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NO. 54224-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN ALAN GRIFFIN,

Appellant.

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

Griffin's convictions should be affirmed because: (1) there was sufficient evidence for the jury to find he had premediated intent to kill when he caused the death of Donnie Howard, and (2) there was no misconduct by the police.

II. ISSUES

1. Was there sufficient evidence for the jury to find Griffin had premediated intent to kill when he was motivated to commit robbery, burglary, and prevent identification; he procured weapons to kill the victim; he attacked the victim in stealth; and, his method of killing involved using three weapons over an extended time period?

2. Was it outrageous police misconduct for detectives to utilize a ruse to obtain information from Griffin's accomplice in the investigation of an unsolved murder?

III. STATEMENT OF THE CASE

Donnie Howard lived alone at 2145 Dahlia Street in Woodland, Washington. RP 298, 305-06. Due to a head injury, Howard was disabled and told by his doctor he needed a hobby to keep busy. RP 302-04, 306. As a result, Howard would go fishing on a regular basis on a dam 10 miles north of Woodland on the Columbia River. RP 306. Seven days a week, Howard would wake up around midnight and leave with his dog to go

fishing sometime between 1:00 a.m. and 4:30 a.m. RP 307, 331-32. Howard collected gold and would often wear so much gold jewelry that he “looked like Mr. T.” RP 309, 311. Howard also kept commemorative eagle items, knives displayed in shadow boxes, U.S. quarter coins, and thousands of dollars in cash in his house. RP 309-10. When fishing, Howard would often speak with strangers, show them his jewelry, and talk about items at his house. RP 336-37. Howard was the victim of prior burglaries. RP 364.

In November of 2016, Dustin Griffin was living with his girlfriend, Tawny Langin, at 1514 N.E. 156th Street in the Salmon Creek area of Vancouver, Washington. RP 912, 1158-59, 1292. His friend Daniel Strange would fish in the Woodland area and was familiar with Howard and his “gold chains.” RP 1205. On one occasion, Griffin accompanied Strange to Woodland on a fishing trip. RP 1205.

Another friend of Griffin’s, Kris Hoyt, was present during an argument between Griffin and Strange. RP 1293-94. Strange was upset because he had provided information to Griffin about Howard’s house, and Griffin burglarized the house but “didn’t cut him in.” RP 1293-94. Subsequently, Griffin told Hoyt he knew Howard’s schedule, believed there were “gold bars” inside Howard’s home, and invited Hoyt to return with him to burglarize it. RP 1294. Hoyt agreed to commit the burglary with Griffin. RP 1294.

On the night of November 20, 2016, Griffin and Hoyt drove from Griffin's home in Vancouver north to Woodland in a stolen blue Dodge Ram to burglarize Howard's home. RP 786, 815, 941, 1295-96. Griffin replaced the license plates on the stolen Dodge Ram with plates from a similar make of vehicle to avoid being detected by police if the plates were run. RP 1296. Griffin wore a pair of 2015 Nike Air Max shoes bearing a "reverse swoosh" under the ankle. RP 632, 940, 1057-58. Griffin obtained gloves and stocking caps for both Hoyt and himself. RP 1298. Griffin and Hoyt took the batteries out of their cell phones. RP 786, 816, 828, 843, 849, 1298. Griffin also brought an assault rifle. RP 1297.

When Griffin and Hoyt arrived in Howard's neighborhood, he was still home. RP 1299. They parked the Dodge Ram one street over from Howard's house. RP 1300-01. They waited for Howard to go fishing. RP 1299-1300. While they waited, they prowled a vehicle parked nearby. RP 1300. They observed Howard depart in his pickup truck. RP 1300. After Howard left, Griffin and Hoyt went to the back of Howard's house. RP 1300. They placed duct tape on a window, and Griffin broke it with the assault rifle. RP 1301. The duct tape allowed them to remove pieces of the window in "chunks." RP 1301. Hoyt entered the house through the window, then he let Griffin into the house through a door. RP 1301-02.

Once inside the house, Griffin and Hoyt separated. RP 1303. They searched Howard's house for gold. RP 1303. They gathered Howard's property and placed items just inside the garage door, so they could easily be loaded into the Dodge Ram. RP 1302. While Griffin was in the house, he kicked open a bedroom door in the hallway, leaving a shoe tread impression on the door. RP 537.

After they had been in the house for 30-45 minutes, Howard returned home. RP 1303-04. Hoyt was in the office when he heard Howard's keys jingling as he unlocked the front door. RP 1304. Entering the house, the office was immediately to the left of the front entryway, and a hallway leading to the bedrooms was to the right of the entryway, opposite the office. RP 452. Hoyt notified Griffin that Howard had returned home. RP 1304. Howard entered, turned toward Hoyt in the office, and came at him. RP 1304-05.

After being notified, Griffin obtained a baseball bat. RP 1304-05. Griffin came from the hallway and approached Howard from behind with the bat. RP 1305. With Howard facing away from him toward Hoyt, Griffin struck Howard in the back of the head with the bat. RP 1304-05. Howard fell to the floor. RP 1305. After knocking Howard to the floor, Griffin next stole jewelry Howard was wearing and removed items from his pockets. RP 1305. The blow rendered Howard unable to defend himself. RP 1335.

While on the office floor, Griffin struck Howard several more times with the bat. RP 1305. Howard's head was at two locations in the office, leaving two blood stains that saturated the floor. RP 500, 526. Griffin struck Howard in two different directions. RP 528-29. Blood was spattered in one direction on the west wall and the door of the office. RP 528-29. Blood was spattered in a second direction on the south wall of the office and on a paper shredder in front of the south wall. RP 528-29. The blood spatter on these walls was inconsistent with having been cast off the bat as it was pulled away from Howard. RP 544-45, 554.

Griffin yelled at Hoyt to "get a rope." RP 1306. Hoyt found a rope in Howard's garage and provided it to Griffin. RP 1306. Griffin then bound Howard with the rope, tying his hands and legs together. RP 1306-07. Howard was not moving or speaking when bound but was still breathing. RP 1307. After binding Howard with the rope, Griffin continued to remove Howard's jewelry. RP 1307. Griffin had difficulty removing a bracelet from Howard. RP 1308. Hoyt obtained pliers from the garage and used them to remove the bracelet. RP 1308.

Griffin removed possessions from Howard's pockets and then pulled him to the living room. RP 1308. Griffin and Hoyt conducted a sweep of Howard's house that took 15-30 minutes. RP 1308, 1329. They piled up Howard's property inside the garage door. RP 1309. After

completing the sweep, Griffin struck Howard a final time with the assault rifle. RP 1336.

Griffin backed the Dodge Ram into Howard's driveway, Hoyt opened the garage door, and they loaded property into the truck. RP 1309, 1330. They left Howard's house in the Dodge Ram. RP 1309, 1330. The driver's side of the Dodge Ram scraped Howard's Geo Prizm that was parked on the street facing the driveway, leaving behind blue paint transfer. RP 462-69, 1251. When Griffin and Hoyt left the house, Howard was still breathing. RP 1326-27.

Griffin drove the Dodge Ram to a dirt road in Woodland where he disposed of the bat. RP 1309-10. Before leaving Woodland, Griffin drove the Dodge Ram to Kayla Strabeck's house and woke her up. RP 1073-75. Griffin told Strabeck, "[t]hat – some guy – some guy was supposed to be fishing; came home early. The guy started coming at the other guy, and he got knocked out." RP 1075. Griffin and Hoyt returned to Griffin's residence, where they unloaded the stolen property. RP 1311.

