

COURT OF APPEALS
DIVISION II

MAY 15 2007

STATE OF WASHINGTON
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No. 37095-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CRAIG MICHAEL CAHILL,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 02-1-05324-8
The Honorable Sergio Armijo, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it refused to instruct the jury in accordance with Defense Proposed Instruction number 4, which defined the element of premeditation.
2. The trial court erred when it used the Court's Instruction Number 11 to define the element of premeditation for the jury.
3. Appellant was denied his right to a fair trial, and the State was relieved of its burden of proving all the elements of the crime, when the trial court did not explain the element of premeditation to the jury.

B. Issues Pertaining to the Assignments of Error

1. Where the trial court's jury instruction defining premeditation did not fully convey to the jury the factors that must be proved in order to find premeditated intent, was Appellant denied his right to a fair trial? (Assignments of Error 1, 2, & 3)

II. STATEMENT OF THE CASE

A. Procedural History

The State charged Craig Michael Cahill by Information on November 20, 2002 with first degree murder of his wife, Theresa Ann Cahill, pursuant to RCW 9A.32.030(1)(a). (CP 1-4) Craig's first trial resulted in conviction.¹ (CP 5-7, 8-19) That conviction was later overturned on appeal due to the trial court's improper admission of certain evidence. (CP 20, 21-69)

A second trial began on December 1, 2006, and also resulted in conviction. (CP 185-86; RP 1025) The trial court sentenced Cahill within his standard range to 548 months of confinement. (CP 205, 207; RP 1048) This appeal follows. (CP 215)

B. Substantive Facts

Theresa Cahill disappeared on or about November 13, 2002. (RP 67, 73, 95-96, 180, 384) She had recently undergone surgery on her left arm, requiring that she wear a splint and sling on her left hand and arm, and necessitating the use of prescription painkillers that made her drowsy. (RP 44-45, 87, 89, 379, 382-83) Family

¹ Several witnesses share last names. For clarity, the witnesses will be referred to by first names throughout this brief.

members became concerned for Theresa's welfare when telephone calls and voice mail messages went uncharacteristically unanswered. (RP 54, 74) Theresa's husband, Craig Cahill, told police and neighbors that Theresa may have gone to Ocean Shores to think because she had recently been diagnosed with cancer.² (RP 255, 292, 314, 3223, 324, 337-38, 344-45, 726)

Unsuccessful efforts were made to locate Theresa, including a review of possible financial transactions and a televised plea to the public. (RP 119-20, 364-67) Theresa's body was discovered on November 18, 2002. (TP 151, 154) Her body had been bound with duct tape; wrapped in plastic, bed sheets and a sleeping bag; placed in a blue recycling bin tied shut with rope; and left beside a remote logging road off of Interstate 90 in the North Bend area. (RP 151-52, 155, 167, 204-06, 395-96) The road was unpaved, steep and narrow. (RP 156, 396-97) Overgrown bushes and trees scrape the sides of vehicles as they pass. (RP 396-97, 864)

The bedding resembled the sheets used by Theresa in her bedroom. (TP 81-82, 167) The plastic sheeting, duct tape and

² Although Theresa's arm surgeon informed the Cahills that he found tumors in her arm, he did not believe they were cancerous. (RP 380-82) Theresa did not tell her friends or family that she thought she had cancer. (RP 46, 86, 229) Later testing revealed that she did not. (RP 384)

rope were similar to items found in the Cahill's home. (RP 503, 603-04, 596, 599, 614-15, 616, 617-18, 841, 870) The recycling bin originated with Tacoma Solid Waste Management, and had been provided to the home next door to the Cahills. (RP 426, 428-29) A neighbor observed a recycling bin in the Cahill's garage on November 13, but police did not find a bin at the home during subsequent investigations. (RP 477, 480, 825, 829)

When family members and police first inspected the Cahill's home, before Theresa's body was discovered, they noticed nothing out of the ordinary, except that Theresa's normal bedding was missing. (57, 82, 103-04, 301-02, 308, 313) The home appeared clean and tidy. When police returned to execute a search warrant after locating Theresa's body, they found her bedroom in disarray. A fish tank had been recently overturned,³ the bathtub water was running, and an end table had been knocked over. (RP 549, 808-09)

