

NO. 39769-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA ELIAS BOYD,

Appellant.

FILED
COURT OF APPEALS
10 MAY 27 PM 12:50
STATE OF WASHINGTON
BY _____

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

The Honorable James R. Orlando

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

P.M. 5/26/2010

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issues Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	7
1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT BOYD OF ATTEMPTED MURDER IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT	11
2. THE TRIAL COURT ERRED IN FAILING TO VACATE THE ASSAULT IN THE FIRST DEGREE CONVICTION THEREBY VIOLATING BOYD’S CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY	19
3. THE TRIAL COURT ERRED IN IMPOSING A SENTENCE WHICH EXCEEDS THE STATUTORY MAXIMUM WHEN THE TERM OF CONFINEMENT IS COMBINED WITH THE TERM OF COMMUNITY CUSTODY	22
D. <u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Personal Restraint of Percer,</u> 150 Wn.2d 41, 75 P.3d 488 (2003)	19
<u>State v. Aumick,</u> 126 Wn.2d 422, 894 P.2d 1325 (1995)	13
<u>State v. Barajas,</u> 143 Wn. App. 24, 177 P.3d 106 (2007)	13
<u>State v. Bingham,</u> 105 Wn.2d 820, 719 P.2d 109 (1986)	15
<u>State v. Bobic,</u> 140 Wn.2d 250, 996 P.2d 610 (2000)	20
<u>State v. DeVries,</u> 149 Wn.2d 842, 72 P.3d 748 (2003)	12
<u>State v. Finch,</u> 137 Wn.2d 792, 975 P.2d 967 (1999)	13
<u>State v. Gentry,</u> 125 Wn.2d 570, 888 P.2d 1105 (1995)	13
<u>State v. Gocken,</u> 127 Wn.2d 95, 896 P.2d 1267 (1995)	20
<u>State v. Hardesty,</u> 129 Wn.2d 303, 915 P.2d 1080 (1996)	12
<u>State v. Hoffman,</u> 116 Wn.2d 51, 804 P.2d 577 (1991)	19

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Hundley,</u> 126 Wn.2d 418, 895 P.2d 403 (1995)	11
<u>State v. Ortiz,</u> 119 Wn.2d 294, 831 P.2d 1060 (1992)	14
<u>State v. Pirtle,</u> 127 Wn.2d 628, 904 P.2d 245 (1995)	13
<u>State v. Price,</u> 103 Wn. App. 845, 14 P.3d 841 (2000)	12
<u>State v. Salinas,</u> 119 Wn.2d 192, 829 P.2d 1068 (1992)	12
<u>State v. Sargent,</u> 40 Wn. App. 340, 698 P.2d 598 (1985)	14
<u>State v. Smith,</u> 115 Wn.2d 775, 801 P.2d 975 (1990)	13
<u>State v. Womac,</u> 160 Wn.2d 643, 160 P.3d 40 (2006)	20

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>FEDERAL CASES</u>	
<u>Alabama v. Smith</u> , 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)	12
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	11
<u>Jones v. Wood</u> , 114 F.3d 1002 (9 th Cir.1997)	15
<u>Jones v. Wood</u> , 207 F.3d 557 (9 th Cir.2000)	14
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996)	12
 <u>RULES, STATUTES, OTHERS</u>	
RCW 9A.29.020(1)	13
RCW 9A.32.030(1)(a)	12
RCW 9A.32.020(1)	13
RCW 9.94A.701(8)	22
U.S. Const. amend 5	19
U.S. Const. amend 14	11
Wash. Const. art. I, section 3	11
Wash. Const. art. I, section 9	19

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of attempted murder in the first degree.

2. The trial court erred in denying appellant's motion for dismissal of the charge of attempted murder in the first degree.

3. The trial court erred in failing to unconditionally vacate the conviction of assault in the first degree.

4. The trial court erred in imposing a sentence which exceeds the statutory maximum when the term of confinement is combined with the term of community custody.

