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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

JOEL CONDON,

Respondent.

---

APPEAL FROM THE SUPERIOR COURT OF YAKIMA COUNTY

THE HONORABLE DAVID A. ELOFSON

---

**SUPPLEMENTAL BRIEF OF PETITIONER**

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A. ISSUES PRESENTED

1. A defendant is not entitled to a jury instruction on a lesser degree offense that is unsupported by the facts. Joel Condon asserted a general denial defense to the charge of first degree premeditated murder. Where the evidence established at least felony murder in the first degree, and the only defense theory was that Condon was not involved in the killing at all, did the trial court properly decline to instruct the jury on second degree intentional murder?

2. The failure to instruct the jury on an appropriate lesser included offense is harmless when the jury is instructed on an intermediate offense and rejects it in favor of the charged offense. As an alternative to the principal charge of first degree premeditated murder, the State charged Condon with first degree felony murder predicated on first degree burglary. The trial court treated the felony murder alternative as a lesser offense of premeditated first degree murder, instructing the jury to consider it only if it found the State's evidence of premeditated murder lacking. Where the jury rejected the lesser offense of felony murder and found Condon guilty of premeditated murder, was any error in failing to instruct the jury on second degree intentional murder harmless?

3. Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact

could have found guilt beyond a reasonable doubt. To convict Condon of premeditated murder, the State had to prove that Condon caused the death of Carmelo Ramirez with premeditated intent. The evidence showed that Condon kicked down Ramirez's door and burst into his house wielding a loaded pistol and intending to rob a drug dealer. Ramirez resisted the attack and struggled with Condon's confederate, Jesus Padilla Lozano, choking him. After Lozano started "turning purple," Condon shot Ramirez two times about the torso while carefully avoiding Lozano. Condon later laughed about the shooting and said he probably should have shot Lozano as well. Was the evidence of premeditation sufficient to support Condon's conviction?

B. STATEMENT OF THE CASE

On January 20, 2009, Joel Condon and Jesus Lozano decided to rob a drug dealer of drugs and money. RP 793-96. They were dropped off several blocks away from what they believed was the dealer's home and approached on foot. RP 794. When they reached the house, Condon kicked open the door while holding a loaded pistol. RP 797. Lozano followed Condon inside. RP 797.

Condon and Lozano found no drug dealer, drugs, or money inside the house. RP 799. Instead, Enedina Gregorio was in the kitchen preparing dinner for her husband, Carmelo Ramirez. Also in the house

were the couple's three children and their nephew, Roman Ramirez. RP 720-21, 724, 738. Condon and Lozano shouted at the family in English, but Ramirez and Gregorio primarily spoke Spanish and did not understand the commands. RP 729, 740. Jesus Ramirez, Ramirez's 13-year-old son, tried to get his younger siblings to hide under his bed. RP 720, 724-25. As he was doing so, Gregorio rushed in and told them to climb through a bedroom window and run away. RP 725, 743, 754. Lozano then grabbed Gregorio, returned her to the living room, and pushed her down onto the sofa. RP 741-43. Meanwhile, Ramirez confronted the intruders. According to Lozano, Ramirez fought with him and eventually put Lozano in a choke-hold. RP 798. After Lozano was "turning purple," Condon approached within three or four feet and shot Ramirez. RP 798. Then Condon shot Ramirez again. RP 798. One bullet entered Ramirez's upper thigh and traveled through his genitals and into his other thigh. RP 776. The other bullet entered Ramirez's arm and traveled through his chest, tearing a hole through Ramirez's aorta. RP 776-77, 781. The arrival of Ramirez's dinner guest, Martin Gutierrez, interrupted the burglary. RP 643, 747.

Condon and Lozano escaped through the back door while Ramirez and Gregorio ran out through the front. RP 747, 799. Ramirez told Gregorio to call for an ambulance and asked Gutierrez to take him to the

hospital, but his wounds were fatal. RP 643-44, 748. He lost consciousness on the way to the hospital, and despite Gutierrez's efforts to get him more immediate medical attention from a nearby farm worker clinic, Ramirez died. RP 644-45, 782-83.

Officers responded to the Ramirez home and took Gregorio's statement. RP 635. She described the intruders. RP 636-37. The one with the gun was tall, about 5'10", slender, Native American or Hispanic, and had a pock-marked face. RP 637-38. The other was shorter, about 5'5", also Native American or Hispanic, and was also slender and wearing a black sweatshirt. RP 637.

