

NO. 49481-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD BLAIR,

Appellant.

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

The Honorable Ronald E. Culpepper, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
	Issues pertaining to assignments of error.....	1
B.	STATEMENT OF THE CASE.....	1
	1. Procedural History	2
	2. Substantive Facts	2
C.	ARGUMENT.....	12
	1. BLAIR’S STATEMENT TO REIGLE SHOULD HAVE BEEN SUPPRESSED BECAUSE HE WAS NOT ADVISED OF HIS CONSTITUTIONAL RIGHTS BEFORE BEING SUBJECTED TO CUSTODIAL INTERROGATION.....	12
	2. THE STATE PRODUCED INSUFFICIENT EVIDENCE TO ESTABLISH THE ESSENTIAL ELEMENT OF PREMEDITATION, AND BLAIR’S CONVICTION OF FIRST DEGREE MURDER MUST BE REVERSED.....	19
D.	CONCLUSION.....	24

TABLE OF AUTHORITIES

Washington Cases

<u>In re Cross</u> , 180 Wn.2d 664, 327 P.3d 660 (2014)	14, 16
<u>State v. Bingham</u> , 105 Wn.2d 820, 719 P.2d 109 (1986)	23, 24
<u>State v. Brooks</u> , 97 Wn.2d 873, 651 P.2d 217 (1982)	20
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992)	19
<u>State v. Denney</u> , 152 Wn. App. 665, 218 P.3d 633 (2009).....	16, 17
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995).....	20
<u>State v. Green</u> , 94 Wn. 2d 216, 616 P.2d 628 (1980).....	19
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	19
<u>State v. Heritage</u> , 152 Wn.2d 210, 95 P.3d 345 (2004)	14
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998)	19
<u>State v. Hummel</u> , 196 Wn. App. 329, 383 P.3d 592 (2016).....	20
<u>State v. Otis</u> , 151 Wn. App. 572, 213 P.3d 613 (2009)	15
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245, <u>cert. denied</u> , 518 U.S. 1026 (1995).....	20
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	15, 18
<u>State v. Sargent</u> , 40 Wn. App. 340, 698 P.2d 598 (1985).....	20
<u>State v. Wheeler</u> , 108 Wn.2d 230, 737 P.2d 1005 (1987)	16

Federal Cases

<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991).....	18
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<u>Dickerson v. United States</u> , 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000).....	13
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)....	19
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)	13
<u>Rhode Island v. Innis</u> , 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).....	14, 15
<u>United States v. Disla</u> , 805 F.2d 1340 (9th Cir. 1986).....	18

Statutes

RCW 9A.32.030(1)(a)	2, 19
---------------------------	-------

Constitutional Provisions

Const. art. I, § 3.....	19
U.S. Const. amend. V.....	13
U.S. Const. amend. XIV	13, 19

A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding appellant was not subject to custodial interrogation.

2. The trial court should have suppressed appellant's statement elicited during custodial interrogation because he was not advised of his rights.

3. There was insufficient evidence to establish the essential element of premeditation.

Issues pertaining to assignments of error

1. Appellant was taken into custody on suspicion of murder, but the arresting officer did not give him Miranda warnings. Where the officer asked appellant a question which he should have known was reasonably likely to elicit an incriminating response, did the trial court err in failing to suppress appellant's response?

2. Appellant was convicted of first degree murder, requiring the State to prove he acted with premeditated intent to kill. Where the State presented evidence that appellant had the opportunity to deliberate, but there was no evidence of actual deliberation, is the evidence insufficient to prove the essential element of premeditation?

B. STATEMENT OF THE CASE

1. Procedural History

On February 4, 2015, the Pierce County Prosecuting Attorney charged appellant Richard Blair with one count of first degree murder. CP 1-2; RCW 9A.32.030(1)(a). The case proceeded to jury trial before the Honorable Ronald E. Culpepper. The jury was instructed on first degree murder and the lesser included offenses of second degree murder, first degree manslaughter, and second degree manslaughter. CP 75-89. The jury found Blair guilty as charged. CP 96. The court imposed a mid-standard range sentence of 495 months confinement, mandatory legal financial obligations, and 36 months community custody. CP 108-10. Blair filed this timely appeal. CP 126.

