

FILED
Court of Appeals
Division II
State of Washington
3/27/2019 12:22 PM

97006-8

No. 50065-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ODIES D. WALKER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

The Honorable John R. Hickman, Judge

PETITION FOR REVIEW

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
<u>Table of Authorities</u>	iii
A. IDENTITY OF PETITIONER	1
B. DECISION OF COURT OF APPEALS	1
C. ISSUES PRESENTED FOR REVIEW	1
D. STATEMENT OF THE CASE	1
1. <u>Procedural history</u>	1
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	2
1. <u>THE STATE BORE THE BURDEN TO PROVE KURT HUSTED WAS KILLED WITH PREMEDITATED INTENT</u>	2
<i>a. The State did not prove premeditation because it did not prove that Walker engaged in conscious deliberation and reflection over more than a moment in time</i>	3
F. CONCLUSION	6

TABLE OF AUTHORITIES

WASHINGTON CASES

Page

<i>State v. Bingham</i> , 105 Wash.2d 820, 719 P.2d 109 (1986).....	5
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	4, 6
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	4
<i>State v. Hoffman</i> , 116 Wash.2d 51, 804 P.2d 577 (1991)	3, 6
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	
<i>State v. Hummel</i> , 196 Wn. App. 329, 383 P.3d 592 (2016)	3, 5
<i>State v. Ollens</i> , 107 Wash.2d 848, 733 P.2d 984 (1987).....	4
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995)	4, 5
<i>State v. Robtoy</i> , 98 Wash.2d 30, 653 P.2d 284 (1982).....	4
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976 (2015)	2
<i>State v. Walker</i> , 2019 WL 952546, (slip op. filed February 26, 2019)	2

UNITED STATES CASES

Page

<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)	4
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	4

REVISED CODE OF WASHINGTON

Page

RCW 9A.32.020(1).....	3, 5
RCW 9A.32.030(1)(a)	3
RCW 9A.32.050(1)(a)	3

CONSTITUTIONAL PROVISIONS

Page

Wash. Const. art. 1, § 3	4
U. S. Const. Amend. XIV	4

COURT RULES

Page

RAP 13.4(b)(1)	2
RAP 13.4(b)(2)	2

A. IDENTITY OF PETITIONER

Petitioner, Odies Walker, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Walker seeks review of the unpublished opinion of the Court of Appeals in cause number 50065-5-II, filed February 26, 2019. A copy of the decision is in the Appendix A at pages A-1 through A-12.

C. ISSUE PRESENTED FOR REVIEW

1. To obtain a conviction for aggravated first-degree murder, the prosecution was required to prove that Mr. Walker premeditated an intent to kill Loomis guard Kurt Husted. In this case, the evidence showed that accomplice Calvin Finley, entered the Walmart with Marshawn Turpin intending to commit robbery, and that Finley shot Mr. Husted only after he refused to give him the money. Should this Court accept review where the aggravated first-degree murder conviction infringed on Mr. Walker's Fourteenth Amendment right to due process because it was based on insufficient evidence?

D. STATEMENT OF THE CASE

1. **Procedural history:**

Odies Walker was convicted on remand of first degree premeditated

murder, first degree felony murder, first degree assault, first degree solicitation to commit robbery, and first degree conspiracy to commit robbery, following Walker's role in robbery and murder of Loomis guard Kurt Husted on June 2, 2009. *State v. Walker*, 2019 WL 952546, (slip op. filed February 26, 2019).

Walker was previously convicted of aggravated first degree murder, first degree murder (felony murder), first degree assault, first degree robbery, solicitation to commit first degree robbery, and conspiracy to commit first degree robbery and the case was remanded for new trial. *State v. Walker*, 182 Wn.2d 463, 469, 341 P.3d 976 (2015).

By unpublished opinion filed February 26, 2019, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion.

