

FILED

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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 13417.7
COA No. 46569-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARCUS ALLEN MORRISON,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 4

B. COURT OF APPEALS DECISION 4

C. ISSUES PRESENTED FOR REVIEW..... 4

D. STATEMENT OF THE CASE..... 5

E. ARGUMENT 5

 1. THE COURT SHOULD GRANT REVIEW BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MORRISON ACTED WITH PREMEDITATION 6

 2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MORRISON, WHO WAS HIGHLY INTOXICATED AT THE TIME OF THE OFFENSE, ACTED WITH INTENT 10

F. CONCLUSION 14

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	6
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	7
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986).....	9
<i>State v. Bolen</i> , 142 Wash. 653, 666, 254 P. 445 (1927).....	10
<i>State v. Brooks</i> , 97 Wn.2d 873, 651 P.2d 217 (1982).....	8
<i>State v. Craven</i> , 67 Wn. App. 921, 841 P.2d 774 (1992).	7
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	7
<i>State v. Dunbar</i> , 117 Wn.2d 587, 817 P.2d 1360 (1991).....	8
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995);.....	8,9
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<i>State v. Lane</i> , 112 Wn.2d 464, 472, 771 P.2d 1150 (1989).....	9

State v. Neslund, 50 Wn. App. 531, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988).....9

State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992).....8

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245, cert. denied, 518 U.S. 1026 (1995)8

State v. Price, 103 Wn.App. 845, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014 (2001).....8

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....6,7

State v. Weaver, 60 Wn.2d 87, 371 P.2d 1006 (1962).....7

UNITED STATES CASES **Page**

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)6

In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....6

REVISED CODE OF WASHINGTON **Page**

RCW9A.32.020(1).....8

RCW 9A.28.020(1).....7

RCW 9A.32.030(1)(a).....7

CONSTITUTIONAL PROVISIONS **Page**

Washington Constitution art. 1, § 36

A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Marcus Morrison, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Morrison seeks review of Division Two's order denying the previously-filed Motion to Modify the Commissioner's ruling in *State v. Morrison*, No.46569-8-4 II filed January 22, 2016, and the ruling of Court Commissioner, filed August 19, 2015. No Motion for Reconsideration has been filed in the Court of Appeals. A copy of the Order Denying Motion to Modify is attached.

C. ISSUE PRESENTED FOR REVIEW

1. The Fourteenth Amendment's Due Process Clause requires the State prove every element of the offense beyond a reasonable doubt. Premeditation is an essential element of attempted first degree murder. Should this Court grant review and hold that the State has failed to sustain its burden where the State's evidence established only that Morrison assaulted the victims impulsively and in "heat of passion," did the trial court err and deprive Morrison of due process by entering convictions for attempted first degree murder without providing the element of premeditation? RAP 13.4(b)(3); RAP 13.4(b)(4).

2. In order to prove attempted first degree murder, the State bears the burden of proving beyond a reasonable doubt that Morrison acted with premeditated intent. Should this Court grant review where the evidence produced by the defense showed his ability to premeditate was diminished due to the combination of alcohol and drugs, thus depriving Morrison of his right to due process by entering the convictions for attempted first degree murder? RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

On January 12, 2015, Morrison filed a brief alleging that the trial court had erred in regards to the above-indicated issues. The brief set out facts and law relevant to this petition and are hereby incorporated herein by reference.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. THE COURT SHOULD GRANT REVIEW BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MORRISON ACTED WITH PREMEDITATION

Principles of due process require the State to prove all essential elements of the crime charged beyond a reasonable doubt. U.S. Const. amends. 5, 14; Const. art, I, § 3; *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and requires it be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of

guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rationale trier of fact to find guilty beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing *State v. Weaver*, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Morrison was convicted to two counts of attempted first degree murder. Under RCW 9A.32.030(1)(a), in order to sustain a conviction for first degree murder, the State has the burden of proving beyond a reasonable doubt that a defendant, "[w]ith a premeditated intent to cause the death of another person, . . . causes the death of such person or of a third person." Morrison was convicted to two counts of attempted first degree murder. Under RCW 9A.32.030(1)(a), in order to sustain a conviction for first degree murder, the State has the burden of proving beyond a reasonable doubt that a defendant, "[w]ith a premeditated intent to cause the death of another person, . . . causes the death of such person or of a third person." The required element of premeditation distinguishes first from second degree murder. *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982). Premeditation requires "more than a moment in point of time" and "the deliberate formation of and reflection upon the intent to take a human life." RCW 9A.32.020(1); *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284

(1982). In addition, premeditation requires "the mental process of thinking beforehand, deliberation, reflection, 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. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987)). In this case there is no evidence Morrison at any time formed the intent to kill, much less deliberated and reasoned about it.

