

No. 36241-4-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

TODD DWAYNE ROGERS,

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

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On Appeal from the Pierce County Superior Court  
Cause No. 06-1-02460-7  
The Honorable Frederick Fleming, Judge

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OPENING BRIEF OF APPELLANT

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PM 1-29-08

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## I. SUMMARY OF THE CASE

In the early morning hours of May 13, 2006, during a dispute at a mutual friend's apartment, Todd Rogers shot and killed Jason Johnson and Timothy Jackson. Descriptions of the events leading up to the shooting, and of the events of the shooting itself, differ from witness to witness. But the witnesses agree that Jason and Timothy confronted Todd at a party, and asked him to step outside onto the balcony to talk.<sup>1</sup> While outside, Timothy appeared to "pat down" Todd, and Jason became angry, yelled at Todd, and gestured in his face. Todd then pulled a gun from his pocket and shot at Jason, who jumped or fell over the balcony onto the ground below. Timothy ran inside, and Todd followed. Todd shot Timothy, then immediately left. The State subsequently charged Todd with first degree premeditated murder for the death of Timothy, and second degree murder for the death of Jason. Todd asserted that he acted in self-defense. A jury convicted Todd of the premeditated murder charge, but deadlocked on the second degree murder charge. Todd later entered a guilty plea to second degree manslaughter for the death of Jason.

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<sup>1</sup> To avoid confusion, the parties in this case will be referred to by their first names.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. In convicting Todd Rogers of first degree murder, the State failed to present sufficient evidence to prove beyond a reasonable doubt the essential element premeditation.
2. In convicting Todd Rogers of first degree murder, the State failed to present sufficient evidence to prove beyond a reasonable doubt that he was not acting in self-defense.
3. The trial court erred when it allowed the State to use Todd Rogers' custodial statement as impeachment during cross-examination.
4. In ruling that Appellant's custodial statement was admissible as impeachment evidence during cross-examination of Todd Rogers, the trial court erred when it entered written Finding of Fact 4.

### **B. Issues Pertaining to the Assignments of Error**

1. Did the State present sufficient evidence to prove beyond a reasonable doubt that Appellant formed a premeditated intent to cause the death of Timothy Jackson, where the State presented nothing more than the fact of the shooting to establish premeditation. (Assignment of Error 1)

2. Did the State present sufficient evidence to prove that Appellant was unjustified in shooting Timothy Jackson, where Appellant testified that he believed Timothy Jackson was armed and Appellant believed he might shoot Appellant or Appellant's girlfriend? (Assignment of Error 2)
3. Did the trial court err in allowing the State to use Appellant's custodial statements to impeach Appellant during cross-examination, where the investigating officers admitted that they held Appellant for several hours before beginning questioning, that they did not honor his invocation of his right to remain silent, and that they used psychological interrogation techniques to overcome his resistance to answering their questions? (Assignments of Error 3 & 4)

### **III. STATEMENT OF THE CASE**

#### **A. Substantive Facts**

Todd ("Cuzzo") Rogers, Jason ("Jake") Johnson and Timothy ("Sky") Jackson met and became friends in 2001, but had lost contact for several years. (RP 353, 585, 1217, 1218) In May of 2006, Jason and Todd bumped into each other at the Tacoma mall. (RP 360-61, 1217, 1219) After their chance meeting, they began spending time together regularly. (RP 362, 363-64)

One afternoon, Todd, Jason and his girlfriend Jessica Jackson, and some other friends met at the Tacoma Waterfront for a barbecue. (RP 356, 365-66) According to Jessica, Jason made a comment to Todd, who then “exploded.” (RP 368) She testified that Jason and Todd exchanged words, and that Todd made a gun gesture with his hands and said: “Watch. Watch. I’m gonna show you.” (RP 369) Jessica interpreted the statement and gesture as a threat, but Jason did not seem to be afraid. (RP 369) Then Jessica and Jason left. (RP 371)

On the afternoon of May 12, 2006, Jason received a call from a man nicknamed “Lucky.” (RP 391) Jessica testified that Jason was upset after the call because Lucky had told him about a statement that Todd had made about Jason. Jason said Todd’s statement was a lie, and he was upset with Todd as a result of the conversation with Lucky. (RP 392)

