

ORIGINAL

**IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

FILED
JUN 18 2010
LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 93768

91006

**STATE OF MISSOURI
Respondent**

v.

**ANTONIO ANDREWS
Appellant**

FILED

JUN 28 2010

Thomas F. Simon
CLERK, SUPREME COURT

**On Appeal from the Circuit Court of the City of Saint Louis
Twenty-Second Judicial Circuit
The Honorable Presiding Judge Dennis Schaumann
Underlying Cause No. 0722-CR10753**

BRIEF OF APPELLANT ANTONIO ANDREWS

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SCANNED

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JURISDICTIONAL STATEMENT

Antonio Andrews ("Andrews") appeals the judgment and sentence imposed against him by the Honorable Dennis Schaumann for first degree murder in violation of § 565.020 and armed criminal action in violation of § 571.015 RSMo, after a jury trial in the Twenty-Second Judicial Circuit Court, City of St. Louis.

On October 9, 2009, the court sentenced Andrews to life incarceration without parole on count one and fifty years to be served consecutively on count two (LF 109-112; Tr. 439-40). Andrews timely filed his notice of appeal on October 19, 2009 (LF 113).

This appeal involves the constitutionality of a Missouri Statute, an issue reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, and Andrews requests this Court order transfer this cause to the Missouri Supreme Court pursuant to Andrews' attached memorandum in support. V.A.M.S. Const. Article V, Section 3.

The record on appeal will be referred to as: Legal File, "LF" and Trial Transcript, "Tr."

STATEMENT OF FACTS

On the evening of August 15, 2007, Antonio Andrews and three of his friends, Lamont Johnson the Third "Johnson," Montez Jackson "Jackson," and Xavier McCully "McCully," were hanging out on a porch on Semple Street. The boys had at least one .38 caliber revolver, possibly two guns among them on the porch (Tr. 223, 231, 256, 282).

Andrews and Johnson decided they would go for some Chinese food around the corner (Tr. 258). Police Officer Norvelle Brown, riding alone in his patrol car, attempted to stop Johnson and Andrews, but they ran (Tr. 258, 260-61), and a gunshot was fired (Tr. 268). Officer Brown was killed by one shot to the chest as he attempted to follow the boys (Tr. 204). Police located a .38 caliber revolver near the scene of the shooting on Semple Street (Tr. 230). The weapon was loaded, with one spent shell casing (Tr. 244).

On August 17, 2007, police interviewed Johnson and McCully and took videotaped statements in which each incriminated Andrews (Tr. 262, 339). Johnson told police that he and Andrews ran from Officer Brown, during the running Andrews told Johnson that he was tired of being

chased, pulled out the .38, shot twice, and threw the gun (Exhibit A, videotaped statement of Johnson).

McCully told police that he saw Officer Brown, who McCully stated he knew because the officer had stalked them before, pull up on Andrews and Johnson who began running. McCully further said he saw Andrews with a gun, he ran in the other direction, and heard two shots (he believed from two different guns), but did not see anyone actually shoot (Exhibit B, videotaped statement of McCully).

Subsequently, officers arrested Andrews, age 15 at the time (Tr. 338). On December 26, 2007, Andrews was certified to stand trial as an adult (LF 22). Prior to his jury trial, his attorney deposed Johnson, who denied the veracity of the videotaped statement taken by police and stated he had not seen Andrews shoot Officer Brown (Tr. 264). Johnson, in his deposition, told Andrews' attorney that before his videotaped statement, he tried to tell police he did not see who shot Officer Brown, but the officers accused him of lying and told him to "tell that story, [or Johnson was] going down." (Tr. 270). According to Johnson, he was scared so he said what the officers told him to say on the video (Tr. 270-71).

Before trial, Andrews moved to prevent the several police officers anticipated to attend the trial from wearing their uniforms because it would prevent an atmosphere of impartiality (Tr. 9-10). Andrews also moved the trial court to declare § 221.071 RSMo unconstitutional and dismiss the charges against him (LF 40). Those motions were denied (Tr. 8, 10).

At trial, the State presented the testimony of Johnson and McCully. Johnson testified that he and Andrews did run from Officer Brown, but he did not see who shot Brown (Tr. 268-269). McCully, charged with a misdemeanor illegal transfer of a weapon as a result of the shooting, testified under the grant of immunity, that he did make a videotaped statement incriminating Andrews, but only because he was handcuffed to a table and scratched by one of the police officers (Tr. 284, 296). He stated that he did not remember if Andrews was with him that night (Tr. 287).

The State additionally presented testimony from Thomas Weeks, Donte Newsome, Morneisha Goins. Thomas Weeks testified he gave an audio-taped¹ interview to police indicating that Andrews told him he shot

¹The trial transcript indicates that a videotaped statement was played for the jury, but the statement was actually audio-taped (Tr. 301,

Officer Brown, but that his statement was led by the police before the statement as to what he should say (Tr. 301; Exhibit C, audio-taped statement by Thomas Weeks). Weeks admitted that he did say McCully told him Officer Brown had been shot, but that he did not speak to Andrews about the shooting (Tr. 300).

Donte Newsome testified at trial that he and his sister, Morneisha Goins, were on his porch on August 15, 2007, and he saw Andrews and Johnson leave their porch walking. They started to run when Officer Brown pulled up to them (Tr. 319). He stated he had not told police that he saw Andrews shoot Officer Brown as he ran, but he did see his arm go back and heard three gunshots (Tr. 321). He also admitted that a few days later he told Andrews, "you got the block hot." (Tr. 323). According to Newsome, Andrews responded, "I didn't have anything to do with that." (Tr. 324).