Issues Pertaining to Assignments of Error

1. Was the evidence insufficient to convict appellant of attempted murder in the first degree where the evidence failed to prove beyond a reasonable doubt that appellant acted with premeditated intent to cause the death of another? (Assignments of Error 1 and 2)

2. Did the trial court err in failing to unconditionally vacate the assault in the first degree conviction which merged with the attempted murder in the first degree conviction thereby violating appellant's constitutional right against double jeopardy? (Assignment of Error 3)

3. Did the trial court err in imposing a sentence which exceeds the statutory maximum when the term of confinement is combined with

the term of community custody contrary to RCW 9.94A.701(8), effective August 1, 2009? (Assignment of Error 4)

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On March 23, 2009, the State charged appellant, Joshua Elias Boyd, with one count of assault in the first degree with a deadly weapon enhancement and one count of a domestic violence court order violation. CP 1-2. The State amended the information on August 4, 2009, charging Boyd with one count of attempted murder in the first degree with a deadly weapon enhancement and one count of a domestic violence court order violation. CP 10-11. On September 15, 2009, the State filed a second amended information, charging Boyd with one count of attempted murder in the first degree with a deadly weapon enhancement, one count of a domestic violence court order violation, and one count of assault in the first degree with a deadly weapon enhancement. CP 13-15.

Following a trial before the Honorable James R. Orlando, and the court's denial of a motion to dismiss the first degree attempted murder count, a jury found Boyd guilty as charged on September 30, 2009. CP 107-111; 4RP 462-65, 557-58. On November 6, 2009, the court sentenced

¹ There are five volumes of verbatim report of proceedings: 1RP - 08/17/09, 08/24/09, 09/15/09, 09/21/09, 09/22/09; 2RP - 09/23/09; 3RP - 09/24/09; 4RP - 09/28/09, 09/29/09, 09/30/09, 11/06/09; 5RP - 09/10/09.

Boyd to 312 months in confinement for attempted murder in the first degree with an additional 24 months for the deadly weapon enhancement and 36 months of community custody and 54 months in confinement for the domestic violence court order violation, to be served concurrently, and 12 months of community custody. CP 122; 4RP 569-72. The court did not sentence Boyd for the assault in the first degree conviction. 4RP 562-64, 572.

Boyd filed a timely notice of appeal. CP 131.

2. Substantive Facts²

On March 21, 2009, at approximately 1:48 a.m., officers were dispatched to an apartment at 2410 South I Street in Tacoma to investigate a stabbing. 3RP 269-272. Officer David May, the first officer on the scene, entered the apartment and saw a female lying on the couch “bleeding from several areas of her body.” 3RP 273. Family members stood by while May attended to a wound to her throat. 3RP 273-74. May asked the woman “who had done this to her” and she said “[i]t was Joshua Boyd.” 3RP 274. He held a compress on the woman’s throat until the fire department arrived. Medics determined that “the injury to her neck was

² For the purpose of clarity, members of the Mitchell family who testified are referred to by their first name.

not immediately life threatening” and transported her out of the apartment. 3RP 278-80.

Officer Philip Hoschouer took statements from the other residents in the home. 3RP 298-99. Cheryl Mitchell told him that she was awakened from her sleep when she heard her daughter, Tasha, screaming. Mitchell ran to the living room, saw Boyd running out the front door, and she called 911. 3RP 307-09. Cheryl Mitchell’s boyfriend, Billy Bell, said he was asleep when he heard screaming, rushed to the living room, and saw Boyd running out of the apartment with a knife in his right hand. 3RP 309-312. Hoschouer also went to Tacoma General Hospital to speak with Tasha Mitchell and the medical staff. 3RP 300-01. Doctor Inouye advised him that the injuries were “non-life threatening” and the wounds were “superficial.” 3RP 303, 315.

A K-9 Unit tracked Boyd to a house not far from the apartment. 3RP 346-47. Boyd was outside on the porch talking on a cell phone when officers arrested and searched him after Tasha’s brother, Terrence Mitchell, identified him. 3RP 347-48, 366-76. When the officers placed handcuffs on Boyd, he “was bleeding profusely out of his hands” so they called the fire department and an ambulance transported Boyd to Allenmore Hospital. 3RP 383-84, 389. Boyd was examined at the hospital over a period of four hours and then taken to the Pierce County Jail. 4RP 437-39. After

the day of the incident, Terrence Mitchell notified the police, claiming that “he found the knife used in the assault.” 4RP 255-56. Sergeant Daniel Grant retrieved a “folding blade knife” from Mitchell, packaged it, and placed it in the evidence room. 4RP 256-58.

