No. 93596-3

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DEMAR MICHAEL NELSON,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 46768-2-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 10-1-05090-8
The Honorable Bryan Chushcoff, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is DEMAR MICHAEL NELSON, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 46768-2, which was filed on August 16, 2016. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. By affirming Nelson's conviction, did the Court of Appeals relieve the State of its burden to prove beyond a reasonable doubt the essential element of premeditation, where the facts showed no opportunity to reflect and deliberate and no evidence of actual reflection and deliberation?

2. Did the prosecutor improperly comment on Demar Nelson's exercise of his constitutional right to remain silent when it told the jury that it could infer Nelson did not act in self-defense, and was therefore guilty of first degree murder, because he did not immediately tell his friends or the police that he shot the victim in self-defense?

IV. STATEMENT OF THE CASE

On the night of December 27, 2008, two groups of young men met outside of a mutual friends' home because one man from each group wanted to continue a fist fight that began earlier that night at a Tacoma bar. A loud and aggressive James Guillory

challenged several bystanders to fight as well, but one of those bystanders shot and killed Guillory. Police had no suspect for several years, but eventually police concluded that the shooter was Demar Michael Nelson. Nelson was charged with murder. He admitted that he shot Guillory, but claimed that he was acting in self-defense. The jury rejected his claim and convicted Nelson of first degree murder.

A. PROCEDURAL HISTORY

The State charged Demar Nelson with one count of first degree premeditated murder (RCW 9A.32.030(1)(a)), and alleged he was armed with a firearm during the commission of the offense (RCW 9.94A.510, .533). (CP 1, 26) Nelson filed a notice informing the State that he intended to assert the defense of justifiable homicide (self-defense). (CP 25) The jury was instructed on the lesser included offense of second degree murder and on the law of self-defense. (CP 67-69, 74) But the jury convicted Nelson of first degree premeditated murder, and found that he was armed with a firearm when he committed the offense. (CP 80-82; 12RP 1249)[1]

Nelson's criminal history included an assault conviction from

[1] The transcripts labeled volumes 1 through 13 will be referred to by their volume number (#RP). Any remaining transcripts will be referred to by the date of the proceeding.

King County that was committed after, but tried and sentenced before, his current offense. (CP 86; 13RP 1260) That crime included a jury finding that Nelson was armed with a firearm, and Nelson's sentence included a firearm enhancement. (CP 86; 13RP 1260-61) Because of this prior conviction, the length of Nelson's firearm sentence enhancement in this case was doubled to 120 months. (CP 86; 13RP 1260-61) The trial court imposed a standard range sentence of 361 months, for a total term of confinement of 481 months. (CP 89; 13RP 1289) The trial court ordered that Nelson's sentence in the current case be served consecutive to the sentence imposed in the King County case. (CP 89; 13RP 1289) The court also imposed $3,300 in legal financial obligations (CP 87; 13RP 1289)

Nelson timely appealed. (CP 98) Division 2 affirmed Nelson's conviction, rejecting his arguments that the State failed to prove the element of premeditation and that prosecutor improperly comment on his exercise of his constitutional right to remain silent. The Court agreed that the trial court erred by failing to inquire into Nelson's ability to pay before it imposed discretionary legal financial obligations (LFOs), and the Court subsequently granted Nelson's motion to reconsider and amended its opinion to deny the State's

request to impose appeal costs.

B. SUBSTANTIVE FACTS

Demar Nelson, Grady Brown and Calvin Davis spent the evening of December 26-27, 2008, together at O'Toole's bar in Lakewood. (4RP 128; 5RP 240, 245-46; 8RP 861) James Guillory, Ryan Blosser, Robert Poeltl, and Jamar Robinson also spent the evening together at O'Toole's. (6RP 322-23; 7RP 577, 647) After the bar closed, Guillory got into an altercation with someone in the parking lot. (6RP 326; 7RP 579, 712) Guillory was punched and fell to the ground. (7RP 579, 649, 712) Joseph Coleman was standing nearby and made a comment about Guillory. (7RP 580) In retaliation, Blosser turned and hit Coleman. (6RP 327; 7RP 580, 712) Because there were several police officers in the area, however, the fight between Blosser and Coleman quickly ended and the two groups of men went their separate ways. (6RP 328, 330, 438-39; 7RP 580)

Both Blosser and Coleman were still upset about the incident and wanted to continue the fight. (6RP 329; 7RP 581, 714) Their mutual friend, Jermillo Larkins, arranged for the men to meet at his house so they could have a "fair fight." (6RP 330-31, 378; 7RP 581-82, 715-16)

Coleman asked Nelson, Davis, and Brown to accompany him to Larkins' house to protect Coleman from being attacked by Blosser's friends. (8RP 867) Coleman drove his white Cadillac and Brown drove the other men in his BMW. (5RP 263)