2. Substantive Facts

In January 2015, Jimmy Payne was living in a small room in a detached garage behind the house where Robert Berg, Daniel Berg, and Tanya Holland lived. 4RP¹ 169, 171-72. Payne had just gotten out of prison and needed a place to stay. Richard Blair stayed with Payne on occasion rather than in his tent at a transient camp. 4RP 184, 201-02. The detached garage had no running water, so Blair and Payne had access to the main house to use the kitchen and bathroom. 4RP 173.

¹ The Verbatim Report of Proceedings is contained in ten volumes, designated as follows: 1RP—7/5/16; 2RP—7/18/16 and 7/19/16 (voir dire); 3RP—7/18/16 and 7/19/16; 4RP—7/20/16; 5RP—7/21/16; 6RP—7/25/16; 7RP—7/26/16 (am); 8RP—7/26/16 (pm); 9RP—7/27/16; 10RP—8/1/16, 8-2-16, and 8-4-16.

On the morning of January 31, 2015, Blair woke Robert Berg up after using the shower. 4RP 177. He told Robert he needed help cleaning something up out back. 4RP 179. Robert went to the garage with Blair. 4RP 179. In the room off the garage Robert saw the furniture stacked against the wall, and Blair said Payne was under the furniture. 4RP 180. Blair said he had killed Payne. 4RP 181.

Robert returned to the house. A neighbor, Kathy Perozzo, was in the kitchen, and Robert told her to leave, saying there was a dead body in the back yard. 4RP 182. Robert then woke up his brother Daniel and Daniel's girlfriend Tanya Holland. 4RP 182. Blair told Daniel he had killed Payne and asked Daniel if he had a machete or chainsaw. 4RP 209. Before she left, Perozzo heard Blair say he and Payne got into a fight, and he killed Payne. Blair told them not to call police because he did not want to go back to prison. 5RP 305. Blair also said he wanted to burn the body and bury it. Robert wanted Blair to think he was going along with this plan so he could get Blair out of the house. He told Blair that Daniel would go get burial supplies while he walked Blair back to his tent at the camp. 4RP 183. Daniel, Tanya, and Jason Jenkins went to buy donuts, and when they returned, Daniel called police. 4RP 211-12, 236-37.

Daniel told the 911 dispatcher that he had gone back to talk to Payne about the rent and found the body. He made up this story to keep

Robert out of the report, because Robert had an outstanding warrant. 4RP 219-21. Daniel and Tanya both initially lied to police and then corrected their statements later in the day. 4RP 220, 242. Robert Berg went next door when he returned, hoping to avoid talking to the police. 4RP 185. He ended up giving a statement later in the day, however. 4RP 185. Robert told police that Blair had said Payne had tried to attack him, and he told Blair it sounded like self-defense. 4RP 193. He told police that Blair said Payne had hit him with a hammer. 4RP 194.

Paramedics arrived and went into the room. They saw a pile of blankets with a foot sticking out from underneath. 5RP 383. There were blood stains on the walls and blood on the body. Payne was not breathing and not responsive. 5RP 385-86. Paramedics determined this was a suspicious death and radioed for police without touching anything further. 5RP 387.

Pierce County Sheriff's Deputy Jeff Reigle was the first officer on the scene, arriving after the medic unit. The people who lived at the house showed him to the detached garage and living space. 4RP 120. He saw Payne in the room. 4RP 123. He noticed a hammer and screwdriver on the ground next to Payne. There were blood spatter and smears on the wall and a tooth fragment on the floor. 4RP 125. Reigle noticed injuries

to Payne's back, head, and wrists. 4RP 125-26. Reigle notified detectives and started a major incident log. 4RP 128.

Detective Tim Kobel was assigned as lead detective. 7RP 684. He viewed the scene and arranged for forensics investigators to process it. 7RP 688. Kobel then spoke to Daniel Berg, who gave him information about where to find Blair. 7RP 689-90.

Kobel sent Reigle and another deputy to the transient camp to detain Blair. 4RP 131. They approached Blair's tent and ordered him to come out. When he did not respond Reigle opened the flap of the tent, saw Blair, and ordered him outside. Blair complied, and Reigle placed him in handcuffs. 4RP 136-37. Reigle commented that Blair appeared to be limping, and Blair responded that he had been sleeping all day. 4RP 138.

