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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)

Plaintiff-Respondent,)

vs.)

ROBROY WALL, Jr.,)

Defendant-Appellant.)

DOCKET NO. 32070

APPELLANT'S BRIEF

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

The Honorable Darla S. Williamson
District Judge

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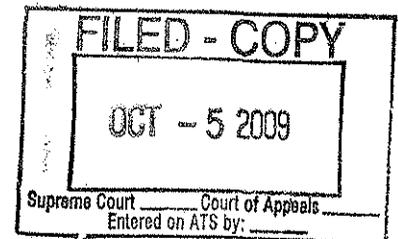


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STATEMENT OF THE CASE

Nature of the Case

Robroy Wall, Jr., (hereinafter Mr. Wall) appeals from his convictions for first degree murder and use of a firearm in the commission of that offense, asserting that the district court committed reversible instructional error.

Statement of Facts

This case was the subject of a 10 day jury trial, and the issue herein is factually intensive. While the detailed facts specifically relevant to our issue will be taken from the trial testimony, what generally happened is that in the early morning hours of May 2, 2003, Zachariah Street (hereinafter Zach) was murdered in the desert south of Boise. There were three defendants involved, Mr. Wall, Jason McDermott, and Daniel Hosford. They all belonged to a gang called La Familia which was run by McDermott. Zach had recently been arrested for committing vehicle burglaries, and McDermott learned that Zach had given names to the police, so McDermott wanted Zach beaten up or killed. (PSI, p. 2.)

As to what happened next, while Mr. Wall was acquitted of the charge of conspiracy to commit first degree murder, the overt acts charged in that offense nevertheless provide a good timeline of events. The overt acts alleged as follows:

1. On or about the 25th day of April, 2003, Jason McDermott and Daniel Hosford drove from Boise, Idaho to Pullman, Washington intending to bring Robroy Wall, Jr. back to Boise to assist in the murder of Zachariah Street.
2. On or about the 27th day of April, 2003, Jason McDermott, Daniel Hosford and Robroy Wall, Jr. drove from Pullman, Washington to Boise, Idaho to participate in the murder of Zachariah Street.

3. On or about the 27th day of April, 2003, Jason McDermott stole a Ruger 9mm handgun *intending to use it to murder Zachariah Street.*
4. Robroy Wall, Jr. and Daniel Hosford hid the stolen Ruger 9mm handgun so that it could be used at a later date to murder Zachariah Street.
5. Prior to the 1st day of May, 2003, Jason McDermott retrieved the stolen Ruger handgun from its hiding place *intending to use it to murder Zachariah Street.*
6. On or about the 1st day of May, 2003, Jason McDermott, Robroy Wall, Jr. and Daniel Hosford dressed in black clothing and wore gloves in preparation to murder Zachariah Street.
7. Jason McDermott, Robroy Wall, Jr., and Daniel Hosford induced Zachariah Street to get into a vehicle on May 1, 2003 *intending to take him to a remote spot to murder him.*
8. Jason McDermott, Robroy Wall, Jr. and Daniel Hosford drove Zachariah Street to a remote desert location in Ada County, Idaho, in the *early morning hours of May 2, 2003, where they intended to murder him.*
9. In the early morning hours of May 2, 2003, at the remote desert location, Jason McDermott, Robroy Wall, Jr. and Daniel Hosford made Zachariah Street get out of the vehicle and *made him remove articles of his clothing in preparation to murder him.*
10. In the early morning hours of May 2, 2003, at the remote desert location, Zachariah Street was shot twice in the head with the Ruger 9mm handgun, from which *shots Zachariah Street died.*
11. Prior to shooting Zachariah Street, *articles of his removed clothing were placed over his head.*

Information, p. 2-3. (R. p. 46-47.)

McDermott fired the first shot into Zach's head after which Mr. Wall took the gun from McDermott and fired the second shot. (PSI, p. 2.) The forensic pathologist testified at trial that the sequence of events was that the victim was on his knees, he was shot once, he fell forward, pants were put over his head, he was shot again, and the body was not moved; this all happened right where the body was found. (Tr. p. 569.)

The pathologist further testified that while the first shot would have been fatal, the victim was medically alive at the time of the second shot. (Tr. p. 578-79, 582.) This opinion was based on the hemorrhagic wound track of the second shot, which showed that the heart was beating and pumping blood, indicating the person was alive. (Tr. p. 577-78.) However, the first shot, which was through the brain, would have rendered him immediately unconscious. (Tr. p. 598.) The first shot was not survivable even with immediate medical attention. (Tr. p. 601.)

According to the pathologist, after the first shot, the victim was not moving. Instead, he pitched forward, landed on the left side of his face, and stayed there unconscious and didn't have spasms or writhe on the ground. (Tr. p. 600.) He would have never moved after falling into the position he ended up in after the first shot, would have been incapable of speech or communication, and incapable of any movement, including his extremities, except that his chest would have been moving since he was still breathing, but, in essence, pretty still. (Tr. p. 603-04.)

At trial, the primary witness regarding what happened was Daniel Hosford, and the following is from his testimony. At the time of Mr. Wall's trial, Hosford had pled guilty to aiding and abetting second degree murder, but had not yet been sentenced. (Tr. p. 639-640.)

Hosford testified that at the relevant time, McDermott, Mr. Wall, Zach, Renton McGowan, Mike Bennett, and Robert Key were all involved with a gang-type affiliation that had been given the name La Familia by McDermott. (Tr. p. 657.) McDermott was in charge of the gang, and Mr. Wall was second in command. (Tr. p. 701.)

At the time, Mr. Wall lived in Pullman, Washington, and Hosford lived with McDermott at his apartment (in Boise). (Tr. p. 660-61, 663.) Other people, including other members of the gang, stayed on and off at McDermott's apartment, including Zach. (Tr. p. 663-64.) McDermott went by the name of Junez Miselli, tried to speak with an Italian accent, and claimed that his uncle was a godfather in the Italian Mafia. (Tr. p. 664-65.) Mr. Wall went by the supposed German name of Saragei and tried speaking with a German accent. (Tr. p. 665-66.)

McDermott would subject the gang members to various tests, some of which, according to Hosford, involved pain and hurting people. (Tr. p. 721.) For example, they would have to stand there and take hits and kicks from McDermott and see how long they could stand up without falling down. (Tr. p. 721.) McDermott also had a sword which was really sharp, and he would have them sit down and move the sword really fast around parts of their body, head, shoulders or whatever. (Tr. p. 722.) He did it a couple times to Hosford and he never got hurt, but another one of them got a couple cuts on his back. (Tr. p. 722.)

The gang members were told not to rat on anybody in the group, and if they did, they would be punished. (Tr. p. 675.) Approximately a month before the murder, Renton McGowan and Zach were arrested, and McDermott believed that Zach had ratted him out. (Tr. p. 675-76.)

