

No. 44966-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**WESTON GARRETT MILLER,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITES ..... iii

I. ISSUES.....1

II. STATEMENT OF THE CASE .....1

III. ARGUMENT .....7

    A. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT THE MURDER OF MR. CARSON WAS PREMEDITATED AND THEREFORE MILLER COMMITTED MURDER IN THE FIRST DEGREE.....7

        1. Standard Of Review.....7

        2. There Was Sufficient Evidence Presented To Prove Miller’s Killing Of Mr. Carson Was Premeditated And Therefore, Miller Committed Murder In The First Degree .....7

    B. THE COURTROOM CONFIGURATION DID NOT DENY MLLER A FAIR AND PUBLIC TRIAL, HIS RIGHT TO CONFRONTATION, OR HIS ABILITY TO ASSIST HIS ATTORNEY.....15

        1. Courtroom Configuration Falls Under The Broad Discretion Of The Trial Court Judge .....21

        2. Miller’s Arguments That His Jury Trial Rights, Right To A Fair Trial, Confrontation Clause Rights, Presumption Of Innocence And Right To A Fair Trial, And His Public Trial Rights Were Violated Are Without Merit.....23

            a. Miller presents no case law on point for any of the arguments he makes regarding the courtroom configuration .....24

            b. Miller was not denied his right to a jury trial..24

c.	Miller’s confrontation clause rights were not violated.....	26
d.	Miller was not denied his ability to assist his attorney during his jury trial .....	27
e.	The right to a public trial was not violated by the courtroom configuration.....	28
f.	Miller’s right to appear and his presumption of innocence were not violated.....	31
IV.	CONCLUSION.....	34

## TABLE OF AUTHORITIES

### **Washington Cases**

<i>In re Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994).....	31
<i>State v. Barajas</i> , 143 Wn. App. 24, 177 P.3d 106 (2007) .....	11
<i>State v. Bastas</i> , 75 Wn. App. 882, 880 P.2d 1035 (1994).....	27
<i>State v. Bingham</i> , Wn.2d 820, 719 P.2d 109 (1986).....	9, 10
<i>State v. Boiko</i> , 138 Wn.App. 256, 156 P.3d 934 (2007) .....	24
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	29
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 1550 (2005).....	29
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	8
<i>State v. Colquitt</i> , 133 Wn. App. 789, 137 P.3d 893 (2006) .....	8
<i>State v. Commodore</i> , 38 Wn. App. 244, 684 P.2d 1364 (1984) .....	9, 12, 13, 14
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	8
<i>State v. Dow</i> , 162 Wn. App. 324, 253 P.3d 476 (2011) .....	24
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192, (2013) .....	21, 22
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	10
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.2d 410 (2004) .....	8
<i>State v. Gonzalez</i> , 129 Wn. App. 895, 120 P.3d 645 (2005) .....	31
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	8, 14
<i>State v. Hutchinson</i> , 135 Wn.2d 863, 959 P.2d 1061 (1998)...	32, 33
<i>State v. Irby</i> , 170 Wn.2d 874, 246 P.3d 796 (2011).....	23, 31

<i>State v. Jordan</i> , 103 Wn. App. 221, 11 P.3d 866, <i>rev. denied</i> 143 Wn.2d 1015 (2001) .....	25
<i>State v. Lormor</i> , 172 Wn.2d 85, 257 P.3d 624 (2011) .....	29
<i>State v. Momah</i> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	30
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	8, 14, 26
<i>State v. Olinger</i> , 130 Wn. App. 22, 121 P.3d 724 (2005).....	8
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	11
<i>State v. Rehak</i> , 67 Wn. App. 157, 834 P.2d 651 (1992) .....	11, 12
<i>State v. Sadler</i> , 147 Wn. App. 97, 193 P.3d 1108 (2008) .....	30
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	7
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	30
<i>State v. Williams</i> , 18 Wn. 47, 50 P. 580 (1897) .....	32

**Federal Cases**

<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970) .....	7, 8
<i>Jones v. Meyer</i> , 899 F.2d 883 (9 <sup>th</sup> Cir. 1990).....	32
<i>Medina v. California</i> , 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) .....	27, 28
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S.Ct. 240, 96 L. Ed. 288 (1952) .....	31, 32
<i>Rushen v. Spain</i> , 464 U.S. 114, 104 S.Ct. 453, 78 L. Ed.2d 867 (1983) .....	31