Blair was taken to the precinct where he was interviewed by Detectives Anderson and Kobel. He gave a recorded statement after being advised of his rights. 7RP 694-95. In his statement Blair said he had not seen Payne since November 2009. Exhibit 273A, at 1. He said he had been at his camp all night, only leaving in the morning for a little while to get food and cigarettes. Id. at 3-4. Blair denied being at the house where Payne was killed, saying he did not know anyone there. Id. at 8. He said

he didn't hear about Payne being found dead, and he thought Payne was in prison. Id. at 9.

Blair had the hood of his sweatshirt pulled forward, and when he removed the hood at Kobel's request, the detectives saw some abrasions and cuts on his head. 5RP 353-54. Kobel asked Blair how he got the injuries to his head, and Blair said he had wrecked his bicycle, and he had been in a fight at McDonald's. Exhibit 273A at 9-10. Kobel told Blair his injuries looked like he had been hit with a hammer. He told Blair that he thought Blair and Payne got into an altercation and a fight occurred, and Blair walked away as the survivor. Id. at 20. Kobel told Blair that people had already put him at the scene, and the best thing he could do was tell the truth about it. Id. at 21.

Blair then agreed to tell the truth. He told Kobel that he and Payne were living in the room. He was sleeping when Payne hit him in the head with a hammer. Id. at 21. Blair said he acted in self-defense when Payne tried to kill him by hitting him in the head with a hammer as hard as he could. Id. at 22. When he woke up Payne was swinging the hammer again, so Blair wrestled him. Id. at 23. Blair pinned him down, and when he let Payne go Payne charged him again with some type of glass. Id. at 24. Blair said Payne also hit him with a heater and tried to choke him. Id.

at 26. When Payne tried to cut him with some type of glass, Blair twisted his arm and stuck it in his neck. Id. at 27.

Blair showed Kobel hammer marks on his legs. Id. at 29-31. He said when he got the hammer away from Payne, he hit Payne with it a couple of times. Id. at 33. When Kobel asked how Payne got cut, Blair said there was glass everywhere, and they were wrestling around. Id. at 33. Blair said he had Payne in a choke hold and was trying to talk to him, but Payne stopped breathing and Blair knew he was dead. Id. at 34. Blair thought the fight lasted 30 to 45 minutes. Id. at 34. When Kobel asked Blair why he didn't call the police, he explained that he had gone to jail in the past for defending himself. Id. at 35.

After he gave his statement, Blair reported that it hurt to breathe, and he was taken to the hospital, where he was treated for a fractured rib and broken toe. 5RP 358, 375. Blair told the deputy who transported him that he was a lot bloodier earlier, but he had taken a shower. He said he felt lucky to be alive and was glad Payne had not cut his throat. He said he did not expect what happened, and he went into self-defense mode. He admitted that he should have called the police and told them the truth about what happened. 5RP 340.

While Blair was at the hospital a forensic investigator collected his clothes and photographed his injuries. 6RP 625-26. He had multiple

scratches and bruises, cuts on his head and scalp, swelling to his left hand, injuries to his chest, under his armpit, to his back, and bruising on his legs. 6RP 627-31.

A forensics investigation manager with the Pierce County Sheriff's Department conducted a forensic analysis some time after the incident using photographs and evidence collected from the scene. 5RP 403. He noted multiple blood patterns on the wall. Some were transferred by bloody objects, and others appeared to be expired by someone standing close to the wall. 5RP 407, 413. There was also some impact spatter which indicated someone facing the wall was struck, and some projected blood indicating a wound to a blood vessel where the blood was under pressure, or a wound to a profusely bleeding body part that was moving. 5RP 414-15. There was a bloody handprint on the wall which was determined to be Blair's. 5RP 420-23. There was damage to the wall and sheetrock dust on Payne's foot in proximity to the damaged wall. 5RP 424.

Police documented and collected several items from the scene. In the room there was a file cabinet with the top drawer missing, and debris near the cabinet that looked like it came from the drawer. There was a space heater on top of the debris, with what looked like oatmeal on top of that. 6RP 586-87. A blanket and a TV mount were hanging on the wall.

6RP 587. There was a pillow on top of Payne's foot and pieces of wood on top of the pillow. 6RP 588. Sleeping bags partially covered Payne. 6RP 590. A towel, some jackets, and a sweatshirt were on the floor across the room from Payne. 6RP 592-93. There was a large hole in the sheetrock near Payne's feet and an injury with sheetrock dust on Payne's left heel. 6RP 599. There was broken glass under the body but no apparent source for the glass. 6RP 601, 604.