As to the murder itself, Hosford testified that it occurred in the desert off Pleasant Valley Road in Boise in the early morning hours of May 2, 2003. (Tr. p. 641-43.) McDermott was driving, Mr. Wall was in the passenger seat, and Hosford and Zach were in the back seat. (Tr. p. 643.) When they got to the location, McDermott and Mr. Wall

got out, opened the trunk, and did something for about 15 minutes, after which Hosford wondered what was going on, so he got out and saw McDermott putting a handgun in the waistband of his pants. (Tr. p. 643-44.) Hosford believed it to be loaded since he had earlier seen it and it had a full magazine of bullets, but that night he did not know because he did not see McDermott put bullets in the gun, all he heard was McDermott say that “two or three would be enough.” (Tr. p. 644.)

McDermott then spoke to Zach who was still in the car, but Zach did not reply or get out, and then Mr. Wall told him to get out, and he still did nothing. (Tr. p. 645.) Then Hosford told Zach to get out, and he did. (Tr. p. 645.) Once out, they all walked out into the desert, probably 100 yards. Then McDermott told Zach to take off his shirt, pants, hat and shoes. (Tr. p. 646.) Zach did not remove any item of clothing. Mr. Wall then told him to take off his clothes and he still did nothing. Hosford then told Zach to take off his clothes and he did, after which he had on his socks and underwear. (Tr. p. 647-48.)

McDermott then told him to get on the ground on his knees and put his hands behind his back, to which Zach asked “are you F-ing serious?” He did not kneel and then Mr. Wall told him to kneel and he still did not. (Tr. p. 648.) So then Hosford said “Go ahead, Zach. It’s a test.” And then Zach kneeled down, crossed his ankles, and put his hands behind his back. (Tr. p. 649.)

At this point, the gun was still in McDermott’s waistband. Mr. Wall mentioned something about blood splatter and to put the shirt around Zach’s head so that blood would not get on them. McDermott then went over to Zach and picked up his shirt, and put it over Zach’s head like a shroud so he couldn’t see anything. (Tr. p. 649-50.) McDermott took out the pistol and pulled the slide back to load it. (Tr. p. 650.) He

cocked the pistol and told Zach that he had reliable information that Zach had ratted him out, which Zach denied. (Tr. p. 650.) McDermott then put the pistol in different places around Zach's head and asked him where the gun was, to which Zach answered correctly. (Tr. p. 651.) Hosford said that at first Zach was upset, but said he wasn't scared, but then said he was scared and was upset and crying. (Tr. p. 651.)

McDermott said he was looking for a certain spot, and when the gun was around Zach's left temple, he said it was "right there" and pulled the trigger. (Tr. p. 652.) At the shot Zach fell forward, and Hosford said he heard the air kind of come out of him. (Tr. p. 652.) Hosford was probably about 15 feet from Zach when McDermott shot him, and Mr. Wall was around five feet away from Hosford. (Tr. p. 652.) Then, McDermott faced Hosford and tried to hand him the gun, but Hosford stepped back and told him he didn't want it. (Tr. p. 652-53.) McDermott urged him, but he again said he didn't want it. At that time Mr. Wall stepped up and took the gun from McDermott. (Tr. p. 653.) McDermott mentioned the blood splatter and tried pulling the shirt back over Zach's head but couldn't, so Mr. Wall took the pants and put them over Zach's head. (Tr. p. 653.) Mr. Wall then bent down, said "[w]here do you want it, Brother," and shot Zach in the head. (Tr. p. 653.) Hosford estimated no more than a minute and a half elapsed between the shots. (Tr. p. 653.)

Hosford testified that he thought Zach was dead after McDermott shot him in the head. (Tr. p. 756.) It was late at night, dark, there was no artificial light where they were parked, and they did not have flashlights or anything. (Tr. p. 749-50.)

Hosford testified that after McDermott shot Zach, Mr. Wall didn't really show any emotion on his face (which he found weird), no sadness, no happiness, but after he shot Zach, he had a smile on his face and was jumping up and down as if he was happy, like a crazy happy. (Tr. p. 654.) Mr. Wall then handed McDermott the gun, and they embraced each other and kissed each other on the cheek. Then Mr. Wall came up to Hosford, embraced him, kissed him on his cheek, and told him if he told anybody, he would kill him. (Tr. p. 654.) McDermott then came over and did and said the same thing to Hosford, except he also put the gun barrel up to his head when he said it. (Tr. p. 655.)

After the shooting, they went to another person's house (Cory), and on the way they decided on the alibi they would use if anyone asked them what happened to Zach. (Tr. p. 691-692.) At Cory's house Mr. Wall acted like nothing had happened. (Tr. p. 694.) They then went to Jason's apartment, and Mr. Wall went to bed, McDermott played video games, and Hosford drank alcohol. (Tr. p. 694.)

Hosford testified that when they left that night, he thought the options were that they were going to take Zach out and either beat him up, make him strip down to his underwear and make him walk back to Boise, or shoot him. (Tr. p. 685.) However, Hosford testified that he believed that when they left, they were going to kill him. (Tr. p. 737.) This belief was based on actions of McDermott and Mr. Wall, in that they were not really listening when Hosford talked of beating him up. (Tr. p. 685-86.)

It was pointed out that contrary to this testimony, Hosford had told the police he thought McDermott and Mr. Wall were just going to beat him up and not kill him, and also, he earlier testified in McDermott's trial that he thought they were just going to scare him. (Tr. p. 738-39.) His testimony from McDermott's trial was read in the instant case,

and he had testified that his impression when Zach was told to take his clothes off was that he thought McDermott and Mr. Walls were testing him. (Tr. p. 741.) They had earlier talked about causing some consequence to Zach for naming names to the police, and they talked about maybe they should just beat him up and about humiliating him, such as having him walk from the desert in his underpants. (Tr. p. 741-42.) His further impression was that Zach thought it was going to be a test also. (Tr. p. 742-43.) Even up to Zach being on his knees with his clothes off, it was Hosford's impression that Zach still thought it was part of a test. (Tr. p. 743.) Hosford thought the gun was a prop in the test so that it was a test Zach would long remember. (Tr. p. 743.) Hosford said that while he knew when they came back from Pullman that something was going to happen to Zach, that he might be hurt or even killed, he didn't think they (McDermott and Mr. Wall) were serious, and they were just there to scare people, and told them so. (Tr. 745.)

Finally, Hosford testified (in Mr. Wall's trial) that even when McDermott was moving the gun around Zach's head, he still thought it was a test, but at that point he had more belief that Zach was going to die. (Tr. p. 753.)