Guillory, Blosser, Poeltl and Robinson arrived at Larkins' house first and waited on the porch. (6RP 336-37; 7RP 584-85) Coleman, Nelson, Davis, and Brown arrived soon after, and parked in front of Larkins' house. (5RP 266; 6RP 337; 7RP 586) Blosser and Coleman met in the middle of the street, and started circling each other and throwing punches while the other men watched. (5RP 267, 270; 6RP 341-42; 7RP 587, 589-90, 651-52, 722)

Although the specific details of what occurred next vary from witness to witness, the essential facts are consistent. Guillory, who was still extremely upset about being punched in O'Toole's parking lot, was yelling loudly and demanding a "knockout." (5RP 272, 294-95; 6RP 333-34, 387; 9RP 970, 1069; 10 RP 1129) At one point, as he stood on Larkins' porch, Guillory broke a 40-ounce beer bottle and waived it around like a weapon. (6RP 346-47, 383; 7RP 759; 10RP 1127) Guillory came down to the sidewalk and was pacing back and forth, yelling and watching the other men fight. (6RP 386-87; 10RP 1128-29, 1130) Guillory then turned to Nelson,

Brown and Davis and challenged them to a fight. (6RP 344-45, 348, 384, 384, 388; 7RP 679, 690-91; 10RP 1130)

Nelson, Davis and Brown told Guillory to calm down, but Guillory instead tore off his shirt and walked towards them in an aggressive manner as they stood near the BMW. (5RP 269, 274, 275; 6RP 349-50, 387, 389; 7RP 723-24; 8RP 739, 740, 761; 8RP 873, 874, 876, 877-78; 9RP 1003-04; 10RP 1130) Nelson told Guillory to back away, but when he did not, Nelson pulled his semi-automatic handgun out of its hip holster and fired 18 rounds in quick succession.[2] (5RP 315; 6RP 351, 420; 7RP 599, 595-96, 632; 8RP 742, 792, 870; 9RP 1004; 10RP 1115, 1132, 1133)

Guillory was hit numerous times in his chest, back and upper extremities. (8RP 821) Guillory slumped to the ground and died a short time later. (4RP 143; 6RP 357, 426; 7RP 602-03; 8RP 838) Guillory, who stood six feet one inch tall and weighed 235 pounds, was found to have a blood alcohol level of 0.21 at the time of his death. (8RP 842, 843)

Law enforcement found fired bullets and 18 bullet casings

[2] The witness' testimony differed on whether Guillory was still moving towards Nelson when he was shot, and whether Nelson was backing away or walking towards Guillory as he fired. (6RP 349-50, 351; 7RP 599, 632, 633; RP8 751, 892, 1004)

scattered along the front fence-line of Larkins' yard, and a broken bottle on Larkins' porch. (6RP 455, 456, 457, 461, 471; 7RP 548, 549; 8RP 792) The casings were located in the same general area, about 17 feet from the pool of blood where Guillory lay. (6RP 474-75, 497, 498-99)

Nelson testified on his own behalf. He testified that Guillory had broken a bottle and was yelling and acting angry and aggressive. (10RP 1126, 1127) Nelson tried to tell Guillory to "chill" and told Guillory that he was just there to watch the other men fight. (10RP 1130) But Guillory would not calm down, and instead got angrier and angrier, until he ripped off his shirt and moved quickly towards Nelson. (10RP 1130, 1131-32) Nelson told Guillory to back up, but Guillory kept coming. (10RP 1132, 1132) Guillory seemed bigger and stronger than Nelson, and Nelson was afraid that Guillory would seriously injure or even kill him. (10RP 1128, 1132, 1143, 1144) Nelson removed his gun and fired a warning shot, hoping that would stop Guillory's advance. (10RP 1133) When that attempt failed, Nelson fired his weapon repeatedly until the clip was emptied. (10RP 1133) Nelson testified that everything happened quickly, and it was dark so he could not tell if Guillory had a weapon. (RP 10RP 1147, 1163-64)

Nelson, Davis and Brown immediately left. (5RP 277; 8RP 871) In the car, Nelson asked if everyone was all right, and told them that he had asked Guillory to back away. (5RP 285; 8RP 871; 10 RP 1142) Nelson did not call 911 or report the incident because he was scared, and did not know if his life would be in danger if Guillory's friends knew he was responsible. (10RP 1143, 1159)

V. ARGUMENT & AUTHORITIES

The issues raised by Nelson's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT NELSON ACTED WITH THE PREMEDITATED INTENT TO KILL GUILLORY.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only 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." Salinas, 119 Wn.2d at 201.

The jury convicted Nelson of first degree murder pursuant to RCW 9A.32.030(1)(a), which requires that the State prove "a premeditated intent to cause the death of another." Accordingly, the State is required to prove both intent and premeditation, which are not synonymous. State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

While intent means only "'acting with the objective or purpose to accomplish a result which constitutes a crime'", premeditation involves "'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'" State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) and State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)); Brooks, 97 Wn.2d at 876. Premeditation requires a "conscious consideration and planning that precedes an act [or] the pondering of an action before carrying it out." PREMEDITATION,

Black's Law Dictionary (10th ed. 2014).

