

**NO. 49481-7**

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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD WAYNE BLAIR, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Ronald E. Culpepper

No. 15-1-00472-9

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**BRIEF OF RESPONDENT**

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MARK LINDQUIST  
Prosecuting Attorney

By  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit a pre-*Miranda* statement where the deputy's question concerned the defendant's health and welfare and where the deputy was not attempting to elicit an incriminating response?

2. Was there sufficient evidence to show premeditation where death from blood loss was hastened by multiple modes of attack with multiple weapons over a period of approximately thirty to forty minutes?

B. STATEMENT OF THE CASE.

1. Procedural History.

On February 4, 2015, Richard Wayne Blair, hereinafter the "defendant," was charged with first degree murder for the murder of James Payne. CP 1-2. Prior to trial beginning, two separate 3.5 hearings were held to determine the admissibility of statements made by the defendant to members of the Pierce County Sheriff's Department<sup>1</sup>. 1RP 22<sup>2</sup>; 2RP 92. The court ruled that the statements made to the lead detective, Tim Kobel, were admissible, and that one statement made to

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<sup>1</sup> The defendant does not challenge the admissibility of statements made to Detective Tim Kobel. *See* Brf. of App. at 12. He only challenges the admissibility of statements made to Deputy Jeff Reigle.

<sup>2</sup> The pre-trial voluntariness hearing and trial proceedings are referenced by volume page number. Other proceedings are referenced by date and page number.

first responder, Jeff Reigle, was also admissible. CP 27-29, 134-137<sup>3</sup>; 1RP 42, 2RP 113.

The case proceeded to a jury trial. At trial, the State called a total of twenty witnesses. CP 132-133. They included nine members of the Pierce County Sheriff's Department, forensic and crime scene investigators, and a medical examiner. *Id.* Defendant called two witnesses. *Id.* The jury convicted the defendant as charged. CP 96; 8RP 1120.

## 2. Statement of Facts.

On January 31, 2015, the defendant and James Payne were living in the back of a garage located at 804 97<sup>th</sup> Street South in Tacoma. 2RP 172. Mr. Payne had been living there for about a week and the defendant had moved in more recently. 2RP 173. Around 11:00 a.m.<sup>4</sup> on the morning of January 31, 2015, the defendant went into the room of Robert Berg and woke him up. 3RP 293, 301. Defendant told Robert<sup>5</sup> that he needed some help out back. 2RP 178. Defendant was wearing a raincoat and pants, but

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<sup>3</sup> A trial court must enter written findings of fact and conclusions of law following a suppression hearing. CrR 3.6(c). The written Findings of Fact and Conclusions of Law were entered on June 8, 2017. Courts have allowed entry after a case is appealed as long as it does not prejudice the defendant. *State v. Cruz* 88 Wn. App. 905, 908, 946 P.2d 1229 (1997). Defendant does not claim prejudice and even admits that the oral findings alone were sufficient for appellant review. *See* Brf. of App. at 14-15. On July 11, 2017, this Court granted the State's motion to supplement the record with the Findings of Fact and Conclusions of Law. They have been included as Clerk's Papers 134-137.

<sup>4</sup> Robert testified that it was approximately 6:00 a.m. when defendant woke him up. 2RP 177. All other witnesses testified that it was approximately 11:00 a.m. when Robert went to the house after going to the garage with defendant. 3RP 293, 301.

<sup>5</sup> Because multiple witnesses share the same surname, some witnesses will be referred to by their first name. No disrespect is intended.

no shirt or shoes. *Id.* It appeared to Robert that the defendant had just showered and he admitted having done so. 2RP 178-179. Robert went with the defendant to the garage. 2RP 179.