Griffin and Hoyt both reactivated their phones that morning in the area of Hayden Island/Jantzen Beach, Oregon, where Hoyt lived.¹ RP 786, 815-16, 832, 842-44, 849, 1292. Later in the afternoon of November 21,

¹ Jantzen Beach is located on Hayden Island on the Columbia River in Oregon. RP 895.

2016, Griffin unloaded items from the Dodge Ram in his driveway. RP 947-50. Around midnight on November 22, 2016, Griffin departed from his home in Vancouver and returned to Howard's house in Woodland. RP 958, 817-19. Griffin placed propane tanks around Howard's body in the living room, covered him with a sheet, poured gasoline, motor oil, and lighter fluid on and around Howard's body, and started a fire in the house using butane torches. RP 476-83, 533-35, 1107, 1311. At 4:19 a.m., Griffin departed the area of Howard's house in Woodland and headed south toward Vancouver. RP 819-22.

Shortly after Griffin departed, a jogger, Christopher Farrell, observed Howard's house was on fire. RP 388-89. Farrell called 911 at 4:34 a.m. and reported the fire. RP 390, 392. Firefighters responded and extinguished the fire. RP 399, 404. They discovered Howard's body in the living room and the propane tanks. RP 406. Firefighters observed Howard to be dead on arrival. RP 407. Howard died as a result of head injuries suffered from blunt force trauma. RP 1123, 1142.

Howard suffered blunt force trauma in at least six different locations all about his head. RP 1142. These injuries were consistent with more than six blows to his head, as multiple blows on top of each other were possible at each injury location. RP 1143. Howard also suffered blunt force trauma to his chest, fracturing his ribs and causing bleeding in his chest wall. RP

1123, 1141. Due to the “devastating” head injuries suffered by Howard, he died “anyplace from minutes to, at most, a few hours” after receiving the final blow to his head. RP 1123, 1146. Because Griffin attempted to create an explosion with the propane tanks, the Portland Bomb Squad was called. RP 408.

Cowlitz County Sheriff’s Office detectives investigated, and the Washington State Patrol Crime Scene Response Team processed evidence. RP 729, 731-32. Detectives discovered the shoe tread impression left on the door Griffin kicked open in the hallway and the blue paint transfer from the Dodge Ram on Howard’s Geo Prizm. RP 462-64, 733-34, 1251. The shoe tread impression was consistent with that of a Nike Air Max shoe, including the 2015 Nike Air Max. RP 632. The blue paint was specific to Dodge Rams manufactured between the years 2000 and 2008 at the Dodge/Chrysler plant located in St. Louis, Missouri. RP 599-602. The 11th digit of the vehicle identification number (“VIN”) designating this was the letter “J.” RP 614. Detectives kept the information regarding the shoe tread impression and the paint transfer confidential. RP 757-58, 769-70.

More than a year after Howard was murdered, the case remained open. RP 767. No DNA or fingerprints connecting to persons who could have been involved were ever located. RP 681. In an effort to make progress with the investigation, detectives conducted additional interviews

in the Woodland area. RP 767-69. On August 21, 2018, detectives interviewed Kayla Strabeck. RP 890. Strabeck disclosed one night/early morning around Thanksgiving of 2016, Griffin and another man—who she had not met before but later identified in a photo montage as Hoyt—came to her house in a blue Dodge truck. RP 1072-75, 1267.

Detectives discovered a 2006 blue Dodge Ram had been stolen near Griffin's home in Vancouver on November 4, 2016, and was found abandoned on Hayden Island near Hoyt's home on December 22, 2016. RP 685, 691, 693-94, 1270-71. Prior to being stolen there was no damage to the Dodge Ram. RP 690. When recovered, the Dodge Ram had damage consistent with having rubbed against a vehicle on the driver's side at the same height as the damage to Howard's Geo Prizm. RP 690, 701-02, 1272. The 11th digit of the VIN was a "J," indicating it had been manufactured at the Dodge St. Louis plant. RP 695, 1271. When the vehicle was recovered, it had a license plate on it that had been stolen from another Dodge Ram parked at an auto dealership on Hayden Island. RP 686, 708, 1271.

Detectives obtained security footage of Griffin's motion-activated security system at his Vancouver apartment, pursuant to a search warrant. RP 925. The surveillance showed Griffin wearing a 2015 Nike Air Max shoe in the afternoon of November 20, 2016, Griffin and Hoyt leaving together later that night at 10:11 p.m., and Griffin unloading property out of

the blue Dodge Ram the following day. RP 940-41, 947-50, 1045, 1057-59. The surveillance also showed Griffin carrying two long gun cases into his apartment on November 14, 2016. RP 930-31, Ex. 362, 363.²

Detectives contacted Hoyt, who was incarcerated in Monroe, Washington. RP 895, 897. Using a ruse, they provided Hoyt with a fictitious statement allegedly written by Griffin. RP 898-900. In the fictitious statement, both Griffin and Hoyt were implicated in the crime. RP 899. Hoyt admitted to his and Griffin's involvement in the murder and told detectives Griffin had told him that he returned the following night to burn the house.³ RP 90, 1312. Detectives later revealed to Hoyt that they had written the fictitious statement rather than Griffin. RP 909-910, 1025-26. After this was revealed, Hoyt again told detectives what had happened, took responsibility, and showed remorse. RP 910, 1026.

Phone records later corroborated that Griffin had traveled from Vancouver and was present in the area of Howard's house in Woodland at 10:59 p.m. on November 20, 2016. RP 812, 815. Consistent with both Griffin and Hoyt removing the batteries from their phones, phone records indicated Griffin's phone was inactive between 10:59 p.m. on November

²A prior serious offense made it unlawful for Griffin to possess firearms. RP 1337-38. In addition to Hoyt, several other witnesses also testified that Griffin possessed the assault rifle and described these gun cases. RP 1187-88, 1244-45, 1090-91.

³ Griffin also told Jerry Bunker he returned to burn the house. RP 1107.

20, 2016, and 7:36 a.m. on November 21, 2016, and Hoyt's phone was inactive from 11:52 p.m. on November 20, 2016, until 8:15 a.m. on November 21, 2016. RP 828, 843. When Griffin's phone was reactivated at 7:36 a.m., it was near Hayden Island, where Hoyt lived. RP 815-16.

At 8:16 a.m. on November 21, 2016, phone records showed Griffin returned to his apartment in Vancouver. RP 817. Surveillance showed Griffin leaving his apartment alone around 11:45 p.m. on November 21, 2016. RP 957-58; Ex. 469, 470, 471. Griffin's phone records showed him leaving the Vancouver area around 12:06 a.m., traveling north, and arriving in the Woodland area around 12:24 a.m. on November 22, 2016. RP 817-19. Griffin was in the area of Howard's house from 2:06 a.m. to 4:19 a.m. RP 820. Shortly before the fire was reported, Griffin departed the area of Howard's house, at 4:19 a.m., and returned to Vancouver. RP 822.

Griffin was charged with aggravated murder in the first degree, felony murder in the first degree, robbery in the first degree, burglary in the first degree, arson in the first degree, unlawful possession of a firearm in the first degree, and possession of a stolen vehicle. RP 28; CP 13-18. Griffin's case proceeded to trial. RP 25. At trial, Hoyt testified. RP 1290. Hoyt's plea agreement was disclosed to the jury. RP 1313, 1366-67. The jury was also informed of the fictitious statement that had been provided to

Hoyt. RP 898-900. Griffin had the opportunity to cross-examine the detectives and Hoyt about the fictitious statement. RP 1018-22, 1333-34.

