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Supreme Court No. 99381-5
(Court of Appeals No. 51822-8-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARKANGEL HOWARD,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Arkangel Howard concedes the State proved second-degree murder. The court instructed the jury on this crime, and convictions may be entered for this offense. But the Court of Appeals affirmed convictions for *first-degree* murder based on evidence that does not pass muster under the Due Process Clause and this Court's decision in *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). The opinion in Mr. Howard's case "obliterates the distinction between first and second degree murder[,]" *id.* at 826, by finding sufficient evidence of premeditation where the killing was quick and there was no evidence of motive, arguments, or threats.

As to sentencing, the Court of Appeals' published opinion counted a prior Oregon conviction in the offender score based on "factual comparability." The decision violates the Sixth Amendment and conflicts with decisions of this Court, the U.S. Supreme Court, and Division One of the Court of Appeals. A different opinion of this Court contributed to the confusion, and the Court of Appeals has struggled to reconcile incompatible cases. Because of the constitutional issues at stake and the conflicts among published cases, this Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Arkangel Howard, petitioner here and appellant below, asks this Court to review the part-published opinion of the Court of Appeals in

State v. Howard, ___ Wn. App. 2d ___, ___ P.3d ___(No. 51822-8-II, Filed December 8, 2020), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The State is required to prove the element of premeditation beyond a reasonable doubt to sustain a conviction for first-degree murder. Here, the State presented no evidence of a motive and no evidence that Mr. Howard made any threats or statements indicating premeditation. The State presented evidence that Mr. Howard and the victims were friends, that they were chatting calmly just before the shooting, that Mr. Howard always carried a gun for self-protection, and that the shooting was "quick." Did the State present insufficient evidence to prove premeditation, requiring reversal and remand for entry of convictions on second-degree intentional murder? And should this Court grant review because the court's conflation of first-degree murder and second-degree murder violates due process and is contrary to this Court's decision in *Bingham*? RAP 13.4(b)(1), (3).

2. The Sixth and Fourteenth Amendments and the Sentencing Reform Act prohibit including an out-of-state conviction in a defendant's offender score if the elements of the foreign crime are broader than those of the Washington crime. Nevertheless, Division Two held Mr. Howard's out-of-state conviction for a concededly broader crime must be included in

his offender score based on "factual comparability." Did Division Two err in this case, and should this Court grant review because (a) the decision in this case conflicts with a U.S. Supreme Court case, (b) the decision in this case conflicts with a recent Division One case, and (c) this Court's cases on the issue are inconsistent and have resulted in tortured attempts by the Court of Appeals to reconcile the case law? RAP 13.4(b)(2), (3), (4).

D. STATEMENT OF THE CASE

Arkangel Howard agreed to help his girlfriend, Valerie Sizemore, move out of her apartment in Vancouver. RP 570, 572, 581. While Ms. Sizemore packed her boxes, Mr. Howard drove her car to Portland. RP 589. There, he enlisted two of his friends, Allen Collins and Jason Benton, to help him bring a truck back to Vancouver to use for the move. RP 593. The three returned to Ms. Sizemore's apartment complex with Ms. Sizemore's car, the borrowed truck, and Mr. Collins's car. RP 606.

Ms. Sizemore went outside to talk to the men. RP 592-93. Neighbor Andrew Kallenberger saw the four in the parking lot and "didn't notice anything" unusual like arguing. RP 659, 665. He said, "It looked like they were just talking." RP 659. Neighbor Cynthia McDaniel was also home, and did not hear any arguing. RP 702.

According to Ms. Sizemore, Mr. Collins was just talking to her about how the car needed gas, when all of a sudden "there was quick

gunfire" and Mr. Collins and Mr. Benton were on the ground with fatal wounds. RP 593-95. The gunshots were "quick. Quick. Like, not even seconds." RP 595.

Neighbors heard gunshots but did not see the shooting. RP 494, 542, 661-63, 671. Mr. Benton died of a single gunshot wound to the head, and Mr. Collins died of three gunshot wounds to the left side of his body. RP 1135, 1143-53.

The State charged Mr. Howard alternatively with two counts of first-degree premeditated murder and two counts of second-degree intentional murder, as well as unlawful possession of a firearm. CP 1-2. Mr. Howard exercised his right to trial. During closing argument, the prosecutor admitted the State was not aware of any motive Mr. Howard would have for shooting his friends. RP 1315, 1344. He also acknowledged the events unfolded rapidly, but stated, "It is up to you, ladies and gentlemen, to decide, to determine what length of time is required for premeditation in this case." RP 1345. The prosecutor noted, "in the event that for whatever reason you feel that the premeditated intent was not proved to you, you have the option of considering the alternative charge of murder in the second degree, which is defined for you in Instruction No. 16." RP 1347.

The jury entered "guilty" verdicts for first-degree murder with firearm enhancements on counts one and two, and unlawful possession of a firearm on count three. CP 80-86.

At sentencing, the court concluded that one of Mr. Howard's two Oregon convictions was comparable to a Washington crime and could be counted in the offender score, but that the other was not comparable. RP 1392-95. The court calculated an offender score of four and sentenced Mr. Howard to 760 months in prison. CP 201-02.

On appeal, Mr. Howard conceded he was guilty of second-degree murder, for which the jury was instructed in the alternative, but argued the convictions for first-degree murder could not stand because the State presented insufficient evidence of premeditation. He also argued the sentencing court should not have included Mr. Howard's prior Oregon conviction in the offender score. The State cross-appealed and argued the sentencing court wrongly excluded the other Oregon conviction from the offender score.

The Court of Appeals held sufficient evidence supported the convictions for first-degree murder. It acknowledged Mr. Howard always carried a gun and did not procure it to shoot his friends. App. A at 13, 19. It acknowledged the shooting was quick and that there was no arguing or any other evidence of motive. App. A at 1, 14. But it used this absence of

evidence to conclude Mr. Howard must have thought it over beforehand, and that the State therefore proved premeditation. App. A at 20. It also concluded that because the second victim happened to be urinating in the bushes at the time of the killing, Mr. Howard must have planned it beforehand. App. A at 20.

On the sentencing issues, the Court of Appeals rejected Mr. Howard's argument that evaluating "factual comparability" is impermissible. App. A at 6-7. Based on its assessment of the facts underlying the prior Oregon convictions, it held the sentencing court wrongly excluded one of the out-of-state convictions from the offender score and wrongly included the other. App. A at 2, 8, 11. The court published its opinion on the sentencing issues. App. A at 2, 12.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' decision affirming the convictions obliterates the distinction between first-degree murder and second-degree murder, contrary to this Court's decision in *Bingham* and Mr. Howard's right to due process.