**Washington Statutes**

RCW 2.36.110 .....25  
RCW 9A.32.030(1)(a) .....9  
RCW 9A.32.050(1)(a) .....9  
RCW 10.77.010(15).....27

**Constitutional Provisions**

Washington Constitution, Article I, § 3 .....31  
Washington Constitution, Article I, § 10 .....28  
Washington Constitution, Article I, § 21 .....24, 31  
Washington Constitution, Article I, § 22 .....28, 31, 33, 34  
U.S. Constitution, Amendment IV .....28  
U.S. Constitution, Amendment VI .....24, 26, 27, 31  
U.S. Constitution, Amendment XIV .....7, 27, 31

## I. ISSUES

- A. Did the State present sufficient evidence of premeditation to sustain the Miller's conviction for Murder in the First Degree?
- B. Did the trial court violate a number of Miller's rights by refusing to further reconfigure the courtroom after Miller's counsel complained of inability to see all of the jurors?

## II. STATEMENT OF THE CASE

Sara DeSalvo and David Carson began dating in 2008 after Ms. DeSalvo came to Lewis County to visit her mother and met Mr. Carson. RP 215-16.<sup>1</sup> Ms. DeSalvo and Mr. Carson were in love and moved in together late in 2009. RP 216. Ms. DeSalvo and Mr. Carson lived together in his home for two years, until Mr. Carson lost his job and they were forced to move out. RP 216-17. Mr. Carson and Ms. DeSalvo camped and stayed at different people's homes. RP 217.

Ms. DeSalvo met Weston Miller sometime between 2009 and 2010. RP 219. Ms. DeSalvo ran into Miller again in 2012. RP 220. Ms. DeSalvo mentioned to Miller that she did really great work and if he ever needed anyone to help out or do some work he should get in touch with her. RP 220. Miller called Ms. DeSalvo and

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<sup>1</sup> There are two numbered verbatim report of proceedings. The VRP containing most of the pretrial hearings and all of the trial will be cited to as RP. The VRP dated 3/28/13 and 4/3/13, containing the change of plea to Counts II, III, IV, and V will be cited to as 2RP.

asked her out for a drink with him. RP 221. Ms. DeSalvo explained to Miller that she had a boyfriend and she only gave Miller her number for work. RP 221. Ms. DeSalvo ran into Miller again and he gave her a ride. RP 222.

Ms. DeSalvo was forced to leave where she had been staying and contacted Miller for assistance. RP 227. Miller allowed Ms. DeSalvo and Mr. Carson to stay in his home in exchange for them to work on his house, which needed some cleaning and repairs. RP 227-29. According to Ms. DeSalvo, she lived up to her end of the bargain and did cleaning for Miller. RP 231.

Miller, in his statement to the police, acknowledged that he allowed Ms. DeSalvo to stay at his house but denied making any arrangements to allow Mr. Carson to live there, stating he just showed up and moved in on his own. Ex. 19 at 2:27, 3:55.<sup>2</sup> Miller denied knowing that Ms. DeSalvo and Mr. Carson were dating prior to him showing up at Miller's house. Ex. 19 at 3:47.

Ms. DeSalvo described Mr. Carson as very quiet, courteous, polite, and soft spoken. RP 230-31. Ms. DeSalvo acknowledged

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<sup>2</sup> The State acknowledges that citing to the approximate time stamp that Miller made the statements is not ideal, but given that no transcript of the statement was admitted into evidence or even marked for identification, the State believes it has no other choice. Miller's counsel cites to the page numbers of the transcript of the Miller's statement. This transcript does exist but is not part of the record below and has not been designated in the Clerk's papers.

that she and Mr. Carson argued, but was adamant that Mr. Carson was never violent and had never hit her. RP 231-32. Miller commented to Ms. DeSalvo about the frequent fights between her and Mr. Carson. RP 235. Miller asked Ms. DeSalvo, "Why don't you just shoot him?" RP 235. Ms. DeSalvo became angry and said, "Don't come in here and do that Weston. Are you crazy?" RP 235. Miller replied, "I'll do it for you." RP 235. Ms. DeSalvo said no and she and Miller had an argument about the matter. RP 235. Ms. DeSalvo told Miller, "I'm telling Dave. We're out." RP 235. Ms. DeSalvo began packing up her and Mr. Carson's belongings but Mr. Carson talked Ms. DeSalvo out of leaving. RP 235-36, 245.