Lozano had dropped his cell phone in Ramirez's house and was soon identified as a suspect. RP 680, 694, 799, 880-81. Police showed Gregorio a montage that included Lozano's photo, and she immediately identified Lozano as the shorter of the two intruders. RP 708, 742-43. When it was clear that police were looking for him, Lozano fled to Mexico. RP 803, 805. Several weeks later, however, Lozano turned himself in at the border and was extradited to Washington. RP 804-05, 925. Lozano confessed his involvement in the burglary and identified Condon, whom he knew as "Wak Wak," as the shooter. RP 805, 818-19.

Meanwhile, Condon was arrested on an unrelated warrant and was booked into jail. RP 862. During the traffic stop that ultimately led to

Condon's arrest, he identified himself to police as "Cameron Wak Wak." RP 860. Condon later participated in a court-ordered lineup. RP 936-37. While Jesus and Roman Ramirez were unable to pick anyone from the lineup, Gregorio identified Condon within 10 seconds. RP 935-38. In particular, Gregorio recognized Condon's pock-marked face. RP 760-61. She was "one hundred percent sure that it was him." RP 750, 938.

The State charged Condon with one count of first degree murder under two alternatives: aggravated premeditated murder and felony murder with a first-degree burglary predicate. CP 302-03. The State also charged Condon with one count of first degree burglary and one count of second degree unlawful possession of a firearm. CP 302-03. Lozano pleaded guilty to second degree murder and testified at Condon's trial. RP 789. Also testifying was Bruce Davis, one of Condon's fellow inmates. RP 1000. Davis related some of Condon's comments about the crime, including he had laughed about it and said that he wished he had shot Lozano "because if I did I wouldn't be here right now." RP 1005.

Condon requested a jury instruction on second degree intentional murder as a lesser included offense of first degree premeditated murder. RP 1050-51. The trial court declined to instruct the jury on second degree murder because it was not a lesser included offense of both the principal charge of premeditated murder and the alternative charge of felony

murder.<sup>1</sup> RP 1083-86. The court treated the felony murder alternative as a lesser included offense of premeditated murder, however, instructing the jury to consider the felony murder charge only if it found Condon not guilty of first degree premeditated murder or was unable to reach a verdict on that offense. CP 220.

The jury found Condon guilty of first degree premeditated murder, first degree burglary, and second degree unlawful possession of a firearm. CP 305-07. The jury also found the aggravating circumstance that Condon had committed the murder in the course of, in furtherance of, or in immediate flight from the crime of first degree burglary, and that he committed the murder and burglary while armed with a firearm. CP 308-10. The jury did not render a verdict on the alternative offense of felony murder. The trial court sentenced Condon to life without possibility of release. CP 321.

Condon appealed on numerous grounds, including that there was insufficient evidence of premeditation to support his conviction and that the court erred by failing to instruct the jury on second degree intentional murder. The Court of Appeals, Division Three, found no merit in most of Condon's claims, including that of evidentiary insufficiency, and affirmed

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<sup>1</sup> As the Court of Appeals noted, the trial court's reasoning was erroneous. State v. Condon, 174 Wn. App. 1041, 2013 WL 1628247, \*5 n.1 (2013). The State offers the correct analysis below.

Condon's convictions for burglary and unlawful possession of a firearm. State v. Condon, 174 Wn. App. 1041, 2013 WL 1628247 at \*1, \*4-\*5 (2013). The court reversed the murder conviction, however, concluding that Condon was entitled to an instruction on second degree murder and that the refusal to so instruct the jury was not harmless. Id. at \*5-\*8.

This Court granted the State's Petition for Review and granted Condon's cross-petition in part. Before this Court are three issues: the sufficiency of the evidence of premeditation, whether the trial court erred by failing to give an instruction on second degree murder and, whether any such error was harmless.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON SECOND DEGREE MURDER.

A defendant has a statutory right to present a lesser included offense to the jury when two conditions are met. RCW 10.61.006. First, each element of the lesser offense must be a necessary element of the charged offense; and second, the evidence must support an inference that the lesser crime was committed. State v. Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). To satisfy the second of these requirements, there must be a "factual showing more particularized than required for other

jury instructions. Specifically, ... the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (emphasis in original). The “evidence must affirmatively establish the defendant’s theory of the case – it is not enough that the jury might disbelieve the evidence pointing to guilt.” Id. at 456 (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)).