Under RCW 9A.28.020(1), "[a] person is guilty of an attempt commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." Thus, attempted first degree murder requires proof that the defendant not only formed premeditated intent to cause the death of the victim or victims, and also the additional requirement of proof that the defendant took a substantial step toward committing the offense. *State v. Price*, 103 Wn.App. 845, 851, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014 (2001). See also, *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991) (offense of attempted murder requires the specific intent to kill and any lesser mens rea does not suffice).

Premeditation must involve "more than a moment in point of time," and a mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, cert. denied, 518 U.S. 1026 (1995). Instead, the

element of 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." *Pirtle*, 127 Wn.2d at 644, quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). 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. *Pirtle*, 127 Wn.2d at 643; *Gentry*, 125 Wn.2d at 597; *State v. Neslund*, 50 Wn. App. 531, 558, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988).

Premeditation is the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). The premeditation required in order to support a conviction for the crime of attempted murder in the first degree must involve more than a moment of time and, merely because a defendant had the time and the opportunity to deliberate, that is insufficient to support a finding of premeditation. *Bingham*, 105 Wn.2d at 824. Therefore, the State must prove a defendant in fact did deliberate or reflect upon the killing of another before it can sustain a conviction for murder in the first degree.

The State bears the burden of proving premeditation beyond a reasonable doubt. *State v. Lane*, 112 Wn.2d 464, 472, 771 P.2d 1150 (1989). In *State v. Bingham*, the Court determined that showing only that a person had the opportunity to deliberate is not conclusive evidence they in fact did deliberate and form the intent to kill. *State v. Bingham*, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). In *Bingham*, the defendant choked a woman to death. *Id.* at 821. The State argued that because of the time it takes to strangle a person to death, the defendant had time to form the intent to kill. The Court ruled that having the opportunity to deliberate without more is not conclusive evidence that one actually deliberated. *Id.* at 827.

Also in *Bingham*, the Court stated "The planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to a jury." *Id.* at 827, citing *State v. Tikka*, 8 Wn. App. 736, 509 P.2d 101 (1973). The case described and cited in *Bingham*, however (*State v. Griffith*, 91 Wn.2d 572, 589 P.2d 799 (1979)), the defendant placed a gun where he could easily reach it in anticipation of someone coming to his door. *Bingham*, 105 Wn.2d at 827. It makes sense that when one brings a gun into a situation, the conclusion that their intent is to kill is easy to reach. Just as in *Bingham*, the mere presence of the hammer without more does not

conclusively prove intent to kill. The nature of the weapon should be taken into consideration along with the motivation of the defendant. The weapon in this case is not one that immediately springs to mind as a likely lethal weapon. The court should, therefore, require more than just the use of the hammer as a weapon before declaring it alone indicates premeditation in this action.

Here, the State proved only that Morrison acted impulsively and in the "heat of passion," but failed to prove premeditation.

In support of a lack of premeditation, there is no evidence of prior planning by Morrison. In assaulting both victims, there was little stealth utilized by Morrison; he went into the bedroom, apparently unconcerned that Mr. Warner's roommate was in the house. The State proved only that the assaults were committed by Morrison, who was undoubtedly enraged by what he viewed as a fundamental betrayal by a close friend and his former girlfriend, and that Mr. Morrison acted in an apparent fit of rage. This is insufficient to prove the assaults were committed with premeditation.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MORRISON, WHO WAS HIGHLY INTOXICATED AT THE TIME OF THE OFFENSE, ACTED WITH INTENT