On March 13, 2012 Ms. DeSalvo and Mr. Carson got into an argument in Miller's daughter's bedroom. RP 246-49. Ms. DeSalvo said she moved a chair and it made a loud bump. RP 249. Miller came to the bedroom door, banged on it, and told Ms. DeSalvo and Mr. Carson to not disrespect his daughter's room by fighting in it. RP 249. Ms. DeSalvo said it was only a verbal argument and Mr. Carson was never physical with her. RP 249.<sup>3</sup> According to Ms. DeSalvo, Miller came back to the bedroom door 15 to 20 minutes

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<sup>3</sup> Ms. DeSalvo did acknowledge on cross-examination that in her statement to police she told them she hit her head on the wall and yelled for Miller who then knocked on the bedroom door. RP 265-66.

later, again admonishing her and Mr. Carson for fighting, which was odd because Ms. DeSalvo and Mr. Carson were not arguing at the time, nor were they even speaking loudly. RP 250. Miller came back to the door a third time. RP 250. Ms. DeSalvo was on the top bunk of the bed looking for her cigarettes and Mr. Carson was standing in the middle of the room. RP 251. Miller asked Mr. Carson if he could speak with him and Mr. Carson replied, "Sure, dude, what's up?" RP 251. When Mr. Carson stepped out of the room he was not carrying anything in his hands, he had no weapon, and was not angry. RP 252. As soon as the door closed Ms. DeSalvo heard three gunshots. RP 252.

Ms. DeSalvo opened the door and saw a puff of smoke and could smell the gunpowder. RP 253. Mr. Carson was holding his stomach and said, "Dude, what did you do? You shot me." RP 253. Ms. DeSalvo begged Miller not to kill her and ran out the door, screaming for help. RP 253-55. Ms. DeSalvo did not touch or move a knife or any other weapon. RP 256.

Miller took off after the shooting, tearing out of his driveway in his truck. RP 475. After Miller was located he gave a videotaped statement to the police. Ex. 19. Miller's version of the events that led up to the shooting evolved over his statement, changing from

Ms. DeSalvo and Mr. Carson having an argument, to Mr. Carson physically holding Ms. DeSalvo, to Mr. Carson holding Ms. DeSalvo with his right hand and threatening her with a knife in his left hand. Ex. 19 at 5:14, 9:56 to 12:53. Miller claimed that he heard Ms. DeSalvo tell Mr. Carson to kill Miller. Ex. 19 at 6:24, 7:42, 45:28. Miller said after twice telling Ms. DeSalvo and Mr. Carson to stop fighting he went to his bedroom and retrieved his gun. Ex. 19 at 15:07, 46:29, 1:22:10. The gun was kept in a safe in Miller's bedroom. Ex. 19 at 46:29. When Miller retrieved his gun from the safe it was not loaded. Ex. 19 at 1:22:10. Miller loaded the gun and chambered a round on his way into the kitchen from his bedroom and then concealed the gun in the pocket of his sweatpants. Ex. 19 at 1:22 to 1:23:54. Miller claimed that he opened the door to the bedroom to stop Mr. Carson and Ms. DeSalvo from fighting and Mr. Carson charged at Miller with a knife and that is when Miller shot Mr. Carson. Ex. 19 at 1:24:30 to 1:27:00.

None of the officers on the scene, nor the paramedics, located a knife in Mr. Carson's hands or around his body. RP 380, 421, 429. The medical examiner confirmed that Mr. Carson died from a penetrating gunshot wound to the chest. RP 328-29.

The State charged Miller with Count I, Murder in the First Degree with a special allegation that Miller was armed with a firearm; Counts II through V, Unlawful Possession of a Firearm in the Second Degree. CP 1-6. Miller elected to plead guilty to Counts II through V and proceed to trial only on the Murder in the First Degree charge. 2RP; CP 83-91. During the trial there was an allegation by Miller's attorney that the jury was having difficulty seeing due to the configuration of the courtroom. RP 289. The trial judge stated it was only one juror who complained of difficulty and that the problem was resolved by moving counsel table forward. RP 291. The trial judge inquired of the panel and there was no indication that anyone had any further difficulty. RP 291-92. Miller's counsel complained a second time about difficulty viewing the jury and the juror having a difficult time seeing Miller and his attorney. RP 452. The trial judge again indicated that none of the jurors complained of any difficulty. RP 453.