“A trial court’s refusal to give a requested instruction, when based on the facts of the case, is a matter of discretion and will not be disturbed on review except upon a clear showing of abuse of discretion.” State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). When the refusal is based upon questions of law, it is reviewed de novo. Id.

Second degree intentional murder meets the legal component of the Workman test because each element of that crime is a necessary element of first degree premeditated murder. State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). The second prong of the test is not met, however, because the facts do not permit an inference that only second degree murder was committed.

In State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992), the defendant was convicted of first degree premeditated murder, which was aggravated because it was committed in the course of a rape. Id. at 297. Among many other claims, Ortiz argued on appeal that the evidence of premeditation was insufficient and that the jury should have been instructed on second degree murder. Id. at 311-13. This Court held that such an instruction was not supported by the evidence. Id. at 313-14. Because the evidence established that a rape was committed by the same person who committed the murder, “at the very least, the crime that was committed was [first degree] felony murder.” Id. at 314.

Similarly, here the evidence established, and the jury found, that Condon committed first degree burglary and that Ramirez was killed in the course of that crime. CP 306, 308. A killing in the course of first degree burglary is first degree felony murder. RCW 9A.32.030(1)(c). As in Ortiz, an instruction on second degree murder was unsupported by the evidence because “at the very least, the crime committed was [first degree] felony murder.” 119 Wn.2d at 314. See also State v. Roberts, 142 Wn.2d 471, 525, 14 P.3d 713 (2000) (no jury instruction on lesser offense of second degree murder required “when the evidence clearly establishes that the murder was committed in the course of a felony that would serve as a predicate for a charge of felony murder in the first degree”); Proll v.

Morris, 85 Wn.2d 274, 276, 534 P.2d 569 (1975) (“Where the undisputed evidence in a murder case shows the crime to have been committed in the course of a felony enumerated in [the first degree felony murder statute], ... the trial court will only instruct on the highest degree of the crime.”); State v. Peyton, 29 Wn. App. 701, 714-15, 630 P.2d 1362 (1981) (when the evidence establishes a killing was committed in the course of a first degree felony murder predicate crime, “the trial court need not instruct on lesser offenses, even as to coparticipants”). Because the evidence established that the murder was either premeditated or felony murder in the first degree, the trial court properly refused to instruct the jury on murder in the second degree.

Furthermore, determining whether the factual component of the Workman test is satisfied requires consideration of the defendant’s defense theory. Because second degree murder is not a lesser offense of first degree murder unless the jury could rationally convict on the lesser offense and acquit on the greater, a defense theory that negates the inference that either offense was committed precludes an instruction on that offense. Bowerman, 115 Wn.2d at 806.

In Bowerman, the defendant was charged with aggravated first degree murder for contracting with another to kill her former boyfriend. 115 Wn.2d at 797. Bowerman asserted a diminished capacity defense and

presented expert testimony that she was incapable of forming either the intent or premeditation to kill. Id. At the close of trial, Bowerman requested jury instructions on the lesser included offense of second degree murder, which the trial court refused. Id. This Court affirmed, holding that Bowerman was not entitled to the second degree murder instruction because her diminished capacity defense, if believed, negated the inference that she had the intent to kill. Id. at 806. “If the jury believed Bowerman’s defense then it could not have found her guilty of second degree murder. Therefore, the only choices the jury would have had were to find Bowerman guilty of aggravated first degree murder, or to find her not guilty of any crime. Under those circumstances, a lesser included instruction is not warranted.” Id.; see also State v. Charles, 126 Wn.2d 353, 356, 894 P.2d 558 (1995) (where the State’s evidence indicates that the defendant is guilty as charged and the defendant’s evidence indicates that no crime was committed, no lesser offense instruction is warranted).

In this case, Condon asserted a general denial defense, attacking the accuracy of Gregorio’s identification, the motives of Lozano and Davis to testify against him, and the lack of forensic evidence tying Condon to the crime scene. According to defense counsel, “essentially it’s a case on identity.” RP 1139. Defense counsel did not argue that Condon was not guilty because he did not premeditate the murder; instead, counsel

urged the jury to conclude that Condon was not involved at all.