Other members of the gang confirmed Hosford's belief that Zach would not be killed (just scared). Robert Key testified that a week before the murder, he had a conversation with McDermott who said that Zach and Renton McGowen had to die on a camping trip because they were snitches. (Tr. p. 1157-58.) After that, Robert Key stole what would become the murder weapon on the demand of McDermott and gave it to him. (Tr. p. 1159-60.) Robert Key testified that Zach and Renton were his friends. (Tr. p. 1160.) However, he did not take McDermott's threats seriously because he had a big mouth and thought it was just talk. (Tr. p. 1160, 1164.)

Derek Carter testified that about a week before the murder, McDermott told him that he was very angry at Zach for being a snitch and that he deserved either a bullet to the back of the head or to be cut from ear to ear. (Tr. p. 1271-72.) He did not take the threat seriously because he believed that McDermott was a blowhard and a big talker, having told many stories about his Mafia connections that he did not believe. (Tr. p. 1273.) He didn't bother to contact Zach and tell him about it because he thought it was just more puffery on the part of McDermott. (Tr. p. 1273-74.)

Renton McGowan testified consistently with Hosford that McDermott affected an Italian accent at times and claimed he was with the Mafia. (Tr. p. 1111.) According to Renton, McDermott claimed he had \$30,000,000, military experience, diplomatic immunity, and a lot of friends in the high ranks of the Mafia. (Tr. p. 1123.) It was McDermott who ran La Familia in Boise, gave the orders, and gave people tests. (Tr. p. 1122.) Renton received one test from McDermott, he was told he had to join the gang and he had to commit a crime in order to be initiated. (Tr. p. 1122-23.)

Finally, Mr. Wall had been interrogated by police on two occasions which were videotaped. The jurors were provided with a transcript (court's exhibits to the record) to read along with as the video was played, but the transcripts were not entered into evidence. (Tr. p. 1249, 1252.) Of significance was Mr. Wall's statement that he didn't think Zach was alive after McDermott shot him. (Court's exhibit 1, p. 18, ln. 726-728.) He also said that he didn't know that Zach had been shot twice until the police told him. (Court's exhibit 2, p. 9, lns. 344-345.) This is because he did not want to shoot him even if he was dead, but wanted it to look like he was because they were watching him. So he

tried to shoot into the ground and thought that they couldn't see because it was dark. (Court's exhibit 1, p. 18, lns. 735-738; Court's exhibit 2, p. 8, ln. 341—p. 9, ln. 343.)

Also, Mr. Wall said in regard to McDermott talking about taking Zach out and killing him, that he "thought he was full of sh-t," he didn't think McDermott was going to kill Zach, but just scare him. (Court's exhibit 1, p. 21, lns. 877-880.) He did not think McDermott was serious because he had said he was going to kill people before, but he never went through with it, and he was all talk. (Court's exhibit 2, p. 6, lns. 233-239.) Mr. Wall repeatedly said that he really didn't think McDermott would do it, and his belief was based on his previous experiences with McDermott where he did similar things but never pulled the trigger, he just was scaring people. (Court's exhibit 2, p. 8, lns. 300-318.) He also repeatedly said that he was just playing along (including about the blood splatter). (Court's exhibit 2, p. 3, 7, & 8.) At the scene, he decided to still play along and thought that when it came down to it, McDermott would just uncock the pistol and tell Zach to put on his clothes and then they would leave, like he had always done. (Court's exhibit, p. 8, lns. 316-318.)

A detective was asked about a portion of the interview and testified in response to a question about why Mr. Wall was laughing and smiling and stuff when this happened, that his answer was that he was trying to hide the fact that he was kind of scared. (Tr. p. 1372-73.) In the interview this was further explained as him being afraid of getting shot himself if McDermott saw he was nervous and thought that Mr. Wall might rat him out. (Court's exhibit 1, p. 23, lns. 957-959.)

Course of Proceedings

Mr. Wall, Jason McDermott, and Daniel Hosford were charged with Conspiracy to Commit Murder in the First Degree, Murder in the First Degree, and Use of Firearm During the Commission of a Crime. (R. p. 45-48.) The state filed a notice of intent to seek the death penalty against Mr. Wall and McDermott. While the state much later withdrew the notice of intent to seek the death penalty as to Mr. Wall, until that time much litigation ensued related to it, none of which is relevant at this time since the state ultimately did not seek the death penalty against him.¹

The co-defendants' trials were severed, and McDermott was tried first. (R. p. 174.) The jury found McDermott guilty as charged, but was unable to reach a unanimous decision on the statutory aggravating circumstances that would have triggered the death penalty as to McDermott. After this, the state withdrew its notice of intent to seek the death penalty as to Mr. Wall. (R. p. 356-357, 360, 363.)

Mr. Wall proceeded to jury trial and was convicted of first degree murder and use of a firearm in the commission of a crime, but was acquitted of conspiracy to commit first degree murder. (R. p. 448-449.) He was sentenced to life in prison with the first 25 years fixed for murder, and 5 years fixed for use of a firearm to run concurrent. (R. p. 464.)

McDermott was sentenced to two fixed life sentences and a consecutive 10 year fixed sentence for the firearm. (R. p. 482.) Hosford, who had pled guilty to second degree murder, received 10 years fixed and 5 years indeterminate. (R. p. 482.)

¹ The notice and its later withdrawal were not included in the clerk's record for unknown reasons, but their omission is not important to the issue on appeal.

Mr. Wall filed a timely notice of appeal. (R. p. 467-470.) He also brought a Rule 35 motion, which the district court denied. (R. p. 479-480, 481-483.)

ISSUE

Whether the court committed reversible instructional error when after the jury had begun its deliberations and over objection of the parties, it *sua sponte* changed the transitional verdict form regarding 1st and 2nd degree murder to one misstating the law and contradicting the other instructions, which allowed for conviction on 1st degree murder without the jury having found the defendant guilty of murder.

ARGUMENT

THE COURT COMMITTED REVERSIBLE INSTRUCTIONAL ERROR WHEN
AFTER DELIBERATIONS HAD BEGUN IT *SUA SPONTE* CHANGED THE
TRANSITIONAL VERDICT FORM REGARDING 1st and 2nd DEGREE MURDER TO
ONE MISSTATING THE LAW AND CONTRADICTING THE OTHER
INSTRUCTIONS, WHICH ALLOWED FOR CONVICTION ON 1ST DEGREE
MURDER WITHOUT THE DEFENDANT HAVING BEEN FOUND GUILTY OF
MURDER

A. Introduction

Here, the jury instructions (and transitional verdict form), followed the Idaho pattern instructions and first required the jury to determine whether Mr. Wall was guilty of murder and then to decide whether the state had proven the special circumstance which would establish first degree murder. After the case had gone to the jury, the court *sua sponte* and over the objection of both parties, halted the jury's deliberations and changed the transitional verdict form to require the jury to first decide whether Mr. Wall was guilty of first degree murder and if not, then to decide whether he was guilty of what the court called the lesser included offense of second degree murder.