Tasha Mitchell testified that she met Boyd in 2004 or 2005 and they have two young daughters. 2RP 128, 131-32. Despite a restraining order, she allowed Boyd to visit the children at her home where they lived. 2RP 132. On March 21, 2009, Boyd came over in the afternoon to play with the children and she and Boyd drank two or three beers. 2RP 133-35, 149, 152. Boyd left around 8:00 or 9:00 p.m. when the children went to bed. 2RP 135. Sometime after midnight, Tasha heard Boyd knocking on the front door saying, “I want to see my kids.” 2RP 136. Tasha told him they were asleep but he started beating on the door so she let him in. Boyd was drunk and boisterous. 2RP 136-37. He sat down at the end of the couch and began talking to her while she laid on the couch. 2RP 137, 145, 159. They talked for about fifteen minutes and Boyd kept asking her for money. 2RP 137-38, 159. Tasha did not want to give him any money and told him it was time for him to leave. 2RP 137-38. When Boyd refused, she yelled at him to “get the fuck out of here.” 2RP 138-39. Boyd “jumped up, put on his coat and stood over me while I was laying down and just started just stabbing me.” 2RP 139. Boyd stabbed her on

“[m]y neck, my finger, my wrist, my knee, and my chest” with a knife that he had in his coat pocket. 2RP 139-40. Then Billy Bell ran into the living room and Boyd ran out the door. 2RP 140-41.

Tasha “jumped up off the couch” and ran to her bedroom where she realized that she was bleeding heavily from her neck and she was having difficulty breathing. 2RP 141-42. Her mother called 911 and an ambulance transported her to the hospital. 2RP 141-42. Tasha’s wounds were stitched and she stayed at the hospital for a few hours until her release. 2RP 143-45. When she returned for a follow-up appointment, doctors discovered that her lung had collapsed, “[t]hey admitted me and put a tube in my chest.” 2RP 147. Tasha remained at the hospital for a week. 2RP 147.

Billy Bell raised Tasha “on and off since she was 7 years old” and he knew Boyd but “didn’t hang out with him.” 1RP 56, 59-60. When Boyd would stop by to deliver diapers for the children, they sat and talked a few times. 1RP 60. Bell testified that in March 2009, Boyd came over to the apartment sometime during the day. 1RP 61-62. He could not recall whether Boyd was still there when he went to bed around 10:00 that night. 1RP 62-63. Bell “woke up out of a dead sleep” when he heard Tasha screaming for help. 1RP 64. Bell jumped out of bed and ran to the living room where he saw Tasha on the couch and Boyd standing over her.

1RP 65. Bell thought Boyd was punching Tasha and he saw Tasha trying to protect herself by holding up a blanket. Bell ran toward them and Boyd turned around with a knife in his hand. 1RP 68-69. When Bell saw the knife, he went to the kitchen to get himself a knife to help Tasha. 1RP 69-70. Bell went back to the living room and saw Boyd run out the door, “Tasha was screaming, the kids were screaming, he ran out the door. It was just total chaos.” 1RP 70, 74. He followed Boyd to the parking lot and stopped when Boyd ran down the street. Bell returned to the apartment where Tasha’s mother had called 911. 1RP 71-73. The police came first and then the medics arrived and took Tasha to the hospital. 1RP 73-75.

Cheryl Mitchell knew Boyd “as being my granddaughter’s dad” and saw him a few times when he “would bring baby diapers to the house.” 2RP 99-100. Cheryl testified that one night in March 2009, Boyd was at the apartment and he and Tasha were in the bedroom with the girls. At around 9:00 p.m., Tasha asked Boyd to leave and Cheryl went to sleep. 2RP 102-03. She was awakened when Bell heard Tasha screaming, “Billy had woke me up and said Tasha was in there screaming something.” 2RP 104. Then Cheryl heard the screams and they ran to the living room. Cheryl saw Boyd “leaning over Tasha like he was hitting her or something.” 2RP 104-05. Bell hollered at Boyd and he jumped back and

looked at Bell. By then, the children were screaming so Cheryl went to their bedroom to calm them down. She grabbed the phone to call 911 and Boyd ran out the door. 2RP 105.