In addition to Hoyt, several of Griffin's acquaintances testified to admissions Griffin made about the crimes and to observations of Howard's stolen property and the assault rifle in his possession. RP 970, 1075, 1088-89, 1105-07, 1174, 1183-88, 1207, 1243-45. The jury also heard testimony and observed evidence of the blood spatter, the paint transfer from the stolen Dodge Ram, the shoe tread impression from Griffin's 2015 Nike Air Max, his phone location data and certified phone records, sales of fishing equipment consistent with Howard's that Griffin sold online, and the emails received from Griffin's surveillance system. RP 461-69, 512-15, 528-29, 590-605, 613-14, 619-70, 786, 802-49, 925-67, 982-95, 1002-05, 1057-62, 1269-76. Griffin was convicted of all charges. RP 1515-17. Because he was convicted of aggravated murder in the first degree and felony murder in the first degree, his felony murder conviction was vacated. RP 1524-25, 1538. Griffin received a life sentence. RP 1537.

IV. ARGUMENT

A. SUFFICIENT EVIDENCE WAS PRESENTED FOR THE JURY TO FIND GRIFFIN HAD PREMEDITATED INTENT TO KILL.

Taken in the light most favorable to the State, there was sufficient evidence for the jury to find Griffin had premeditated intent to kill when he

caused the death of Donnie Howard. It is well-established that “[w]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Griffin claims there was insufficient evidence for the jury to find he premeditated when he intentionally killed Donnie Howard. However, when all reasonable inferences are drawn in favor of the State and interpreted most strongly against Griffin, there was sufficient evidence to support the jury’s verdict.

When determining the sufficiency of the evidence, the standard of review is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn. App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *Jones*, 63 Wn. App. at 707-08. "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

The same standard of review that applies to sufficiency of the evidence claims generally also applies when the sufficiency of premeditation evidence is challenged. *See State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995) ("That standard is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt."). Thus, to prevail on a claim of insufficient evidence, it must be shown "that given the evidence no trier of fact could find premeditation beyond a reasonable doubt." *State v. Ollens*, 107 Wn.2d 848, 853, 733 P.2d 984 (1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1970)).

“Premeditated killing is an intentional killing where the defendant, however briefly, considers the consequences of his acts.” *State v. Eggleston*, 129 Wn. App. 418, 432, 119 P.3d 959 (2005). “Premeditated design is a mental operation of thinking upon an act before doing it or upon an inclination before carrying it out.” *State v. Duncan*, 101 Wash. 542, 544, 172 P. 915 (1918) (approving of this definition in the jury instructions). “In other words, the State must show that the defendant decided to cause the victim’s death after some period of reflection, however short.” *State v. Monaghan*, 166 Wn. App. 521, 535, 270 P.3d 616 (2012).

“It is acceptable to inform a jury that no ‘fixed or definite’ period of time need elapse so long as they are told that premeditation can occur in any length of elapsed time sufficient for forming an intent.” *State v. Tikka*, 8 Wn. App. 736, 741, 509 P.2d 101 (1973). “Premeditated malice exists when the intention unlawfully to kill is deliberately formed in the mind and the determination thought over and reflected upon before the fatal blow is struck (no particular space of time, however, need intervene between the formation of the intent to kill and the killing)[.]” *State v. Blane*, 64 Wash. 122, 128-29, 116 P. 660 (1911) (finding no error with this language in the jury instructions). “[P]remeditation means ‘thought over beforehand,’ and if [the jury] found that there was previous thought that the execution of the

design might follow immediately thereafter.” *Id.* at 129 (explaining why this language was proper in the jury instructions).

“Evidence of planning activity before the murder . . . has been widely accepted as probative of premeditation.” *State v. Lindamood*, 39 Wn. App. 517, 521, 693 P.2d 753 (1985) (citing *Tikka*, 8 Wn. App. at 742). Also, an extended time period involving multiple blows with a weapon has been found to provide sufficient evidence of deliberation. *See State v. Gentry*, 125 Wn.2d 570, 601, 888 P.2d 1105 (1995) (“[T]he killer of this child had deliberately picked up a large rock to use against his victim; that he had the opportunity during continuous blows over 148 feet of trail to deliberately form and reflect upon the intent to take the life of the victim[.]”). The jury may also find deliberation when death results from multiple acts occurring over the course of the crime, even when it cannot be determined which particular act caused the death. *See Monaghan*, 166 Wn. App. at 535-36 (“Even if the evidence cannot conclusively establish that one particular act actually killed Mr. Karavias, a reasonable juror could find beyond a reasonable doubt that Mr. Monaghan made the decision to kill his victim at least by the time he twisted Mr. Karavias’s neck.”).

“It is true that proof of the fact of killing alone does not raise a presumption of premeditation or deliberation, but premeditation or deliberation may be inferred from the circumstances of the killing.” *State v.*

Gaines, 144 Wash. 446, 467, 258 P. 508 (1927) *superseded by rule on other grounds by State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005). “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.” *State v. Hoffman*, 116 Wn.2d 51, 82–83, 804 P.2d 577 (1991). As a practical matter, circumstantial evidence is often necessary to prove premeditation: “Premeditation and deliberation are usually proved by circumstantial evidence because they are not readily susceptible to proof by direct evidence.” *State v. Ginyard*, 334 N.C. 155, 158, 431 S.E.2d 11 (1993).

“A wide range of proven facts will support an inference of premeditation[.]” *State v. Thompson*, 169 Wn. App. 436, 490, 290 P.3d 996 (2012). When inferences drawn are merely speculative, actions taken after the victim’s death may only show evidence of guilt rather than premeditation. *See State v. Hummel*, 196 Wn. App. 329, 356-57, 383 P.3d 592 (2016). However, a reasonable inference of premeditation exists from extensive efforts to bind, conceal, and dispose of the victim’s body after the killing, because such actions are inconsistent with a spontaneous killing. *See State v. Anderson*, 10 Wn.2d 167, 175-76, 116 P.2d 346 (1941) (finding the act of trussing the victim’s body and hiding the victim in the cellar prior

to hauling him away the following night “precluded any inference that the killing was spontaneous and without premeditation”).

“Four characteristics of the crime are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing.” *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). Despite their relevance, all four characteristics need not be present for there to be sufficient evidence of premeditation. *See State v. Sherrill*, 145 Wn. App. 473, 485, 186 P.3d 1157 (2008) (“Here, no evidence of motive, procurement of a weapon, or stealth was presented. Accordingly, Mr. Sherrill argues that the evidence was insufficient to establish premeditation. We disagree.”). Any of these characteristics may provide sufficient evidence of premeditation. *See State v. Evans*, 45 Wash. 4, 10-11, 258 P. 845 (1927) (explaining how killing with the motive of robbery provided sufficient evidence of premeditation). Further, “procurement of a weapon and stealth, ‘can be further combined as evidence of planning.’” *Hummel*, 196 Wn. App. at 355 (quoting *Pirtle*, 127 Wn.2d at 644).

In *Ollens*, these four characteristics were considered in combination:

- (1) *Motive*: “Ollens killed Tyler in order to effectuate a robbery;”
- (2) *Procurement of a Weapon*: “[A] knife was used in the killing;”
- (3) *Stealth*: “Ollens struck Tyler from behind;” and

(4) *Method of Killing*: “[N]ot only did Ollens stab the victim numerous times, he thereafter slashed the victim’s throat.”

107 Wn.2d at 853. The combination of these characteristics provided sufficient evidence to submit the issue of premeditation to the jury. *See id.* (“It is properly the function of a jury to determine whether Ollens deliberated, formed and reflected upon the intent to take Tyler’s life in order to effectuate the robbery.”).