Sharry Caulder was Todd’s girlfriend during this time period. (CP 585) Todd told her that Jason had tried to “start something” at the waterfront barbeque. (RP 590-91) Sharry testified that Todd was not angry about the incident, but he was not interested in spending time with Jason any more. (RP 686) On the evening of May 12th, Todd’s friend Karisha Pierce stopped by Todd’s home

and invited the pair to a gathering at her apartment later that night.<sup>2</sup>  
(RP 597)

Sharry testified that they drove together to Karisha's house, and parked behind a red car. (RP 633-34) Timothy exited the red car and approached Todd. (RP 634-35) They greeted each other in a friendly manner, and Timothy told Todd that Jason was upstairs at the party. (RP 635) The trio then went upstairs to Karisha's apartment. (RP 636) Sharry testified that there were a number of people sitting around a table and on couches in the living room. (RP 638) Todd said hello and shook hands with several acquaintances while Sharry sat down on the couch. (RP 639, 640)

Jason approached Todd a few minutes later, said "we need to talk," then asked Todd to step outside. (RP 641) Sharry testified that Jason appeared angry. (RP 697) Todd initially responded that they could talk "right here," but he eventually went out to the balcony with Jason and Timothy. (RP641-42)

According to Sharry, Jason stood towards the middle of the balcony, while Todd stood to the left of the doorway and Timothy to the right. (RP 645-46) Timothy tried to close the sliding glass door,

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<sup>2</sup> Sharry told investigators that Karisha called to invite them to the party. (RP 600-01, 1072)

but Todd pushed it back open. (RP 646-47) Timothy also started patting Todd's jacket with his left hand, while keeping his right hand inside his own jacket pocket. (RP 647-48) Sharry saw Jason move closer to Todd and begin gesturing with his hands in Todd's face. (RP 647, 698) It looked to Sharry like they were trying to intimidate Todd. (RP 708) She testified that Todd could not have just walked back inside, and that he "might as well have been" cornered. (RP 650-51)

Moments later, Sharry heard gunshots and saw Jason go over the side of the balcony. (RP 651, 653-54) She immediately moved toward the front door, at the same time that Timothy came back into the apartment and ran towards the front door. (RP652, 656) Timothy grabbed her from behind, crouched down and pulled her towards him so that her body shielded him from Todd.<sup>3</sup> (RP 657-59) Todd warned Timothy to let go of Sharry. (RP 712) Todd then reached his arm over Sharry's right shoulder, fired a shot, and Timothy fell to the floor. (RP 660) Todd pushed Timothy's body away from the front door, then opened the door and left with Sharry. (RP 662-63)

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<sup>3</sup> At trial Sharry testified that she did not know if Timothy said anything at this point, but she told police that Timothy said: "I don't got nothing to do with this." (RP 661-622, 1074)

Karisha Pierce testified that she knew Todd, but that she did not invite him to the party on that night. (RP 514, 522) She saw Todd arrive and greet several of the party guests. (RP 522-23) She noticed Todd, Jason and Timothy step onto the balcony, but could not see or hear what happened while they were out there. (RP 527)

Karisha heard several popping sounds, then saw Timothy run through the living room towards the front door. (RP 528, 530) Karisha testified that Timothy did not say anything, and she did not see any interaction between Timothy and Sharry. (RP 534, 541) Instead, she testified that Todd followed Timothy inside, and raised his arm and shot at Timothy. (RP 533-34) Todd and Sharry then ran out the front door. (RP 542)

Lakewood police officers who were in the area on an unrelated call heard the gunshots at 3:07 in the morning of May 13th. (RP 806, 080, 089) At 3:15 in the morning, 911 dispatch finally received a call reporting the shooting. (RP 810) Several units immediately responded. (RP 810, 811, 920) They discovered Timothy lying face-up on the floor just inside the front door, and Jason lying face-down on the ground below the balcony. (RP 451, 408-09, 815, 816, 922) Both had multiple gunshot wounds. (RP

456, 411) Timothy was pronounced dead at the scene. (RP 484) Jason was transferred to the hospital, but died a short time later. (RP 492)

