

NO. 41960-2-II
Cowlitz Co. Cause NO. 10-1-00189-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH JOSHUA PARK,

Appellant.

RESPONDENT'S BRIEF

SUSAN I. BAUR
Prosecuting Attorney
MICHELLE L. SHAFFER/WSBA# 29869
Chief Criminal Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

	PAGE
A. ANSWER TO ASSIGNMENT OF ERROR	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	26
THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY FINDING ON THE CHARGE OF PREMEDITATED MURDER IN THE FIRST DEGREE.	26
1. STANDARD OF REVIEW.....	26
2. DEFINITION OF PREMEDITATION.....	27
3. PROOF OF PREMEDITATION.....	29
4. ILLUSTRATIVE CASES.....	30
5. PARK'S ARGUMENT.....	37
D. CONCLUSION.....	47
APPENDIX A.....	i
APPENDIX B.....	iii

TABLE OF AUTHORITIES

Page

CASES

<i>Austin v. United States</i> , 382 F.2d 129, 139 (D.C. Cir. 1967).....	46
<i>State v. Allen</i> , 159 Wn.2d 1, 147 P.3d 581 (2006).....	31, 44
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986)..	29, 31, 44, 45, 46
<i>State v. Clark</i> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....	31, 41
<i>State v. Commodore</i> , 38 Wn.App. 244, 684 P.2d 1364, <i>rev. denied</i> 103 Wn.2d 1005 (1984).....	36, 37
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	29
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	28, 29, 30, 41
<i>State v. Giffing</i> , 45 Wn.App. 369, 725 P.2d 445 (1986).....	29, 45
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	26
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	40, 41
<i>State v. Griffith</i> , 91 Wn.2d 572, 589 P.2d 799 (1979).....	45
<i>State v. Harris</i> , 62 Wn.2d 858, 385 P.2d 18 (1963)	45
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	31, 45
<i>State v. Massey</i> , 60 Wn.App. 131, 803 P.2d 340 (1991).....	31
<i>State v. Millante</i> , 80 Wn.App. 237, 908 P.2d 374 (1995).....	32

<i>State v. O’Neal</i> , 159 Wn.2d. 500, 150 P.3d 1121 (2007)	27
<i>State v. Ollens</i> , 107 Wn.2d 848, 733 P.2d 984 (1987).....	41, 44, 45, 46, 47
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	30, 39, 41
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	27
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).	28, 29, 30, 31, 42, 43
<i>State v. Ra</i> , 144 Wn.App. 688, 175 P.3d 609 (2008).....	31
<i>State v. Rehak</i> , 67 Wn.App. 157, 834 P.2d 651 (1992), <i>rev. denied</i> 120 Wn.2d 1022, 844 P.2d 1018, <i>cert. denied</i> 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993).....	34, 35
<i>State v. Ross</i> , 56 Wn.2d 344, 353 P.2d 885 (1960).....	29
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	27
<i>State v. Sherrill</i> , 145 Wn.App. 473, 186 P.3d 1157 (2008)....	30, 31, 32, 33
<i>State v. Shirley</i> , 60 Wn.2d 277, 373 P.2d 777 (1962).....	29
<i>State v. Theroff</i> , 25 Wn.App. 590, 608 P.2d 1254, <i>aff’d</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980)	27
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	27
<i>State v. Tikka</i> , 8 Wn.App. 736, 509 P.2d 101 (1973)	29

STATUTES

RCW 9A.32.020(1).....	28
RCW 9A.32.030(1)(a)	27

OTHER AUTHORITIES

W. LaFare & A. Scott, *Criminal Law* § 73, at 564 (1972)..... 37

A. ANSWER TO ASSIGNMENT OF ERROR

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY FINDING ON THE CHARGE OF PREMEDITATED MURDER IN THE FIRST DEGREE.

B. STATEMENT OF THE CASE

1. Procedural History

The State agrees with the recitation of the Procedural History provided by the appellant Jeremiah Joshua Park.

2. Evidence of Premeditation Presented to the Jury

At around 11:00 p.m. on February 19, 2010, the victim Joseph Gemar was found unresponsive and bleeding to death on a porch a few blocks from Park's house. 4RP¹ 24-35. The owner of the house where he was found called 911. 4RP 26-29. Gemar was transported to St. John Medical Center and was pronounced dead a short time later. 5RP² 67-70.

¹ "4RP" refers to the verbatim report of proceedings on March 2, 2011.

² "5RP" refers to the verbatim report of proceedings on March 3, 2011.

At trial, there was no dispute that Park stabbed Gamar, causing Gamar's death. The jury heard the following evidence of premeditation.

a. Testimony of Officer Michael Berndt

Officer Michael Berndt testified that on the night of the murder he and Detective Brian Streissguth followed the blood trail left by Gamar from the sidewalk in front of the house where Gamar was found to Park's house several blocks away. 4RP 48-49, 82. Park was outside his house when they arrived. 4RP 49-50. On rebuttal, Officer Berndt testified that when speaking to Park in front of his house, Park claimed he had been stabbed by an unknown intruder. 7RP³ 107-09. Park showed Officer Berndt a cut on Park's forearm. 4RP 51. Officer Berndt examined Park and did not observe any other injuries. 4RP 51-52. Officer Berndt cleared the house and searched the area along the blood trail for weapons or other evidence, finding none. 4RP 52-53.

³ "7RP" refers to the verbatim report of proceedings on March 8, 2011.

b. Testimony of Brian Pickering

Brian Pickering testified that he knew both Park and Gemar. 4RP 59. Earlier on the night of the murder, sometime between 4:00 and 6:00, Gemar showed up at Pickering's house with a half gallon of vodka. 4RP 60-62. Pickering, Gemar and two others drank the half gallon. Gemar left the house between 8:00 and 9:00 p.m., appearing intoxicated but happy. 4RP 62-63. After Gemar left, Pickering realized his girlfriend's cell phone was missing. 4RP 63-64.

c. Testimony of Shira Presnell

Shira⁴ Presnell testified that she grew up with both Park and Gemar (who was 28 years old at the time of his death) and saw the two of them hanging out together while they were growing up. 4RP 20, 69-70.

⁴ The transcript indicates this witness's first name is "Tyra"; however, it is Shira. The witness was not asked to spell her first name.

d. Testimony of Rachel Samuels

Rachel Samuels testified she is a heroin addict and that prior to February 19, she had known Park for three years. 4RP 76-77. Three to four weeks before the murder, Samuels and her boyfriend began staying at Park's house. 4RP 79-80. After a couple nights, her boyfriend was arrested, but she continued to stay there. *Id.* Park and Samuels were not romantically involved during this time. 4RP 80.

Samuels testified that she used heroin, valium and methamphetamine on February 19. 4RP 82-83. She used the heroin and valium throughout the day along with Park. 4RP 83-84. She had gotten the heroin and the methamphetamine from Park. 4RP 84. Samuels described feeling "normal", "well" or "high" after using heroin and feeling "dope sick" when she was withdrawing from heroin. 4RP 84-86. When feeling normal, she has a clear mind. 4RP 85. Samuels testified that the drugs do not affect her ability to accurately perceive events but that they would affect her ability to remember events. 4RP 157.