When police did a more thorough search for evidence, they found light blood stains on the bedroom carpet and wall. (RP 548, 551-52) Forensic investigators conducted Luminol tests to detect

³ Several fish were still alive in a puddle of water. (RP549, 810)

any blood not visible to the naked eye, and found significant traces of blood on the bedroom walls, ceiling, and carpet. (RP 552-53, 556-57, 669-71) Investigators noted the blood traces on the wall were in a swirled pattern, indicating that someone had attempted to wipe them away. (RP 556-57) Investigators also noted a strong smell of cleaning solution on the carpet in the area of the blood stain. (RP 848)

Medical examiners concluded that Theresa had died as a result of numerous blows to the head. (RP 210-11, 231) Marks left by the blows had a linear and triangular pattern. (RP 211, 214-15) During one of the more forceful blows, a dark substance was transferred and embedded into Theresa's skull. (RP 220-22, 578-79) Theresa's granddaughter testified that she saw Craig stoke a fire using a long fireplace poker the day before Theresa's disappearance. (RP 407-08; Exh. 212)

The medical examiner noted "defensive" wounds on Theresa's arms. (RP 211-13) The examiner opined that duct tape wrapped across Theresa's mouth and head was likely placed there before any head injuries were inflicted, because blood pooled above the tape and not below. (RP 206-07) Testing also revealed the presence of Craig's DNA under Theresa's fingernails. (RP 652-

54)

Craig was arrested on November 21 near the Oregon/Washington border. (RP 461, 463) He was driving Theresa's Ford Explorer, but the license plates on the vehicle were plates reported stolen earlier in the day from a Subaru Forrester parked at a trailhead in rural Snohomish County. (RP 80, 433-34, 435, 439, 445, 463) Inside the Explorer, police found other items stolen from the Subaru, and items stolen earlier that day from a second vehicle parked off Interstate 90 near Snoqualamie. (RP 448-49, 452-53, 873) Arresting officers noted scratches along the sides of the Explorer, mud and dirt on the fenders and tires, and foliage in the cargo rack. (RP 466, 860-62) During booking, officers noted marks on Craig's chest that resembled fingernail scratches. (RP 514-15, 516, 630)

Craig told police that Theresa was "his everything" and that they were "soul mates." (RP 887, 729) He told police that, if he had killed her he would admit it, but also said that no one else was involved in her death. (RP 887-88)

III. ARGUMENT & AUTHORITIES

A criminal defendant has a due process right to instructions that clearly and accurately charge the jury regarding the law to be

applied in a given case. U.S. Const amends. 5, 14; Wash. Const. art. I § 3; Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977). The standard for clarity in jury instructions is higher than for statutes; while a court can resolve an ambiguously-worded statute through statutory construction, “a jury lacks such interpretive tools and thus requires a manifestly clear instruction.” State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). It is improper to instruct the jury in a way that relieves the State of its burden of proof or that fails to correctly inform the jury of an essential ingredient of the crime. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

In this case, the prosecution charged Craig with one count of first degree murder, requiring the State to prove that he acted with premeditation.⁴ (CP 1-2, 127) Premeditation has long been recognized as a difficult concept to define and assess. Judge Benjamin Cardozo described the phrase “deliberate and premeditated” as “so obscure that no jury hearing it . . . can fairly be expected to assimilate and understand it.” Matthew Pauley, 37 AM.

⁴ RCW 9A.32.030(1)(a) states, in relevant part: “A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.]”

CRIM. L. REV. 145, 161 (1999) (quoting Benjamin Cardozo, *What Medicine Can Do For Law*, Selected Writings of Benjamin Nathan Cardozo 371, 382-84 (M. Hall ed., 1947)).

Premeditation is not the same as intent to kill. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). While intent means only "acting with the objective or purpose to accomplish a result which constitutes a crime", premeditation 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) and State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)); Brooks, 97 Wn.2d at 876.

Premeditation must involve "more than a moment in point of time," RCW 9A.32.020(1), but mere opportunity to deliberate is not sufficient to support a finding of premeditation. Pirtle, 127 Wn.2d at 644. It is therefore possible for a person to act with an intent to kill that is not premeditated. Brooks, 97 Wn.2d at 876. For this reason, premeditation cannot simply be inferred from the intent to kill. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984).

