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Supreme Court No. 93840-7
(Court of Appeals No. 72068-6-I)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRUCE ALLEN HUMMEL, Appellant.

PETITION FOR REVIEW

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ORIGINAL

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A. IDENTITY OF RESPONDENT, PETITIONER

Respondent, State of Washington, by Kimberly A. Thulin, appellate deputy prosecutor for Whatcom County, seeks the relief designated in Part B.

B. COURT OF APPEALS DECISION

Bruce Hummel was convicted following a jury trial of murder in the first degree.¹ CP 310-312. After reviewing the arguments of the parties below, comparing the evidence in Hummel's first trial to that provided in the second,² diminishing the relevance of Hummel's elaborate cover-up and evasions after the murder, weighing testimony and drawing inferences from the evidence, and likening this case to possession with intent to defraud cases, the Court of Appeal's concluded the evidence was insufficient for any rational trier of fact to find Hummel killed his wife with premeditated intent, and reversed Hummel's first degree murder conviction with instructions to dismiss this case with prejudice.

¹ This was Hummel's second conviction for murder in the first degree. The first jury verdict was overturned on appeal for a public trial violation; Hummel proposed a questionnaire that offered individual questioning of potential jurors during voir dire if they were uncomfortable discussing sensitive subjects in public to ensure he obtained impartial jurors but because the trial court made findings *after* the closure, the court of appeals determined the error was structural and reversed.

² In Hummel's first trial, the State offered testimony of a jailhouse informant who testified Hummel told him he helped Alice get to a better place. The jailhouse informant, on bench warrant status at the time of the second trial, did not testify, nor was his testimony offered below.

Twelve rational jurors concluded Alice was not murdered as a result of an impulsive act, but instead was murdered in a calculated manner that enabled Hummel to conceal Alice's murder from her children, her family and her clients, allowed Hummel to continue molesting his youngest daughter, permitted him to steal Alice's disability payments and continue his life unjustly enriched and unencumbered.

Review is warranted because the Court of Appeals erroneously held the State must present direct evidence of planning or method of killing to justify a conclusion by the jury that Alice's murder was premeditated, and that Hummel's actions after he murdered Alice could not be relied on by the jury to infer that he murdered Alice with premeditated intent. The Court of Appeals also erroneously applied the sufficiency of the evidence standard of review by weighing evidence in an unduly restrictive manner, drawing inferences that favor the moving party instead of the non-moving party, and ultimately, substituting its judgment for that of twelve jurors.

Additionally, review is warranted to consider the remedy in this case. In contrast to the first trial, Hummel affirmatively requested an all or nothing defense and asked the trial court to remove murder in the second degree instructions from the consideration of the jury. The Court of Appeals, relying on In re Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012), concluded that it could not remand for imposition of a murder in the

second degree as a lesser degree offense even though the State proved beyond a reasonable doubt Hummel intentionally murdered his wife. Heidari is not controlling. In light of Hummel's request for an all or nothing defense, that he fully defended the allegation he intentionally murdered Alice below and the jury expressly found Hummel intentionally murdered his wife, whether premeditated or not, the remedy should be remand for entry of judgment on the lesser degree crime of murder in the second degree. Remand for entry of judgment is permissible where the essential elements of the lesser degree offense are encompassed in the jury verdict. *See, State v. Freidrich*, 4 Wash. 204, 224, 29 P. 1055 (1892) (court reversed the defendant's first degree murder based on insufficient evidence of premeditation and remanded for entry of judgment on lesser included murder in the second degree offense.) Further review is warranted. A copy of the Court of Appeal's Opinion is attached in Appendix A, incorporated by reference herein.

C. ISSUES PRESENTED FOR REVIEW

1. Taking the evidence in the light most favorable to the State and drawing all inferences most strongly in favor of the non-moving party, whether *any* rational juror could find the evidence presented below supports the jury's conclusion Hummel murdered his wife Alice with premeditated intent.
2. Whether the jury's verdict on premeditated murder permits this Court to remand for imposition of judgment on the lesser degree offense of murder in the second degree because Hummel requested an all or nothing defense, the verdict necessarily encompasses all of the essential elements of murder in the second degree and the

record reflects Hummel fully and fairly litigated whether he murdered Alice, premeditated or not.

D. STATEMENT OF THE CASE

In October of 1990, Bruce Hummel's wife, Alice Hummel, suspicious of sexual abuse, asked the youngest of Hummel's three children, S.K., if Hummel was sexually abusing her. RP 45. During an emotional discussion, twelve year old S.K. acknowledged Hummel had been sexually abusing her for years. RP 22, 42-45. Alice reassured S.K. she would take care of it, would take action, telling S.K. she would talk to Hummel. RP 71, 83.

S.K. had previously denied Hummel was molesting her because she feared a disclosure to Alice would cause more arguing or violence in the home. RP 45. When she finally disclosed, S.K. felt safe and protected and that Alice was home before and after school every day until she disappeared. RP 69-70. S.K.'s disclosure occurred within five days of her 13th birthday; a birthday wherein Alice and S.K. had special plans to see a Ballet performance at Western Washington University. RP 85, 433. Two days before S.K.'s special birthday event, S.K. came home from school and Alice was gone. RP 47. S.K. never saw Alice again and the sexual abuse with Hummel continued, though less frequently. RP 52.

When Hummel returned alone later in the evening, he told S.K. and her older brother, S.H., Alice was at a motel and he would be driving her to

the airport to fly to California for a job interview the following day. RP 133, 47, 135, 136. Alice never mentioned a job interview, did not pack any suitcases and S.K. noticed her wallet, purse and medications were still at home when Hummel asked them to pack up Alice's belongings to send to her following Alice's disappearance. RP 134, 48, 49, 50. Months later S.K. found the boxes she packed to allegedly be forwarded to her mom, hidden in the basement of the Hummel home. RP 50, 140.

According to all three of the Hummel children, Alice and Hummel had a volatile and argumentative relationship that sometimes resulted in Hummel physically abusing Alice. RP 119-121, 3637, 132, 506. Money was a constant source of dispute. RP 38, 131, 157. Alice had money and Hummel did not. RP 38. Alice had a computer business she ran out of her family home and collected monthly disability payments from the State of Alaska where, prior to becoming sick with Lupus, she worked as a teacher. RP 134. Hummel on the other hand, did odd jobs, including home repair for a local realtor and routinely driving to remote areas off logging roads in Whatcom County to collect cedar, pinecones and flowers to sell to make potpourri. RP 34.

When S.K. and S.H. returned home from school the day Alice disappeared, they noticed nothing amiss at home other than both Alice and Hummel were gone. RP 48, 73. At the time of Alice's disappearance, she rarely left the Hummel home, even to go shopping. RP 135. When

Hummel did return later that evening, he acted as though nothing were amiss and did not appear to suffer any injuries. RP 74. After Alice's unexpected disappearance, Hummel repeatedly told his children Alice wasn't a good mom, didn't want to be a part of their lives and had abandoned them for another man. RP 52. Hummel would get mad and agitated when any of the Hummel children asked about their mom after her disappearance. RP 76. Hummel also became very guarded over the mail; not allowing S.K. or S.H. to get the mail and continued to abuse S.K. RP 52, 56.

Despite Alice's illness, she did continue to work from home on computer related matters. Alice enjoyed a reputation of being reliable and timely with work projects. RP 299, 300. When she vanished, Alice was in the middle of a computer job for client, Alton Wayne Terry, a former Seattle Police detective. Despite his best efforts, Terry never retrieved his computer disks or found any trace of Alice after she vanished. RP 301, 302.

In 2003, after S.K. and her oldest sister, S.C. discussed Alice's disappearance; they filed a missing person's report.³ RP 107. While searching for Alice, investigators discovered and later confirmed, Hummel had been stealing Alice's monthly disability payments from the State of

³ Hummel on the other hand, never filed a missing person's report. RP 211.

Alaska. Hummel began holding himself out as Alice and stealing Alice's money immediately following her disappearance. RP 204-206. Hummel initially denied stealing her disability payments but when confronted with evidence, eventually admitted he had been stealing Alice's money for the good of his children. RP 204-206. Hummel also admitted molesting S.K. and acknowledged that if Alice knew about the sexual abuse, he was confident she would have confronted him. RP 214-15. Hummel nonetheless still maintained Alice had voluntarily abandoned him and their children. State v. Freidrich, 4 Wash. 204, 29 P. 1055 (1892)

Hummel subsequently sent a letter to Bellingham police department Detective Gitts apologizing for the "smoke screen" he threw at them when they confronted him about stealing Alice's disability payments, stating "but what else would you expect when it's the same story I have been telling you for thirteen years. ..." RP 221. Hummel then confirmed Alice was dead, had died on October 18th 1990 but claimed she died of suicide and he covered it up. RP 221. In this letter, Hummel claimed he came home around noon on that Friday and found Alice dead on the upstairs bathroom floor with a large gash across her left wrist. According to Hummel there was a lot of blood in and around the toilet, splatters of blood on the vanity and a note saying "don't tell the kids."