Morneisha Goins testified that she was on her porch and saw a police car pull up and do a u-turn to stop by Andrews and Johnson, who started running as the car approached (Tr. 333). She recalled Andrews

424).

telling Newsome that Newsome got the block hot, to which Newsome replied, “no you got the block hot.” (Tr. 334-35).

The State presented testimony from Detective Jerome Jackson that no threats, promises or lies were used to coerce statements from any witnesses in the case (Tr. 338-340). Andrews was convicted of both counts. The court sentenced Andrews to life imprisonment without the opportunity for parole (LF 108). This appeal follows.

POINTS RELIED ON

I. The trial court erred in imposing judgment and sentence against Andrews because Section 211.071 violates due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution, in that (1) the statute which subjects juveniles to a mandatory sentence of permanent incarceration for first degree murder is cruel and unusual because the mandatory sentence does not allow for a particular assessment of the circumstances of the crime at sentencing, including the age and maturity of the juvenile, in violation of the juvenile defendant's right to be free from cruel and unusual punishment and his right to a fair sentence, and (2) the statute subjects the juvenile to an enhanced punishment without submitting facts to a jury and requiring the facts be proven beyond a reasonable doubt.

Roper v. Simmons, 543 U.S. 551 (2005)

Florida v. Graham, --- S.Ct. ----, 2010 WL 1946731 (U.S.)

Apprendi v. New Jersey, 530 U.S. 466 (2000)

II. The trial court erred in denying Andrews' motion for judgment of acquittal at the close of all evidence on count one because the State failed to prove beyond a reasonable doubt that Andrews committed first degree murder. Viewed in the light most favorable to the state, there was insufficient evidence from which a reasonable juror could find Andrews deliberated or coolly reflected for any length of time before Officer Brown was shot and killed. The trial court's ruling violated Andrews' rights to due process of law and a fair and impartial trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution in that there was insufficient evidence from which a reasonable jury could conclude Andrews committed first degree murder.

Jackson v. Virginia, 443 U.S. 307 (1979)

State v. O'Brien, 857 S.W.2d 212 (Mo. banc 1993)

III. The trial court erred in overruling Andrews' objection to the presence of uniformed police officers during the jury trial because the court's ruling violated the Missouri Constitution, article I, sections 10, 15, and 18(a) and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that the uniformed officers denied Andrews an environment of impartiality for his jury trial.

Turner v. Louisiana, 379 U.S. 466 (1965)

State v. Baumruk, 85 S.W.3d 644 (Mo. banc 2002)

ARGUMENT

I. The trial court erred in imposing judgment and sentence against Andrews because Section 211.071 violates due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution, in that (1) the statute which subjects juveniles to a mandatory sentence of permanent incarceration for first degree murder is cruel and unusual because the mandatory sentence does not allow for a particular assessment of the circumstances of the crime at sentencing, including the age and maturity of the juvenile, in violation of the juvenile defendant's right to be free from cruel and unusual punishment and his right to a fair sentence, and (2) the statute subjects the juvenile to an enhanced punishment without submitting facts to a jury and requiring the facts be proven beyond a reasonable doubt.

Standard of Review:

Statutory interpretation is an issue of law and must be reviewed *de novo*, giving no deference to the trial court's determination. State v. Rousan, 961 S.W.2d 831, 845 (Mo. banc 1998); Andrews v. State, 282 S.W.3d 372, 377 (Mo. App. W.D. 2009).

Preservation of Error:

This assignment of error is preserved by Andrews' pretrial motion and by his motion for new trial (Tr. 8; LF 40, 99).

Discussion:

Pursuant to sections 211.071 and 565.020 RSMo, Andrews was sentenced to a mandatory term of life imprisonment without the possibility of probation or parole for having committed first-degree murder. Andrews was subjected to this sentence pursuant to his adult certification. This certification procedure is unconstitutional.

A. *The Eighth Amendment*

In holding that capital punishment for crimes committed by minors violates the Eighth Amendment, Roper v. Simmons, 543 U.S. 551, 578 (2005) held that juvenile offenders like Andrews are as a group less culpable than adult offenders who commit the same types of crimes. Id. at 569-70. This holding of the U.S. Supreme Court applies to sentences of life without the possibility of parole for nonhomicide offenses as well. See Florida v. Graham, --- S.Ct. ----, 2010 WL 1946731 (U.S.).

The Eighth Amendment to the United States Constitution and Article I, section 21 of the Missouri Constitution protect the right to be free

from cruel and unusual punishment. In Roper, The United States Supreme Court held that capital punishment for offenders who were under the age of 18 when their crimes were committed violates this right. Roper, 543 U.S. at 578.

In Roper, Christopher Simmons was sentenced to death for a murder he committed at the age of 17. Id. at 556. Simmons discussed his plan to commit burglary and murder with friends before he and a friend entered the home of Shirley Crook, covered her eyes and bound her hands with duct tape, drove her to a state park, reinforced the bindings, covered her head with a towel, walked her to a railroad trestle over the Meramec River, tied her hands and feet together with electrical wire, wrapped her face in duct tape, and threw her from the bridge. Id. at 556-57.

The Supreme Court of the United States affirmed the Missouri Supreme Court's decision to set aside Simmons' death sentence. Id. at 560. In determining whether the sentence was cruel and unusual, the Court referred to the "evolving standards of decency that mark the progress of a maturing society." Id. at 560-61 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion)). The Court found that "the objective indicia of consensus in this case – the rejection of the juvenile death penalty in the

majority of the States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles . . . as ‘categorically less culpable than the average criminal.’” Id. at 568.

