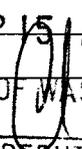


NO. 37095-6

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COURT OF APPEALS
DIVISION II

08 SEP 15 AM 11:48

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

CRAIG MICHAEL CAHILL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo

No. 02-1-05324-8

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court properly reject defendant’s proposed instruction on premeditation when it was misleading and inaccurate and when the given pattern instruction allowed defendant to argue his theory of the case? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 16

 1. THE COURT’S INSTRUCTIONS TO THE JURY PROPERLY STATED THE LAW WITH REGARD TO THE ELEMENT OF PREMEDITATION..... 16

D. CONCLUSION..... 22

Table of Authorities

State Cases

<i>Herring v. Department of Social and Health Servs.</i> , 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996)	16
<i>In re Personal Restraint of Lord</i> , 123 Wn.2d 296, 317, 868 P.2d 835, clarified, 870 P.2d 964 (1994)	19, 20
<i>State v. Benn</i> , 120 Wn.2d 631, 657-58, 845 P.2d 289 (1993)	19, 20
<i>State v. Clark</i> , 143 Wn.2d 731, 770-771, 24 P.3d 1066 (2001)	19, 20
<i>State v. Colwash</i> , 88 Wn.2d 468, 470, 564 P.2d 781 (1977)	16
<i>State v. Dana</i> , 73 Wn.2d 533, 536, 439 P.2d 403 (1968)	16
<i>State v. Dent</i> , 123 Wn.2d 467, 478, 869 P.2d 392 (1994)	17
<i>State v. Fernandez-Medina</i> , 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999)	16
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999)	20
<i>State v. Harris</i> , 62 Wn.2d 858, 385 P.2d 18 (1963)	17
<i>State v. Jackson</i> , 70 Wn.2d 498, 424 P.2d 313 (1967)	17
<i>State v. Lucky</i> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by <i>State v. Berlin</i> , 133 Wn.2d 541, 544, 947 P.2d 700 (1997)	17
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995)	20
<i>State v. Rahier</i> , 37 Wn. App. 571, 575, 681 P.2d 1299 (1984)	17
<i>State v. Rice</i> , 110 Wn.2d 577, 757 P.2d 889 (1988)	19, 20
<i>State v. Staley</i> , 123 Wn.2d 794, 803, 872 P.2d 502 (1994)	16
<i>State v. Walker</i> , 136 Wn.2d 767, 771, 966 P.2d 883 (1998)	17

Rules and Regulations

CrR 6.15.....16

Other Authorities

WPIC 26.01.0118, 19

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly reject defendant's proposed instruction on premeditation when it was misleading and inaccurate and when the given pattern instruction allowed defendant to argue his theory of the case?

B. STATEMENT OF THE CASE.

1. Procedure

This appeal marks the second time that this matter has been before this court on appeal.

On November 20, 2002, the Pierce County Prosecutor's Office filed an information charging appellant, CRAIG MICHAEL CAHILL, hereinafter "defendant," with one count of murder in the first degree (premeditated) and obtained a warrant for his arrest. CP 1-4. The State alleged that defendant had murdered his wife, Theresa Cahill. CP 1-4.

The matter was assigned to the Honorable Kathryn Nelson and tried before a jury, who convicted defendant as charged; he appealed his conviction and the Court of Appeals reversed for evidentiary errors. CP 21-69.

On remand, the case was assigned to the Honorable Sergio Armijo. RP 1-3. A second jury also found defendant guilty as charged. CP 185-186; RP 1024-1026. The court imposed a high end standard range

sentence of 548 months based upon an offender score of 13. CP 201-214; RP 1047-1048. Defendant filed a timely notice of appeal from entry of this judgment and sentence. CP 215.

2. Facts

a. Discovery of the Body.

On Monday, November 18, 2002, three men hunting near North Bend area discovered a blue recycling or garbage bin off of forest roads that are accessible by a four-wheel drive vehicle. RP 151-156, 162, 396-397, 417-426. Because the bin seemed out of place they stopped to investigate. RP 154-155. The bin had a serial number of R 60003311. RP 169. They cut the rope that was tying the bin shut and dumped out the heavy contents. RP 157. It contained a sleeping bag with plastic inside of it. RP 157. They cut open a corner to reveal a woman's leg; they called 911 using a cell phone then waited for the police to show up. RP 157-158. The body was about 3.7 miles, or a 15 to 20 minute drive, from the end of a paved road. RP 160, 395.