A conviction based on insufficient evidence violates a defendant's right to due process. *Jackson v. Virginia,* 443 U.S. 307, 316, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); U.S. Const. amend. XIV; Const. art. I, § 3.

To convict a person of first-degree murder, the prosecution must prove beyond a reasonable doubt that the defendant acted with premeditated intent to cause death. RCW 9A.32.030(1)(a); *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986). Premeditation means "'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) (internal citations omitted). "The element of premeditation distinguishes first and second degree murder." *Bingham*, 105 Wn.2d at 823.

Here, the prosecution presented sufficient evidence to prove that Mr. Howard intended to cause death – which is sufficient to sustain convictions for second-degree murder – but it did not present sufficient evidence of premeditation. The Court of Appeals' contrary conclusion violates due process and conflicts with *Bingham.*

As the Court of Appeals conceded, the State presented *no* evidence of threats, *no* evidence of statements indicating premeditation, and *no* evidence of motive. RP 1315, 1344; App. A at 1, 14, 19. The three men were at the apartment complex to help Ms. Sizemore move, and she was in the parking lot chatting with them just before the shooting. RP 570, 572, 581, 589, 592-93; App. A at 12-13. Other witnesses described seeing the

group talking normally – there was no indication anyone was yelling or arguing. RP 659, 665, 702; App. at 14. Ms. Sizemore was not aware of any disputes between Mr. Howard and his friends. RP 609; App A. at 13. Mr. Howard did not procure a weapon to carry out this crime; he always carried a gun in his waistband, and had bought it to protect himself. RP 603-04; App. A at 13, 19. Viewing the evidence in the light most favorable to the State, Mr. Howard simply shot the two in quick succession and drove away. RP 595-96; App. A at 14.

The Court of Appeals stated, "Although the State did not present direct evidence of motive or planning, a reasonable jury could have inferred that Howard planned the murders from the fact that he asked both Collins and Benton to accompany him to Sizemore's home." App. A at 20. But the only evidence the State presented was that Mr. Howard asked Collins and Benton to accompany him in order to bring the truck for Ms. Sizemore's move. RP 581-82, 589. And as the Court of Appeals acknowledged, a person who planned a murder would not shoot two people in a public place in broad daylight. App. A at 19.

While the court admitted there was no evidence of motive because there were no statements, threats, or arguments, the court perversely used that *absence* of evidence to support its ruling on premeditation. App. A at 20. It stated that because there was no evidence of a dispute, that absence

of evidence "supports an inference that the shooting did not occur in the heat of an altercation." App. A at 20. But this hardly proves premeditation as opposed to intent. Courts may not conclude sufficient evidence supports a conviction based on speculation from an absence of evidence. *See Bingham*, 105 Wn.2d at 826; *State v. Irby*, 187 Wn. App. 183, 202, 347 P.3d 1103 (2015).

Finally, the Court of Appeals suggested the State proved premeditation, as opposed to just intent, because there was a brief pause between the shooting of the first victim and the shooting of the second victim and because the second victim was in a vulnerable position urinating. App. A at 20. This reasoning is contrary to *Bingham.*

In *Bingham*, the defendant and the victim were with each other for some time before the killing. 105 Wn.2d at 821. As in this case, none of the witnesses who saw them heard any arguing. *Id.* The defendant ultimately killed the victim when she was in a vulnerable position lying on the ground, and it took *three to five minutes* for him to strangle her to death. *Bingham*, 105 Wn.2d. at 822.

This Court rejected the State's argument that sufficient evidence supported the premeditation element because the killing took three to five minutes. The Court stated, "to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the

distinction between first and second degree murder." *Id.* at 826. "Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection." *Id.* This Court held sufficient evidence supported a conviction for second-degree murder, but not first-degree murder. *Bingham*, 105 Wn.2d at 821.

It is intolerable that Mr. Howard's convictions were affirmed while Bingham's was reversed. Bingham's victim was in a more vulnerable position and Bingham took much longer to kill her. But this Court held these facts are insufficient to support a conviction for first-degree murder, and instead support a conviction for second-degree murder. In sustaining Mr. Howard's convictions for the greater crime, the Court of Appeals obliterated the distinction between first-degree murder and second-degree murder. Because this decision conflicts with *Bingham* and violates due process, this Court should grant review. RAP 13.4(b)(1), (3).

2. Division Two's published opinion on the sentencing issues violates the Sixth Amendment and conflicts with this Court's decision in *Lavery*, the U.S. Supreme Court's decision in *Descamps*, and Division One's published opinion in *Davis*.

This Court should also grant review of the sentencing issue. In a published opinion, Division Two held a prior Oregon conviction for third-

degree robbery must be included in Mr. Howard's offender score even though the Oregon crime is broader than the closest Washington crime, which is second-degree robbery. Oregon's robbery statute encompasses attempted thefts while Washington's requires proof of a completed theft. App. A at 9-11. But the court ruled that because the facts Mr. Howard admitted in his guilty plea would satisfy Washington's narrower crime, that conviction must be counted. App. A at 11.

Contrary to Division Two's opinion, such "factual comparability" is no longer permitted because it violates the Sixth Amendment. Division Two's opinion conflicts with decisions of this Court, the U.S. Supreme Court, and Division One. This Court's cases on the issue have been inconsistent and have contributed to the conflict between the Divisions. This Court should grant review to resolve the confusion, settle the conflicts, and enforce the Constitution. RAP 13.4(b)(1), (2), (3), (4).

a. Sentencing courts may not count prior out-of-state convictions in a defendant's offender score unless the convictions are comparable to a Washington crime.

The Sentencing Reform Act creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime and the defendant's offender score. RCW 9.94A.505, .510, .520, .525; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of certain prior convictions. RCW

9.94A.525. "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). A foreign conviction for a crime that is *not* comparable to a Washington felony may not be included in the offender score. *State v. Thomas*, 135 Wn. App. 474, 477, 144 P.3d 1178 (2006).

b. Division Two's opinion on comparability conflicts with *Lavery*.