The Court noted at that time a total of 30 states prohibited the juvenile death penalty (combining the 12 states that did not allow the death penalty under any circumstances and the 18 states allowed it only for persons over 18). Id. at 564. Among the 20 states that did allow the execution of juveniles, the practice was infrequent. Id. Since 1989, when the Supreme Court upheld the validity of the death penalty for minors ages 16-17, six states had executed offenders for crimes committed as juveniles. Id. Finally, although the rate of change in reducing the incidence of the juvenile death penalty was relatively slow, it was the “consistency of the direction of change” that is most important. Id. at 566.

The Court determined that the death penalty is disproportionate punishment for juveniles by finding three general differences between juveniles and adults that “demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.” Id. at 569. First, a

“lack of maturity and an underdeveloped sense of responsibility” are understandably found more often in juveniles than in adults. Id. This lack of maturity and sense of responsibility often result in “impetuous and ill-considered actions and decisions.” Id. Second, juveniles are more “vulnerable or susceptible to negative influences and outside pressures, including peer pressure” because they have less control, or less experience with control, over their own environments than adults. Id. Third, the character of juveniles is not as well formed as that of adults. Id. at 570.

Taken together, these differences “render suspect any conclusion that a juvenile falls among the worst offenders” and signify that the irresponsible conduct of juveniles “is not as morally reprehensible as that of an adult” and that juveniles have “a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” Id. Further, given the general differences between juveniles and adults, the primary penological justifications for the death penalty, retribution and deterrence, apply to juveniles with less force than to adult offenders. Id. at 571.

Finally, the Court noted the virtual unanimous condemnation of the juvenile death penalty in other countries. Id. at 575. Article 37 of the

United Nations Convention on the Rights of the Child, ratified by every country except the United States and Somalia, expressly prohibits the imposition of capital punishment for crimes committed by juveniles under 18. Id. at 576. Since 1990, only eight countries have executed offenders who committed their crimes as juveniles, and many of these countries have since abolished the practice or publicly disavowed it. Id. at 577.

Recently in Graham, the Supreme Court extended its holding in Roper to include sentences of life without the possibility for probation or parole for nonhomicide offenses. --- S.Ct. ----, 2010 WL 1946731 (U.S.) at *23. The Court reasoned that “no recent data provide reason to reconsider the Court’s observations in Roper about the nature of juveniles.” Id. at *13.

The developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. Id. citing Roper, 543 U.S. at 570. It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater

possibility exists that a minor's character deficiencies will be reformed.” Id. These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply. Id.

As for the punishment, life without parole is “the second most severe penalty permitted by law.” Id. It is true that a death sentence is “unique in its severity and irrevocability, yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. Id. While the State does not execute the offender sentenced to life without parole, the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency-the remote possibility of which does not mitigate the harshness of the sentence. Id.

As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.” Naovarath v. State, 105 Nev. 525, 526 (1989). Life without

parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.

Applying the Roper and Graham analysis to the mandatory sentence of life imprisonment without the possibility of parole for a juvenile offender leads to the conclusion that this mandatory, nondiscretionary sentence of permanent incarceration is cruel and unusual in violation of the Eighth Amendment of the United States Constitution and Article I, section 21 of the Missouri Constitution. The “objective indicia of consensus” provide evidence that society views mandatory life imprisonment without the possibility of parole for juveniles to be inappropriate.

Second, the same general differences between juveniles and adults that the United States Supreme Court found to determine that the death penalty is a disproportionate punishment for juveniles apply with equal force to the mandatory life without parole sentence. Because juveniles have a lack of maturity and underdeveloped sense of responsibility, are more susceptible to outside pressures, and have characters that are not as

well formed as those of adults, they are categorically not as culpable as adults.

Because Andrews' sentence of life imprisonment without the possibility of parole was mandatory under section 565.020 due to his certification under section 211.071, the judge could not take these factors into account in its sentence for this juvenile defendant, which violates the letter and spirit of Roper and Graham that tell us that juveniles are categorically less culpable for the same crimes that, if committed by an adult, might warrant the ultimate punishment. This is a violation of Andrews' right to due process of law.

The Court's reasoning in Roper and Graham applies to the mandatory sentence of life imprisonment without the possibility of parole for juvenile offenders for homicide offenses. There is a growing national consensus against this punishment, the characteristics of juveniles make this punishment disproportionate, and the United States is one of only a few countries that impose it. Even before Roper, other courts that have examined the life without parole sentence for juveniles have found that it violated the Eighth Amendment. In Naovarath, 779 P.2d at 946-47, the Supreme Court of Nevada concluded that the sentence of life

imprisonment without possibility of parole imposed on a 13-year-old with evidence of mental disturbance was impermissibly cruel and unusual. Similarly, in Workman v. Commonwealth, 429 S.W.2d 374, 378 (1968), the Court of Appeals of Kentucky held that life imprisonment without the benefit of parole for a 14-year-old shocked the general conscience of society and violated the state constitution.

Because it does not allow for a discretionary sentence of life with parole for juvenile offenders, section 211.071, which in effect mandates the same punishment of life in prison without the possibility of parole for all children who commit first-degree murder, is unconstitutional. Because juveniles are categorically less culpable than adult offenders, after Roper, a sentencing scheme that mandates a sentence of life imprisonment without the possibility of parole for juvenile offenders cannot stand. U.S. Const. V, VIII, XIV; Mo. Const. Art. I, sec.