Walker now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. THE STATE BORE THE BURDEN TO PROVE THAT KURT HUSTED WAS KILLED WITH PREMEDITATED INTENT

The State bore the burden to prove that Loomis guard Kurt Husted was murdered with premeditated intent. RCW 9A.32.030(1)(a). The essential element of premeditation distinguishes murder in the first degree from murder in the second degree. *State v. Hummel*, 196 Wn. App. 329, 353, 383 P.3d 592 (2016); RCW 9A.32.050(1)(a). A person is guilty of aggravated first degree murder when “[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.” RCW 9A.32.030(1)(a).

a. The State did not prove premeditation because it did not prove that Walker engaged in conscious deliberation and reflection over more than a moment in time.

The State did not prove the killing of Mr. Husted was premeditated because the evidence does not establish that Mr. Walker deliberated for more than a moment in time before saying “shoot the m*****r and hurry up” to Finley after Husted did not immediately give the money bag to Calvin Finley and Marshawn Turpin. 8RP at 869.

“Premeditation must involve more than a moment in time; it is defined as 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.” *State v. Hoffman*, 116 Wash.2d 51, 82-83, 804 P.2d 577 (1991) (footnotes omitted). See also, RCW 9A.32.020(1). “Premeditation”

involves a deliberate formation of and reflection on the intent to take a human life and includes the mental process of thinking beforehand, deliberation, reflection, and weighing or reasoning for a period of time, however short. *State v. Gentry*, 125 Wn.2d 570, 597–98, 888 P.2d 1105 (1995) (quoting *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987)). Premeditation can be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury’s verdict is substantial. *Id.* at 83, 804 P.2d 577. Factors relevant to establish premeditation include motive, procurement of a weapon, stealth, and method of killing. *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995).

Due process required the State to prove this essential element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); U.S. Const. amend. XIV; Const. art. I, § 3.

The critical inquiry on review is to “determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” *Jackson*, 443 U.S. at 316-19. 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 reasonable doubt.” *Id.*

Intent and premeditation are not synonymous. Premeditation cannot simply be inferred from the existence of a criminal intent. Typically, circumstantial proof of premeditation requires some showing that the perpetrator planned the killing ahead of time or demonstrated clear intent to kill over more than a moment in time (i.e. multiple shots to the head). RCW 9A.32.020(1). Premeditation “must involve more than a moment in 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). The State must prove “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.” *Hummel*, 196 Wn. App. at 354 (quotation marks and citations omitted). Premeditation may be proved through circumstantial evidence but inferences based on circumstantial evidence must be reasonable and cannot be based on speculation. *Id.* at 355, 358. See also *State v. Bingham*, 105 Wash.2d at 827, 719 P.2d 109 (“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 Wash.2d at 82–83; *Gentry*, 125 Wash.2d at 597–98.

Even when considered in a light most favorable to the state, the evidence did not establish a premeditated intent to kill. First, Mr. Walker’s stated intent (according to Williams-Irby), was to commit robbery. 8 RP at 820. The plan as arranged was to rob the armored car driver. Second, although Finley had a gun when he entered the WalMart, he did not immediately shoot Mr. Husted. 8 RP at 869. Finley demanded money and he fired only when Mr. Husted refused to give him the moneybag. According to Williams-Irby, the guard laughed at Finley and at that time Mr. Walker told him to shoot the guard. Finley fired a single shot into Mr. Husted’s head, killing him. 7RP at 661. The record shows that although Finley had a gun and that, according to Williams-Irby, said “do whatever you have to do” when planning the robbery (8 RP at 820), the actual statement by Walker to shoot the guard (according to Williams-Irby) was done instantaneously without deliberation after Finley told him the guard did not give the moneybag to Turpin. For the reasons discussed in the brief filed in the Court of Appeals, in light of the State’s failure to establish premeditation, Walker’s first degree murder conviction violates due process. Walker respectfully requests that this Court accept review.

