SUPREME COURT NO. 95774-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD BLAIR,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 49481-7-II
Pierce County No. 15-1-00472-9

PETITION FOR REVIEW

CATHERINE E. GLINSKI
Attorney for Petitioner

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. IDENTITY OF PETITIONER

Petitioner, RICHARD BLAIR, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Blair seeks review of the March 27, 2018, unpublished decision of Division Two of the Court of Appeals affirming his convictions and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. After taking Blair into custody, but before providing Miranda warnings, the law enforcement officer asked Blair a question reasonably likely to elicit an incriminating response. Must Blair's response be suppressed, even though the officer had a non-investigatory purpose for the question?

2. Blair was convicted of first degree murder, requiring the State to prove he acted with premeditated intent to kill. Where the State presented evidence that he had the opportunity to deliberate, but there was no evidence of actual deliberation, is the evidence insufficient to prove the essential element of premeditation?

3. Do the issues raised in Blair's statement of additional grounds for review require reversal?

D. STATEMENT OF THE CASE

In January 2015, Jimmy Payne was living in a small room in a detached garage behind the house where Robert Berg, Daniel Berg, and Tanya Holland lived. 4RP[1] 169, 171-72. Payne had just gotten out of prison and needed a place to stay. Richard Blair stayed with Payne on occasion rather than in his tent at a transient camp. 4RP 184, 201-02. The detached garage had no running water, so Blair and Payne had access to the main house to use the kitchen and bathroom. 4RP 173.

On the morning of January 31, 2015, Blair woke Robert Berg up after using the shower. 4RP 177. He told Robert he needed help cleaning something up out back. 4RP 179. Robert went to the garage with Blair. 4RP 179. In the room off the garage Robert saw the furniture stacked against the wall, and Blair said Payne was under the furniture. 4RP 180. Blair said he had killed Payne. 4RP 181.

Robert returned to the house. A neighbor, Kathy Perozzo, was in the kitchen, and Robert told her to leave, saying there was a dead body in the back yard. 4RP 182. Robert then woke up his brother Daniel and Daniel's girlfriend Tanya Holland. 4RP 182. Blair told Daniel he had killed Payne and asked Daniel if he had a machete or chainsaw. 4RP 209.

[1] The Verbatim Report of Proceedings is contained in ten volumes, designated as follows: 1RP—7/5/16; 2RP—7/18/16 and 7/19/16 (voir dire); 3RP—7/18/16 and 7/19/16; 4RP—7/20/16; 5RP—7/21/16; 6RP—7/25/16; 7RP—7/26/16 (am); 8RP—7/26/16 (pm); 9RP—7/27/16; 10RP—8/1/16, 8-2-16, and 8-4-16.

Before she left, Perozzo heard Blair say he and Payne got into a fight, and he killed Payne. Blair told them not to call police because he did not want to go back to prison. 5RP 305. Blair also said he wanted to burn the body and bury it. Robert wanted Blair to think he was going along with this plan so he could get Blair out of the house. He told Blair that Daniel would go get burial supplies while he walked Blair back to his tent at the camp. 4RP 183. Daniel, Tanya, and Jason Jenkins went to buy donuts, and when they returned, Daniel called police. 4RP 211-12, 236-37.

Pierce County Sheriff's Deputy Jeff Reigle was the first officer on the scene, arriving after the medic unit. The people who lived at the house showed him to the detached garage and living space. 4RP 120. He saw Payne in the room and noticed a hammer and screwdriver on the ground next to Payne. 4RP 123, 125. There were blood spatter and smears on the wall and a tooth fragment on the floor. 4RP 125. Reigle noticed injuries to Payne's back, head, and wrists. 4RP 125-26. Reigle notified detectives and started a major incident log. 4RP 128.

Detective Tim Kobel was assigned as lead detective. 7RP 684. He sent Reigle and another deputy to the transient camp to detain Blair. 4RP 131. They approached Blair's tent and ordered him to come out. When he did not respond Reigle opened the flap of the tent, saw Blair, and ordered him outside. Blair complied, and Reigle placed him in handcuffs. 4RP

136-37. Reigle commented that Blair appeared to be limping, and Blair responded that he had been sleeping all day. 4RP 138.

Blair was taken to the precinct where he was interviewed by Detectives Anderson and Kobel. He gave a recorded statement after being advised of his rights. 7RP 694-95. In his statement Blair said he had not seen Payne since November 2009. Exhibit 273A, at 1. He said he had been at his camp all night, only leaving in the morning for a little while to get food and cigarettes. *Id*. at 3-4. Blair denied being at the house where Payne was killed, saying he did not know anyone there. *Id*. at 8. He said he didn't hear about Payne being found dead, and he thought Payne was in prison. *Id*. at 9.