B. *Blakely and Apprendi*

If a juvenile is certified to stand trial as an adult, the range of punishment greatly increases. In the Missouri juvenile justice system, jurisdiction expires at the age of twenty-one. Accordingly, any sentence given in the juvenile court system concludes at age twenty one. For

Andrews, age 15, this allowed less than six years of juvenile jurisdiction and thus a maximum sentence of less than six years. In contrast, should any juvenile be tried in the adult system and convicted of first degree murder, he faces, as Andrews received, a sentence of life in prison without parole.

This violates due process because it increases punishment based on facts that have not been submitted to a jury and proven beyond a reasonable doubt. In Apprendi v. New Jersey, 120 S.Ct. 2348, 2362-2363 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." See also Blakely v. Washington, 124 S.Ct. 2531, 2536 (2004) and State v. Whitfield, 107 S.W.3d 253, 263 (Mo. banc 2003). As Justice Stevens stated:

the relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?...

Apprendi, 120 S.Ct. at 2365.

As a juvenile, a defendant's case can only be properly heard in juvenile court. The possibility of transfer to the adult court would remove him from the juvenile court system and expand any possible sentence he would face upon conviction to life in prison without parole. In addition, transfer to the adult court system would have collateral consequences which implicate defendant's liberty interests. Thus, the *effect* of being certified is an increase in the allowed punishment. As such, the effect of defendant being certified triggers the protections of Apprendi: proof to a jury of the factual basis for the sentence beyond a reasonable doubt. As the certification procedures provide no such process, § 211.071 RSMo fails to meet the requirements of Apprendi and is unconstitutional.

Traditional justifications for reduced process in the juvenile justice system do not excuse a failure to adhere to Apprendi's requirements in the case of certification hearings. One of the concerns expressed by the United States Supreme Court in McKeiver v. Pennsylvania, 91 S.Ct. 1976 (1971), was that requiring a jury trial would cause the juvenile process to become more adversarial. Id. at 545.

There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept will remake the juvenile proceeding into a

fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding. Id.

However, this fact alone simply does not outweigh the reality that a certification hearing is not an informal protective proceeding. It is a hearing in which the court is contemplating moving the child from the protective juvenile system and placing him in the adult system where he will enjoy none of the benefits of the juvenile justice system and will face the full force of the adult system. Certification hearings are by nature adversarial and require the same protections that the adult system does. Moreover, the requirement of a jury in a certification hearing would not undermine the remaining juvenile justice system.

The three most common arguments against applying Apprendi and its progeny to juvenile certification hearings are: 1) adequate procedural safeguards exist in the juvenile system, (2) transfer proceedings are jurisdictional in nature, and (3) introduction of a jury will erode the special protections offered to offenders who benefit from the juvenile system. *See State v. Rudy B.*, 147 N.M. 45 (N.M. App. 2009).

These arguments are unconvincing. A certification hearing exposes the juvenile to a higher sentence than he or she would otherwise face, and therefore, the court must offer the protections of Apprendi. To focus on the fact that a certification hearing is only about jurisdiction, or that it doesn't determine guilt, is to focus on the form of a certification hearing, and not its effect. Further, any difference in the juvenile system that warranted different standards simply do not apply in a certification hearing. The goal of helping the child and doing what is in his best interests has been put aside. The juvenile officer is no longer seeking to help the juvenile; rather, he is saying that he can no longer help the juvenile.

Section 211.011 RSMo provides:

The purpose of this chapter is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state, and that when such child is

removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them. The child welfare policy of this state is what is in the best interests of the child.

While removing a child from the protections of the juvenile code may appear to conflict with the policy of doing what is in the best interest of the child, the Missouri Supreme Court has specifically stated,

[w]hile a laudable purpose of our juvenile code is the rehabilitation of erring youths (citation omitted), the statute has been described as a complete code, with each section to be construed in relation to the other (citation omitted). The legislature by providing that one not a proper subject may be prosecuted as an adult clearly intended in a proper case that consideration of societal needs and the likely unrewarding ameliorative effect of the juvenile justice system require application of the general law.

In the Interest of A.D.R., 603 S.W.2d 575, 580 (Mo. banc 1980).

In construing these two sections, it is clear that if the child is a “proper subject” for the juvenile code, he should have his case disposed of in the juvenile court. Allowing a child who is a proper subject for the juvenile code to be prosecuted under the general law would be in direct conflict with the policy of doing what is in the best interest of the child. Further, “[t]he ultimate purpose for allowing a juvenile to be tried as an adult is to protect the public in cases where further treatment within the juvenile system would be unavailing.” Id. at 582.

Placing a juvenile in the adult court system greatly enhances his range of punishment, is adversarial, and triggers the protections of Apprendi. Therefore, Andrews requests this Court reverse the trial court’s ruling, find section 211.071 RSMo unconstitutional, and remand for proceedings not inconsistent with this ruling.

II. The trial court erred in denying Andrews' motion for judgment of acquittal at the close of all evidence on count one because the State failed to prove beyond a reasonable doubt that Andrews committed first degree murder. Viewed in the light most favorable to the state, there was insufficient evidence from which a reasonable juror could find Andrews deliberated or coolly reflected for any length of time before Officer Brown was shot and killed. The trial court's ruling violated Andrews' rights to due process of law and a fair and impartial trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution in that there was insufficient evidence from which a reasonable jury could conclude Andrews committed first degree murder.

Standard of Review:

In reviewing a defendant's challenge to the sufficiency of evidence this Court views the facts and all the reasonable inferences that can be drawn therefrom in the light most favorable to the verdict and all contrary evidence and inferences are disregarded. State v. Jackson, 703 S.W.2d 30, 31 (Mo App. E.D. 1985).