The body was taken to the King County Medical Examiner's Office for autopsy. RP 168. The body was subsequently identified as that of Teresa Cahill. RP 198-201. Time of death was estimated to have occurred late on November 13 or early on November 14. RP 201-202. An examination of the body revealed that it had been wrapped in a sheet, followed by a wrap of plastic sheeting, followed by the sleeping bag,

which was secured with a rope and a wire. RP 204-205. The head had a second sheet wrapped around it. RP 205-206. Duct tape had been wrapped around the mouth and around the hands and legs. RP 206-209. There were injuries on her hands and arms that were consistent with defensive wounds. RP 211-212, 240-241. There were also numerous blunt force injuries to her head; the medical examiner estimated that there were at least 20 such blows to her head. RP 213, 216, 221-222. The duct tape to the mouth had been applied prior to the victim receiving the head injuries. RP 207-208. The positioning of the blows was consistent with her having been lying in bed on her right side at the time of the attack. RP 216-217. The body was in a flannel nightgown. RP 209, 224. The injuries were consistent with having been inflicted by a heavy object such as a fireplace poker. RP 217-218. There was black discoloration on part of the skull bone which was transferred from the weapon used in the attack. RP 219-222. The cause of death was multiple blunt force injuries to the head, causing lacerations, skull fractures and injuries to the brain. RP 231.

A forensic anthropologist who specializes in bone trauma cases examined several pieces of Teresa Cahill's skull. RP 220-221, 563-570. From the portion of the skull she examined she determined that there were at least four distinctive fractures to the skull: two depressed and two linear. RP 570-577. She testified that the depressed fractures require a forceful blow to inflict. RP 577. One blow was strong enough that it not

only depressed the outer table of the skull but carried through and depressed the inner table; this requires a “high degree of force.” RP 577. The black discoloration that was imbedded in the bone was consistent with the blows being inflicted by a fireplace poker. RP 578-579.

Fingernail clippings taken from the victim body revealed the presence of defendant’s DNA under her right fingernails. RP 226, 652-658. Evidentiary items found with or on the body were collected by King County Medical Examiner and later transferred to Detective Webb with the Tacoma Police Department. RP 223-224, 800.

b. Crime Scene.

A forensic specialist with the Tacoma Police Department searched the Cahill home for evidence of murder on November 19-22, 2002. RP 544-548, 583. Under the carpeting in the master bedroom, he found a large blood stain. RP 548-549. Using Hemaglow, he uncovered evidence that someone had tried to remove blood spatter from the wall using a circular motion. RP 551-558. A sample of blood stained carpet was tested and found to be Teresa’s Cahill’s. RP 587-590, 639-652. An expert in crime scene reconstruction looked at the evidence of blood spatter in the room and concluded that something, like a canopy, had to be blocking certain areas of the bed and walls. RP 663-679. He also noted evidence of efforts to “clean” the crime scene. RP 679-683. Based upon his

experience, a detective concluded that the bedroom was the likely scene of the murder. RP 839.

In the garage, police recovered duct tape, plastic sheeting and rope similar to that used to bind up the body. RP 596, 599-603, 684-697, 793-799. The plastic sheeting wrapped around the victim's body was consistent with the plastic sheeting found in the Cahill garage. RP 603-604, 611-620, 840-842. The police did not locate any of the bedding that had been on the victim's bed. RP 828-829.

There was a fireplace poker at defendant's home on November 8, 2002, the day Teresa had surgery on her wrist. RP 404-408. There was not one at the house when it was searched. RP 815.