In the garage Robert saw the furniture stacked up against the back wall and the rest of the room was cleaned. 2RP 180. Defendant told Robert that Mr. Payne was buried under the furniture and Robert saw Mr. Payne's foot sticking out from under the furniture. 2RP 180-181. Defendant then admitted that he killed Mr. Payne. 2RP 181. Defendant threatened to kill Robert's family during this encounter. 2RP 182. This caused Robert to immediately return to the house to check on his family. 2RP 181-182. As he returned to the house, he saw Mary (Kathy) Perozzo<sup>6</sup>. 2RP 182, 3RP 304. Robert told Perozzo to get out of the house because there was a dead body in the back yard. 2RP 182.

Robert than woke up his brother Daniel and Daniel's girlfriend. *Id.* Robert told Daniel that there was a dead body in the garage. 2RP 182, 208. Defendant wanted to burn and bury Mr. Payne's body. 2RP 183. He asked Daniel for a machete and chainsaw to dispose of the body. 2RP 209. Daniel refused to assist him. *Id.* The people in the house wanted to remove the defendant so they could call 911. 2RP 183, 211. Robert convinced the defendant to leave the house and he walked with the defendant to a homeless camp where the defendant sometimes stayed about one mile

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<sup>6</sup> Perozzo lived in a house that shared a gravel driveway with 804 97<sup>th</sup> Street South. 2RP 245, 3RP 295. It was common for her to go to the house and use their kitchen. 2RP 253.

from the house. 2RP 183. After the defendant left, Daniel went to Safeway to get breakfast and, upon returning, called 911. The police arrived 15-20 minutes later<sup>7</sup>. 2RP 211, 213. Prior to the police arriving, Daniel did not enter the garage and saw no one enter the garage. 2RP 214.

Deputy Jeff Reigle of the Pierce County Sheriff's Department arrived at 12:58 p.m. in response to the 911 call. 2RP 119. He contacted the medics on scene. 2RP 125. They told him Mr. Payne was deceased. *Id.* While at the scene, Deputy Reigle noted that there was a hammer on the ground on the right side of Mr. Payne's body and a screwdriver and small tooth fragment on Mr. Payne's left side. *Id.* There was blood spattered and smeared on the walls. *Id.* He then conducted a quick examination of the body, observing several injuries to Mr. Payne's back, an injury to the top of his head, and a pretty severe vertical laceration to his right wrist. 2RP 125-126. Mr. Payne's head was located in a pool of blood. 2RP 125. After observing the body, the deputy called for detectives and began to secure the scene. 2RP 128. The lead detective, Tim Kobel, arrived on the scene between 1:30 and 1:40 p.m. 2RP 130, 5RP 685. He assigned Deputy Reigle and another deputy, Deputy Charles Roberts, to go to the homeless camp to try and detain the defendant. 2RP 130-131.

Deputies Reigle and Roberts found the defendant in his tent in the homeless camp. 2RP 136. Defendant complied with the deputies'

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<sup>7</sup> Upon contacting the police Daniel initially provided a false name for Robert since Robert had an outstanding arrest warrant. 2RP 213.

instructions, was handcuffed, and arrested. 2RP 137. While walking to Deputy Reigle's car, Reigle saw that the defendant appeared to be limping. *Id.* He asked the defendant if he was limping, which the defendant denied. 2RP 138.

Detective Lynelle Anderson, a twenty-year veteran of the Pierce County Sheriff's Department, conducted witness interviews and examined the scene. 3RP 350. She also was present for the autopsy on Mr. Payne. 3RP 359. In her twenty-years of experience and seeing hundreds of beatings, she had never seen an individual beaten as badly as Mr. Payne. 3RP 365-366.

Defendant was transported to a Sheriff's Department precinct to be interviewed. 2RP 139, 5RP 691. Sergeant Kobel and Detective Anderson conducted the interview. 5RP 692. Defendant was given *Miranda* warnings, waived his rights, and gave a tape recorded interview. 5RP 694; Exh. 249. Defendant claimed that he had not seen Mr. Payne since November of 2009. Exh. 273A at 1, 273B<sup>8</sup>. He also denied knowing anyone on 97<sup>th</sup> Street and not knowing where that street is located. Exh. 273A at 8. The detectives eventually asked him to remove the hood he was wearing. Exh. 2783A at 9; 6RP 706. When it was removed, they saw injuries to his head. Exh. 273A; 6RP 707. Defendant claimed that he got them in a bicycle accident the day before and from a fight in a

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<sup>8</sup> Exhibit 273A is a transcript of the interview and Exhibit 273B is the audio recording.