Blair had the hood of his sweatshirt pulled forward, and when he removed the hood at Kobel's request, the detectives saw some abrasions and cuts on his head. 5RP 353-54. Kobel asked Blair how he got the injuries to his head, and Blair said he had wrecked his bicycle, and he had been in a fight at McDonald's. Exhibit 273A at 9-10. Kobel told Blair his injuries looked like he had been hit with a hammer. He told Blair that he thought Blair and Payne got into an altercation and a fight occurred, and Blair walked away as the survivor. *Id*. at 20. Kobel told Blair that people had already put him at the scene, and the best thing he could do was tell the truth about it. *Id*. at 21.

Blair then agreed to tell the truth. He told Kobel that he and Payne were living in the room. He was sleeping when Payne hit him in the head with a hammer. *Id*. at 21. Blair said he acted in self-defense when Payne tried to kill him by hitting him in the head with a hammer as hard as he could. *Id*. at 22. When he woke up Payne was swinging the hammer again, so Blair wrestled him. *Id*. at 23. Blair pinned him down, and when he let Payne go Payne charged him again with some type of glass. *Id*. at 24. Blair said Payne also hit him with a heater and tried to choke him. *Id*. at 26. When Payne tried to cut him with some type of glass, Blair twisted his arm and stuck it in his neck. *Id*. at 27.

Blair showed Kobel hammer marks on his legs. *Id*. at 29-31. He said when he got the hammer away from Payne, he hit Payne with it a couple of times. *Id*. at 33. When Kobel asked how Payne got cut, Blair said there was glass everywhere, and they were wrestling around. *Id*. at 33. Blair said he had Payne in a choke hold and was trying to talk to him, but Payne stopped breathing and Blair knew he was dead. *Id*. at 34. Blair thought the fight lasted 30 to 45 minutes. *Id*. at 34. When Kobel asked Blair why he didn't call the police, he explained that he had gone to jail in the past for defending himself. *Id*. at 35.

After he gave his statement, Blair reported that it hurt to breathe, and he was taken to the hospital, where he was treated for a fractured rib

and broken toe. 5RP 358, 375. Blair told the deputy who transported him that he was a lot bloodier earlier, but he had taken a shower. He said he felt lucky to be alive and was glad Payne had not cut his throat. He said he did not expect what happened, and he went into self-defense mode. He admitted that he should have called the police and told them the truth about what happened. 5RP 340.

On initial examination the Associate Medical Examiner who conducted the autopsy noted that there were blood stains on Payne's clothing, a tooth had been knocked out recently, and there were injuries to his feet, legs, torso, hands, arms and head. 8RP 745-56. A toxicology screen showed methamphetamine in an amount at the low end of the range that could cause death by overdose. 8RP 758. The medical examiner believed, however, that Payne died as a result of blood loss from his injuries rather than an overdose of methamphetamine. 8RP 809-10; 9RP 821. He felt that the most significant blood loss was from blunt force injuries to Payne's head, which included scrapes, bruises, and lacerations to the nose, cheeks, mouth, and skull. 8RP 763-70, 774, 776-78, 810. There was a fracture to the outer layer of Payne's skull consistent with being struck by a hammer, and the skin over that fracture would have bled profusely. 8RP 777-78. There were other shallow, sharp force injuries which the medical examiner believed occurred around the time of death

and therefore would not have bled as profusely. 8RP 780. These include cuts to the neck and arms. 8RP 782, 794, 799, 803.

A deputy state medical examiner from Oregon testified as a consulting expert for the defense. 9RP 843. He reviewed the autopsy report, photos from the scene and the autopsy, charging documents, and Blair's medical records. 9RP 846. The expert agreed that the cause of death looked like exsanguination, but he did not agree that the wounds to Payne's face and head were the major source of blood loss. 9RP 903, 906. He concluded that Payne's wrist and neck injuries occurred at a time when the heart was pumping blood into the surrounding tissue. 9RP 847. He felt the wounds to the wrists were the only possible source of the castoff blood patterns found at the scene, and that the blunt force injuries to the head and face would not have bled enough to account for the amount of blood at the scene. 9RP 856, 862, 906. He also concluded that the laceration on Blair's head was consistent with being struck by a hammer, as were two contused abrasions on Blair's back. 9RP 884, 888-89.