RP 1139-50. If the jury had been persuaded that Condon was not involved, then it could no more have found him guilty of second degree murder than first degree murder. Under Bowerman, then, Condon was not entitled to a jury instruction on the lesser included offense of second degree murder. The trial court did not err.

Without discussing Bowerman, Division Three of the Court of Appeals relied on Fernandez-Medina to conclude that the trial court erred by failing to instruct the jury on the lesser offense of second-degree murder. Condon, 2013 WL 1628247 at \*7. In Fernandez-Medina, the defendant was charged with the alternative offenses of attempted first degree murder and first degree assault for the attempted shooting of Dorothy Perkins. 141 Wn.2d at 451. Perkins testified that Fernandez-Medina pointed a gun at her head, whereupon she closed her eyes and heard “a clicking sound” from the gun. Id. In his testimony, Fernandez-Medina claimed an alibi for the time of the crime. Id. But the defense also presented expert testimony that the type of gun used made clicking noises even when the trigger is not pulled. Id. at 451-52. Based upon the expert evidence, Fernandez-Medina requested an instruction on second degree assault as an inferior degree offense to the first degree assault charge. Id. at 452. The trial court refused, and the Court of Appeals

affirmed, holding that Fernandez-Medina's alibi defense negated any inference that only the lesser included offense had been committed. Id.

In reversing the Court of Appeals, this Court emphasized that courts are not bound by the defendant's own testimony, but must consider all of the evidence presented at trial. Id. at 456. There, the expert testimony raised the inference that the "clicking sound" that Perkins heard was not caused by Fernandez-Medina pulling the trigger as he pointed the gun at her, and that inference was not controverted by the testimony of any other witness. Id. at 457. Thus, "the jury might reasonably have inferred from all of the evidence that Fernandez-Medina did not intend to do great bodily injury to Perkins, an element of first degree assault," but instead merely "put her 'in apprehension of harm,' thereby committing second degree assault rather than first degree assault." Id. This Court concluded, "Such a finding would have been consistent with the defendant's theory that he was guilty of only the inferior degree offense of second degree assault." Id. Because there was affirmative evidence supporting an inference that Fernandez-Medina was guilty of only the lesser offense, he was entitled to an instruction on that offense, notwithstanding his simultaneous pursuit of an alibi defense that would negate the inference that either offense had been committed. Id. at 457-61.

This case differs from Fernandez-Medina, because Condon did not present a theory inconsistent with premeditation. He argued that the only question in the case was identity, emphasizing the absence of any forensic evidence that linked him to the scene of the murder, problems with Gregorio's identification of him at the lineup, and credibility issues of Lozano and Davis – the only other people who testified that Condon had shot Ramirez. Because Condon's only defense was that he was the wrong man, the jury could not rationally conclude that he committed second degree intentional murder to the exclusion of first degree premeditated murder. The Court of Appeals' reliance on Fernandez-Medina was misplaced, and this Court should conclude that the trial court properly declined to give a lesser included offense instruction.

2. IF ERROR, THE FAILURE TO INSTRUCT THE JURY ON SECOND DEGREE MURDER WAS HARMLESS.

The Court of Appeals held that the failure to instruct the jury on second degree murder was not harmless in this case. In so doing, Division Three adopted but misapplied the reasoning of its fellow divisions in State v. Guillot, 106 Wn. App. 355, 22 P.3d 1266 (2001) and State v. Hansen, 46 Wn. App. 292, 730 P.2d 706 (1986). Because the jury in this case implicitly rejected all lesser murder offenses when it found Condon guilty

of aggravated premeditated murder in the first degree, any error in failing to instruct the jury on second degree intentional murder was harmless.

A trial court's failure to properly instruct the jury is presumed to be prejudicial to the defendant unless the error affirmatively appears harmless. State v. Southerland, 109 Wn.2d 389, 390-91, 745 P.2d 33 (1987). Since the right to a lesser included offense instruction derives from a statute, nonconstitutional harmless error analysis applies. Id. at 391. Under that standard, "the error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Id. (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). The failure to instruct on a lesser degree offense is harmless when the jury's verdicts demonstrate an implicit rejection of the lesser degree offense. Guilliot, 106 Wn. App. at 368-69; Hansen, 46 Wn. App. at 297-98.