Cheryl did not see Boyd with a weapon but Tasha was stabbed and bleeding from her neck and chest. 2RP 106, 109, 121. An ambulance arrived and transported Tasha to the trauma center at Tacoma General Hospital where she was treated and released. When Tasha returned for a follow-up examination, doctors discovered a collapsed lung. She underwent surgery and remained hospitalized for about four or five days. 2RP 110-13.

Terrence Mitchell lived with his older sister, Tasha, and their mother, Cheryl Mitchell. 2RP 204-05. Terrence knew Boyd and they talked occasionally, "I was looking at him as my niece's father. So he was pretty much family." 2RP 206-07. Terrence testified that Boyd came over to visit Tasha on March 21, 2009, "It was daytime. You know, everything seemed normal." 2RP 208. At around 9:30 or 10:00 p.m., he and his girlfriend, Dominique, who lived in an apartment upstairs, left to go play pool. 2RP 210. They returned about 1:30 a.m. and went to Dominique's apartment. 2RP 211. While in the bedroom getting ready to go to sleep, Dominique heard Tasha screaming. Remembering that "Josh was there," Terrence grabbed a five-pound dumbbell and they rushed downstairs to

Tasha's apartment where he saw her on the couch bleeding and heard his mother on the phone reporting a stabbing to police. 2RP 211-12, 240. He immediately searched the neighborhood for Boyd and was picked up by the police who took him to a house where they had apprehended a suspect. 2RP 212, 215, 229. After Terrence identified Boyd, the police dropped him off at the apartment and he went to the hospital to see Tasha. 2RP 230-31. When he returned home, he scoured the neighborhood for a weapon and found a knife with blood on it. He retrieved the knife and turned it over to the police. 2RP 232-35.

Dominique Nason, Terrence's girlfriend, lived in an apartment directly above Tasha's apartment in March 2009. 2RP 175-76. She knew who Boyd was but only saw him once before the day of March 21, 2009, when she saw him with his daughters at Tasha's apartment. 2RP 177-78. Nason testified that Boyd was still at the apartment that evening when she and Terrence went out to play pool. 2RP 178-79. They returned around 1:00 a.m. and went to her apartment. While watching television, they heard Tasha screaming and "some rumbling" so they ran downstairs. 2RP 179-80. As they came down the stairwell, she saw Boyd running away. 2RP 182. Terrence ran ahead of her into the apartment and then chased after Boyd. 2RP 183. Nason entered the apartment and saw Tasha "standing in the hallway kind of like about to pass out, faint, and she had

blood all over her.” 2RP 183. Using her nursing experience, Nason helped Tasha onto the couch and attended to her wounds until the medics arrived. She asked what happened and Tasha said Boyd suddenly stabbed her when she kept telling him to leave. 2RP 185-91.

Dr. Paul Inouye treated Tasha at Tacoma General Hospital at around 2:00 a.m. on March 21, 2009. 4RP 394-95. Inouye testified that Tasha had “several lacerations or stab wounds to her body, most prominent being the right upper chest, and a laceration along her left neck and some smaller wounds in her right knee and left hand.” 4RP 396. The “deepest wound” was to her chest and she had a “superficial” wound on her neck. 4RP 396-97. He examined Tasha, sewed up the chest wound, and discharged her after a chest x-ray showed no collapsed lung. Tasha returned to the hospital several days later complaining of pain and a second chest x-ray showed a collapsed lung. 4RP 401. Inouye inserted a plastic tube between the lung surface and chest wall and kept Tasha hospitalized until the lung healed. 4RP 403-04.

