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Division II
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No. 50065-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ODIES D. WALKER,

Appellant.

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

The Honorable John R. Hickman, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. There is insufficient evidence of premeditation to sustain a finding of First Degree Premeditated Murder

The State charged Mr. Walker with first degree premeditated murder pursuant to RCW 9A.32.030(l)(a). Mr. Walker was accused of helping Calvin Finley fatally shoot Kurt Husted on June 2, 2009. To convict him on this charge, the State had to prove that he 1) acted with intent to kill Mr. Husted, 2) the intent to cause his death was premeditated, 3) that Mr. Husted died as a result of the defendant's acts, and, 4) the acts took place in the State of Washington. Clerk's Papers 996-1052; (Instruction 13). The last two elements are not relevant to this discussion as they do not relate to premeditation.

"[P]remeditation is a separate and additional element to the intent requirement for first degree murder." *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). "Specific intent to kill and premeditation are not synonymous, but separate and distinct elements of the crime of first-degree murder." *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987) citing RCW 9A.32.030(l)(a), RCW 9A.32.050(l)(a); *State v. Brooks*, 97 Wash.2d 873, 876, 651 P.2d 217 (1982).

Premeditation is "the deliberate formation of and reflection upon the intent to take a human life." *State v. Hoffman*, 116 Wash.2d 51, 82,

804 P.2d 577 (1991). Premeditation may be shown by circumstantial evidence where the jury's inferences are reasonable and substantial evidence supports the jury's verdict. *State v. Finch*, 137 Wash.2d 792, 831, 975 P.2d 967 (1999). While the mere opportunity to deliberate is not sufficient to support a finding of premeditation, a wide range of facts can support the inference of premeditation. *Id.* Motive, procurement of a weapon, stealth, and the manner of killing are all important facts that can support the finding of premeditation. *Pirtle*, 127 Wash.2d at 644.

In Washington, premeditation is defined as “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *Bingham*, 105 Wn.2d at 823, citing *State v. Brooks*, at 876, 651 P.2d 217. It is “the deliberate formation of and reflection upon the intent to take a human life.” *Bingham*, 105 Wn.2d at 823, citing *State v. Robtoy*, 98 Wash.2d 30, 43, 653 P.2d 284 (1982); *State v. Condon*, 182 Wn.2d 307, 343 P.3d 357, 361 (2015); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). Premeditation requires “more than a moment in point of time.” RCW 9A.32.020; *State v. Gentry*, 125 Wn.2d 570, 598, 888 P.2d 1105 (1995). However, although time is required, the length of time is not, by itself, sufficient to show premeditation. *Austin v. United States*, 382 F.2d 129, 139 (D.C.Cir.1967).

Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection.

Bingham, 105 Wash.2d at 826. Moreover, even when the time “is sufficient to permit deliberation, evidence of actual deliberation must also be presented.” *State v. Bushey*, 46 Wn.App. 579, 585, 731 P.2d 553 (1987) (citing *Bingham*, 105 Wn.2d at 827). What is important is whether the defendant actually planned the killing.

Where the sufficiency of the evidence has been challenged with respect to the element of premeditation, Washington cases hold that a wide range of factors can support an inference of premeditation. *State v. Sherrill*, 145 Wn.App. 473, 484, 186 P.3d 1157 (2008). Our Supreme Court has required multiple indices of premeditation to establish premeditation and relies on four characteristics; motive, procurement of a weapon, stealth, and method of killing are “particularly relevant” factors in establishing premeditation. *Pirtle*, 127 Wn.2d at 644, citing *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). No single element is sufficient to establish premeditation. See, *State v. Hummel*, 196 Wn.App. 329, 383 P.3d 592 (2016). For example, circumstantial evidence that the defendant brought a weapon to the scene and fired multiple shots supports

the reasonable inference of premeditation. See *Hoffman*, 116 Wash.2d at 83, 804 P.2d 577. The defendant's statements may be considered when determining whether the defendant acted with premeditation. *Id.* at 83–84, 804 P.2d 577.