Jason sustained four gunshot wounds; one to his upper right chest, one to his left shoulder, one to his right hip, and one to his mid-thigh. (RP 1102) Timothy sustained three gunshot wounds; one to the left side of his chest, one to the back side of his right shoulder, and one to the right side of his head. (RP 1129) The medical examiner noted that the head-wound bullet traveled on a right-to-left and downward trajectory. (RP 1142-43) The medical examiner also noted evidence of "stippling" on Timothy's nose and face, suggesting that the gun was fired from close range. (RP 1157-58) Both men died as a result of their gunshot wounds. (RP 1127, 1159) Subsequent blood and urine analysis showed that both men had ingested alcohol, cocaine, methamphetamine, and marijuana. (RP 1126, 1156)

Responding officers found a small bag on Karisha's kitchen counter that appeared to have once contained methamphetamine or cocaine. (RP 977, 987-88) Karisha admitted that some of the guests were using drugs during the party. (RP 989) Investigators also noted a bullet hole in the wall above where Timothy's body lay,

and found several empty bullet casings in the living room area. (RP 458, 461)

After the incident, Todd and Sharry checked into a Fife motel, where they stayed for a few days. (RP 665-66) They moved several times over the next few weeks. (RP 671) Todd cut his hair and shaved off his facial hair. (RP 668) Todd and Sharry also traded cars with a friend for a few days, then traded back. (RP 670)

Police eventually apprehended Sharry while she was driving Todd's car. (RP 671, 935-36) After interviewing Sharry, police located Todd at the home of his close friend, Robin Steward. (RP 936-37) Police arrested Todd in the early morning hours of June 1, 2006. (RP 938, 946, 979, 986)

Robin testified in the State's case in chief that she has known Todd since he was a boy, and was close friends with his mother. (RP 781-82) Robin also knew Jason, but thought he was "disrespectful" and a "jerk." (RP 785) When she spoke to Todd after the incident, he told her that someone tried to rob him and that he was only defending himself. (RP 788, 798)

At trial, Todd testified that Jason made a derogatory comment at the waterfront barbeque, but there was no face-off, no

threats, and no gun gesture made. (RP 1222-23) Todd did not like the way Jason had been acting, so he decided to ignore him, and did not take his phone calls. (RP 1223)

On the afternoon of May 12th, Todd saw his friend Lucky, and told Lucky that Jason had talked about trying to rob Lucky. (RP 1228) Lucky called Jason to confront him, then handed the phone to Todd. (RP 1229) Jason told Todd that "it's going to be on" the next time he saw Todd. (RP 1232) Todd took this statement as a threat. (RP 1232)

Later that night, Karisha called Todd and asked if she could stop by to see him. (RP 1235) When she arrived, she invited Todd and Sharry to her house for a party. (RP 1235, 1236) Todd also gave Karisha a bag of cocaine. (RP 1236) Karisha did not tell Todd who was going to be at the party. (RP 1236) Todd testified that he did not know that Jason was going to be there. (RP 1282, 1285)

Todd and Sharry arrived at Karisha's apartment around 3:00 on the morning of May 13th. (RP 1237) Karisha's neighborhood is unsafe, so Todd took a gun with him for protection. (RP 123, 1238-39) Timothy arrived at the same time, and told Todd that Jason was in the apartment. (RP 1240) This made Todd suspicious. (RP

1240) Todd, Sharry and Timothy entered Karisha's apartment together, and Todd immediately saw Jason snorting a white powder. (RP 1241, 1242) Jason then approached Todd and said that they needed to talk outside. (RP 1243) Todd told Jason they could talk later and inside, then Todd proceeded to greet his other friends. (RP 1243, 1244)

Todd noticed Jason and Timothy talking together, then Jason again approached Todd and asked him to talk on the balcony. (RP 1244, 1245) The three men went outside, and Jason told Todd that he was "tired of biting his tounge." (RP 1245-46) Timothy tried to close the sliding glass door, but Todd pushed it back open. (RP 1250-51)

Timothy began patting Todd's jacket, while keeping his right hand in his jacket pocket. (RP 1246) Todd became concerned for his safety because he knew that Timothy always carries a gun, and he thought Timothy might have a gun in his jacket pocket. (RP 1247, 1249) Todd also knew that Jason becomes aggressive and unpredictable when he does drugs. (RP 1251-52)

Todd told the other men that he was going to go back inside, but Jason stepped closer to Todd and said "you ain't going nowhere." (RP 1253) Jason told Todd to "give up [his] shit." (RP

1253) Todd then realized that Jason and Timothy wanted to rob him. (RP 1254-55) Todd turned to go inside, but the men grabbed him by the shoulders and pulled him towards the balcony. (RP 1255) Todd believed they were going to throw him over the side of the balcony. (RP 1255)