Preservation of Error:

Defense counsel moved for judgment of acquittal at the close of all the evidence (Tr. 376; LF 77). The trial court denied the motion (Tr. 376-77). Rule 29.11(d) does not require defense counsel to include the allegation that trial court's erred in overruling Andrews' motion for judgment of acquittal. However, defense counsel included this allegation in the motion for new trial (LF 106). Thus, this allegation of error is preserved for appellate review. Rule 29.11(d).

Discussion:

The State's evidence failed to prove Andrews had time to think about his actions when Officer Brown was shot and killed. Police interviewed Johnson and McCully and took videotaped statements in which each incriminated Andrews (Tr. 262, 339). Johnson told police that he and Andrews ran from Officer Brown, Andrews told Johnson that he was tired of being chased, and pulled out the .38, shot twice and threw the gun (Exhibit A, videotaped statement of Johnson). McCully told police that he saw Officer Brown, who McCully stated had stalked them before, pull up on Andrews and Johnson who ran, saw Andrews with a gun, and heard two shots (he believed from two different guns), but did not see

anyone actually shoot (Exhibit B, videotaped statement of McCully). The State also presented Weeks' testimony that Andrews told him he shot Officer Brown, but not that he deliberated about it (Exhibit C, audio-taped statement of Weeks). Officer Brown was struck by one bullet and killed.

A directed verdict of acquittal is authorized where there is insufficient evidence to support the verdict. State v. Blue, 811 S.W.2d 405, 409 (Mo. App. E.D. 1991). Conviction upon evidence that is insufficient to establish guilt beyond a reasonable doubt violates the criminal defendant's constitutional right to due process of law. Jackson v. Virginia, 443 U.S. 307, 316-318 (1979). The state must prove beyond a reasonable doubt that the defendant committed each element of the offense charged. Id. If the state does not prove beyond a reasonable doubt that the defendant committed each element of the charged offense, the evidence is insufficient to support a conviction. Id.

In considering whether evidence is sufficient to support a criminal conviction, the appellate court is required to accept as true all evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. State v. Skaggs, 74 S.W.3d 282 (Mo. App. E.D. 2002); State v. Grim, 854 S.W.2d

403 (Mo. banc 1993). Appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. Grim, 854 S.w.2d at 406. The appellate court does not act as a “super juror” with veto powers, but gives great deference to the trier of fact. Skaggs, 74 S.W.3d at 284; State v. Bell, 62 S.W.3d 84 (Mo. App. W.D. 2001).

The crime of first degree murder consists of three elements: (1) knowingly (2) causing the death of another person (3) after deliberation upon the matter. State v. Hudson, 154 S.W.3d 426, 429 (Mo. App. S.D. 2005). “Section 565.002(3), RSMo defines the intent element of deliberation as cool reflection for any length of time no matter how brief” Id. at 429. The element of deliberation may be proven from the circumstances surrounding the crime. Id. Absent evidence of deliberation, an intentional killing is second-degree murder. Id. “Evidence of a prolonged struggle, multiple wounds, or repeated blows may...support an inference of deliberation.” Id. quoting State v. Ervin, 979 S.W.2d 149, 159 (Mo. banc 1998).

In Hudson, the defendant went to the victim’s home and demanded money. 154 S.W.3d at 428. The victim told the defendant he did not have

money and the defendant pulled out a revolver and shot the victim. Id. When the revolver malfunctioned the codefendant handed the defendant a knife. Id. The defendant stabbed and choked the victim. Id. At some point, the defendant left the victim and went to the bathroom. Id. Upon the defendant's return, he proceeded to stab the victim--who was still alive-- a couple more times. Id. The defendant grabbed the victim's head and tried to break his neck. Id. Eventually, the defendant and the codefendant left the victim's home. Id. The victim was later found lying dead on the floor with a gunshot wound and stab wounds. Id.

The Southern District found the evidence presented in Hudson disclosed beyond a reasonable doubt that the defendant had time to think about his actions before completing the attack that resulted in the victims' death; the defendant thereafter inflicted additional wounds that contributed to the victims' death. Id. The Southern District found deliberation for purposes of proving murder in the first degree occurs "if the actor had time to think and intended to kill the victim from any period of time." Id. citing State v. Mitchell, 408 S.W.2d 39, 43 (Mo. banc 1966).

Here, even if the State's evidence was believed by the jury, there was no evidence that Andrews deliberated or coolly reflected for any length of

time. Deliberation for purposes of proving murder in the first degree occurs “if the actor had time to think and intended to kill the victim for any period of time.” Hudson, 154 S.W.3d at 428 *citing* Mitchell, 408 S.W.2d at 43.

The State’s theory was that Andrews knew Officer Brown and was tired of Officer Brown chasing him. The State presented evidence that Officer Brown was attempting to catch Andrews at the time he was shot. The jury should not have been instructed on first degree murder because the evidence presented during the State’s case-in-chief did not establish Andrews deliberated or coolly reflected at any time prior to or at any point before the shot was fired, rather Andrews was running away from Officer Brown. *See* State v. O’Brien, 857 S.W.2d 212, 218 (Mo. banc 1993) (“[t]he element of deliberation [] sets first degree apart from all other forms of homicide”); Rhodes v. State, 157 S.W.3d 309, 313 (Mo. App. S.D. 2005) (finding that a time lapse between the threat and the shooting would have established a period of deliberation). And absent evidence of deliberation, the killing of Officer Brown was second degree murder. *See* O’Brien, 857 S.W.2d at 218 and Section 565.021, RSMo.