An employee of the Solid Waste Management Department for the City of Tacoma testified that a 90 gallon blue recycling bin with the serial number R 90002582 was delivered to the Cahill residence and that a 60 gallon blue recycling bin with a serial number of R 60003311 was delivered to Cahill's next door neighbors, the Muhamed's. RP 426-429. The Muhamed's bin was the one that held Teresa's body. RP 169, 429. When police served the search warrant they found no recycle bin on defendant's property and the bin registered to defendant on the Muhamed's property. RP 824-826, 830. On November 13, a neighbor saw a blue recycling bin inside defendant's garage. RP 475-481. The recycle bin could fit into the back of the victim's Ford Explorer and could be transported in that vehicle. RP 877-879.

her to call back. RP 98-100. Prompted by a message from her grandmother, Shauna decided to go to her mother's home to check on her on Friday evening, November 15, 2002. RP 100. The house did not look normal; it was dark and her mother's Ford Explorer was gone, but the defendant's Camaro was there. RP 101, 306. Teresa Cahill drove a Ford Explorer with an automatic transmission. RP 80. Defendant drove a Camaro with a stick shift. RP 80. They did not drive each other's cars. RP 80, 290, 343, 350. Ms. Cagle had a key to the house but called the police to have them help her with a welfare check. RP 101-102, 297-301, 310-311.

Upon her entry into the house, Ms. Cagle smelled a strong ammonia/cleaner smell. RP 103. There was no sign of an intruder and the valuables were still in place. RP 103-105. The only thing she noted that was unusual was that the bedding was gone from her mother's bed. RP 103-104, 301-312. The bedding, pillows, special mattress, and canopy were gone and the only thing on the bed was a fitted sheet. RP 103-104. Teresa's mother-in-law, sister, daughter, and granddaughter all indicated that Teresa's had an elaborate bed - a queen size four-poster with a net canopy. RP 40-42, 69-71, 82-83, 410. Defendant slept in a different bedroom decorated in a fishing theme. RP 42-44, 408. Shauna Cagle testified that, in anticipation for her surgery, her mother had bought a mattress-sized feather pillow so she could be comfortable during recovery. RP 80-81. She received it a few days before her surgery and put it on her

bed by November 8. RP 81-82. Ms. Cagle saw her mother's bedroom on November 11 and the canopy was up over the bed as usual. RP 83-84.

The lack of bedding seemed very wrong to Ms. Cagle and she told the police her concerns. RP 106. She left a note asking her mom to call her right away and left with the police. RP 106, 108-109. Later that night she got a call from the defendant who said her mother wasn't there and that he didn't know where she was. RP 110-112. He indicated that he had last spoken to her on Thursday afternoon and that she was trying to find someone to drive her to her doctor's appointment. RP 110. Teresa's doctor did not see her on November 14; he last saw her on November 11, 2002. RP 380-384.

Teresa's brother-in-law, Daniel Stoner, spoke with Teresa over the phone around 10:30 a.m. on Wednesday, November 13, 2002. RP 64-67. Teresa's sister was having a surgery at Harborview on that day; Teresa indicated that she would drive up the next day to visit her sister. RP 67-68. She did not visit her sister and did not call. RP 68-69, 73-74.

d. Defendant's Explanations For Teresa's Absence.

Defendant told a rental manager inspecting the house that his wife was away because she was fearful that she had breast cancer. RP 323-324. Defendant told neighbors that Teresa had just found out she had cancer. RP 288-293, 332-338, 342-344, 349-351. He told a co-worker that his

wife had cancer. RP 251. Teresa's mother-in-law, sister, and daughter had never heard from Teresa or her doctor that she had cancer. RP 46, 72, 86. The autopsy did not reveal any cancer. RP 229. Her doctor never diagnosed any cancer. RP 377-385.

e. Defendant's Activities.

Defendant's employer testified from business records that defendant worked from 7:00 a.m. to 3:30 p.m. on November 11, from 7:00 a.m. until noon on November 12 and from 7:00 a.m. to 1:00 p.m. on November 13; he did not work on November 14. RP 268-276.