In *Lavery*, this Court addressed the change in comparability analysis required by *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *In re the Pers. Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005). The sentencing court had included a prior federal bank robbery in Lavery's offender score and counted it as a strike, concluding it was comparable to a conviction for second-degree robbery in Washington. *Id.* at 252-53. Before this Court, the State conceded the two crimes had different legal elements because Washington's crime requires proof of specific intent to steal while the federal offense requires only proof of general intent. *Id.* at 253-54. But it argued the Court should remand for a determination of the facts of the foreign crime, claiming, "a sentencing court acts properly if it looks to the record of the prior conviction to determine if a defendant's conduct would

have constituted a strike offense as defined in a Washington criminal statute." *Id.* at 254. The defendant, in contrast, argued such factual analysis was impermissible following *Apprendi,* because a defendant has a constitutional right to have every fact essential to punishment proved to a jury beyond a reasonable doubt. *Id.*

This Court acknowledged it had previously "devised a two part test for comparability" that included both a legal component and a factual component. *Lavery*, 154 Wn.2d at 255 (citing *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1988)). But it limited the factual prong in light of *Apprendi*. *Id.* at 257-58. This Court stated:

> The State asks us to remand this case to the sentencing court so that it may examine the underlying facts of Lavery's federal robbery conviction to determine if his 1991 offense was factually comparable to Washington's second degree robbery. *Where the foreign statute is broader than Washington's, that examination may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense*.

Id. at 257 (emphasis added).

The Court pointed out that "Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but were unavailable in the federal prosecution." *Id.* at 258. And while the Court also noted the defendant "neither admitted nor stipulated to facts which established specific intent

in the federal prosecution," it concluded, "where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable." *Id.*

Division Two's opinion in Mr. Howard's case conflicts with *Lavery* because Division Two recognized the elements of the foreign conviction at issue are broader yet still found the conviction comparable. App. A at 9-11. It did so based on Mr. Howard's Oregon guilty plea, even though Mr. Howard had no reason to contest a fact that would have been relevant in Washington but was not relevant in Oregon. To the extent Washington courts believed an admission to such irrelevant facts could still be considered following *Apprendi*, the U.S. Supreme Court finally foreclosed such factual inquiries in *Descamps*, discussed below.

c. Division Two's opinion on comparability conflicts with ***Descamps***.

Division Two's opinion in this case conflicts with the U.S. Supreme Court's decision in *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d (2013). There, the Court held that sentencing courts may not engage in any type of factual comparability where the prior conviction is for a broader crime. *Id.* at 258. The Court interpreted a sentence-enhancing statute to preclude such factual inquiry,

because to interpret it otherwise would contravene the Sixth Amendment. *Id.* at 267, 269-70 (citing U.S. Const. amend. VI).[1]

The statute at issue required an increased sentence for a person who had at least three prior convictions for violent offenses, and burglary was one of the listed offenses. *Id.* at 258. But only prior burglaries that were comparable to "generic" burglary could be counted, and the defendant argued his prior California burglary conviction could not be counted because the California statute was broader than generic burglary: it did not require breaking and entering. *Id.* at 258-59. The sentencing court counted it anyway after reviewing the California plea colloquy and determining the defendant admitted to breaking and entering, thereby admitting to all of the elements of the generic offense. *Id.* at 259.

The Ninth Circuit affirmed but the Supreme Court reversed, holding such factual inquiry is impermissible. *Id.* at 259-60. Citing *Apprendi*, 530 U.S. at 490, the Court stated, "the Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *Descamps*, 570 U.S. at 269.

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[1] The Court explained the only type of factual inquiry that is permitted is a determination of which alternative means formed the basis of a conviction, if the prior conviction was for an alternative means crime (what the Court called a "divisible" statute), and if only a subset of alternatives would be comparable. *Descamps,* 570 U.S. at 261-63.

When a defendant is convicted following a jury trial, courts cannot know whether the jury actually found any facts extraneous to the elements. *Id.* at 269-70. And as to prior guilty pleas, the *Descamps* Court noted a defendant "often has little incentive to contest facts that are not elements of the charged offense …." *Id.* at 270. Accordingly, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; *whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment*." *Id.* at 270 (emphasis added).

Applying the rule to the facts, the Court held the defendant's prior California burglary conviction could not be used to enhance his current sentence, regardless of whether he admitted the elements of the narrower crime when he pleaded guilty. *Id.* at 264-65. This was so because the California prosecutor did not have to prove that he broke and entered. *Id.* at 265. The Court explained, "[w]hether Descamps *did* break and enter makes no difference. And likewise, *whether he ever admitted to breaking and entering is irrelevant*." *Id.* (second emphasis added). Because the California crime is legally broader, "the inquiry is over." *Id.*

Division Two's published opinion in Mr. Howard's case directly contravenes *Descamps* and violates the Sixth Amendment. Division Two relied on Mr. Howard's admission to a fact that was superfluous in Oregon

– that he aided a completed theft rather than an attempted theft. App. A at 11. Mr. Howard had no incentive to challenge this fact in Oregon. Accordingly, "whether he ever admitted to [completed theft] is irrelevant." *Descamps*, 570 U.S. at 265. "[W]hatever he [said], or fail[ed] to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." *Id.* at 270. Because that is exactly what Division Two did, this Court should grant review. RAP 13.4(b)(3).

d. Division Two's opinion on comparability conflicts with *Davis*.

Unlike Division Two, Division One has complied with *Descamps*. *See State v. Davis*, 3 Wn. App. 2d 763, 418 P.3d 199 (2018). This Court should grant review to resolve the split between the divisions in published cases. RAP 13.4(b)(2).

In *Davis*, Division One held five prior California burglary convictions could not be included in the defendant's offender score. 3 Wn. App. 2d at 769. The court recognized the California burglary statute is broader than Washington's because it does not require proof of an unlawful entry and also applies to structures beyond buildings. *Id.* at 773. Accordingly, California burglary is not legally comparable to Washington burglary. *Id.* at 776.

The State argued the convictions should nevertheless be counted because they were factually comparable: the California charging documents alleged the defendant committed "unlawful entry" into various buildings, and the defendant had pleaded guilty to the charges. *Id.* at 779-80. The State acknowledged *Lavery*, but argued a different case from this Court (*Olsen,* discussed below) permitted inclusion of prior convictions where the defendant admitted facts that would constitute a Washington crime. *Id.* at 780.

Division One rejected the argument. *Id.* at 780-82. Relying on *Descamps*, *Lavery*, and an earlier Division One case, the court stated:

> [T]he elements of the foreign crime remain the focus of any factual inquiry when performing a factual comparability analysis. Thus, facts untethered from the elements of the charged crime to which a defendant later pleads guilty are not within this focus. That is because permitting such facts to support use of a prior conviction runs the risk of violating the Sixth Amendment protections discussed in *Apprendi* and its progeny.