A forensic scientist who is a blood spatter expert also testified for the defense. 9RP 921, 932. The expert concluded that the damage to the sheetrock was caused by slamming the portable heater into the wall. 9RP 930. He noted that Blair did not have any bleeding injuries to his hands or arms, but Payne had bleeding injuries to both wrists. 9RP 940. He did not

agree with the sheriff's department investigator who concluded the blood patterns on the wall showed arterial spurting. Instead, the patterns indicated blood was cast off an object that was connected to a blood source. 9RP 944-45. Another area on the wall showed a broad deposit of blood with enough volume that the blood began to run down the wall, and then some object was wiped across the blood trail while it was still wet. A castoff pattern higher on the wall was also smeared. 9RP 948-50.

The State argued that Blair acted with premeditated intent when he killed Payne and that the killing was not justifiable. 10RP 1051-52. Blair argued that he acted in self-defense, reasonably believing Payne would kill him when he attacked him in his sleep with a hammer. 10RP 1081-82. He argued that the State had produced no evidence that he was not attacked first, and thus it had failed to disprove self-defense. 10RP 1085-86.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS'S CONCLUSION THAT THE OFFICER'S INTENT IN ASKING A QUESTION CONTROLS WHETHER THE QUESTION CONSTITUTED INTERROGATION CONFLICTS WITH PRIOR DECISIONS AND PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Prior to trial the court held a hearing to determine whether Blair's statements to law enforcement were admissible. Deputy Jeff Reigle

testified that he was sent from the scene where Payne was killed to the camp to detain Blair for murder. He ordered Blair out of his tent, handcuffed him, and walked him to a patrol car. RP 94-95. He did not give Blair *Miranda* warnings. 4RP 107. Reigle noticed that Blair was walking with a limp, so he asked Blair if he was injured. 4RP 95. Blair responded that he had been sleeping all day and he just woke up. 4RP 97. Reigle testified that he asked Blair about the limp to determine whether he needed to call for medical aid. RP 98. If he suspected Blair was injured, procedure would call for him to have Blair checked out by medical personnel. 4RP 99.

Defense counsel argued that since Reigle had been at the scene before he took Blair into custody, he knew there had been a fight and thus knew the question about Blair's limp had the potential to elicit an incriminating response, even if he was also asking for medical reasons. 4RP 110-11. The question therefore amounted to interrogation, and Blair's response should be suppressed. 4RP 112. The trial court found that the statement was not the product of custodial interrogation, because the deputy asked about the limp to determine if Blair needed medical care. It ruled that Blair's response was admissible. 4RP 113.

The Court of Appeals agreed with the trial court, holding that

> Deputy Reigle asked Blair if he was injured to determine whether Blair needed medical care before being transported to the police station. Accordingly, it cannot be said that Deputy Reigle should have known that his question was reasonably likely to elicit an incrimination response. As a result, Deputy Reigle's question was not interrogation. Therefore the trial court's findings support its conclusion that Blair's statement to Deputy Reigle was admissible at trial.

Opinion, at 6-7. The Court of Appeals's conclusion conflicts with prior Washington cases and presents a significant constitutional question which this Court should review. RAP 13.4(b).

An individual has the right to remain free from compelled self-incrimination while in police custody. U.S. Const. amends. V & XIV; *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). In *Miranda*, the Supreme Court recognized that custodial interrogation, by its very nature, "isolates and pressures the individual," "blurs the line between voluntary and involuntary statements," and thereby heightens the risk that an individual will be deprived of his privilege against compulsory self-incrimination. *Dickerson v. United States*, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000). Thus, before a suspect in custody may be interrogated by a state agent, he must be advised of his right to remain silent and his right to an attorney. *Miranda*, 384 U.S. at 479.

There is no question Blair was in custody when Reigle asked why he was limping. He had been told he was under arrest, he was placed in handcuffs, and he was being led to a patrol car to be transported to the precinct. Thus the *Miranda* safeguards apply to any interrogation by Reigle. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) ("*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

In *Innis*, the United States Supreme Court defined "interrogation" for Fifth Amendment purposes:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U.S. at 301. And, significantly, the focus of this definition is on the perceptions of the suspect, rather than the intent of the police. *Id*.; *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988). The standard focuses on what the officer knows or should have known would be the result of his words or acts. The subjective intention of the officer is not at issue. *Sargent*, 111 Wn.2d at 651. Thus, a practice which the police should know is reasonably likely to evoke an incriminating response from the suspect amounts to interrogation. *Innis*, 446 U.S. at 301. Even routine

questioning can constitute interrogation when, under the specific circumstances of the case, the officer should have known the questions were likely to elicit an incriminating response. *State v. Denney*, 152 Wn. App. 665, 670, 218 P.3d 633 (2009), *abrogated as to standard of review by In re Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014).