Tony Sterley testified that he met defendant through work and that he often got a ride from defendant in his Camaro. RP 246-249. Defendant drove Sterley to work on November 11, 12, and 13; on the morning of November 14 at approximately 5:30 a.m., defendant called and said that he could not give him a ride that morning because his wife was having seizures and he was going to take her to the doctor. RP 249-250. Unable to find a ride, Sterley did not work that day. RP 251. At about 10:00 a.m., defendant called stating that he was at the Algona dump, which was closed, and wanted to know where there was a transfer station. RP 252-253. The Algona Transfer Station, or dump, was closed on November 14, 2002. RP 260. Defendant arrived at Sterley's in his wife's Green Ford SUV around 11:00 a.m.; he had shaved his beard. RP 253-254. Defendant represented that his wife had received a shot for her

seizures and that, now, she was on her way to Bellingham to visit family.
RP 255.

At 4:40 p.m., defendant cashed a payroll check at the drive-up window of the Twin Lakes branch of the Rainier Pacific Bank. RP 278-283. He was driving an SUV and had a white female with curly hair in the vehicle, who was not his wife. RP 279-280. According to defendant's statements to Detective Davis, this woman was a prostitute named Cream. RP 739.

Defendant spent the night at the Hampton Inn in Tukwila on November 14, 2002. RP 731-732.

Defendant's supervisor testified that defendant and Mr. Sterley were working at the same job site the week of November 11, 2002. RP 263. On November 14, Sterley called to indicate that he would not be at work unless he could find a ride. RP 264. He also got a call from the defendant who indicated that his wife was having seizures and that he was taking her to the doctor. RP 264-265. He spoke with defendant again on Sunday, when the defendant informed him that he had "lost" his wife, meaning that he couldn't find her, so he would not be into work on Monday. RP 265. Defendant indicated that he had already tried to track his wife through bank records. RP 265-266.

Shauna Cagle expressed her fears and concerns to the police on November 16. RP 114. On Monday she met with Detective Davis. RP 125. She then got banking records on her mother's account and tried to trace her mother through the ATM activity. RP 115-122. She also went back into her mother's house surreptitiously to try to locate the missing bedding, but could not find it. RP 122-125.

On Monday night, November 18, defendant broadcast a news conference asking for information on his missing wife. RP 776-777, 783. In the media broadcast, defendant indicated that neighbors had seen his wife leaving with someone. RP 784. None of the neighbors had reported this to the police. RP 785-786. The next day, Detective Davis learned that her body had been found in King County. RP 788-791. Defendant did not show up for his appointment with Detective Davis on November 19. RP 785-788. Detective Davis got a search warrant for the Cahill home. RP 805.

Ms. Cagle heard on November 19 that her mother's body had been found. RP 125-126.

h. Finances.

An employee of Rainier Pacific Bank testified that defendant and Teresa had two savings accounts, a checking account, and that each of them had a debit card associated with that checking account. RP 520-524. Defendant had been added to this account on October 3, 2002. RP 524-

528. Bank records showed that there were two uses of the debit card on November 14, 2002. RP 362-369.

Defendant told Detective Davis that there had been no activity on the account after Wednesday, November 13, 2002. RP 739. When the detective learned that this was not true, he tried to locate security video from the locations where there had been activity. RP 742-749. He made digitized prints from a security video taken from a Union 76 station in Federal Way where two ATM withdrawals using a debit card on the Cahill's account were made on November 14, 2002. RP 741-752, 755-763. The prints were to show who was using the card on those occasions. RP 755-763. The appearance of the person was consistent with the defendant's appearance in 2002. RP 763.

i. Defendant's Flight and Arrest.

Michael Stoccardo testified that on November 21, 2002, he and some friends were hiking on the Boulder Lake Trail in Snohomish County. RP 432-434. Mr. Stoccardo drove and parked his white Subaru Forrester at the end of an access road in a remote area. RP 434-436. When he returned to his car after four and a half hours of hiking, he discovered that his car had been broken into and his license plates were stolen. RP 436-439. Whoever had broken into the car had taken all the clothing and packs, but left the stereo system and compact discs. RP 437. A Snohomish County Sheriff's deputy took a report on this vehicle prowl

and put the stolen license plate numbers into the national database. RP 439, 444-447. The clothing and the license plates were recovered from defendant's car when he was arrested. RP 439-442, 464, 858-875.