Miller was convicted as charged in Count I. CP 408. The jury also found the murder had been committed while Miller was armed with a firearm. CP 409. Miller was sentenced to 360 months in prison. CP 496. Miller timely appeals his conviction for Count I, Murder in the First Degree. CP 507.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT THE MURDER OF MR. CARSON WAS PREMEDITATED AND THEREFORE MILLER COMMITTED MURDER IN THE FIRST DEGREE.**

The State presented sufficient evidence to sustain the jury's verdict, convicting Miller of Murder in the First Degree. The evidence introduced proved beyond a reasonable doubt that Miller acted with premeditated intent to cause Mr. Carson's death.

##### **1. Standard Of Review.**

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

##### **2. There Was Sufficient Evidence Presented To Prove Miller's Killing Of Mr. Carson Was Premeditated And Therefore, Miller Committed Murder In The First Degree.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397

U.S. 358, 362-65, 90 S.Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict a person of Murder in the First Degree the State must prove “[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). Premeditation is an element distinct from intent and both elements must be proven in order to secure a conviction for Murder in the First Degree. *State v. Commodore*, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984). Intent requires that a person act “with the objective or purpose to accomplish a result which constitutes a crime.” *Commodore*, 38 Wn. App. at 27. Statutorily premeditation requires more than a moment in point of time. RCW 9A.32.020(1). The case law, as developed in Washington, “defines premeditation as the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *State v. Bingham*, Wn.2d 820, 823, 719 P.2d 109 (1986) (internal quotations and citations omitted). It is possible for a person to intentionally kill someone but act without premeditation which would constitute Murder in the Second Degree. RCW 9A.32.050(1)(a).

Circumstantial or direct evidence may be presented to prove a person acted with premeditation. *Bingham*, 105 Wn.2d at 823-24. “Circumstantial evidence can be used where the inferences drawn

by the jury and the evidence supporting the jury's verdict is substantial." *Id.* at 824. In Miller's case the State presented substantial circumstantial evidence of premeditation.

Miller argues that while he may have acted in self-defense or intentionally but impulsively, his decision to kill Mr. Carson was not a premeditated act. Brief of Appellant 11-12. Miller states he had no motive, there was no motive of planning, nor was the shooting prolonged, and Miller was concerned for Ms. DeSalvo's safety. Brief of Appellant 11. Miller cites to a number of cases as examples of when the reviewing court found sufficient evidence of premeditation and argues Miller's actions do not add up to evidence of premeditation. Brief of Appellant 8-11. Miller does not argue that he did not act with intent, only that the evidence was insufficient to prove premeditation. Brief of Appellant 11. The State, therefore, will not address the other elements of Murder in the First Degree and only respond to the premeditation argument.

There are a number of cases where appellate courts have considered whether there was sufficient evidence to support premeditation and these cases "demonstrate that a wide range of proven facts will support an inference of premeditation." *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). Procurement of

a weapon, motive, stealth, and the manner in which the killing is carried out are all important facts that can be used to support the finding of premeditation. *State v. Barajas*, 143 Wn. App. 24, 36, 177 P.3d 106 (2007), citing *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995).

Dana Rehak, Sr. was found in the basement family room of his home, he had been shot in the head three times. *State v. Rehak*, 67 Wn. App. 157, 159, 834 P.2d 651 (1992). There was no sign of forced entry into the home or that anyone, other than those who were already in the home, had even been on the property prior to paramedics and police arriving on the scene. *Id.* Anna Rehak told police she had gone to the barn and when she returned she found Dana, her husband, lying on the floor. *Id.* at 159-60. There were no boot prints matching Anna's boots and Anna's boots were dry. *Id.* at 160. The murder weapon was discovered hidden in the Rehaks' travel trailer and there was evidence of unpaid bills that were hidden with the gun. *Id.* The Rehaks had a stormy marriage and it was not uncommon for Anna to hide bills and mail from Dana. *Id.*

Anna argued there was not sufficient evidence to show she acted with a premeditated intent to kill her husband. *Id.* at 164. The Court of Appeals held,

In this case, a reasonable trier of fact could find premeditation from the circumstantial evidence. 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.* This evidence was sufficient to prove premeditation. *Id.*

