

FILED
Court of Appeals
Division II
State of Washington
6/25/2020 4:29 PM

No. 54224-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN ALAN GRIFFIN,

Appellant.

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

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
wapofficemail@washapp.org
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT 9

1. The State failed to prove Mr. Griffin acted with premeditated intent..... 9

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt...... 9

b. The State failed to prove Mr. Griffin acted with premeditated intent. 9

c. The State proved only a quick, impulsive, spontaneous act by Mr. Griffin in reaction to Mr. Howard unexpectedly returning home...... 12

d. Any post-mortem acts do not enter the analysis of premeditation. 16

e. This Court must reverse with instructions to dismiss. 18

2. The outrageous conduct of the police violated Mr. Griffin’s right to due process...... 19

F. CONCLUSION..... 22

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV	9
-----------------------------	---

FEDERAL CASES

<i>Alleyne v. United States</i> , 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).....	9
<i>Austin v. United States</i> , 382 F.2d 129 (D.C.Cir.1967) <i>overruled on other grounds by United States v. Foster</i> , 783 F.2d 1082 (D.C.Cir.1986)	12
<i>Burks v. United States</i> , 437 U.S. 1, 98 S.Ct. 2141, 57 L. Ed.2d 1 (1978).....	18
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	9
<i>United States v. Luttrell</i> , 889 F.2d 806 (9th Cir.1989).....	19
<i>United States v. Russell</i> , 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).....	19

WASHINGTON CASES

<i>In re Pers. Restraint of Heidari</i> , 174 Wn.2d 288, 274 P.3d 366 (2012).....	18
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986)	11, 13, 14
<i>State v. Bingham</i> , 40 Wn.App. 553, 699 P.2d 262 (1985), <i>reversed on other grounds</i> , 105 Wn.2d 820 (1986)	13
<i>State v. Bolen</i> , 142 Wn. 653, 254 P. 445 (1927)	12
<i>State v. Brooks</i> , 97 Wn.2d 873, 651 P.2d 217 (1982)	10, 14, 15
<i>State v. Bushey</i> , 46 Wn.App. 579, 731 P.2d 553 (1987)	11

<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105, <i>cert. denied</i> , 516 U.S. 843 (1995).....	11
<i>State v. Hummel</i> , 196 Wn.App. 329, 383 P.3d 592 (2016)	11, 17
<i>State v. Lively</i> , 130 Wn.2d 1, 921 P.2d 1035 (1996).....	19, 20, 21
<i>State v. Luoma</i> , 88 Wn.2d 28, 558 P.2d 756 (1977).....	12
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	11
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245, <i>cert. denied</i> , 518 U.S. 1026 (1995).....	10, 11, 16
<i>State v. Sargent</i> , 40 Wn.App. 340, 698 P.2d 598 (1985)	10
<i>State v. Sherrill</i> , 145 Wn.App. 473, 186 P.3d 1157 (2008), <i>review denied</i> ,165 Wn.2d 1022 (2009)	12, 15
<i>State v. Wright</i> , 165 Wn.2d 783, 203 P.3d 1027 (2009).....	18
STATUTES	
RCW 9A.32.020	10
RCW 9A.32.030	10

A. SUMMARY OF ARGUMENT

Dustin Griffin and Kristopher Hoyt entered Donnie Howard's house while he was away with the intent of taking his jewelry and money. When Mr. Howard unexpectedly returned to his home, Mr. Griffin immediately, impulsively, and spontaneously struck Mr. Howard several times in the head killing him. Mr. Griffin's conviction for aggravated first degree premeditated murder must be reversed where the State failed to prove Mr. Griffin acted with premeditated intent.

In addition, during the investigation of Mr. Howard's death, the assigned sheriff's detectives created a fictional "confession" allegedly by Mr. Griffin, which they showed to Mr. Hoyt, blatantly lying to him, telling him the "confession" was Mr. Griffin's. This outrageous misconduct on the part of the police also must result in the reversal and dismissal of Mr. Griffin's convictions.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence of premeditation presented by the State to support the jury's verdict.