Davis, 3 Wn. App. 2d at 780. Moreover, "allowing the use of such facts is also inappropriate because a defendant charged with a broader foreign offense may not have an incentive to prove that he is [not] guilty of narrower conduct covered by a Washington statute." *Id.* at 782. The court recognized, "it is irrelevant whether Davis pleaded guilty to 'unlawful entry,' as alleged in the California felony complaints in this record." *Id.* at

781. The convictions were not comparable, and could not be included in the offender score. *Id.* at 771.

Division Two's published opinion in Mr. Howard's case conflicts with Division One's published opinion in *Davis.* Had Mr. Howard's case been before Division One, his offender score and sentence would be lower. This Court should grant review pursuant to RAP 13.4(b)(2).

e. *Olsen* created confusion; this Court should grant review to resolve the issues caused by irreconcilable case law.

The case Division Two relied on here is *State v. Olsen*, 180 Wn.2d 468, 325 P.3d 187 (2014). App. A at 4, 6-7. There, this Court held "factual comparability" analysis is still permitted after *Descamps*, even where the foreign statute at issue is broader than Washington's. *Olsen,* 180 Wn.2d at 476-77.

In *Olsen*, the defendant had a prior California conviction for terroristic threats, which is not legally comparable to Washington's crime of felony harassment because it criminalizes threats of great bodily harm, not just threats of death. *Id.* at 478. But this Court held the prior conviction could be counted anyway, because the defendant had pleaded no contest to a California charging document that alleged he threatened both great bodily injury and death. *Id.* at 478-79. This Court stated, "Because Olsen admitted facts surrounding his California conviction that would have

satisfied Washington's felony harassment statute, the trial court properly included the foreign conviction in his offender score." *Id.* at 480.

This conclusion is directly contrary to *Descamps*, which held that whether a defendant admitted to the narrower crime is irrelevant. *Descamps*, 570 U.S. at 265. And since *Descamps* and *Olsen* were decided, the Court of Appeals has struggled to reconcile those cases with each other, with *Lavery*, and with their own prior cases. *See Davis*, 3 Wn. App. 2d at 780-82; App. A at 6-7. Their attempts have fallen short because the cases are irreconcilable. Unless this Court grants review, the confusion will continue, and defendants in Division Two will be subject to higher offender scores than defendants in Division One. For all of these reasons, this Court should grant review.

F. CONCLUSION

For the reasons state herein, this Court should grant review.

DATED this 31st day of December, 2020.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ARKANGEL D. HOWARD, Appellant.	No. 51822-8-II PARTIALLY PUBLISHED OPINION

GLASGOW, J.—Arkangel D. Howard shot and killed two men outside his girlfriend's apartment and drove off. There was no evidence of a motive. A jury found Howard guilty of premeditated first degree murder for both killings.[1] At sentencing, the trial court determined that one of Howard's prior out-of-state convictions was comparable to a Washington felony and included it in his offender score, but the trial court declined to include a second out-of-state conviction. Therefore, Howard did not qualify as a persistent offender.

Howard appeals his convictions for premeditated first degree murder and his sentence. He argues that the State presented insufficient evidence of premeditation to support his convictions for first degree murder. He also argues that the trial court erred by ruling that his prior conviction for attempted first degree robbery in Oregon was comparable to a Washington felony, and he asks to be resentenced. He contends that the trial court erred by imposing a criminal filing fee. In addition, Howard files a statement of additional grounds (SAG).

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[1] Howard was also convicted of unlawful possession of a firearm, but he does not challenge that conviction or his sentence for that crime.

The State cross appeals, arguing that the trial court erred by ruling that the second of Howard's prior out-of-state convictions, for third degree robbery in Oregon, was not comparable to the Washington crime of second degree robbery.

In the published portion of this opinion, we hold that the trial court erred at sentencing. Howard's prior out-of-state attempted first degree robbery conviction was not comparable to a Washington felony and should have been excluded from the court's calculation of Howard's offender score. However, Howard's prior out-of-state third degree robbery conviction was factually comparable to second degree robbery under Washington law and should have been included in the offender score calculation. Howard still does not qualify as a persistent offender.

In the unpublished portion of this opinion, we hold that there was sufficient evidence of premeditation to support Howard's convictions for premeditated first degree murder, that the criminal filing fee was improperly imposed, and that nothing in Howard's SAG requires reversal.

We affirm Howard's convictions, reverse his sentence, and remand for resentencing consistent with this opinion. The trial court must not impose the criminal filing fee upon resentencing.

FACTS

Howard shot and killed Allen Collins Jr. and Jason Benton. A jury found Howard guilty of two counts of premeditated first degree murder.

In calculating Howard's offender score and determining whether he was a persistent offender, the trial court considered whether two of Howard's prior convictions in Oregon were comparable to Washington felonies. The trial court determined that Howard's prior conviction for attempted first degree robbery, although not legally comparable, was factually comparable to the

Washington crime of attempted first degree robbery. The trial court included this conviction in calculating Howard's offender score. The trial court determined that Howard's prior conviction for third degree robbery was neither legally nor factually comparable to a Washington felony, and the court did not include this conviction in calculating the offender score. Because Howard did not have three strikes, the trial court did not sentence him as a persistent offender. The trial court sentenced Howard to 760 months in prison.

Howard appeals his convictions and sentence. With regard to his sentence, he argues that the trial court improperly included his Oregon attempted first degree robbery conviction in the offender score. The State cross appeals the exclusion of Howard's Oregon third degree robbery conviction from the offender score and, ultimately, the trial court's decision not to sentence Howard as a persistent offender.

ANALYSIS

HOWARD'S OUT-OF-STATE CONVICTIONS

Both Howard and the State challenge the trial court's decisions regarding whether Howard's prior Oregon convictions should be included in his offender score and considered in the trial court's persistent offender analysis. We conclude that the trial court should not have included in Howard's offender score his prior Oregon conviction for attempted first degree robbery, but the trial court should have included his prior Oregon conviction for third degree robbery. The trial court correctly concluded that Howard was not a persistent offender.

A. Comparability of Out-of-State Convictions and Standard of Review

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the trial court uses the defendant's prior convictions to determine an offender score which, along with the seriousness

level of the current offense, establishes a presumptive standard sentencing range. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). A defendant's sentence is determined based on the law in effect when the defendant committed the offense. RCW 9.94A.345.

We review a sentencing court's calculation of an offender score de novo. *Olsen*, 180 Wn.2d at 472. We review underlying factual determinations for abuse of discretion. *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 764, 297 P.3d 51 (2013).

The State must prove the existence of prior felony convictions by a preponderance of the evidence. RCW 9.94A.500(1). If the convictions are from another jurisdiction, the State must also prove that they are comparable to a Washington felony. RCW 9.94A.525(3); *Olsen*, 180 Wn.2d at 472. "Comparability is both a legal and a factual question." *State v. Collins*, 144 Wn. App. 547, 553, 182 P.3d 1016 (2008).