McDonald's bathroom. *Id.* He then changed his story to claim the fight was the day before and the accident had been a different day. Exh. 273A at 11. Eventually, the defendant admitted that he lied to the detectives and was at the house, living with Mr. Payne. Exh. 273A at 21. Defendant then tried to claim that he had gotten into a physical altercation with Mr. Payne and that his actions were in self-defense. Exh. 273A at 22. The defendant's self-defense claim was belied by his injuries. 6RP 708.

He told the detectives that the altercation occurred in the middle of the night. Exh. 273A at 24. He admitted that during the fight, he twisted Mr. Payne's arm, resulting in Mr. Payne getting stabbed in the neck. Exh. 273A at 28. He then admitted hitting him with a hammer. Exh. 273A at 33. Defendant also admitted that he strangled Mr. Payne. Exh. 273A at 34. Defendant estimated the whole encounter lasted for thirty to forty-five minutes. *Id.* After the interview concluded the defendant was returned to a cell. 3RP 358. While there, he complained of breathing difficulties and was transported to the hospital. *Id.*

A Forensic Investigator with the Pierce County Sheriff's Department conducted a blood stain analysis based upon photographs of the scene. 3RP 403. He identified transfer patterns on a wall, meaning that a hand, piece of bloody clothing, bloody object, etc. came into contact with another object, in this case the wall. 3RP 407. There were indications that there was a transfer on the wall was caused by bloody head hair. 3RP 409. He determined that the blood on the wall also had an expiration

pattern, caused by blood being expelled from a person's nose, mouth, or lung while breathing. 3RP 410. The pattern indicated it was caused by an injured individual facing the wall and being struck while breathing through blood. 3RP 413-414. The wall also showed a pattern of projected blood, caused by a wound in an artery or blood vessel being under pressure. 3RP 414-415. This could be caused by a part of the body bleeding profusely and moving slowly in the direction of the blood pattern. *Id.*

A forensic scientist for the Washington State Patrol conducted a DNA<sup>9</sup> analysis on blood found at the scene. 4RP 468. DNA recovered from a hammer matched the defendant's DNA. 4RP 488. Blood on a television wall mount and the west wall matched both Mr. Payne's and the defendant's DNA. 4RP 496-497; Exh. 257, 260. Two other swaps of blood at the scene, one from the south lower wall and one from the south upper wall, only matched Mr. Payne's DNA. 4RP 496-497; Exh. 258-259. Numerous bloody items solely matched Mr. Payne's DNA. These include, a pillow, a sleeping bag, a watch, and a Wrangler coat. 4RP 502-504; Exh. 231-233, 235.

John Lacy, the Associate Medical Examiner at the Pierce County Medical Examiner's Office, conducted the autopsy on Mr. Payne. 6RP 739. Dr. Lacy wrote a report, made two diagrams of Mr. Payne's various

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<sup>9</sup> Deoxyribonucleic acid, the unique genetic code for each individual. 4RP 463.

injuries, and had photographs taken of Mr. Payne's autopsy. 6RP 739, 742-743; Exh. 159-217, 223-224, 283. During the initial exterior examination of Mr. Payne, Dr. Lacy noted bloody clothing and a variety of injuries. On his long underwear there was staining consistent with blood on the knees and the outer pants had staining on both the front and back consistent with blood. 6RP 746-747. There were pinpoints of blood in his eyes, blood on the bottom of his feet, a tear in the heel area, pieces of debris throughout his feet, bruising on his hands, blood on the right wrist, and both arms had injuries going from his shoulder down to his hand. 6RP 749-750, 753, 756.