In *State v. Commodore* there was argument between Mr. Cavazos and Commodore regarding a small amount of drugs. *Commodore*, 38 Wn. App. at 245. The argument started downstairs and then continued upstairs a short while later. *Id.* Things calmed down and Commodore went inside the house, closed a sliding door, and stood inside the door, listening. *Id.* After a couple of minutes Commodore left, retrieved a gun, returned to the porch, and shot Mr. Cavazos from approximately three feet away. *Id.* Commodore then left the scene. *Id.* The Court of Appeals held that the argument between the men was the apparent motive to kill Mr. Cavazos. *Id.* at 248. The Court of Appeals further stated,

Commodore’s lingering behind the door, proceeding to a room where he knew he would find a gun, and returning to shoot Cavazos, suggests that Commodore engaged in planning activity. Both types

of evidence have been recognized as permitting an inference of premeditation.

*Id.* The court held there was sufficient evidence of premeditation and affirmed the conviction. *Id.*

There are a number of possible motives Miller may have had to kill Mr. Carson. Miller could have reached his breaking point because in his mind Ms. DeSalvo and Mr. Carson were using him, getting a free place to live without living up to their end of the bargain. RP 229, 236-37; Ex. 19 at 4:13, 42:13. Miller was angry at Ms. DeSalvo and Mr. Carson for disrespecting his daughter's room by arguing in it. RP 249-50; Ex. 19 at 20:23. It is also possible that Miller, although he denied it, wanted some type of relationship with Ms. DeSalvo. RP 221; Ex. 19 at 36:58.

Miller was not armed the first or second time he contacted Ms. DeSalvo and Mr. Carson regarding their argument in his daughter's bedroom. Ex. 19 at 15:07, 46:29, 1:22:10. After speaking with Mr. Carson and Ms. DeSalvo a second time Miller went back to his bedroom and retrieved his gun out of a safe. *Id.* The gun was not loaded. Ex. 19 at 1:22:10. Miller loaded the gun, chambered a round on his way into the kitchen from his bedroom, and then concealed the gun in the pocket of his sweatpants. Ex. 19 1:22 to 1:23:54.

Miller went back to the bedroom and lured Mr. Carson out of the bedroom by asking Mr. Carson if he could speak with him. RP 251. Mr. Carson replied, "Sure, dude, what's up?" RP 251. Mr. Carson calmly stepped out of the room, without a weapon, defenseless, unaware that Miller had procured a gun, and shut the door behind him. RP 251-52. As soon as the door closed Miller shot at Mr. Carson three times, ultimately killing him. RP 252, 328-29.

Miller claimed in his statement that he was attempting to protect Ms. DeSalvo and that Mr. Carson attacked him by running at him with a knife. Ex. 19 at 1:24:30 to 1:27:00. The members of the jury determine credibility and it is not for this Court to substitute its judgment for that of the jury. *Myers*, 133 Wn.2d at 38; *Green*, 94 Wn.2d at 221. The jury clearly did not find Miller's self-serving version of the events, which changed throughout his statement, credible. CP 408-09.

The facts in this case are similar to those in *Commodore*. Considering the evidence introduced, in the light most favorable to the State, any rational jury could have found Miller acted with premeditation when he murdered Mr. Carson. Miller had multiple possible motives for killing Mr. Carson, he had to procure the gun from a safe in another room after two altercations with Mr. Carson

and Ms. DeSalvo. Miller had to load the gun. Miller chambered a round in the kitchen, prior to returning to the bedroom, and concealed the gun in his pocket. Miller lured Mr. Carson out of the room and immediately fired three shots upon Mr. Carson exiting the room and closing the door behind him. This constitutes substantial circumstantial evidence of premeditation and therefore the evidence presented was sufficient to prove Murder in the First Degree beyond a reasonable doubt. This Court should affirm Miller's conviction.

**B. THE COURTROOM CONFIGURATION DID NOT DENY MILLER A FAIR AND PUBLIC TRIAL, HIS RIGHT TO CONFRONTATION, OR HIS ABILITY TO ASSIST HIS ATTORNEY.**

Miller next makes a creative yet meritless argument regarding a laundry list of rights he argues were violated by the configuration of the courtroom. Brief of Appellant 12-27. Miller asserts his rights were violated in five different ways due to the configuration of the courtroom, (1) his right to a jury trial, (2) confrontation clause rights, (3) ability to assist his counsel, (4) the public trial right, and (5) his right to appear the presumption of innocence. Brief of Appellant 12-27. Miller's argument fails because, 1) the trial court judge retains the ability to control the proceedings in his courtroom including courtroom configuration, 2)

Miller's rights were not violated by the courtroom configuration, and  
3) Miller has not presented any case law on point.