Thus, premeditation must involve "more than a moment in point of time," and mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); Pirtle, 127 Wn.2d at 644. It is therefore possible for a person to act with an intent to kill that is not premeditated. Brooks, 97 Wn.2d at 876. For this reason, premeditation cannot simply be inferred from the intent to kill. State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984).

In Ortiz, the Court found sufficient evidence of premeditation from the defendant's infliction of multiple wounds, procurement of a weapon from another room, and his prolonged struggle with the victim. 119 Wn.2d at 312-13. But in this case, there was no moment where Nelson left to procure a weapon, and no prolonged struggle.

In State v. Rehak, premeditation was proved where there was evidence showing that the killer "prepared the gun; crept up behind the victim who was sitting quietly in his chair and not in a confrontational stance; and shot three separate times, twice after the victim had already fallen to the floor." 67 Wn. App. 157, 164, 834 P.2d 651 (1992). In this case, the evidence shows that Guillory

was "in a confrontational stance" and that Nelson fired only when Guillory approached him demanding to fight, and that Nelson fired his gun without stopping to "prepare" or reload the weapon.

Conversely, in State v. Bingham, an autopsy of the victim indicated that the "cause of death was 'asphyxiation through manual strangulation', accomplished by applying continuous pressure to the windpipe for approximately 3 to 5 minutes." 105 Wn.2d 820, 822, 719 P.2d 109 (1986). The State relied on the length of time required to cause death to support the charge of premeditated murder. 105 Wn.2d at 822. However, on appeal the Court found that "no evidence was presented of deliberation or reflection before or during the strangulation, only the strangulation. The opportunity to deliberate is not sufficient." 105 Wn.2d at 827.

The State argued in this case that it proved premeditation "based on the number of shots, based on the location of the shots, based on the defendant's demeanor both before and after this killing." (11RP 1193) However,

> "[V]iolence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy."

State v. Ollens, 107 Wn.2d 848, 852, 733 P.2d 984 (1987) (quoting Austin v. United States, 382 F.2d 129, 139 (D.C.Cir.1967)). In this case, the number of shots fired (all in quick succession) and the fact that some of those shots hit Guillory in the back is much more consistent with an intent to kill in the "frenzy" of the moment, than with conscious consideration and planning. Furthermore, Nelson's demeanor *after* the shooting does not shed any light on whether he premeditated *before* the shooting.

As for his demeanor before the shooting, this also does not show premeditation. Nelson stood by watching the other men fight. (5RP 269; 7RP 652-53; 8RP 876; 10RP 1124, 1125) He was not yelling or challenging anyone to fight. (6RP 355) Nelson did not seek out Guillory, instead Guillory picked a fight with Nelson. (5RP 273, 294-95; 6RP 344-45, 348, 384, 388; 7RP 679, 690, 723 724; 8RP 739-40, 873, 876; 10RP 1128-29, 1130) Then, when Guillory was advancing aggressively towards Nelson, Nelson reacted in the heat of the moment by firing his weapon. (6RP 349-50, 389; 8RP 724-25, 726; 8RP 740, 892; 9RP 1004; 10RP 1131-32, 1133, 1163) There was absolutely no evidence presented of Nelson deliberating, reflecting, or planning before or during the assault on Guillory.

The State must present some evidence that Nelson actually reflected and deliberated and formed a reasoned plan to take Guillory's life. Contrary to the Court of Appeals' opinion, the State failed to offer this evidence. (Opinion at 4-7) The facts presented cannot sustain a finding that Nelson formed a premeditated intent to kill Guillory, and Nelson's first degree murder conviction must be reversed.[3]

B. THE PROSECUTOR IMPROPERLY ENCOURAGED THE JURY TO INFER GUILT FROM NELSON'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

Both the Federal and Washington State constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to remain silent. U.S. Const., amend. V; Wash. Const., art. I, § 9. The State may not comment on a defendant's right to remain silent, including a defendant's prearrest silence. State v. Gregory, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006); State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to

[3] The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wn.2d at 707.

However, when defendants take the stand, their prearrest silence may be used to impeach their testimony, but their silence may not be used as substantive evidence of guilt. *See* State v. Clark, 143 Wn.2d 731, 756, 24 P.3d 1006 (2001); Lewis, 130 Wn.2d at 705-06; State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); Jenkins v. Anderson, 447 U.S. 231, 237-38, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). When the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, § 9 of the Washington Constitution are violated. Lewis, 130 Wn.2d at 706-07.