Here, taken in the light most favorable to the State, there was sufficient evidence for the jury to find Griffin premeditated when he intentionally killed Donnie Howard. First, the evidence permitted the jury to infer premeditation from Griffin’s obvious motives of robbery, burglary, and avoiding identification. Second, the jury was permitted to infer premeditation when Griffin procured three weapons—the assault rifle, the baseball bat, and the rope—then used all three to kill Howard. Third, Griffin’s stealth attack, where he approached Howard from behind and struck him in the back of the head with the baseball bat, permitted the inference of premeditation. Fourth, the method of killing permitted the inference of premeditation, because it showed a sustained effort to end Howard’s life that involved striking him from behind with a deadly weapon, then robbing him of his jewelry, striking an already incapacitated Howard

on the floor many times in two directions, binding him, and then striking him again 15-30 minutes later. Lastly, Griffin's arguments to the contrary do not show insufficient evidence because each of the four characteristics relevant to premeditation were present. Thus, the jury was permitted to infer Griffin premeditated when he intentionally killed Donnie Howard.

1. Motive evidence permitted the inference of premeditation.

“Motive and prior conduct of a defendant is as much a part of the substantive evidence to show premeditation as is the immediate reflective deliberation which precedes the act itself.” *State v. Horner*, 21 Wn.2d 278, 281-82, 150 P.2d 690 (1944). Bringing a weapon with a plan to kill in the event that a victim refuses to submit, is motive evidence of premeditation. *See State v. Burkins*, 94 Wn. App. 677, 690, 973 P.2d 15 (1999). Further, a murder that is motivated to prevent identification also provides evidence of premeditation. *See Lindamood*, 39 Wn. App. at 520 (“The victim could have identified Lindamood had he lived.”).

When a murder is motivated by robbery, “[t]hat motive is relevant to establishing premeditation.” *See State v. Condon*, 182 Wn.2d 307, 315, 343 P.3d 357 (2015). “A person can form a premeditated design to effect the death of another for the purpose of better enabling him to rob the person or premises of that other.” *Evans*, 45 Wash. at 11. The prior decision of

bringing a weapon to commit a robbery provides sufficient evidence for a jury to find premeditation. *See Condon*, 182 Wn.2d at 315 (“Given that Condon entered the house with a loaded handgun, intending to rob a drug dealer, a rational jury could have found premeditation[.]”). Similarly, when a weapon is brought to commit a burglary with a plan to use it against the victim for protection, this motive also supports premeditation. *See Anderson*, 10 Wn.2d at 178.

Here, motive evidence permitted the jury to find Griffin killed Howard to commit a burglary, a robbery, and to prevent identification. The jury heard evidence that Griffin entered Howard’s home to commit a burglary while armed with an assault rifle. After Griffin struck Howard with the baseball bat, he then robbed Howard of jewelry and items in his pockets while he was incapacitated on the floor. After stealing the jewelry, he struck Howard with the bat many more times while he was on the floor. He then continued to steal items from Howard’s pockets, while his accomplice cut a bracelet off of him. Griffin bound Howard with a rope, preventing Howard from taking any action, even if he had been able to recover physically. This allowed Griffin and Hoyt to continue stealing property while in Howard’s presence for 15-30 minutes. Then, as they were leaving, with Howard incapacitated and bound, Griffin again struck Howard, using the assault rifle, and left in the Dodge Ram with Howard’s

property. Griffin did not wear a mask and even returned to burn the house the following night. From this evidence it can be inferred that, in addition to robbery and burglary, Griffin was motivated to prevent Howard from identifying him and Hoyt.

Such motive evidence supported a finding of premeditation. As in *Anderson*, Griffin brought a weapon to commit a burglary, and then, as in *Burkins*, Griffin used a weapon to kill a non-compliant victim. See 10 Wn.2d at 178; 94 Wn. App. at 690. Consistent with *Condon* and *Evans*, the evidence showed Griffin was motivated to rob Howard when, after knocking him down, he stole property from his person. See 182 Wn.2d at 315; 45 Wash. at 11. Then, after beating him repeatedly with a weapon, binding him, and striking him again, Griffin stole more property from Howard—who, as Hoyt testified—had not died yet but would as a result of Griffin’s acts. The jury was convinced that Griffin was motivated to commit both burglary and robbery, as they found him guilty of both charges beyond a reasonable doubt. And, as in *Lindamood*, the evidence permitted the jury to infer that Griffin sought to prevent Howard from identifying him or Hoyt. See 39 Wn. App. at 520. Griffin did not wear a mask, he inflicted multiple “devastating” blows to Howard while he was still alive but after he was incapable of resistance, and he returned to create an explosion to burn Howard and his home.

2. Evidence of procuring weapons permitted the inference of premeditation.

“[T]he planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury.” *State v. Massey*, 60 Wn. App. 131, 145, 803 P.2d 340 (1990), *review denied*, 115 Wn.2d 1021, 802 P.2d 126, *cert. denied*, 111 S. Ct. 1584, 499 U.S. 960, 113 L. Ed. 2d 648 (quoting *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986)) (evidence that the defendant brought a gun to the murder site supported a finding of premeditation). The act of arming oneself with a weapon capable of inflicting lethal wounds is evidence of premeditation. *See Lindamood*, 39 Wn. App. at 520 (“This planning included arming himself with a table leg, a weapon capable of inflicting lethal wounds.”). Further, utilizing a weapon to attack the victim from behind provides evidence of premeditation. *See State v. Giffing*, 45 Wn. App. 369, 375, 725 P.2d 445 (1986) (“[K]illing with a knife can be distinguished from strangulation which does not require the procurement of a weapon ... Giffing must have slit Ms. Williams’ throat from behind after stabilizing her, indicating premeditation.”).

Obtaining a weapon and then using it to kill has been found to provide sufficient evidence of premeditation. *See State v. Crenshaw*, 27 Wn. App. 326, 341, 617 P.2d 1041 (1980) (“After the defendant had beaten

his wife unconscious, he left the motel room to obtain a knife, and returned to kill her.”). Even if a weapon is not brought, but is procured on the premises, this is sufficient evidence for a finding of premeditation. *See State v. Ortiz*, 119 Wn.2d 294, 312-13, 831 P.2d 1060 (1992), *disapproved of on other grounds by Condon*, 182 Wn.2d at 323-25 (“Although the knife was procured on the premises, the jury could have found that the act of obtaining the knife involved deliberation.”); *see also State v. Commodore*, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984) (obtaining a gun from another room and then returning to shoot the victim indicated planning activity).

Here, the jury was permitted to infer premeditation when Griffin procured three weapons—the baseball bat, the rope, and the assault rifle—and used them to kill Howard. The jury heard evidence that Griffin did not merely break into Howard’s home but did so with an assault rifle. This was evidence Griffin was planning for the possibility of encountering Howard and using the gun against him if necessary. When Howard entered the home, Hoyt notified Griffin. Griffin then made the decision to procure a baseball bat from inside the home. With Howard facing the opposite direction, Griffin approached him from the hallway, then struck him in the back of the head with the bat. Next, after robbing Howard, while he was incapacitated on the floor, Griffin struck him several more times with the bat. With Howard mortally wounded but still alive, Griffin instructed Hoyt

to find a rope. He then bound Howard, ensuring he had no hope of survival. Finally, with Howard still alive but bound with rope on the living room floor, Griffin struck Howard for the final time – this time using the assault rifle.

Griffin decided to procure three weapons that he used to cause the death of Howard, both by mortally wounding him and by rendering him incapable of survival once wounded. As in both *Massey* and *Lindamood*, bringing the assault rifle to the house was evidence of premeditation. See 60 Wn. App. at 145; Wn. App. at 520. While the rifle was not fired, it was used to inflict the final blow upon Howard. As in *Monaghan*, even if the jury was unsure which particular blow caused Howard's death, it could have found that prior to striking him for the final time with the assault rifle, Griffin had made the decision to kill him. See 166 Wn. App. at 535-36.