2. The outrageous conduct of the police violated Mr. Griffin's right to due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every element of the offense beyond a reasonable doubt. Premeditation is an essential element of the charged offense of first degree murder. The evidence established Mr. Griffin and his accomplice were surprised by the return of the homeowner and Mr. Griffin impulsively and spontaneously reacted by striking the homeowner several times in the head. These acts may have established an intent to kill the homeowner but were insufficient to establish premeditation. Is Mr. Griffin entitled to reversal of his conviction for aggravated first degree murder for insufficient evidence?

2. Outrageous police conduct that shocks the conscience violates due process which results in dismissal. The police fabricated a “confession” they claimed was made by Mr. Griffin admitting to committing the offenses, and showed it to the alleged accomplice in the hope the accomplice would incriminate himself and Mr. Griffin. After being shown the “confession,” the accomplice implicated himself as well as Mr. Griffin. Was this outrageous conduct by the police in fabricating a false confession sufficient to shock the conscience, thus

violating Mr. Griffin's right to due process and requiring dismissal of his convictions?

D. STATEMENT OF THE CASE

Dustin Griffin decided to burglarize the Woodland home of Donnie Howard. RP 1293. Mr. Griffin enlisted Kristopher Hoyt to help him. RP 1291-92. Mr. Griffin told Mr. Hoyt he knew Mr. Howard's schedule and Mr. Howard would be out of the house when the burglary occurred. RP 1294, 1299. Mr. Howard had a habit of going fishing everyday twice a day, once in the early morning and once in the afternoon. RP 307. Mr. Howard collected gold jewelry and would wear much of his jewelry when he went out. RP 309-11. On the morning of the burglary, Mr. Griffin and Mr. Hoyt watched as Mr. Howard left his house before they entered. RP 1299.

The only evidence of what occurred in Mr. Howard's home during the burglary was the testimony of the accomplice, Mr. Hoyt. According to Mr. Hoyt, he and Mr. Griffin had been in the house approximately 30 – 45 minutes when:

Q So, let's talk about what happened once you heard someone come home. First of all, what is it that you heard or saw that alerted you to someone coming back?

A I heard keys -- keys jingling, and the door -- the chain to get in the door was getting unlocked.

Q Did that surprise you?

A Absolutely.

Q Did someone enter the house?

A Yes.

Q Did you say anything to the Defendant when you heard someone coming in?

A I did.

...

Q So, after you said something to alert the Defendant that someone was coming in, what happened next?

A The guy -- Mr. Howard turned towards me and was coming at me, and then Griffin came from the direction of the hallway and hit him with a baseball bat.

Q When the Defendant hit him with the baseball bat, what part of Mr. Howard did he hit?

A The head.

Q Okay. Did he hit the front of the head or the back of the head?

A The back of the head.

Q What happened to Mr. Howard after the Defendant hit him in the back of the head with the baseball bat?

A He -- he fell down.

...

Q Okay. Were there any more -- did -- did the Defendant hit Mr. Howard after he had fallen to the ground anymore with the baseball bat?

A Yes, several times.

RP 1304-05. The two men then fled the home and returned to Mr. Griffin's home in Vancouver. RP 1309-10.

Mr. Howard suffered blunt force trauma to his head consistent with the baseball bat. RP 1122, 1134. There was no evidence of defensive wounds on Mr. Howard's hands or arms. RP 1128.

The day following Mr. Howard's death, Clark County firefighters responded to a report that Mr. Howard's house was ablaze. RP 388-89, 396-99. The responding firefighters discovered someone had set fire to Mr. Howard's body and portions of his home. RP 399-406. The firefighters immediately contacted the Woodland Police, who in return contacted the Cowlitz County Sheriff's Office.

Clifford Nelson, the pathologist who conducted the autopsy of Mr. Howard testified that Mr. Howard suffered devastating injuries from the blows by the baseball bat. RP 1123. Dr. Nelson opined that the cause of Mr. Howard's death was the blunt force injuries to Mr. Howard's head. RP 1142. The two most devastating blows to Mr. Howard were to the rear of his head, each of which could have been the cause of death, thus consistent with being surprised from behind and immediately struck. RP 1146. Dr. Howard further opined that Mr.