Blood was found on pieces of the filing cabinet drawer, the sleeping bags, a comforter, a broken guitar, a pillow, a watch, the portable heater, a brown coat, a sweatshirt, and a sheet. 7RP 651-60. DNA analysis was conducted on bloodstains on several items collected from the scene. Stains from a hammer, a wall mount, and the west wall contained DNA from both Payne and Blair, while stains from a screwdriver, the south wall, a sleeping bag, pillow, watch, coat and sweatshirt contained Payne's DNA. 6RP 487-505.

On initial examination the Associate Medical Examiner who conducted the autopsy noted that there were blood stains on Payne's clothing, a tooth had been knocked out recently, and there were injuries to his feet, legs, torso, hands, arms and head. 8RP 745-56. A toxicology screen showed methamphetamine in an amount at the low end of the range that could cause death by overdose. 8RP 758. The medical examiner

believed, however, that Payne died as a result of blood loss from his injuries rather than an overdose of methamphetamine. 8RP 809-10; 9RP 821. He felt that the most significant blood loss was from blunt force injuries to Payne's head, which included scrapes, bruises, and lacerations to the nose, cheeks, mouth, and skull. 8RP 763-70, 774, 776-78, 810. There was a fracture to the outer layer of Payne's skull consistent with being struck by a hammer, and the skin over that fracture would have bled profusely. 8RP 777-78. There were other shallow, sharp force injuries which the medical examiner believed occurred around the time of death and therefore would not have bled as profusely. 8RP 780. These include cuts to the neck and arms. 8RP 782, 794, 799, 803.

A deputy state medical examiner from Oregon testified as a consulting expert for the defense. 9RP 843. He reviewed the autopsy report, photos from the scene and the autopsy, charging documents, and Blair's medical records. 9RP 846. The expert agreed that the cause of death looked like exsanguination, but he did not agree that the wounds to Payne's face and head were the major source of blood loss. 9RP 903, 906. He concluded that Payne's wrist and neck injuries occurred at a time with the heart was pumping blood into the surrounding tissue. 9RP 847. He felt the wounds to the wrists were the only possible source of the castoff blood patterns found at the scene, and that the blunt force injuries to the

head and face would not have bled enough to account for the amount of blood at the scene. 9RP 856, 862, 906. He also concluded that the laceration on Blair's head was consistent with being struck by a hammer, as were two contused abrasions on Blair's back. 9RP 884, 888-89.

A forensic scientist who is a blood spatter expert also testified for the defense. 9RP 921, 932. The expert concluded that the damage to the sheetrock was caused by slamming the portable heater into the wall. 9RP 930. He noted that Blair did not have any bleeding injuries to his hands or arms, but Payne had bleeding injuries to both wrists. 9RP 940. He did not agree with the sheriff's department investigator who concluded the blood patterns on the wall showed arterial spurting. Instead, the patterns indicated blood was cast off an object that was connected to a blood source. 9RP 944-45. Another area on the wall showed a broad deposit of blood with enough volume that the blood began to run down the wall, and then some object was wiped across the blood trail while it was still wet. A castoff pattern higher on the wall was also smeared. 9RP 948-50.

The State argued that Blair acted with premeditated intent when he killed Payne and that the killing was not justifiable. 10RP 1051-52. Blair argued that he acted in self-defense, reasonably believing Payne would kill him when he attacked him in his sleep with a hammer. 10RP 1081-82. He argued that the State had produced no evidence that he was not

attacked first, and thus it had failed to disprove self-defense. 10RP 1085-86.

C. ARGUMENT

1. BLAIR'S STATEMENT TO REIGLE SHOULD HAVE BEEN SUPPRESSED BECAUSE HE WAS NOT ADVISED OF HIS CONSTITUTIONAL RIGHTS BEFORE BEING SUBJECTED TO CUSTODIAL INTERROGATION.