About 30 minutes before anyone else arrived at Park's house, Samuels used heroin again. *Id.* Samuels was feeling "well" and then

Gemar arrived. 4RP 86-87. Before Gemar had gotten there, Park had talked to Gemar on his cell phone and told him to come over. 4RP 88. Fifteen minutes later, Gemar arrived without any sort of disturbance. 4RP 88-89. Samuels described Park and Gemar as appearing as if they knew each other and seeming “cool with each other.” 4RP 91-92. Samuels had never met Gemar before. 4RP 81.

Samuels testified that she, Park and Gemar were hanging out in Park’s bedroom. 4RP 89-91. Park and Gemar talked about Gemar being “sick”, i.e. withdrawing from heroin, although Gemar appeared “well” to Samuels. 4RP 92-93. Gemar also seemed drunk. 4RP 92. Park and Gemar talked about exchanging drugs. 4RP 93. The conversation between Park and Gemar started to become tense. 4RP 94. Gemar was acting drunk and arrogant and playfully grabbed one of Samuels’ breasts. 4RP 97-98. Samuels asked him to stop. 4RP 98. Park saw this and also told Gemar to stop. 4RP 99. Park joked that Gemar could “mess with him” instead. *Id.* Gemar jokingly pinned Park down on the bed and pretended “to hump his rear end.” 4RP 94, 99-100. Park told Gemar to get off him and appeared embarrassed. 4RP 100.

Samuels testified that Cody Wade and Ashley Jorgenson then showed up. 4RP 93. Samuels had never met Wade or Jorgenson before. *Id.* They appeared to know both Park and Gemar. 4RP 97. When Wade and Jorgenson arrived, they appeared friendly but “dope sick.” 4RP 94-95. They spoke to Park and tried to get drugs from him. 4RP 95-96. Gemar was also trying to get drugs from him, asking Park to “hook him up.” 4RP 101-02. Park would tell Gemar to hold on, then Gemar would drop the issue for a while and then bring it up again. 4RP 102. Park finally agreed to give Gemar heroin but told Gemar that Gemar needed to go to the store for him first. 4RP 102-03. Park wanted groceries in exchange for the drugs. 4RP 103. Gemar said he wanted the heroin before he would go to the store. *Id.* The two men went back and forth over who was going to do what first. 4RP 103-04. The exchange was friendly at first but then Gemar head-butted Park twice. 4RP 104-05.

Samuels testified that she and Jorgenson were telling Gemar to calm down and that he would get the drugs. 4RP 106-07. Gemar sat down on the bed and calmed down. 4RP 107. Samuels was standing, and Jorgenson was sitting next to Gemar. *Id.* Park and Wade were still in the bedroom. 4RP 108. Park appeared normal and then left the

bedroom for no more than two minutes. *Id.* While Park was out of the room, Gemar apologized to Samuels and Jorgenson and appeared upset or “drunk sad.” 4RP 109-10. Gemar had his head between his legs and was sobbing, saying that he and Park were good friends. 5RP 22-23.

Samuels testified that Park then came back into the bedroom with a blank stare on his face. 4RP 109. Samuels did not see any weapon. 4RP 110. Gemar apologized to Park, and Park indicated he accepted the apology. 5RP 20-21. Park walked straight over to Gemar, who was still sitting on the bed. 4RP 110-11. Park jumped on Gemar, tackling him on the bed, and Samuels testified that it appeared Park was hitting Gemar on the right-hand side. 4RP 111. Gemar asked Park to stop and asked why he was doing this. 4RP 112. Gemar’s voice sounded like he was in pain. *Id.* Park then jumped off of Gemar, and Gemar limped out of the bedroom. 4RP 113. Samuels saw blood on the blanket on the bed. 4RP 116. Samuels later noticed the back door was open. 4RP 113. Park gave the heroin to Wade and Jorgenson, who then left the house. 4RP 113-15.

Samuels testified that she was in shock and stayed in the bedroom for a time. 4RP 115. Samuels asked Park why he did that, and Park said,

“I shanked that mother-fucker.” 4RP 149. Eventually, she and Park ended up in the living room. 4RP 116. Park was pacing between the kitchen and the living room. 4RP 117. Samuels hid the drug paraphernalia. 4RP 117-18. Samuels testified she had her purse with her at the house but that it disappeared shortly after the murder. 4RP 118-19. While she was in the living room, Samuels saw Park walk from the kitchen into the living room carrying a knife. 4RP 119-20. Samuels then watched as Park purposely cut his own arm with the knife. 4RP 120. Park had Gemar’s cell phone and broke it apart. 4RP 138. Park then called 911 on his own phone and spoke to the operator in a normal voice. 4RP 121. Park then told Samuels a false story that she was to tell the police when they arrived. 4RP 122-23. Park told her the story at least three times. 4RP 123. The police arrived within five to ten minutes, and Park and Samuels went outside to talk with them. 4RP 122-23.

Samuels testified that with Park nearby watching, she wrote out a statement for the officers, telling them the false story that Park had insisted she tell them. 4RP 124-25. Samuels was about to sign the statement, but the officer told her that she would be signing it under penalty of perjury. 4RP 125. Rather than sign it, Samuels asked for a

new statement form. *Id.* The officer took her to the police department's satellite office where she then wrote out a new, truthful statement for the officer. 4RP 125-26. At a later date, Samuels went to the police station to retrieve her purse and made another written statement for a detective there. 4RP 136-37, 139-40, 146-47.

At trial, Samuels was able to identify a photo of a blanket with a piece cut out that the police had recovered when searching Park's house. 4RP 138-39; 5RP 17. Samuels testified the blanket did not have any pieces cut out of it at the time of the murder. 4RP 139. Samuels also testified that her memory of the events was better when she wrote the two truthful statements for the police than it was at trial over a year later. 4RP 161. Samuels also testified that her memory of the events was affected because she was suffering from post-traumatic stress disorder due to what she had witnessed. 4RP 170-71.

e. Testimony of Detective Brian Streissguth

Detective Brian Streissguth testified that on February 19, he and Officer Berndt followed the blood trail left by Gemar from the sidewalk in front of the house where Gemar was found to Park's house several blocks

away. 5RP 26-30. While following the trail, he received word that someone had also called 911 from 230 21st Avenue, where the blood trail was leading (Park's house).. 5RP 29. When they arrived at Park's house, Detective Streissguth saw Park pacing between the gate and the front of the house, shirtless, holding a tee shirt in his hands. 5RP 31, 33. Streissguth had previously been to the house and noticed the broken front door was in the same condition as when he had seen it previously. *Id.* Park walked up to the gate to speak with the officers. 5RP 34.