Richard Parent testified that on November 21, 2002, he parked his truck so he could ride his bike on trails in and around Preston, Fall City and Snoqualamie Falls. RP 447-450. When he returned to his vehicle it had been broken into and his cell phone and several clothing items were missing. RP 450-452. He reported this crime to the Sheriff in North Bend. RP 452. These items were later recovered from the defendant's car when he was arrested. RP 453-454, 858-875. Upon examining a list of numbers that had been called on his phone, Mr. Parent did not recognize a number -(253) 952-0452, which was the number for the Cahill residence- that had been called on November 21 at 3:20 p.m. when he did not have possession of his phone. RP 454-458, 876.

Trooper Svinth stopped defendant, driving the Ford Explorer, for a broken headlight on November 21, 2002, in Pacific County. RP 460-462. The trooper soon learned that the license plates on the car were stolen. RP 462-463. He asked defendant to step out of the car in preparation for his arrest on stolen property and advised him of his Miranda rights. RP 463-468. Defendant told the trooper that he was wanted in Tacoma on suspicion of murdering his wife. RP 469. The trooper confirmed the existence of a warrant for murder. RP 469. Defendant was taken back to

Tacoma and his vehicle was towed. RP 469-470. The Ford had many scratches on it as if it had been scraped by branches. RP 861-862

Detectives Devault and Davis interviewed defendant at the County –City building in Tacoma. RP 505-506, 855, 882. Defendant did not make eye contact but kept his head down looking at the floor looking sullen. RP 508, 518. When asked about the crime that happened in his home defendant, after a long pause, said “it doesn’t matter, not anymore.” RP 884-885. When asked whether anyone else was involved, defendant replied “There’s nobody else involved. ...I make a nice scapegoat.” RP 885-886.

While being booked into the jail that night, detectives noticed bruising and scratches to defendant’s chest. RP 514-516, 888-890. The injuries were approximately a week old at the time of booking. RP 629-630. Dr Howard, a medical examiner, testified that the scrapes were consistent with being inflicted by fingernails. RP 624-632.

Defendant looked considerably different at the time of arrest than he had three days earlier. RP 890-891.

Defendant did not testify or present any witnesses. RP 904.

C. ARGUMENT.

1. THE COURT'S INSTRUCTIONS TO THE JURY PROPERLY STATED THE LAW WITH REGARD TO THE ELEMENT OF PREMEDITATION.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v.*

Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). A trial court has broad discretion in determining the number and wording of jury instructions. *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is

the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963). A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994).

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo.

In this case, defendant proposed a different instruction on premeditation than the pattern instruction.

Premeditation must involve more than a moment in point of time; but mere opportunity to deliberate is not sufficient to support a finding of premeditation.

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.

Premeditation may be proved by circumstantial evidence where the inferences drawn are reasonable and the evidence supporting premeditation is substantial.

Defense Proposed Instruction No. 10, CP 72-93; RP 908-913. The Court used the State's proposed instruction on premeditation, which was the pattern instruction, WPIC 26.01.01.

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

Instruction No. 11, CP 113-132; RP 916-917. Defendant argued that his instruction was a correct statement of the law and that it clarified that the mere opportunity to deliberate is not sufficient to support a finding the person actually did deliberate. RP 908-913. When the court opted for giving the pattern instruction on premeditation, defendant took exception to the court's failure to give his proposed instruction No. 10 on premeditation and to the giving of the Court's No. 11. RP 921.

The State is unaware of any Washington case that has found the pattern instruction on premeditation to be deficient or an incomplete

statement of the law. Defendant cites to no such authority in his brief. The Washington Supreme Court has repeatedly found that the pattern instruction is a proper statement of the law and indicated that further challenges to the instruction could be characterized as frivolous. *State v. Clark*, 143 Wn.2d 731, 770-771, 24 P.3d 1066 (2001), citing *In re Personal Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835, clarified, 870 P.2d 964 (1994) (Lord II), *State v. Benn*, 120 Wn.2d 631, 657-58, 845 P.2d 289 (1993), and *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988). In *Clark* the court was addressing a challenge nearly identical to the one raised by the defendant in this case. Clark wanted an instruction on premeditation that included language stating that premeditation “involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *Clark*, 143 Wn.2d at 770. This same language was included in defendant’s proposed instruction. Defense Proposed Instruction No. 10, CP 72-93. The Supreme Court rejected these arguments:

Nevertheless Clark urges us to evaluate his argument that the instruction as given places an “over-emphasis on the briefness of the time necessary to premeditate and . . . minimiz[es] the amount of deliberation (any) that must occur before intent becomes premeditation.” Br. of Appellant at 158. Clark’s concern is that the instruction erroneously emphasizes that premeditation can occur quickly, with minimal deliberation, prior to the killing.