Howard most likely died within minutes of receiving these blows to the head. RP 1146.

The investigation began to focus on Mr. Griffin and Mr. Hoyt. During their investigation of Mr. Howard's death, Cowlitz County Sheriff's Detectives McNeal and Gladson concocted a scheme to attempt to goad Mr. Hoyt into incriminating himself and Mr. Griffin. RP 895-98. Labeling it a "ruse," the detectives created a false statement allegedly made by Mr. Griffin wherein Mr. Griffin implicated himself and Mr. Hoyt:

Q What was that?

A It was a statement form, written purportedly by Dustin Griffin.

Q Okay. But who actually drafted it?

A I wrote it.

Q And did Detective Gladson assist?

A Yes, he did.

Q Okay. And on that, did you use -- is there a certain type of statement for you used [sic] when presenting this?

A Yes.

Q What is that?

A At the Cowlitz County Sheriff's Office we have prescribed statement forms, and we used one of those.

Q Okay. And then, when this form was filled out, was it signed fictitiously by Dustin Griffin?

A Yes, it was.

Q Okay. And did this -- did the fictitious form have Dustin Griffin saying that he and Mr. Hoyt had committed this crime?

A Yes, it did.

RP 899.

The detectives visited with Mr. Hoyt, who was in the custody of the Department of Corrections on an unrelated matter, and presented the "statement" to him:

Q And did you present that to Mr. Hoyt?

A Yes.

Q And when you presented him with this statement, was he immediately willing to speak with you?

A No, he wasn't.

Q Did Detective Gladson leave him with anything?

A Yes.

Q What was that?

...

Q (By Mr. Bentson:) Go ahead.

A He told Mr. Hoyt upon -- when we were getting ready to depart if he changed his mind and wanted to do the right thing, whether it be minutes, hours, days, so forth, to contact us. And after that, Mr. Hoyt said he wanted to talk to us.

Q Okay. And then did Mr. Hoyt talk to you about what happened?

A Yes, he did.

RP 899-900.¹

As a result of Mr. Hoyt's statement and other evidence, Mr. Griffin was subsequently charged with one count of aggravated premeditated first degree murder, first degree felony murder, one count of first degree burglary, one count of first degree robbery, one count of first degree arson, one count of first degree unlawful possession of a firearm, and one count of possession of a stolen vehicle. CP 13-16. Following the jury trial, Mr. Griffin was convicted as charged and sentenced to a standard range sentence of life imprisonment without the possibility of parole. CP 104-17, 132. The court found the imposition of convictions for both alternatives of first degree murder violated

¹ Mr. Hoyt entered into an agreement in this case to cooperate with authorities. He pleaded guilty to one count of first degree murder, one count of first degree burglary, and one count of first degree robbery. CP 118; RP 1366. In return for his cooperation, the State agreed to recommend a sentence of 20 years. *Id.*

double jeopardy and vacated the conviction for first degree felony murder. RP 1524-25.

E. ARGUMENT

1. The State failed to prove Mr. Griffin acted with premeditated intent.

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Alleyne v. United States*, 570 U.S. 99, 104-05, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State failed to prove Mr. Griffin acted with premeditated intent.

The evidence produced at trial failed to prove the essential element of premeditation for first degree murder, proving only that Mr.

Griffin acted with an intent to kill, but not premeditated. In light of this failure of the State's burden of proof, Mr. Griffin is entitled to reversal of his conviction for aggravated premeditated first degree murder with instructions to dismiss.

To convict Mr. Griffin 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). First degree murder requires the defendant act "with premeditated intent to cause the death of another person" RCW 9A.32.030(1)(a). Premeditation distinguishes first degree murder from second degree murder. *Brooks*, 97 Wn.2d at 876.