Todd shook himself loose, pulled his gun out of his pocket, and fired. (RP 1256) He saw Jason go over the side of the balcony, then Todd fired at Timothy. (RP 1256) Timothy ran inside and grabbed Sharry. (RP 1257) Todd testified that Timothy was reaching toward his pocket, so he thought Timothy was going pull out his own gun and shoot him or Sharry. (RP 1257-58) He believed he and Sharry were in danger, so he reached around Sharry and fired a blind shot. (RP 1257-58, 1259) Timothy fell to the ground, and Todd and Sharry left. (RP 1259)

Todd testified that he was afraid that Jason's and Timothy's friends would seek retribution, so he checked into a Fife motel room and changed his appearance. (RP 1263-64)

Todd testified that the men were on the balcony for only two to three minutes. (RP 1262) He testified that he feared for his life on the balcony, and for his and Sharry's lives when Timothy ran inside. (RP 1273)

## **B. Procedural History**

The State charged Todd by Information in Pierce County Superior Court with first degree premeditated murder of Timothy (RCW 9A.32.030(1)(a) while armed with a firearm (RCW 9.94A.510, .530); second degree murder of Jason<sup>4</sup> (RCW 9A.32.050(1)(a), (1)(b)) while armed with a firearm (RCW 9.94A.510, .530); and first degree unlawful possession of a firearm (RCW 9.41.040). (CP 1-3)

Following a CrR 3.5 hearing, the trial court suppressed the statements made by Todd to police during questioning, finding that the officers did not scrupulously honor Todd's invocation of his right to remain silent. (RP 120-22; CP 356-60) The trial court ruled that the State could not use Todd's statements during its case in chief. (RP 120-22; CP 356-60) It later ruled, over defense objection, that the State could impeach Todd with the statements when it cross-examined Todd during the defense case. (RP 1187-1207; CP 189-92, 353-55)

Todd entered a guilty plea to unlawful possession of a

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<sup>4</sup> The State charged Todd with two alternative means of committing second degree murder: (1) with intent to cause the death of Jason; or (2) while in the course of and in furtherance of the crime of assault in the second degree. (CP 1-2)

firearm before trial. (RP 261-66; CP 101-04) The jury convicted Todd of the premeditated murder of Timothy, and found that he was armed with a firearm. (RP 1538-39; CP 314) However, the jury was unable to reach a unanimous verdict on the charges for the death of Jason. (RP 1524, 1529, 1531) The trial court declared a mistrial on that count. (RP 1538, 1541) The State and Todd subsequently reached a plea agreement whereby Todd would plead guilty to an amended information charging second degree manslaughter for the death of Jason. (RP 1547, 1550, 1555-56; CP 324-331; 322-23)

The trial court sentenced Todd to the high end of his standard range, for a total term of confinement of 512 months. (RP 1572; CP 339, 341) This appeal follows. (RP 318)

#### IV. ARGUMENT & AUTHORITIES

**A. The State presented insufficient evidence to prove beyond a reasonable doubt that Todd formed a premeditated intent to kill Timothy, or to prove beyond a reasonable doubt that Todd's actions were unjustified.**

“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.

1. The State failed to prove premeditation.

The jury convicted Todd 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).

“Premeditation” means “the deliberate formation of and reflection upon the intent to take a human life.” *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982). Stated another way, premeditation “involves the mental process of thinking over beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short, after which the intent to kill is

formed.” *State v. Bingham*, 40 Wn. App. 553, 555, 699 P.2d 262 (1985) (citing *Brooks*, 97 Wn.2d at 876). However, it must involve more than a moment in point of time. RCW 9A.32.020(1).

There is no evidence in this case from which to infer that Todd developed the premeditated intent to kill Timothy. “For premeditation to be inferable by the jury, there must have been a period of time during which the intent to kill is deliberated.” *State v. Bingham*, 105 Wn.2d 820, 824, 719 P.2d 109 (1986). In this case, the altercation between Jason, Timothy and Todd occurred in a matter of minutes. Nevertheless, even if this was sufficient time to allow reflection and deliberation, “having the opportunity to deliberate is not evidence the defendant did deliberate, which is required for a finding of premeditation. Otherwise, any form of killing which took more than a moment could result in a finding of premeditation, without some additional evidence showing reflection.” *Bingham*, 105 Wn.2d at 826.

