

68661-5

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No. 68661-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PARAMJIT SINGH BASRA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

There was insufficient evidence of premeditation presented by the State to support the jury's verdict.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State prove every element of the offense beyond a reasonable doubt. Premeditation is an essential element of the charged offense of first degree murder. The evidence established Mr. Basra killed his wife in an impulsive and/or spontaneous single act of strangulation lasting 30 - 60 seconds, which the Supreme Court has held is insufficient to prove premeditation. Did the trial court err and deprive Mr. Basra of due process by entering a conviction for first degree murder?

C. STATEMENT OF THE CASE

Paramjit and Harjinder Basra were married in their native India and moved to the United States with their son and youngest daughter in 2006. RP 332. The family settled in Auburn. Paramjit ran a transportation business in India and became a truck driver when he moved to the United States. RP 334, 460, 481.

In 2009, Paramjit, Harjinder, and their two children returned to India for five months to attend the wedding of their oldest daughter

who did not immigrate to the United States. RP 170, 332, 464-66. Mr. Basra spent a substantial sum of money in celebrating his daughter's marriage, and on return to the United States, money woes arose. RP 482, 542. Jobs were scarce and Mr. Basra's poor English skills further limited his job opportunities. RP 470-71, 481-82. This began to cause Mr. Basra to suffer from anxiety and depression. RP 543. Mr. Basra also began to suffer from insomnia. RP 543.

On July 27, 2009, Mr. Basra was to begin a new job. On his way to work, Mr. Basra realized he had left his wallet and cord for his GPS at home. RP 549, 731-32. Mr. Basra went home and began searching the master bedroom for the wallet and GPS cord. RP 176, 342. Mr. Basra's youngest daughter, Amandeep Basra,¹ was in the bedroom finishing a homework assignment on the computer. RP 178. Mr. Basra and Harjinder began to quarrel about the wallet. RP 305. Mr. Basra instructed Amandeep to leave the room, and then slapped her across the face when she refused. RP 176. Harjinder stepped in to stop Mr. Basra when Mr. Basra grabbed Harjinder around her throat with his hand. RP 179, 311. Amandeep told her father to stop but he continued.

¹ For ease of citation, Mr. Basra will refer to Harijnder Basra and Amandeep Basra by their first names. No disrespect is intended.

RP 318. Amandeep called 9-1-1, and then moved into the bathroom.

RP 319-20.

Auburn police officers responding to Amandeep's 9-1-1 call detained Mr. Basra. RP 66-67. Mr. Basra told the officers he had killed his wife and that she could be found in the master bedroom. RP 69. The officers entered the house and located Harjinder on the floor of the master bedroom unconscious and not breathing. RP 76-77. They immediately began cardio-pulmonary resuscitation until firefighters arrived. RP 77, 107. The officers noted bruising under Harjinder's neck. RP 132.

Harjinder was taken to Harborview Hospital in Seattle where she died on July 30, 2009. RP 366, 378. A subsequent autopsy revealed Harjinder died of asphyxia due to ligature strangulation. RP 384. The Medical Examiner opined that the strangulation took approximately 30 to 60 seconds before there was irreversible brain damage leading to death. RP 399. A GPS cord found in Mr. Basra's master bedroom was consistent with the ligature impression on Harjinder's neck. RP 390. The Medical Examiner did not find any evidence of manual strangulation. RP 392.

Mr. Basra was subsequently charged with first degree murder and second degree felony murder. CP 8-9. Prior to trial, Mr. Basra moved pursuant to *State v. Knapstad*,² to dismiss the first degree murder count in the information on the basis that the facts as stated by the prosecution failed to establish the element of premeditation. CP 10-16; 1/27/2012RP 16-26. The court denied the motion. 1/27/2012RP 37.

Following the State's case-in-chief, Mr. Basra again moved to dismiss the first degree murder count, submitting that the State's evidence failed to prove the element of premeditation, only spontaneous anger and loss of control. RP 442-45. The trial court denied the motion. RP 453-55.

Following the jury trial, Mr. Basra was convicted as charged. CP 102-03. At sentencing, the trial court found the second degree felony murder conviction merged with the first degree murder conviction and vacated the lesser degree conviction. CP 110; 4/20/2012RP 10.

² 107 Wn.2d 346, 729 P.2d 48 (1986).

D. ARGUMENT

THE STATE FAILED TO PROVE MR. BASRA WAS
GUILTY OF PREMEDITATION

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State failed to prove Mr. Basra premeditated the murder of his wife, Harjinder Basra. The evidence produced at trial failed to prove the essential element of premeditation for first degree murder, proving only a single act of strangulation, which has been held by the Washington Supreme Court to be insufficient proof of premeditation.