For example, in State v. Knapp, the defendant was convicted of residential burglary. 148 Wn. App. 414, 199 P.3d 505 (2009). At trial, the prosecutor elicited a detective's testimony about two separate witnesses positively identifying Knapp and Knapp's subsequent reactions: In the first occurrence, Knapp had immediately hung his head and said nothing; in the second, Knapp had displayed no reaction. 148 Wn. App. at 419. Knapp later testified, denying that he had committed the burglary and asserting an alibi. 148 Wn. App. at 418. During closing, the prosecutor

argued that the jury should find Knapp guilty because he did not protest his innocence when confronted by the identifying witnesses:

> And another reason to believe that this defendant, Kyle Knapp, did the burglary, both times that it was mentioned to him that Darren Blakeslee identified him and then Officer Harris identified him, what did he do? He put his head down. *Did he say, "No. It wasn't me"?* [sic] *No.*

148 Wn. App. at 420 (emphasis and alterations in original). This Court held that the prosecutor did not properly impeach Knapp's testimony but instead, impermissibly commented on Knapp's silence. 148 Wn. App. at 421.

In State v. Burke, the 22-year old defendant had intercourse with a 15 year old girl. 163 Wn.2d 204, 206, 207, 181 P.3d 1 (2008). The police subsequently charged Burke with rape of a child in the third degree. 163 Wn.2d at 208. Burke asserted that he reasonably believed the alleged victim to be 16 years old based upon her declarations. 163 Wn.2d at 208. The State sought to undermine this defense based upon the idea that if she had told him she was 16, then he would have made such a comment to police at the first interview or when the victim's sister had called him the next day. 163 Wn.2d at 208-09.

The State made these arguments in its opening and closing

arguments to the jury and stressed Burke's silence in both direct examination of the investigating officers and in cross examination of Burke himself. Burke, 163 Wn.2d at 208-09. For example, the prosecutor told the jury:

> And for a time the defendant talked to them [police], freely telling them, yeah, I don't remember what her name was, but it was [Jaime's] sister, and yes, we had sex. . . . [The police] were there to gather the defendant's side of the story. That is all he chose to give them and they left.

163 Wn.2d at 208 (alterations in original). The Court found that by doing so, the State "thus advanced the link between guilt and the termination of the interview. The implication is that suspects who invoke their right to silence do so because they know they have done something wrong." 163 Wn.2d at 222. The Court concluded that the State thereby violated Burke's right to silence.

Here, the State also violated Nelson's right to silence by using the fact that Nelson did not immediately report to his friends or to law enforcement that he acted in self-defense. During cross examination, the prosecutor questioned Nelson:

> Q. You did absolutely nothing in regard to calling the police, telling these guys in the car that you shot in self-defense, none of that?
> A. Correct.
> Q. This is when you are saying that.
> A. Correct.

(10RP 1159)[4] Then in closing arguments, the prosecutor repeatedly told the jury that Nelson's failure to immediately claim self-defense to his friends and law enforcement showed his guilt:

- The **defendant is guilty of Murder in the First Degree** based on the number of shots, based on the location of the shots, **based on the defendant's demeanor both before and after this killing**. (11RP 1193) (emphasis added)
- **Look at what he did afterward**. Rationalize this case, use your common sense in deciding this case, and you will discover of course that **he raised self-defense because that's all he could do**. (11RP 1190) (emphasis added)
- Any person -- I don't care who you are, any person -- **if you act in self-defense**, whether you are scared or not, you are worried, **you are talking**, you are especially talking to the two guys in the car. None of them. **It is cold-blooded murder**. (11RP 1190-91) (emphasis added)

The prosecutor did more than simply use Nelson's silence as impeachment. The prosecutor clearly and unequivocally told the jury that a person who truly acted in self-defense will immediately confess that fact, and that only the guilty remain silent as to such a claim. The prosecutor urged the jury to use Nelson's silence as substantive evidence of his guilt. The prosecutor therefore

[4] Before Nelson took the stand, he asked that the State be precluded from questioning him regarding his prearrest silence, but the court rejected the request and ruled that the State could question Nelson about his failure to immediately claim self-defense. (10RP 1078-80, 1107-09)

improperly commented on Nelson's constitutional right to remain silent.

The Court of Appeals agreed that the "cold-blooded murder" statement was likely improper, but not prejudicial. (Opinion at 11-13) A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State bears the burden of showing the error was harmless. Easter, 130 Wn.2d at 242.

In Burke, the Court found that the error was not harmless because "the trial boiled down to whether the jury believed or disbelieved Burke's story that the victim told him she was 16. Repeated references to Burke's silence had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury's consideration." 163 Wn.2d at 222-23. Similarly, in Knapp, this Court found that the prosecutor's comments were prejudicial and reversible error, because "[t]he case turned on the credibility of

Knapp and his alibi witness versus the two witnesses who identified him." 148 Wn. App. at 421, 425.