Dr. Steven Pace treated Boyd at Allenmore Hospital on March 21, 2009. 4RP 450. Pace testified that Boyd sustained cuts to his finger and the back of his hand and suffered a neck strain. 4RP 450-53. Pace identified a picture of Boyd’s bloodied hand which showed that the wound

was fairly deep. 4RP 453. Pace recalled documenting that Boyd was injured during an altercation involving a knife. 4RP 454-55.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT BOYD OF ATTEMPTED MURDER IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT.

Reversal and dismissal of Boyd’s conviction of attempted murder in the first degree is required because the evidence was insufficient to prove beyond a reasonable doubt that Boyd acted with the premeditated intent to cause the death of another.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. I, section 3. “[T]he reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’ ” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).³

³ The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing 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 can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

A person commits the crime of first degree murder when, with premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a); State v. Price, 103 Wn. App. 845, 851, 14 P.3d 841 (2000), review denied, 143 Wn.2d 1014, 22 P.3d 803 (2001). To convict of an attempt, the State must prove both intent to

offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

commit the crime and a substantial step toward its commission. RCW 9A.29.020(1); State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Thus, a person commits first degree attempted murder when, with premeditated intent to cause the death of another, he takes a substantial step toward commission of the act. State v. Smith, 115 Wn.2d 775, 782, 801 P.2d 975 (1990).

The premeditated intent to cause the death of another is an essential element of the crime of attempted first degree murder. State v. Barajas, 143 Wn. App. 24, 177 P.3d 106 (2007), review denied, 164 Wn.2d 1022, 195 P.3d 957 (2008). Premeditation must involve “more than an moment in time,” RCW 9A.32.020(1), but mere opportunity to deliberate is not sufficient to support a finding of premeditation. State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). 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.” Id. (quoting State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995)). 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. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). Four characteristics of the crime

are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing. State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992).

In State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985), a jury convicted Joseph Sargent of the first degree murder of his wife. Id. at 342. Lori Sargent sustained massive head wounds caused by severe blows to the head with a blunt instrument. The blows resulted in severe skull fracturing, determined to be the cause of death. Id. A criminalist testified that she was struck by two blows to the head with some interval passing between them and a medical examiner testified that the blood splattered on the wall indicated that she was lying down and not looking when she was struck. Id. at 353. Division One of this Court concluded that a rational trier of fact could have inferred premeditation from the evidence indicating the killing was not the result of a heated argument because there was no struggle and there was time to pick up a weapon and deliver two separate blows while the victim was lying down facing away from the murderer. Id.

In Jones v. Wood, 207 F.3d 557 (9th Cir.2000), a jury convicted Jerry Jones of the first degree murder of his wife, Lee. Id. at 559, 563. On the evening of the murder, Jones was home with his wife and their five-year-old son. He made contradictory statements about when the crime

occurred, telling his neighbor that he was watching television but telling police that he was preparing to shower. Lee Jones was stabbed over sixty times with a knife, creating doubt that Jerry Jones would not have heard the crime being committed. Id.⁴

The Ninth Circuit concluded that the evidence was sufficient to support the element of premeditation, although the question is “quite close.” Id. at 564. The Court observed that “the mere fact that the stabbing must have taken at least some period of time is not itself enough to support an inference of premeditation.” Id. (citing State v. Bingham, 105 Wn.2d 820, 719 P.2d 109 (1986)). However, because no one in the Jones household had seen the fishing knife prior to the murder and such a knife would not ordinarily be found in a bathroom, the Court determined that a reasonable juror could conclude that the crime involved a planned procurement of a weapon. Id.

Here, Tasha Mitchell testified that when Boyd returned to the apartment, he was drunk and wanted to see his daughters. She let him in because he kept beating on the door. 2RP 136. Boyd sat down at the end

⁴ Jones v. Wood, 114 F.3d 1002, 1004-05, (9th Cir.1997)(“Jones I”), contains more facts which state that Jones testified that he was in the master bedroom preparing to take a shower while his wife was taking a bath. He heard her scream and ran into the hallway where he saw a man with a knife coming out of the bathroom. Jones swung at the intruder who pushed him and he hit his head against the wall. He was not certain if he lost consciousness but when he recovered, he went to the bathroom where he found his wife bleeding profusely.

of the couch and they were talking for about fifteen minutes while she laid on the couch. 137, 159. When Boyd kept asking her for money, she told him it was time for him to leave:

Q. And what was his reaction to that?

A. I don't -- his reaction was he wasn't leaving.

Q. Was he still in the same kind of boisterous condition that he was in when he first got there?

A. No, because he was sitting down.

Q. And when he wouldn't leave when you asked him to leave, wouldn't leave, what did you do?

A. He started getting louder and louder.

Q. And what did you tell him?

A. "Josh, you need leave. Josh, please, you need to leave. You need get out." And finally I just finally yelled, "You need get the fuck out of here."