To convict Mr. Basra 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). First degree murder requires the defendant act “with premeditated intent to cause the death of another person; . . .” RCW 9A.32.030(1)(a). Premeditation distinguishes first degree murder from second degree murder. *Brooks*, 97 Wn.2d at 876.

Premeditation must involve “more than a moment in point of time,” but a mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995). Rather premeditation is “the deliberate formation of and reflection upon the intent to take a human life” and involves “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for

a period of time, however short.”” *Pirtle*, 127 Wn.2d at 644 quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995); *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. *Pirtle*, 127 Wn.2d at 643; *Gentry*, 125 Wn.2d at 597. Premeditation is not shown merely because the act takes an appreciable amount of time because to do so would obliterate the distinction between first and second degree murder. *State v. Bingham*, 105 Wn.2d 820, 826, 719 P.2d 109 (1986).

Murders resulting from an impulsive or spontaneous act are not premeditated. *State v. Luoma*, 88 Wn.2d 28, 34, 558 P.2d 756 (1977). Where there is evidence that a killing occurred in the heat of passion, it is possible to find the absence of premeditation but the presence of intent. *State v. Bolen*, 142 Wn. 653, 666, 254 P. 445 (1927).

Here, the only evidence presented by the State established that Mr. Basra strangled his wife with the ligature for approximately 30 – 60 seconds before she suffered irreversible brain damage resulting in her death. RP 390, 399. This may be sufficient to establish an intent to kill but is simply not enough to establish the element of

premeditation. At best, the evidence established an impulsive, frenzied loss of control by Mr. Basra which ultimately led to his wife's unfortunate death.

In *Austin v. United States*, it was determined that, standing alone, multiple stab wounds and sustained violence cannot support an inference of premeditation. 382 F.2d 129, 139 (D.C.Cir.1967) *overruled on other grounds by United States v. Foster*, 783 F.2d 1082, 1085 (D.C.Cir.1986) (“Violence 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.”).

In *Bingham, supra*, the defendant met his victim on a bus. The two exited the bus together and started to hitchhike on a rural highway. The defendant raped his victim in a field along the highway. Before raping her, he held his hand over her mouth and strangled her. Although the Supreme Court found *time* for deliberation, it found no evidence from which the jury might have inferred *actual* deliberation. *Bingham*, 105 Wn.2d at 827. The Court held that the mere passage of time for the killing to occur, in that case the approximately 3 to 5

minutes it took for killing by manual strangulation, shows only an opportunity to deliberate and by itself is insufficient to sustain the premeditation element absent evidence that the defendant did in fact deliberate. *Id.*, at 822, 826. The method of inflicting death is relevant but will not support premeditation alone without other evidence supporting an inference “that the defendant not only had the time to deliberate, but that he actually did so.” *State v. Bingham*, 40 Wn.App. 553, 555, 699 P.2d 262 (1985), *reversed on other grounds*, 105 Wn.2d 820 (1986).

[T]o allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder. Having the *opportunity* to deliberate is not evidence the defendant *did* deliberate, which is necessary for a finding of premeditation.

Bingham, 105 Wn.2d at 826 (emphasis added).

The State’s claim at trial that was that, in addition to strangling his wife with the GPS cord, Mr. Basra manually strangled her, thus establishing that he premeditated. Initially, there was no evidence that Mr. Basra actually manually strangled his wife: only that he placed one of his hands on his wife’s neck. RP 180. The medical examiner who conducted the autopsy of Harjinder Basra testified that there was no evidence of manual strangulation. RP 392. More importantly, Mr.

Basra's actions were consistent with an intent to kill his wife by strangulation, whether manually or by ligature, thus establishing intent but not premeditation:

Although intent and premeditation each involve processes of the mind, their impact upon the ultimate decision to be made by a jury is dissimilar. "Intent" involves the mental state of "acting with the objective or purpose to accomplish a result which constitutes a crime." On the other hand, the verb "premeditate" encompasses the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. Thus, the objective or purpose to take human life (sufficient to support a charge of second degree murder) must have been formed after some period of deliberation, reflection or weighing in the mind for the act to constitute first degree murder. One may be capable of forming an intent sufficient to support a charge of second degree murder and still be incapable of deliberation or forming a *premeditated intent* to take the life of another.

Brooks, 97 Wn.2d at 876 (emphasis added, footnotes omitted). Here, the State's argument conflates intent and premeditation. The evidence established an intent to kill, but failed to establish any deliberation on Mr. Basra's part, only his quick act of strangulation which resulted in Harjinder's death.

The State proved nothing more than that Mr. Basra strangled his wife, an act so swift that within 30-60 seconds, the injury had caused irreversible brain damage resulting in death. There was no proof that

Mr. Basra actually deliberated or that there was even time to deliberate.
Brooks, 97 Wn.2d at 876.