For example, in *Denney*, the defendant was arrested for theft and unlawful possession of a controlled substance after being found with morphine tablets at a pharmacy. When she was being booked, jail personnel administered a standard medical questionnaire, in the presence of the arresting officer, to determine if she could be booked into the jail or needed to be transferred to a medical facility. In response to a question about drug use, Denney admitted she had taken morphine that day. In a bail survey, she was asked about drug use in the past 72 hours, and she admitted to using morphine. *Denney*, 152 Wn. App. at 667-68. On appeal, the Court of Appeals held that, since Denney had been arrested for morphine possession, jail staff should have known that the otherwise routine medical questions were reasonably likely to produce an incriminating response. *Id*. at 673. The questions thus amounted to custodial interrogation. *Id*. at 673-74.

Contrary to this authority, the Court of Appeals and trial court focused on Reigle's subjective intention in asking Blair about his limp,

concluding that since Reigle was trying to determine whether Blair needed medical attention, the question did not constitute interrogation. But a legitimate question, asked with good intentions, will still violate a defendant's *Miranda* rights if reasonably likely to elicit an incriminating response. *Denney*, 153 Wn. App. at 670. Here, Reigle had been to the scene where Payne was killed. He knew there had been a considerable struggle in the small room and that anyone involved in Payne's death was likely injured. Reigle knew that Blair had been identified as the suspect in Payne's death. Any response Blair could give would likely be incriminating. Because an objective officer could reasonably foresee Blair would give an incriminating statement in response to the otherwise routine question, the question constituted interrogation. *See Sargent*, 111 Wn.2d at 650; *see also United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986) (officer's questions about defendant's place of residence were interrogation where officer had preexisting knowledge of illegal behavior at defendant's apartment). The Court of Appeals's holding to the contrary conflicts with the decisions in *Sargent* and *Denney* and involves a significant question of constitutional law. This Court should grant review. RAP 13.4(b)(1), (2), (3).

2. THE COURT OF APPEALS'S CONCLUSION THAT THE STATE PRODUCED SUFFICIENT EVIDENCE OF PREMEDITATION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION.

The burden of proving the essential elements of a crime unequivocally rests on the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. Therefore, as a matter of state and federal constitutional law, a reviewing court must 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 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

A conviction of first degree murder requires proof that the defendant acted "with premeditated intent to cause the death of another person." RCW 9A.32.030(1)(a). Thus, to convict Blair of first degree murder, "the State [was] required to prove both intent and premeditation, which are not synonymous." *State v. Sargent*, 40 Wn. App. 340, 352, 698

P.2d 598 (1985) (citing *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982)). Premeditation distinguishes first degree murder from second degree murder. *Brooks*, 97 Wn.2d at 876; *State v. Hummel*, 196 Wn. App. 329, 383 P.3d 592 (2016).

Premeditation means "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. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995)); RCW 9A.32.020(1). It requires deliberation lasting "more than a moment in point of time." *Id*. at 644. A mere opportunity to deliberate is not sufficient to support a finding of premeditation. *Pirtle*, 127 Wn.2d at 644.

The State can prove premeditation by circumstantial evidence "where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." *Pirtle*, 127 Wn.2d at 643. In *Pirtle*, the court identified four factors that are "particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing." *Pirtle*, 127 Wn.2d at 644. None of these factors establishes a reasonable inference of premeditation in this case.

First, there was no evidence of any motive for the killing other than Blair's claim of self-defense. The neighbors who testified about their interactions with Blair and Payne during the time preceding the incident identified no animosity between the pair. No one heard or saw anything which would provide an explanation for what happened. 4RP 174-75, 202-04, 215, 231-32, 247-49; 5RP 278, 280, 297-98. Nor was there any evidence that Blair procured a weapon before the struggle. The State presented no evidence that Blair brought a hammer to the location. In fact, the only evidence regarding where the hammer came from was Blair's statement that he wrestled it away from Payne after Payne attacked him with it. There were cuts which were possibly made from glass which appeared to have been broken in the struggle, but this evidence did not give rise to an inference that Blair procured a weapon after forming a plan to kill Payne. There was also no showing of stealth. This was a struggle between two large men in a small room, in which furniture was thrown around and items were broken. Finally, the method of killing does not support an inference of premeditation. This was a fight, and there is no dispute that both men were engaged in the fight. 10RP 1068, 1081, 1103. Blair suffered a fractured rib, and broken toe, cuts and bruises to his arms and legs, and blunt injuries to his head and torso. Blair said in his statement that Payne started the fight by attacking him in his sleep, and the

State could not present evidence to establish that that did not happen. The evidence did not give rise to a reasonable inference of premediated intent to kill.