Q. And what did he do at that time?

A. He jumped up, put on his coat and stood over me while I was laying down and just started just stabbing me.

Q. Do you know what he was stabbing you with?

A. A knife.

Q. Do you know where he stabbed you?

....

A. My neck, my finger, my wrist, my knee, and my chest.

Q. Was he saying anything to you at this time?

A. I don't remember.

Q. What did you do as he stabbed you at this time?

A. Just trying to cover myself. And I think I was screaming, but I can't -- I can't remember what's going on.

....

Q. From the time that the stabbing started to when it stopped, how long did that whole thing take?

A. Maybe ten seconds, 15.

2RP 138-39, 145.

Tasha said that when Boyd put on his coat, he took the knife out his pocket. She recognized the knife because she saw him with it before, "I know he's had that knife for a while." 2RP 140.

In considering the relevant characteristics of motive, procurement of a weapon, stealth, and method of killing, the evidence fails to establish premeditation. Unlike in Jones, where no one had seen the fishing knife before, Tasha's testimony substantiates that it was not unusual for Boyd to be carrying his folding knife in his pocket, consequently negating any inference of a plan. Significantly, Tasha was stabbed five times within ten to fifteen seconds, while Lee Jones was stabbed over sixty times and the

Court concluded that the fact that the stabbing took some period of time did not support an inference of premeditation. Unlike in Sargent, where Lori Sargent was not looking when she was struck and an interval of time passed between the two blows, according to Tasha, Boyd kept stabbing her while she tried to protect herself. She never testified that he paused at any time. Furthermore, Tasha's injuries were not life-threatening. 4RP 406-07, 417-18.

Importantly, Boyd was at the apartment earlier in the day without incident. According to Tasha, Boyd came over in the afternoon to play with the children and she and Boyd had two or three beers. 2RP 133-35, 149, 152. Terrence Mitchell testified that Boyd came over to visit Tasha and "everything seemed normal." 2RP 208. Dominique Nason noticed Boyd sitting on the couch with his daughters. 2RP 178. Cheryl Mitchell saw Boyd and Tasha in the bedroom with their daughters who were playing. 2RP 103. The record substantiates that when Boyd returned to the apartment, he was drunk and provoked when Tasha yelled at him "to get the fuck out of here," and he stabbed her in the heat of the moment. The stabbing lasted ten to fifteen seconds but "mere opportunity to deliberate is not sufficient to support a finding of premeditation." Pirtle, 127 Wn.2d at 644. "[S]tanding alone, multiple wounds and sustained

violence cannot support an inference of premeditation.” Ortiz, 119 Wn.2d at 312.

Even when viewing the evidence in the light most favorable to the State, the evidence fails to show that Boyd acted with “the deliberate formation of and reflection upon the intent to take a human life.” State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). Reversal and dismissal is required because no rational trier of fact could have found the essential element of premeditation beyond a reasonable doubt.

2. THE TRIAL COURT ERRED IN FAILING TO VACATE THE ASSAULT IN THE FIRST DEGREE CONVICTION THEREBY VIOLATING BOYD’S CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY.

Remand for resentencing is required because the trial court erred in failing to vacate the assault in the first degree conviction thereby violating Boyd’s constitutional right against double jeopardy.

The fifth amendment to the United States Constitution provides “[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . .” Similarly, article I, section 9 of the Washington Constitution provides “[n]o person shall be . . . twice put in jeopardy for the same offense.” Washington’s double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. In re Personal Restraint of Percer, 150 Wn.2d 41, 49, 75 P.3d 488

(2003)(citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)).