Premeditation must involve "more than a moment in point of time," but a mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995). 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.'" *Pirtle*, 127 Wn.2d at 644 *quoting*

State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995); *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). Premeditation may be proved 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; *Gentry*, 125 Wn.2d at 597. Premeditation is not shown merely because the act takes an appreciable amount of time because to do so would obliterate the distinction between first and second degree murder. *State v. Bingham*, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). The "mere opportunity to deliberate is not sufficient to support a finding of premeditation." *State v. Hummel*, 196 Wn.App. 329, 354, 383 P.3d 592 (2016); *Bingham*, 105 Wn.2d at 827 ("The opportunity to deliberate is not sufficient."). Evidence of actual deliberation must also be presented. *State v. Bushey*, 46 Wn.App. 579, 584, 731 P.2d 553 (1987).

In *Pirtle*, the Supreme Court identified four factors that are "particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing." *State v. Hummel*, 196 Wn.App. 329, 355, 383 P.3d 592 (2016), *quoting Pirtle*, 127 Wn.2d at 644. The second and third factors can be further combined as evidence of planning. *Ortiz*, 119 Wn.2d at 312. Evidence including prior threats

or quarrels and defensive wounds on the victim will support an inference of premeditation. *State v. Sherrill*, 145 Wn.App. 473, 486, 186 P.3d 1157 (2008), *review denied*, 165 Wn.2d 1022 (2009).

c. The State proved only a quick, impulsive, spontaneous act by Mr. Griffin in reaction to Mr. Howard unexpectedly returning home.

The entire State's case was based on Mr. Howard unexpectedly returning home and Mr. Griffin's spontaneous impulsive act of striking him with the baseball bat. This evidence does not constitute evidence of premeditation.

Murders resulting from an impulsive or spontaneous act are not premeditated. *State v. Luoma*, 88 Wn.2d 28, 34, 558 P.2d 756 (1977). When there is evidence that a killing occurred in the heat of passion, it may prove intent but not premeditation. *State v. Bolen*, 142 Wn. 653, 666, 254 P. 445 (1927).

In *Austin v. United States*, it was determined that, standing alone, multiple stab wounds and sustained violence cannot support an inference of premeditation. 382 F.2d 129, 139 (D.C.Cir.1967) *overruled on other grounds by United States v. Foster*, 783 F.2d 1082, 1085 (D.C.Cir.1986) ("Violence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an

inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained frenzy.”).

In *Bingham*, 105 Wn.2d 820, the defendant met his victim on a bus. The two exited the bus together and started to hitchhike on a rural highway. The defendant raped his victim in a field along the highway. Before raping her, he held his hand over her mouth and strangled her. Although the Supreme Court found *time* for deliberation, it found no evidence from which the jury might have inferred *actual* deliberation. *Bingham*, 105 Wn.2d at 827. The Court held that the mere passage of time for the killing to occur, in that case the approximately 3 to 5 minutes it took for killing by manual strangulation, shows only an opportunity to deliberate and by itself is insufficient to sustain the premeditation element absent evidence that the defendant did in fact deliberate. *Id.* at 822, 826. The method of inflicting death is relevant but will not support premeditation alone without other evidence supporting an inference “that the defendant not only had the time to deliberate, but that he actually did so.” *State v. Bingham*, 40 Wn.App. 553, 555, 699 P.2d 262 (1985), *reversed on other grounds*, 105 Wn.2d 820 (1986).

[T]o allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder. Having the *opportunity* to deliberate is not evidence the defendant *did* deliberate, which is necessary for a finding of premeditation.

Bingham, 105 Wn.2d at 826 (emphasis added).

Mr. Griffin's actions were consistent with an intent to kill Mr. Howard using the baseball bat, thus establishing intent but failing to establish premeditation:

Although intent and premeditation each involve processes of the mind, their impact upon the ultimate decision to be made by a jury is dissimilar. "Intent" involves the mental state of "acting with the objective or purpose to accomplish a result which constitutes a crime." On the other hand, the verb "premeditate" encompasses the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. Thus, the objective or purpose to take human life (sufficient to support a charge of second degree murder) must have been formed after some period of deliberation, reflection or weighing in the mind for the act to constitute first degree murder. One may be capable of forming an intent sufficient to support a charge of second degree murder and still be incapable of deliberation or forming a *premeditated intent* to take the life of another.

