

NO. 41960-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH PARK,

Appellant.

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

The Honorable Stephen Warning, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence at trial was insufficient to prove the element of premeditation for Murder in the First Degree.

Issue Pertaining to Assignment of Error

Premeditation requires proof the accused deliberated before acting on his design to kill. In appellant's case, the State provided no evidence of a plan to kill the victim the night of his death. Evidence showed the victim arrived unexpectedly at appellant's house and remained there for a time before the killing occurred. Three people witnessed the killing and the incident was reported to police by the appellant himself. Where the killing was not "stealthy" and did not involve a prolonged process of causing death is the evidence sufficiently substantial to support a finding of premeditated murder?

B. STATEMENT OF THE CASE

1. Procedural History

The Cowlitz County prosecutor charged appellant Jeremiah Park with one count each of first degree premeditated murder with a deadly weapon, intimidating a witness, and possession of heroin. CP 8-10, 18-20, 40-42.

Park pled guilty to the possession charge prior to trial. 4RP 3, 8, 10.¹ The trial court denied Park's motion to dismiss the murder charge for insufficient evidence of premeditation following the State's case in chief. 6RP 171-73.

A jury found Park guilty of first degree premeditated murder and intimidating a witness. CP 127, 131. The jury returned special verdicts finding Park was armed with a deadly weapon and "displayed an egregious lack of remorse" during the murder. CP 126, 134. The jury also returned a special verdict finding Park attempted to induce a witness not to "report information relevant to a criminal investigation." CP 135.

Park was sentenced to a standard range of 380 months in prison, plus a consecutive 24 months for using a deadly weapon. CP 136-145; 9RP 35-36. Park timely appeals. CP 146.

2. Trial Testimony

Joseph Gemar was a heroin addict. 7RP 14. On February 19, 2010, he went to Park's house determined to get high on heroin. 4RP 93, 102, 166; 6RP 35-36. Rachel Samuels was at Park's house when Gemar

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – September 2, 9, and 16, 2010; 2RP – September 23, and 28, 2010, October 19, 2010, February 16, 2011; 3RP – February 28, 2011, March 1, 2011; 4RP – March 2, 2011; 5RP – March 3, 2011; 6RP – March 7, 2011; 7RP – March 8, 2011; 8RP – March 9, 10, 2011; 9RP – March 29, 2011.

arrived. Samuels testified Park invited Gemar, Ashley Jorgensen, and Cody Wade to his house at 230 21st Avenue. 4RP 86-88, 95, 152, 158-59.

Gemar was intoxicated when he arrived 30 minutes before Wade or Jorgensen. 4RP 92-93, 163; 5RP 83, 96, 155. Samuels said Park “seemed normal” and he and Gemar were “cool with each other.” 4RP 91-93. Samuels described Gemar as “drunk and arrogant” and said he twice groped her breast. 4RP 97-98, 164-65. Park told Gemar he could “mess with him” instead of Samuels. 4RP 99. In response, Gemar jokingly pinned Park to the bed and simulated sexual intercourse with him for approximately one minute. Gemar let Park up when asked. Samuels said Park was embarrassed but not angry by Gemar’s behavior. 4RP 94, 99-100, 165.

Gemar answered the door when Wade and Jorgensen arrived. 5RP 79-81, 153-55. Wade said Park was in a good mood when they went to his bedroom to discuss drugs. Wade said everyone was in the bedroom for approximately 15 minutes. 5RP 156-57. Gemar repeatedly and belligerently asked Park for heroin. 4RP 104, 169; 5RP 98-99. Park told Gemar he would get heroin if he went to the store and bought Park food first. Gemar became angry and offered to get food after he got high. When Park refused, Gemar pushed and head butted Park. Park pushed Gemar back. 4RP 102-05, 169; 5RP 99-102, 124-25, 158-160.

Wade separated Park and Gemar and followed Park when he walked to the kitchen. Wade said Park appeared mad after the head butt and said, "I can't believe he'd [Gemar] disrespect me like that in my own house." 5RP 110, 113, 162-63; 6RP 22-23. Park reentered the bedroom less than two minutes later. 4RP 108. Jorgenson testified Park had no obvious change in demeanor. 5RP 107. Samuels said Park had a normal "blank face" when he returned to the bedroom. 4RP 109. Samuels said Park walked to Gemar and tackled and hit him. 4RP 111, 172. Wade said Park and Gemar appeared to only be wrestling and he saw "no punches being thrown." 5RP 167-68; 6RP 37-38. Park did not say anything. 4RP 110, 112; 5RP 107, 167. No one saw a weapon in Park's hands. 4RP 110; 5RP 108, 164.

Samuels said the fighting lasted "a few minutes." Gemar asked Park to stop and sounded like he was in pain. 4RP 112, 172. No one tried to separate Park and Gemar. 4RP 112. Gemar ran out of the bedroom and left the house through the front door. 4RP 113; 5RP 169. No one saw blood on Gemar. 4RP 116. Wade and Jorgensen had "no idea" Gemar had been stabbed. 5RP 115, 171. Wade exchanged drugs with Park before leaving the house with Jorgensen. 4RP 113-14, 170; 5RP 170; 6RP 26.