Both prohibit “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.” Percer, 150 Wn.2d at 48-49 (citing State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000)).

In State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2006), the State charged Womac with homicide by abuse, felony murder in the second degree, and assault of a child in the first degree for the death of his infant son. A jury found Womac guilty as charged and the trial court entered judgment on all three counts. Id. at 647-48. Womac moved to dismiss counts II and III, claiming dismissal was necessary to avoid a double jeopardy violation. The State asked that the charges and verdicts on counts II and III remain in place until Count I had survived postsentence challenges. The trial court determined double jeopardy did not require dismissal of counts II and III and left both convictions on Womac’s record. Id. at 648.

On appeal, this Court directed the trial court to “conditionally dismiss Counts II and III,” allowing reinstatement should Count I later be reversed, vacated, or otherwise set aside. The Washington Supreme Court reversed this Court’s order to conditionally dismiss counts I and II and

directed the trial court to vacate Womac's convictions for felony murder and assault in the first degree, emphasizing that "conditional dismissal of Womac's lesser charges and verdicts, allowing for reinstatement if the greater verdict and sentence are later aside, is entirely without merit." Id. at 649, 658. The Court concluded that the trial court cannot enter multiple convictions for the same offense without offending double jeopardy. Id. at 658.

At sentencing here, the presented an order which allowed the State to bring a motion "to resurrect or bring back the assault first degree count" if the first degree attempted murder conviction was dismissed on appeal. 4RP 562-63. The trial court questioned the order, citing State v. Womac:

THE COURT: I am just not sure if the language of this is appropriate. I had the Womac case that went up to the State Supreme Court where they had -- I had not sentenced him on one of the inferior degree offenses, and they said we couldn't -- we could not let it sort of hang out there and resurrect itself in the event the other count was vacated.

4RP 563.

The court decided not to sentence Boyd on the first degree assault conviction and instructed the State to "take a look at and maybe talk to your appellate unit regarding the issue." 4RP 572. The judgment and sentence does not include the first degree assault conviction and the record contains no further order pertaining to the conviction. CP 115-30.

Under Womac, the trial court erred in failing to vacate the first degree assault conviction thereby violating Boyd's constitutional right against double jeopardy. Resentencing is required for the court to unconditionally vacate the assault conviction in accordance with the Supreme Court's holding.

3. THE TRIAL COURT ERRED IN IMPOSING A SENTENCE WHICH EXCEEDS THE STATUTORY MAXIMUM WHEN THE TERM OF CONFINEMENT IS COMBINED WITH THE TERM OF COMMUNITY CUSTODY.

The trial court sentenced Boyd to 54 months in confinement and 12 months of community custody for his conviction of violation of a domestic violence court order. A remand for resentencing is required because the sentence exceeds the statutory maximum of 5 years contrary to RCW 9.94A.701(8), effective August 1, 2009, which requires the trial court to reduce the term of community custody whenever an offender's term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.

Last year, the Legislature passed Engrossed Substitute S.B. 5288, 61st Leg., Reg. Sess. (Wash.2009), effective August 1, 2009, amending RCW 9.94A.701 and adding 9.94A.701(8) which provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with

the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

LAWS of 2009, ch. 375, section 5.

Accordingly, pursuant to RCW 9.94A.701(8), Boyd's sentence must be amended to reduce the term of community custody so as to ensure that he will not serve a sentence beyond the statutory maximum.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Mr. Boyd's first degree attempted murder conviction and remand for resentencing.

DATED this 26th day of May, 2010.

Respectfully submitted,

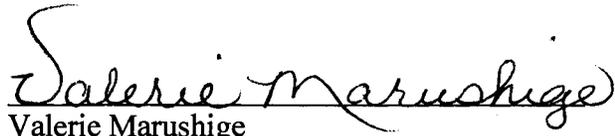

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Joshua Elias Boyd

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Joshua Boyd, DOC # 737554, Unit G, Tier E, Cell 119, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington 99362-8817.

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

DATED this 26th day of May, 2010 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

FILED
COURT OF APPEALS
MAY 27 2010
10 MAY 27 PM 12:50
STATE OF WASHINGTON
BY 