Hummel claimed he wrapped Alice up in plastic sheeting, drug her through the house and lifted her into his Ford Van despite that Alice

weighed over 200 lbs. Hummel asserted he then cleaned the bathroom and went to the store to get a replacement rug for the bathroom before S.H. got home from high school. Hummel further wrote that later that evening, in the middle of the night, he put together a homemade makeshift inflatable raft, drove to the waterfront, rowed Alice's body out in the middle of Bellingham Bay, tied a rock between Alice's feet in the plastic sheeting and then dumped her body into the water. RP 221. Hummel claimed, due to the wind conditions that night, he barely managed to row Alice's body out and get back in. State v. Freidrich, 4 Wash. 204, 29 P. 1055 (1892)

Contrary to Hummel's story, Bellingham Bay was not windy that evening but calm and light. RP 360-365. Moreover, expert witness Dr. Hayes testified based on scientifically approved biomechanical theory, a man of Hummel's size could not have moved Alice's dead body, specifically *lifted* it into the back of Hummel's van as he described without suffering injury to his back. RP 483, 488, 492. Dr. Hayes noted the maneuver would only be made more difficult if she were in plastic wrap. RP 488, 492, 497-98, 492. Hummel did not suffer any apparent injury when Alice disappeared and reportedly never complained of back problems. RP 26. Forensic analysis in and around the Hummel home also did not reveal any evidence to suggest Alice bled out, died or was buried there. RP 182- 185, 229, 324, 241. The medical examiner, Dr. Goldfogel also testified based on his expertise and experience, it was unlikely a

horizontal gash to a wrist as described by Hummel could result in a successful suicide. For success, deep vertical cuts to the wrist are required. RP 396. Also, if Alice had bled out in the manner described by Hummel, she would have lost over two quarts of blood. RP 334, 338, 392-95, Pla. Exhibit 12. Yet, no trace of blood as would be expected even years later, was detected. RP 229, 324, 241, 242. Finally, Dr. Goldfogel explained that if Alice had been dumped in Bellingham Bay as described, the gases in her decomposing body would have caused her body to rise up to the surface of the water in some manner or another where it would be discovered. RP 390. A body on the other hand, dumped off a remote logging road, Dr. Goldfogel explained would be much more difficult to discover because decomposition necessarily occurs faster in these circumstances.⁴ RP 391.

After eluding authorities, Hummel was finally arrested in 2007. When pressed by investigators Hummel told them he had “told you the story. I’m not going to change it.” RP 241. When detectives gave Hummel the opportunity to make things right for his family, he teared up, lowered his head but then regained his composure and looked at detectives and said, “I don’t care. They don’t care about me. I don’t care about them.” RP 241.

⁴ When Hummel petitioned for divorce twice, he listed Alice’s last known address as 2050 forest road and 602 Forest Road, Dallas TX respectively. RP 316, 243

Hummel plead guilty to twelve counts of federal wire fraud for unlawfully stealing Alice's disability payments from November 1990 until February 2004. RP 242. In his guilty plea statement, Hummel admitted Alice died on October 18th 1990, the day he told his children she voluntarily abandoned them, that he falsely represented himself to be Alice and forged her name to maintain the fiction Alice was still alive in order to collect her benefits. RP 242, Plaintiff exhibit 6.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

Appellate courts must respect a jury verdict unless no reasonable trier of fact could find the essential elements beyond a reasonable doubt based on direct and circumstantial evidence in the entire record and the reasonable inferences derived therefrom. Although appellate court must review verdicts to determine if they meet minimum constitutional standards, sufficiency review requires that courts respect the wisdom and collective judgments experience jurors, (perhaps especially) in close cases. The public has a substantial interest in ensuring that a sufficiency review does not improperly encroach on the jury's function.

Review is warranted in this case under RAP 13.4(b)(1) and (4) because the Court of Appeals erroneously weighed evidence and construed the evidence to draw its own inferences against the State. The

Court of Appeal's decision also conflicts with Washington's long standing principles that motive and the circumstances surrounding a murder, including after, may be relied on by jurors to infer premeditation and that direct evidence of planning or the method of the killing itself is not required to support such a finding. Additionally, review is warranted as to the appropriate remedy in this case. Where the jury verdict necessarily encompassed all of the essential elements of murder in the second degree and Hummel cannot assert prejudice because he fully litigated below whether he murdered Alice, In re Heidari does not compel that a proven murderer walk free.

1. **The public has a substantial interest in ensuring jury verdicts are upheld where the evidence examined in the light most favorable to the State supports the verdict notwithstanding whether reasonable minds may draw a different conclusion.**

Washington courts apply the federal constitutional standard in reviewing the evidentiary sufficiency of a criminal conviction in determining "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Under this analysis, the "only question ... is whether [the jury's] finding was so insupportable as to fall below the

threshold of bare rationality.” Coleman v. Johnson, 132 S. Ct. 2060, 2064, 182 L. Ed. 2d 978 (2012); *see also*, Musacchio v. United States, 136 S. Ct. 709, 715, 193 L. Ed. 2d 639 (2016) (“Sufficiency review essentially addresses whether ‘the government’s case was so lacking that it should not have even been submitted to the jury.’”)

The appellate court’s limited review “does not intrude on the jury’s role ‘to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.’” Musacchio, 136 S. Ct. at 715; State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). Moreover, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant” in assessing the sufficiency of the evidence as to each element of the crime. Joy, 121 Wn. 2d at 339. “The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference.” State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (*quoting* State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)). A jury has broad discretion to decide what inferences to draw from the evidence presented at trial. Coleman, 132 S. Ct. at 2064. A sufficiency of the evidence review is a deferential standard: appellate courts are not to engage in a “fine-grained factual parsing.” Coleman, 132 S. Ct. at 2064.

A review for the sufficiency of the evidence requires an appellate court not second guess how the jury resolved conflicts, made inferences, or considered evidence at trial and “must presume-even if it does not affirmatively appear in the record-that the trier of fact resolved any such conflicts in favor of the prosecution and must defer to that resolution.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

The Court of Appeals erroneously compared and contrasted the evidence presented in Hummel’s first and second trial, reviewed arguments and ultimately, substituted its judgement for that of twelve jurors in reversing Hummel’s conviction. First, the Court of Appeals complained that the State did not present uncorroborated testimony of a jailhouse informant who testified in the first trial, in the second trial.⁵ Twelve jurors nonetheless, concluded Hummel murdered Alice with premeditated intent without this testimony. The scope of a sufficiency analysis is limited to examining all of the evidence presented below in the light most favorable to the non-moving party, not comparing or contrasting separate trials.

⁵ Hummel argued in the appeal following his first trial, he was denied a fair trial because the trial court failed to caution the jury of the inherent untrustworthiness of the jailhouse informants uncorroborated testimony.

Moreover, a reviewing court may not substitute its judgment for the reasonable judgment of twelve jurors. Reasonable minds may draw different conclusions when presented with substantial evidence, some of which may be conflicting. State v. Reynolds, 51 Wn.2d 830, 322 P.2d 356 (1958). Here, twelve jurors unanimously agreed Hummel killed Alice with premeditated intent after considering all of the evidence and applying accurate jury instruction detailing the essential elements the State was required to prove, including premeditation, beyond a reasonable doubt, to obtain a guilty verdict. See, Appendix B, attached and incorporated herein. Jurors are presumed to follow the instructions. State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014). Moreover, the instructions given carry more weight than the arguments presented below. United States v. Begay, 673 F.3d 1038 (9th Cir. 2011).

- a. *The Court of Appeals erroneously drew its own inferences and substituted its own judgement for the jury.*

Under a sufficiency standard of review, the Court of Appeals should have considered how a reasonable juror *could* have viewed Dr.Hayes' expert testimony in a manner that supports the jury verdict. Dr.Hayes' testimony, when viewed in the light most favorable to the verdict, in conjunction with other expert, forensic and witness testimony, permitted jurors to draw the reasonable inference that Alice was not

murdered in her home because Hummel could not have lifted her if she was already deceased, whether wrapped in plastic or not, into his van without sustaining a back injury.⁶ A reasonable juror could rely on this conclusion, knowing Alice rarely left her home and was motivated to stay home to protect S.K. at the time of her disappearance, to reasonably infer Alice was not murdered at home. Additionally, the fact that Alice's murder was concealed and that Hummel engaged in elaborate cover-up after her murder than enabled him to continue molesting S.K. and steal Alice's disability payments reasonably suggests the murder was in an isolated or private location that required a certain degree of planning to effectively execute. Killing a victim in an isolated location or manner supports an inference of premeditation. State v. Giffing, 45 Wn. App. 369, 725 P.2d 445 (1986), *see also*, State v. Luoma, 88 Wn.2d 28, 33, 558 P.2d 756 (1977), State v. Lanning, 5 Wn. App. 426, 438, 487 P.2d 785 (1971). The Court of Appeals decision reflects the court erroneously weighed the credibility of Dr. Hayes' testimony and drew its own inferences. This constitutes error. See, Slip. Op. at 13.

Oddly, the Court of Appeals decision also asserts the testimony of certified American sailing association expert Tim Ferguson supports the

⁶ The court of appeals misconstrued Dr. Hayes testimony below. Dr. Hayes testified trying to remove and lift Alice into the van if she were wrapped in a plastic, would have made the task more difficult, not less, than the different lifting scenarios he analyzed. RP 492.

inference the conditions of Bellingham Bay would not have precluded Hummel from rowing a five-man inflatable raft into Bellingham Bay to dump Alice's body in the middle of the night. Slip. Op. at 14. Again, if a reviewing court were viewing the evidence in the light most favorable to Hummel, a juror could have reached this conclusion. Under the appropriate scrutiny of review however, Ferguson's testimony, when reviewed in context, demonstrates one more reason Hummel's suicide story was not credible because contrary to Hummel's assertion that Bellingham Bay was windy and he could barely row Alice' body out to dump her in the middle of the bay, the bay was in fact calm with no more than a light breeze.

It was well within the province of the jury to draw reasonable inferences from Ferguson's and Dr. Hayes' testimony in conjunction with the testimony of Dr. Goldfogel, other witness' and the forensic evidence to conclude Hummel murdered his wife with premeditated intent. By mischaracterizing Ferguson's testimony, drawing their own inferences from Dr. Hayes' testimony and failing to examine how all of the evidence fits with the circumstances surrounding Alice's murder to determine if the evidence supports the *jury's verdict* rather than Hummel's claims, the Court of Appeals erred.

b. *The State was not required to present direct evidence of the method or planning to support the jury's finding of premeditation.*

In addition to drawing its own inferences from the evidence and substituting its judgment for that of twelve jurors, the Court of Appeals also erred as a matter of law by concluding a reasonable juror could not find Hummel had motive to kill Alice or that Alice's murder was premeditated without direct evidence presented below detailing the planning, method or manner of the murder. Slip. Op. at 27.