In closing argument, the State focused on the amount of time over which Payne's injuries occurred, arguing that the passage of time demonstrated premeditation:

> [Y]ou look at the amount of time it took to inflict these injuries, the different types of injuries, the different instruments used, the level of force, the resulting injuries. All of this is time.
>
> You look at what happened afterwards, where he left him, how he covered him up. This is all time. This is more time than we often get with premeditation. There's a significant amount of premeditation. One might look at this and say, well, it was just a fight; it was a fight; how could he have premeditated this murder. Because it took that much time.
>
> If you have a single gunshot that happens really quickly, you don't have much time. If you have a protracted beating here to the point of so much blood loss, so many weapons, you have premeditation.

10RP 1051. And then in rebuttal,

> I'm not going to repeat everything I said originally about premeditation. Just understand what that means. It doesn't mean planned out. It doesn't mean you draw up a plan. This is a plan that evolved, but given the injuries inflicted, given the manner in which he beat Jimmy to death, that the intent is demonstrated by that amount of time. It's the defendant who said it was 40, 45, minutes. This is an event over a period of time where the defendant's intent was shown.

10RP 1104. And finally, "Premeditation is defined by law. It's here over the amount of time that it took to cause his death." 10RP 1110.

There is a significant flaw in the State's argument, however. Premeditation is not established merely by proof that the act causing death occurred over an appreciable period of time. To allow a finding of premeditation on such proof "obliterates the distinction between first and second degree murder." *State v. Bingham*, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). "Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation." *Id*.

In *Bingham*, the defendant met the victim on a bus, and later that day they hitchhiked on a rural highway. *Bingham*, 105 Wn.2d at 821. The victim was found dead, and evidence showed the defendant held his hand over her mouth, strangling her before raping her. *Id*. Although this Court found there was time for deliberation, it found no evidence from which the jury might have inferred actual deliberation. *Id*. at 827. The Court held that the mere passage of time for the killing to occur showed only an opportunity to deliberate and by itself was insufficient to sustain the premeditation element absent evidence that the defendant did in fact deliberate. *Id*. at 822, 826.

Here, as in *Bingham*, while the passage of time might have provided Blair the opportunity to deliberate, there was no evidence of actual deliberation. Instead, the evidence shows that Blair was reacting to

the situation. An unplanned or impulsive killing may be intentional but without premediated deliberation. *See Bingham*, 105 Wn.2d at 826. Where the State is unable to offer evidence of planning or show that the killing occurred in circumstances from which deliberation could be logically inferred, the State has not met its burden of proving premeditation. The Court of Appeals conclusion to the contrary conflicts with this Court's decisions in *Pirtle* and *Bingham* and presents a significant constitutional question this Court should address. RAP 13.4(b)(1), (3).

3. THIS COURT SHOULD REVIEW ISSUES RAISED IN THE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW AND PERSONAL RESTRAINT PETITION

Blair raised several arguments in his statement of additional grounds for review, which the Court of Appeals rejected. Those arguments are incorporated herein by reference.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Blair's convictions and sentence.

DATED this 26th day of April, 2018.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

_____
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in

State v. Richard Blair, Court of Appeals Cause No. 49481-7-II, as follows:

Richard Blair/DOC#947837
Washington Corrections Center
PO Box 900
Shelton, WA 98584

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

Catherine E. Glinski
Done in Manchester, WA
April 26, 2018

Filed
Washington State
Court of Appeals
Division Two

March 27, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD WAYNE BLAIR, Appellant.	No. 49481-7-II UNPUBLISHED OPINION

WORSWICK, J. — Richard Wayne Blair appeals his conviction for first degree murder of James Payne. Blair argues that the trial court erred by denying his CrR 3.5 motion to suppress the inculpatory statement he made to police and that insufficient evidence supports his first degree murder conviction. In his statement of additional grounds for review (SAG), Blair contends that the prosecutor engaged in purposeful jury discrimination and that the trial court erred by allowing the prosecutor to change his peremptory challenges list. Finding no error or misconduct, we affirm Blair's conviction.

FACTS

In January 2015, Payne rented a room in a detached garage on Robert and Daniel Berg's property. Blair occasionally shared the room with Payne. The morning of January 31, Blair entered the main home on the Bergs' property and awoke Robert.[1] Blair then told Robert that he had killed Payne. Robert took Blair to a nearby transient camp while Daniel called the police.

[1] We refer to the Bergs by their first names to avoid confusion and intend no disrespect.