Samuels testified Park was panicked but not angry with Gemar after the incident. 4RP 116-17, 121. Samuels later told police Park said he “shanked that mother-fucker.” 4RP 149. Park cut bloodied portions off a blanket in his bedroom and changed his clothing. 7RP 22-24, 44-45, 69. Samuels did not recall seeing blood on Park’s clothing. 4RP 116, 144. Park asked Samuels to get rid of drug paraphernalia in the house. 4RP 117; 7RP 22-24, 44-45, 69. Park retrieved a knife from the kitchen and cut his arm. 4RP 119-120; 7RP 25, 34-35. Park told Samuels to tell police his arm had been cut during an attempted robbery of the house. 4RP 122-23. Samuels told police Park told her, “you better do what I tell you to,” and “don’t say anything or you’re gambling with your family and you.” 5RP 52.

Park took six or seven Valium pills and called 911. 7RP 25, 68. Park told police an unknown person pushed in his front door, demanded his property, and brandished a knife. 7RP 25-26, 32, 104-09. Park said the knife cut his arm during a scuffle with the person. Park did not mention whether the person had been injured and told police he did not know where the person went. 7RP 104-09.

Lindsey Piekkola called 911 when Gemar collapsed on her porch at 297 20th Avenue. 4RP 25-28. Gemar died at the hospital at 11:42 p.m.

6RP 123. Police claimed Park had no visible reaction when told Gemar died. 7RP 129.

Medical examiner Clifford Nelson testified Gemar had a triangular knife wound in his neck, cuts on his face, and a knife wound in his left chest which caused Gemar to bleed to death. 6RP 141-44, 155-58. Nelson could not identify the type of knife responsible for the wounds but said it was no wider than five-eighths of an inch. 6RP 146-47. The same knife could have caused all of Gemar's wounds. 6RP 159.

Nelson testified Gemar's injury was not immediately incapacitating and Gemar was able to move until he went into shock from blood loss. 6RP 156-57. Nelson said Gemar would have required extremely rapid medical attention to survive. 6RP 155. Gemar had no defensive wounds on his hands. 6RP 161.

Police found several knives during a search of Park's house, including one in a picture frame in the hallway. 6RP 94, 129. No blood was found on any knives and police could not identify the murder weapon. 6RP 43, 130.

Park admitted he knew Gemar before the incident but testified he had not invited him over that particular evening. 7RP 13, 31, 37. Gemar put Park in a stranglehold when he tried to physically remove Gemar from his house. 7RP 18-19. Afraid of Gemar, Park retrieved a paring knife

from the kitchen and went to the bedroom and asked Gemar to leave. 7RP 19-21. Park said he retrieved the knife and reentered the bedroom within 30 seconds. 7RP 88.

In the bedroom Gemar came toward Park to attack so Park stabbed him. Park stabbed Gemar again when he came at Park a second time. 7RP 21-22. Park said he did not intend to kill Gemar, but stabbed him because he was afraid and did not want to get hurt anymore. 7RP 22, 26-27. After the incident Park threw the knife away. 7RP 42, 58, 68. Park testified approximately 10 minutes passed from the time Gemar arrived at his house to the time he left after the incident. 7RP 87-88.

Park said Gemar did not have a weapon during the incident, and admitted he cut his own arm. 7RP 34-37. Park said he was not truthful with police about what happened during the incident. 7RP 36, 86. Park denied threatening Samuels but admitted he probably asked her to corroborate the story he told police. 7RP 24, 40-41.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO PROVE
PREMEDITATION

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90

S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

A person is guilty of Murder in the First degree when “[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.]” RCW 9A.32.030(1)(a).² Premeditation must involve “more than a moment in point of time.” RCW 9A.32.020(1).³ Mere opportunity to deliberate is insufficient to support a finding of premeditation. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). Rather, premeditation requires

² The jury instructions defined murder in the first degree as follows: “A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he causes the death of such person unless the killing is justifiable.” CP 96.

³ The jury instructions defined premeditation as follows: “Premeditated means thought or 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.” CP 97.

“the deliberate formation of and reflection upon the intent to take a human life,” and involves the “mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). There must be some evidence to show reflection apart from the commission of the fatal act itself. Bingham, 105 Wn.2d at 827-28. “[S]tanding alone, multiple wounds and sustained violence cannot support an inference of premeditation.” State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992).

Premeditation may be proved with circumstantial evidence, but only 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, cert. denied, 516 U.S. 843 (1995). In determining whether there is sufficient evidence of premeditation, courts look to evidence of four factors: (1) motive, (2) procurement of a weapon, (3) stealth, and (4) method of killing. Pirtle, 127 Wn.2d at 644.

The State provided no evidence of a plan to kill Gemar the night of his death. Park testified Gemar arrived unexpectedly at his house. The evidence shows Gemar was at the house between 10 and 45 minutes before the incident occurred. Samuels said Park “seemed normal” and he and Gemar were “cool with each other.” Nonetheless, the State alleged

the killing was motivated by Park's anger and embarrassment resulting from Gemar's behavior. But, Park testified he did not intend to kill Gemar and the incident only occurred because he was afraid and Gemar refused to leave the house.