Premeditation is "the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand; deliberation, reflection, weighing and reasoning for a period of time, however short." ⁷State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995), RCW 9A.32.120(1), State v. Ollens, 107 Wn.2d 848, 733 P.2d 984 (1987). Intent is rarely proven by direct evidence. Consequently, premeditation is often inferred from all of the circumstances surrounding the murder. Giffing, 45 Wn. App. 369. Circumstantial evidence supports such a finding where the inferences drawn by the jury are reasonable and the evidence supporting the finding, substantial. State v. Finch, 137 Wn.2d

⁷ The jury was instructed: Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in which a design to kill is deliberately formed. CP 227 -246, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 26.01.01 (4th Ed).

792, 831, 975 P.2d 967 (1999). Circumstantial evidence is not considered any more or less reliable than direct evidence. State v. Cross, 156 Wn. App. 568, 581, 234 P.3d 288 (2010), as amended (July 1, 2010), *review granted, cause remanded*, 172 Wn.2d 1009, 260 P.3d 208 (2011).

While opportunity alone is insufficient to support the element of premeditation, *motive*, procurement of a weapon, *stealth* and the *manner of killing* are all important facts that can support this inference. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995), aff'd sub nom. Gentry v. Sinclair, 693 F.3d 867 (9th Cir. 2012), and aff'd sub nom. Gentry v. Sinclair, 705 F.3d 884 (9th Cir. 2013), *quoting*, State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992)(*emphasis added*). Motive is well recognized in murder cases as evidence reflecting intent, premeditation or purpose. State v. Ross, 56 Wn.2d 344, 349, 353 P.2d 885 (1960). Moreover, “a person can form a premediated design to effect the death of another for the purpose of better enabling him to rob the person or premises of that other.” State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015), *relying on the analysis set forth in* State v. Miller, 164 Wash. 441, 2 P.2d 738 (1931). Ultimately, a finding of premeditation is within the province of the jury to determine.

Motive and prior conduct of defendant is as much part of the substantive evidence to show premeditation as is the immediate reflective deliberation which precedes the act itself. “Such evidence tends to show

the relationship of the parties and their feelings one toward another, and often bears directly upon the state of mind of the accused with consequent bearing upon the question of malice and premeditation.” State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995), State v. Neslund, 50 Wn. App. 531, 749 P.2d 725 (1988) (motive supports finding of premeditation).

Moreover, when the evidence suggests there is a reasonable motive to kill, a jury’s finding of premeditation is not based on speculation. In re Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995) (Court agreed Pirtle had motive to kill because he could face additional incarceration on criminal case pending in Montana, if identified as the robber in this event.)

Hummel faced dire consequences including incarceration, losing his home and his family if S.K.’s allegations of molestation were reported or used to negotiate him out of his children’s lives. Hummel and Alice already had a contentious and sometimes violent relationship prior to S.K.’s disclosure to Alice. Additionally, Money was tight and Hummel reliant on Alice’s monthly disability payments. When Hummel’s daughter S.K. finally disclosed to Alice just days before she was murdered that Hummel had been sexually molesting her for years, Alice, reassured S.K. she would “take care of it” and S.K. understood that to mean Alice would talk to Hummel. Hummel himself confirmed to investigators that if Alice knew about the molestation, he was confident she would have confronted him. Alice knew of the molestation for several days before her

disappearance. The logical inference from this evidence is that Alice did confront Hummel prior to her death. This reasonable inference was well within the province of the jury to make and supports the conclusion Hummel had motive to kill Alice so he could avoid any consequence and continue to molest S.K.

Additionally, because of Hummel's financial dependence on Alice, Hummel had motive to kill her in a manner that enabled him to conceal her death so he could also steal her disability payments for continued financial support. Murdering Alice away from her home, in an isolated manner that concealed her death so he could steal her disability payments and convince her children Alice had abandoned them, required a degree of sophistication reflective of a deliberated planning.

Courts have permitted jurors to rely on a wide range of facts proven by direct and circumstantial evidence to support an inference of premeditation *including* the conduct of a defendant *before and after* the killing. State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999) (hostility toward a victim expressed before or after the killing may be admitted to show hostility existed at the time of the crime.), *citing* Henley v. State, 31 Ala. App. 433, 18 So. 2d 98 (Ala. Ct. App. 1944), *See also*, State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

The Court of Appeals conclusion that Hummel's actions after he murdered Alice may not be used to support the jury's finding of

premeditation therefore is an incorrect conclusion of law that also warrants further review. See, Slip. Op. at 26 (“evidence that Hummel disposed of Alice’s body, concealed her death, and fraudulently obtained her disability checks after she died is evidence of guilt but does not prove premeditation.” See, Giffing, 45 Wn. App. 369 (premeditation may be inferred from *all of the circumstances surrounding* the murder), see also, State v. Cox, 884 N.W.2d 400 (Minn. 2016) (defendant’s actions following the killing may support an inference of premeditation.)

Relying on State v. Etheridge, 74 Wn.2d 102, 113, 443 P.2d 536 (1968), a grand larceny case, and State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013), a possession of forged I.D. case, wherein this Court concluded possession of a forged document alone is insufficient to infer fraudulent intent, the Court of Appeals held premeditation cannot be inferred based on the evidence Hummel concealed Alice’s death or stole her disability monies because this evidence only supports the conclusion that Alice was murdered and cannot therefore support a finding of premeditation.

The record reveals jurors did not rely and could not rely on the conclusion that Alice was murdered to support the element of premeditation. CP 227-246. The trial court’s instructions to the jury accurately set out the required elements of first degree murder and further defined what the jury was required to find to conclude Hummel’s actions

were premeditated. Jurors are presumed to follow the instructions. State v. Lamar, 180 Wn.2d 576.

In State v. Thompson, 73 Wn. App. 654, 870 P.2d 1022 (1994), a first degree no body murder case, the court concluded it was the victim's routine habits, that she was careful, never lent her vehicle to others, kept appointments, took care of her cat, in addition to her sudden disappearance that provided circumstantial evidence that her death was by criminal means. The remaining evidence, the court explained, supported the jury's determination that the murder was premeditated even though the State presented no direct or circumstantial evidence detailing the means or method of death. While an informant did testify Thompson kept his victim until he had her bank PIN number and confirmed it worked, the informant's testimony revealed nothing about the circumstances or method of the victim's murder. That wasn't required to sustain a finding of premeditation.

The court also noted the informant's testimony, whose credibility was challenged on appeal much as the jailhouse informant was in Hummel's first trial, was not the only evidence that supported the finding of premeditation. Additional facts including that Thomas was observed driving the victim's vehicle and using her ATM card *after* her disappearance also supported the inference of premeditation.

Here, as in Thompson, it is the fact Alice's body was never found, in conjunction with Alice's habits and circumstances at the time of her death that presumes her death was by murder. The remaining circumstances surrounding Alice's murder, as in Thompson permitted the jury to find Hummel's actions were premeditated notwithstanding that no direct evidence of planning or method of death were presented below.

Hummel was, by his own admission, the last person with Alice telling the Hummel children he had taken her to a motel for the night and then was driving her to the airport the following day. Alice and Hummel also had a volatile unhappy relationship and led separate lives within the Hummel home. At the time Alice was murdered, she rarely left the Hummel home due to her Lupus and had no incentive to leave home in light of S.K.'s disclosure. Alice had reassured S.K. she would protect and take care of the sexual abuse by talking or confronting Hummel. Alice was home every day before and after school following S.K.'s disclosure and had special plans to go see the ballet with S.K. for her 13th birthday just two days after she suddenly disappeared.

When Alice disappeared nothing appeared amiss at the Hummel home inferring no struggle or physical confrontation had occurred there. Hummel also did not appear to suffer any injury to his back and no forensic evidence supported Hummel's contention Alice died at home. Hummel knew Alice was dead on October 18th 1990. Yet, he not only

concealed the fact of her death, he lied to his children and engaged in an elaborate cover-up so he could convince his children Alice callously abandoned them, so he could steal Alice's disability payments and continue molesting S.K.. The jury is permitted to infer from this information, as in Powell, Hummel not only was motivated to murder Alice, he harbored the same hostility toward Alice when he murdered her, as reflected in Hummel's attitudes towards Alice before and after the murder.

Finally, Hummel was financially dependent on Alice and had motive to murder Alice in a manner that enabled him to steal her disability income and avoid consequences for molesting S.K. Hummel's subsequent organized conduct in methodically holding himself out to be Alice, safeguarding the mail so he could collect her disability monies while keeping her death concealed from her children, clients and extended family in a manner disparaging Alice, further suggests Hummel's action were the result of a deliberate plan borne out of malice and not the result of an impulsive act. Twelve reasonable jurors concluded Alice's murder was premeditated. This inference is reasonable given the motives and circumstances surrounding her death and was well within the province of the jury to make. "A verdict does not rest upon speculation or conjecture when founded upon reasonable inferences drawn from circumstantial

evidence.” Lamphiear v. Skagit Corp., 6 Wn. App. 350, 356, 493 P.2d 1018 (1972).

2. **The jury’s verdict on premeditated murder permits this Court to remand for imposition of judgment on the lesser degree murder offense because Hummel sought an “all or nothing strategy” below, fully litigated the allegation of intentional murder and the jury expressly found Hummel murdered Alice intentionally.**

The Court of Appeals, while concluding the State proved Hummel murdered Alice, nonetheless, reversed his conviction with prejudice and, *citing* In re Heidari, 174 Wn. 2d 288, instructed the trial court to dismiss this case. The court held Heidari precluded remanding this matter back to the trial court to impose a conviction on the lesser degree offense of murder in the second degree necessarily encompassed within the jury’s first degree murder verdict because the jury was not given murder in the second degree instructions.