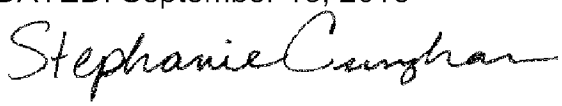
Here, the outcome of this case similarly turned on the credibility of Nelson and the witnesses who testified that Guillory was aggressive and advancing towards Nelson, that the events unfolded quickly, and that all shots were fired in quick succession; versus the other witnesses who testified to the contrary. There is no way for this Court to say that the outcome would not have been different, and that the jury still would have found Nelson guilty of premeditated murder, if the State had not repeatedly told the jury that Nelson's silence proves his guilt. Nelson's conviction must therefore be reversed.

VI. CONCLUSION

The State failed to meet its burden of presenting evidence establishing beyond a reasonable doubt that Nelson reflected and deliberated before shooting Guillory, and therefore failed to prove the essential element of premeditation. Furthermore, the prosecutor improperly encouraged the jury to consider Nelson's decision to remain silent as proof of his guilt. This improper comment on Nelson's exercise of his constitutional right also requires that his conviction be reversed.

Accordingly, Nelson respectfully requests that this Court grant review, reverse the Court of Appeals, and vacate Nelson's conviction.

DATED: September 13, 2016



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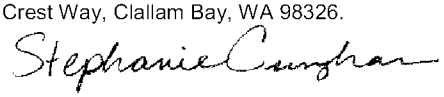
CERTIFICATE OF MAILING

I certify that on 09/13/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Demar M. Nelson, DOC# 358568, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



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Filed
Washington State
Court of Appeals
Division Two

August 16, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEMAR MICHAEL NELSON, Appellant.	No. 46768-2-II UNPUBLISHED OPINION

MAXA, J. – Demar Nelson appeals his conviction and sentence for first degree murder of James Guillory. We hold that (1) the State presented sufficient evidence of premeditation, (2) the prosecutor did not make impermissible comments on Nelson's post-incident silence during cross-examination and closing argument, and (3) the trial court erred by failing to inquire into Nelson's ability to pay before it imposed discretionary legal financial obligations (LFOs). Accordingly, we affirm Nelson's conviction of first degree murder but remand for reconsideration of discretionary LFOs.

FACTS

On the night of December 26, 2008, Nelson went to a bar in Lakewood with Grady Brown and Calvin Davis. Nelson encountered his friend Joseph Coleman at the bar. Guillory went to the same bar that night with Ryan Blosser, Robert Poeltl, and Jamar Robinson.

After both groups left the bar, Blosser and Coleman ended up in a fistfight in the parking lot. Police broke up the fight, but the men agreed to finish the fight at a mutual friend's house.

Coleman asked Nelson, Brown and Davis to come to the fight to make sure that Blosser's friends would not attack him. They agreed and arrived at the house shortly after Coleman. Blosser, Guillory, Poeltl and Robinson were already there on the front porch. Blosser and Coleman resumed their fight in the street, and Nelson, Brown and Davis stood outside of Brown's car.

Guillory left the porch and approached Nelson. Guillory was drunk and made comments to Nelson that implied he wanted to fight. Nelson told Guillory to calm down and that he did not want to fight. Guillory was pacing and took his shirt off. He then moved quickly toward Nelson. Nelson told Guillory to back up and drew a pistol.

According to Nelson, Guillory continued to move toward him. When Guillory was about four feet away, Nelson fired a couple of shots that intentionally missed him. Guillory continued to move forward and Nelson then aimed at him and fired repeatedly until his gun had emptied the remaining rounds in his ammunition clip. Nelson claimed that Guillory was still standing when Nelson got into Brown's car and left the scene.

Poeltl provided a different version of the shooting. He stated that Guillory took a step or two toward Nelson and then Poeltl heard shots. There was a pause and then Nelson approached Guillory and shot him several times. The pause was long enough for Nelson to get closer to Guillory. Poeltl testified that Guillory turned around and was trying to run as he was getting shot. Finally, Poeltl stated that after Guillory had been shot, Nelson stood over him and shot him a few more times as Guillory was wiggling on the ground.

Nelson left with Brown and Davis. In the car, Nelson asked Brown and Davis if they were okay. He also said that he told Guillory to back up a couple of times. Nelson did not say

anything else to Brown and Davis about the shooting. He did not say that he shot Guillory in self-defense. Nelson also did not call the police.

Police recovered 18 bullet casings from the area around Guillory's body. An autopsy indicated that 15 of the bullets that Nelson fired struck Guillory, with at least five of the shots causing fatal wounds to the chest area. At least four shots entered through Guillory's back.

Almost two years later, the State charged Nelson with first degree murder. The trial started in September 2014, close to six years after the shooting. At trial, Nelson stipulated to killing Guillory. Nelson argued that he acted in self-defense, and he testified at trial.

The trial court ruled that the State could impeach Nelson with his failure to characterize the shooting as self-defense immediately after the shooting. During cross-examination, the prosecutor asked Nelson two questions about the fact that he did not call the police or tell the others in the car that he acted in self-defense. The prosecutor also elicited from Brown and Davis that Nelson did not say anything in the car about acting in self-defense.