Of course, the evidence was sufficient for the jury to find Griffin deliberated and made that decision much earlier. Hoyt testified that he notified Griffin that Howard had returned home. Griffin then obtained the bat that he used to inflict lethal injuries upon Howard. Consistent with *Ortiz* and *Commodore*, obtaining a weapon on the premises then using it to kill permitted the jury to infer premeditation. See 119 Wn.2d at 312-13; 38 Wn. App. at 247. Thus, procuring the bat prior to striking the initial blow alone was sufficient evidence of premeditation. Griffin was not involved in a

conflict with Howard, but rather he attacked him from behind, striking him in the back of the head with the bat. Any of the blows to the back of Howard's head were severe enough to cause his death, and the jury could have found he received at least one of these when first struck from behind.

Moreover, after inflicting blunt force trauma upon Howard that would lead to his death if left untreated, Griffin caused Howard's death by obtaining a rope and binding him. The rope rendered Howard unable to resist any further attack and unable to even make a phone call to obtain medical assistance. Hoyt testified that Howard was still alive when he was left bound in the house. Thus, binding him with the rope was akin to a person being thrown into the sea while bound. While the bound person's death is caused by drowning, it is the binding that prevents that person from swimming to safety or remaining afloat to be rescued. Having inflicted wounds that would cause Howard's death, Griffin then used the rope to bind him and eliminate any possibility of his survival.

3. Stealth evidence permitted the inference of premeditation.

Approaching the victim in stealth rather than in open confrontation is relevant to premeditation. *People v. Jablonski*, 37 Cal. 4th 774, 821, 38 Cal. Rptr. 3d 98, 126 P.3d 938 (2006). Attacking an unaware victim from "behind" is evidence of premeditation. *See State v. Rehak*, 67 Wn. App.

157, 164, 834 P.2d 651 (1992) (creeping from “behind” and shooting the victim who was not in a confrontational stance supported the jury’s finding of premeditation); *see Giffing*, 45 Wn. App. at 375 (slitting the victim’s throat from “behind” indicated premeditation); *see Ollens*, 107 Wn.2d at 853 (striking the victim from “behind” was evidence of premeditation).

Attempting to hide from the victim prior to the attack is stealth evidence from which the jury may infer premeditation. *See State v. Barajas*, 143 Wn. App. 24, 36-37, 177 P.3d 106 (2007) (citing *Pirtle*, 127 Wn.2d at 644). Stealth evidence of premeditation also exists when the victim is transported and killed in a secluded area “or other place where no help would be available.” *See Burkins*, 94 Wn. App. at 688, 691. Further, stabbing a victim despite an effort by another to shield that victim indicates a use of stealth that supports a finding of premeditation. *See State v. Aguilar*, 176 Wn. App. 264, 274, 308 P.3d 778 (2013) (“The evidence indicates his use of stealth, as Mr. Cortes stabbed his wife even though his 13-year-old daughter attempted to block the attack by standing between Mr. Cortes and his wife.”).

Here, after obtaining the bat, Griffin attacked Howard in stealth. When Howard entered the house, Hoyt notified Griffin of his return. Griffin did not rush to the front door and attack Howard as he entered the home. He did not become involved in a confrontation with Howard. Rather, armed

with a baseball bat he had found in the house, Griffin came from behind Howard and delivered a lethal blow to the back of his head. The evidence indicated Howard was aware of Hoyt burglarizing the home, but not Griffin. Griffin attacked, and killed, an unsuspecting victim who was completely unaware the attack was coming. A rational jury could infer that striking another in the back of the head with a club was evidence of intent to kill, and that doing so in stealth, rather than open confrontation, was indicative of premeditation.

As *Rehak*, *Ollens*, and *Giffing* demonstrate, Griffin's decision to attack Howard from behind with a weapon was stealth evidence sufficient for the jury to find premeditation. *See* 67 Wn. App. at 164; 107 Wn.2d at 853; 45 Wn. App. at 375. Further, Griffin waited to deliver this attack until Howard had entered the house and headed toward Hoyt in the office. Consistent with *Barajas*, the jury could have found this was evidence of Griffin hiding until the opportune time to kill Howard. *See* 143 Wn. App. at 36-37. Considering in *Aguilar* the court found the stabbing to be in stealth when it occurred while the victim's 13-year-old attempted to shield her mother, Howard's involvement in a confrontation with Hoyt also provided evidence of stealth. *See* 176 Wn. App. at 274. The jury could have found Griffin used the distraction of Hoyt to attack and kill his unsuspecting victim. Finally, although Howard was not transported to a secluded area,

as in *Burkins*, Griffin murdered him in a place where he knew no help would be available. *See* 94 Wn. App. at 688, 691. Griffin was aware Howard lived alone, and no one would be immediately aware of his mortal wounds when he left Howard bound in his home. This was easily inferred from Griffin's willingness to return the next morning, enter the house, and set it on fire.

4. The method of killing permitted the inference of premeditation.

As future Chief Justice Alexander once observed, a jury "should not be precluded from considering the method of killing if its very nature provides clues to the mental process of the perpetrator." *State v. Bingham*, 40 Wn. App. 553, 565, 699 P.2d 262 (1985) (Alexander, J., dissenting). Blood spatter evidence, indicating the victim was attacked both standing and on the ground and at two locations, showed the method of killing and was sufficient evidence to infer premeditation, even where there was no evidence of motive, procuring a weapon, or stealth. *Sherrill*, 145 Wn. App. at 485. Shooting a victim not once, but also a second time at close range supports a finding of premeditation. *Burkins*, 94 Wn. App. at 691 ("[A]s to the method of killing, *Burkins* told the police that he shot Anderson twice, once aiming at her head, from a distance of 12 to 18 inches.").

When the method of killing allows the jury to infer the defendant made the decision to kill by the time the final lethality was inflicted, this

will support a finding of premeditation. *Monaghan* 166 Wn. App. at 535-36 (despite multiple acts that could have caused death, evidence was sufficient to find the defendant decided to kill prior to twisting the victim's neck). The method of killing will support premeditation when, after an initial assault, there is a passage of time prior to the final act of lethality. *See Pirtle*, 127 Wn.2d at 645 (after the defendant had already struck the victim and rendered her unconscious on the floor, he then cut her throat). Additional lethality after the victim has already been incapacitated by the initial assault evinces a method of killing that will allow the jury to find premeditation. *Rehak*, 67 Wn. App. at 164 (finding jury could infer premeditation after the defendant's initial shot caused the victim to fall to the floor, and then the defendant shot the victim two additional times).