For example, in *Bingham*, an autopsy on 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 at 822. The State relied on the length of time required to cause death to

support the charge of premeditated murder. *Bingham*, 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.” *Bingham*, 105 Wn.2d at 827. Similarly here, there was no evidence presented of deliberation before or during the assault on Timothy.

The State must present some evidence that Todd actually reflected and deliberated and made a conscious choice to take Timothy's life. The State did not do this. The facts presented simply cannot sustain a finding that Todd formed a premeditated intent to kill Timothy, and Todd's first degree murder conviction must be reversed.

2. The State failed to disprove Todd's assertion that his actions were justified because he was acting in self-defense.

The State bears the burden of proving the absence of self-defense in a prosecution for first degree murder when the defendant introduces evidence corroborating a claim of self-defense. *State v. McCullum*, 98 Wn.2d 484, 496, 656 P.2d 1064 (1983). Self-defense is judged by a subjective standard. *McCullum*, 98 Wn.2d at 488-89. The jury must "view the evidence

from the defendant's point of view as conditions appeared to him or her at the time of the act." *McCullum*, 98 Wn.2d at 488-89 (citing *State v. Wanrow*, 88 Wn.2d 221, 234-36, 559 P.2d 548 (1977)). Thus, the jury must view the claim of self-defense "from the defendant's perspective in light of all that [he] knew and experienced with the victim." *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984) (citing *Wanrow*, 88 Wn.2d at 235-36).

The jury in this case deadlocked on the charge of second degree murder for the death of Jason, which shows that the State failed to unanimously convince the jury that Todd was not acting in self-defense when he shot at Jason. But the State also did not prove that Todd's subsequent actions were unjustified. Todd testified that Timothy kept his hand in his pocket on the balcony, that he knows Timothy carries a gun, and that Timothy was reaching toward his pocket after he ran inside and grabbed Sharry. (RP 1247, 1249, 1257) Timothy also used Sharry as a human shield. (RP 1257) Todd testified that he believed Timothy might pull a gun and shoot him or Sharry. (RP 1257, 1258, 1259)

The State did not present sufficient evidence to prove beyond a reasonable doubt that, under these circumstances, and knowing what he knew about Timothy, Todd's actions were

unjustified. The facts presented by the State simply do not overcome the evidence that Todd acted with the reasonable belief that he and Sharry were in mortal danger, and Todd's first degree murder conviction must be reversed.

**B. The trial court erred when it allowed the State to use Todd's custodial statement as impeachment during cross-examination.**

After spending several hours in a holding cell in the middle of the night, then being brought to an interview room and handcuffed to a chair, Todd was asked by police investigators whether he wanted to answer questions about the shooting. (RP 55, 59, 25, 26, 27-28) Todd repeatedly told the officers he had "nothing to say." (RP 28, 67-68) Two investigators then spent the next 45 minutes using techniques learned in their interrogation training sessions to try to overcome Todd's reluctance to talk. (RP 45-46, 68-69) Eventually, Todd agreed to make a statement, which the officers tape recorded. (RP 30-31) Near the end of the statement, Todd asked for water, but the officers said he would have to wait until they were finished taping. (RP 33-34)

Based on these facts, the trial court suppressed the use of Todd's statement during the State's case in chief. (RP 120-22; CP 356-60) In its written findings, the court concluded that Todd

“invoked his right to remain silent . . . and that constitutional right was not scrupulously honored by law enforcement.” (CP 359)

However, the trial court later ruled that the statements were admissible to impeach Todd during the State’s cross-examination.

The court entered the following relevant finding:

4. This Court finds that the officer’s conduct while speaking with the defendant did not rise to the level of coercion. The defendant was not intoxicated; the defendant did not appear ill; the defendant did not appear affected by the late hour; officers spoke in a calm tone of voice; officers did not misrepresent the law to the defendant; officers permitted the defendant the opportunity to give his side of the story without interruption; the officers responded to questions posed by the defendant; officers made no promises to the defendant; the defendant has substantial experience with the criminal justice system.