Detective Streissguth testified that he also saw Samuels coming out of the house. *Id.* He had Park sit on the retaining wall in front of the house and sent Samuels to the end of the street so that each would not hear the other's discussion with him. 5RP 34-35. Detective Streissguth observed the cut on Park's arm. 5RP 35. There were no visible injuries to Park's head. 5RP 36. Detective Streissguth went back and forth between Park and Samuels, talking to each of them. 5RP 37. Park was very calm and was playing with his cell phone, possibly sending text messages. 5RP 37-38, 62. Samuels appeared shocked. 5RP 38.

Detective Streissguth asked Samuels to give a written statement and left her to do so while he assisted the other officers. 5RP 38-39.

When he returned, Samuels had some questions regarding the perjury language at the bottom of the statement form so Detective Streissguth read the perjury language to her and explained what it meant. 5RP 41-42. Samuels then looked up at him, said, "It's all a lie, it's all made up", and started crying. 5RP 42. She told him that she was afraid Park would see her talking with him. 5RP 43. She said she was afraid for her and her family's safety. *Id.* Samuels said she wanted to write a new statement. 5RP 44. Park was taken to the police department for an interview, and Detective Streissguth took Samuels to the satellite office to complete her new written statement. 5RP 45. While at the satellite office, Detective Streissguth also conducted a recorded interview of Samuels. 5RP 46. Samuels told him that while Park was cleaning up the crime scene before the police arrived, he said "something about he shouldn't have made me a punk, make me feel like a punk..." 5RP 65.

In her second written statement, Samuels stated that after the stabbing, she saw blood on Park, on Gemar and on the blanket. 5RP 51. Samuels also wrote that after Wade and Jorgenson left, Park threatened her by saying "Don't say anything or you're gambling with your family

and you.” 5RP 51-52. Samuels also wrote that after Wade and Jorgenson left, Park:

... took a razor blade out and cut off a square from his blanket full of blood. Then he ended up taking the whole blanket out of there. He had blood all over this clothing. He stripped down. I didn't see where he put the knife. He put the bloody objects in a white trash bag before he called 911. He took the knife and cut his left arm and tried poking his stomach.

5RP 52. Samuels also wrote that after calling 911, Park grabbed her face, looked her in the eyes and said, “You better do what I tell you to do.” *Id.* Detective Streissguth testified that he told Samuels at the satellite office that Gemar had died, and she broke down crying 5RP 53.

On rebuttal, Detective Streissguth testified that when interviewing Park in front of his house, Park claimed he was attacked by an unknown intruder. 7RP 112-14. Park told him that Wade and Jorgenson had not seen the incident because they had shown up afterward; however, he claimed not to know their last names or how the officers could get in touch with them. 7RP 116.

f. Testimony of Ashley Jorgenson

Ashley Jorgenson testified she is a 23-year-old heroin addict. 5RP 78-79. She had known Park for three years and was hanging out with her

boyfriend Cody Wade on the night of the murder. 5RP 79-80. On that night, she and Wade drove to Park's house and knocked on the back door, which was answered by Gemar whom she had known since she was 15 years old. 5RP 80-82. Gemar was drunk but friendly and let them in the house, where Park and Samuels also were. 5RP 83. Jorgenson and Wade were there to buy heroin, since they had not had heroin in two days and were "dope sick". 5RP 91-93. Jorgenson and Wade went inside and Jorgenson introduced Wade to Gemar in the living room since they had not met before. 5RP 94. Jorgenson went into the bedroom where Samuels was. 5RP 95. Samuels told Jorgenson she was high on heroin and appeared so. 5RP 97. Park did not appear under the influence of anything. *Id.*

Gemar was also in the bedroom. 5RP 95. Jorgenson testified that Gemar wanted to get high and started raising his voice. 5RP 98. While Jorgenson was sitting on the bed talking to Samuels, Gemar stood in front of her, grabbed Park's shirt and said "Get me high, get me high, you know, I want to get high." 5RP 99. Jorgenson turned to talk to Samuels and then heard what sounded like two hard objects colliding. 5RP 99-100. She looked and saw that Gemar was head-butting Park and shaking

him by the shirt. 5RP 100, 124. Gemar and Park then broke apart, and Gemar did not look badly injured. 5RP 102.

Jorgenson asked Gemar to sit down next to her and calm down. *Id.* He did calm down but kept talking about wanting to get high. *Id.* Jorgenson testified Park wanted Gemar to go to the store and would get him high when he got back. *Id.* Jorgenson and Samuels were sitting next to Gemar and were telling him to just go to the store first and “then you can come back and you can enjoy it.” 5RP 102-03. Gemar kept saying he wanted to get high first, and the women kept suggesting he go to the store first. *Id.* Gemar was getting frustrated but was not being physically aggressive with anyone at this point. 5RP 103-04, 107.

Jorgenson testified she then saw Park walk in front of her. 5RP 107. He walked toward Gemar who was still sitting on the bed. 5RP 108-09. Park “came at” Gemar, and Jorgenson figured they were going to start wrestling around. 5RP 109-10. Gemar did not stand up from the bed; rather, Park and Gemar “laid down” or “laid back”, like “when you’re wrestling and you’ve got one person on top”. 5RP 111-13. Jorgenson jumped up, and her boyfriend Wade pulled her out of the room into the kitchen. 5RP 108, 110. Jorgenson and Wade left the house through the

back door. 5RP 115. Before leaving, she noticed the front door was open. 5RP 114. Jorgenson and Wade then used heroin. 5RP 116. Jorgenson was interviewed by the police early the next morning. 5RP 115.

g. Testimony of Detective Charles Davis

Longview Police Detective Charles Davis testified that he and Detective Streissguth interviewed Rachel Samuels at the Longview Police Department three days after the murder. 5RP 132. He also asked Samuels to write another statement clarifying some details of what she had observed. 5RP 133-136. In the written statement, Samuels said that after the stabbing, she saw blood all over Park's clothes. 5RP 136. Samuels also said Park "... looked at me and said cut the blood off the blanket, you have to help me clean up. And I said no. Then I was walking towards my purse because my phone is inside. [Park] got to my purse first." 5RP 137. She said Park "... grabbed a kitchen knife and cut his left arm, then tried to cut his stomach but he couldn't do it. [Park] went to his bedroom and began to clean up the wolf comforter where the blood was. He cut a square out of the blanket. Then [Park] decided to throw away the whole

thing. [Park] changed his bloody clothes because it was Gemar's blood not his blood on the outfit he was wearing." *Id.* Samuels said "[Park] came up to [her] while [she] was on the couch and grabbed [her] face with his two palms and said: You better say everything I tell you or else bad stuff happens" and "You must repeat everything I told you to say ... or else it's not going to be good for you and your family." 5RP 137-38.

h. Testimony of Cody Wade

Cody Wade testified he is a 21-year-old heroin addict who had been a friend of Park for five or six years and used to live with him at Park's mother's house. 5RP 147, 151-52; 6RP⁵ 27. On the night of the murder, Wade was hanging out with his girlfriend Ashley Jorgenson. 5RP 152. They were "dope sick" and called Park to let him know they were coming over to get drugs. 5RP 152, 154. When they got to Park's house, they knocked on the back door, and Gemar answered. 5RP 155. Wade did not know Gemar, but Jorgenson did. *Id.* Gemar appeared drunk and friendly. 5RP 155-56. Once in the house, they went into the bedroom. 5RP 156. Wade, Jorgenson, Park (who was in his underwear),

⁵ "6RP" refers to the verbatim report of proceedings on March 7, 2011.