It violates due process to convict a defendant of a crime the state has failed to prove beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318 (1979). The trial court erred in denying Andrews' motion for judgment of acquittal at the close of all evidence because the State failed to prove beyond a reasonable doubt that Andrews had time to think about his actions before the shooting or that he deliberated prior to or at any point. Andrews was denied his rights to due process of law and a fair and impartial trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Missouri Constitution. Thus, Andrews respectfully requests this Court reverse his conviction and sentence for first degree murder.

III. The trial court erred in overruling Andrews' objection to the presence of uniformed police officers during the jury trial because the court's ruling violated the Missouri Constitution, article I, sections 10, 15, and 18(a) and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that the uniformed officers denied Andrews an environment of impartiality for his jury trial.

Standard of Review:

In general a trial court has wide discretion in determining whether to take action to avoid an environment for trial in which there is not a "sense or appearance of neutrality. State v. Baumruk, 85 S.W.3d 644 (Mo. banc 2002); Turner v. Louisiana, 379 U.S. 466 (1965).

Preservation of Error:

This assignment of error is preserved by Andrews' pretrial motion and by his motion for new trial (Tr. 9-10; LF 105). However, if this Court finds defense counsel failed to properly preserve this issue, Andrews respectfully requests this Court review for plain error. Rule 30.20, V.A.M.R. Plain error relief is appropriate if this Court determines that Appellant has suffered a "manifest injustice or a miscarriage of justice."

Rule 30.20, V.A.M.R.; State v. Gilmore, 22 S.W.3d 712 (Mo. App. W.D. 1999).

Discussion:

Andrews was charged with shooting a young police officer. Counsel for Andrews moved the trial court to prevent police officers from attending trial in uniform unless they were testifying for the State because counsel foresaw the undue influence a large group of police officer would have on a jury deliberating in this case (Tr. 9-10).

The environment of a trial must give jurors, who may otherwise have been carefully selected, a sense or appearance of neutrality. Baumruk, 85 S.W.3d at 650. The United States Supreme Court said in Groppi v. Wisconsin, 400 U.S. 515 (1971) quoting Justice Holmes: “any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere” (quoting Holmes' dissent in Frank v. Mangum, 237 U.S. 309, 349 (1915)). The Court in Baumruk found reversible error even where there was no indication of actual prejudice because the circumstances so undermined Baumruk's right to a fair trial as to create inherent prejudice. Baumruk, 85 S.W.3d at 646.

This required sense or appearance of neutrality was also addressed by the United State Supreme Court in Turner, where two key witnesses for the state also served as the bailiffs attending the jury during the three day trial. 379 U.S.466. Even though the bailiffs assured the judge that they had not communicated with the jurors about the case, the Court found such an association between the jurors and two key prosecution witnesses, especially when those witnesses were deputy sheriffs, was wrong and undermined the basic guarantees of trial by jury. Id. at 474.

Here, the victim of the shooting, and murder with which Andrews was charged, was a police officer. The presence of several uniformed officers would create an atmosphere of undue pressure for the jury to convict Andrews.² During jury selection, a member of the panel even admitted that he would be intimidated by the presence of several police officers in this trial (Tr. 148). While this panel member was not selected to serve on the petit jury, his statement is indicative of the type of inherent prejudice found in both Baumruk and Turner.

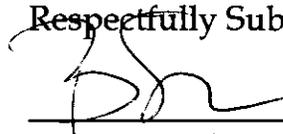
² The court did instruct defense counsel to bring to its attention anything would infringe upon the defendant's or the State's right to a fair trial (Tr. 10).

Therefore, Andrews requests this Court reverse and remand for a new trial.

CONCLUSION

For the aforementioned reasons, Andrews requests this Honorable Court reverse the trial court's judgment and sentence, and remand to the trial court for proceedings not inconsistent with this Court's ruling.

Respectfully Submitted:

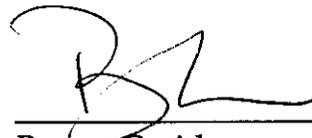


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Certificate of Service

The undersigned hereby certifies that a true and complete copy of the foregoing was delivered via first-class mail, to the below attorney, on the 17th of June, 2010 and further certifies that an electronic version was sent via electronic mail to the Court and below counsel and that the file was scanned for viruses and was virus free.

Shaun Mackelprang
Supreme Court Building
PO Box 899
Jefferson City, MO 65102

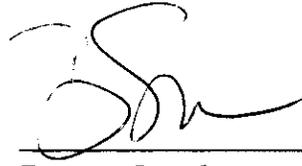


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Certification Pursuant to Rule 84.06(c)

I, Brocca Smith, counsel for Appellant, hereby certify that this brief for the Appellant:

- (1) contains the information required pursuant to Rule 55.03;
- (2) complies with the limitations of Rule 84.06(b);
- (3) contains 6,351 words according to the Word Count function of Microsoft Word.

A handwritten signature in black ink, appearing to be 'Brocca Smith', written over a horizontal line.