Heidari held that *only where the jury is instructed on a lesser included offense*, a finding that greater offense was committed means the jury necessarily found all of the elements of the lesser offense and if the greater offense is vacated, entry of the lesser offense is warranted. In re Heidari, 174 Wn. 2d at 4.

Heidari is not controlling in this case because it was Hummel, not the State, who sought an “all or nothing” strategy below. Hummel proposed all of the jury instructions. CP 205-226. After the trial court determined the evidence did not support his proposed manslaughter instructions, Hummel affirmatively requested the court remove murder in the second degree instructions from the jury’s consideration. RP 469, 457. It is within Hummel’s right to make such strategic decisions in consultation with his trial attorney. State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). This tactical decision provided Hummel a chance of obtaining an acquittal if the jury did not believe the evidence supported the element of premeditation. The State’s acquiescence to Hummel’s strategic decision by failing to object, should not be construed as the State choosing an “all of nothing strategy.”

Additionally, in Heidari, the jury was not instructed nor did the jury find, Heidari had acted with *intent*, an element of the lesser included crime of attempted second degree molestation. In contrast, here the jury expressly found every element of second degree murder as the “to convict” instruction required the jury to find *both* premeditation and intent. See, Appendix B, C, attached and incorporated herein.

Moreover, the record reflects Hummel’s defense of the greater charge necessarily encompassed defending the lesser degree offense such that remand for imposition on the lesser included offense would not be

unduly prejudicial and meets due process considerations. In light of the procedural posture of this case and substantive distinctions between this case and Heidari, remand for entry of a conviction on the lesser degree offense of murder in the second degree should be permitted.

If this Court determines remand for entry of murder in the second degree is not permitted under Heidari, the state requests this Court overrule Heidari. Washington Supreme Court precedent should be overruled if it is shown to be incorrect and harmful. State v. Nunez, 174 Wn.2d 707, 713, 285 P.3d 21 (2012). A decision is incorrect if it is not supported by the authority upon which it relies or if it conflicts with other Washington Supreme Court precedent. *Id.*; *accord*, State v. Barber, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). The Supreme Court clarified the meaning of “incorrect” in Barber:

The meaning of “incorrect” is not limited to any particular type of error. We have recognized, for example, that a decision may be considered incorrect based on inconsistency with this court's precedent; inconsistency with our state constitution or statutes; or inconsistency with public policy considerations. A decision may also be incorrect if it relies on authority to support a proposition that the authority itself does not actually support.

Barber, 170 Wn. 2d at 864 (internal citations omitted). A decision may be harmful “for a variety of reasons.” *Id.* at 865. A decision is harmful if it undermines an important public policy or a fundamental legal principle. Nunez, 174 Wn. 2d at 716–19. A decision is also harmful

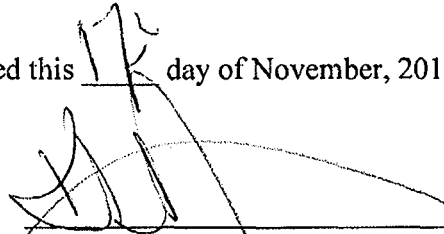
where it has a “detrimental impact on the public interest.” Barber, 170 Wn. 2d at 865.

If the Court of Appeal’s decision on the sufficiency of the evidence is upheld in this case and this Court finds Heidari applies, the result will thwart the public’s interest in holding murders accountable and stand in conflict with long standing precedent. *See, Freidrich*, 4 Wash. at 224 (court reversed the defendant’s first degree murder based on insufficient evidence of premeditation and remanded for entry of judgment on lesser included murder in the second degree offense.)

Moreover, a closer look at In re Heidari reveals its holding is not logical. When a jury convicts of the greater offense, the jury is instructed to not consider the lesser degree instructions in the event it concludes the defendant is guilty of the greater. Thus, whether the jury was instructed on the lesser degree offense should not be the basis for determining what if any remedy is available when a reviewing court determines insufficient evidence supports a greater offense. *See, Musacchio v. U.S.*, 136 S.Ct.709 (how the jury is instructed not relevant in determining whether the evidence is legally sufficient to support a charge.) As in Musacchio, in considering the authority of an appellate court to remand for entry of a judgment on a lesser degree offense, this Court should only consider the “legal” questions. Whether the jury verdict encompasses all of the essential elements of the lesser degree offense and whether the record

reflects sufficient due process was afforded to ensure the defendant had a meaningful opportunity to defend against the lesser degree offense below. The remedy available following a successful sufficiency challenge should not be predicated on the parties strategic decision's below.

Respectfully submitted this 12 day of November, 2016.

A handwritten signature in black ink, appearing to read 'K. Thulin', is written over a horizontal line. The signature is stylized and somewhat cursive.

KIMBERLY A. THULIN, WSBA # 21210
Appellate Deputy Prosecutor
Whatcom County Prosecuting Attorney

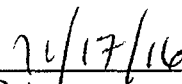
CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Nancy Collins
Washington Appellate Project
1511 3rd Ave Suite 701
Seattle, WA 98101-3647
nancy@washapp.org
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Legal Assistant



Date

APPENDIX

A

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COURT OF APPEALS
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 72068-6-I
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
BRUCE ALLEN HUMMEL,)	
)	
Appellant.)	FILED: October 17, 2016

SCHINDLER, J. — Following the second trial in this case, a jury convicted Bruce Allen Hummel of premeditated murder in the first degree of his spouse Alice Kristina Hummel. Even when viewed in the light most favorable to the State, the evidence does not support finding the essential element of premeditation beyond a reasonable doubt. We reverse and vacate the conviction of premeditated murder in the first degree. Because the prosecutor did not request the court instruct the jury on murder in the second degree, we must remand to dismiss the conviction with prejudice.

FACTS

Bruce Allen Hummel and Alice Kristina Wehr Hummel married and have three children, S.C., S.H., and S.K. Hummel and Alice taught school in rural Alaska for a number of years.¹ Alice suffered from lupus and as a result, in April 1979, she retired

¹ We refer to Alice Hummel by her first name for clarity and intend no disrespect by doing so.

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from teaching on disability. Alice was entitled to receive disability benefits from the State of Alaska Teachers' Retirement System from April 1979 until she turned 60 and was eligible to receive retirement benefits on February 28, 2004.

Hummel and Alice purchased a house in Bellingham, Washington. Hummel continued to teach school in Alaska. Alice operated a computer business from home. Hummel would spend summers with Alice and the children in Bellingham.

In June 1986, Hummel decided to stop teaching in Alaska. Hummel did construction work in Bellingham. He would also frequently go to remote forest areas to collect cedar and pine cones to sell to a company that made potpourri.

Alice Disappears on October 18, 1990

In 1990, only 17-year-old S.H. and 13-year-old S.K. were living at home. According to S.H., Hummel and Alice "never really got along at that point." S.H. fought with his father "a bit" and "didn't get along all that well" with his mother. According to S.K., there was "constant arguing in the house, but it . . . wasn't always directly between" Hummel and Alice.

In 1990, S.K. had been taking ballet lessons. In October, Alice made plans to attend a ballet performance with S.K. to celebrate her fourteenth birthday on October 21, 1990. S.K. was looking forward to going to the ballet with Alice. A few days before her birthday, S.K. disclosed to Alice that Hummel sexually abused her. S.K. said Hummel had forced her to help him masturbate for years. Alice told S.K. she would "take care of it."

S.K. saw Alice before she left for school on Thursday, October 18. When S.K. returned home from school around 3:30 p.m., Hummel told S.K. that Alice received a

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telephone call for a job interview in California. When S.H. returned home from school, Hummel told S.H. that Alice "was going off to California for a job interview." S.H. knew Alice was looking for "a job with computers" and "California was the primary area that she was looking" for a job. Alice did not return to attend the ballet with S.K. on her birthday.

One or two weeks later, Hummel told S.H. and S.K. that Alice needed some possessions for her job in California. Hummel asked S.K. to help pack medications, jewelry, and clothing for Alice. While packing, S.K. found Alice's "current purse" and wallet but she did not examine the contents of the wallet. S.H. watched Hummel pack a bag with Alice's needlepoint and a box of software to send to California. Hummel later told S.H., S.K., and their older sister S.C. that Alice got a promotion and moved to Texas.

S.K., S.H., and S.C. never saw or spoke to Alice after October 18, 1990. S.K. received typewritten birthday cards signed by Alice and a letter stating she "met a new guy who didn't like kids." That winter, S.H. received a Christmas card signed by Alice but Hummel signed the check inside. In March 1991, S.C. received an anniversary card signed by Alice. In August, S.C. received a package from Alice for her birthday with a return address in Fort Worth, Texas but with a postal service stamp of "not a valid address."

In spring 1991, S.K. saw the possessions she had packed to send to Alice "in a pile" for a garage sale. S.H. later found the bag with the needlepoint and the box of software in the basement.

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Hummel told S.H. that Alice planned to attend his high school graduation in June 1991. But a day or two before the graduation, Hummel said Alice "wasn't going to be able to make it after all." After S.H. graduated, he moved to Nevada. Hummel listed the Bellingham house for sale. Hummel and S.K. moved to Okanogan. Hummel taught school in Okanogan and then moved to Enumclaw to teach school.

Alice often left notes for S.H. in the basement ceiling of the house in Bellingham. While the house was listed for sale, S.H. returned to the house and found a "suicide letter" from Alice in the basement ceiling. S.H. said he was "pretty distraught" when he read the letter "for a number of reasons, but the main one is it was definitely written in my father's handwriting." S.H. did not keep the letter.