Gemar and Samuels were all in the bedroom. 5RP 156, 161. Park and Samuels both seemed to be in a good mood and both seemed to be under the influence of heroin. 5RP 157. Gemar was flirting with Samuels. 6RP 16-17.

Wade testified that Gemar was trying to get drugs from Park, who told him to walk to the store first. 5RP 158. At first, Gemar was acting normal but then when Park told him to go to the store, Gemar got angry. *Id.* Gemar was being obnoxious and saying “you’re really not going to get me high, I really have to walk to the store first...” 5RP 159. Gemar walked over to Park, got in his face and then head-butted him. 5RP 160. Park got mad and pushed Gemar back against the door, and Wade got between the two of them. *Id.*; 6RP 20-21. Park told Gemar “to stop, that he’d get him high, just chill out.” 6RP 21. Park put his pants on and went into the living room and then into the kitchen. 5RP 160-61, 163. Wade followed Park to make sure he was alright and to “[t]ry and help him out to cool off.” 6RP 9. Wade had no concerns leaving his girlfriend Jorgenson in the room with Gemar and Samuels. 5RP 164.

Park seemed mad and was pacing back and forth saying “I can’t believe he disrespected me like that in my own house.” 5RP 162; 6RP

23. While in the kitchen, Wade told Park “just calm down, let it go...” 5RP 164-65. They were in the kitchen for a couple minutes. 5RP 165. Park began to calm down. 6RP 23. Wade told Park “just to cool off, it’s time to leave or something and [Park] said: Yeah, that’s what I’m going to do.” 6RP 24. Wade told Park “not to do anything stupid, just tell him to leave.” *Id.* Park then left the kitchen and walked back to the bedroom with Wade following. 5RP 165.

When Park got back to the bedroom, Gemar was still sitting on the bed next to Jorgenson. 5RP 166. Park then walked up to Gemar. *Id.* Wade testified that Park stopped “[m]aybe for just a second” between the kitchen and when he walked up to Gemar. 5RP 167. Wade did not see any weapon in Park’s hand. *Id.* Wade testified Gemar either tried to get up or just stayed seated. *Id.* Park then jumped onto Gemar on the bed. 5RP 168; 6RP 11. Wade described it “just like a wrestling match like just one was trying to gain control of the other one.” *Id.* Wade grabbed Jorgenson and pulled her out of the room into the living room and kitchen area. *Id.*; 6RP 37. Jorgenson told Wade she wanted to leave. 5RP 169.

Wade testified that after a minute, Park chased Gemar out of the bedroom, and Wade peripherally saw Gemar run out the front door. 5RP

156, 170; 6RP 12. Park looked out the front door, went back into the bedroom, came back out and handed Wade the heroin he came for, saying “come back later, now’s not a good time.” 5RP 170. Wade gave Park pills in exchange for the heroin and used the heroin once he and Jorgenson left. 5RP 170-71. Wade had no idea a stabbing had occurred. 5RP 171. Wade was interviewed by the police the next morning and provided them a sworn written statement. *Id.*

i. Testimony of Detective Sergeant Michael Hollowell

On the night of the murder, Longview Detective Sergeant Michael Hollowell was called into the Longview Police Department to assist in the investigation. 6RP 53-54. Along with Detective Davis, he interviewed Park at the police station at around 1:30 a.m. 6RP 57. On rebuttal, Sergeant Hollowell testified that Park gave a lengthy interview detailing his story regarding the unknown intruder. 7RP 127-131; Ex. 103B.

Sergeant Hollowell also interviewed Cody Wade later that morning. 6RP 64. Wade told Sergeant Hollowell that Park had been defending Gemar’s drunken behavior, saying “this guy’s a really cool guy, he’s just being an asshole right now”. 6RP 65-66. Wade also told

Sergeant Hallowell that after the head butting, Gemar and Park apologized to each other and “kind of made up....” 6RP 67. Wade also told Sergeant Hallowell that when Park left the kitchen to go back into the bedroom “he walked straight back and he didn’t even look at me and he went straight into the bedroom after that” and “he was walking fast.” 6RP 68. Wade described Park as being focused, as if “[h]e was on a mission.” 6RP 69. After Park entered the room but before Wade got there, Wade heard one of the women scream “get off of him”. *Id.* Wade told Sergeant Hallowell that after Gemar ran out of the house, Wade saw Park walk out the back door and “do something by the garbage can.” 6RP 69-70.

j. Testimony of Officer Doug Kazensky

Longview Police Officer Doug Kazensky testified that he assisted other officers in processing the crime scene. 6RP 106. Officer Kazensky found a blue blanket inside a paper bag that was inside a garbage bag in the kitchen. 6RP 111. A large piece had been cut out of the blanket, and there were blood stains near the cut-out portion. 6RP 112. In another garbage bag in the kitchen, he found pants and a tee shirt with Gemar’s

blood on them. 6RP 113-15. He also found red stains on the floor at the foot of the bed in the bedroom. 6RP 115.

k. Testimony of Officer Robert Huhta

Longview Patrol Captain Robert Huhta testified that he was on duty on the night of the murder and that at 11:42 p.m., dispatch reported Gemar had been pronounced dead. 6RP 119, 124. Captain Huhta assisted the other officers in the execution of the search warrant at Park's house. 6RP 126. He found a garbage bag outside the back door of the house and inside was a piece of a blanket with Gemar's blood on it. 6RP 127-28. Captain Huhta also found a knife stuck in a picture frame by the front door and scissors on the bed in the bedroom, neither of which tested positive for blood. 6RP 129-31. He also found a purse in the detached garage. 6RP 131. Its contents were those of Rachel Samuels. 6RP 132.

l. Testimony of Dr. Clifford Nelson

Medical examiner Dr. Clifford Nelson testified that he conducted Gemar's autopsy. 6RP 136. He observed two stab wounds: a large and triangular-shaped wound to the chest, near the heart and aorta, and then "a

more typical stab wound” on the side. 6RP 143-44, 165. The triangular stab wound to the chest appeared as if either the blade of the weapon had been twisted inside the body or the victim had moved, causing a twisting-type motion. 6RP 144. The “more typical” stab wound appeared to be “in and out”. *Id.* The larger stab wound went through Gemar’s breast muscle, between two ribs, and into his right lung. 6RP 148. In doing so, it cut several medium and large branches of pulmonary arteries and veins. 6RP 148. Blood -- approximately forty percent of Gemar’s total blood supply -- filled Gemar’s chest cavity. 6RP 151-52. This does not include the blood lost from his body. 6RP 152.