Brocca Smith

APPENDIX

TABLE OF CONTENTS

Sentence and Judgment.....A1-A4
Section 211.071 RSMo.....A5-A6



IN THE 22ND JUDICIAL CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

Judge or Division: Schaumann 12 23150		Case Number: 0722-CR 10753
		<input type="checkbox"/> Change of Venue
		County: _____
		Case Number: _____
		Offense Cycle No.: _____
State of Missouri	vs.	Prosecuting Attorney/MO Bar No.: C'Hagan 25895
Defendant: Antonio Andrews		Defense Attorney/MO Bar No.: Ruess #40061
DOB: 5/17/92 SSN: _____ SEX: M		Appeal Bond Set Date: _____
<input type="checkbox"/> Pre-Sentence Assessment Report Ordered		Amount: _____
<input checked="" type="checkbox"/> Pre-Sentence Assessment Report Waived		

FILED

MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

(Date File Stamp)

Judgment

Count No. I Charge Description: Murder First Degree Charge Code: Statute: Date of Offense: 8/15/07	Count No. II Charge Description: ACA Charge Code: Statute: Date of Offense: 8/15/07	Count No. Charge Description: Charge Code: Statute: Date of Offense:
<input type="checkbox"/> Misdemeanor <input checked="" type="checkbox"/> Felony Class <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> A B C D Unclassified On the above count, it is adjudged that the defendant has been: <input type="checkbox"/> Found Guilty upon a plea of guilty <input checked="" type="checkbox"/> Found guilty by a jury/court <input type="checkbox"/> Dismissed/Nolle pros/found not guilty	<input type="checkbox"/> Misdemeanor <input checked="" type="checkbox"/> Felony Class <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/> A B C D Unclassified On the above count, it is adjudged that the defendant has been: <input type="checkbox"/> Found Guilty upon a plea of guilty <input checked="" type="checkbox"/> Found guilty by a jury/court <input type="checkbox"/> Dismissed/Nolle pros/found not guilty	<input type="checkbox"/> Misdemeanor <input type="checkbox"/> Felony Class <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> A B C D Unclassified On the above count, it is adjudged that the defendant has been: <input type="checkbox"/> Found Guilty upon a plea of guilty <input type="checkbox"/> Found guilty by a jury/court <input type="checkbox"/> Dismissed/Nolle pros/found not guilty

Count No. Charge Description: Charge Code: Statute: Date of Offense:	Count No. Charge Description: Charge Code: Statute: Date of Offense:	Count No. Charge Description: Charge Code: Statute: Date of Offense:
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AI

The defendant has been found beyond a reasonable doubt to be a:

- Persistent Sexual Offender (558.018 RSMo)
- Persistent Drug Offender (195.285, .291, .292, .295, or .296 RSMo)
- Persistent Misdemeanor Offender (558.016 RSMo)
- Persistent Offender (558.016 RSMo)
- Persistent Domestic Violence Offender (565.063 RSMo)
- Persistent Offender (Intoxication-related Traffic Offense) (577.023 RSMo)
- Aggravated Offender (577.023 RSMo)
- Not Applicable
- Predatory Sexual Offender (558.018 RSMo)
- Prior Drug Offender (195.285, .291, .295, or .296 RSMo)
- Dangerous Offender (558.016 RSMo)
- Prior Offender (558.016 RSMo)
- Prior Domestic Violence Offender (565.063 RSMo)
- Prior Offender (Intoxication-related Traffic Offense) (577.023 RSMo)
- Chronic Offender (577.023 RSMo)

on _____ (date).

The court:

- Informs the defendant of ~~rights~~/finding, asks the defendant whether he has anything to say why judgment should not be pronounced, and finds that no sufficient cause to the contrary has been shown or appears to the court.
- Defendant has been advised of his/her rights to file a motion for post-conviction relief pursuant to Rule 24.035/29.15 and the court has found
 - Probable cause
 - No probable cause to believe that defendant has received ineffective assistance of counsel.
- Finds the defendant has pled or been found guilty of a dangerous felony, as defined in Section 556.061 RSMo, and if committed to the Department of Corrections, must serve at least 85% of the sentence.
- Finds the defendant has pled or been found guilty of an offense for which probation and parole are not authorized.

On count I, the Court:

- Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.
- Sentences and commits the defendant to the custody of Mo DEPARTMENT OF CORRECTIONS for a period of LIFE WITHOUT PROBATION OR PAROLE. Sentence to be served
 - Concurrent
 - Consecutive with _____
- Probation Time Credit: _____
- Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.
- Fines the defendant \$ _____. The court stays \$ _____ with the remainder due by _____ (date).

On count II, the Court:

- Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.
- Sentences and commits the defendant to the custody of Mo DEPARTMENT OF CORRECTIONS for a period of 50 YEARS. Sentence to be served
 - Concurrent
 - Consecutive with COUNT I
- Probation Time Credit: _____
- Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.
- Fines the defendant \$ AZ. The court stays \$ 110 with the remainder due by _____ (date).

On court _____, the Court:

- Suspends imposition of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.
- Sentences and commits the defendant to the custody of _____ for a period of _____. Sentence to be served
 - Concurrent Consecutive with _____.
- Probation Time Credit: _____.
- Suspends execution of sentence. Defendant is placed on probation for a period of _____ under the supervision of _____. Defendant shall comply with the conditions set forth in the separate Order of Probation.
- Fines the defendant \$ _____. The court stays \$ _____ with the remainder due by _____ (date).

The court orders:

- The clerk to deliver a certified copy of the judgment and commitment to the sheriff.
- The sheriff to authorize one additional officer/guard to transport defendant to the Department of Corrections.
- That judgment is entered in favor of the state of Missouri and against the defendant for the crime victims compensation fund for the sum of
 - \$10.00 \$46.00 \$68.00.
 - Satisfied Unsatisfied
- Judgment for the State of Missouri and against the defendant for appointed counsel services in the sum of \$ _____
 - Satisfied Unsatisfied
- Costs taxed against Defendant.
- Costs waived.
- Defendant to report immediately to the _____ Department for fingerprinting. The Defendant is ordered to submit to the fingerprinting, and is further ordered to provide all information necessary for the officer taking the fingerprints to fully complete all identification and photograph portions of the standard fingerprint cards.