S.H. and S.K. tried to locate Alice using "online search databases" and a search service called "1-800 U.S. Search" without success. After Alice's father died in January 1993, S.C. made a "concerted" effort to locate Alice. "I felt that it was important that she know that he had passed away, and there was also an inheritance for her involved." S.C. could not locate Alice.

August 2001 Missing Person Report

S.K. moved to Seattle when she was 17. Sometime around 2000, S.C. and S.K. spent time together. S.K. told S.C. for the first time "about the abuse" and the "anomalies that she noticed at the time of [Alice]'s disappearance." S.C. then talked to S.H. about Alice's disappearance. On August 21, 2001, S.C. filed a missing person report with the Bellingham Police Department.

Bellingham Police Detective Les Gitts and Detective Michael Mozelewski interviewed S.C., S.H., and S.K. and investigated the disappearance. The "only trace"

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of Alice that Detective Mozelewski found was a current driver's license from the state of Alaska, deposits of the monthly disability payments from the Alaska Teachers' Retirement System, and withdrawals from a bank account in Alaska. Detective Mozelewski contacted the Federal Bureau of Investigation (FBI) about the deposits and withdrawals from the bank account in Alaska.

Detective Mozelewski obtained a copy of the petition for dissolution that Hummel filed in March 1995 in King County Superior Court but was later dismissed. In the petition, Hummel lists a Dallas, Texas address for Alice. Detective Gitts confirmed the address listed for Alice was "not a valid address."

After Alice disappeared, Hummel did some remodeling at the Bellingham house. On August 18, 2003, the detectives used a ground-penetrating radar instrument to search the Bellingham house and the yard for a body. The search did not reveal any trace of a body. Nor did a later search with cadaver dogs reveal any trace of a body.

April 2004 Interview

The FBI scheduled an interview with Hummel for April 27, 2004 about deposits of the disability checks for Alice and withdrawals of funds from their joint bank account in Alaska. Detective Mozelewski and Detective Gitts went to Billings, Montana to attend the interview. The FBI agent and the detectives met with Hummel at his house in Billings. Hummel admitted the Alaska retirement system continued to deposit disability payments after Alice disappeared in October 1990, and for a period of time, he withdrew money from the account.

Detective Mozelewski and Detective Gitts asked Hummel about Alice's disappearance. Hummel told the detectives that "right around [S.K.]'s birthday" in 1990,

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Alice "received a job offer in California. Somebody had sent her up a plane ticket, and she went to California." Hummel said the last time he saw Alice was when he "put her on an airplane in Seattle." Hummel told the detectives Alice moved from California to Dallas and "met another man and wasn't coming back."

Hummel said he met his current spouse while he was teaching in Enumclaw. After they went to Alaska to teach school, Hummel obtained a decree of dissolution from Alice in Alaska. Hummel then married his current spouse and they moved to Billings. Hummel admitted he had "inappropriate contact" with S.K. but said he "rectified that with [her] in a letter," and "his current wife . . . knew what had happened, too."

On May 5, 2004, an FBI agent in Billings contacted Detective Mozelewski about a letter that he obtained that was from Hummel to Detective Gitts. In the 11-page letter, Hummel states Alice committed suicide on October 18, 1990 and he took steps to " 'cover[] up her suicide.' "

May 2007 Federal Indictment

In May 2007, a federal grand jury in Alaska indicted Hummel on 12 counts of wire fraud. Hummel pleaded guilty.

In the plea agreement, Hummel states Alice "disappeared" on October 18, 1990 and in May 2004, he "represented that Alice Hummel was deceased, and had been deceased since October 18, 1990." Hummel admits between November 1990 and February 2004, the state of Alaska "deposited approximately \$340,032.96 into the Credit Union 1 joint account in the name of, and for the benefit of, Alice K. Hummel;" and he "falsely represented himself to be his deceased wife" so he could continue to collect her disability retirement benefits.

The plea agreement states, in pertinent part:

Hummel, during the above-mentioned time period, in communications with the State of Alaska Division of Retirement and Benefits, falsely represented himself to be his deceased wife, Alice K. Hummel. The purpose of this deception was to maintain the fiction that his wife was alive in order to continue to collect his deceased wife's disability retirement benefits. The scheme included forging his wife's name as the check payee. During the period alleged in this Indictment, checks written on the Credit Union 1 joint account in Alaska by Hummel were deposited into Hummel's account at the First Interstate Bank in Billings, Montana.

The court sentenced Hummel to a 27-month sentence on each count of wire fraud in violation of 18 U.S.C. § 1343 to be served concurrently.

July 2008 Charge of Premeditated Murder in the First Degree

On July 30, 2008, the State charged Hummel with premeditated murder of Alice in the first degree.

I, DAVID S. MCEACHRAN, Prosecuting Attorney in and for Whatcom County, State of Washington, comes now in the name and by the authority of the State of Washington and by this information do accuse **BRUCE ALLEN HUMMEL** with the crime(s) of **MURDER IN THE FIRST DEGREE**, committed as follows:

then and there being in Whatcom County, Washington,

MURDER IN THE FIRST DEGREE

That during the period of time intervening between the 1st day of October, 1990, through the 30th day of October, 1990, said defendant, BRUCE ALLEN HUMMEL, then and there being in said county and state, with a premeditated intent to cause the death of another person, to-wit: Alice Kristina Hummel, caused the death of said person, contrary to Revised Code of Washington 9A.32.030(1)(a), which violation is a Class A Felony; contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Washington.^[2]

² Emphasis in original.

August 2009 First Trial

A number of witnesses testified at the first trial including S.K., S.H., S.C., the detectives, forensic scientists, and jail inmate Donald Cargill. The court admitted into evidence the May 2004 letter Hummel wrote to Detective Gitts and the federal plea agreement to 12 counts of wire fraud.

S.K. testified that when she “finally told her mother about the molestation a few days before her birthday,” Alice was “ ‘upset’ ” and S.K. “believed her mother would take action.”³ S.K. testified that Hummel continued to molest her after Alice disappeared.

Cargill shared a jail cell with Hummel in the Whatcom County Jail. Cargill testified that Hummel told him “that he had helped his wife Alice ‘get to a better place’ by mixing a handful of ground up pills in apple cider and giving it to Alice to drink.”⁴

The court instructed the jury on murder in the first degree and the lesser included crime of murder in the second degree. The jury convicted Hummel of premeditated murder in the first degree.

First Appeal

In his first appeal, Hummel argued insufficient evidence established the corpus delicti for premeditated murder in the first degree. Specifically, that independent evidence did not establish premeditation. We held the State must prove premeditation beyond a reasonable doubt as an element of the charged crime of murder in the first degree but not to establish the corpus delicti. State v. Hummel, 165 Wn. App. 749, 765, 266 P.3d 269 (2012). “[T]he evidence is sufficient to establish the corpus delicti in a

³ State v. Hummel, 165 Wn. App. 749, 755, 266 P.3d 269 (2012).

⁴ Hummel, 165 Wn. App. at 757.

homicide case if it leads to a reasonable and logical inference of death and a causal connection between the death and a criminal act." Hummel, 165 Wn. App. at 766.

Viewed in the light most favorable to the State, because the evidence "leads to a reasonable and logical conclusion that Alice is deceased and that her death was a result of a criminal agency . . . on the part of Hummel," we concluded the evidence established the corpus delicti. Hummel, 165 Wn. App. at 770.

The evidence that Alice vanished suddenly and surprisingly, never to be heard from again; that she was close with her children and was unlikely to simply abandon them; that, without explanation, she failed to attend a special event for her daughter's birthday; and that the failure to complete a work assignment was out of character leads to a reasonable and logical inference that she is deceased. The evidence that her daughter revealed Hummel's molestation just days before Alice's disappearance, that Hummel continued to molest his daughter after his wife vanished, that he lied to his children about Alice's belonging and whereabouts, that he forged Alice's signature on documents, and that he stole Alice's pension immediately after she vanished leads to a logical and reasonable inference that Alice is dead and that her death is the result of a criminal agency on the part of Hummel.

Hummel, 165 Wn. App. at 770. Nonetheless, because we concluded the court violated Hummel's constitutional right to a public trial, we reversed the conviction and remanded for a new trial. Hummel, 165 Wn. App. at 774.

May 2014 Second Trial

In the second trial, the State called a number of witnesses including S.K., S.H., S.C., the detectives, Alton Terry, forensic scientists, the Whatcom County Medical Examiner, and biomechanics expert Dr. Wilson Hayes. The State did not present the testimony of jail inmate Cargill.

S.K. testified that she "finally told [Alice] what had been happening with the sexual abuse" three to five days before her birthday on October 21, 1990. S.K. said

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Hummel "would have me help him masturbate" beginning when she was 3 years old. S.K. said Alice "told me that she was going to take care of it." S.K. said she made the "assumption" that Alice would confront Hummel. But S.K. did not know whether Alice "ever confronted" him. S.K. testified the molestation continued after Alice disappeared, albeit less frequently, until she left home at age 17. S.K. testified that prior to her mother's disappearance, Hummel's behavior "was pretty much how it had been."

Alice did some work for former Seattle Police Department Officer and Private Investigator Alton Terry. Terry testified that about a week before Alice disappeared, he gave her a damaged "floppy disk" and asked her to try to recover the information on the disk. Alice told Terry she would return the disk to him by the "middle of the following week." Terry said Alice always completed work on time but he "[n]ever saw her or heard from her again." After Alice disappeared, Terry tried to locate her using search databases but could not "find any trace" of her.

Detective Mozelewski testified about the April 27, 2004 interview with Hummel in Billings, Montana. Detective Mozelewski said that throughout the interview, Hummel "maintained that he had absolutely nothing to do with" Alice's disappearance. Hummel told the detectives that Alice went to California and then to Dallas for a job.

The details that [Hummel] gave me were, in fact, [Alice] had gone for the job [in California]. Then she went to some type of computer conference or — and I believe in Dallas, and she received another job there, and then that she had met another man and wasn't coming back.