Prior to trial the court held a hearing to determine whether Blair's statements to law enforcement were admissible. Deputy Jeff Reigle testified that he was sent from the scene where Payne was killed to the camp to detain Blair for murder. He ordered Blair out of his tent, handcuffed him, and walked him to a patrol car. RP 94-95. He did not give Blair Miranda warnings. 4RP 107. Reigle noticed that Blair was walking with a limp, so he asked Blair if he was injured. 4RP 95. Blair responded that he had been sleeping all day and he just woke up. 4RP 97. Reigle testified that he asked Blair about the limp to determine whether he needed to call for medical aid. RP 98. If he suspected Blair was injured, procedure would call for him to have Blair checked out by medical personnel. 4RP 99.

The State argued that since Reigle's question about Blair limping was asked for the purpose of ensuring Blair's health and safety, not to elicit an incriminating response, the questioning did not amount to

interrogation. RP 107-08. Defense counsel responded that Reigle had been at the scene and knew there had been a fight, so he would know that the question about Blair's limp had the potential to elicit an incriminating response, even if he was also asking for medical reasons. 4RP 110-11. The question therefore amounted to interrogation, and Blair's response should be suppressed. 4RP 112. The court found that the statement was not the product of custodial interrogation, because the deputy asked about the limp to determine if Blair needed medical care. It ruled that Blair's response was admissible. 4RP 113.

An individual has the right to remain free from compelled self-incrimination while in police custody. U.S. Const. amends. V & XIV; Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). In Miranda, the Supreme Court recognized that custodial interrogation, by its very nature, "isolates and pressures the individual," "blurs the line between voluntary and involuntary statements," and thereby heightens the risk that an individual will be deprived of his privilege against compulsory self-incrimination. Dickerson v. United States, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000). Thus, before a suspect in custody may be interrogated by a state agent, he must be advised of his right to remain silent and his right to an attorney. Miranda, 384 U.S. at 479.

Miranda warnings protect a suspect's constitutional right not to make incriminating statements while in the coercive environment of police custody. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Any response to custodial interrogation is deemed incriminating if used by the State against the accused at trial. Rhode Island v. Innis, 446 U.S. 291, 301 n.5, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Blair's statement to Reigle regarding his limp is incriminating because it was presented at trial to attack the credibility of his claim of self-defense.

Whether a suspect's statement was obtained in violation of Miranda is a mixed question of law and fact. This Court defers to the trial court's findings of fact but reviews legal conclusions drawn from those findings de novo. In re Cross, 180 Wn.2d 664, 680-81, 327 P.3d 660 (2014). Although the trial court entered findings of fact and conclusions of law regarding the admissibility of Blair's recorded statement at the precinct, it did not include its findings and conclusions as to Blair's statement to Reigle. CP 27-29. But the parties presented evidence about Blair's statement, and the facts were undisputed. The court heard argument and issued a ruling that Reigle's question did not amount to interrogation. This Court can conduct a de novo review of whether the undisputed facts support the legal conclusion that Blair was not subject to interrogation. The record from the CrR 3.5 hearing is sufficient, even

without the court's written findings, to conduct this review. See State v. Otis, 151 Wn. App. 572, 577, 213 P.3d 613 (2009).

There is no question Blair was in custody when Reigle asked why he was limping. He had been told he was under arrest, he was placed in handcuffs, and he was being led to a patrol car to be transported to the precinct. Thus the Miranda safeguards apply to any interrogation by Reigle. See Innis, 446 U.S. at 300-01 (“Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.”).

In Innis, the United States Supreme Court defined "interrogation" for Fifth Amendment purposes:

[T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U.S. at 301. Moreover, the focus of this definition is on the perceptions of the suspect, rather than the intent of the police. Id.; State v. Sargent, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988). The standard is an objective one, focusing on what the officer knows or should know will be the result of his words or acts. The subjective intention of the officer is not at issue. Sargent, 111 Wn.2d at 651. Thus, a practice which the police

should know is reasonably likely to evoke an incriminating response from the suspect amounts to interrogation. Innis, 446 U.S. at 301.

Washington courts recognize that “‘routine booking procedures ... rarely elicit an incriminating response’ and, thus, may be exempt from Miranda requirements.” State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009) (quoting State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987)), abrogated as to standard of review by In re Cross, 180 Wn.2d 664, 327 P.3d 660 (2014). It is not the standard nature of the booking questions which shield them from Miranda requirements, however, but that fact that they are not reasonably likely to elicit an incriminating response. Denney, 152 Wn. App. at 670. Even routine questioning can constitute interrogation when, under the specific circumstances of the case the officer should have known the questions were likely to elicit an incriminating response. Id. The relationship between the question asked and the crime suspected is highly relevant. Id. at 673. A legitimate question, asked with good intentions, will still violate a defendant’s Miranda rights if it is reasonably likely to produce an incriminating response. Id.