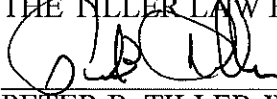
F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced error in the unpublished opinion of the court below that

conflict with prior decisions of this Court and the courts of appeals.

DATED: March 27, 2019.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for Odies D. Walker

CERTIFICATE OF SERVICE

The undersigned certifies that on March 27, 2019, that this Appellant's Petition for Review was sent by the JIS link to Derek Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

Michelle Hyer
Pierce County Prosecutor
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
PCpatcecf@co.pierce.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Odies D. Walker
DOC # 349910
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 27, 2019.



PETER B. TILLER

APPENDIX A

February 26, 2019

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

STATE OF WASHINGTON,

Respondent,

v.

ODIES DELANDUS WALKER,

Appellant.

No. 50065-5-II

UNPUBLISHED OPINION

Lee, J. — Odies D. Walker appeals his convictions for aggravated first degree murder, first degree assault, first degree robbery, solicitation to commit first degree robbery, and conspiracy to commit first degree robbery resulting from Walker's role in a robbery and shooting that occurred at a Lakewood Wal-Mart. Walker argues that (1) there was insufficient evidence of premeditation to support the jury's verdict finding Walker guilty of aggravated first degree murder, (2) he received ineffective assistance of counsel, and (3) the trial court improperly influenced the jury's verdict on the first degree assault. We affirm.¹

FACTS

Walker was convicted of aggravated first degree premeditated murder, first degree felony murder, first degree assault, first degree robbery, first degree solicitation to commit robbery, and

¹ Walker asks us to decline to impose appellate costs if the State prevails in this appeal. The State represents that it will not be seeking appellate costs. Given the State's representation, no appellate costs will be imposed.

No. 50065-5-II

first degree conspiracy to commit robbery for his role in planning and executing the 2009 robbery of a Lakewood Wal-Mart that resulted in the death of Loomis security guard Kurt Husted. *State v. Walker*, 182 Wn.2d 463, 469-71, 475, 341 P.3d 976 (2015), *cert. denied*, 135 S. Ct. 2844. In 2015, our Supreme Court reversed Walker's convictions because of prosecutorial misconduct during closing arguments. *Id.* at 480-81, 485.

On remand, the State charged Walker with first degree aggravated murder (Count I), first degree murder (felony murder) (Count II), first degree assault (Count III), first degree robbery (Count IV), solicitation to commit first degree robbery (Count V), and conspiracy to commit first degree robbery (Count VI). On Count I, the State charged an aggravating circumstance alleging that the murder was committed in the course of, in furtherance of, or in immediate flight from first or second degree robbery. The State also alleged separate aggravating circumstances on Count II. And the State included firearm enhancements for both murder charges, the first degree assault, and the first degree robbery. Walker's second jury trial began in January 2017.

The parties stipulated that, on June 2, 2009, Calvin Finley killed Kurt Husted at the Lakewood Wal-Mart. Husted was a Loomis security guard performing the daily deposit pick up at the Lakewood Wal-Mart. The bullet that killed Husted, also struck Wilbert Pina, a Wal-Mart customer, in the shoulder.

The State presented the testimony of numerous other witnesses over seven days of trial. Tonie Williams-Irby was Walker's girlfriend at the time of the robbery. Before the robbery, Williams-Irby and Walker lived together near the Lakewood Wal-Mart. Williams-Irby testified that she heard multiple conversations between Walker, Finley and others planning the robbery.

No. 50065-5-II

During one conversation, Williams-Irby heard Finley and Walker discussing how to accomplish getting the money from the guard. When discussing killing the guard, Walker told Finley, "Do whatever you have to do." 8 Verbatim Report of Proceedings (VRP) at 820.

Williams-Irby also testified that, after the robbery, Walker discussed the robbery with her. Walker told Williams-Irby that he was on the phone talking to Finley during the robbery. Williams-Irby testified,

Well, [Finley] called [Walker] to tell him that when he asked for the moneybag, the guy laughed at him. So [Walker] said shoot the m*****r and hurry up.