Brooks, 97 Wn.2d at 876 (emphasis added, footnotes omitted). Here, the State's argument conflated intent and premeditation. The evidence established an intent to kill, but failed to establish any deliberation on

Mr. Griffin's part, only his quick act of striking Mr. Howard in the head which resulted in Mr. Howard's death.

In addition, Mr. Griffin and Mr. Howard did not know each other, thus there were no prior threats or quarrels between the two. *See Sherrill*, 145 Wn.App. at 486. Further, the pathologist was clear in his testimony that Mr. Howard did not have any defensive wounds, further evidence of a lack of premeditation. RP 1127-28. Finally, there was no evidence of any prior planning by Mr. Griffin to kill Mr. Howard. It appears Mr. Griffin did not bring the baseball bat, thus he spontaneously grabbed the first thing he found to strike Mr. Howard. Again, this is not evidence of premeditation, but only evidence of a spontaneous act in reaction to the untimely return of Mr. Howard.

The State proved nothing more than that Mr. Griffin beat Mr. Howard in the head, an act so swift that within seconds, the injury had caused brain damage that resulted in death. There was no proof that Mr. Griffin actually deliberated or that there was even time to deliberate. *Brooks*, 97 Wn.2d at 876.

The State failed to prove Mr. Griffin acted with premeditated intent. The conviction for aggravated first degree premeditated murder should be reversed.

d. Any post-mortem acts do not enter the analysis of premeditation.

In closing argument, the prosecutor repeatedly included the act of setting Mr. Howard's body on fire the day *after* his death as evidence of premeditation:

And again, if we were backing up before we even knew the definition and you say, come into a house, a guy has been beaten to death, bound, and a fire been started to burn the house up, most people are going to say there was a prior decision made to murder this person. That's premeditated intent.

...

And if there was any question at all about that, he comes back to the house the next day to burn it up with him in it. He had to get away with this crime. And he had to make sure the one witness who had saw him wouldn't be able to get help, wouldn't say anything against him. It's more important to get this gold and whatever else is in that house. So, yes, he had premeditated intent to kill Mr. Howard and cause his death. And it was brutal.

RP 1437, 1439. Contrary to the prosecutor's argument, evidence of what occurred *after* Mr. Howard's death is not relevant to whether Mr. Griffin acted with premeditated intent.

By definition, evidence of premeditation requires the formation of the intent *before* the murder. *See Pirtle*, 127 Wn.2d at 628 (“‘Premeditation’ is deliberate formation of and reflection upon intent to take human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period

of time, however short.”). Further, evidence that Mr. Griffin attempted to dispose of Mr. Howard’s body by burning it might be evidence of guilt, but is not evidence of premeditation. *See Hummel*, 196 Wn.App. at 356-57 (evidence that Hummel disposed of Alice’s body and fraudulently obtained her disability checks *after* she died was evidence of guilt, but not probative of premeditation).

In *Hummel*, the jury convicted Mr. Hummel of premeditated first degree murder of his spouse, Alice. *Id.* at 331. The Court of Appeals found that, even if the evidence supported an inference that a confrontation between Mr. Hummel and Alice occurred, there was no evidence to show deliberation or reflection before Mr. Hummel killed Alice. *Id.* at 356. The Court reasoned that evidence that Mr. Hummel disposed of her body, concealed her death, and fraudulently obtained her disability checks *after* she died may be evidence of guilt, but not premeditation. *Id.* at 356-57. Thus, the Court held that no reasonable trier of fact could have found beyond a reasonable doubt that Mr. Hummel killed Alice with premeditated intent. *Id.* at 358-59.

The same applies here. The burning of Mr. Howard’s body the day after his death is simply not relevant to whether Mr. Griffin acted

with premeditated intent in the killing of Mr. Howard. As a consequence, the State's argument to the contrary should be ignored.

e. This Court must reverse with instructions to dismiss.

Reversal for insufficient evidence is "equivalent to an acquittal" and bars retrial for the same offense. *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L. Ed.2d 1 (1978).

Because the prosecutor did not request the court instruct the jury on the lesser included crime of murder in the second degree, this Court cannot remand to enter a judgment on murder in the second degree. *In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 293-94, 274 P.3d 366 (2012). Thus, Mr. Griffin's conviction for aggravated first degree murder must be reversed with instructions to dismiss.