As to the legal prong, "If the Washington statute defines the offense with elements that are identical to, or broader than, the foreign statute, then the conviction under the foreign statute is necessarily comparable to a Washington offense." *Id.* "If, however, the foreign statute is broader than the Washington statute, the court moves on to the factual prong—determining whether the defendant's conduct would have violated the comparable Washington statute." *Olsen*, 180 Wn.2d at 473. In this factual analysis, courts "consider only facts that were admitted, stipulated to, or proved beyond a reasonable doubt." *Id.* at 473-74.

If an out-of-state conviction involves an offense that is neither legally nor factually comparable to a Washington offense, the sentencing court may not include that conviction in the defendant's offender score. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)). If a defendant has been

erroneously sentenced, we will remand for resentencing. *State v. Wilson*, 170 Wn.2d 682, 690, 244 P.3d 950 (2010).

B. Howard's Appeal—Attempted First Degree Robbery

Howard argues the trial court erred in determining that his 2005 Oregon conviction for attempted first degree robbery was comparable to the Washington crime of attempted first degree robbery. We agree.

1. Legal comparability

At the time Howard committed the offense of attempted first degree robbery in 2005, Oregon's attempt statute provided that "[a] person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime." Former OR. REV. STAT. § 161.405(1) (1971). In 2005, Oregon's robbery statute provided that a person commits first degree robbery if they commit a robbery and they are armed with a deadly weapon, use or attempt to use a dangerous weapon, or cause or attempt to cause serious physical injury. Former OR. REV. STAT. § 164.415(1) (1971).

Washington's attempt statute provides that "[a] person is guilty of an attempt to 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." RCW 9A.28.020(1) (emphasis added).[2] Washington's first degree robbery statute provides in relevant part that a person commits first degree robbery if "[i]n the commission of a robbery or of immediate flight therefrom, [they are] . . . armed with a deadly

[2] RCW 9A.28.020 was last amended in 2001, so the current version of the statute was the version in effect when Howard committed attempted first degree robbery in 2005.

weapon; or . . . [d]isplay[] what appears to be a firearm or other deadly weapon; or . . . [i]nflict[] bodily injury." RCW 9A.56.200(1)(a).[3]

The elements of a conviction for attempted first degree robbery were broader in Oregon than in Washington at the time Howard's offense was committed. First, Washington required an intent *to commit robbery* in addition to taking a substantial step toward its commission, whereas Oregon required the intentional taking of a substantial step, but with no specific intent requirement. Second, in Washington the crime of first degree robbery included a means that required the defendant to inflict bodily injury, whereas in Oregon a defendant could be convicted if they only *attempted* to cause injury. Thus, Howard's prior Oregon conviction for attempted first degree robbery is not legally comparable to the equivalent Washington felony.

2. Factual comparability

Next, we determine whether the facts underlying Howard's conviction for attempted first degree robbery in Oregon would have constituted attempted first degree robbery in Washington. *See Olsen*, 180 Wn.2d at 473. Citing *Lavery*, Howard argues this inquiry is unnecessary and improper where the foreign statute has been determined to be broader. In *Lavery*, our Supreme Court stated: "Where the foreign statute is broader than Washington's, [the factual comparability] examination *may* not be possible because there *may have been* no incentive for the accused to have attempted to prove that he did not commit the narrower offense." 154 Wn.2d at 257 (emphasis added). But the court reached this conclusion in *Lavery* because the underlying facts had not been admitted, stipulated to, or proved beyond a reasonable doubt. *Id.* at 258. *Olsen* reaffirmed that the

[3] RCW 9A.56.200 was last amended in 2002, so the current version of the statute was the version in effect when Howard committed attempted first degree robbery in 2005.

factual comparability analysis is appropriate where it is limited to the consideration of "only those facts that were clearly charged and then clearly proved beyond a reasonable doubt to a jury or admitted by the defendant." 180 Wn.2d at 476.

Howard also relies on Division One's decision in *State v. Davis*, 3 Wn. App. 2d 763, 418 P.3d 199 (2018). There, Division One considered whether five prior California burglary convictions were factually comparable to the Washington crime of burglary. *Id.* at 777. The State alleged that the defendant unlawfully entered a building in each of those prior incidents, and the defendant pleaded guilty to each charge. *Id.* at 779-80. However, the *Davis* court focused only on the language in the charging document, not a plea statement where the defendant admitted to underlying facts. *Id.* The *Davis* court explained that based on *Lavery*, the factual comparability inquiry had to focus on facts that were central to proving the elements of the foreign crime. *Id.* at 782. Because the relevant California statute, unlike the Washington statute, did not include "unlawful entry" as an element of burglary, the defendant had no incentive to dispute that element. *Id.*

Although both *Lavery* and *Davis* require appellate courts to consider only facts that were admitted or proved at trial, and those facts must have been tethered to the elements of the foreign crime, neither case prevents us from considering factual comparability in this case, as Howard seems to suggest. Unlike in *Davis*, here we have a specific plea statement where Howard admitted to the underlying facts proving the elements of the foreign crime. Thus, as in *Olsen*, we must determine whether the facts admitted in Howard's plea statement were factually comparable to attempted first degree robbery in Washington.

Howard pleaded guilty to attempted first degree robbery, admitting in his plea statement that he "helped another person take a substantial step towards using a firearm to steal money." Clerk's Papers (CP) at 121. In Oregon, "[a] guilty plea implicitly admits all facts necessary to support the material elements of a charge," but it does not constitute an admission of any facts that go beyond those essential elements. *State v. Kappelman*, 162 Or. App. 170, 175, 986 P.2d 603 (1999).

The State argues Howard's admission would have constituted attempted first degree robbery in Washington because he admitted to taking a substantial step toward committing robbery and to being armed with a firearm. But as noted above, Washington also requires that the defendant intend to commit the specific crime of robbery when taking a substantial step. *See* RCW 9A.28.020(1). There is no admission anywhere in Howard's plea statement indicating his specific intent during the commission of the crime. Because Howard did not admit to intending to commit robbery when he helped someone take a substantial step toward stealing money using a firearm, his guilty plea does not establish all of the essential elements of the Washington crime of attempted first degree robbery.

Therefore, the State has not met its burden to show that Howard's Oregon conviction for attempted first degree robbery is factually comparable to a Washington felony, and the trial court erred in so ruling. Howard's prior Oregon conviction for attempted first degree robbery should not have been included in his offender score, nor should it be considered in a persistent offender analysis.