When the police arrived at the Bergs' property, they discovered Payne's body in the rented room. There was a hammer and screwdriver next to Payne and blood spatter on the wall. Police identified a number of injuries on Payne, including multiple injuries to his head and back and severe lacerations on one of his wrists.

Soon after, police arrived at the transient camp and located Blair. Deputy Jeff Reigle placed Blair under arrest and walked Blair toward his patrol vehicle. While Deputy Reigle walked Blair to his patrol vehicle, he noticed that Blair was limping. Deputy Reigle asked if Blair was injured, and Blair answered in the negative, stating that he had been sleeping all day. Blair had not been read his *Miranda*[2] warnings at this point.

Later, the police provided Blair with his *Miranda* warnings and interviewed him. During the interview, Blair stated that while he was sleeping, Payne hit him in the head with a hammer. Blair awoke and a struggle ensued. Blair stated that he stabbed Payne in the neck, cut Payne several times, and hit Payne with a hammer. Blair stated that he held Payne in a choke hold and said, "[B]ro man, don't make me f****** kill you dog." Ex. 273A at 34. Blair also stated that the fight lasted for approximately 45 minutes before he strangled Payne to death.

The State subsequently charged Blair with one count of first degree murder.[3] Before trial, the trial court held a CrR 3.5 hearing to determine the admissibility of Blair's statement to Deputy Reigle. The trial court, in its oral ruling, determined that Blair's statement was

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

[3] RCW 9A.32.030(1)(a).

admissible, reasoning that Deputy Reigle's question regarding whether Blair was injured was not a custodial interrogation because the purpose of Deputy Reigle's question was to determine whether Blair required medical attention.

At trial, witnesses testified that Payne received injuries to his head, neck, and arms. One of the witnesses who testified was Dr. John Lacy, an associate medical examiner. Dr. Lacy concluded that multiple blunt and sharp force injuries, strangulation, and the loss of blood caused Payne's death. Dr. Lacy testified that Payne had a skull fracture as well as a number of bruises on his face, the back of his head, and his back that were caused by a blunt object consistent with a hammer. A number of lacerations on Payne's face and neck were caused by a sharp object. Some of the lacerations were so deep that they exposed bone, and Dr. Lacy discovered glass in a number of the injuries. Additionally, there were a number of deep lacerations on Payne's arms that were caused by a sharp object.

Dr. Lacy determined that Payne likely received the injuries to his head and neck and that these injuries substantially contributed to his death. Dr. Lacy also testified that Payne did not exhibit defensive wounds and that he would have been unable to defend himself after receiving the blows to his head. Dr. Lacy noted that the injuries to Payne's arms occurred after the injuries to his head.

The jury found Blair guilty as charged. Blair appeals. While this appeal was pending, the trial court submitted its written findings and conclusions for the CrR 3.5 hearing that were consistent with its oral ruling.

ANALYSIS

I. PRE-*MIRANDA* STATEMENT

Blair argues that the trial court erred by denying his CrR 3.5 motion to suppress the inculpatory statement he made to Deputy Reigle. We disagree.

A. *Late Entry of Findings and Conclusions*

As an initial matter, Blair states that the trial court failed to enter findings of fact and conclusions of law regarding Blair's pre-*Miranda* statement to police. Blair does not assign error on these grounds and instead contends that the facts were undisputed and that the record of the CrR 3.5 hearing is sufficient for this court's review. The State notes that the trial court entered its findings and conclusions after Blair filed his opening brief. Because there is no prejudice to Blair, we review the trial court's late entry of findings and conclusions in determining the admissibility of Blair's statement to Deputy Reigle.

CrR 3.5(c) requires the trial court to enter written findings of fact and conclusions of law after a CrR 3.5 hearing. *State v. France*, 121 Wn. App. 394, 401, 88 P.3d 1003 (2004). Late findings and conclusions may be submitted and entered while an appeal is pending "if the defendant is not prejudiced by the belated entry of findings." *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). We do not infer prejudice from delay alone. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998).

Here, the trial court entered its findings and conclusions after Blair filed his opening brief. The trial court's findings and conclusions are consistent with its oral ruling following the CrR 3.5 hearing. *See Cannon*, 130 Wn.2d at 329-30 (finding no prejudice when late-filed

findings and conclusions were consistent with the trial court's oral ruling). In addition, Blair has not alleged or demonstrated that the written findings and conclusions are inadequate to permit appellate review or that the delayed entry is in any way prejudicial. As a result, we find no error in the trial court's late entry of findings and conclusions, and we review those findings and conclusions to determine the admissibility of Blair's statement to Deputy Reigle.

B. *Custodial Interrogation*

Blair argues that the trial court erred by denying his CrR 3.5 motion to suppress the inculpatory statement he made to Deputy Reigle because his statement was elicited during a pre-*Miranda* custodial interrogation. We disagree.