Hummel "readily admitted" he had inappropriate sexual contact with S.K. between the ages of 3 and 12. Detective Mozelewski testified Hummel did not "indicate whether Alice knew" about the molestation but he told Detective Mozelewski that "if

Alice would have known that, she would have definitely confronted him with it."

- A. I think [Hummel] said [the molestation] happened more than once, and I think it was, I think his statement was between the ages of three and 12.
- Q. And did he describe what he was doing?
- A. Yes, he did.
- Q. His, in his words?
- A. In his words, he said it was, he would masturbate in front of [S.K.]. Sometimes he would have her assist him in doing that.
- Q. Did you ask him whether or not Alice knew about this?
- A. Yes, I did.
- Q. Did you ask him what response or did he make a comment what response Alice would have had she known?
- A. His response to me was he felt confident that if Alice would have known, she would have confronted him about it.
- Q. Did he indicate whether Alice knew or not?
- A. I don't believe he did.
- Q. Would you check your notes on that and just see? This would be on the interview in Billings.
- A. Yeah, my notes reflect that he told me that he felt that if Alice would have known that, she would have definitely confronted him with it.
- Q. And did the notes indicate whether or not he felt Alice knew?
- A. No, they do not.

The court admitted into evidence the 11-page letter Hummel wrote to Detective Gitts in May 2004. Detective Mozelewski read the letter to the jury. At the beginning of the letter, Hummel states he did not tell the truth during the interview on April 27, 2004. Hummel admits Alice is dead but claims she committed suicide. The letter states, in pertinent part:

"I apologize for the smokescreen I threw at the three of you, but what else could you expect when it is the same story I've been telling for 13 years? You must admit it sounded rehearsed. Parts of it are true, mostly false."

"What I'm about to write in the best detail is the absolute truth and accurate to the best of my ability considering the amount of time that has passed."

"First fact, Alice Kristine [sic] Wehr Hummel is dead. Second fact, she died of her own hand. Third fact, I covered up her suicide for two reasons, A) On a note I found half laying in the bathroom sink was a request, quote, 'Don't let the kids know,' quote. B) I didn't want [the

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Alaska Teachers' Retirement System] to be aware of her death for fear of losing her disability payments."

The letter describes the suicide. Hummel went home around noon on Thursday, October 18, 1990. And as he " 'passed the open bathroom door,' " he " 'found [Alice] laying on her left side with her back to the bathtub. There was a lot of blood in and around the toilet.' " According to Hummel, her " 'left wrist had a terrible gash across it' " and he " 'noticed a note laying mostly down in the sink. Right at the bottom were the words, "Don't tell the kids.' ' "

Hummel gives a detailed description of how he cleaned up the blood and disposed of her body. Hummel said he rolled Alice in plastic sheeting, dragged her through the house, and lifted her into the back of his van. The next day on " 'Friday night after the kids were asleep, almost midnight,' " Hummel rowed out to the middle of Bellingham Bay in a makeshift " 'five-man inflatable raft.' " Hummel said the " '[r]owing was very difficult' " and " 'I rowed and bailed for an hour and a half at least, but the wind got worse, and I had to let her body go.' " Hummel states that rowing back " 'was aided by the wind, but finding my way to the marina took a long time.' "

Detective Mozelewski testified that he and Detective Gitts "attempt[ed] to either verify parts of the letter or show that it didn't happen the way that the letter indicated." The detectives obtained a search warrant and returned to the Bellingham house to search for "any residue or residual effects of any blood in the residence" and, in particular, the bathroom. They did not find any trace of blood.

Detective Gitts testified the forensic investigation "revealed essentially no physical evidence" and "[n]othing that was described in the letter was found."

Washington State Patrol Crime Laboratory forensic scientist Alexis Sanzo compared the signatures on the cards and letters that the children received after Alice disappeared with known handwriting samples from Alice and Hummel. Sanzo testified that "although Alice Hummel cannot be identified or excluded as the writer, there are indications she did not write the questioned text. . . . [T]here are indications that [Hummel] wrote the questioned text."

Whatcom County Medical Examiner Dr. Gary Goldfogel testified that if Alice died as Hummel described, she would have lost at least two quarts of blood. Dr. Goldfogel said it is "exceptionally difficult" and "a very rare event" to commit suicide as described by Hummel by cutting the wrist horizontally. Dr. Goldfogel testified that because the two major arteries in the wrist are "quite protected . . . and both are quite deep," a person would "almost have to cut [their] hand off to get deep enough to get at those arteries, and bleeding from the veins and the smaller blood vessels would not allow the blood loss that would be necessary to die." Dr. Goldfogel testified it was also "highly unusual" to not find a body in Bellingham Bay, a "fairly confined body of water." Dr. Goldfogel testified it would be "far more difficult" to discover human remains buried in the forest.

Biomechanics expert Dr. Wilson Hayes testified that assuming Alice "weighed 200 to 250 pounds" and Hummel was 5 feet 10 inches tall and weighed approximately 200 pounds, "Hummel could not, and thus, did not lift his wife into the back of the van." But Dr. Hayes testified that he did not determine whether Hummel could have wrapped the body in plastic and dragged her body out of the house.

[W]e know from the handwritten note that Mr. Hummel found his, according to his description, found his wife on the floor of the bathroom on her left side, and that he subsequently wrapped her in a piece of plastic

that he had left over from a job and dragged her essentially through the house out to the van.

I've not looked at the difficulty of that process, of that part of the process. The most difficult part of this was the process of lifting or would have been the process of lifting a deceased body weighing between 200 and 250 pounds up into the van, and so has been the focus of the analysis.

Certified American Sailing Association instructor Tim Ferguson testified that from midnight on October 19, 1990 until noon on October 20, the wind on Bellingham Bay was between three and five knots. Ferguson testified three knots is equal to approximately three and one-half miles per hour. The condition of Bellingham Bay for that time period was "very light air" and "not even to the point of waves." Ferguson testified waves from midnight on October 19 until noon on October 20 "wouldn't be a factor at all" for a person trying to "row a five-man inflatable boat."

- Q. Based on your knowledge of the bay and the background that you have and the training that you've had, what would you expect to see on Bellingham Bay with the highest wind speed we had I believe you indicated was 5 knots? What would you expect to see in the bay?
- A. At that point, you would have just ripples on the water . . . or small wavelets.
- Q. Would they even be called waves at that point?
- A. No, it's not even to the point of waves. It's just so little.
-
- A. That would be very light air. . . . [W]hen we race out on the bay, if it's not over 4 knots, we don't even start the race, because there's not really enough wind to move the boats around
- Q. Now, if the tide is going in opposition to the wind, is that going to make any difference with winds this light?
- A. With winds this light, it would be negligible.
- Q. Based on those weather records and your training and experience and your knowledge of the bay, would it be difficult to row a five-man inflatable boat due to wave action at any times that you've described to us on the 19th, late evening, early morning through noon on the 20th of October, 1990?
- A. No, as far as wave action is concerned, under those conditions, it wouldn't be a factor at all.

At the conclusion of the State's case in chief, the defense moved to dismiss the charge of premeditated murder in the first degree. The defense argued that unlike in the first trial, the State presented no evidence of premeditation to commit murder.

Your Honor, at this time, the Defense would move to dismiss the case because the State has not established a prima facie case of murder in the first degree. Pursuant to State v. Green,^[5] there is a lack of evidence from which a rational trier of fact could reasonably find beyond a reasonable doubt that the Defendant committed the crime as charged.

What I did, Your Honor, in case you wanted to refer to it, I printed out from the last trial Your Honor's ruling on the half-time motion in the previous trial. Though I know Your Honor is not tied to those specific rulings by any means, I think it's illustrative of what I plan on presenting here which is in the first case, we had Mr. Cargill. Mr. Cargill testified that there was barbiturates in the apple juice slowly administered over time, and that there was a plan to commit murder. We don't have that in this case.

As of right now, there's been absolutely no shred of evidence regarding the premeditation. Without that, I don't think the State has the sufficient evidence for a first degree charge, so I would ask the . . . Court to dismiss this charge.^[6]

The prosecutor argued there was sufficient evidence of premeditation based on "the disclosure of the sexual abuse made by [S.K.] to her mother . . . a few days before the mother disappeared;" Hummel's statement that if Alice knew about the molestation, "she would have confronted him;" his admission that Alice died on October 18, 1990; and his plan to fraudulently obtain her disability checks after she died.

Your Honor, I think it's very clear, and then we have all of the testimony and his admissions, his convictions of 12 counts of wire fraud that related specifically to the thefts of her disability, and he indicated that . . . certainly was one of the motivating factors when he wrote the letter to Detective Gitts, that the financial disclosure was something that he, he indicated at that point, he hid the body and actually got rid of the body, because he did not want to lose that money.

I would submit to you the evidence shows clearly that there is sufficient evidence to go to the jury on premeditation. This was not

⁵ State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

⁶ Emphasis added.

something that was disclosed, and immediately after that, the mother disappeared. There were a number of days, and I would submit that that certainly would establish and gives us the ability to argue premeditation, and there's no contrary evidence, Your Honor.

I would argue that that certainly is sufficient to go to the jury.

Defense counsel argued that even if there were evidence of motive, the evidence did not prove premeditation.

Sufficient evidence of motive, but motive is not an element here. What the State has to prove is premeditation, and that has not been shown. There may have been actions after the fact that she died, but with the State looking at the evidence in the light most favorable to the State, we don't know if there was a confrontation that occurred, and there was no thought, no plan of forethought and an immediate murder occurred. That would be murder II. We don't know if there was an argument, and she had a heart attack; if there was [an] argument, that he struck her down the stairs.

So there's been no evidence of any sort of premeditation, that plan ahead of time that is necessary for a murder I, and so again, please, Your Honor, don't mix up motive with premeditation. I don't think the State has shown that element.^[7]

The court denied the motion to dismiss.