C. The State's Cross Appeal—Third Degree Robbery

In its cross appeal, the State argues the trial court erred in determining that Howard's 2004 Oregon conviction for third degree robbery was not legally or factually comparable to the Washington crime of second degree robbery. Howard argues the trial court correctly concluded these two crimes were not comparable. We conclude that the crimes were not legally comparable but, contrary to the trial court's ruling, they were factually comparable.

1. Legal comparability

Oregon law provides that a person commits third degree robbery if, in the course of committing or attempting to commit theft, they use or threaten the "immediate use of physical force upon another person with the intent of: (a) [p]reventing or overcoming resistance to the taking of the property . . . or (b) [c]ompelling the owner . . . or another person to deliver the property or engage in other conduct which might aid in the commission of the theft." OR. REV. STAT. § 164.395(1).[4]

In 2004, Washington law provided that a person commits robbery when they unlawfully take personal property against another person's will

> by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

[4] Or. Rev. Stat. § 164.395 was last amended in 2003, so the current version of the statute was the version in effect when Howard committed third degree robbery in 2004.

Former RCW 9A.56.190 (1975); *see also* former RCW 9A.56.210(1) (1975) ("A person is guilty of robbery in the second degree if he commits robbery."). In 2004, any person who aided and abetted in the commission of any crime was guilty of that crime. RCW 46.64.048.[5]

The State argues that these two crimes are legally comparable, citing *State v. McIntyre*, 112 Wn. App. 478, 49 P.3d 151 (2002). There, Division One held that the Oregon crime of third degree robbery is legally comparable to the Washington crime of second degree robbery. *Id.* at 483. The court noted that "[b]oth statutes require (a) a theft; (b) the use or threatened use of immediate force or fear of injury; and ([c]) the force or fear be used to obtain or retain the property." *Id.* at 481. The court rejected the defendant's argument that the Washington statute included an additional requirement that the property be taken either from the victim's person or in their presence and against their will, and it held that the elements of the two crimes were the same. *Id.* at 481-83.

However, as Howard points out, no party in *McIntyre* presented the issue raised in this case—that the Washington second degree robbery statute required an actual taking of property, whereas the Oregon statute provides that third degree robbery encompasses both actual theft and *attempted* theft of property. The *McIntyre* court did not have an opportunity to address this specific issue. Addressing it now, we conclude that the Oregon statute prohibits a broader array of conduct than the Washington statute. In Oregon, someone could be convicted of third degree robbery for using force when merely attempting to commit theft, while in Washington in 2004, second degree robbery was committed only when someone used force in successfully committing theft.

[5] RCW 46.64.048 was last amended in 1990, so the current version of the statute was the version in force in 2004.

We hold that Howard's 2004 Oregon conviction for third degree robbery was not legally comparable to the Washington crime of second degree robbery as it was defined at that time. The Oregon robbery statute was broader than its 2004 Washington equivalent because it encompassed attempted thefts as well as committed thefts, whereas the Washington statute applied only when theft had been committed.

2. Factual comparability

The State argues that these two crimes are factually comparable. The State points to Howard's admission when pleading guilty to third degree burglary that he "'aided and abetted Latisha M. Storey in taking property from Marshalls by assaulting Richard Wyche who [was] chasing [Howard's] sister and attempting to take her in custody for shoplifting.'" CP at 91 (first alteration in original). Howard again contends that it is improper to reach the factual comparability prong, but as discussed above, it is appropriate to consider Howard's admission made in his plea statement to determine factual comparability with Washington's crime of second degree robbery.

In his plea statement, Howard admitted to using physical force (assault) with the intent of overcoming Wyche's resistance to the taking of property by his sister and to aid his sister in retaining the property. Howard's admission therefore establishes each of the elements of Washington's second degree robbery statute as it existed in 2004. *See* former RCW 9A.56.190; *see also* RCW 46.64.048 (establishing that any person who aids and abets in the commission of any crime is guilty of that crime). The factual comparability prong is met. Thus, the trial court erred when it concluded that Howard's admission was insufficient to meet the State's burden to show factual comparability. This conviction should have been included in Howard's offender score.

Because Howard's prior Oregon conviction for attempted first degree robbery should not be included in his offender score, Howard does not have three strikes and should not be sentenced as a persistent offender on remand. *See* 13 Verbatim Report of Proceedings (VRP) at 1395 (trial court finding no other qualifying prior crimes and concluding that, with only one prior qualifying conviction, Howard was not subject to a persistent offender sentence).

CONCLUSION

We affirm Howard's convictions, reverse his sentence, and remand for resentencing consistent with this opinion. The trial court must not impose the criminal filing fee upon resentencing.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Howard appeals his convictions for premeditated first degree murder, arguing that the State presented insufficient evidence of premeditation to support the convictions. He also contends that the trial court erred by imposing a criminal filing fee. In addition, Howard filed a SAG. We hold that there was sufficient evidence of premeditation to support Howard's convictions for premeditated first degree murder. The criminal filing fee, however, was improperly imposed. Nothing in Howard's SAG requires reversal.

ADDITIONAL FACTS

Howard agreed to help his girlfriend, Valerie Sizemore, move out of her apartment in Vancouver, Washington. Howard drove Sizemore's car to Portland, Oregon to obtain a truck, and he enlisted two of his acquaintances, Collins and Benton, to drive back to Vancouver with him to

help with the move. Sizemore had heard Collins and Benton were Howard's friends, "but it didn't really seem like they were friends when they were around." 6 VRP at 593. She did not understand why Collins and Benton accompanied Howard to Vancouver.

Howard had started consistently carrying a gun about two weeks beforehand and had carried it every day for the week prior to the shooting. Howard was carrying a gun the morning of the shooting before he drove down to Portland to get the truck.

Howard, Collins, and Benton arrived at Sizemore's apartment building in the afternoon in different cars. Sizemore came out to greet them. Shortly thereafter, Howard shot and killed Collins and Benton and then quickly got in Sizemore's car and drove off. Collins was shot once in the left side of his head. Benton was shot in the back, the armpit area, and the back of his head.

The police arrived and interviewed Sizemore and her neighbors, many of whom had heard gunfire or saw Howard arrive and then leave quickly. Sizemore initially told police that she did not know who shot Collins and Benton. But she later contacted police and told them that Howard was the shooter.

The police later discovered the gun under a shed at Howard's mother's home. The police found and arrested Howard, and the State charged him with two counts of premeditated first degree murder and one count of unlawful possession of a firearm.