During closing argument, the prosecutor made two references to Nelson's conduct after the shooting and a reference to the fact that Nelson had not told the people in the car that he shot Guillory in self-defense. Nelson did not object to these comments.

The jury found Nelson guilty of first degree murder and also returned a special verdict supporting a firearm sentencing enhancement. The trial court sentenced Nelson to 481 months. The trial court also imposed $3,300 in LFOs, including $2,500 in discretionary LFOs for court-appointed attorney fees and costs. The trial court did not inquire into Nelson's ability to pay LFOs.

Nelson appeals his conviction and sentence.

ANALYSIS

A. SUFFICIENCY OF PREMEDITATION EVIDENCE

Nelson argues that the State presented insufficient evidence of premeditation, which is an element of first degree murder. We disagree.

1. Standard of Review

When evaluating the sufficiency of evidence for a conviction, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). We assume the truth of the State's evidence and all reasonable inferences drawn from that evidence when evaluating whether sufficient evidence exists. *Id.* at 106. We also defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

2. Legal Principles

To convict a defendant of first degree murder, the State must prove that the defendant acted with "premeditated intent to cause the death of another person." RCW 9A.32.030(1)(a). 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." *State v. Hoffman*, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). The State may prove premeditation through circumstantial evidence if the inferences drawn from the evidence are reasonable and the evidence is substantial. *Id.* at 83.

But proof of premeditation requires more than the fact that the defendant had an opportunity to deliberate. *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986).

"Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection." *Id.* at 826. And RCW 9A.32.020(1) states that "the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time."

Washington courts have recognized that a number of factors may provide evidence of premeditation, including:

(1) The infliction of multiple wounds or multiple shots. *State v. Gregory*, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006) ("[t]his court has found that sufficient evidence supported the jury's finding of premeditation in cases where multiple wounds were inflicted with a knife or other weapon"), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 768-69, 336 P.3d 1134 (2014); *State v. Cross*, 156 Wn.2d 580, 627, 132 P.3d 80 (2006) ("Multiple blows are strong evidence of premeditation."); *Hoffman*, 116 Wn.2d at 84 (noting that the firing of "a considerable number of shots" supported a finding of premeditation); *State v. Ra*, 144 Wn. App. 688, 703, 175 P.3d 609 (2008) ("Examples of circumstances supporting a finding of premeditation include . . . multiple wounds inflicted or multiple shots.").

(2) A time interval or pause between shots. *Ra*, 144 Wn. App. at 704 (finding that a pause between shots supported an inference that the defendant had time to deliberate on and weigh his decision to kill the victim); *State v. Sargent*, 40 Wn. App. 340, 353, 698 P.2d 598 (1985) (finding that evidence that the victim received two blows to the head with some interval between them provided sufficient evidence of premeditation).

(3) Continued firing after missing with the first shots. *Ra* 144 Wn. App. at 704 (finding that continued firing after missing twice supports a finding of premeditation).

(4) Attacking the victim from behind. *State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006) ("Sufficient evidence of premeditation may also be found . . . where the victim was struck from behind."); *Hoffman*, 116 Wn.2d at 84 ("An attack on a victim from behind may indicate premeditation."); *State v. Ollens*, 107 Wn.2d 848, 853, 733 P.2d 984 (1987) (noting that the defendant striking the victim from behind was a "further indication of premeditation").

3. Premeditation Analysis

The factors listed above support a finding of sufficient premeditation evidence. First, the evidence showed that Nelson shot Guillory 15 times. This evidence supports an inference that Nelson's repetitive firing was premeditated.

Second, there was evidence that Nelson fired his shots in two phases. Nelson testified that he first fired a couple of shots not aimed at Guillory. He then paused before firing the remaining shots, which emptied the ammunition clip. Poeltl testified that Nelson paused long enough to move closer to Guillory before firing additional shots. The pause in Nelson's shots after he missed Guillory shows that he had an opportunity to deliberate. And his moving toward Guillory supports an inference that he decided to kill Guillory after that deliberation.

Third, the evidence shows that Nelson continued firing after intentionally missing with the first few shots. During the second phase of shooting Nelson was aiming at Guillory directly. Continuing to fire and the change in aim supports an inference that Nelson made a conscious decision to kill Guillory. Also, Poeltl testified that after Guillory had been shot and was lying on the ground, Nelson stood over him and shot him again. Standing over a person who had been shot multiple times and shooting him again supports a finding of premeditation.

Fourth, Poeltl testified that Guillory had turned around and was trying to run away when Nelson shot him. And the evidence indicated that at least four of Nelson's shots entered through Guillory's back. This evidence allowed the jury to find that Nelson deliberated and decided to continue to fire lethal shots at Guillory even as Guillory retreated.