In the Brief of Respondent (BR), the State argues that among the evidence in support of premeditation, circumstantial evidence showed that Mr. Walker supplied the murder weapon and that he encouraged Mr. Finley to commit the murder by telling him how easy the robbery would be and told him to “do what you got to do.” BR at 20, citing to 8RP at 937-938, 10RP at 1273. Tonie Williams-Irby testified that Mr. Walker was listening on his cellphone when Finley approached Mr. Husted and told him, when Mr. Husted would not give him the moneybag, to “shoot the mother ____ and hurry up.” BR at 21, citing 8RP at 869.

Here, even when considered in a light most favorable to the State, the evidence did not establish a premeditated intent to kill. See, *Bingham*, 105 Wn.2d at 827. As noted above, premeditation is an essential element of murder in the first degree. RCW 9A.32.030(1)(a). It is defined 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. *State v. Nestlund*, 50 Wn. App. 531, 558, 749 P.2d 725,

review denied, 110 Wn.2d 1025 (1988); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987). It must involve more than a moment in time. RCW 9A.32.020(1). The evidence presented at trial shows that Mr. Walker's intent was to rob the guard and take the money. The evidence shows that Mr. Walker supplied a 9mm gun to Mr. Finley, and encouraged the robbery, by stating that the job would be "easy" and that Mr. Finley should "do what you got to do." Both statements and providing a weapon to Mr. Finley can reasonably be viewed as an intent to commit to a armed robbery only.

Washington caselaw contains numerous cases representing circumstances in which the factual record consists of evidence that would allow the jury to reasonably conclude the defendants each premeditated a killing -- prior threats by the defendant, the bringing of a number of deadly weapons to the scene by the defendant, multiple shots fired by the defendant, the shooting of a victim from behind, and statements clearly indicating premeditation. See, e.g., *State v. Hoffman*, supra, *State v. Ollens*, 107 Wn.2d at 853, and *Neslund*, 50 Wn. App. at 559. For instance, in *Hoffman*, 116 Wn.2d at 84-85, premeditation was proved where the defendants brought multiple guns to a location, fired on police officers, and continued to fire as the victims crawled away, coordinating their gunfire with flares they had brought to illuminate the scene of the

shooting. “Such conduct is evidence of calculated actions and premeditated intent to kill.” *Hoffman*, 116 Wn.2d at 84-85. Evidence showing the victim was shot three times in the head, twice after he had fallen to the ground, supports a finding of premeditation. *State v. Rehak*, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993). But in contrast, the record regarding the statement by Mr. Walker to Mr. Finley (according to Williams-Irby) to “shoot the mother ____” was made only when the guard “laughed at him” and refused to give Mr. Finley the moneybag. 8RP at 869.

Even when taken in a light most favorable to the prosecution, the evidence does not suggest that Mr. Walker deliberated, thought over his intent beforehand, formed a settled purpose to direct Mr. Finley to kill Mr. Husted, or that he took more than a moment in time to form a design to kill. Evidence of Mr. Walker’s statement made immediately after Mr. Finley stated that Mr. Husted would not give him the money bag does not allow a reasonable inference of deliberate formation of and reflection upon the intent to take a human life. The defendant’s conviction for first degree murder must be reversed.

Dismissal of the first degree murder conviction is required. A finding of insufficient evidence in support of a verdict necessitates dismissal with prejudice rather than remand for a new trial. U.S. Const.

amend. 5; *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996), review denied, 138 Wn.2d 1011 (1999). Mr. Walker's conviction for first degree murder must be reversed and the charge dismissed.

B. CONCLUSION

The appellant asks the Court to find that there was insufficient evidence to show premeditation beyond a reasonable doubt and that is vacate the verdict for first degree murder. For the reasons stated herein and in the appellant's opening brief, this Court should grant the relief previously requested.

DATED: July 6, 2018.

Respectfully submitted,
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CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Appellant to Clerk of Court of Appeals, Derek Byrne and to Ms. Michelle Hyer, Pierce County Prosecutor, and mailed copies, postage prepaid on July 6, 2018, to appellant, Odies Walker:

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