At trial, Sizemore and many of her neighbors testified to what they heard and saw. Sizemore testified that she heard gunfire and saw a gun in Howard's hand immediately after the shooting. She testified that she believed Howard shot Collins and Benton. Sizemore said she "had no clue" that Howard was going to shoot them, and she was not aware of any disputes between them. 6 VRP at 596.

Sizemore thought she heard about four to six shots and that they were "[q]uick. Like, not even seconds." 6 VRP at 595. One neighbor testified that she heard one gunshot, a brief pause, and then four more shots in quick succession. A second neighbor testified that she heard one gunshot, a pause of no more than a couple seconds, and then four more gunshots. A third neighbor testified that he heard two shots, a half-second or one second pause, and then two more shots.

The third neighbor also testified that Howard, Collins, and Benton were just talking, and he did not notice any arguing or agitation before the shooting. A fourth neighbor said that the two victims did not seem angry or animated when he saw them just before the shooting.

There was also testimony that Collins was found with his pants down, and the autopsy showed that his bladder was half empty, suggesting he was urinating when he was killed. And each bullet striking Benton entered on the left side of his body, angling roughly back to front, showing he had turned away from the shooter.

In closing argument, the State argued that various facts showed Howard acted with premeditation. Howard shot Collins while Collins was urinating and therefore vulnerable. In other words, the State argued that Howard deliberately chose that moment to shoot Collins and, therefore, the shooting was premeditated. The State also argued that the locations and angles of Benton's gunshot wounds suggested he was bent over, running away from Howard when he was shot. The State inferred that Howard had premeditated intent to kill Benton because Howard had time to reflect between each shot as Benton tried to run away. The State did not offer a potential motive for the murders and instead argued that it was not required to prove why Howard killed Collins and Benton.

Howard argued in closing that he had no motive to kill his acquaintances and suggested that Sizemore was the one who shot Collins and Benton.

The jury found Howard guilty of two counts of premeditated first degree murder and one count of first degree unlawful possession of a firearm. Howard appeals his convictions for premeditated first degree murder.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Howard argues that the State presented insufficient evidence of premeditation to sustain his convictions for premeditated first degree murder. We disagree and hold there was sufficient evidence of premeditation to sustain Howard's convictions.

"The State bears the burden of proving all the elements of an offense beyond a reasonable doubt." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). "To determine whether there is sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Song Wang*, 5 Wn. App. 2d 12, 18, 424 P.3d 1251 (2018), *review denied*, 192 Wn.2d 1012 (2019). "'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.'" *Id.* (internal quotation marks omitted) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). "Circumstantial evidence provides as reliable a basis for findings as direct evidence." *State v. DeJesus*, 7 Wn. App. 2d 849, 883, 436 P.3d 834, *review denied*, 193 Wn.2d 1024 (2019). "However, 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).

A. <u>Premeditation</u>

To convict Howard of premeditated first degree murder, the State had to prove beyond a reasonable doubt that Howard acted with premeditation to cause the deaths of Collins and Benton. RCW 9A.32.030(1)(a); *State v. Hummel*, 196 Wn. App. 329, 354, 383 P.3d 592 (2016). 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.'" *Hummel*, 196 Wn. App. at 354 (quoting *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995)).

Premeditation requires "'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.'" *Id.* (quoting *State v. Hoffman*, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991)). "There are four characteristics or factors that are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing." *DeJesus*, 7 Wn. App. 2d at 883 (citing *Hummel*, 196 Wn. App. at 355). However, a "wide range" of other factors can also be relevant and can "support an inference of premeditation." *State v. Aguilar*, 176 Wn. App. 264, 273, 308 P.3d 778 (2013) (citing *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999)). Thus, we consider the totality of the circumstances. *See State v. Ollens*, 107 Wn.2d 848, 855, 733 P.2d 984 (1987) (Callow, J., concurring in result) (describing the jury's evaluation of whether a killing was premeditated as "the evaluation of the totality of the evidence in the light of all of the surrounding circumstances").[6]

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[6] *See also State v. Hurd*, 819 N.W.2d 591, 599 (Minn. 2012) ("'Premeditation is a state of mind generally proved circumstantially by drawing inferences from a defendant's words and actions in light of the totality of the circumstances.'" (quoting *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998))); *People v. Avila*, 46 Cal.4th 680, 714, 208 P.3d 634, 94 Cal. Rptr. 3d 699 (2009)

Howard argues the State presented insufficient evidence of premeditation because the murders took only a couple of seconds and there was no evidence of deliberation, planning, motive, or threats. The State argues the fact that Howard brought a gun with him to Sizemore's house was sufficient to sustain the convictions for first degree murder.

In *Pirtle*, the defendant killed two former coworkers at a fast food restaurant. 127 Wn.2d at 638-39. The Washington Supreme Court determined there was sufficient evidence of premeditation where there was evidence of planning, the defendant had multiple possible motives, he brought a weapon to the scene, and he inflicted multiple, gruesome wounds. *Id.* at 644-45. The defendant hid in the parking lot of a nearby church, waiting until he believed his coworkers were alone. *Id.* at 644. He knocked both victims unconscious before cutting their throats. *Id*. at 645.

The *Pirtle* court relied in part on *Ollens*, 107 Wn.2d 848. There, the Supreme Court found sufficient evidence of premeditation where there was evidence of a motive, the defendant used a weapon, he inflicted multiple wounds and then cut the victim's throat, and he struck the victim from behind. *Ollens*, 107 Wn.2d at 853.

In *DeJesus*, Division One concluded there was sufficient evidence of premeditation because the State presented evidence of motive and planning. 7 Wn. App. 2d at 885. There, the defendant went to a home to kill one victim, shot her on the porch, and then entered the home and killed multiple others. *Id.* The court reasoned, "After shooting Kelso, DeJesus entered the home with a loaded gun, shot Kelso again, and pursued and shot Dean as he ran through the home." *Id.* This showed "a premeditated intent to kill not only Kelso, but the other occupants of the home, as

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(permitting the State to argue "the jury could find defendant premeditated and deliberated based on the totality of the circumstances").

well. DeJesus then deliberately shot at Lum while she was holding Kaden on the ground." *Id.* at 885-86.