Dr. Nelson testified that Gemar bled to death from the larger stab wound to the chest. 6RP 155. The other wound to the side went through soft tissue and muscle, ending “blindly on the outside of the chest”. 6RP 153. Dr. Nelson testified that a person would be unlikely to survive the larger wound unless he received “extremely rapid medical attention” by being “very close to a trauma center”. 6RP 155. If one were to happen upon such a person in the street, first aid would be insufficient: the victim’s chest would have to be opened to slow the bleeding. 6RP 156.

Dr. Nelson also testified that Gemar had two parallel superficial incisions or cutting wounds on the right side of his neck. 6RP 157. Gemar also had a small J-shaped scratch-type incision on his right cheek near his jaw. 6RP 158. Dr. Nelson did not observe any wounds on Gemar's hands, arms or legs. 6RP 161-62. The parties stipulated and the jury heard that Gemar had a blood alcohol level of 0.26 g/mL and that his blood and urine tested positive for marijuana. 6RP 162.

m. Park's testimony

Park took the stand and told a self-serving version of the events, amounting to a claim of self-defense. 7RP 10-88. Park admitted that he was using valium and heroin on the day of the murder. 7RP 10-11. He claimed that he was in his underwear when Gemar showed up to his house unannounced and swung the front door open loudly. 7RP 12. He claimed he had only known Gemar for a month but had used heroin with him before. 7RP 13-14. Gemar was asking for drugs. 7RP 14. After Wade and Jorgenson arrived, Gemar was being offensive toward Jorgenson. 7RP 14-15. Park claimed he defended Wade and Jorgenson and that Gemar then turned his attention to Samuels. 7RP 15. He

claimed Gemar was “molesting” Samuels’ breasts. *Id.* Park testified they were all in the living room and that he defended Samuels. 7RP 15-16. Park claimed Gemar then put him in a wrestling hold and pretended to hump him. 7RP 16. Park claimed he was scared. 7RP 16. Park put on pants and a shirt and told Gemar to go to the store for him or leave. 7RP 16-17. Park said Gemar head-butted him, leaving Park dazed. 7RP 17. Park said Wade held him off of Gemar and that everyone else then went into the bedroom. 7RP 18.

Park said he walked into the bedroom, past the women, reached down and tried to lift Gemar and “force him out”. *Id.* Park claimed that Gemar then pulled him down on the bed. 7RP 18. Park claimed Gemar then put him in a “stranglehold”, but Park managed to break free. 7RP 19. When he broke free, no one else was left in the bedroom. *Id.* Park then claimed he was afraid Gemar was going to break his face or strangle him to death so he walked into the kitchen and grabbed a paring knife from the stove to defend himself. 7RP 19-21. Park claimed he went back into the bedroom and told Gemar to leave. 7RP 21. Park sobbed that Gemar came at him again and tried to grab him. *Id.* Park sobbed that he stabbed Gemar and pushed him back to the bed. *Id.* Park claimed

Gemar came at him again and that he stabbed Gemar again. 7RP 21-22. Park testified Gemar then ran out the front door and down the street. 7RP 22.

Park admitted cutting out the bloody portion of the blanket and putting it in the garbage. 7RP 22, 44-46. He admitted giving Wade drugs. *Id.* Park claimed he simply asked Samuels to help him clean the house. 7RP 23. He then claimed he called 911 to make sure an ambulance got to Gemar. *Id.* Park admitted that before doing so, he cut his own arm with a knife and was going to tell the police he had been robbed. 7RP 23-24. He claimed he never threatened Samuels. 7RP 24. He claimed he then took six or seven valium. 7RP 25. He claimed he had not intended to kill Gemar. 7RP 26.

Park admitted telling Samuels to tell a false story the police. 7RP 41. Park admitted lying to the 911 operator about what happened and to the responding officers about Wade and Jorgenson's identities. 7RP 25-26, 32. Park admitted that he lied to officers on scene, saying that an unknown intruder had pulled a knife on him. 7RP 34-36. Park claimed he was never embarrassed by Gemar and was never mad at him, just fearful. 7RP 47. Park testified he disposed of the knife by throwing it

toward a vacant lot behind his house. 7RP 58, 67-68. Park claimed to have no idea how Samuels' purse got to his garage. 7RP 68-69.

The jury also heard Park's 911 call, in which he relays the false story of being attacked by an unknown intruder. 7RP 104-07. At no point does he tell the operator that the other person was injured or needed medical assistance. *Id.*

C. ARGUMENT

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY FINDING ON THE CHARGE OF PREMEDITATED MURDER IN THE FIRST DEGREE.

1. Standard of Review

Park challenges the sufficiency of the evidence of premeditation in his case. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of evidence is challenged, all reasonable inferences from the evidence must be drawn in the State's favor and interpreted most

strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (en banc). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Reviewing courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.* at 874-75. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wn.2d. 500, 506, 150 P.3d 1121 (2007).

2. Definition of Premeditation

A person is guilty of the crime of premeditated murder in the first degree if, with a premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a); see *Appendix A*; CP 96. There is no dispute that Park caused Gemar's death. Thus, the

only issue regarding sufficiency on appeal is whether there was sufficient evidence to support the jury's finding that the killing was premeditated.

Premeditation "must involve more than a moment in point of time." RCW 9A.32.020(1); see *Appendix B*. Park's jury was instructed as follows:

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.

CP 97.

The State agrees that "mere opportunity to deliberate" is not sufficient to support a finding of premeditation. *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). In other words, having the opportunity to deliberate is not proof that the killer did deliberate. 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.*, citing *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995). The period of deliberation may be very short

provided that it is an “appreciable period of time.” See *State v. Shirley*, 60 Wn.2d 277, 279, 373 P.2d 777 (1962); *State v. Ross*, 56 Wn.2d 344, 351, 353 P.2d 885 (1960); *State v. Tikka*, 8 Wn.App. 736, 740, 509 P.2d 101 (1973).

3. Proof of Premeditation

Premeditation may be shown by direct or circumstantial evidence. *State v. Bingham*, 105 Wn.2d 820, 823-24, 719 P.2d 109 (1986); *State v. Giffing*, 45 Wn.App. 369, 374-75, 725 P.2d 445 (1986) (because intent is rarely provable by direct evidence, evidence of premeditation may be inferred from all the circumstances surrounding the event). Circumstantial evidence is no less reliable than direct evidence, and “specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and where the evidence supporting the jury’s finding is substantial. *Bingham*, 105 Wn.2d at 824, 719 P.2d 109; *Gentry*, 125 Wn.2d at 598, 888 P.2d 1105; *Pirtle*, 127 Wn.2d at 643, 904 P.2d 245.