When the method of killing involves a "lengthy and excessive attack" this will provide evidence of premeditation. *Aguilar*, 176 Wn. App. at 274. Multiple wounds inflicted in multiple locations on the victim's body allow for a jury to infer premeditation. *See State v. Woldegerogis*, 53 Wn. App. 92, 93, 765 P.2d 920 (1988). Such evidence permits the jury to draw an inference of premeditation, as it provides "windows of the mind" through which the jury can see a defendant's subjectivity at the time of the murder. *State v. Lynch*, 215 Neb. 528, 534, 340 N.W.2d 128 (1983). Moreover, when the killing is especially brutal, the nature and circumstances of the

wounds may permit the inference of premeditation and deliberation. *State v. Fisher*, 318 N.C. 512, 518, 350 S.E.2d 334 (1986). Wounding, binding, then inflicting additional wounds upon the victim is evidence of premeditation. *See State v. Gregory*, 158 Wn.2d 759, 818, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

The decision to continue to use force against a helpless victim when there is the opportunity to withdraw is also evidence of premeditation. *See State v. Hughes*, 106 Wn.2d 176, 199-200, 721 P.2d 902 (1986) (“Sergeant Hicks was not killed immediately but after some period of time, during which the opportunity to meditate, think and withdraw from this course of action was presented.”). The infliction of blunt force trauma and the binding of the victim, combined with decision not to withdraw is sufficient for a jury to find deliberation. *State v. Bushey*, 46 Wn. App. 579, 585, 731 P.2d 553 (1987) (“These acts required ‘thinking beforehand.’ They are consistent with planning but inconsistent with impulse or spontaneity. Bushey had an opportunity to withdraw from his course of action.”).

Here, Griffin’s cruel and barbaric method of killing was highly probative of premeditation. Griffin did not merely disable Howard with one blow and flee. Rather, he struck him multiple times, in multiple locations, bound him, and struck him again over a 15-30 minute time period. He later

returned to incinerate Howard and his house by attempting to cause an explosion. Because he struck Howard from behind—clubbing him in the back of the head—the jury could have inferred Griffin decided to kill prior to his attack. Further, after Howard was incapacitated by the initial blow, Griffin robbed Howard of property before inflicting multiple other blows to him with the bat while he was on the floor. This would have permitted the jury to find that during the time he was ripping Howard’s jewelry off and going through his pockets, Griffin deliberated and decided to kill him by inflicting further blunt force trauma upon him.

The jury could have found that after inflicting mortal wounds to Howard’s head, Griffin then decided to bind him with a rope for the purpose of causing his death. Because the rope would not have been necessary were Howard already dead, it was evidence of an intent to end Howard’s life by preventing him from surviving. Further, the jury could have found that during the 15-30 minutes after the initial attack, Griffin premeditated before inflicting the final blow with the assault rifle to cause Howard’s death.

Even if the jury did not find the first blow was with premeditated intent, it was not required to disregard further evidence of deliberation from the method of killing. As in *Sherrill*, the blood spatter evidence showed Griffin struck Howard while he was standing and on the ground. *See* 145 Wn. App. at 485. The blood spatter evidence on the west wall indicated a

series of strikes with the bat in one direction. The blood spatter evidence on the south wall indicated a series of strikes in a second direction. This blood spatter was not “cast off.” Therefore, the jury could have found that after he had incapacitated Howard on the floor, and stole items from his person, Griffin beat Howard several times in one direction, then stopped and beat Howard several times in another direction. The jury also could have found the two blood saturation stains on the office floor were consistent with Howard being in two locations when he was beaten.

There were similarities to *Burkins* and *Rehak*, where premeditation evidence existed after the victims were initially shot, because those defendants shot their victims again. *See* 94 Wn. App. at 691; 67 Wn. App. at 164. After Griffin delivered the initial, incapacitating blow to Howard’s head, he robbed him of jewelry then decided to deliver two separate series of blows, mostly to Howard’s head, while he was on the floor. Because this lengthy and excessive use of force against Howard occurred after Griffin had the opportunity to deliberate while ripping off his jewelry, the jury could have inferred that during this time period, Griffin decided Howard needed to die.

As in *Gregory*, the jury could have found that inflicting wounds upon Howard, binding him, then delivering another blow to him with the assault rifle was evidence of premeditation. *See* 158 Wn.2d at 818. And,

as in *Monaghan*, the jury could have found that by the time Griffin delivered the final blow with the assault rifle, he had decided to kill Howard. *See* 166 Wn. App. at 535-36. Consistent with *Pirtle*, because this final blow occurred 15-30 minutes after the initial attack and was inflicted upon a completely helpless victim, who was already barely clinging to life, it also provided evidence of premeditation. *See* 127 Wn.2d at 645.

The jury could also have found the prolonged use of force against Howard, which involved multiple decisions by Griffin, indicated premeditation. The initial blow from behind would have been sufficient to cause Howard's death. However, after robbing Howard, Griffin inflicted two more series of blows in different directions in the office, bound him, and 15-30 minutes later, struck him again with the assault rifle. He then returned and attempted to cause an explosion at the location of Howard's body. As in *Anderson*, the jury could have found that Griffin's return to burn the house was circumstantial evidence that the killing of Howard was not merely the result of a spontaneous act, but involved premeditation. *See* 10 Wn.2d at 175-76. As in *Woldegerogis*, Griffin did not merely inflict wounds in a single location. *See* 53 Wn. App. at 93. Rather, he beat Howard all about his head and fractured his ribs. The repeated blows with a deadly weapon were evidence of premeditated intent, especially when Griffin had the opportunity to deliberate before inflicting the first blow from behind and

again while he was robbing Howard, and then again prior to switching the direction of the beatings he delivered to Howard's head on the office floor.

Unfortunately, Griffin did not stop even then. He ordered Hoyt to "get a rope" that he used to bind Howard. He dragged Howard to the living room, then 15-30 minutes later, he delivered a final blow with the assault rifle. Hence, there was an extended time period for Griffin to deliberate. The evidence was that after this time period, Griffin inflicted further blunt force trauma with the assault rifle. As explained in *Hughes* and *Bushey*, Griffin had the "opportunity to meditate, think and withdraw[,]" but he did not. *See* 106 Wn.2d at 199-200; 46 Wn. App. at 585. The jury could have found this was evidence of premeditated intent to kill.

Thus, the jury was not merely presented with sufficient evidence of premeditation, but rather overwhelming evidence of it. While sufficient evidence existed when considering even one of the four characteristics of premeditation individually, as in *Ollens*, all four characteristics were present. *See* 107 Wn.2d at 853. Taken in the light most favorable to the State, there was sufficient evidence for the jury to find Griffin had premeditated intent to kill when he caused the death of Donnie Howard.

5. Griffin fails to show the evidence was insufficient.

Griffin's arguments against premeditation leave out important facts and fail to consider evidence of the characteristics of premeditation as

applied in prior cases. Most notably, when recounting what occurred Griffin's brief skips an important part of Hoyt's testimony. In recounting Hoyt's testimony, Griffin states:

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 anymore – did – did the Defendant hit Mr. Howard after he had fallen to the ground anymore with the baseball bat?

A: Yes, several times.

Brief of Appellant at 4-5. By using ellipses to omit part of Hoyt's testimony, Griffin's brief implies that after knocking Howard to the floor, he immediately began striking him with the bat. However, when the omitted portion of the record is included, it shows Griffin stole from Howard's person prior to beating him while he was on the floor. Without this omission, the verbatim report of proceedings reads as follows:

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: Once Mr. Howard fell down, what happened next?

A: Proceeded to – Griffin proceeded to take – take the jewelry he had on, take that and the possessions in his pockets.

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

A: Yes, several times.

RP 1305. Thus, Hoyt's testimony was that after Griffin struck Howard in the back of the head with the bat, he next stole jewelry from Howard's person. He then beat him several more times on the ground.

Griffin also asserts: "When Mr. Howard unexpectedly returned to his home, Mr. Griffin immediately, impulsively, and spontaneously struck Mr. Howard several times in the head killing him." Brief of Appellant at 1. The record does not support this claim. Griffin brought an assault rifle to the home. RP 1297. He was notified by Hoyt that Howard was entering. RP 1304. Griffin obtained a baseball bat. RP 1304-05. With Howard turned away from him and headed toward Hoyt in the office, Griffin came from behind Howard and struck him in the back of the head with the bat. RP 1304-05. Next he robbed Howard. RP 1305. He then beat Howard in two directions. RP 528-29. He then bound Howard. RP 1306-07. And, 15-30 minutes later, he struck Howard again with the assault rifle. RP 1336.