In *State v. Ra*, 144 Wn. App. 688, 704, 175 P.3d 609 (2008), we determined there was sufficient evidence to support a finding of premeditation in part because the defendant paused between shots and continued firing after missing twice. Witness testimony describing a pause between shots "support[ed] an inference that Ra had time to deliberate on and weigh his decision to kill." *Id.*

In contrast, in *Hummel* there was insufficient evidence of premeditation. The defendant was accused of killing his wife, who had disappeared. 196 Wn. App. at 332, 337. Hummel continued to collect his wife's retirement benefits, but later claimed she had committed suicide. *Id.* at 335-36. The court concluded that the State presented no evidence of planning or method of killing or any concrete evidence to support its theory for a possible motive. *Id.* at 355-56. The court also reasoned that there was no evidence of deliberation or reflection before the murder occurred, and the fact that the defendant took steps afterward to conceal his crime proved only his guilt, not premeditation. *Id.* at 356-57.

The parties discuss three additional cases. In *State v. Bingham*, 105 Wn.2d 820, 828, 719 P.2d 109 (1986), the Supreme Court held that manual strangulation of the victim alone, without further evidence of premeditation, was insufficient. But the court noted, in contrast, that the planned presence of a weapon had been held to show premeditation sufficiently to present the issue of premeditation to a jury. *Id.* at 827. In *State v. Massey*, 60 Wn. App. 131, 145, 803 P.2d 340 (1990), *abrogated on other grounds by State v. Houston-Sconiers*, 191 Wn. App. 436, 365 P.3d 177 (2015), there was evidence that the defendant had a gun prior to entering a marina where he

shot and killed someone. This court held that this fact alone was sufficient to show premeditation. *Id.* And in *State v. Rehak*, 67 Wn. App. 157, 159, 834 P.2d 651 (1992), the defendant shot her husband three times in the head while he was sitting in their home. This court held there was sufficient evidence of premeditation because the defendant prepared a gun, the victim was apparently seated and in a nonconfrontational stance, and the defendant shot him multiple times, twice after he had already fallen to the floor. *Id.* at 164.

Thus, Washington courts have considered a wide variety of facts when evaluating sufficiency of the evidence to show premeditation. The fact-specific inquiry requires us to consider the totality of the circumstances in a particular case. *See Ollens*, 107 Wn.2d at 855 (Callow, J., concurring in result).

B. Sufficiency of the Evidence to Support Premeditation

Here, some facts weigh against premeditation. The murders of Collins and Benton took only seconds, there was no direct evidence of any motive or planning, and the shootings occurred in broad daylight in public view, so there was no complex plan to conceal the crime. Further, Howard carried a gun every day for the couple of weeks prior to the shooting, so the fact that he carried a gun the day of the murders does not, by itself, establish premeditation in this case.

But several other facts support the jury's finding of premeditation. The fact that Howard brought a gun is one factor that supports the finding of premeditation, although not a particularly strong one since he regularly carried a gun in the days before the shooting. *Pirtle*, 127 Wn.2d at 644-45; *Bingham*, 105 Wn.2d at 827; *DeJesus*, 7 Wn. App. 2d at 885; *Massey*, 60 Wn. App. at 145. Multiple witnesses testified that there was a pause between the first gunshot and the rest, which suggests Howard had a moment, however brief, to deliberate and reflect between the

killings. This evidence is similar to the evidence in *Ra*, where the defendant paused before firing additional shots, 144 Wn. App. at 704, and in *DeJesus*, where the defendant first shot the person he initially intended to kill, and then proceeded to shoot other occupants of the house, 7 Wn. App. 2d at 885-86.

Although the State did not present direct evidence of motive or planning, a reasonable jury could have inferred that Howard planned the murders from the fact that he asked both Collins and Benton to accompany him to Sizemore's home. Further, multiple witnesses testified that there were no sounds or signs of an intense argument, which supports an inference that the shooting did not occur in the heat of an altercation. These facts support the jury's finding of premeditation because they suggest that the shooting was not a spontaneous act of self-defense or anger, but instead was planned.

Moreover, Collins was shot in the side of the head, and Benton was shot multiple times in the back, torso, and head from behind or above. The State drew the inference in closing argument that the fact that Collins was found with his pants down and with a half-empty bladder suggested he had been urinating and therefore vulnerable when he was shot. The angle and configuration of Benton's wounds suggested he had turned to run away when he was shot. These circumstances are similar to *Ollens*, where evidence that the defendant attacked the victim from behind and inflicted multiple wounds supported a finding of premeditation, 107 Wn.2d at 853, and *Rehak*, where the victim was shot multiple times while he was in a nonconfrontational stance, 67 Wn. App. at 159.

In sum, the method of killing provides circumstantial evidence of premeditation. To the extent that the jury could infer Howard took advantage of Collins's distraction, there is an inference of stealth as well. Viewing the evidence in the light most favorable to the State as we must, we

conclude that there was sufficient evidence of premeditation to support Howard's convictions for first degree murder.

II. LEGAL FINANCIAL OBLIGATIONS

Howard argues that the trial court improperly imposed the $200 criminal filing fee because Howard is indigent. The State concedes that this fee should be stricken from the judgment and sentence on remand. RCW 36.18.020(2)(h) prohibits the imposition of the criminal filing fee if a defendant is indigent as defined in RCW 10.101.010(3)(a)-(c). *See also State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). We accept the State's concession that the filing fee should be stricken, and we order the trial court to not impose the criminal filing fee upon resentencing.

III. STATEMENT OF ADDITIONAL GROUNDS

First, Howard argues that it was improper for Sizemore to testify when the trial had already started without her. He does not explain why this was improper. He also claims the State threatened Sizemore in order to obtain her testimony. This argument relies on evidence outside the record, so we cannot consider it. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

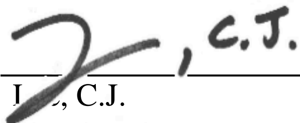
Second, Howard argues he was deprived of a fair trial. He believes his jury was biased against him, and one juror fell asleep. Howard does not point to any evidence of bias. Howard also does not identify which juror he claims fell asleep, and because no one moved to dismiss any juror for sleeping, this claim is not preserved for appeal. RAP 2.5(a).

CONCLUSION

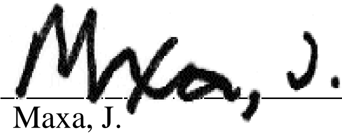
We affirm Howard's convictions for premeditated first degree murder, reverse his sentence, and remand for resentencing consistent with this opinion. The trial court must not impose the criminal filing fee upon resentencing.

Glasgow, J.

We concur:



Lee, C.J.



Maxa, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 51822-8-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Kasey Vu, DPA
[kasey.vu@clark.wa.gov]
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Clark County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: December 31, 2020
Washington Appellate Project

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Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51822-8
Appellate Court Case Title:	State of Washington, Respondent v Arkangel D. Howard, Appellant
Superior Court Case Number:	17-1-00636-0

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