In prior Washington cases where there was evidence of strangulation to the victim, which the courts found to be evidence of premeditation, there was also evidence of blunt injury as well and evidence the injuries were inflicted over an extended period of time. In *State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006), the defendant asserted there was insufficient evidence of premeditation arguing that “he never expressed a preconceived intent to kill, he did not take weapons to his mother's home, and he himself was shocked at how their heated argument escalated into violence.” The court disagreed, noting that “a physical struggle over ‘an appreciable period of time’ prior to strangulation is sufficient evidence of premeditation.” *Id.* The altercation with his mother went from the kitchen to the bedroom and involved pushing and wrestling before escalating to strangulation. *Id.*

In *State v. Harris*, 62 Wn.2d 858, 868, 385 P.2d 18 (1963), the victim “had been struck on the head several times with a blunt instrument with such force that in one place her skull had been fractured into her brain.” The victim was also strangled with a garrote fashioned from a vacuum cleaner cord and handle. *Id.* at 860. While

strangulation was the immediate cause of death, the victim would have died as a result of the skull fracture. *Id.* at 860–61.

In *State v. Gaines*, the victim was first strangled, then the defendant went to a nearby garbage dump, retrieved a rock, returned and inflicted the fatal wounds to the victim's head. *State v. Gaines*, 144 Wn. 446, 467, 258 P. 508 (1927).

Finally, in *State v. Gibson*, the victim was first struck in the head with a 2x4 piece of lumber or a thin pipe, then strangled with a thin rope or cord-like object. *State v. Gibson*, 47 Wn.App. 309, 312, 734 P.2d 32 (1987).

These cases point out the dearth of evidence of premeditation in Mr. Basra's matter. In all of these cases, the assailant initially utilized a weapon, be it a rock, pipe, or other blunt instrument. The assailant then strangled the victim, in Mr. Gibson's case, utilizing a rope, in *Gaines*, the victim was first strangled, then beaten with a rock. In all of the cases there was a break between the two means of killing the victim. In addition, in all the cases there was a protracted struggle during which there was an act of strangulation. Here, the only evidence established a short single act of strangulation without any other acts of violence by Mr. Basra on Harjinder. There was no evidence of a break

or opportunity by Mr. Basra during this quick act to reflect or deliberate.

3. This Court must reverse with instructions to remand for entry of a conviction for second degree murder. A defendant may generally be convicted of only those crimes charged in the information. *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997); *State v. DeRosia*, 124 Wn.App. 138, 150, 100 P.3d 331 (2004). The two recognized exceptions to this rule are lesser included offenses and crimes of an inferior degree. *In re the Personal Restraint of Thompson*, 141 Wn.2d 712, 722, 10 P.3d 380 (2000); *DeRosia*, 124 Wn.App. at 151.

A successful challenge to the sufficiency of the evidence generally warrants a reversal of the criminal conviction with an order to dismiss the prosecution. *State v. Smith*, 155 Wn.2d 496, 504-05, 120 P.3d 559 (2005). However, under certain circumstances, the court may remand the case with instructions to sentence a defendant for a lesser included offense or an inferior degree offense where “the jury necessarily found each element of the lesser included [or inferior degree] offense beyond a reasonable doubt in reaching its verdict on the crime charged.” *State v. Hughes*, 118 Wn.App. 713, 731, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004), *quoting State v.*

Gamble, 118 Wn.App. 332, 336, 72 P.3d 1139 (2003), *aff'd in part*,
rev'd in part on other grounds, 154 Wn.2d 457, 114 P.3d 646 (2005).

An offense is an inferior degree offense if:

(1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

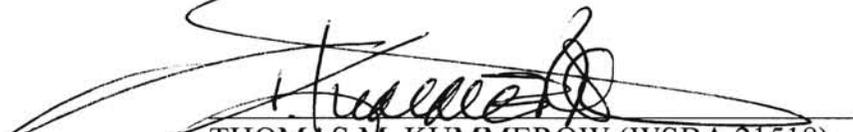
Second degree murder is an inferior degree of first degree murder, as it simply required that Mr. Basra intentionally kill his wife. RCW 9A.32.050. A reversal of the first degree murder conviction and remand with an instruction to convict and sentence Mr. Basra of the inferior degree offense of second degree murder is proper. *DeRosia*, 124 Wn.App. at 151; *Hughes*, 118 Wn.App. at 731.

E. CONCLUSION

For the reasons stated, Mr. Basra requests this Court reverse his conviction for first degree murder.

DATED this 28th day of January 2013.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
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 v.) NO. 68661-5-I
)
 PARAMJIT BASRA,)
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 Appellant.)

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