Appellant asserts that the court was incorrect about the order in which the jury's decisions for a charge of murder are structured, and that the court's new *transitional* verdict form was misstatement of law because it was contrary to the presumptively correct Idaho pattern instructions. Regardless, it contradicted the elements instructions already given.

Appellant further asserts that his due process rights and right to a jury trial under the 5th, 6th, and 14th Amendments were violated. The new transitional verdict form in effect directed the verdict for the state on the offense of murder and allowed the jury to find him guilty of first degree murder without every having found him guilty of murder. This is because the jury was directed to first decide whether he committed first degree murder, not murder, and the first degree murder instruction presupposes a murder had been committed. Even if the jury found the special circumstances for first degree murder, it does not establish there was a murder to begin with. Then, according to the verdict form, once the jury found him guilty of first degree murder, it moves on to whether he used a firearm, and never decides whether he had committed the underlying murder.

Appellant also asserts that the manner in which the court changed the transitional verdict form was error, *to wit*, over objection of both parties and by interrupting the deliberations and giving the new verdict form after closing arguments which were based on the original verdict form which was consistent with the elements instructions.

Finally, Appellant asserts that the error is reversible. First, the directing of the verdict for the state on the charge of murder is per se reversible. However, the other errors are not harmless because it simply cannot be concluded beyond a reasonable doubt that the error(s) had no effect on the verdict. This is shown by the length of the deliberations both before and after the change in the verdict form, the other jury verdicts on the other counts, and the evidence (and defenses), which those other verdicts show was otherwise insufficient to support a murder conviction, much less a first degree murder conviction.

These factors show that it cannot be concluded that the jury would have convicted Mr. Wall of even second degree murder had it considered that charge first, even though it convicted him of first degree murder once it was given the new verdict form which implicitly or explicitly told the jury that Mr. Wall had committed murder.

Further, the instructional error may have caused other problems as well. For example, the irreconcilable and contradictory instructions certainly advised the jury that it really did not need to follow all the instructions. Finally, the suspect timing of the guilty verdict in relation to the change in verdict form suggests that it acted as a prohibited dynamite instruction.

B. Applicable law and standards of review

As explained by the United States Supreme Court in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995):

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without “due process of law”; and the Sixth, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277-278, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993).

Id., 509-510 (footnote omitted).

As stated in *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080 (1993): “Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.”

The United States Supreme Court also held in *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827 (1999), that a harmless error analysis may be applied when a court omits an essential element from the instructions to the jury.

Under Idaho law, the standards for reviewing instructional errors are as explained in *State v. Nevarez*, 142 Idaho 616, 130 P.3d 1154 (Ct.App. 2005):

Whether the jury has been properly instructed is a question of law over which we exercise free review. When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law.

Id. p. 619 (internal citations omitted). *Nevarez* further explained:

If contradictory jury instructions are given on a material issue, the error is prejudicial, for an error in one instruction cannot be cured by reference to a correct statement of the law in another.

Id.

Where a harmless error analysis applies to a jury instruction question, Idaho Appellate courts have followed *Neder*, as explained in *State v. Thompson*, 143 Idaho 155, 139 P.3d 757 (Ct.App. 2006):

The determination of error in the jury instructions does not end our inquiry where, as here, the state argues that the error was harmless. To constitute error entitling a defendant to relief, an instruction must mislead the jury or prejudice the defendant. Any error, defect, irregularity, or variance that does not affect substantial rights shall be disregarded. I.C.R. 52. A harmless error analysis may be applied when a court omits an essential element from the instructions to the jury. *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Lovelace*, 140 Idaho 73, 79, 90 P.3d 298, 304 (2004). In cases where the improper instruction did not vitiate all the jury's findings, the United States Supreme Court has "recognized that improperly omitting an element from the jury can easily be analogized to improperly instructing the jury on an element of the offense, an error which is subject to harmless-error analysis." *Neder*, 527 U.S. at 10-11, 119 S.Ct. 1827; *State v. Peteja*, 139 Idaho 607, 613, 83 P.3d 781, 787 (Ct.App.2003). See, e.g., *State v. Lilly*, 142 Idaho 70, 72, 122 P.3d 1170, 1172 (Ct.App.2005) (instruction submitted to the jury resulted

in the omission of an element by effectively canceling out the essential element given in another instruction).

The error at issue here, as in *Neder*, is simply an error in the trial process, not a structural error defying harmless-error review by “affecting the framework within which the trial proceeds.” *Neder*, 527 U.S. at 19, 119 S.Ct. 1827. Our inquiry is not “whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The government bears the burden of showing that the error had no effect on a defendant's substantial rights. *Lilly*, 142 Idaho at 72, 122 P.3d at 1172. If, after examining the record, the reviewing court “cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error ... it should not find the error harmless.” *Neder*, 527 U.S. at 19, 119 S.Ct. 1827. Thus, the error is reversible where a jury is not instructed as to an element of an offense and the record contains evidence that could rationally lead to a finding in favor of the defendant with respect to the omitted element.

Id., p. 157-158 (internal citations omitted).

However, harmless error review does not apply to all instructional error. For example, *Sullivan*, *supra*, held that it does not apply to a deficient reasonable doubt instruction, a holding which Idaho has followed in *State v. Sheahan*, 139 Idaho 267, 282, 77 P.3d 956, 971 (2003). Nor, as suggested by the United States Supreme Court in *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101 (1986), would it apply to a directed verdict for the state:

... harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that “a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict ... regardless of how overwhelmingly the evidence may point in that direction.” This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Id., p. 578 (internal citations omitted).

C. The jury instructions and verdict forms

The relevant jury instructions given by the court (without objection by the parties) were as follows:

INSTRUCTION NO. 17

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

1. On or about May 2, 2003
2. in the state of Idaho
3. the defendant Robroy Wall, Jr. engaged in conduct which caused the death of Zachariah Street,
4. the defendant acted without justification or excuse, and
5. with malice aforethought.

If you find that the state has failed to prove any of the above, then you must find the defendant not guilty of murder. If you find that all of the above have been proven beyond a reasonable doubt then you must find the defendant guilty of murder and decide if the defendant is guilty of first degree murder.

INSTRUCTION NO. 18

Murder is the killing of a human being without legal justification or excuse and with malice aforethought.

The killing of a human being is legally justified or excused when "done in self-defense". There is no evidence of "self-defense" in this case.

INSTRUCTION NO. 19

Malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

INSTRUCTION NO. 20

In order for the defendant to be guilty of First Degree Murder, the state must prove that 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.

If you unanimously agree that the state has proven the above special circumstance beyond a reasonable doubt, then you must find the defendant guilty of first degree murder. If you unanimously agree that the special circumstance has not been proven beyond a reasonable doubt, you must find the defendant guilty of second degree murder.