There were two instances when Miller's attorney raised concern with the trial court judge regarding the courtroom configuration. Miller's attorney argued the jurors could not see Miller and the attorney and Miller could not see the jurors. At the beginning of the second day of testimony the following exchange occurred:

MR. ENBODY: I have another matter to bring up, too.

THE COURT: What is it?

MR. ENBODY: Some of the jurors or alternates or whatever have indicated they are having trouble seeing, because of the configuration of the wall and the tables. My suggestion would be that the bailiff put the alternates at the far end. I don't know whether that's where they are currently situated but that would seem to make more sense –

THE COURT: No, alternates are down here on this end.

MR. ENBODY: -- which would make it a lot more –

THE COURT: Well, but, then, you are basically discriminating against the alternates, saying the alternates are more shall we say expendable than the regular 12 jurors.

MR. ENBODY: Well, it won't be a 14 to nothing verdict.

THE COURT: Do you have a position, Mr. Meagher?

MR. MEAGHER: No, your Honor.

THE COURT: Some of the jurors are also complaining to the bailiff that they are having a hard time hearing. Mr. Enbody.

MR. ENBODY: I understand that. I don't have any suggestions, anyway. I can barely see the jurors.

MR. MEAGHER: The wall hooks around.

THE COURT: Anything else?

MR. ENBODY: No.

THE COURT: Your witness is here?

MR. MEAGHER: Yes, she is.

THE COURT: So we are ready to resume. Bring the jury in.

MR. ENBODY: Have we decided how we're going to do that?

THE COURT: I have a belief that the jury is able to see and observe adequately the way they are sitting right now.

MR. ENBODY: Even though they say they can't.

THE COURT: It isn't that they said they couldn't. One juror in particular the juror in the back seat number one was complaining and we solved that by pushing the table forward. I'll address it.

(WHEREUPON THE JURY ENTERS THE COURTROOM.)

THE COURT: Good morning, ladies and gentlemen. Please be seated. Yesterday an issue came up with

apparently some of the jurors having a hard time seeing everything that's going on in the courtroom. I've had the defense table moved up, which should help the line of sight issues. If any of you have a problem seeing or hearing during the proceedings, let me know. One alternative that I do have that I've done before in some of these trials is I have moved the alternates down in front and moved everybody over one seat, but I would rather not do that if I don't have to, because it makes it a little crowded in here when I do it that way, so I would prefer that we just stay where we are as long as everybody can see.

Also, it has come to my attention that counsel has had some difficulty being heard by the jurors. I've spoken to both attorneys and suggested that had they speak up.

RP 289-92. At the start of the next day, day three of testimony, the following exchange occurred:

MR. ENBODY: We still have a continuing problem of configuration of the jury. Just for purposes of the record, from where we sit we cannot see at least two or three of the jurors. They cannot see us.

THE COURT: Well, you don't know that. That's your speculation that they can't see you.

MR. ENBODY: Well, I can't see them and I can't see through Officer Hughes and I can't see through the bailiff. They are in direct line, so once again I make my request to have the alternates be placed outside.

THE COURT: I inquired of the jury yesterday as to whether anybody was having a problem seeing or hearing with the defense table being where it is. None of the jurors indicated that they had a problem seeing or hearing the evidence, and here again the evidence generally comes from the witness stand. It may very well be that the jurors have an opportunity to view the

parties at the counsel table, during the trial, but I'm not aware that being able to view the parties at counsel table is necessarily such a fundamental issue in a trial that I have to be concerned with the configuration of the jury.

The fact of the matter remains is that there are 14 chairs in the jury box in this particular courtroom and the 12 jurors are seated at one end and proceeding down the jury box with the alternates at the end and I'm not going to change that.

MR. ENBODY: For the record.

THE COURT: Bring the jury in.

(WHEREUPON THE JURY ENTERS THE COURTROOM.)