After completing the external examination, Dr. Lacy washed the body to further document Mr. Payne's injuries. 6RP 762. Mr. Payne's face had numerous lacerations, some of which went right down to the bone. 6RP 762; Exh. 170, 224. Both eyes were black and swollen caused by a blunt injury. 6RP 763; Exh. 170, 224. From his lip to his nose there was a large laceration going almost all the way through the lip. 6RP 764, Exh. 170, 224. The right central maxillary incisor, a tooth, was knocked out, likely occurring during the altercation. 6RP 766.

Dr. Lacy documented numerous injuries to both the top and back of Mr. Payne's head. 6RP 773; Exh. 178-179, 224. A cluster of bruises and lacerations in the skin of the back of the head was indicative of being caused by blunt force injuries. 6RP 773-774. An internal examination confirmed this where there was indication of impacts in the undersurface

of the skin of his head. 6RP 775; Exh. 177, 224. All the head injuries would have caused profuse bleeding. 6RP 774-775. There was a depressed skull fracture and a second separate skull fracture. 6RP 776; Exh. 177, 224. The two fractures could have been caused by one blow or multiple blows to the head. *Id.* To cause an injury of this type a good amount of force must be used. 6RP 777; Exh. 177, 224. The injuries were consistent with Mr. Payne being struck in the head by a hammer. *Id.* He could have been knocked unconscious by all of the blows to the head and he would have suffered from all of these injuries. 6RP 776, 7RP 832; Exh. 177, 224. Dr. Lacy determined that although Mr. Payne could have survived these injuries, if he was not treated for them, his chance of survival would have decreased substantially. 6RP 779-780.

There were substantial injuries to Mr. Payne's neck caused by a sharp implement. 6RP 780; Exh. 180, 224. These were perimortem injuries, meaning they occurred just before or after death or during the dying process. 6RP 780-781. These injuries could have been caused by broken glass and a piece of glass was found in one of the wounds. 6RP 783-784. There was also evidence of Mr. Payne being strangled based on two injuries to the strap muscles and petechia in the eyes were indicative of strangulation. 6RP 771-772, 789.

Mr. Payne's arms and shoulders also had multiple injuries. Just like his head, Mr. Payne had injuries to his shoulders that also could have been caused by a hammer. 6RP 790. His right arm had a perimortem

wound caused by a sharp force, exposing the tendons connecting the forearm muscles to the wrist bone. 6RP 794-795; Exh. 214, 224. The right arm lacerations had multiple crossing wounds, created by multiple passes of a sharp object over the skin. 6RP 795-796. The left wrist also had a perimortem injury, exposing the tendons in the left arm more than the right arm. 6RP 799. The arm had bruising, indicating that it was impacted prior to being cut and unconnected to the lacerations. 6RP 800-801. The wounds were more consistent with being cut by a knife than glass. 6RP 802. Mr. Payne would not have been unable to defend himself when these injuries were inflicted and no defensive wounds were present. 6RP 803.

The final area of injuries were to Mr. Payne's back, where the pattern of impact sites indicated multiple blows. 6RP 792-793. The concentration of the injuries was more prominent on the upper back and shoulder area than on the lower back. 6RP 794.

Dr. Lacy determined that Mr. Payne died from multiple blunt and sharp force injuries to the head, neck and arms. 6RP 809-810. While blood loss was the major factor in his death, some degree of strangulation could have occurred. 6RP 810. The most blood loss was to his face, lips, and scalp. *Id.* The injuries to the arms would have bled to some extent and also contributed to his death. *Id.*

When viewed together, the severity of injuries, different types of injuries, and mechanism of death served to create a rough timeline of the attack. The blunt and sharp force injuries to the head, neck and extremities

resulted in blood loss causing his death. 6RP 809-810. The largest loss of blood came from the injuries to his face, lips, and scalp. *Id.* This means that the first injuries to occur would have been to his head and face. While there was no way to know with certainty the order of the injuries, the blood evidence from the scene coupled with the head and facial injuries indicated that they occurred before the incised injuries to the neck and wrists. Those perimortem injuries had an anemic, near bloodless appearance, and thus were inflicted after Mr. Paynes blood pressure had diminished just before his death. 6RP 782-783.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S STATEMENT THAT HE WAS NOT INJURED AND HAD BEEN SLEEPING ALL DAY.