All other murder is murder of the second degree.

INSTRUCTION NO. 21

An act is "willful" or done "willfully" when done on purpose. One can act willfully without intending to violate the law,

INSTRUCTION NO. 22

The law makes no distinction between a person who directly participates in the acts constituting a crime and a person who, either before or during its commission, intentionally aids, assists, facilitates, promotes, encourages, counsels, solicits, invites, helps or hires another to commit a crime with intent to promote or assist in its commission. Both can be found guilty of the crime. Mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not in the absence of a duty to act sufficient to make one an accomplice.

INSTRUCTION NO. 23

All persons who participate in a crime either before or during its commission, by intentionally aiding and abetting another to commit the crime with intent to promote or assist in its commission are guilty of the crime. All such participants are considered principals in the commission of the crime. The participation of a defendant in the crime must be proved beyond a reasonable doubt.

Court's instructions. (Exhibit to record)

The court then gave voluntary and involuntary manslaughter instructions. Next came the conspiracy to commit first degree murder instructions. While Mr. Wall was acquitted of this charge, the conspiracy instructions follow since the acquittal itself is relevant as will be explained below.

INSTRUCTION NO. 29

The crime of Conspiracy involves an agreement by two or more persons to commit a crime. They need not agree upon every detail. The agreement may be established in any manner sufficient to show an understanding of the parties to the agreement. It may be shown by evidence of an oral or written agreement, or may be implied from the conduct of the parties.

INSTRUCTION NO. 30

All of the parties to a conspiracy need not enter into the agreement at the same time. A person who later joins an already formed conspiracy with knowledge of its unlawful purpose is a party to the conspiracy.

INSTRUCTION NO. 31

The defendant is not guilty of Conspiracy if the defendant in good faith withdrew by informing another party to the conspiracy of the defendant's withdrawal before any party performed an act for the purpose of carrying out the agreement.

INSTRUCTION NO. 32

In order for the defendant to be guilty of Conspiracy to Commit First Degree Murder, the state must prove each of the following:

1. On or about April 25, 2003 through May 2, 2003
2. in the state of Idaho, and elsewhere
3. the defendant Robroy Wall, Jr. and Jason McDermott, and Daniel Earl Hosford agreed
4. to commit the crime of first degree murder
5. the defendant intended that the crime of first degree murder would be committed,
6. one or more of the parties to the agreement performed at least one of the following acts for the purpose of carrying out the agreement:

- a. On or about the 25th day of April, 2003, Jason McDermott and Daniel Hosford drove from Boise, Idaho to

Pullman, Washington intending to bring Robroy Wall, Jr. back to Boise to assist in the murder of Zachariah Street.

b. On or about the 27th day of April, 2003, Jason McDermott, Daniel Hosford and Robroy Wall, Jr. drove from Pullman, Washington to Boise, Idaho to participate in the murder of Zachariah Street.

c. On or about the 27th day of April, 2003, Jason McDermott stole a Ruger 9mm handgun intending to use it to murder Zachariah Street.

d. Robroy Wall, Jr. and Daniel Hosford hid the stolen Ruger 9mm handgun so that it could be used at a later date to murder Zachariah Street.

e. Prior to the 1st day of May, 2003, Jason McDermott retrieved the stolen Ruger handgun from its hiding place intending to use it to murder Zachariah Street.

f. On or about the 1st day of May, 2003, Jason McDermott, Robroy Wall, Jr. and Daniel Hosford dressed in black clothing and wore gloves in preparation to murder Zachariah Street.

g. Jason McDermott, Robroy Wall, Jr., and Daniel Hosford induced Zachariah Street to get into a vehicle on May 1, 2003 intending to take him to a remote spot to murder him.

h. In the early morning hours of May 2, 2003, at the remote desert location, Jason McDermott, Robroy Wall, Jr. and Daniel Hosford made Zachariah Street get out of the vehicle and made him remove articles of his clothing in preparation to murder him.

i. In the early morning hours of May 2, 2003, at the remote desert location, Zachariah Street was shot twice in the head with the Ruger 9mm handgun, from which shots Zachariah Street died.

j. Prior to shooting Zachariah Street, articles of his removed clothing were placed over his head.

If elements 1 through 5 and at least one of the overt acts in element 6 has been proven beyond a reasonable doubt, then you must find the defendant

guilty of conspiracy to commit first degree murder. Otherwise you must find the defendant not guilty of conspiracy to commit first degree murder

Court's Instructions. (Exhibit to record.)

The jury was also instructed as follows:

INSTRUCTION NO. 36

In every crime or public offense there must exist a union or joint operation of act and intent.

Court's Instructions. (Exhibit to record.)

The original instruction describing the verdict form was as follows:

INSTRUCTION NO. 40

In this case you will return a verdict, consisting of a series of questions. Although the explanations on the verdict form are self explanatory, they are part of my instructions to you. I will now read the verdict form to you. It states:

"We, the Jury, for our verdict, unanimously answer the questions submitted to us as follows:

QUESTION NO. 1: Is Robroy Wall, Jr. guilty or not guilty of Murder?

Not Guilty_____ **Guilty**_____

If you unanimously answered Question No. 1 "**Guilty**", then answer Question No. 2. If you unanimously answered Question No. 1 "**Not Guilty**", then proceed to Question No. 3.

QUESTION NO. 2: Is Robroy Wall, Jr. guilty or not guilty of First Degree Murder?

Not Guilty_____ **Guilty**_____

Please proceed to answer Question No. 5.

QUESTION NO. 3: Is Robroy Wall, Jr. guilty or not guilty of Voluntary Manslaughter?

Not Guilty_____ **Guilty**_____

If you unanimously answered Question No. 3 "**Guilty**" then answer Question No. 5. If you unanimously answered Question No. 3 "**Not Guilty**" then answer Question No. 4.

QUESTION NO. 4: Is Robroy Wall, Jr. guilty or not guilty of Involuntary Manslaughter by negligent use of a firearm?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 4 "**Guilty**" then answer Question No. 5. If you unanimously answered Question No. 4 "**Not Guilty**" then answer Question 6.

QUESTION NO. 5: Did Robroy Wall, Jr. personally use a firearm in the commission of any crime of which you have found him guilty in Questions 1 through 4?

Yes _____ **No** _____

Please now answer Question No. 6.

QUESTION NO. 6: Is Robroy Wall, Jr. guilty or not guilty of Conspiracy to Commit First Degree Murder?

Not Guilty _____ **Guilty** _____

The verdict form then has a place for it to be dated and signed. You should sign the verdict form as explained in another instruction.

Court's exhibit 43.

The body of the actual verdict form was identical to the body of Instruction No. 40, above. (Court's exhibit 42.)