- §217.785 RSMo Missouri Post Conviction Drug Treatment Program
 - Non-Institutional Institutional
- §217.362 RSMo Court Ordered Long-Term Substance Abuse Program
- §217.378 RSMo Regimented Discipline Program
- The court sentences §559.115(2) RSMo General Population Department of Corrections shall provide a report and recommendation whether probation should be granted.

The court recommends placement to:

- §559.115(3) RSMo Institutional Treatment Program Department of Corrections shall provide a report and recommendation whether probation should be granted. (Statutory Discharge)
- §559.115(3) RSMo Sexual Offender Assessment Unit Department of Corrections shall provide a report and recommendation whether probation should be granted.
- §559.115(3) RSMo Shock Incarceration Program Department of Corrections shall provide a report and recommendation whether probation should be granted. (Statutory Discharge)

The court further orders: _____

So Ordered:

10/9/09 A3
Date

[Signature] 23150
Judge

I certify that the above is a true copy of the original Judgment and Sentence of the court in the above cause, as it appears on record in my office.



Issued on 10-9-09
Date

Deborah E. Grindley
Clerk

~~X~~ Armando Hernandez
DEFENDANT

~~Richard R. Lucas #400661~~
A7D

Seán J. O'Hagan
ACA 25893

~~23150~~
10/9/09

A4

Missouri Revised Statutes

Chapter 211 Juvenile Courts Section 211.071

August 28, 2009

Certification of juvenile for trial as adult--procedure--mandatory hearing, certain offenses--misrepresentation of age, effect.

- 211.071. 1. If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law; except that if a petition alleges that any child has committed an offense which would be considered first degree murder under section 565.020, RSMo, second degree murder under section 565.021, RSMo, first degree assault under section 565.050, RSMo, forcible rape under section 566.030, RSMo, forcible sodomy under section 566.060, RSMo, first degree robbery under section 569.020, RSMo, or distribution of drugs under section 195.211, RSMo, or has committed two or more prior unrelated offenses which would be felonies if committed by an adult, the court shall order a hearing, and may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law.
2. Upon apprehension and arrest, jurisdiction over the criminal offense allegedly committed by any person between seventeen and twenty-one years of age over whom the juvenile court has retained continuing jurisdiction shall automatically terminate and that offense shall be dealt with in the court of general jurisdiction as provided in section 211.041.
3. Knowing and willful age misrepresentation by a juvenile subject shall not affect any action or proceeding which occurs based upon the misrepresentation. Any evidence obtained during the period of time in which a child misrepresents his or her age may be used against the child and will be subject only to rules of evidence applicable in adult proceedings.
4. Written notification of a transfer hearing shall be given to the juvenile and his or her custodian in the same manner as provided in sections 211.101 and 211.111. Notice of the hearing may be waived by the custodian. Notice shall contain a statement that the purpose of the hearing is to determine whether the child is a proper subject to be dealt with under the provisions of this chapter, and that if the court finds that the child is not a proper subject to be dealt with under the provisions of this chapter, the petition will be dismissed to allow for prosecution of the child under the general law.
5. The juvenile officer may consult with the office of prosecuting attorney concerning any offense for which the child could be certified as an adult under this section. The prosecuting or circuit attorney shall have access to police reports, reports of the juvenile or deputy juvenile officer, statements of witnesses and all other records or reports relating to the offense alleged to have been committed by the child. The prosecuting or circuit attorney shall have access to the disposition records of the child when the child has been adjudicated pursuant to subdivision (3) of subsection 1 of section 211.031. The prosecuting attorney shall not divulge any information regarding the child and the offense until the juvenile court at a judicial hearing has determined that the child is not a proper subject to be dealt with under the provisions of this chapter.
6. A written report shall be prepared in accordance with this chapter developing fully all available information relevant to the criteria which shall be considered by the court in determining whether the child is a proper subject

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to be dealt with under the provisions of this chapter and whether there are reasonable prospects of rehabilitation within the juvenile justice system. These criteria shall include but not be limited to:

- (1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;
- (2) Whether the offense alleged involved viciousness, force and violence;
- (3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;
- (4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;
- (5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;
- (6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;
- (7) The age of the child;
- (8) The program and facilities available to the juvenile court in considering disposition;
- (9) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court; and
- (10) Racial disparity in certification.

7. If the court dismisses the petition to permit the child to be prosecuted under the general law, the court shall enter a dismissal order containing:

- (1) Findings showing that the court had jurisdiction of the cause and of the parties;
- (2) Findings showing that the child was represented by counsel;
- (3) Findings showing that the hearing was held in the presence of the child and his counsel; and
- (4) Findings showing the reasons underlying the court's decision to transfer jurisdiction.

8. A copy of the petition and order of the dismissal shall be sent to the prosecuting attorney.

9. When a petition has been dismissed thereby permitting a child to be prosecuted under the general law, the jurisdiction of the juvenile court over that child is forever terminated, except as provided in subsection 10 of this section, for an act that would be a violation of a state law or municipal ordinance.

10. If a petition has been dismissed thereby permitting a child to be prosecuted under the general law and the child is found not guilty by a court of general jurisdiction, the juvenile court shall have jurisdiction over any later offense committed by that child which would be considered a misdemeanor or felony if committed by an adult, subject to the certification provisions of this section.

11. If the court does not dismiss the petition to permit the child to be prosecuted under the general law, it shall set a date for the hearing upon the petition as provided in section 211.171.