The State may not use statements from custodial interrogation of a defendant unless it demonstrates that the defendant was previously advised of his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). For an individual to be considered to be under interrogation, there must be a measure of compulsion above and beyond that which is inherent from being in custody itself. *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Thus whether *Miranda* warning were needed is dependent on whether the individual was subject to either express questioning or its functional

equivalent. *Rhode Island v. Innis*, 446 U.S. at 300-301. Interrogation in this sense refers to both words and the actions of the police if the actions were likely to illicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. at 301. However, words or actions normally accompany arrest and custody are not considered to be interrogation and therefore, any statements by the defendant during that process are admissible. *Id.*

Not every question posed while an individual is under arrest and in custody is interrogation. *State v. Bradley*, 105 Wn.2d 898, 903-904, 719 P.2d 546 (1986). The test used is whether based upon all the circumstances in a given case, a question is likely to elicit an incriminating response from the suspect. *Id.*

The standard of review is whether substantial evidence supports the trial court's findings of fact and conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Unchallenged findings of fact are verities of appeal. *Id.* Conclusions of law are reviewed *de novo*. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The issue of whether a defendant was subject to interrogation under *Miranda* is also reviewed *de novo*. *In re Personal Restraint of Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014).

There can be little doubt that the defendant was in custody. This does not mean that the question prompted by the defendant's limp was interrogation. The question had nothing to do with the injuries to the victim. It was prompted by a need to determine whether the defendant

would need medical attention. No objectively reasonable person in a position similar to the defendant's would consider such a question to be the functional equivalent of interrogation about the murder.

Deputy Reigle's testimony was uncontroverted. He testified that the purpose of asking the question was to determine if he needed to call for medical aid to ensure the defendant was safe and secure. 2RP 99. This is part of his standard procedure as a sheriff's deputy. *Id.* One of his priorities during an arrest is to ensure that a detained individual's safety is accommodated. 2RP 99-100. He is responsible for the safety of detained individuals. 2RP 99. If the defendant was injured, he would not have been able to do anything else until he ensured that the defendant received medical attention. *Id.*

Just as there can be little question that the defendant was in custody, there can be little question that his response was freely and voluntarily given. The defendant later waived *Miranda* and gave a formal statement. CP 27-29. The statement challenged here, at the time it was made, was not incriminating. The defendant stated that he was not injured and had been sleeping all day. 2RP 97. The denial of injury and the claim of having been asleep is not susceptible of being characterized as incriminating. It is not a statement that could reasonably be expected to be used in court. Rather, it is simply a response to a question regarding health and welfare from both the defendant's and the officer's perspective. As such, this Court should affirm the trial court's ruling of admissibility.

Defendant wrongfully compares this case to *State v. Denney*, 152 Wn. App. 665, 218 P.3d 633 (2009). The defendant in *Denney* was charged with, among other things, unlawful possession of morphine. *State v. Denney*, 152 Wn. App. at 666-667. The defendant invoked her right to remain silent after being arrested and given her *Miranda* warnings. *State v. Denney*, 152 Wn. App. at 667. Nevertheless at the jail, the defendant was given a standard questionnaire with a question about drug use and was later asked additional questions about drug use. *State v. Denney*, 152 Wn. App. at 667-668. Because the defendant was charged with drug possession the court understandably held that the questions should have been considered likely to elicit an incriminating response about a charged offense. *Id.*

The statement here bears no resemblance to the drug use questions in *Denney*. The question was prompted purely out of a concern for the defendant's health and well-being. 2RP 95. The defendant put to rest the concern by denying he was injured and the deputy did not pursue the matter any further. The interchange did not include questioning about how the apparent injury had occurred and thus cannot have been considered as likely to elicit an incriminating response for a murder charge. Since the question was unconnected to the underlying charge and was asked solely to gauge the defendant's health and well-being it follows that it was not interrogation. The trial court's admission of the statement should be affirmed.