The day after the jury was given the case, the court met with counsel outside the presence of the jury and advised that it thought the verdict form was incorrect as a matter of law. (Tr. p. 1466, 1470.) The court stated that the first question was whether the defendant was guilty of what it called the lesser included offense of murder and then the second question is whether it was first degree murder, whereas the first question should have been whether it was first degree murder. (Tr. p. 1466.) The court stated that since no verdict had been rendered yet, that it was going to correct the verdict form. (Tr. p. 1467.) The court acknowledged that neither side wanted the court to do this. (Tr. p. 1467.)

In response, the prosecutor first argued that the verdict form was not incorrect and was structured to follow the instructions. (Tr. p. 1468.) He further stated that he did not want the court to change anything because that would interrupt the deliberations process and also, he would have argued the case differently to the jury had the verdict form been different. (Tr. p. 1468.)

The defense objected because they did not know that there was any problem with the jury at that point. (Tr. p. 1469.) The defense pointed out that the jury had been out approximately 11 hours and 15 minutes, but that this is a serious case and that is not an unusually long deliberation. (Tr. p. 1469.) Defense counsel asked that the verdict form not be changed and noted that it worked fine in McDermott's case. (Tr. p. 1469.)

The court voiced its concern, which is what happens if the jury finds the defendant guilty of second degree murder but then is deadlocked on whether it is first degree murder and is the state entitled to a mistrial because of the deadlock on the crime charged? But the jury does not reach a lesser included offense until it makes a decision on the crime charged. (Tr. p. 1470.) The court then stated that it told the jury to stop deliberating until it could make a decision on the matter. Defense counsel objected, arguing that the court does not have the right to interrupt the jury's deliberations and it is not fair to change the ground rules. (Tr. p. 1471.) The court overruled the objection stating it was not changing any rules but was just correcting an error in the instructions. (Tr. p. 1472.)

The court explained that it was going to substitute a new Instruction No. 40 into the jurors' packets and would read the new Instruction No. 40 to them and tell them the previous No. 40 had been deleted and give them the new verdict form. (Tr. p. 1471.) The

court brought the jury in and read the instruction. (Tr. p. 1472-74.) The court also marked the original Instruction No. 40 as Court's exhibit 43 and the original verdict as Court's exhibit 42. (Tr. p. 1474-75.)

The new Instruction No. 40 provided as follows in relevant part:

INSTRUCTION NO. 40

In this case you will return a verdict, consisting of a series of questions. Although the explanations on the verdict form are self explanatory, they are part of my instructions to you. I will now read the verdict form to you. It states:

"We, the Jury, for our verdict, unanimously answer the questions submitted to us as follows:

QUESTION NO. 1: Is Robroy Wall, Jr. guilty or not guilty of First Degree Murder?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 1 "**Guilty**", then answer Question No. 5. If you unanimously answered Question No. 1 "**Not Guilty**", then proceed to Question No. 2.

QUESTION NO. 2: Is Robroy Wall, Jr. guilty or not guilty of Second Degree Murder?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 2 "**Guilty**", then answer Question No. 5. If you unanimously answered Question No. 2 "**Not Guilty**", then proceed to Question No. 3.

QUESTION NO. 3: Is Robroy Wall, Jr. guilty or not guilty of Voluntary Manslaughter?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 3 "**Guilty**" then answer Question No. 5. If you unanimously answered Question No. 3 "**Not Guilty**" then answer Question No. 4.

QUESTION NO. 4: Is Robroy Wall, Jr. guilty or not guilty of Involuntary Manslaughter by negligent use of a firearm?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 4 “**Guilty**” then answer Question No. 5. If you unanimously answered Question No. 4 “**Not Guilty**” then answer Question 6.

QUESTION NO. 5: Did Robroy Wall, Jr. personally use a firearm in the commission of any crime of which you have found him guilty in Questions 1 through 4?

Yes _____ No _____

Please now answer Question No. 6.

QUESTION NO. 6: Is Robroy Wall, Jr. guilty or not guilty of Conspiracy to Commit First Degree Murder?

Not Guilty _____ **Guilty** _____ ”

The verdict form then has a place for it to be dated and signed. You should sign the verdict form as explained in another instruction.

Court’s Instruction No. 40. (Exhibit to record)

The body of the actual verdict form was again identical to the body of the instruction describing the verdict form. (R. p. 448-49.)

D. The court erred by changing the transitional verdict form mid-deliberations

Appellant asserts that the district court committed multiple errors by changing the transitional verdict form, particularly in the manner in which it did. First of all, the new verdict form was a misstatement of the law and constituted instructional error. Of course, the error was not limited to the verdict form itself, since as stated in Instruction No. 40 describing it, the verdict form is part of the instructions themselves.

The district court’s conceptual premise about the relationship between first and second degree murder was contrary to how it now exists under Idaho law. In short, second degree murder is not treated as a lesser included offense of first degree murder but

rather, the base offense is second degree murder which may be enhanced, so to speak, by the finding of a special circumstance which would make it first degree murder.

According to the statute, murder is the unlawful killing of a human being with malice aforethought. I.C. § 18-4001. A different statute provides that there are two degrees of murder. I.C. § 18-4003. If one of various listed circumstances are present (here, a willful, deliberate, and premeditated killing), it is first degree murder, otherwise, it is second degree murder. *Id.*

In Idaho, at least at this time, the degrees of murder are treated differently than are greater and lesser included offenses, where the defendant is required to be acquitted of the greater offense before the lesser offense is considered. Instead, in the case of murder, the jury is instructed to first determine whether the defendant is guilty of (second degree) murder, and if so, to then decide whether the defendant is guilty of first degree murder. This structure is called for by the pattern Idaho Criminal Jury Instructions, and was followed in this case.² (ICJI 704; Court's Instruction 17.)

This structure is continued by the pattern first degree murder instruction (which was again followed in our case). This instructs the jury that if it does not unanimously find the special circumstance which would establish first degree murder, it must find the defendant guilty of second degree murder. (ICJI 705, Court's Instruction 20.) Significantly, it does not instruct the jury that it should then consider whether he is guilty of second degree murder or not.

As explained in *State v. Ruel*, 141 Idaho 600, 114 P.3d 158 (Ct.App. 2005):

² While the current version of the pattern jury instructions had not been adopted until shortly after the instant trial, the murder and first degree murder instructions from the prior version were the same.

The pattern ICJI instructions are presumptively correct. The Idaho Supreme Court approved the pattern jury instructions and has recommended that the trial courts use the instructions unless a different instruction would more adequately, accurately, or clearly state the law. *Id.*

Id. p. 602 (internal citations omitted).

So in our case, the district court provided the correct elements instructions and at first the correct transitional verdict form which followed those instructions. However, it then strayed from the pattern instructions when it gave the new transitional verdict form, which was error because it not only did not more clearly state the law, it affirmatively misstated it.