Griffin notes the medical examiner testified that Howard could have died minutes after receiving the blows to his head, but fails to mention that he also testified Howard's death could have taken hours. RP 1146. Further, Griffin fails to mention that Hoyt testified Howard was still alive when they

left the house. RP 1327. The jury was permitted to consider all the evidence in determining whether Griffin premeditated when he killed Howard.

Finally, Griffin claims that under *Hummel*, evidence of what occurred after the killing cannot be considered evidence of premeditation. Brief of Appellant at 17-18. However, the fact that evidence of the defendant's subsequent acts in *Hummel* did not provide evidence of premeditation does not mean such evidence never could. For example, in *Anderson*, such evidence was inconsistent with acting spontaneously; therefore, it was evidence of premeditation. *See* 10 Wn.2d at 175-76.

Griffin's decision to return to burn the house and Howard's body was evidence the jury could have considered in determining his state of mind when he committed the acts that caused Howard's death. Griffin was so concerned that evidence of the crime would implicate him, he returned the following night to create an explosion to burn the house. Also, there was no evidence that Griffin knew how long it would take for Howard to die. The jury could have found Griffin returned to kill Howard, if he was still alive. This was relevant to discerning Griffin's intentions when, after Howard was incapacitated from the first strike, he beat him severely on the ground, bound him, and struck him again 15-30 minutes later. The jury could have found that after incapacitating Howard and robbing him of jewelry, Griffin decided to beat him further on the floor, bind him, and then

strike him again to end his life, to prevent Howard from identifying him or Hoyt. His later arson provided evidence of this.

Moreover, in *Hummel*, there was “no evidence of motive, planning, the circumstances or the method and manner of death, or the deliberate formation of the intent to kill” 196 Wn. App. at 358. Conversely, in Griffin’s case there was abundant evidence of motive, procurement of a weapon, stealth, and a method of killing consistent with premeditation. Rather than a spontaneous killing, here, Griffin—while motivated to commit burglary, robbery, and hide his identity—decided to strike Howard from behind with a bat, rob him, beat him excessively on the floor, bind him, and then strike him again, causing him to die after he left the house. Accordingly, when all reasonable inferences are drawn in favor of the State and against Griffin, there was sufficient evidence for the jury to find he premeditated when he intentionally killed Donnie Howard.

B. THE POLICE DID NOT COMMIT OUTRAGEOUS MISCONDUCT BY USING A RUSE TO OBTAIN INFORMATION FROM GRIFFIN’S ACCOMPLICE TO THE MURDER.

The use of a police ruse to obtain information from Griffin’s accomplice to the murder was not outrageous police misconduct. “Governmental misconduct must somehow impact the defendant’s own rights before it rises to the level of outrageousness that will justify dismissing a prosecution.” *State v. Rundquist*, 79 Wn. App. 786, 797, 905

P.2d 922 (1995). Griffin maintains that his convictions must be dismissed for outrageous police conduct due to the ruse that was used by detectives when interviewing Hoyt. Yet, he did not bring a motion to dismiss at trial and raises the issue for the first time on appeal. He asserts that he is permitted to do so, because he claims he suffered a due process violation. Griffin's argument fails. First, by not moving to dismiss at trial, Griffin waived the issue and cannot raise it now, because he did not suffer a manifest error affecting a constitutional right when the ruse was not even used against him. Second, there was no police misconduct; therefore, there was no due process violation.

“The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)); *See also* RAP 2.5(a). “[A]n issue, theory, or argument not presented at trial will not be considered on appeal.” *State v. Jamison*, 25 Wn. App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). This rule requires parties to bring purported errors to the trial court's attention, thus allowing the trial court to correct them. *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

In certain limited circumstances, appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration is satisfied. *See State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). The parameters of a “manifest error affecting a constitutional right” are not unlimited:

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

Id. The alleged error must first be of constitutional magnitude before it will be considered for the first time on appeal. *Id.* at 343. Not only must the claim be constitutional, but it must also be “manifest,” otherwise the word “manifest” could be removed from the rule. *Id.* “[P]ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts.” *Id.* at 344 (emphasis in original).

If police conduct was so outrageous as to violate fundamental aspects of due process, such a claim could be raised for the first time on appeal. *State v. Lively*, 130 Wn.2d 1, 18-19, 921 P.2d 1035 (1996). However, a due process violation of such magnitude would be a manifest error affecting a constitutional right. It is noteworthy that the standard of

review for a trial court's decision to dismiss under CrR 8.3(b) is abuse of discretion. See *Rundquist*, 79 Wn. App. at 793. This is appropriate considering a trial court is able to hear from witnesses who were involved and is well-positioned to discern what occurred. Cf. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991) (recognizing the advantage trial courts have in evaluating witnesses). In contrast, a reviewing court is limited to the record in determining whether this decision was "manifestly unreasonable or [was] exercised on untenable grounds, or for untenable reasons." *Rundquist*, 79 Wn. App. at 793. For these reasons, a claim of outrageous police misconduct should first be brought to the attention of the trial court. If brought for the first time on appeal, it should, like other constitutional claims, be evaluated to determine whether it entails a manifest error affecting a constitutional right.

"The doctrine of outrageous police conduct must be sparingly applied and used only in the most egregious situations." *State v. Markwart*, 182 Wn. App. 335, 349, 329 P.3d 108 (2014). "Each case must be resolved on its own unique facts bearing in mind proper law enforcement objectives – the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness." *Id.* at 349 (citing *Lively*, 130 Wn.2d at 21 (quoting *People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 28, 83 (N.Y. 1978))). "Public policy allows for

some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity.” *Lively*, 130 Wn.2d at 20. “A review of many decisions shows that ‘[t]he banner of outrageous misconduct is often raised but seldom saluted.’” *Markwart*, 182 Wn. App. at 350 (quoting *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993)) (commenting that as of 2014, a majority of the United States Supreme Court had never approved the outrageous conduct defense and finding only one Washington decision had dismissed a prosecution for outrageous conduct).

“A due process claim based on outrageous conduct requires more than a mere demonstration of flagrant police conduct.” *Lively*, 130 Wn.2d at 20 (citing *State v. Myers*, 102 Wn.2d 548, 551, 689 P.2d 38 (1984)). “Dismissal based on outrageous conduct is reserved for only the most egregious circumstances. ‘It is not to be invoked each time the government acts deceptively[.]’” *Id.* (citing *United States v. Sneed*, 34 F.3d 1570, 1577 (10th Cir. 1994) (quoting *United States v. Mosely*, 965 F.2d 906, 910 (10th Cir. 1992))). “Generally, ruses are upheld as long as the actions do not violate a defendant’s due process rights.” *State v. Athan*, 160 Wn.2d 354, 371, 158 P.3d 27 (2007). Of course, because due process rights belong to an individual, a defendant does not have standing to bring a violation of another’s due process rights on appeal. *See State v. Gutierrez*, 50 Wn. App. 583, 592, 749 P.2d 213 (1988) (recognizing Fifth Amendment rights are

“purely personal;” therefore the defendant did not have standing to raise a violation of another’s due process rights); *see* U.S. CONST. amend. V.