Although it is unnecessary to address harmless error, without conceding error, it does not hurt to discuss harmless error. It is well-established that constitutional errors may constitute harmless error. *Harrington v. California*, 395 U.S. 250, 251-251, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969). A constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The test to determine if the error is harmless is the “overwhelming untainted evidence” test. *Id.* Under this test, a constitutional error is harmless if the untainted evidence is so overwhelming that it would lead to the same outcome. *Id.*

There was overwhelming evidence of guilt apart from the defendant’s statement. To put the statement at issue into context, it is important to note that at trial the State asked one witness a total of two questions regarding if the defendant was limping. 2RP 137-138. Another witness even testified that he could not recall if the defendant was limping or not. 2RP 184. In closing argument the State only mentioned the defendant limping once. 8RP 1059. When this is compared to the overwhelming evidence presented, there can be no doubt that any error no matter how unlikely was harmless.

Defendant admitted that he killed Mr. Payne. 2RP 181, 208. Furthermore he killed Mr. Payne over a period of thirty to forty-five minutes. Exh. 273A at 34. He asked for assistance in dismembering and

burying the body. 2RP 183, 209, 235. He wanted a machete and chainsaw to accomplish the dismemberment. 2RP 209. None of these facts are affected by the statement to Deputy Reigle.

The victim suffered numerous blows to the head with a hammer. 6RP 775. There was DNA recovered from the hammer which matched the defendant's DNA. 4RP 488. There was strangulation and attempts to sever veins or arteries, which would hasten the blood loss that was the cause of death. 6RP 810. The medical evidence was overwhelming rendering any claim that even if this Court were to view the admission of Deputy Reigle's statement to be error, it was clearly harmless. This Court should affirm the trial court's admission of the defendant's statements to Deputy Reigle.

2. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT CAUSED THE VICTIM'S DEATH WITH A PREMEDITATED INTENT TO KILL.

Due process requires that the State bear the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). Sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light

most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* In addition, "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from the conduct where "it is plainly indicated as a matter of logical probability." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Circumstantial evidence and direct evidence are equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

In considering sufficiency, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App.

539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

The jury in this case was properly instructed that a person commits first degree murder when “with a premeditated intent to cause the death of another person, he or she causes the death of such person. . . .” CP 67-95 (Instruction No. 9). To convict the defendant of first degree murder the jury was instructed that it must find:

- (1) That on or about January 31, 2015, the defendant acted with intent to cause the death of James Patrick Payne;
- (2) That the intent to cause the death was premeditated;
- (3) That James Patrick Payne died as a result of defendant’s acts; and
- (4) That any of these acts occurred in the State of Washington.

CP 67-95 (Instruction No. 12).

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, reflections, weighing or reasoning for a period of time, however short.’” *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999) (internal citations omitted). Considering human ingenuity, there are likely an infinite number of ways in which premeditation may be established but at minimum they include: (1) a physical struggle taking place over an “appreciable period of time,” (2)

injuries inflicted by various means over a period of time, (3) where the weapon used was not readily available but was obtained and deployed in a deliberate manner, (4) where multiple wounds were inflicted, or (5) where the victim was struck from behind. *State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006), citing *State v. Harris*, 62 Wn.2d 858, 868, 385 P.2d 18 (1963), *State v. Bingham*, 105 Wn.2d 820, 825-826, 719 P.2d 109 (1986), and *State v. Gentry*, Wn.2d 570, 599, 888 P.2d 1105 (1995).

All of the foregoing hallmarks of premeditation were present in the evidence in this case. It is undisputed the defendant was engaged in a physical struggle with Mr. Payne over an appreciable period of time. By the defendant's own admission, the altercation lasted for thirty to forty-five minutes. Exh. 273A at 34. This was far more than a moment in point of time. Thirty to forty-five minutes is time enough for anyone to consider what he is doing and make a conscious choice to go through with it or not.