8 VRP at 869.

Jessie Lewis also testified at trial. Walker had talked to Lewis about being the shooter in a robbery of an armored car guard at the Lakewood Wal-Mart. Walker told Lewis that Marshawn Turpin would call when the guard went into the store, Finley would grab the money, Lewis would be the shooter, and Walker would drive the get-away car. Before June 2, Lewis, Walker, Finley, and Turpin went to the Lakewood Wal-Mart to rob the armored car courier. Walker gave Lewis a 9-millimeter handgun, which Lewis carried with him into the Wal-Mart. However, Lewis changed his mind and walked out of the Wal-Mart without engaging in the planned robbery, so the robbery did not happen on that day.

The trial court instructed the jury that on aggravated murder in the first degree charge (Count I):

If you find the defendant guilty of premeditated murder in the first degree as charged in Count I and as defined in Instruction 13, you must then determine whether the following aggravating circumstances exists:

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree.

No. 50065-5-II

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

For the aggravating circumstances to apply, the defendant must have been a major participant in acts causing the death of Kurt Husted and the aggravating factors must specifically apply to the defendant's actions. The State has the burden of proving this beyond a reasonable doubt. If you have a reasonable doubt whether the defendant was a major participant, you should answer the special verdict "no."

Clerk's Papers (CP) at 1047.

The trial court also provided the jury with a special verdict form that stated:

We, the jury, having found the defendant guilty of premeditated murder in the first degree, Count I, on verdict form A, return a special verdict by answering as follows:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree.

CP at 1055.

The jury began deliberations on February 8. On February 13, the jury informed the trial court that it had reached its verdicts in the case. While reading the verdicts, the trial court discovered the jury had improperly completed the verdict forms for first degree assault and the lesser included charge of second degree assault. The trial court stated it wanted "to give the jury a fair opportunity to make sure that whatever decision you did make regarding whether it was Verdict Form D or E, that the correct verdict form is, in fact, filled out." 13 VRP at 2447. The trial court instructed the jury to "make sure that you fill out the verdict form that reflects your

decision, which is either D or E.” 13 VRP at 2447. The jury was sent back to complete the verdict forms again. The jury found Walker guilty as charged.

Before sentencing, Walker filed a motion to dismiss the aggravating factor alleged in Count I. Walker argued that, although the jury was instructed that the jury had to find beyond a reasonable doubt that Walker was a major participant for the aggravator to apply, the jury should have been given a definition of major participant and a special verdict form asking if Walker was a major participant. The trial court denied the motion because the defense did not request any jury instructions defining “major participant” or any aggravating circumstances special verdict form.

At the sentencing hearing, the State acknowledged that a 2013 affidavit from Finley absolving Walker of culpability for the robbery and murder was anonymously sent to the trial court after the jury had reached its verdicts. For the purposes of the record, the State filed a responsive declaration from the lead detective on the case, which stated Finley’s declaration was contrary to numerous statements that Finley had previously made during the investigation. However, the State requested that the trial court take no other action on the Finley affidavit. Walker’s defense counsel stated, “The defense has no comment.” 19 VRP at 2472. The trial court stated it was not taking any further action. The trial court merged the two murder verdicts and imposed the statutorily proscribed sentences.

Walker appeals.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE - PREMEDITATION

Walker argues that there was not sufficient evidence of premeditation to support the jury's verdict for first degree aggravated murder. We hold that the State presented sufficient evidence of premeditation to support the jury's verdict.