Taken together and viewing the evidence in the light most favorable to the State, these factors constitute sufficient evidence of premeditation. Accordingly, we hold that the State presented sufficient evidence to support the first degree murder conviction.

B. PROSECUTORIAL MISCONDUCT – COMMENT ON PREARREST SILENCE

Nelson argues that the prosecutor committed misconduct by making comments regarding Nelson's failure to say after the shooting that he acted in self-defense, which improperly encouraged the jury to infer guilt from silence. We disagree.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

2. Comment on Silence

The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." Both provisions guarantee a defendant the right to be free from self-

incrimination, including the right to silence. *State v. Pinson*, 183 Wn. App. 411, 417, 333 P.3d 528 (2014). This right precludes the State from using the defendant's silence to its advantage either as substantive evidence of guilt or to invite an inference that the defendant's silence is an admission of guilt. *State v. Burke,* 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

However, the State is allowed to present evidence of the defendant's silence if (1) the defendant testifies at trial, (2) the evidence is limited to the defendant's silence before arrest and before issuance of *Miranda*[1] warnings, and (3) the evidence is limited to impeachment of the defendant's trial testimony and not used to show guilt. *Id.* at 217-18. The fact that the defendant testifies does not automatically transform a comment on prearrest silence into impeachment. *Id.* at 215-16. Impeachment is evidence offered solely to show that the witness is not being truthful. *Id.* at 219.

When a prosecutor makes a statement about the defendant's silence, we must consider whether the prosecutor manifestly intended the remark to be a comment on the right to silence or whether the remark was a "mere reference" to silence. *Id.* at 216. A comment on silence violates the defendant's constitutional right to silence and occurs when the State "invites the jury to infer guilt from the invocation of the right of silence." *Id.* at 217. But a prosecutor's mere reference to the defendant's silence is not necessarily a constitutional violation. A statement is a mere reference if it is so subtle and brief that it does not naturally and necessarily emphasize the defendant's silence. *Id.* at 216. A mere reference to silence is not reversible error absent a showing of prejudice. *Id.*

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

3. Cross-Examination Questions

Nelson argues that the prosecutor violated his right to silence by asking him about his failure to tell his friends or report to police that he acted in self-defense. We disagree because this questioning involved proper impeachment evidence.

At trial, the State had the burden of disproving Nelson's self-defense claim. Nelson testified that all he said to his friends after the shooting was "I was telling the guy to back up a couple of times" and that he did not call the police after leaving the scene. Report of Proceedings (RP) at 1142. During cross-examination the prosecutor questioned Nelson:

> Q. You did absolutely nothing in regard to calling the police, telling these guys in the car that you shot in self-defense, none of that?
>
> A. Correct.
>
> Q. This is when you are saying that.
>
> A. Correct.

RP at 1159.

This questioning involves classic impeachment. Nelson testified at trial – almost six years after the shooting – that he shot Guillory in self-defense. But he did not tell anybody at the time that he acted in self-defense. The State elicited this testimony to support an argument that Nelson had recently fabricated this defense and that his trial testimony was false. The State was implying that Nelson's claim of self-defense was less credible because he had not mentioned it to anyone until after he was charged with Guillory's murder. "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." *Jenkins v. Anderson,* 447 U.S. 231, 239, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

We hold that the prosecutor's questions during cross-examination regarding Nelson's prearrest silence were proper because they were used for impeachment and not to imply guilt.

4. Statements About Nelson's Conduct

Nelson argues that two statements the prosecutor made during closing argument about his conduct after the shooting impermissibly commented on silence.

> *Look at what he did afterward*. Rationalize this case, use your common sense in deciding this case, and you will discover of course that he raised self-defense because that's all he could do.

RP at 1190 (emphasis added).

> The defendant is guilty of Murder in the First Degree based on the number of shots, based on the location of the shots, *based on the defendant's demeanor* both before and *after this killing*. The State is asking you to find the defendant guilty.

RP at 1193 (emphasis added).

Nelson argues that discussing in the first statement what Nelson did after the shooting and in the second statement his demeanor after the shooting are comments on his silence. However, the statements do not expressly mention Nelson's silence and do not seem to even indirectly refer to silence. The statements could encompass a number of actions other than Nelson failing to tell his friends that he shot in self-defense or failing to call the police. Even if these statements did relate to Nelson's silence, they were so indirect, subtle and brief that they would be considered "mere references" to silence. *Burke,* 163 Wn.2d at 216. Therefore, we hold that the prosecutor did not engage in misconduct by making brief references to Nelson's actions and demeanor after the shooting.

5. Argument About Nelson's Silence

The prosecutor began his closing argument discussion of Nelson's self-defense claim by talking about the credibility of Nelson's self-defense claim: "Anyone can claim self-defense after the fact. . . . Just because a defendant raises a claim of self-defense doesn't mean it is valid. . . . You are the ones who decide, one, is that true? It is not. It's just not. It can't be." RP at 1189-90. A moment later, the prosecutor made a statement that expressly referenced Nelson's silence:

> Any person – I don't care who you are, any person – if you act in self-defense, whether you are scared or not, you are worried, you are talking, you are especially talking to the two guys in the car. None of them. It is cold-blooded murder.