We review a trial court's ruling after a CrR 3.5 suppression hearing to determine whether substantial evidence supports the trial court's findings of fact and whether those findings, in turn, support the trial court's conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). We review the trial court's conclusions of law de novo. 180 Wn.2d at 867.

"*Miranda* warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). When these conditions are present but *Miranda* warnings are not given, we presume that the suspect's self-incriminating statements are involuntary and cannot be admitted at trial. *State v. Rhoden*, 189 Wn. App. 193, 199, 356 P.3d 242 (2015). Here, it is clear that Blair was in custody and that he made his statement to an agent of the State. Thus, the matter to be resolved is whether Blair was subject to an "interrogation."

Not all statements made while in custody are products of an interrogation. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 685, 327 P.3d 660 (2014). To determine whether an officer's question was interrogation, we apply an objective test to determine whether the officer should have known that the question was reasonably likely to elicit an incriminating response. *State v. Shuffelen*, 150 Wn. App. 244, 257, 208 P.3d 1167 (2009).

Here, as Deputy Reigle walked Blair to his patrol vehicle, he noticed that Blair was walking with a limp. Deputy Reigle asked Blair if he was injured, and Blair stated that he recently woke up and that he had been sleeping all day. The trial court concluded that no custodial interrogation occurred because the purpose behind Deputy Reigle's question was to determine whether Blair needed medical attention. As a result, the trial court concluded that Blair's statement that he had been sleeping all day was admissible.

Blair argues that Deputy Reigle's question amounts to an interrogation because Deputy Reigle should have known that his question was reasonably likely to elicit an incriminating response, given that Blair was likely injured because there was evidence of a considerable struggle when police discovered Payne's body. Blair's argument is unpersuasive.

While escorting Blair to his patrol vehicle, Deputy Reigle noticed Blair was limping and asked if he was injured. Deputy Reigle's question was not intended to elicit information for investigatory purposes. Deputy Reigle did not ask what caused Blair to limp or if he had been in an altercation. Using an objective test, it is clear that Deputy Reigle asked Blair if he was injured to determine whether Blair needed medical care before being transported to the police station. Accordingly, it cannot be said that Deputy Reigle should have known that his question was

reasonably likely to elicit an incrimination response. As a result, Deputy Reigle's question was not interrogation. Therefore, the trial court's findings support its conclusion that Blair's statement to Deputy Reigle was admissible at trial.

II. SUFFICIENCY OF THE EVIDENCE

Blair next argues that insufficient evidence supports his conviction for first degree murder because the State failed to prove beyond a reasonable doubt that Blair's murder was premeditated. We disagree.

A challenge to the sufficiency of the evidence to convict is a constitutional question that we review de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). To determine whether sufficient evidence supports a defendant's conviction, we must, after viewing the evidence in a light most favorable to the State, consider whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. 184 Wn.2d at 903. We draw all reasonable inferences from the evidence in favor of the State and interpret them strongly against the defendant. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). We consider circumstantial evidence and direct evidence as equally reliable. *State v. Bowen*, 157 Wn. App. 821, 827, 239 P.3d 1114 (2010).

A person is guilty of first degree murder when "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such 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 'thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Allen*, 159 Wn.2d 1, 7-8, 147 P.3d 581 (2006) (internal

quotation marks omitted) (quoting *State v. Finch,* 137 Wn.2d 792, 831, 975 P.2d 967 (1999)). Premeditation can be established by a number of factors, including the infliction of multiple injuries, inflicting injuries by various means over a period of time, and attacking a victim from behind. 159 Wn.2d at 8.

Here, it is uncontested that the injuries Blair inflicted upon Payne caused his death. When police discovered Payne's body, they found a hammer and screwdriver next to him. Blair admitted that he was involved in an altercation with Payne and that he stabbed Payne in the neck and hit him with a hammer. Blair also stated that the altercation lasted for approximately 45 minutes and that he held Payne in a choke hold and said, "[D]on't make me . . . kill you." Ex. 273A at 34.

Evidence at trial showed that Payne likely received the injuries to his head and neck. Dr. Lacy testified that Payne did not exhibit defensive wounds and that he would have been unable to defend himself after receiving the blows to his head. Dr. Lacy also testified that the deep lacerations on both of Payne's arms were inflicted close to or after Payne's death.