As indicated in Section 1 of this petition, the defendant contends the

evidence of the previous assault in no way showed premeditation or intent to kill on Morrison's part. As defined in RCW 9A.32.020, premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time. Under RCW 9A.08.010, a person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime. Specific intent is an intent to produce a specific result, as opposed to an intent to do the physical act. As noted *Supra*, "Premeditated intent" is one of the elements of the crime the State must prove beyond a reasonable doubt in order for Morrison to be found guilty of the crime with which he was charged. Premeditation is an element separate and distinct from the specific intent to kill required for first degree murder. The evidence showed that he was highly intoxicated and upset by his friend's actions. Beyond that, the evidence does not show that Morrison's had any particular animosity or other motive to attempt to kill the victims. Morrison was too intoxicated to know that the hammer and the way he used it was extremely destructive—he simply had no sense of proportion about what he was doing. He did not attempt to hide after incident the and he probably did not reflect the gravity of what he had done before he sobered up.

Morrison presented the testimony of Dr. Larsen to support the argument that he lacked the ability to act with premeditation or form the

intent to commit the offenses because of alcohol and drug intoxication at the time of the incident. 4RP at 355-70.

Dr. Larsen testified regarding the amount of alcohol and various narcotics Mr. Morrison had ingested on the night of the incident. This included thirty milligrams of morphine, four milligrams of Dilaudid, and a significant amount of alcohol. 4RP at 364. Dr. Larsen opined that Mr. Morrison's alcohol level—which he stated was approximately .3 grams per liter—compounded the effects of the morphine and Dilaudid, leading to the possibility of memory loss and impaired cognitive abilities. 4RP at 365. Dr. Larsen testified that the combination of drugs and alcohol would allow him to walk, talk, and perform other basic functions, but that his cognitive ability would be impaired, which would have impacted Mr. Morrison's ability to premeditate the intent to kill or understand the outcome of his actions. 4RP at 366, 369.

Here, the State failed to prove Mr. Morrison acted with the requisite premeditated intent where the weight of the evidence proved he lacked the capacity to either premeditate the offenses. Dr. Larsen testified about the effects of the drugs in Mr. Morrison's system at the time of the incident and noted that the large amount of alcohol that Mr. Morrison consumed magnified the effects of the drugs. 4RP 364. In addition, the combination of substances would have altered Mr. Morrison's perception

of reality, potentially cause memory loss, and impacted his ability to premeditate. 4RP 369.

Diminished capacity was disregarded by the jury, when the evidence was overwhelming that Morrison failed to premeditate, and lacked the specific intent to attempt to kill either victim. See *State v. Eakins*, 127 Wn.2d 490, 502, 902 P. 2d 1236 (1995); *State v. Ellis*, 136 Wn. 2d 498, 963 P. 2d 843 (1998). The evidence just does not point to Morrison making a conscious deliberated intent to attempt to kill the victims. Such a finding by the jury in this case was more an emotional response to the horrendous facts in this case and a need to hold someone responsible.

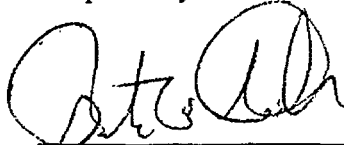
The Court of Appeals' affirmance of Morrison's convictions was based on a cursory assessment of the facts and merits review by this Court.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse and remand consistent with the arguments presented herein.

DATED this 14th day of February, 2016.

Respectfully submitted:

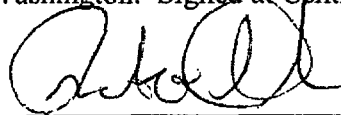


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Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on February 19, 2016, copy of the Petition for Review, was sent via JIS link to the Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and true and correct copies were mailed by first class mail, postage prepaid Ms. Anne Cruser, Deputy Prosecuting Attorney, Clark County Prosecutor's Office, PO Box 5000, Vancouver, WA 98666 and to the appellant, Mr. Marcus Allen Morrison, DOC #897402, 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 February 19, 2016.



PETER B. TILLER

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,
v.
MARCUS ALLEN MORRISON,
Appellant.

No. 46569-8-II

ORDER DENYING MOTION TO MODIFY

FILED APPEALS
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DIVISION II
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APPELLANT filed a motion to modify a Commissioner's ruling dated August 19, 2015, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 28th day of January, 2015.

PANEL: Jj. Melnick, Lee, Bjorgen

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

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