Further, the new transitional verdict form resulted in the court giving inconsistent and contradictory instructions to the jury, where one requires the jury to first decide whether the defendant is guilty of (second degree) murder and another requires it to first decide whether he is guilty of first degree murder. Again, as explained by *Nevarez*, *supra*, 142 Idaho at p. 619: "If contradictory jury instructions are given on a material issue, the error is prejudicial, for an error in one instruction cannot be cured by reference to a correct statement of the law in another." *Nevarez* later stated:

As we explained in *State v. Andrus*, "[w]e have considerable faith in juries, but we cannot expect them to discern the correct implications necessary to reconcile contradictory instructions given by the court, all of which are expected to be given equal weight." *Andrus*, 118 Idaho 711, 716, 800 P.2d 107, 112 (Ct.App.1990).

Id., 142 Idaho at p. 622.

Of course, the contradictory instructions problem exists regardless of whether the district court was right or wrong about the structure of the instructions. Assuming *arguendo* that the district court was correct and first degree murder had to be considered first, it would have needed to also change the elements instructions and not just the

verdict form. However, the court did not do so, and so it remedied only half of the problem it perceived, which did nothing but ensure juror confusion by providing contradictory instructions.

The biggest problem with the court's new transitional verdict form is that it directed the verdict of murder in favor of the state and allowed Mr. Wall to be found guilty of first degree murder without the jury ever having to determine whether he was guilty of murder. Since the new verdict form required the jury to first determine, not if Mr. Wall was guilty of murder, but whether he was guilty of first degree murder, the first degree murder instruction (No. 20) would have first come into play. That instruction begins by stating that "[i]n order for the defendant to be guilty of First Degree Murder, the state must prove that the murder: was" Then, the last portion of that instruction provides: "If you unanimously agree that the special circumstance has not been proven beyond a reasonable doubt, you must find the defendant guilty of second degree murder."

In short, the first degree murder instruction presupposes that a murder has been committed and does not determine itself whether there was a murder or not. While the instruction determines in our case whether the killing was willful, deliberate, and premeditated, it does not determine whether that killing was murder to begin with, for example, there is no determination regarding malice or justification. In other words, just because the special circumstances in the instruction are found, it does not establish a murder, for example, a police shooting can be a willful, deliberate, and premeditated killing without it being murder.

Then, if the jury finds the special circumstances and so finds Mr. Wall guilty of first degree murder, according to the new transitional verdict form, it moves on to

whether he used a firearm. Thus, the jury never considers whether he had committed (second degree) murder.

So here, by following this instruction, the jury would have found Mr. Wall guilty of first degree murder without ever having found him guilty of murder to begin with. Appellant asserts that as explained by the cases described above, this violates his right to due process and his right to a jury trial guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution in that the jury was not required to find him guilty beyond a reasonable doubt on every element of the offense, and the court directed the verdict of murder against him.

Moreover, Appellant asserts that the manner in which the district court changed the verdict form constituted both an abuse of its discretion as well as a violation of his due process rights under the 5th and 14th Amendments.³ As explained above, over both parties' objections, the court interrupted the jury's deliberations and changed the transitional verdict form mid-deliberations, after the parties had already made their closing arguments based on the original transitional verdict form which was consistent with the elements instructions.

While it is of course much worse that the court changed a correct statement of law to an incorrect one on the transitional verdict form, even if the court was correct about

³ Appellant asserts that this is an abuse of discretion under state law by analogy to the somewhat similar situation of a district court's discretionary decision whether or not to give further instructions in response to jurors' questions. *State v. Sheahan*, 139 Idaho 267, 282, 77 P.3d 956, 971 (2003). As to the due process violation, Appellant asserts that a defendant has a due process right to rely on rulings by the court and to expect that they will not be changed without a change of circumstances. *See, DuPont v. Southern Nat. Bank of Houston*, 771 F.2d 874, 880 (5th Cir. 1985) (finding a due process violation where the court granted the defendant's motion to dismiss but then later granted the plaintiff's motion for partial judgment).

the structure, it still should not have changed it at that time. Again, the parties did not want any change at that point, particularly since they would not be rearguing the case consistent with the new order in which the decisions were to be made according to the verdict form, or, more to the point, without an opportunity to attempt to explain to the jury how to reconcile the now irreconcilable instructions on how it is to make a decision.

Significantly, the concern which lead to the court making the change was unfounded. The court's concern was for the state and whether a retrial would be permissible if the jury found second degree murder but deadlocked on first degree murder. Appellant opines there would be no double jeopardy bar under these circumstances, and it appears that the state came to the same conclusion, or, in any event, was willing to take that risk. In short, since the party affected by the potential problem was willing to take its chances that it is correct about the law and let the jury finish its deliberations undisturbed by any changes, the court should have let it and not have changed the verdict over everyone's objections.

E. The error is reversible

Appellant asserts that the various errors discussed above are reversible. First, for the reasons explained in *Rose v. Clark, supra*, the court's error in directing the verdict on the murder charge is per se reversible and not subject to harmless error review regardless of the evidence which might support the conviction. Given the new transitional verdict form and structure of the first degree murder instruction, it was the court that in effect determined that Mr. Wall was guilty of murder when it directed the jury to first decide

whether he was guilty of first degree murder. Then, the error continued into the first degree murder conviction since it was based on the underlying murder.

However, assuming *arguendo* that the error is not considered to one of a directed verdict, but that the jury did not decide every element of the offense, then a harmless error analysis would apply. This would also be the case for the other errors, such as the transitional verdict instruction misstating the law, the instructions being contradictory to each other and so prejudicial, as well as the error in the manner in which the verdict form was changed. Appellant asserts that these errors are not harmless, whether they are considered individual or collectively, because a review of the record shows that it cannot be concluded beyond a reasonable doubt that the jury verdict would have been the same without them.

To explain, the state pursued two theories of liability for the first degree murder charge, *to wit*, aiding and abetting the shooting by McDermott, and Mr. Wall personally shooting Zach. Given the verdicts, it appears that the jury convicted him based on his personally shooting Zach and not because he aided and abetted McDermott.

The jury found that Mr. Wall personally used a firearm in the commission of the crime of first degree murder, which obviously refers to Mr. Wall shooting Zach. On the other hand, while of course not identical to the aiding and abetting theory, the jury acquitted Mr. Wall of the other charge in which he could be held vicariously liable, *to wit*, conspiracy to commit first degree murder. This strongly suggests that the jury was not finding him vicariously liable for the murder based on the actions of McDermott. This result would be consistent with the evidence of the various witnesses

(including Hosford's earlier testimony and Mr. Wall's statements to the police), that no one really believed McDermott was going to kill Zach and/or it was just a test. It is even supported by the description of McDermott moving the gun around Zach's head, which was eerily similar to the sword test which did not result in death. In short, if Mr. Wall didn't think McDermott was serious about the murder and was just playing along, he would have lacked the intent to promote or assist in its commission.