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When sufficiency of the evidence is challenged, all reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. *Id.* A claim of insufficiency of the evidence "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We do not review credibility determinations made by the trier of fact. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To prove aggravated first degree murder, the State must prove the defendant caused the death of another person with premeditated intent and the existence of at least one statutory aggravating factors.² RCW 10.95.020; RCW 9A.32.030(1)(a). "[T]he premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a

² In this case, the State alleged the murder "was committed in the course of, in furtherance of, or in immediate flight from. . .robbery in the first or second degree." RCW 10.95.020(1)(a). Walker does not challenge the sufficiency of the evidence supporting the aggravating factor.

moment in point of time.” RCW 9A.32.020(1). 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, or reasoning for a period of time, however short.’ ” *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) *cert. denied*, 518 U.S. 1026 (1996)).

Here, Williams-Irby testified that she heard Walker engaged in multiple conversations regarding planning the Wal-Mart robbery. During one of these conversations Walker specifically discussed the possibility of killing the guard and told Finley, “Do whatever you have to do.” 8 VRP at 820. And Williams-Irby testified that after the robbery Walker told her that he was on the phone with Finley during the robbery and told Finley to “shoot the m*****r and hurry up,” when Husted did not immediately give Finley the money. 8 VRP at 869.

In addition, Lewis testified that he participated in planning the robbery before he decided to not go through with robbery. Lewis believed Walker intended him to be the shooter and provided Lewis with a gun to use in the robbery.

Williams-Irby’s and Lewis’ testimony show that before the robbery, Walker reflected on the possibility of taking the guard’s life to effectuate the robbery. And during the robbery, Walker ordered the killing. Thus, Walker ordered the killing of the armored car guard after having previously spent time thinking about killing the guard during the planning of the robbery. The jury found Williams-Irby’s and Lewis’ testimony credible, and we will not review that determination. The evidence is sufficient to prove premeditation. Therefore, the State presented sufficient evidence to support the jury’s verdict for aggravated first degree murder.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). An ineffective assistance of counsel claim is a mixed question of fact and law that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. *Grier*, 171 Wn.2d at 32-33 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If the defendant fails to satisfy either prong, the defendant's ineffective assistance of counsel claim fails. *Id.*

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* We engage in a strong presumption that counsel's performance was reasonable. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing that " 'there is no conceivable legitimate tactic explaining counsel's performance.' " *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Recently, our Supreme Court held that the record before this court must be sufficient for us to determine what counsel's reasons for the decision were in order to evaluate whether counsel's reasons were legitimate. *State v. Linville*, 191 Wn.2d 513, 524-25, 423 P.3d 842 (2018). If counsel's reasons for the challenged action are outside the record on appeal, the defendant must bring a separate collateral challenge. *Id.* at 525.

Prejudice is established if the defendant can show that “but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862.

1. Failure to Investigate

Walker argues that his counsel’s performance was deficient by failing to take any action in regard to Finley’s affidavit when it was anonymously mailed to the court. Specifically, Walker argues that defense counsel should have investigated the affidavit or filed a motion for a new trial based on newly discovered evidence. However, based on *Linville*, the record before us on direct appeal is insufficient to make a determination regarding whether defense counsel’s performance was deficient.

Here, the record before us contains no information regarding what defense counsel did regarding the affidavit or why. There is no way of knowing when defense counsel learned of the affidavit or what action defense counsel took regarding the affidavit. And although the record is clear that defense counsel did not file any post judgment motions for relief based on the affidavit, there is nothing in the record that provides counsel’s reasons for not filing any post judgment motions for relief. Because the appellate record does not establish all of what defense counsel did or did not do or the reasons behind defense counsel’s decisions, the record is insufficient for Walker to demonstrate deficient performance related to the affidavit. Therefore, under *Linville*, Walker must bring a separate collateral challenge.

2. Major Participant Jury Instructions

Walker also argues that defense counsel was deficient for failing to propose an instruction defining “major participant” for the purposes of the aggravating factor for premeditated murder and for failing to propose a special verdict specifically asking for a finding that Walker was a major participant. But Walker only argues that he was prejudiced because “[g]iven the limited circumstantial evidence and shortcomings regarding witness credulity, in particular Ms. Williams-Irby, there is a reasonable probability that, but for counsel’s deficient investigation, the court may have granted an instruction defining ‘major participant.’ ” Br. of App. at 42.