(CP 354-55) The court concluded that Todd’s “will to resist was not overborne,” and his statements were therefore admissible for purposes of cross examination. (CP 355)

This court should first determine whether substantial evidence supports the challenged findings of fact. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). The court then reviews the trial court’s conclusions of law de novo. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

The courts' "supervisory responsibility to deter police misconduct and to preserve the dignity and integrity of the judicial process forbids a blanket ruling that such evidence is *invariably* admissible for purposes of impeachment." *State v. Greve*, 67 Wn. App. 166, 175, 834 P.2d 656 (1992) (emphasis in original). Thus, the use of previously suppressed custodial statements for purposes of impeachment must be determined on a case by case basis. See *Greve*, 67 Wn. App. at 175.

A statement obtained in violation of *Miranda* and used for impeachment purposes must have been made free of coercion and must satisfy constitutional due process standards of voluntariness. *State v. Brown*, 113 Wn.2d 520, 556, 782 P.2d 1013, 787 P.2d 906 (1989); *State v. Davis*, 82 Wn.2d 790, 793, 514 P.2d 149 (1973). The test for voluntariness is whether "the confession [is] the product of an essentially free and unconstrained choice by its maker. *Scheneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

The Court must examine the totality of the circumstances in determining voluntariness, including the presence of threats or violence, direct or implied promises, or the use of improper influence or police trickery. *Scheneckloth*, 412 U.S. at 227; *State v.*

*Davis*, 34 Wn. App. 546, 550, 662 P.2d 78 (1983). Further, in assessing the totality of the circumstances, a court must consider any promises or misrepresentations made by the interrogating officers. *United States v. Springs*, 17 F.3d. 192, 194 (7th Cir. 1993); *United States v. Walton*, 10 F.3d 1024, 1028-29 (3rd Cir. 1993). If promises or misrepresentations were made to the defendant, the court must determine whether there is a causal relationship between the official's statements and the confession. *Walton*, 10 F.3d at 1029-30. The inquiry is whether the defendant's will was overborne. See *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984).

Under the facts of this case, the trial court incorrectly determined that the officer's conduct was not coercive, and that Todd's will to resist was not overborne. Todd was held for nearly four hours, handcuffed and isolated for much of that time. (RP 33, 55, 25, 26) He was then handcuffed to a chair in a small room with two detectives for an extended period of time. (RP 26, 28-29) After Todd invoked his right to remain silent, the officers engaged in a calculated plan to employ psychological pressure to overcome Todd's reluctance to speak with them. (RP 28, 30, 45-46, 68-69) These tactics and psychological maneuvering were applied to Todd

for nearly an hour before Todd's will was overborne and he finally provided a statement. (RP 28-29, 30, 45-46, 68-69) Moreover, a review of the taped statement shows that the officers made some sort of representations to Todd about the law of self-defense and justifiable homicide before he agreed to talk, and that Todd relied upon these representations. (RP 1192-93, 1197; Exh. P215)

Under these particular facts, Todd's statement cannot be deemed voluntary. The tactics and trickery employed by the officers render the statements wholly unreliable. The trial court should have prohibited the State's use of these unreliable statements for impeachment purposes.

The trial court's error was prejudicial to Todd's defense. In his statement, Todd told a different account of what occurred on the balcony. He did not tell police that Jason planned to rob him or that Jason and Timothy tried to throw him over the balcony. (RP 1344, 1355; Exh. P215) He told police that Timothy pulled a gun and started firing. (RP 1349; Exh. P215) He also told police he knew before he arrived that Jason would be at the party, and that he expected there might be a fight. (RP 1286-87, 1288, 1329; Exh. P215)

The jury's opinion of Todd's credibility was crucial to his

defense. And it is clear that the jury struggled with the question of whether the State's theory of the case or Todd's theory of the case was more believable. It cannot be said that the statements Todd made to police had no impact on the outcome of trial.

Given that Todd invoked his right to remain silent, that the officers did not honor his invocation and instead used psychological tactics and legal representations to pressure him to confess, the trial court should not have allowed the State to use Todd's statements against him during cross-examination. Accordingly, Todd's convictions must be reversed.

#### IV. CONCLUSION

The State's evidence did not prove beyond a reasonable doubt that Todd acted with premeditated intent to kill Timothy or that his actions were unjustified. Further, the trial court erred when it allowed the State to use Todd's custodial statements for impeachment purposes because the statements were not truly voluntary. For these reasons, Todd's convictions must be reversed.

DATED: January 29, 2008



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**CERTIFICATE OF MAILING**

I certify that on 01/29/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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