In Guilliot, the defendant was charged with first degree premeditated murder. 106 Wn. App. at 358. Guilliot presented a diminished capacity defense based upon hypoglycemia. Id. at 359. His expert testified about the condition and opined that Guilliot was hypoglycemic and lacked the ability to form intent at the time of the killing. Id. The trial court instructed the jury on first and second degree murder, but refused to instruct on the lesser offense of manslaughter. Id.

On appeal, Guilliot argued that the trial court erred by refusing to instruct the jury on manslaughter. Id. at 366. Division Two of the Court of Appeals agreed, but concluded that the error was harmless because the court had instructed the jury on both first and second degree murder, and the jury rejected the lesser offense in favor of first degree murder. Id. at 367-69. The court reasoned:

If the jury believed that Guilliot was less culpable due to an accident or his hypoglycemia, logically it would have returned a verdict on the lesser offense of second degree murder. But the jury rejected this intermediate offense and elected to convict him on the highest offense. Thus, because the factual question posed by the omitted manslaughter instructions was necessarily resolved adversely to Guilliot by the jury's rejection of second degree murder, this error does not require reversal.

Id. at 369. In other words, when the jury can consider an offense with a lesser mens rea and instead convicts the defendant of the greater offense, the jury necessarily rejects all other offenses involving a lesser mens rea.

Division One of the Court of Appeals came to the same conclusion in Hansen. There, the defendant was charged with first degree kidnapping and rape while armed with a deadly weapon. 46 Wn. App. at 293.

Hansen presented evidence that his chronic cocaine use caused a mental condition that made it less likely that he acted with the requisite intent during the abduction. Id. at 294-95. The trial court instructed the jury on both first and second degree kidnapping, but refused to give Hansen's

proposed instruction on unlawful imprisonment. Id. at 296. The jury found Hansen guilty of the greater offense. Id.

Although the unlawful imprisonment instruction was both factually and legally supported by the record, Division One nevertheless concluded that the failure to give the instruction was harmless. That court distinguished State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984), in which the defendant presented evidence that his intoxication made him incapable of forming the intent to commit felony flight, but the court refused to instruct the jury on the lesser included offense of reckless driving. This Court reversed Parker's conviction, noting that absence of an instruction on the lesser offense, the jury was given no way to consider that defense short of complete acquittal. Hansen, 46 Wn. App. at 296-97 (citing Parker, 102 Wn.2d at 164, 166). In contrast, the Hansen jury was not presented with an "all or nothing" choice of convicting Hansen of first degree kidnapping or acquitting him of any offense because it had a third option: convicting Hansen of second degree kidnapping. Id. at 297.

If the jury believed that Hansen was less culpable because of his drug-induced mental disorder, logically it would have returned a conviction on the lesser crime of second degree kidnapping. Second degree kidnapping requires only an intent to abduct. To convict Hansen of first degree kidnapping, the jury had to find he intended to abduct the victim with the intent to facilitate the rape. In our view, the jury's verdict on the highest offense was an implicit

rejection of all lesser included offenses that could have been based upon Hansen's diminished capacity defense.

Id. at 298. Accordingly, the court's failure to instruct on unlawful imprisonment was harmless error. Id.

The reasoning of Hansen and Guilliot applies here and requires the same conclusion. In this case, the trial court treated the alternative charge of first degree felony murder exactly like a lesser included offense. The court instructed the jury to consider the felony murder charge only if it was not unanimously convinced beyond a reasonable doubt that Condon was guilty of first degree premeditated murder. CP 220.<sup>2</sup> Although first degree felony murder is not a lesser included offense of first degree premeditated murder,<sup>3</sup> the availability of that offense gave the jury a third option. Thus, if the jury found the evidence of premeditation lacking, it logically would have returned a conviction on felony murder rather than premeditated murder. Felony murder in the first degree only requires proof that Condon caused Ramirez's death during a first degree burglary; the only intent required was to commit the predicate crime.<sup>4</sup> RCW

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<sup>2</sup> Instruction 13 provided: "The defendant is charged with First Degree (Premeditated) Murder. If after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the alternate crime of First Degree (Felony) Murder."

<sup>3</sup> State v. Pirtle, 127 Wn.2d 628, 660, 904 P.2d 245 (1995).