Regarding the second factor, although Park took a knife from the kitchen to his bedroom there is no evidence the knife was readily accessible or particularly lethal. Indeed, police could not identify the murder weapon. Police found several other knives in Park's house, one of which was in the hallway and closer to Park's bedroom.

In Ortiz, a knife taken from the kitchen and used to commit murder in the bedroom supported a finding of premeditation. Ortiz, 119 Wn.2d at 312-313. However, this was but one of many pieces of evidence providing sufficient proof of premeditation in that case. Notably, unlike Park's case, the victim in Ortiz was also struck in the face with another object, and had defensive wounds, indicating a prolonged struggle with her killer. Ortiz, 119 Wn.2d at 297, 312-313.

Third, the killing was not stealthy. Gemar remained at the house for a time before the killing occurred. Moreover, Samuels, Wade, and Jorgenson were present in the bedroom and witnessed the incident. Inconsistent with premeditation, Park also called 911 to report the incident.

Finally, the evidence did not reveal a prolonged, and therefore premeditated, process of causing Gemar's death. The incident lasted only a few minutes. Gemar was not attacked from behind and did not have defensive wounds. Park did not prevent Gemar from leaving the house and called 911 to report the incident. Nelson testified Gemar's injuries were not immediately incapacitating and possibly survivable had Gemar received rapid medical attention.

In short, the State's evidence of premeditation was not substantial. It falls well short of the evidence in other cases deemed sufficient by the Washington Supreme Court. In each of those cases, it was apparent the killing was truly the product of deliberation and reflection. See, e.g., State v. Gregory, 158 Wn.2d 759, 811-812, 817, 147 P.3d 1201 (2006) (victim stabbed multiple times, hands tied behind her back, raped, and throat slashed multiple times); Pirtle, 127 Wn.2d at 644-45 (multiple motives, taking weapon to scene, waiting for opportunity, rendering victims unconscious, cutting victims' throats, and then cutting one victim's throat a second time to finish her off); State v. Ollens, 107 Wn.2d 848, 849-853, 733 P.2d 984 (1987) (robbery motive, use of knife brought to scene, evidence victim struck from behind, numerous defensive wounds, multiple stab wounds, and subsequent slashing of throat).

In State v. Gentry, 125 Wn.2d at 598-599, the Supreme Court summarized the evidence in several Court of Appeals cases where the evidence also was found sufficient to support premeditation. These cases similarly bear little resemblance to the established facts at Park's trial because of their obvious evidence of deliberation and reflection. See State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992) (victim shot three times in the head, two times after he had fallen on the floor), rev. denied, 120 Wn.2d 1022 (1993); State v. Massey, 60 Wn. App. 131, 803 P.2d 340 (defendant brought a gun to murder site), rev. denied, 115 Wn.2d 1021 (1990); State v. Woldegiorgis, 53 Wn. App. 92, 765 P.2d 920 (1988) (victim had gone to bed prior to the attack, was stabbed multiple times, had defensive wounds), rev. denied, 112 Wn.2d 1012 (1989); State v. Longworth, 52 Wn. App. 453, 761 P.2d 67 (1988) (weapon procured and victim stabbed in back while being held by another to keep her from reporting a burglary), rev. denied, 112 Wn.2d 1006 (1989); State v. Gibson, 47 Wn. App. 309, 734 P.2d 32 (lapse of time between beating and strangling of victim), rev. denied, 108 Wn.2d 1025 (1987); State v. Bushey, 46 Wn. App. 579, 731 P.2d 553 (victim tied, strangled, and received blunt injuries to her face), rev. denied, 108 Wn.2d 1014 (1987); State v. Giffing, 45 Wn. App. 369, 725 P.2d 445 (victim transported some distance to an isolated spot and killed; defendant approached her from

behind and slit her throat after stabilizing her), rev. denied, 107 Wn. 2d 1015 (1986); State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985) (victim struck by two blows to the head, with some interval passing between the blows, while she was lying face down).

No evidence of premeditation appears here, such as prior threats, evidence of planning, or a method of death proving deliberation. Evidence of premeditation was insufficient to support the jury's verdict. Accordingly, Park's conviction for first-degree premeditated murder should be reversed.

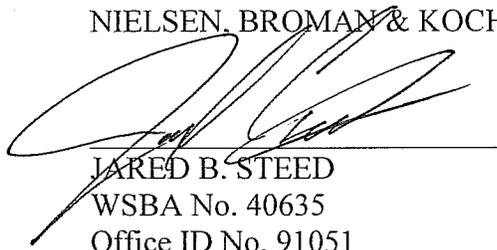
D. CONCLUSION

Because the evidence is insufficient to establish premeditation beyond a reasonable doubt, Park is guilty of no more than Murder in the Second Degree and his current conviction must be vacated.

DATED this 31st day of October, 2011.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCTOBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JEREMIAH PARK
DOC NO. 836010
WASHINGTON STATE PENITENTIARY
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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2011.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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