-incrimination must be made knowingly, voluntarily, and intelligently." State v. Zamora, 160 Idaho 659, 661, 377 P.3d 1122, 1124 (Ct. App. 2016). "The State bears the burden of demonstrating that an individual has knowingly, voluntarily, and intelligently waived his or her rights by a preponderance of the evidence." State v. Jensen, 161 Idaho 243, 251, 385 P.3d 5, 13 (Ct. App. 2016). The district court engaged in a thorough review of the evidence and made factual findings based on that evidence. (R., pp. 202-10.) It

ultimately made a specific factual finding that Bodenbach "was not under the influence of Xanax," and that his claim otherwise was "contradicted by the totality of the evidence." (R., p. 214 n.17.) The district court also found that, even assuming Bodenbach was under the influence of Xanax or some similar drug, Bodenbach "was still coherent enough to give a knowing and intelligent waiver of his *Miranda* rights." (R., p. 214.)

Bodenbach claims error under the totality of the circumstances he wishes the district court found, while ignoring the circumstances actually found by the district court. (Appellant's brief, pp. 20-24.) He does not claim that the district court's conclusion that he made a knowing and voluntary waiver of his *Miranda* rights was not supported by substantial and competent evidence. (Id.) Thus, the district court's conclusion "will not be disturbed on appeal." Luke, 134 Idaho at 297, 1 P.3d at 798.

III.
Bodenbach Has Failed To Show That The District Court Abused Its Discretion In Sentencing Him To Life With 25 Years Determinate Upon His Conviction For First-Degree Murder With A Firearm Enhancement

A. Introduction

The district court imposed a sentence of life with 25 years determinate on Bodenbach's first-degree murder conviction enhanced for use of a firearm. (R., pp. 445-48.) On appeal Bodenbach argues that his sentence is excessive. (Appellant's brief, pp. 24-28.) His argument, however, is based on facts other than, and at times contradictory to, those found by the district court. Because he does not contend the district court's factual findings were clearly erroneous, but instead makes his argument as if they did not matter, he has failed to show an abuse of discretion under the applicable standard of review.

B. Standard Of Review

"We review the length of a sentence under an abuse of discretion standard." State v. Clinton, 155 Idaho 271, 273, 311 P.3d 283, 285 (2013) (internal quotation omitted). "Where the sentence imposed by a trial court is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion." State v. Windom, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011) (internal quotation omitted). The Court considers the defendant's entire sentence, but presumes that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Dabney, 159 Idaho 790, 367 P.3d 185, 189 (2016).

"A sentence is reasonable if it appears necessary to achieve the primary objectives of protecting society or the related sentencing goals of deterrence, rehabilitation, or retribution." State v. Struhs, 158 Idaho 262, 267-68, 346 P.3d 279, 284-85 (2015) (internal quotation omitted). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (internal quotation omitted). "Furthermore, a sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court." State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016) (internal quotation and brackets omitted).

"We will defer to factual findings made by the lower court if supported by substantial and competent evidence in the record." State v. Porter, 130 Idaho 772, 789, 948 P.2d 127, 144 (1997).

C. The District Court Did Not Abuse Its Discretion

The district court applied the correct legal standard and considered all of the materials and arguments presented. (Tr., p. 1694, Ls. 2-23.) It found that Bodenbach had committed "a senseless, needless killing." (Tr., p. 1694, L. 24 – p. 1695, L. 5.) Bodenbach had been "fueled on emotion, drugs, and the culmination of a lifetime spent in that mix, that lifestyle, that somehow made it seem okay to carry a loaded pistol across that apartment compound with extra bullets in his pocket and killing on his mind." (Tr., p. 1695, Ls. 6-12.) The district court commented on and considered Bodenbach's prior violence against his mother. (Tr., p. 1698, Ls. 6-20.) In addition, Bodenbach showed little, if any, remorse for the killing. (Tr., p. 1702, Ls. 2-20; p. 1703, L. 17 – p. 1704, L. 4.) The record shows that the district court did not abuse its discretion.

Bodenbach points out that he "had a normal and relatively happy childhood," but that his "life was derailed" by substance abuse. (Appellant's brief, p. 25.) The district court considered these facts. (Tr., p. 1696, L. 24 – p. 1701, L. 4.) Bodenbach points to his relatively small criminal record. (Appellant's brief, p. 26.) The district court noted Bodenbach's history of violence toward his mother and an incident hitting cars with a broom handle. (Tr., p. 1698, Ls. 6-20; p. 1699, Ls. 8-14.) Thus, the district court considered the matters raised by Bodenbach, but obviously found them more aggravating, as opposed to mitigating, than Bodenbach believes them to be.

Bodenbach asserts that the district court's finding that he intended to kill Banks when he walked to Banks' apartment with a gun is "unlikely," and it is "more likely" that he intended to "threaten or frighten Ryan Banks." (Appellant's brief, pp. 26-27.) The state would dispute what intent was "likely" if this argument were relevant. Bodenbach does

not claim, nor could he show, that the district court's factual finding was clearly erroneous. Thus, what he believes more or less likely is irrelevant under the applicable legal standards.

Bodenbach next claims that the district court improperly considered the senselessness of his crime to be aggravating instead of mitigating. (Appellant's brief, p. 27.) Whether a particular fact is aggravating or mitigating is a factual determination, reviewed for clear error. Porter, 130 Idaho at 788-89, 948 P.2d at 143-44. Again, Bodenbach has not even attempted to meet his burden.

Finally, Bodenbach asserts he had greater rehabilitation potential than found by the district court, and that this rehabilitation potential should have outweighed other sentencing concerns. (Appellant's brief, pp. 27-28.) This argument amounts to nothing more than a request for this Court to improperly substitute its view of a reasonable sentence. See Miller, 151 Idaho at 834, 264 P.3d at 941. Bodenbach has failed to show that the sentence is unreasonable under any view of the facts found by the district court.

CONCLUSION

The state respectfully requests this Court to affirm the judgment.

DATED this 28th day of December, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of December, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

CRAIG H. DURHAM
FERGUSON DURHAM, PLLC
chd@fergusondurham.com

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd