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Court of Appeals
Division II
State of Washington
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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

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

As explained in the opening brief, to convict a defendant of first degree murder, the State must prove premeditated intent to kill, not merely intent to kill. Here, the State presented no evidence of planning, threats, or motive. The State's evidence showed only a spontaneous act by Mr. Griffin in response to Mr. Howard unexpectedly returning home. This Court should accordingly reverse the conviction for first-degree murder and remand for entry of convictions for second-degree murder.

The State's argument conflates the element of an intent to kill with premeditation, eliminating the difference between first and second degree murder. The State argues as it did at trial, that the evidence "showed a sustained to end Howard's life[.]" Brief of Respondent at 19-20.

The fact it took an appreciable amount of time to kill Mr. Howard or the method of inflicting death does not prove premeditation 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) (emphasis added). Further, sustained violence cannot support an inference of premeditation. *Austin v. United States*, 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). The State makes no attempt to distinguish these cases.

The State's attempt to use the evidence of robbery and burglary are not also not sufficient. Mr. Hoyt and Mr. Griffin went to Mr. Howard's home specifically to burglarize his house and rob him. There was no evidence that the two spoke about killing Mr. Howard or went to the house with an intent to kill Mr. Howard. In fact, Mr. Hoyt was shocked when Mr. Griffin struck Mr. Howard. RP 1305.

The State's argument is simply that, once there is proof of an intent to kill, the State has proven premeditation and first degree murder is appropriate. The State was required to, not only prove an ability to premeditate, but also that Mr. Griffin did. What the State proved here was that Mr. Griffin acted spontaneously when Mr. Howard returned home, striking him with the baseball bat and then continuing until Mr. Howard was dead. Such evidence was only proof that Mr. Griffin acted with an intent to kill Mr. Howard. But there is

nothing in Mr. Griffin's words or actions that prove he acted with premeditated intent.

The State failed to prove the essential element of premeditation. Mr. Griffin's conviction for first degree murder should be reversed.

2. Mr. Griffin can challenge the outrageous police misconduct.

The State initially contends Mr. Griffin waived this issue by not raising it in the trial court thus, may not raise this error for the first time on appeal. Brief of Respondent at 40-42. The Supreme Court has rejected this argument in *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996).

In *Lively*, for the first time on appeal the defendant sought reversal of her conviction for a violation of due process based upon outrageous police misconduct. The Supreme Court ruled:

> The Defendant next argues that the conduct of the State was so outrageous that it violated her right of due process under the Fifth and Fourteenth Amendments of the federal Constitution. The Defendant raised this issue for the first time in her appellate brief. However, constitutional error may be raised for the first time on appeal, particularly where the error affects "fundamental aspects of due process." *State v. Johnson*, 100 Wash.2d 607, 614, 674 P.2d 145 (1983), *overruled on other grounds in State v. Bergeron*, 105 Wash.2d 1, 711 P.2d 1000 (1985).

Id. at 18–19.

Mr. Griffin is in the same posture as in *Lively.* As such, he has not "waived" the issue by failing to raise it in the trial court and can raise a challenge to his right to due process for the first time on appeal.

The State also argues Mr. Griffin may not challenge the violation of Mr. Hoyt's rights, citing *State v. Gutierrez,* 50 Wn.App. 583, 749 P.2d 213, *review denied,* 110 Wn.2d 1032 (1988). *Gutierrez* involved the defendant's objection to the admission of a co-defendant's confession for a violation of *Miranda*. *Id.* at 591-92. The Court determined Mr. Gutierrez did not have standing to challenge the co-defendant's Fifth Amendment rights which the Court ruled were personal. *Id.*

Mr. Griffin not seeking to vindicate Mr. Hoyt's rights. Mr. Griffin is instead seeking to punish and deter police misconduct such as occurred here. Courts have allowed challenges to governmental misconduct even where the right challenged is not a personal right. *See e.g., Batson v. Kentucky*, 476 U.S. 79, 87, 106 S. Ct. 1712, 1718, 90 L. Ed. 2d 69 (1986) (allowing the defendant to challenge the right of citizens to sit on juries).

Commonly, governmental misconduct cases have arisen in situations dealing with police entrapment, such as in *Lively*. As such,

the test enunciated by *Lively* is meaningless is a case such as Mr. Griffin's, which does not involve entrapment. Mr. Griffin's case is more akin to the misconduct committed by the police in *State v. Patton*, 362 N.J. Super. 16, 48, 826 A.2d 783, 804 (2003).

In *Patton*, the police fabricated an audio tape from an alleged eyewitness and played it for the defendant. *Id.* at 19-23. The court concluded that Mr. Patton's due process rights were violated when he was tricked into confessing to a murder after he listened to the police-fabricated audiotape depicting the fictitious eyewitness. *Id.* at 18, 46. The court held that, although the police may misrepresent facts and the existence of evidence, they may not fabricate tangible evidence to deceive a detainee into confessing. *Id.* at 32.

> We hold that law enforcement and the public would best be served by a "bright-line" rule precluding the use of police-fabricated evidence that later finds its way into the trial. Such "bright-line" rules serve to protect the constitutional rights of suspects while providing a clear procedure for police to follow that should produce consistent results.
> . . .
> We recognize that the rule here invalidates a confession to a murder, yet on balance, the sanctity of our constitutional protections for all remains paramount. As a noted jurist observed: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 *Harv. L.Rev.* 1, 26 (Nov.1956), *quoted in Miranda,*

> *supra*, 384 U.S. at 480, 86 S.Ct. at 1631, 16 L.Ed.2d at 727.

Patton, 362 N.J. Super. at 48.

Such a bright-line rule should apply equally to police actions such as here, where the police fabricated evidence in the form of a "confession" by Mr. Griffin which was subsequently utilized to obtain a confession from Mr. Hoyt. As stated so clearly in *Patton*, the police should not be allowed to fabricate evidence in order to obtain a conviction. The only remedy to deter such abhorrent police misconduct is to reverse Mr. Griffin's conviction because of extreme governmental misconduct.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Griffin asks that his conviction be reversed for outrageous police misconduct with instructions to dismiss. Alternatively, Mr. Griffin asks this Court to reverse his conviction for aggravated first degree murder and remand for imposition of a conviction for second degree murder.

DATED this 15th of September 2020.

Respectfully submitted,

s/Thomas M. Kummerow

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	)	
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	)	NO. 54224-2-II
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	)	
DUSTIN GRIFFIN,	)	
	)	
Appellant.	)	

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