The question of whether or not circumstantial evidence is sufficient is of course a question for the jury, but I think if the jury is given evidence that there is a reason to have done this, if the jury is given evidence that there are consequences that would be to Mr. Hummel's benefit as in this case with the receipt of her disability funds over a period of time, there is evidence that there is an event that might be the spur towards making such a plan, that I think can be enough for a jury to consider. It's up to the jury to decide whether that is sufficient for first degree murder for the premeditation.

Certainly, when we talk about instructions, there may be an opportunity for the jury to have a choice to look at a lesser included offense, and we'll talk about that later this afternoon, but I do believe that under the circumstances of this case with the evidence that we have presented to us that the existence of a motive and the opportunity, the children were at school when Ms. Hummel disappeared, Mr. Hummel was not anywhere else, we have no evidence that he was not available, that he has an alibi or anything of that nature, and the circumstances around her disappearance I think can all be taken note of by the jury as sufficient evidence of premeditation, because they have to decide what he was

⁷ Emphasis added.

thinking, and the only thing they will have to go on that would be how did he act, and so I think it's sufficient for the matter to go to the jury on a charge of first degree murder, and I would deny the motion on that basis.

At the beginning of the trial, the defense had submitted jury instructions on the lesser included crimes of murder in the second degree, manslaughter in the first degree, and manslaughter in the second degree. At the conclusion of the evidence, the defense took the position that if the court refused to instruct the jury on the lesser included crimes of manslaughter, "then we will withdraw our murder II and just go solely on first degree."

The prosecutor argued no evidence supported instructing the jury on the lesser included manslaughter offenses. The prosecutor did not object to the defense withdrawing the jury instructions on murder in the second degree.

And I don't believe there's any evidence to support manslaughter, and I believe the evidence really is supportive of murder in the first degree, and if the Defense wishes to pull murder in the second degree, that's certainly — the State certain [sic] would not have an objection. I believe that murder in the first degree is what is supported by the evidence.

The court ruled the evidence did not support instructing the jury on the lesser included manslaughter offenses. The court agreed that "if the jury were to find no premeditation, they could easily find" Hummel guilty of murder in the second degree.

The . . . issue is the premeditation. I understand that, and if that, if the jury were to find no premeditation, they could easily find him guilty of the second degree murder, because they might find everything else without the premeditation, so I understand.

All right. So the Court will withdraw all — the Defense is withdrawing all . . . lesser included offenses.

The prosecutor did not request the court instruct the jury on murder in the second degree.

The court instructed the jury on only premeditated murder in the first degree.

The to-convict jury instruction states:

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) During the period of time intervening between the 1st day of October, 1990, through the 30th day of October, 1990, the defendant Bruce Allen Hummel caused the death of Alice Kristina Hummel;
- (2) That the defendant acted with intent to cause the death of Alice Kristina Hummel;
- (3) That the intent to cause the death was premeditated;
- (4) That Alice Kristina Hummel died as a result of the defendant's acts; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The jury instruction defining "premeditation" states:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

In closing argument, the prosecutor asserted the evidence established "[t]he motive is very clear" and shows Alice confronted Hummel and he killed her "so that [he] would not be exposed, and then he continued to take the money and perpetrated this huge fraud against the Teachers' Retirement System . . . as part of a very elaborate scheme."

[Alice] was dead on October 18th at the hand of this Defendant because of the molestation that was raised by Alice to the Defendant, and she told [S.K.] what she was going to do — I will take care of this, and I would submit to you the evidence . . . shows, clearly, the Defendant took care of

her, and he killed her, and he did that so that [he] would not be exposed, and then he continued to take the money and perpetrated this huge fraud against the Teachers' Retirement System, and it was all done as part of a very elaborate scheme that he had, and it got more and more elaborate, and he told various stories. I would ask you to take a look very carefully because those, all of the stories he tells are circumstantial evidence of exactly what he did.

The motive is very, very clear. The motive is very clear here. We have the two things, the molestation, and we've got the theft, and those things are very clear, and when you look at all of the facts, you can see what he did.

In addressing the element of premeditation, the prosecutor argued the evidence established premeditated intent because Hummel got "rid of the body. . . . [H]e had time and did think about it. All we need is one moment more than one point in time. No question premeditation has been proven."

That brings us right back to the elements, instruction No. 12. Now this, the case begins and it ends on these elements. That's what this case is about. That's a burden that I have as a representative of the state representing the people. I have to prove these elements beyond a reasonable doubt. We don't have to have a body. I don't have to show you a manner and means. I have to show you that he killed Alice Kristina Hummel, and ladies and gentlemen, the evidence just cries out that he did that.

It's very clear he did that, and it's very clear why he did that. It's clear he acted with intent to cause her death, and it's clear that the death was premeditated. He was able to get rid of the body. He had to go somewhere to do that. I would submit to you the evidence is very clear that he had time and did think about it. All we need is one moment more than one point in time. No question premeditation has been proven.^[8]

Defense counsel argued there was no evidence Alice confronted Hummel about S.K.'s disclosure of molestation.

The why, the State has based their case on the molestation, but no one can tell you if he was actually confronted. [S.K.] says the disclosure happened three to five days before mom disappeared. Though at one point, she was saying it was more like a week and a half, but say it's three days. We know that mom didn't do anything that we would expect a mom

⁸ Emphasis added.

to do. Didn't call law enforcement. Didn't call the pastor. Didn't even get her out of the house. Didn't even contact Wayne Terry, who we'll go into a little bit more detail with this. This is the neighbor who they were using to, he was using Alice to do some computer work. He's law enforcement. He's now in the ministry. She didn't talk to him about it.

The defense argued there was no evidence of premeditation.

[T]he real element is premeditation. That's first degree murder. That's what is so different in this case. Premeditation. Premeditation, you have the instruction, but you can see that it requires a thought over — beforehand, some deliberation, formation of a settled purpose, more than a moment in time, some time, however long or short which the design to kill is formed. . . .

When we're talking about premeditation, there's no evidence of this; that Mr. Hummel made a plan before she died. Again, she could have had a heart attack. She could have been pushed down the stairs, but there's no shred of evidence regarding this settled purpose.

What you would want to see, right, is some sort of, I don't know, hired a contract killer, went and bought a gun, bought a shovel, bought plastic sheeting, got some poison, drugged her in her sleep, something that shows you it's a difference of premeditated murder versus murder.

So the defense can only assume, because again, we're speculating a lot. There's probably two theories regarding this molestation, how it could have occurred. [S.K.] tells mom I'm being abused. Mom waits several days, because we know there's a time period, confronts [Hummel] on the day she disappears. Let's assume this. [Hummel] in a rage kills her right then and there, and when the kids come home, mom is gone.

If that is the way it happened, that's murder in the second degree, because there's no premeditation. So if you think he was confronted, and he responded with killing her, under the Judge's instructions, you have to say not guilty today. We're not determining lessors, just premeditated murder.

In rebuttal, the prosecutor argued the evidence showed Alice confronted Hummel about the molestation and he killed her with premeditated intent.

[W]hen that confrontation occurred [Hummel] said I'm going to kill her, and then he killed her, and that would be premeditation, however long or short. Well, ladies and gentlemen, I would submit the evidence is clear that's exactly what happened in this case.

The jury convicted Hummel as charged of premeditated murder in the first degree.

ANALYSIS

Hummel contends insufficient evidence supports the conviction of murder in the first degree. Hummel asserts the State did not prove beyond a reasonable doubt the essential element of premeditation.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3.

[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); accord State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"The sufficiency of the evidence is a question of constitutional law that we review de novo." State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is to "determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 318.

This inquiry impinges on the discretion of the fact finder "to the extent necessary to guarantee the fundamental protection of due process of law" and focuses on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

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reasonable doubt." Jackson, 443 U.S. at 319;⁹ Green, 94 Wn.2d at 221-22; State v. Gentry, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995); Rich, 184 Wn.2d at 903.

Where sufficient evidence does not support a conviction, such a conviction "cannot constitutionally stand." Jackson, 443 U.S. at 317-18.

The determination of whether the evidence, so viewed, is adequate to allow "any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt" guards against a conviction where "no rational trier of fact could find guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319, 317.¹⁰

The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. Glasser v. United States, 315 U.S. 60, 80[, 62 S. Ct. 457, 86 L. Ed. 680 (1942)]; Bronston v. United States, 409 U.S. 352[, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973)]. See also, e.g., Curley v. United States, 81 U.S. App. D.C. 389, 392-393, 160 F.2d 229, 232-233 [(1947)]. Under Winship, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

Jackson, 443 U.S. at 316-318.¹¹

The legal determination of the sufficiency of the evidence "essentially addresses whether 'the government's case was so lacking that it should not have even been submitted to the jury.'" Musacchio v. United States, ___ U.S. ___, 136 S. Ct. 709, 715, 193 L. Ed. 2d 639 (2016) (quoting Burks v. United States, 437 U.S. 1, 16, 98 S. Ct.

⁹ Emphasis in original.

¹⁰ Emphasis in original.

¹¹ Footnotes omitted.

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2141, 57 L. Ed. 2d 1 (1978)). This "limited review does not intrude on the jury's role 'to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" Musacchio, 136 S. Ct. at 715 (quoting Jackson, 443 U.S. at 319).

To convict Hummel of murder in the first degree as charged, the State had the burden of proving beyond a reasonable doubt that Hummel acted with premeditated intent to cause the death of Alice. RCW 9A.32.030(1)(a) (A person is guilty of murder in the first degree when "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person."). The essential element of premeditation differentiates murder in the first degree from murder in the second degree. State v. Bingham, 105 Wn.2d 820, 823, 719 P.2d 109 (1986); State v. Hoffman, 116 Wn.2d 51, 82, 804 P.2d 577 (1991); RCW 9A.32.050(1)(a) (A person is guilty of murder in the second degree when "[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person.").