Several appellate cases have considered the sufficiency of evidence with respect to premeditation and demonstrate that a wide range of proven facts will support an inference of premeditation. *Gentry*, 125 Wn.2d at 598, 888 P.2d 1105; *State v. Sherrill*, 145 Wn.App. 473, 484, 186 P.3d 1157 (2008). Several of these cases are discussed in following section. Furthermore, the Washington Supreme Court has held that three characteristics of the crime are “particularly relevant” to establish premeditation: motive, planning and the method of killing. *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992); *Pirtle*, 127 Wn.2d at 644, 904 P.2d 245. Evidence of planning includes procurement of a weapon and stealth. *Pirtle*, 127 Wn.2d at 644, 904 P.2d 245.

4. Illustrative Cases

Again, the Washington Supreme Court held that motive, planning (including procurement of a weapon and stealth) and the method of killing are particularly relevant when considering the existence of premeditation. Park’s argument implies that these are exclusive considerations, requiring the existence of each to prove premeditation. Instead, case law has shown this is a non-exclusive list of relevant factors that might indicate

premeditation and that a wide range of factors can support an inference of premeditation. Examples of circumstances supporting a finding of premeditation include the existence of a motive, prior threats, striking the victim from behind, assault with multiple means or a weapon not readily available, and the planned presence of a weapon at the scene. *State v. Ra*, 144 Wn.App. 688, 703, 175 P.3d 609 (2008), citing *State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006); *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006 (2001); *Pirtle, supra*; and *State v. Hoffman*, 116 Wn.2d 51, 83, 804 P.2d 577 (1991). In fact, the planned presence of a weapon alone has been held to be adequate evidence to allow the issue of premeditation to go to the jury. *State v. Massey*, 60 Wn.App. 131, 145, 803 P.2d 340 (1991), citing *Bingham*, 105 Wn.2d at 827, 719 P.2d 109.

The following cases are illustrative.

(a) *State v. Sherrill*, 145 Wn.App. 473, 186 P.3d 1157 (2008), rev. denied 165 Wn.2d 1022, 203 P.3d 380 (2009).

Sherrill appealed his first-degree murder conviction, alleging there was insufficient evidence of premeditation. *Sherrill*, 145 Wn.App. at 474, 186 P.3d 1157. Police responded to Sherrill's trailer and found his girlfriend's bloody body on the floor. *Id* at 476. The jury heard evidence

that Sherrill had physically abused the victim over a period of three years. *Id.* at 474-75. The jury heard evidence that on the night of the murder, the victim suffered a horrific, prolonged attack resulting in at least 42 separate blunt impact injuries. *Id.* at 475-77. Sherrill claimed his girlfriend had fallen and that her death was accidental. *Id.* at 476. The court in *Sherrill* noted there was no evidence of motive, procurement of a weapon, or stealth. *Id.* at 485. However, there was evidence presented to the jury that there were injuries to the victim's hands. *Id.* at 486.

Holding that "...while standing alone, multiple wounds and sustained violence are insufficient to support an inference of premeditation, other evidence, combined with multiple wounds and sustained violence, does support an inference of deliberation and reflection." *Id.* The *Sherrill* court then held that evidence including prior threats or quarrels and defensive wounds on the victim will support an inference of premeditation. *Id.*, citing *State v. Millante*, 80 Wn.App. 237, 248, 908 P.2d 374 (1995) (other evidence of premeditation includes, but is not limited to, prior threats or quarrels, the planned presence of a weapon, a possible motive for the killing, and defensive wounds on the victim). Noting that the "infliction of multiple blows is strong evidence of

premeditation” when considered with the history of violence and fighting and the defensive wounds on the victim’s hands, the reviewing court found there was sufficient evidence in Sherrill’s case that a rational jury could find premeditation beyond a reasonable doubt. *Sherrill*, 145 Wn.App. at 487, 186 P.3d 1157.

Sherrill shows that motive, procurement of a weapon and stealth are not required for a jury to find premeditation, as suggested by Park. While those factors are particularly relevant, they are not required. Regardless, in Park’s case, there was in fact evidence of motive, procurement of a weapon and stealth. The jury heard evidence of motive: that Park was embarrassed and angry that Gemar had pretended to hump him in front of the other guests, had head-butted him, and was not complying with Park’s demands to go to the store before Park would give him the heroin. The jury also heard evidence of procurement of a weapon: that Park left the bedroom, went to the kitchen, retrieved a knife and went back into the bedroom to attack Gemar. The jury also heard evidence of stealth: despite their proximity to the attack, none of the guests (including Gemar) saw the knife that Park was holding, which is circumstantial evidence that Park was concealing the knife to prevent it

being detected by Gemar or the other guests as he walked in to make his attack. Finally, the jury heard other evidence of planning: that Wade spent time trying to calm Park down in the kitchen, that Park was in the kitchen for a couple minutes, that Park stopped for a second between the kitchen and the attack, that Park appeared to Wade to be on a mission as he walked out of the kitchen, and that Park had the presence of mind to make up an elaborate story for the police, cut himself, and to clean up the crime scene before they arrived. There is sufficient evidence for the jury to find premeditation in Park's case.

(b) *State v. Rehak*, 67 Wn.App. 157, 834 P.2d 651 (1992), rev. denied 120 Wn.2d 1022, 844 P.2d 1018, cert. denied 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993).

Rehak appealed her first-degree murder conviction, alleging there was insufficient evidence of premeditation. *Rehak*, 67 Wn.App. at 159, 834 P.2d 651. Police responded to Rehak's home after she called 911 to report her husband had been shot. *Id.* Her husband was found dead, seated in the family room with three gunshot wounds to the head. The defense denied that Rehak was the killer. *Id.* at 160-61. The jury heard evidence that Rehak and her husband had a history of marital disputes,

occasional abuse, and recent severe issues with the marital finances. *Id.* The *Rehak* court found that Rehak's claim of insufficient evidence of premeditation was "without merit." *Id.* at 164. In holding that a reasonable trier of fact could find premeditation from the circumstantial evidence, the court relied on the following evidence and allowable inferences:

It was reasonable for the jury to infer from the evidence that the killer prepared the gun; crept up behind the victim who was sitting quietly in his chair and not in a confrontational stance; and shot three separate times, twice after the victim had already fallen to the floor.

Id.

In comparison, in Park's trial, the jury heard evidence that Park procured the knife from the kitchen before returning to the bedroom for the attack. The jury also heard evidence that Gemar was sitting on the bed when Park returned to the bedroom and that Gemar was calm, sad and apologetic towards Park, rather than in any sort of confrontational stance. Finally, the jury heard evidence that Park was stabbed twice and also cut multiple times. The *Rehak* case is illustrative of the wide range of factors, including those found in Park's case, which supports a finding of premeditation.

(c) *State v. Commodore*, 38 Wn.App. 244, 684 P.2d 1364, rev. denied 103 Wn.2d 1005 (1984).