In addition, two distinct types of injuries in this case are of particular note. They included (1) injuries that resulted in loss of blood and loss of consciousness and thus the ability to resist, namely the premortem injuries, and (2) injuries that occurred after consciousness was waning and thus after Mr. Payne would have been less and less capable of resisting, namely the perimortem injuries. These categories not only show premeditation via the defendant's persistence in making sure the victim

would die, but also show that different weapons were used in different ways at different times.

The premortem injuries that would have contributed to Mr. Payne losing consciousness included blows to the head from a hammer, a wall, the rug, or carpet, and by lacerations to his face by a sharp object. 6RP 763-770, 777-81. As a result of those injuries, Mr. Payne would have been unconscious or close to it either from concussion or blood loss. 6 RP 781-82. 7RP 832. But this did not deter the defendant; he went on to inflict even more damage.

The perimortem injuries to the victim's neck and wrists were inflicted as Mr. Payne's blood pressure was slipping away. 6RP 780-84. They included slicing Mr. Payne's wrists and neck to the extent that tendons were exposed. *Id.* These injuries were inflicted while Mr. Payne was still alive but as his blood pressure and thus his capacity to resist was waning. 6 RP 781-82. 7RP 832. By that time the defendant must have been in complete control and it is a perfectly reasonable inference, if not a certainty, that the defendant inflicted those wounds for the purpose of making sure Mr. Payne would not survive.

The mechanism of death adds to the evidence of premeditation. Blood loss was the major factor but other factors such as strangulation could also have contributed. 6RP 809-10. The largest loss of blood came

from the injuries to his face, lips, and scalp. *Id.* Mr. Payne would have been incapacitated by these injuries. 6 RP 781-82. 7RP 832. The injuries that contributed to Mr. Payne becoming unconscious and unable to resist were mostly contained on his head, face, shoulders, and back. In addition to the hammer blows to the back of the head, the head injuries also included (1) a laceration three-quarters of an inch long from the top of his nose between his eyes and going right down to the bone, (2) both eyes were black and swollen and there was a v-shaped laceration on the orbit bone surrounding the eye, (3) the bridge of his nose had scrapes, bruises, and lacerations, (4) on his left cheek there were additional scrapes and bruises caused by blunt injuries, and (5) from his lip to his nose there was a big laceration, three-quarters of an inch long, going almost all the way through the lip and a second small tear on the front lip going to the left side of the midline. 7RP 762-673; Exh. 170, 224. 7RP 764; Exh. 170, 224. These injuries were the result of multiple blows, some with a weapon and some without, over a considerable period of time.

The most viscerally probative injuries are the hammer blows to the back of the head. Dr. Lacy documented numerous injuries caused by blunt injury to the top and back of the head. 6RP 773; Exh. 178-179, 224. Defendant would have intentionally inflicted these injuries on his victim likely by striking Mr. Payne in the head with a hammer from behind. 6RP

778. The hammer blows included impacts in the undersurface of the skin for his head and two separate skull fractures. 6RP 775-776; Exh. 177, 224. These would have been caused by a significant amount of force. 6RP 777. Because of the thickness of the skin, Dr. Lacy was unable to determine the exact number of blows [6RP 793] but the back of the head had just as many, if not more, impact sites than the back and shoulders. *Id.* All of this indicates that the defendant was attacking from behind during a large part of the incident.

The blunt force injuries to multiple parts for Mr. Payne's body were accompanied by injuries indicative of strangulation. There were two injuries to the strap muscles. 6RP 789-790. Thus as Mr. Payne was dying from multiple blunt and sharp force injuries to the head, neck and extremities he was also strangled. 6RP 809-810. Just as the perimortem slicing of the neck and wrists raises a reasonable inference that the defendant sought to ensure his victim would not recover, the same holds true of the strangulation. The mechanism of death was blood loss. 6RP 810. The largest loss of blood came from the injuries to his face, lips, and scalp. *Id.* Mr. Payne would have been incapacitated by these injuries. 7RP 832. But the defendant also strangled Mr. Payne and this too demonstrates premeditation.