As defined by the legislature, premeditation must "involve more than a moment in point of time." RCW 9A.32.020(1). The "mere opportunity to deliberate is not sufficient to support a finding of premeditation." State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995); Bingham, 105 Wn.2d at 827 ("The opportunity to deliberate is not sufficient."). To establish premeditation, the State must show "the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." Hoffman, 116 Wn.2d at 82-83; Gentry, 125 Wn.2d at 597-98.

Viewing the evidence in the light most favorable to the State, evidence supports the jury finding Hummel killed Alice. Alice made plans to go to the ballet with S.K. to celebrate S.K.'s birthday on October 21, 1990. But Alice disappeared on October 18, a few days after S.K. disclosed to Alice that Hummel had been sexually molesting her for years. Alice always completed work projects on time and she told Terry she would complete a work project for him that week. No one ever saw or spoke to Alice after she disappeared on October 18. Hummel admitted Alice died on October 18 but lied to S.K., S.H., and S.C. Hummel told S.K., S.H., and S.C. that Alice went to California and later to Dallas for a job. Hummel wrote cards and letters to S.K., S.H., and S.C. from Alice. In the May 2004 letter to Detective Gitts, Hummel states Alice committed suicide and describes the steps he took to dispose of her body after she died. The evidence at trial established Alice did not commit suicide and Hummel could not have disposed of her body in the manner he describes. In the 2007 federal plea agreement, Hummel admits that beginning in November 1990 until February 2004, he fraudulently obtained the disability payments for Alice that were deposited in the joint account in Alaska.

By contrast, the evidence does not support finding premeditation beyond a reasonable doubt. The State can prove premeditation by circumstantial evidence "where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." Pirtle, 127 Wn.2d at 643; Gentry, 125 Wn.2d at 598; State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). In Pirtle, the Washington Supreme Court identified four characteristics or factors that are "particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing." Pirtle, 127 Wn.2d at 644. The court states two of the factors, procurement of a weapon

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and stealth, "can be further combined as evidence of planning." Pirtle, 127 Wn.2d at 644.

Unlike the first trial, the State presented no evidence of planning or method of killing. In the first trial, jail inmate Cargill testified that Hummel admitted giving Alice barbiturates to kill her. And despite concerted efforts, the police never found her body.

The State argues the evidence establishes Alice confronted Hummel and he had a strong motive to kill her. The State points to the evidence that three to five days before Alice disappeared on October 18, 1990, S.K. disclosed to Alice that Hummel had been molesting her for a number of years and the testimony that Alice told S.K. she would "take care of it." The State also points to the evidence that during the interview with the detectives in April 2004, Hummel said if Alice knew he had been molesting S.K., Alice "would have definitely confronted him with it." The State also points to the evidence that Hummel admitted Alice died on October 18, 1990; he disposed of her body; and he fraudulently obtained her disability checks from November 1990 until February 2004.

The State claims the jury could infer that after Alice confronted Hummel, he formed the intent to kill her. But there is no evidence to show that Hummel knew that in October 1990, S.K. disclosed to Alice that he had been molesting S.K. or that Alice ever confronted Hummel. No witness testified that Hummel knew in October 1990 that S.K. told Alice about the molestation. And no witness testified that Alice confronted Hummel about the molestation. S.K. testified she assumed but did not know whether Alice "ever confronted" Hummel. Detective Mozelewski testified that during the interview in 2004, Hummel did not indicate that he was aware Alice knew about the molestation of S.K.

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And Hummel's statement to Detective Mozelewski that "if Alice would have known, she would have confronted him about it," does not create a reasonable inference that she in fact did confront him.

Further, even if the evidence supports a reasonable inference that a confrontation occurred, there is no evidence to show deliberation or reflection before Hummel killed Alice. The evidence that Hummel disposed of her body, concealed her death, and fraudulently obtained her disability checks after she died is evidence of guilt but does not prove premeditation. See State v. Etheridge, 74 Wn.2d 102, 113, 443 P.2d 536 (1968). Inferences based on circumstantial evidence must be reasonable and "cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013); see also Jackson, 443 U.S. at 319 (the trier of fact may draw only reasonable inferences); United States v. Nevils, 598 F.3d 1158, 1167 (9th Cir. 2010) ("[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case . . . or where there is a 'total failure of proof of [a] requisite' element.")¹² (quoting Briceno v. Scribner, 555 F.3d 1069, 1079 (9th Cir. 2009)).

The two cases the State relies on, State v. Ollens, 107 Wn.2d 848, 733 P.2d 984 (1987), and State v. Neslund, 50 Wn. App. 531, 749 P.2d 725 (1988), do not support the argument that the evidence in this case supports a reasonable inference of premeditation.

In Ollens, in addition to motive, the evidence established the defendant procured a knife, struck the victim from behind, stabbed the victim numerous times, and slashed

¹² Third alteration in original.

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the victim's throat. Ollens, 107 Wn.2d at 853. The court held that based on the evidence, the jury "would not be left to speculate or surmise only as to the existence of premeditation." Ollens, 107 Wn.2d at 853.

In Neslund, in addition to motive, the evidence showed the defendant made previous threats to " 'waste' " her husband, he was afraid of the defendant and "feared for his life," the defendant obtained a gun beforehand, and her brother restrained her husband while she went to get the gun and then shot and killed him. Neslund, 50 Wn. App. at 559-60. The court held the evidence "indicates deliberation and premeditation." Neslund, 50 Wn. App. at 560.

Unlike Ollens and Neslund, the State presented no evidence of motive, planning, the circumstances or the method and manner of death, or the deliberate formation of the intent to kill Alice beforehand.

For the first time on appeal, the State claims the testimony of biomechanics expert Dr. Hayes creates a reasonable inference that "Hummel lured Alice out of the home prior to killing her." The State asserts that because Hummel could not have moved her body, he "used a method that required a plan" to "lure" Alice out of the house before killing her. The argument is speculative and misstates the testimony of Dr. Hayes. Dr. Hayes did not testify that Hummel could not move the body. Dr. Hayes testified that Hummel "did not lift his wife into the back of the van." Dr. Hayes states he did not consider whether Hummel could have wrapped Alice's body in plastic and

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dragged her out of the house.¹³

At oral argument, the State asserted this case is similar to People v. Scott, 274 Cal. App. 2d 905, 79 Cal. Rptr. 587 (1969). We disagree. In Scott, the defendant's stepson testified the defendant "told him how he had planned the killing and said that he had shot [the victim] in the back of the head with [the stepson]'s rifle." Scott, 274 Cal. App. 2d at 910. There was no challenge to the sufficiency of the evidence of premeditation. On appeal, the court addressed whether the State established the corpus delicti of the crime of murder in the first degree. Scott, 274 Cal. App. 2d at 906-08. The court concluded independent evidence established the corpus delicti. Scott, 274 Cal. App. 2d at 907-08.

Viewing the evidence in this case in the light most favorable to the State, we conclude no reasonable trier of fact could have found beyond a reasonable doubt that Hummel killed Alice with premeditated intent to commit murder in the first degree.

Reversal for insufficient evidence is "equivalent to an acquittal" and bars retrial for the same offense. State v. Wright, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Burks, 437 U.S. at 11.

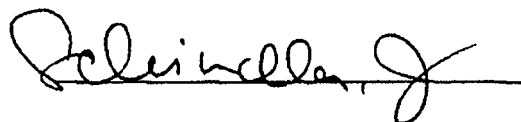
Because the prosecutor did not request the court instruct the jury on the lesser included crime of murder in the second degree, we cannot remand to enter a judgment

¹³ We note the State cites no case and through independent research we have found no case where motive alone supports a jury finding of premeditation. See, e.g., Finch, 137 Wn.2d at 792; Pirtle, 127 Wn.2d at 644-45; Gentry, 125 Wn.2d at 600-01; Hoffman, 116 Wn.2d at 83-84; State v. Howard, 182 Wn. App. 91, 104, 328 P.3d 969 (2014); State v. Cortes Aguilar, 176 Wn. App. 264, 273-74, 308 P.3d 778 (2013).

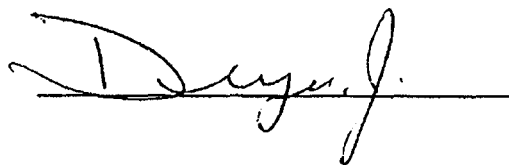
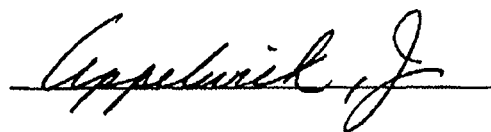
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on murder in the second degree. In re Pers. Restraint of Heidari, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012).

We reverse, vacate the conviction for premeditated murder in the first degree, and remand to dismiss the conviction with prejudice.

A handwritten signature in cursive script, appearing to read "Schneider J", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dwyer J", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Applegate J", written over a horizontal line.

APPENDIX

B

INSTRUCTION NO. 12

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) During the period of time intervening between the 1st day of October, 1990, through the 30th day of October, 1990, the defendant Bruce Allen Hummel caused the death of Alice Kristina Hummel;

(2) That the defendant acted with intent to cause the death of Alice Kristina Hummel;

(3) That the intent to cause the death was premeditated;

(4) That Alice Kristina Hummel died as a result of the defendant's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX

C

Appendix C

Murder in the first degree.

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person.

Wash. Rev. Code Ann. § 9A.32.030 (West)

Murder in the second degree

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person.

Wash. Rev. Code Ann. § 9A.32.050 (West)

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Please see attached Respondent/Petitioner's Petition for Review and Motion for Leave to File Overlength Brief.

The brief and motion previously filed had the wrong Court of Appeals number. I apologize for the error.

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