Commodore appealed his first-degree murder conviction, alleging there was insufficient evidence of premeditation. *Commodore*, 38 Wn.App. at 245, 684 P.2d 1364. On the night of the murder, Commodore was having a party at his home and got into an argument with one of his guests over a small amount of drugs. *Id.* When the argument subsided on the porch, Commodore went inside his home, shut the sliding glass door, and stood by listening. *Id.* After two minutes, he left the door, returned to the porch with a gun, and shot the victim. *Id.*

Finding that a rational finder of fact could “easily” have found premeditation beyond a reasonable doubt on these facts, the reviewing court held that there was sufficient evidence of premeditation based on the following evidence:

The arguments between Commodore and [the victim] indicate that Commodore had a motive to kill. Moreover, Commodore's lingering behind the door, proceeding to a room where he knew he would find a gun, and returning to shoot [the victim], suggest that Commodore engaged in planning activity. Both types of evidence have been recognized as permitting an inference of premeditation.

See W. LaFave & A. Scott, *Criminal Law* § 73, at 564 (1972).

Commodore, 38 Wn.App. at 248, 684 P.2d 1364.

The facts in Park's case are very similar. Park and Gemar had argued about drugs, indicating a motive to kill. Park went to the kitchen where he knew he would find a knife and remained there for two minutes and returned to the bedroom to stab Gemar after pausing for a second on the way, suggesting that Park engaged in planning activity. As in *Commodore*, the evidence in Park's case is sufficient to support a finding of premeditation.

5. Park's argument

Park makes several arguments in support of his claim of insufficient evidence of premeditation. First, he argues that there was no evidence of a plan to kill. BRIEF OF APPELLANT 9. That argument is addressed *supra* at section (C)(4)(a). Second, Park argues that Gemar was only present at the house for 10 to 45 minutes. BRIEF OF APPELLANT 9. As argued *supra*, the period of deliberation may be very short provided that it is an appreciable period of time. Third, Park argues that while the State's theory of the case was that Park was embarrassed by and angry at

Gemar, he testified at trial that he did not intend to kill Gemar. BRIEF OF APPELLANT 10. However, as argued *supra*, credibility determinations are left to the jury, and on review of a sufficiency claim, evidence must be viewed in the light most favorable to the State. Fourth, Park argues that the knife Park used was not particularly lethal. BRIEF OF APPELLANT 10. However, he cites no authority suggesting this is a requirement for a finding of premeditation. Fifth, he claims there was no evidence of stealth. While it is the State's position that evidence of stealth is not required, as argued *supra* at section (C)(4)(a), evidence of stealth was in fact presented to the jury in Park's case. Sixth, Park equates a prolonged process of death with the existence of premeditation. BRIEF OF APPELLANT 11. While the State agrees that a prolonged method of death might indicate the presence of premeditation, Park cites no authority that a prolonged method of death is required to support such a finding. Finally, Park argues that the fact that he call 911 to report the incident is evidence the murder was not premeditated. *Id.* However, this actually supports a finding of premeditation in that Park failed to report that Gemar had been stabbed and was in dire need of immediate treatment. None of these arguments negates the jury's finding of premeditation.

Park also cites several cases in support of his arguments. They are addressed as follows.

(a) *State v. Ortiz*

Park argues that evidence that Park “took a knife from the kitchen to his bedroom” does not establish premeditation because “there was no evidence that the knife was readily accessible or particularly lethal.” BRIEF OF APPELLANT 10. However, Park does not cite any authority for any need to prove the weapon used was readily accessible or particularly lethal. He then attempts to distinguish the facts in Park’s case from those in *Ortiz*, 119 Wn.2d 294, 831 P.2d 1069.

Ortiz was charged with the premeditated murder of a 77-year-old woman. *Ortiz*, 119 Wn.2d at 297, 831 P.2d 1069. In holding there was sufficient evidence of premeditation, the court considered several factors. *Id.* at 313. First, the killing was committed with a knife and multiple wounds were inflicted. *Id.* at 312-13. Second (and most notable for the purposes of Park’s case), the murder occurred in a bedroom, and not in the kitchen where the knife was taken from. *Id.* at 313. Third, the victim was also struck in the face with something other than the knife. *Id.*

Finally, the defensive wounds found on the victim indicate a prolonged struggle. *Id.* In light of all these factors, the Washington Supreme Court found that there was sufficient circumstantial evidence to convict Ortiz of premeditated murder. *Id.*

While the court stated that it considered all of these factors, it also stated in its holding that although the knife was procured on the premises where the murder took place, the jury could have found that the act of obtaining the knife involved deliberation, indicating again that procurement of the murder weapon alone is sufficient to support a finding of premeditation. *Id.*

Park left the bedroom, procured a knife in the kitchen and returned to the bedroom to inflict multiple wounds on Gemar. In comparison to *Ortiz*, there is sufficient evidence of premeditation.

(b) *State v. Gregory*

Park argues that the State's evidence of premeditation was not substantial and, in contrast to the facts in his case, cites those in *State v. Gregory*, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006). *Gregory's* victim was found in her bedroom, stabbed or sliced to death with multiple

wounds to her throat and back. *Id.* at 811. Semen was found inside the victim, on her thigh and on the bedspread. *Id.* at 811-12. Money and jewelry were also missing from her home. *Id.* at 817. The court juxtaposed its facts with those in several cases in which multiple wounds were inflicted with a knife or other weapon, there were signs of a struggle, the victim was struck from behind and there was evidence that sexual assault or robbery was an underlying motive. *Id.*, citing *Clark*, 143 Wn.2d at 769-70, 24 P.3d 1006 (seven-year-old victim stabbed at least seven times in the neck, cuts on her hands suggest a struggle, and she was sexually assaulted); *Gentry, infra*; *Ortiz, supra*; and *Ollens, infra*. Comparing its facts to those in these cases, the *Gregory* court found it was evident that there was equally substantial evidence from which the jury could have found premeditation. *Gregory*, 158 Wn.2d at 818, 147 P.3d 1201.

However, *Gregory* does not indicate that each of these factors must be present to support a finding of premeditation, and Park cites no other authority in support of that contention.

(c) *State v. Pirtle*

As further argument that the State's evidence of premeditation was not substantial, Park contrasts his facts with those in *Pirtle*, 127 Wn.2d at 636, 904 P.2d 245. In *Pirtle*, the Supreme Court found that there was sufficient evidence to support the jury's finding that two murders at a Burger King where he had previously been employed were premeditated. *Id.* There was evidence that Pirtle had been fired from the restaurant and that the murders happened during the course of a robbery. *Id.* The Court found this was relevant to the issue of premeditation because the jury could believe this could serve as a motive to kill that would suggest deliberation. *Id.* The Court also found the evidence of planning (e.g., procurement of a weapon and stealth) was relevant to the issue of premeditation in this case. Notable was that he took a knife from his kitchen with him to the Burger King. *Id.* at 644. He then parked near the restaurant, and waited until another employee left. *Id.* at 645. He entered the restaurant, cut the telephone cord, bound the victims and placed them in the freezer. *Id.* at 645. After emptying cash drawers and a safe, he cut one victim's throat after knocking her unconscious. *Id.* He

then hit the second victim with a fire extinguisher and cut that victim's throat after he was unconscious. *Id.* He then returned to the first victim and cut her throat some more. *Id.* Following the murders, Pirtle had the presence of mind to clean himself up and hide evidence of the crime in a compost pile in his neighbor's yard. *Id.*

The *Pirtle* court found that, when viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, the facts in that case were sufficient for a rational jury to have found beyond a reasonable doubt that Pirtle considered his actions for the requisite time before killing his two victims and thus to support the jury's verdict that the murders were premeditated. *Id.* at 646, 648.