However, to show prejudice, Walker is not required to show that the trial court would have granted the request defense counsel should have made. Rather, Walker must show that either an instruction defining “major participant” or a special verdict form specifically asking if Walker was a major participant would have resulted in a “no” verdict on the aggravating factor. *See Kylo*, 166 Wn.2d at 862 (to show prejudice, the defendant must show that the outcome of the proceeding would have been different). Walker makes no effort to show that he was prejudiced by defense counsel’s performance under the appropriate standard.

An even if Walker had argued that he was prejudiced under the appropriate standard, his argument would fail. Case law does not provide or require a definition of “major participant,” as long as the major participant requirement is included in the aggravating factor instruction. *State v. Whitaker*, 133 Wn. App. 199, 232-33, 135 P.3d 923 (2006), *review denied*, 159 Wn.2d 1017, *cert. denied*, 552 U.S. 948 (2007); *State v. Thomas*, 150 Wn.2d 821, 842-43, 83 P.3d 970 (2004). But, the jury was properly instructed that in order for the aggravator for premeditated murder to

apply, Walker had to be a major participant in the robbery. And the jury was instructed that if Walker was not a major participant, they should answer the special verdict form “no.”

Walker fails to show prejudice resulting from defense counsel’s failure to request a jury instruction defining “major participant” or proposing special verdict form specifically find that Walker was a major participant.

C. IMPROPERLY INFLUENCING THE VERDICT

Walker argues that the trial court improperly influenced the jury’s verdict. We disagree.

The trial court is prohibited from improperly influencing the jury’s verdict through interference with the deliberative process. *State v. Boogaard*, 90 Wn.2d 733, 739-40, 585 P.2d 789 (1978). However, the judicial interference must take place during the jury’s deliberations. *State v. Ford*, 171 Wn.2d 185, 189, 250 P.3d 97 (2011), *cert denied*, 565 U.S. 1269 (2012). If the jury indicates that deliberations have ended by informing the trial court they have reached a unanimous verdict, the trial court does not improperly influence the jury by asking the jury to correct improperly filled out or blank jury forms. *Id.* at 190.

Here, the jury clearly indicated that it had finished deliberating and reached unanimous verdicts. It was only after this point that the trial court required the jury to correct the improperly filled out verdict forms. The trial court did not tell the jury how to fill them out—the trial court only asked the jury to ensure the verdict forms reflected the jury’s verdict. Because deliberations had ended, the trial court did not improperly influence the jury’s verdict by telling the jury to fill out the verdict forms to properly reflect its verdicts.

Walker also argues that the trial court violated CrR 6.15(f)(2). CrR 6.15(f)(2) states,

No. 50065-5-II

After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

However, once the jury has completed its deliberations, CrR 6.15(f)(2) “has no application.” *Ford*, 171 Wn.2d at 191. As explained above, the jury had completed its deliberations and informed the trial court that it had reached a verdict. Accordingly, CrR 6.15(f)(2) does not apply here.

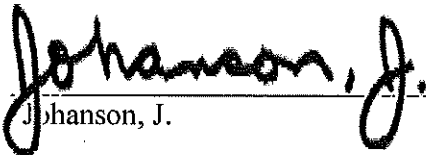
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




Lee, J.

We concur:



Johnson, J.



Maxa, C.J.

THE TILLER LAW FIRM

March 27, 2019 - 12:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50065-5
Appellate Court Case Title: State of Washington, Respondent v. Odies Walker, Appellant
Superior Court Case Number: 09-1-02784-8

The following documents have been uploaded:

- 500655_Petition_for_Review_20190327122038D2552815_5894.pdf
This File Contains:
Petition for Review
The Original File Name was 20190327121705707.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Sender Name: Becca Leigh - Email: bleigh@tillerlaw.com

Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20190327122038D2552815