As to Mr. Wall personally shooting Zach, there was definitely insufficient evidence to convict Mr. Wall of first or second degree murder. The consistent and uncontroverted evidence is that Mr. Wall thought that Zach was already dead. He told the police so, Hosford thought so, and this belief was supported by the medical evidence. The medical examiner testified that Zach would not have been moving after McDermott shot him, except for his chest since he was still breathing. But he had fallen forward and so his chest was on the ground, and more importantly, it was dark. There was simply no evidence before the jury to support the notion that Mr. Wall thought he was shooting into a live person and not a dead body and so there was a complete failure of evidence which would establish all of the elements of murder.

Murder requires malice, which was missing here since there was no evidence that Mr. Wall thought he was killing someone. Of course there was no express malice since there cannot be an express intention to kill someone it is believed is already dead. Likewise as to implied malice, since the circumstances attending the killing showed Mr.

Wall did not think it was a killing, it could not be a killing done without considerable provocation or with an abandoned and malignant heart.⁴

Thus, the evidence in our case was insufficient to support a conviction for (second degree) murder. For the same reasons, it was of course insufficient to support a conviction for first degree murder, because if Mr. Wall did not know he was killing someone, that killing certainly could not have been willful, deliberate, and premeditated. Of course despite this, the jury did convict Mr. Wall of first degree murder, which is where Appellant asserts the instructional error and confusion it rendered comes in.

As explained above, when the court changed the transitional verdict instruction, it would have directed the jury to the first degree murder instruction. Again, this instruction presupposes that a murder has been committed, which explicitly told the jury that Mr. Wall was guilty of murder. Further, the manner in which the change would have come across to the jury must be considered. While deliberating, it was told to stop in its efforts to decide whether Mr. Wall had committed (second degree) murder and instead to look at first degree murder. This impliedly told the jury that Mr. Wall had committed murder (and was, in effect, a comment on the evidence by the court).

Thus Appellant asserts that when the jury is told, either explicitly or implicitly, that Mr. Wall has committed murder, the jury would conclude that his belief that Zach

⁴ Appellant asserts that awareness of the fact that someone is alive is required for implied malice, which is more clearly stated in the revised instruction adopted after our case. Current ICJI 703 provides as follows in relevant part:

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

was dead did not matter and was not a defense. It would thus follow to the jury that if it was not a defense for (second degree) murder, it likewise would not have been for first degree murder. In other words, while the jury may have acquitted Mr. Wall of (second degree) murder, once it was told that he had committed murder, it would simply convict him of first degree murder as well.

Or, the new transitional verdict form may have acted like a prohibited dynamite instruction, which is suggested from the suspect timing of events. The jury deliberated for 11 hours and 15 minutes with a transitional verdict form consistent with the elements instruction and which required them to first decide whether Mr. Wall was guilty of (second degree) murder and if so, whether he is guilty of first degree murder. Then the jury is given a new transitional verdict form which contradicts the elements instructions and instead requires them to first decide whether he is guilty of first degree murder. The jury is given the new verdict form at 11:25 AM and told to keep deliberating, and then the court reconvenes at 1:40 PM to take the guilty verdict for first degree murder. (R. p. 446.)

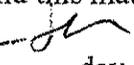
So in other words, after long deliberation, the jury is told to change what it had been doing and first decide whether Mr. Wall committed first degree murder contrary to the elements instructions and the verdict form which it had but was taken away. Then, not surprisingly, it finds him guilty of that crime relatively quickly (when the intervening lunchtime is considered). Many scenarios as to what happened are possible, with one being that the jury had decided that Mr. Wall's belief that Zach was dead was not a defense to (second degree) murder but may be to first degree murder, and the new verdict form then changed the jurors' minds (or forced a break in a deadlock over it).

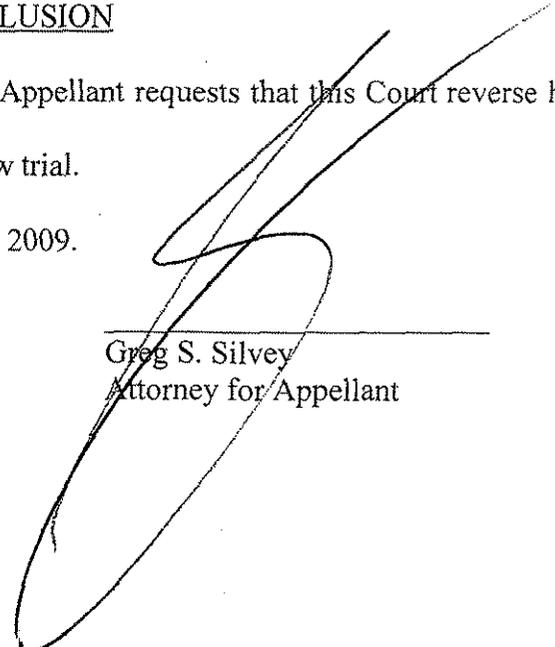
Or perhaps the problems with the instructional error manifested themselves in other ways, for example, the jury might have decided that if the new verdict form was contrary to the other instructions, that it really did not have to follow some other instructions either. Further, it very well could have been a combination of the problems discussed which resulted in the guilty verdict.

Of course, precise knowledge of just what happened is not the test, rather, it is whether this Court can conclude beyond a reasonable doubt that the verdict would have been the same without the error(s). Since, as explained above, there is evidence (and defenses) which could rationally lead to Mr. Wall's acquittal on the charge of first and/or second degree murder, in addition to the fact that he was actually acquitted of conspiracy to commit first degree murder, it cannot be said that the guilty verdict was surely unattributable to the error and thus it is not harmless.

CONCLUSION

For all the reasons as stated above, Appellant requests that this Court reverse his convictions and remand this matter for a new trial.

DATED This  day of October, 2009.



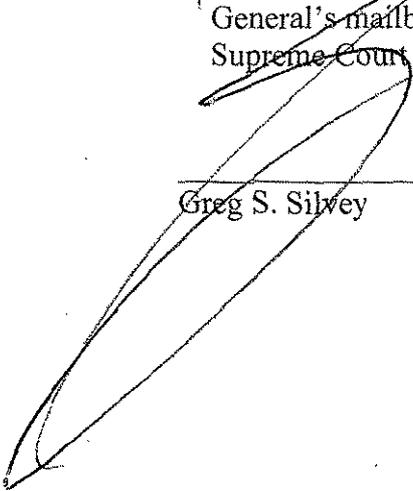
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ⁵ day of October, 2009, I served two true and correct copies of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

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