We have rejected the precise formula Clark advanced in his proposed instruction on premeditation in *Rice*, 110 Wn.2d at 603-04, in favor of WPIC 26.01.01. Clark does not

present a compelling argument why we should reject the holdings from *Rice, Benn*, and *Lord II*. Indeed, it is hard to tell from the face of the WPIC instruction how Clark's proposed language adds anything of substance. The inference Clark draws from the given instruction is not the only way, or even the most reasonable way, to construe the instruction.

State v. Clark, 143 Wn.2d 731, 770-771, 24 P.3d 1066 (2001). Defendant argues that his instruction is required based upon the Supreme Court's decision in *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999), and *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). The Supreme Court clearly does not agree with defendant's assessment of *Finch* and *Pirtle* as *Clark* followed both these decisions yet held that the pattern instruction "remains a correct statement of the law." *Clark*, 143 Wn.2d at 771.

It is clear that under the instructions, the jury had to find that the defendant premeditated rather than merely finding that he had the opportunity to premeditate. This requirement was clearly set forth in the to convict instruction which required the jury to find each of the following elements beyond a reasonable doubt:

- (1) That on or about the 13th day of November, 2002, the defendant Craig Michael Cahill killed Teresa Cahill;
- (2) That the defendant acted with intent to cause the death of Teresa Cahill;
- (3) That the intent to cause death was premeditated;

(4) That Teresa Cahill dies as a result of defendant's acts;
and

(5) That the acts occurred in the State of Washington.

Instruction No. 12, CP 113-132. The wording of element (3) required the jury to find that the defendant engaged in actual premeditation and not just that he had the opportunity to premeditate. *Id.* The pattern instruction then instructed the jury as to what premeditation meant. Moreover, defendant was free to argue his theory of the case under the given instructions. Defense counsel could direct the jury to the "to convict" instruction to make it clear that intent and premeditation were separate elements that meant different things. The trial court did not abuse its discretion in rejecting defendant's proposed instruction in favor of giving the pattern instruction on premeditation which still allowed him to argue his theory of the case.

Finally, the State asserts that defendant's proposed instruction is at best, misleading, and at worst, inaccurate in regards to the nature and level of proof necessary to prove the element of premeditation. It was properly refused on that basis. The final paragraph of defendant's proposed stated:

Premeditation may be proved by circumstantial evidence where the inferences drawn are reasonable and the evidence supporting premeditation is substantial.

The jury was instructed as to the different natures of circumstantial and direct evidence and told that the law makes no distinction between the weight to be given to either direct or circumstantial evidence" as "[o]ne is

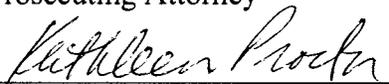
not necessarily more or less valuable than the other.” Instruction No. 4. CP 113-132. Yet the above portion of defendant’s proposed instruction seems to indicate that circumstantial evidence is less reliable when used to prove premeditation. The instruction implies that more circumstantial evidence is required to prove premeditation than would be required if proved by direct evidence. This is an inaccurate statement and inconsistent with the instruction on the nature of evidence. This proposed instruction is also confusing as it suggests that the level of proof for the element of premeditation is “substantial evidence” rather than proof beyond a reasonable doubt. This is an inaccurate statement of the law as well. The court wisely rejected the proposed instruction.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment entered below.

DATED: SEPTEMBER 15, 2008.

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COURT OF APPEALS
DIVISION II

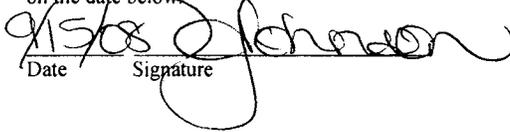
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STATE OF WASHINGTON

BY _____
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/15/08 
Date Signature