<sup>4</sup> The jury's verdicts contain all of the findings necessary to support a conviction on felony murder in the first degree. The jury found Condon guilty of first degree burglary

9A.32.030(1)(c); CP 221-22. First degree burglary requires only the “intent to commit a crime against a person or property” inside a building. CP 229. To convict Condon of first degree premeditated murder, the jury had to find that he acted with premeditated intent to cause Ramirez’s death. CP 219. As in Hansen and Guilliot, “the jury’s verdict on the higher offense was an implicit rejection of all lesser included offenses[.]” Hansen, 46 Wn. App. at 298. Accordingly, the failure to instruct the jury on second degree murder did not affect the outcome of the trial.

The Court of Appeals concluded otherwise because the “instructions given with respect to [premeditated and felony murder] did not draw the jury’s attention to the difference between premeditation and intent, as an instruction on second degree murder would have.” Condon, 2013 WL 1628247 at \*7. That analysis is flawed for two reasons. First, the jury was instructed on the definitions of both premeditation and intent, so the distinction between those concepts was patent. CP 217-18. Second, the court appears to have assumed that the jury would not hold the State to its burden of proving premeditation in the absence of an instruction on intentional murder. As this Court recently pointed out, that assumption is erroneous.

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and, by special verdict, also found that the murder was committed during the burglary. CP 306, 308.

In State v. Grier, 171 Wn.2d 17, 246 P.2d 1260 (2011), the issue was whether defense counsel was constitutionally ineffective for pursuing an “all or nothing” defense to a second degree murder charge rather than having the jury instructed on the lesser included offenses of first and second degree manslaughter. Id. at 20. The Court of Appeals concluded that Grier had received ineffective assistance of counsel based in part on the concern that “[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of convictions.” State v. Grier, 150 Wn. App. 619, 643, 208 P.3d 1221 (2009) (quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)).

This Court reversed, concluding that the Court of Appeals’ assumption that the jury would convict the defendant despite insufficient evidence of the charged offense ignored the presumption that juries follow the courts’ instructions. 171 Wn.2d at 41. “Assuming, as this court must, that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of Grier’s trial.” Id. at 43-44. Because Grier could not establish any prejudice from the failure to instruct the jury on lesser included offenses, this Court rejected her ineffective assistance of counsel claim. Id. at 44.

Although the question here is not counsel's effectiveness, this Court's reasoning in Grier dictates the outcome in this case. Like Grier, Condon's jury was instructed to convict him of first degree premeditated murder only if it found all the required elements beyond a reasonable doubt. CP 219. His jury was also instructed that it should not consider the felony murder charge if it was convinced beyond a reasonable doubt that Condon was guilty of first degree premeditated murder. CP 220. "Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Since the jury returned a guilty verdict on first degree premeditated murder, this Court must presume that it found Condon guilty of that crime beyond a reasonable doubt. Accordingly, the availability of a lesser offense would not have changed the outcome and any error in omitting the instruction was harmless. See Grier, 171 Wn.2d 43-44; see also Autrey v. State, 700 N.E.2d 1140, 1142 (Ind. 1998) (availability of manslaughter would not have affected outcome where jury found defendant guilty of murder beyond a reasonable doubt); State v. Williams, 977 S.W.2d 101, 106-08 (Tenn. 1998) (error in failing to instruct on manslaughter was harmless where jury convicted defendant of first degree premeditated murder and rejected option of convicting of second degree murder and reckless homicide); State v. Barriault, 20 Wn.

App. 419, 427, 581 P.2d 1365 (1978) (defendant not prejudiced by court's failure to give second degree manslaughter instruction where court instructed on second degree murder and first degree manslaughter and the jury convicted the defendant of the greater offense).

The jury in this case implicitly rejected all lesser murder offenses when it found Condon guilty of aggravated premeditated murder in the first degree. Accordingly, any error in failing to instruct the jury on second degree intentional murder was harmless. The Court of Appeals' decision to the contrary is in error and should be reversed.

3. THERE WAS SUFFICIENT EVIDENCE OF  
PREMEDITATED INTENT.

Condon contends that there was insufficient evidence to support the jury's verdict on first degree premeditated murder. This Court should affirm the Court of Appeals' decision to the contrary because Condon's premeditation was evident from the circumstances of the crime.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. An appellate court 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 (1992).

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 (internal quotations omitted). It “must involve more than a moment in time.” RCW 9A.32.020(1). Premeditation may be proven by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury’s verdict is substantial. Pirtle, 127 Wn.2d at 643.