Viewing the evidence in a light most favorable to the State, we conclude that a rational trier of fact could find that Blair's murder was premeditated beyond a reasonable doubt. Blair inflicted a number of injuries on Payne by various means—bruises to Payne's face, head, and back that were consistent with a hammer; lacerations on Payne's face, neck, and arms that contained glass and were made with a sharp object; and evidence of strangulation. The evidence shows that Blair continued to assault Payne after he was unable to defend himself. In addition, the altercation occurred over at least 45 minutes and provided Blair with a period of time to

deliberate and reflect. Moreover, Blair's statement to Payne shows that he did, in fact, have the opportunity to deliberate and that he decided to kill Payne after that deliberation. Taken together, these facts demonstrate that Blair deliberately formed and reflected upon his intent to kill Payne. Thus, the State presented sufficient evidence to support Blair's conviction for first degree murder.

STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Blair contends that the prosecutor engaged in purposeful jury discrimination by exercising a peremptory challenge to strike a potential juror with prior convictions and that the trial court erred by allowing the prosecutor to change his peremptory challenges list. We conclude that Blair's claims lack merit.

I. JURY DISCRIMINATION

First, Blair contends that the prosecutor engaged in purposeful jury discrimination by exercising a peremptory challenge to strike a potential juror who had prior convictions. Specifically, Blair asserts that *Batson*[4] should extend to potential jurors with prior convictions. Blair's claim lacks merit.

In *Batson v. Kentucky*, the Supreme Court held that the equal protection clause prohibits a prosecutor from exercising a peremptory challenge to purposefully discriminate against a potential juror because of race. 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986). This equal protection guaranty has been extended to forbid a prosecutor from challenging

[4] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

potential jurors solely on account of their gender or ethnicity. *See State v. Evans*, 100 Wn. App. 757, 763, 998 P.2d 373 (2000).

To determine whether an equal protection violation occurred during jury selection, we must determine whether the defendant has established a prima facie case of purposeful discrimination. 100 Wn. App. at 763-64. To show a prima facie case of purposeful discrimination, the defendant must first show that the peremptory challenge was exercised against a member of a constitutionally cognizable group. *State v. Rhodes*, 82 Wn. App. 192, 196, 917 P.2d 149 (1996). Then, the defendant must show that this fact, and any other relevant circumstances, raise an inference that the prosecutor's challenge of a potential juror was based on the potential juror's group membership. *Evans*, 100 Wn. App. at 764.

During voir dire, juror 38 stated that he had been convicted of possession of a controlled substance with the intent to deliver. Later, the prosecutor exercised a peremptory challenge against juror 38.

Blair fails to meet his burden in establishing a prima facie case of purposeful jury discrimination. Blair does not show that those with prior convictions are members of a constitutionally cognizable group and does not show that the prosecutor's peremptory challenge of juror 38 was based on the potential juror's membership in a constitutionally cognizable group. As a result, Blair fails to make a prima facie showing of purposeful discrimination. Thus, Blair's claim fails.

II. PEREMPTORY CHALLENGES

Blair also contends that the trial court erred by allowing the prosecutor to change his peremptory challenges list. Blair's claim lacks merit.

"The trial court has broad discretion over the jury selection process." *State v. Williamson*, 100 Wn. App. 248, 255, 996 P.2d 1097 (2000). The procedure for exercising peremptory challenges in a criminal trial is governed both by statute and court rule. *Portch v. Sommerville*, 113 Wn. App. 807, 810, 55 P.3d 661 (2002); *see* RCW 4.44.210. Under CrR 6.4(e)(2), "peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted."

During jury selection, Blair and the prosecutor recorded their peremptory challenges by exchanging a list and alternately writing the names of the potential jurors they sought to challenge. After the prosecutor wrote six potential jurors' names, Blair chose to exercise only five peremptory challenges. Then, the prosecutor changed his peremptory challenge list by crossing out the name of a potential juror he had written and replacing it with the name of a different potential juror. Blair objected. The trial court allowed the altered peremptory challenge list, reasoning that the list was not final at the time the prosecutor altered it because the list had not been submitted to the court. Blair was also given the opportunity to change his peremptory challenge list.

Blair fails to show that the trial court violated the procedure for exercising peremptory challenges. The prosecutor and Blair alternately wrote the names of the potential jurors they wished to challenge until the jury was accepted. The prosecutor's action in replacing one

potential juror on the challenge list with a different potential juror did not violate this procedure. Moreover, Blair also had the opportunity to change his peremptory challenge list. As a result, the trial court exercised its broad discretion in accepting the prosecutor's altered peremptory challenge list. Accordingly, Blair's claim lacks merit.

We affirm Blair's conviction.

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.

Worswick, P.J.

We concur:

Lee, J.

Sutton, J.

GLINSKI LAW FIRM PLLC

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