As was also noted in the *Allen* case, the use of weapons also contributes to the quantum of evidence of premeditation. The sharp force lacerations to Mr. Payne's neck and wrists could have been caused by a knife or broken glass rather than a blunt instrument like the facial and head wounds. 6RP 783-784. There are the multiple slicing injuries to his arms caused by multiple objects. The marks on his arms indicated that he was struck by something that had a linear quality. 6RP 791-792. The parallel lines for the cuts to the right arm show that the implement used may have had multiple points on it. 6RP 795. The multiple crossing wounds indicate multiple passes of a sharp object over the skin. 6RP 795-796. The perimortem injuries to his arms were eight inches in length and up to four inches wide. 6RP 794, 799; Exh. 214, 224. There was a four inch long wound to his left arm and was caused by a sharp object. *Id.* The wounds exposed the tendons connecting the forearm muscles to the wrist bones. 6RP 794-795, 799. The left arm also had cuts over the bruises indicating that it was impacted prior to being cut and unconnected to the lacerations. 6RP 800-801. The wounds were also consistent with being cut by a knife. 6RP 802. Just as there was considerable time involved, this evidence shows that there was also a change of weapons.

Premeditation involves thinking. There was abundant evidence of thinking in this case not just because of the amount of time involved but

also from the number of different ways in which injury was inflicted. Bearing in mind that each change of approach and all of the ways in which death was hastened in this killing involved additional cognitive effort. Under these circumstances it can hardly be said that no reasonable jury would have found the defendant acted with premeditation.

Defendant erroneously compares this case with *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). See Brf. of App. at 23-24. The holding in *Bingham* is not so much that the passage of time is immaterial but that the number of minutes required to cause death by strangulation is not sufficient by itself to prove premeditation. *Bingham*, 105 Wn.2d at 827. In *Bingham* the victim was strangled to death over a period of approximately five minutes. *Id.* The Court held that the single cause of death and the time that it took did not necessarily show deliberation or reflection. *Id.* Here by contrast the murder occurred over a period of thirty to forty-five minutes. Exh. 273A at 34. This is a significantly longer period of time and more than sufficient time for anyone to consider what they were doing and choose to proceed or not proceed.

This case bears more similarity to *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963), a case *Bingham* cites. In *Harris* the victim

...had been struck on the head several times with a blunt instrument with such force that in one place her skull had been fractured into her brain. Also, additional blows had severely damaged one ear and cheek and fractured her jaw, breaking two teeth. After this terrific beating, her assailant,

while she was still alive, tied the vacuum cleaner cord around her neck and strangled her, which was the immediate cause of her death, in the opinion of the autopsy surgeon.

*Harris*, 62 Wn.2d at 868.

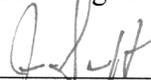
Just like in *Harris*, the defendant here struck his victim's head multiple times, causing a skull fracture. After the terrific beating, while Mr. Payne was still alive, the defendant strangled him according to the autopsy evidence. He also sliced his neck and wrists in an apparent attempt to speed along the blood loss that eventually killed him. 6RP 780. The continuation of the attack, the change in weapons and tactics showed that the defendant was making sure that Mr. Payne would not survive. This Court should affirm the defendant's conviction for First degree murder on abundant evidence of premeditation.

D. CONCLUSION.

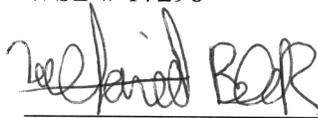
For the foregoing reasons the State urges the Court to affirm defendant's conviction.

DATED: Thursday, August 24, 2017

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298



NATHANIEL BLOCK  
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by *efile* U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/24/17   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**August 24, 2017 - 11:07 AM**

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