A wide range of proven facts will support an inference of premeditation. State v. Finch, 137 Wn.2d 792, 831-32, 975 P.2d 967 (1999). “[S]ufficient evidence to infer premeditation has been found where (1) multiple wounds were inflicted; (2) a weapon was used; (3) the victim was struck from behind; and (4) there was evidence of a motive, such as robbery or sexual assault.” State v. Gentry, 125 Wn.2d 570, 599, 888 P.2d 1105 (1995). In addition to evidence of planning and the method of killing, motive is relevant to establish premeditation. Pirtle, 127 Wn.2d at 644. For example, “[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.” State v. Miller, 164 Wn. 441, 447, 2 P.2d 738 (1931). Further, the planned presence of the murder weapon alone has been held to be adequate to allow the issue of premeditation to go to the jury. State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986); State v. Massey, 60 Wn. App. 131, 144, 803 P.2d 340 (1990).

Here, the Court of Appeals held that “the evidence that Mr. Condon brought a loaded handgun to the Ramirez/Gregorio residence, intended to commit a robbery, and wielded the handgun when he kicked in the door is sufficient evidence to support the element of premeditation” when viewed in the light most favorable to the State. Condon, 2013 WL 1628247 at \*5. In addition, the evidence showed that Condon approached within three or four feet of Ramirez, pulled the trigger not once but twice, and centered the shots closely around Ramirez’s torso while carefully avoiding Lozano.<sup>5</sup> Further, Lozano testified that Condon shot Ramirez after Lozano “was like turning purple.” RP 798. Certainly, it took more than “a moment in time” for Lozano to be placed in such a position, and the fight itself occurred only after the children fled and Lozano brought Gregorio back to the living room. From this evidence, the jury could reasonably infer that Condon had time to reflect and plan his actions. Finally, Davis’s testimony that Condon laughed about the killing and said

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<sup>5</sup> Ramirez was struck through the upper thigh and through the arm and chest. RP 776.

that “now I wish I would have shot [Lozano] because if I did I wouldn’t be here right now” supports the inference that Condon considered his actions at the time and decided to kill Ramirez but not Lozano. RP 1005.

Condon argues that several facts show a lack of premeditated intent to kill. Answer to Petition for Review at 8-9. For example, he points to Lozano’s testimony that “the plan was to get the drugs and money out of that house,” not to kill anyone. RP 795. But Lozano also testified that he did not know that Condon was armed until they entered the house, RP 810, so his understanding of Condon’s intent is not particularly probative.<sup>6</sup> Condon also points out that he has never admitted that he planned the killing, that he didn’t know the target of the planned robbery, and that he did not shoot Ramirez until Ramirez “responded aggressively” when the armed intruders burst into his home. Answer at 9. Condon argues that these facts suggest that he was simply reacting to the struggle between Ramirez and Lozano. Although that is one possible inference, the evidence must be viewed in the light most favorable to the State. Pirtle, 127 Wn.2d at 643. In that light, the circumstances of this crime clearly support the reasonable conclusion that Condon shot Ramirez twice with the premeditated intent to kill him. The Court of Appeals correctly held that the evidence was sufficient; this Court should affirm.

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<sup>6</sup> The trial court similarly concluded that the evidence indicated that Lozano “didn’t know all of the plans in the case.” RP 1085.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to reverse the Court of Appeals' decision that Condon was entitled to an instruction on second degree murder and that he was prejudiced by the trial court's refusal to instruct the jury on that offense. This Court should affirm the Court of Appeals' decision that sufficient evidence of premeditation supports his conviction for first degree murder, and affirm Condon's conviction for aggravated first degree murder.

DATED this 9<sup>th</sup> day of December, 2013.

Respectfully submitted,

JAMES HAGARTY  
Yakima County Prosecuting Attorney

By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jodi R. Backlund, the attorney for the respondent, at Backlund & Mistry, P.O. Box 6490, Olympia, WA 98507-6490, containing a copy of the SUPPLEMENTAL BRIEF OF PETITIONER, in STATE v. JOEL CAMERON CONDON, Cause No. 88854-0, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 9<sup>th</sup> day of December, 2013

U Brame

Name

Done in Seattle, Washington

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Please accept for filing the attached documents (Motion to File Overlength Brief and Supplemental Brief of Petitioner) in State of Washington v. Joel Condon, No. 88854-0.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Jennifer Joseph's direction.

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