RP at 1190-91.

As stated above, the State can use a defendant's silence to argue that his or her testimony is not truthful, but not to argue that the defendant is guilty. *Burke,* 163 Wn.2d at 217. Considered in context, the first two sentences of the quoted statement can reasonably be interpreted as referring to Nelson's credibility. These sentences reflect an argument that because Nelson failed to mention self-defense in the car, his trial testimony that he acted in self-defense should be disregarded as untrue. Therefore, those statements standing alone are not improper.

However, the phrase "It is cold-blooded murder" might not refer to credibility. By adding that phrase, the prosecutor potentially transformed the focus of his argument from the credibility of Nelson's self-defense claim to Nelson's guilt of first degree murder. On the other hand, the prosecutor did not specifically argue that Nelson's silence was evidence of his guilt. Therefore, we must determine whether discussion of Nelson's failure to mention self-defense coupled with the "cold-blooded murder" phrase was a comment on Nelson's silence that violated

Nelson's constitutional right to silence or a mere reference to silence that constitutes reversible error only if Nelson can show prejudice. *Id.* at 216.

The question in distinguishing between a comment and a mere reference is whether the prosecutor " 'manifestly intended' " his remarks to be a comment on the right to silence. *Id.* (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Here, the prosecutor began his short argument regarding self-defense by telling the jury that it had to decide Nelson's credibility – whether his claim of self-defense was true. He concluded by arguing that a person acting in self-defense would have said something about self-defense immediately after the shooting, which as discussed above could be interpreted as a credibility argument.

In this context, the prosecutor's comment about cold-blooded murder – which was somewhat disconnected from the previous argument – is ambiguous. The prosecutor may have been attempting to subtly argue that Nelson's silence was evidence of his guilt. But the prosecutor also may have been attempting to argue, rather inartfully, that because Nelson's self-defense claim was not credible the jury should find him guilty of murder. Because of this ambiguity, we cannot find on this record that the prosecutor "manifestly intended" to comment on Nelson's right to silence. Therefore, we hold that the prosecutor's statement was a mere reference and not a comment on Nelson's silence.

Because the prosecutor's statement was a mere reference to silence, it does not constitute reversible error unless Nelson can show prejudice. *Burke,* 163 Wn.2d at 216. Nelson argues that this statement necessarily was not harmless because his credibility was at issue and the prosecutor told the jury that his silence was evidence of guilt. However, as stated above, the prosecutor's statement was ambiguous and the prosecutor never expressly invited the jury to

infer guilt from Nelson's silence. Further, Nelson's silence was relevant to the credibility of his self-defense claim, and the prosecutor properly argued that Nelson's silence affected his credibility. Finally, the jury heard testimony from Nelson himself as well as Brown and Davis that Nelson did not say anything about self-defense immediately after the shooting. The prosecutor's ambiguous reference to that fact would not likely have affected the jury.

We hold that the prosecutor's statement about cold-blooded murder after mentioning Nelson's silence was a mere reference to silence and did not prejudice Nelson. Therefore, we hold that the prosecutor's statement did not constitute misconduct.

C. IMPOSITION OF LFOS

Nelson argues for the first time on appeal that the trial court erred by imposing discretionary LFOs without making an inquiry into his ability to pay. We exercise our discretion to consider this issue and agree.

1. Failure to Object at Trial

We generally do not consider issues raised for the first time on appeal. However, the Supreme Court repeatedly has exercised its discretion under RAP 2.5(a) to consider unpreserved arguments that the trial court erred in imposing discretionary LFOs without considering the defendant's ability to pay. *E.g.*, *State v. Duncan*, 185 Wn.2d 430,437, 374 P.3d 83 (2016); *State v. Marks*, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016); *State v. Leonard*, 184 Wn.2d 505, 506-08, 358 P.3d 1167 (2015); *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

Here, nothing in the record indicates a possible strategic reason for Nelson's failure to object. And there does not appear to be any compelling reason to decline to consider Nelson's LFO argument. Therefore, we exercise our discretion and consider the issue.

2. Failure to Inquire Into Ability to Pay

Before imposing discretionary LFOs, the trial court must make an individualized inquiry into the defendant's present and future ability to pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 838. The record indicates that the trial court failed to make any inquiry into Nelson's ability to pay LFOs. Further, the length of Nelson's sentence indicates a likelihood that he will not have a future ability to pay. Accordingly, we remand the issue to the trial court in order to allow for an individualized inquiry into Nelson's ability to pay before imposing discretionary LFOs.

CONCLUSION

We affirm Nelson's conviction of first degree murder, but remand for reconsideration of discretionary LFOs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, J.

BJORGEN, C.J.

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