2. The outrageous conduct of the police violated Mr. Griffin's right to due process.

“[O]utrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be ‘so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.’” *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996), quoting *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). For police conduct to violate due process, “the conduct must be so shocking that it violates fundamental fairness.” *Id.*

A claim based on outrageous conduct requires “more than a mere demonstration of flagrant police conduct.” *Lively*, 130 Wn.2d at 20. “Public policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity.” *Id.* “Dismissal based on outrageous conduct is reserved for only the most egregious circumstances.” *Id.* In evaluating a claim of outrageous conduct, the focus must be on the State’s conduct, rather than the defendant’s predisposition to commit the crime. *United States v. Luttrell*, 889 F.2d 806, 811 (9th Cir.1989).

In reviewing a defense of outrageous government conduct, the court evaluates the conduct based on the totality of the circumstances.

Lively, 130 Wn.2d at 21. Proper law enforcement objectives, preventing crime and apprehending violators, must drive law enforcement officers' conduct, not encouraging or participating in sheer lawlessness. *Lively*, 130 Wn.2d at 21. Some of the factors to consider when determining whether police conduct offends due process are: (1) "whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity," (2) "whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation," (3) "whether the government controls the criminal activity or simply allows for the criminal activity to occur," (4) "whether the police motive was to prevent crime or protect the public," (5) "whether the government conduct itself amounted to criminal activity or conduct 'repugnant to a sense of justice.'" *Lively*, 130 Wn.2d at 22. Whether the State has engaged in outrageous conduct is a matter of law, not a question for the jury. *Lively*, 130 Wn.2d at 19.

A claim of outrageous police conduct may be raised for the first time on appeal because constitutional errors may be raised for the first time on appeal, especially where the error affects "fundamental aspects of due process." *Lively*, 130 Wn.2d at 19.

The police conduct here was outrageous and certainly shocked the conscience. The police took great pains to lie to Mr. Hoyt. The officers created a “confession” that was a fraud and they created it knowing it was false. This conduct is the very definition of lawlessness by the police. *Lively*, 130 Wn.2d at 21. Police conduct like this cannot be condoned and the only way to deter such conduct in the future is to dismiss Mr. Griffin’s convictions. This would send a clear message to the police that to engage in this kind of lying would lead to severe sanctions.

Mr. Griffin’s convictions must be dismissed for the outrageous police misconduct in this case.

F. CONCLUSION

For the reasons stated, Mr. Griffin asks this Court to reverse his conviction for aggravated first degree premeditated murder with instructions to dismiss. Alternatively, Mr. Griffin asks his convictions must be reversed and dismissed for the outrageous police misconduct.

DATED this 24th of June 2020.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

tom@waswhapp.org

wapofficemail@washapp.org

Washington Appellate Project - 91052

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 54224-2-II
v.)	
)	
DUSTIN GRIFFIN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF JUNE, 2020, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> ERIC BENTSON	()	U.S. MAIL
[bentsone@co.cowlitz.wa.us]	()	HAND DELIVERY
[appeals@co.cowlitz.wa.us]	(X)	E-SERVICE VIA
COWLITZ COUNTY PROSECUTING ATTORNEY		PORTAL
312 SW 1 ST AVE		
KELSO, WA 98626-1739		
<input checked="" type="checkbox"/> DUSTIN GRIFFIN	(X)	U.S. MAIL
774457	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
1313 N 13TH AVE		
WALLA WALLA, WA 99362-1065		

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF JUNE, 2020.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

June 25, 2020 - 4:29 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54224-2
Appellate Court Case Title: State of Washington, Respondent v. Dustin A. Griffin, Appellant
Superior Court Case Number: 18-1-01424-4

The following documents have been uploaded:

- 542242_Briefs_20200625162859D2525665_2665.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.062520-12.pdf

A copy of the uploaded files will be sent to:

- appeals@co.cowlitz.wa.us
- bentsone@co.cowlitz.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200625162859D2525665