Over defense objection, the trial court in this case gave the following instruction defining premeditation:

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

(CP 126 (Court's Instruction 11); RP 908-17, 921). The given instruction is identical to WPIC 26.01.01. Comparison of WPIC 26.01.01 with existing case law defining premeditation reveals several legal deficiencies.

WPIC 26.01.01 begins with the statement: "Premeditation means thought over beforehand." Though not an incorrect statement, it is woefully incomplete and does not fully advise the jury of the requirements of the law. In Finch and Pirtle, the Supreme Court defines premeditation 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." Pirtle, 127 Wn.2d 644 (emphasis added); Finch, 137 Wn.2d at 831.

The WPIC also uses the term "any deliberation" to define

premeditation. WPIC 26.01.01. This phrase does not adequately convey the requirement of reflection, deliberation and reasoning on the intent to take a life. In other words, it does not explain that the deliberative process must be specifically upon the matter of whether to take a human life. Pirtle, 127 Wn.2d 644. "Any deliberation" that "forms an intent to take a human life" is not the same as premeditation. To follow the State's instruction is to miss the manifest meaning of the concept of premeditation.

The instruction also does not explain to the jury that formation of the intent to kill is not sufficient to establish premeditation. Brooks, 97 Wn.2d at 876. This is the critical distinction between first and second degree murder. See RCW 9A.32.030(1)(a); RCW 9A.32.050(1)(a).⁵ A jury instruction that collapses that distinction is improper. See State v. Shirley, 60 Wn.2d 277, 279, 373 P.2d 777 (1962).

Finally, the State may only establish premeditation by circumstantial evidence when "the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is

⁵ RCW 9A.32.050(1)(a) states, in relevant part: "A person is guilty of murder in the second degree when: (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person[.]"

substantial.” Pirtle, 127 Wn.2d at 643; Gentry, 125 Wn.2d at 597. The WPIC does not express this requirement. This is especially problematic because WPIC 5.01, which was given in this case, tells the jury that “[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.” CP 119 (Court’s Instruction 4). WPIC 26.01.01 does not explain to the jury that this is not the standard to apply when determining whether the State proved the element of premeditation.

The trial court refused to give the defense’s proposed instruction defining premeditation, which read:

Premeditation must involve more than a moment in point of time; but mere opportunity to deliberate is not sufficient to support a finding of premeditation.

Rather, 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.

Premeditation may be proved by circumstantial evidence where the inferences drawn are reasonable and the evidence supporting premeditation is substantial.

(CP 84; RP 908-17, 921) The proposed instruction was based on language pulled from Pirtle, 127 Wn.2d at 644, State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999), and a long line of

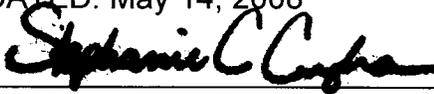
Washington cases. It was a more accurate and complete definition of premeditation, which would have fully and correctly advised the jury of the definition of premeditation, and of the facts the State must prove in order to establish premeditation.

The failure to accurately inform the jury of the constitutional requirements of a conviction is presumptively prejudicial unless it is affirmatively proven to be harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Once an error is presumed to be prejudicial, it is the State's burden to show that it was harmless. State v. Burri, 87 Wn.2d 175, 182, 550 P.2d 507 (1976). Moreover, “[a] legally erroneous instruction cannot be saved by the test for sufficiency.” LeFaber, 128 Wn.2d at 903 (citing Wanrow, 88 Wn.2d at 237). Because the instruction given by the trial court did not accurately state the law of premeditation, Craig’s right to a fair trial was prejudiced and his conviction should be reversed.

IV. CONCLUSION

Craig Cahill offered an instruction defining premeditation that accurately stated the law and would have made the pertinent standard manifestly apparent to the jury. Accordingly, the trial court's refusal to give Craig's proposed instruction or otherwise clarify the law of premeditation deprived Craig of his right to a fair trial, and requires that his conviction be reversed.

DATED: May 14, 2008



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CERTIFICATE OF MAILING

I certify that on 05/14/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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