For example, in Denney, the defendant was arrested for theft and unlawful possession of a controlled substance after being found with morphine tablets at a pharmacy. When she was being booked, jail

personnel administered a standard medical questionnaire, in the presence of the arresting officer, to determine if she could be booked into the jail or needed to be transferred to a medical facility. In response to a question about drug use, Denney admitted she had taken morphine that day. In a bail survey, she was asked about drug use in the past 72 hours, and she admitted to using morphine. Denney, 152 Wn. App. at 667-68. On appeal, this Court held that, since Denney had been arrested for morphine possession, jail staff should have known that the otherwise routine medical questions were reasonably likely to produce an incriminating response. Id. at 673. The questions thus amounted to custodial interrogation. Id. at 673-74.

Similarly, here, Reigle testified that he asked about Blair's limp as required by standard procedure, to determine if he needed medical aid before he could be booked into the jail. Despite this legitimate purpose for asking the question, Reigle should have known that it was reasonably likely to elicit incriminating information under the circumstances of this case. Reigle had been to the scene where Payne was killed. He knew there had been a considerable struggle in the small room and that anyone involved in Payne's death was likely injured. Reigle knew that Blair had been identified as the suspect in Payne's death. Any response Blair could give would likely be incriminating. Because an objective officer could

reasonably foresee Blair would give an incriminating statement in response to the otherwise routine question, the question constituted interrogation. See Sargent, 111 Wn.2d at 650; see also United States v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986) (officer's questions about defendant's place of residence were interrogation where officer had preexisting knowledge of illegal behavior at defendant's apartment).

Miranda is a constitutional requirement. As such, the State bears the burden of proving that the admission of statements obtained in violation of Miranda was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). In other words, the State must show that the admission did not contribute to the conviction. Id. at 296. The State cannot meet this heavy burden here. Blair said in his recorded statement to detectives that Payne attacked him with a hammer and he was defending himself, showing the detectives injuries to his head, arms, and legs. The State was required to prove beyond a reasonable doubt that Blair was not acting in self-defense. CP 76. It spent a considerable amount of time arguing that Blair's injuries were not severe enough to be consistent with his claims that he was defending himself against Payne's attack. 10RP 1065-69, 1075-77. Reigle's testimony that Blair denied being injured likely contributed to the jury's verdict, and improper

admission of the statement was not harmless. Blair's conviction must be reversed.

2. THE STATE PRODUCED INSUFFICIENT EVIDENCE TO ESTABLISH THE ESSENTIAL ELEMENT OF PREMEDITATION, AND BLAIR'S CONVICTION OF FIRST DEGREE MURDER MUST BE REVERSED.

The burden of proving the essential elements of a crime unequivocally rests on the prosecution. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the State must establish to garner a conviction. Winship, 397 U.S. at 364. Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

A conviction of first degree murder requires proof that the defendant acted "with premeditated intent to cause the death of another person." RCW 9A.32.030(1)(a). Thus, to convict Blair of first degree

murder, “the State [was] required to prove both intent and premeditation, which are not synonymous.” State v. Sargent, 40 Wn. App. 340, 352, 698 P.2d 598 (1985) (citing State v. Brooks, 97 Wn.2d 873, 651 P.2d 217 (1982)). Premeditation distinguishes first degree murder from second degree murder. Brooks, 97 Wn.2d at 876; State v. Hummel, 196 Wn. App. 329, 383 P.3d 592 (2016).

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, cert. denied, 518 U.S. 1026 (1995) (quoting State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995)); RCW 9A.32.020(1). It requires deliberation lasting “more than a moment in point of time.” Id. at 644. A mere opportunity to deliberate is not sufficient to support a finding of premeditation. Pirtle, 127 Wn.2d at 644.

The State can prove premeditation by circumstantial evidence “where the inferences drawn by the jury are reasonable and the evidence supporting the jury’s finding is substantial.” Pirtle, 127 Wn.2d at 643. In Pirtle, the court identified four factors that are “particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and

the method of killing.” Pirtle, 127 Wn.2d at 644. None of these factors establishes a reasonable inference of premeditation in this case.