However, the *Pirtle* court noted that there was "more than sufficient evidence of premeditation" under the facts of its case. *Id.* at 643 (emphasis added). This negates Park's argument that the evidence in his case "falls well short of the evidence in other cases deemed sufficient by the Washington Supreme Court." BRIEF OF APPELLANT 11. While there surely are many murders with much more evidence of premeditation than was present in Park's case, this in no way suggests that there was not sufficient evidence to support the jury finding.

(d) *State v. Ollens*

As further argument that the State's evidence of premeditation was not substantial, he contrasts his facts with those in *State v. Ollens*, 107 Wn.2d 848, 733 P.2d 984 (1987). Ollens was charged with premeditated first degree murder for the stabbing and robbery of a cab driver. The State presented the testimony of a medical examiner that the victim was stabbed multiple times and that his throat had been slashed. *Id.* at 849. The medical examiner also stated that there were numerous defensive wounds inflicted while the victim was still alive, indicating that the murderer and the victim struggled. *Id.* at 849-50. The trial court removed the question of premeditation from the trial, analogizing its decision to that in *Bingham*, 105 Wn.2d at 828, 719 P.2d 109, which held that manual strangulation alone shows only an opportunity to deliberate, which is insufficient to sustain a finding of premeditation.⁶ *Ollens*, 107 Wn.2d at 850-51, 733 P.2d 984. The trial court concluded that the use of a knife to inflict more than one wound in and of itself is not probative of premeditation. *Id.* at 850. The State appealed. *Id.*

⁶ However, a physical struggle over an appreciable period of time prior to strangulation is sufficient evidence of premeditation. *State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006).

On appeal, the State argued that *Bingham* is limited to its facts. *Ollens*, 107 Wn.2d at 851, 733 P.2d 984. The State also noted, however, that *Bingham* recognized that “[t]he planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury.” *Ollens*, 107 Wn.2d at 851, 733 P.2d 984, citing *Bingham*, 105 Wn.2d at 827, 719 P.2d 109; *Tikka*, 8 Wn.App. 736, 742, 509 P.2d 101 (1973); accord, *Giffing*, 45 Wn.App. 369, 725 P.2d 445; *State v. Griffith*, 91 Wn.2d 572, 577, 589 P.2d 799 (1979) (gun); *State v. Harris*, 62 Wn.2d 858, 868, 385 P.2d 18 (1963) (vacuum cleaner cord). See also *Hoffman*, 116 Wn.2d at 83, 804 P.2d 577.

The State also argued that the multiple stab wounds and also the subsequent neck slashing revealed premeditation. *Ollens*, 107 Wn.2d at 851, 733 P.2d 984. The State concluded that the physical evidence of the manner and method of death was sufficient to support a finding of premeditation as a matter of law. *Id.* *Ollens* argued that the evidence may indicate an intent to kill in the frenzy of a struggle but that there would be no basis for a jury to infer premeditation. *Id.* at 852. Finally,

Ollens argued that *Bingham* was not limited to manual strangulation and should be applied to other methods of death. *Id.*

On appeal, the *Ollens* court noted that the *Bingham* opinion was based in part on *Austin v. United States*, 382 F.2d 129, 139 (D.C. Cir. 1967). In *Austin*, the reviewing court held that evidence that the victim was stabbed 26 times with the knife left imbedded in the victim's skull was not sufficient to prove premeditation. *Ollens*, 107 Wn.2d at 852, 733 P.2d 984. The *Ollens* court distinguished the facts before it – in *Ollens*, there was evidence that a motive was present – that Ollens killed the cab driver to effectuate a robbery. *Id.* at 853.

Relying on four factors, the court distinguished *Bingham* and held that there was sufficient evidence in *Ollens* to find premeditation. *Ollens*, 107 Wn.2d at 853, 733 P.2d 984. In *Bingham*, the murder was committed by strangulation, which involves one continuous act, whereas in *Ollens*, the victim was stabbed numerous times and, thereafter, the victim's throat was slashed. *Ollens*, 107 Wn.2d at 853, 733 P.2d 984. Second, in *Ollens* a knife was used, which required procurement of a weapon. *Id.* Third, the victim was struck from behind. Fourth, there was evidence of a motive of robbery. *Id.* In conclusion, the *Ollens* court noted, “It is the

proper function of a jury to determine whether [the defendant] deliberated, formed and reflected upon the intent to take [the victim's] life....” *Id.*

In comparison, in Park’s case, Park stabbed Gemar multiple times. Second, Park left the bedroom, procured the knife in the kitchen and returned to the bedroom for the attack. Third, the victim was struck while in a non-confrontational stance while he was apologizing to Park. Fourth, the jury heard evidence of a motive: that Park was embarrassed and angry that Gemar had pretended to hump him in front of the other guests, had head-butted him, and was not complying with Park’s demands to go to the store before Park would give him the heroin. As such, *Ollens* supports the State’s position that the jury finding regarding premeditation was proper.

D. CONCLUSION

From the evidence presented to the jury, a rational trier of fact could well conclude that Park -- incensed by Gemar who had made him look foolish in front of the others -- had deliberately left the bedroom, walked to the kitchen, disregarded his friend’s suggestion not to do anything stupid, procured a knife to kill Gemar with, stopped for a second

on the way back to bedroom for additional deliberation, and then came at the unsuspecting Gemar with the premeditated intent to cause his death.

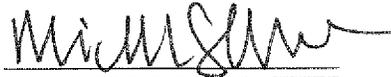
The evidence, when viewed in the light most favorable to the State, with all reasonable inferences drawn in the State's favor and interpreted most strongly against the defendant, was sufficient to prove to a reasonable jury that Park is guilty of premeditated murder in the first degree.

For the reasons argued above, Park's conviction for murder in the first degree should be affirmed.

Respectfully submitted this 13th day of February, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By:



MICHELLE L. SHAFFER
WSBA # 29869
Chief Criminal Deputy Prosecuting Attorney
Representing Respondent

APPENDIX A

RCW 9A.32.030. Murder in the first degree

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

APPENDIX B

RCW 9A.32.020. Premeditation--Limitations

(1) As used in this chapter, the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time.

(2) Nothing contained in this chapter shall affect RCW 46.61.520.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Jared Berkeley Steed
Nielsen Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122-2842
sloanej@nwattorney.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 13, 2012.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

February 13, 2012 - 11:42 AM

Transmittal Letter

Document Uploaded: 419602-Respondent's Brief.pdf

Case Name: State of Washington v. Jeremiah Joshua Park

Court of Appeals Case Number: 41960-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:
sloanej@nwattorney.net