“The defense of government misconduct is nearly impossible to establish.” *Markwart*, 182 Wn. App. at 348. This is because “[p]ublic policy requires that crime be detected and its perpetrators punished.” *Rundquist*, 79 Wn.App. at 796 (quoting *State v. Emerson*, 10 Wn. App. 235, 240-41, 517 P.2d 245 (1973)). “Public policy is generally a matter for the legislature.” *Id.* (citations omitted). As with the defense of entrapment, the doctrine of outrageous police misconduct should not be used to provide a “‘chancellor’s foot’ veto” over law enforcement practices of which the judiciary does not approve. *Cf. id.* at 794 (citing *United States v. Hampton*, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976) (quoting *United States v. Russell*, 411 U.S. 423, 435, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973))). The Court of Appeals has explained: “Our inquiry under the outrageous conduct doctrine must focus on the issue of the defendant’s rights, not on our evaluation of police conduct.” *Id.* at 796. “Governmental misconduct must somehow impact the defendant’s own rights before it rises to the level of outrageousness that will justify dismissing a prosecution.” *Id.* at 797.

The sole Washington case to find outrageous police misconduct, *Lively*, involved unique facts. *See Markwart*, 182 Wn. App. at 350-51 (summarizing *Lively*). In *Lively*, detectives sent a confidential informant to

Alcoholic/Narcotics Anonymous meetings to “identify repeat drug addicts continuing to sell illegal drugs.” 130 Wn.2d at 6. The informant met the emotionally distraught Lively, a young mother going through a divorce, who had both recently completed treatment and attempted suicide. *Id.* Lively had no criminal history, and the informant had no information connecting her to criminal activity. *Id.* at 23. The informant asked Lively out on a date, and they began a sexual relationship. *Id.* at 7. The informant and Lively began living together, and he asked her to marry him. *Id.*

The informant told Lively he had a good friend who wanted to buy cocaine. *Id.* Every day for two weeks, he repeatedly requested she purchase cocaine. *Id.* Eventually, Lively acquiesced and was ultimately convicted of delivering cocaine. *Id.* at 7-8. At sentencing, the court found that Lively “with no apparent predisposition to do so, was induced by others . . . to participate in the crime of delivery of a controlled substance.” *Id.* at 15.

To determine whether the government’s conduct violated due process, the Supreme Court considered five factors:

- (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; and
- (5) Whether the government conduct itself amounted to criminal activity or conduct ‘repugnant to a sense of justice.’

Id. at 22. All five factors weighed in favor of a violation of Lively’s right to due process. *Id.* at 23-27.

The primary thrust of *Lively* related to whether police were promoting crime rather than seeking to prevent or apprehend those who commit crimes. Additionally, by “trolling for targets” through an alcohol and drug rehabilitation organization, the police activity ran counter to society’s goal of rehabilitation. *See id.* at 23, 27. Also foundational to the holding was that the informant preyed on Lively’s own emotional fragility and induced her to commit a crime she had no predisposition to commit. *See id.* at 16, 24-25. Nowhere did the opinion suggest the informant’s action—targeting Lively and inducing her to commit a crime—violated a third party’s due process rights.

Subsequent to *Lively*, at least 18 defendants have unsuccessfully attempted to have their convictions overturned for outrageous government misconduct. *Markwart*, 182 Wn. App. at 351. In *Marwkart*, law enforcement presented falsified and forged documents as part of a ruse to convince Markwart to violate a law prohibiting the sale of medical

marijuana to more than one patient at a time. *Id.* at 342-44, 348. Applying the *Lively* factors, the court found Markwart did not suffer a due process violation. *Id.* at 352. The court noted that despite “Markwart’s wish to follow the law and his steps taken to comply with the law...police conduct was not so outrageous as to violate Markwart’s constitutional rights.” *Id.* at 348. Consistent with the principle set forth in *Rundquist*, the *Markwart* Court properly considered the impact of the conduct on the defendant’s rights, rather than simply evaluating the police conduct. *See Rundquist*, 79 Wn. App. at 796 (explaining the court’s inquiry must focus on the defendant’s rights rather than its own evaluation of police conduct).

In *Athan*, a ruse was used to investigate the murder and rape of a 13-year-old girl, where a male DNA profile was developed 20 years later from semen left on the victim’s body. 160 Wn.2d at 362-63. Detectives created a ruse where they posed as a fictitious law firm and sent Athan, who had been a suspect, a letter inviting him to join a fictitious class action lawsuit. *Id.* Athan returned a fictitious class action authorization form in an envelope that he sealed with his saliva. *Id.* at 363. Detectives sent the envelope to the crime laboratory where a DNA profile was obtained from the saliva on the envelope. *Id.* The DNA profile from the saliva matched the male semen found on the victim, and this led to Athan’s conviction. *Id.* at 363-64. The Supreme Court noted that police are allowed to use ruses to

investigate criminal activity. *Id.* at 371. The ruse of posing as a law firm to obtain Athan's DNA did not violate due process. *Id.* *Athan* demonstrates how a ruse used to investigate a crime that has already been committed is distinguishable from a ruse used to promote the commission of a crime.

Here, because he failed to move for dismissal with the trial court, Griffin's claim of a due process violation should not be considered unless he can show that he suffered a manifest error affecting a constitutional right. However, Griffin's claim fails to even suggest a due process violation. Griffin himself was not subject to the police conduct he complains of. The police employed the ruse when interviewing Hoyt, not Griffin. Griffin has not shown that the complained of conduct somehow impacted his own due process rights. Griffin does not have standing to assert another's due process claim on his own behalf. *See Gutierrez*, 50 Wn. App. at 592. Further, the jury was permitted to hear the ruse that was employed and consider the fictional statement presented to Hoyt when evaluating his credibility as a witness.

It is therefore not surprising that, other than alleging the existence of a due process violation generally, Griffin fails to provide any specific example of how the ruse violated his due process rights. Instead, he feigns outrage over the fact that the police deceived Hoyt. Yet, police are permitted to use deception when investigating crimes. Only in egregious

circumstances, where Griffin's own due process rights were violated, would dismissal be appropriate. By failing to explain how the police conduct violated his own personal due process rights, Griffin fails to raise a constitutional issue. Thus, he cannot show a manifest error affecting a constitutional right. Phrasing his complaint in constitutional terms does not make it so.

Further, the police conduct here was appropriate and does not even remotely approach the outrageous police misconduct found in *Lively*. The detectives did not prey on Griffin's emotions to induce him to commit a crime he was not predisposed to commit. Unlike *Lively*, where but for the conduct of the informant the crime would not have occurred, here the detectives were investigating a crime that had already occurred—the unprovoked murder of a man in his own home. *See* 130 Wn.2d at 15. The detectives had a legitimate interest in investigating the horrific murder of Donnie Howard and in apprehending those involved so they could stand trial. At the time the ruse was used, the murder had long since occurred. Therefore, the detectives did not instigate a crime. No emotional pressure was placed upon Griffin or any other person to commit a crime. The police interview of Hoyt led to Hoyt's conviction for participating in the crime, not some benefit. RP 1312-13. There is also no evidence here that the detectives controlled the criminal activity of Griffin, or even Hoyt. And,

the detectives were obviously motivated by the pressing need to apprehend those responsible for the murder of Howard.

Using an effective method of obtaining evidence was warranted considering the gravity of the crime. There is a legitimate public safety interest in the incarceration of those who break into homes and commit murder. Under these circumstances, the ruse did not amount to criminal activity or conduct repugnant to a sense of justice. Detectives are expected to solve serious crimes and apprehend those dangerous criminals who commit them. Here, the skillful and appropriate work of the detectives did nothing less than further the interests of justice. As such, Griffin did not suffer a due process violation when detectives used a ruse to obtain information from another person.

V. CONCLUSION

For the above stated reasons, Griffin's convictions should be affirmed. Respectfully submitted this 19th day of August, 2020.

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 19th, 2020.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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