First, there was no evidence of any motive for the killing other than Blair’s claim of self-defense. The neighbors who testified about their interactions with Blair and Payne during the time preceding the incident identified no animosity between the pair. No one heard or saw anything which would provide an explanation for what happened. 4RP 174-75, 202-04, 215, 231-32, 247-49; 5RP 278, 280, 297-98. Nor was there any evidence that Blair procured a weapon before the struggle. The State presented no evidence that Blair brought a hammer to the location. In fact, the only evidence regarding where the hammer came from was Blair’s statement that he wrestled it away from Payne after Payne attacked him with it. There were cuts which were possibly made from glass which appeared to have been broken in the struggle, but this evidence did not give rise to an inference that Blair procured a weapon after forming a plan to kill Payne. There was also no showing of stealth. This was a struggle between two large men in a small room, in which furniture was thrown around and items were broken. Finally, the method of killing does not support an inference of premeditation. This was a fight, and there is no dispute that both men were engaged in the fight. 10RP 1068, 1081, 1103. Blair suffered a fractured rib, and broken toe, cuts and bruises to his arms

and legs, and blunt injuries to his head and torso. Blair said in his statement that Payne started the fight by attacking him in his sleep, and the State could not present evidence to establish that that did not happen. The evidence did not give rise to a reasonable inference of premeditated intent to kill.

In closing argument, the State focused on the amount of time over which Payne's injuries occurred, arguing that the passage of time demonstrated premeditation:

[Y]ou look at the amount of time it took to inflict these injuries, the different types of injuries, the different instruments used, the level of force, the resulting injuries. All of this is time.

You look at what happened afterwards, where he left him, how he covered him up. This is all time. This is more time than we often get with premeditation. There's a significant amount of premeditation. One might look at this and say, well, it was just a fight; it was a fight; how could he have premeditated this murder. Because it took that much time.

If you have a single gunshot that happens really quickly, you don't have much time. If you have a protracted beating here to the point of so much blood loss, so many weapons, you have premeditation.

10RP 1051. And then in rebuttal,

I'm not going to repeat everything I said originally about premeditation. Just understand what that means. It doesn't mean planned out. It doesn't mean you draw up a plan. This is a plan that evolved, but given the injuries inflicted, given the manner in which he beat Jimmy to death, that the intent is demonstrated by that amount of time. It's the defendant who said it was 40, 45, minutes. This is an event over a period of time where the defendant's intent was shown.

10RP 1104. And finally, “Premeditation is defined by law. It’s here over the amount of time that it took to cause his death.” 10RP 1110.

There is a significant flaw in the State’s argument, however. Premeditation is not established merely by proof that the act causing death occurred over an appreciable period of time. To allow a finding of premeditation on such proof “obliterates the distinction between first and second degree murder.” State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). “Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation.” Id.

In Bingham, the defendant met the victim on a bus, and later that day they hitchhiked on a rural highway. Bingham, 105 Wn.2d at 821. The victim was found dead, and evidence showed the defendant held his hand over her mouth, strangling her before raping her. Id. Although the Supreme Court found time for deliberation, it found no evidence from which the jury might have inferred actual deliberation. Id. at 827. The Court held that the mere passage of time for the killing to occur showed only an opportunity to deliberate and by itself was insufficient to sustain the premeditation element absent evidence that the defendant did in fact deliberate. Id. at 822, 826.

Here, as in Bingham, while the passage of time might have provided Blair the opportunity to deliberate, there was no evidence of actual deliberation. Instead, the evidence shows that Blair was reacting to the situation. An unplanned or impulsive killing may be intentional but without premeditated deliberation. See Bingham, 105 Wn.2d at 826. Where the State is unable to offer evidence of planning or show that the killing occurred in circumstances from which deliberation could be logically inferred, the State has not met its burden of proving premeditation. Because the State failed to prove an essential element of the offense, Blair's conviction for first degree murder must be reversed.

D. CONCLUSION

For the reasons addressed above, this Court should reverse Blair's conviction.

DATED March 23, 2017.

Respectfully submitted,



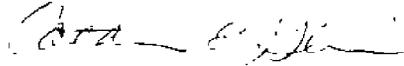
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Catherine E. Glinski
Done in Manchester, WA
March 23, 2017

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