THE COURT: Please be seated. Good morning. Ladies and gentlemen, once, again, the issue has been brought to the Court's attention that some of you may have some difficulty in seeing what's transpiring in the courtroom during the trial. As I mentioned yesterday, if any of you during the course of the presentation of the trial have difficulty either seeing or hearing what's going on, and I'm not aware and I don't catch it, please by all means have a hand up and let me know if there's an issue, because if there's not, I presume all of you have an opportunity to observe and listen and pay attention to what's going on in the courtroom.

RP 452-54. The only mention in these two exchanges of a juror complaining of not being able to see or hear was one juror that was having difficulty seeing defense counsel table and once alerted, the trial court moved the table forward to accommodate the juror. RP 238. It should be noted that on the first day of testimony it was the

trial judge who alerted the parties that one juror was having a hard time seeing Miller:

THE COURT: We're back on State of Washington vs. Weston Miller. Defendant and counsel are present. One of the jurors has complained she's had a hard time seeing the defendant. Perhaps we could push the table a little bit this direction towards the bench.

MR. ENBODY: That's fine.

THE COURT: Are we ready to resume?

MR. ENBODY: I think so.

RP 238. It is curious that during this initial exchange Miller's attorney did not complain about any inability that he or Miller may have had in regards to viewing the jury. RP 238.

After Miller's attorney raised issue regarding the courtroom configuration the trial court inquired of the jurors and told them if anyone had any difficulties seeing or hearing to please alert the court. There is nothing else in the record that suggests, besides on juror's initial complaint, that any juror had difficulty observing or hearing any part of the trial. Miller is attempting to argue by analogy that a number of his rights were violated. Miller's arguments fail because they are meritless.

## **1. Courtroom Configuration Falls Under The Broad Discretion Of The Trial Court Judge.**

Miller asserts a number of his rights were violated due to the courtroom configuration. Miller does not address what the State believes is the fundamental issue, which is a trial judge's ability to control the proceedings in his or her courtroom. A trial judge is afforded "broad discretion to make a variety of trial management decision, ranging from the mode and order of interrogating witnesses and presenting of evidence to the admissibility of evidence to the order and security of the courtroom." *State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192, 1196 (2013).<sup>4</sup> Trial court judges are afforded broad discretion because the reviewing courts acknowledge that a trial court judge is in the best position to perceive and structure the proceedings that occur in their courtrooms. *Dye*, 309 P.3d at 1196.

The standard of review for a question regarding a trial judge's decision in regard to controlling to proceedings is an abuse of discretion. *Id.* A reviewing court will not reverse the trial judge's decision, even if the reviewing court disagrees with that decision,

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<sup>4</sup> The State is pinpoint citing to the Pacific Reporter because while the Washington Reporter numbers are available for the initial citation, the individual page numbers are not in Westlaw as of 12/10/13 and the State could not locate a paperback copy of the edition Official Washington Reporter that contains *State v. Dye*.

“unless that decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *Id.* (internal quotations and citations omitted). This abuse of discretion standard does not change to higher degree of scrutiny just because a defendant alleges the ruling violated one of his or her fundamental rights such as the right to a fair trial or the presumption of innocence. *Id.* The reviewing courts “have consistently reviewed courtroom procedures-allegedly prejudicial or not-for abuse of discretion standard.” *Id.*

Miller argues a number of his fundamental rights were violated by the configuration of the courtroom. Miller argues his right to a jury trial, confrontation clause rights, ability to assist his counsel, the public trial right, and his right to appear the presumption of innocence were violated by the courtroom configuration. Brief of Appellant 12-27. Simply alleging these violations does not change the fundamental question or the standard of review. The trial judge moved the table to accommodate the juror and repeatedly asked the jurors to notify him if they could not hear or see. RP 290-92, 453-54. The judge stated he could move the alternates but would prefer not to

because it would make it crowded and as long as everyone is able to see he would leave the jury as it was seated. RP 291.

The following day when Miller's attorney raised the issue again, speculating that some of the jurors could not see him, the trial judge noted he had dealt with this matter the day before and no one had indicated any difficulty with the way the courtroom was presently configured but he would inquire again, which he did. RP 452-54. The trial judge's rulings and actions in regards to the configuration of the courtroom, the placement of jurors and the table where Miller and his attorney sat, were not manifestly unreasonable or based on untenable reasons or untenable grounds. There was no abuse of discretion and this Court should affirm Miller's conviction.

**2. Miller's Arguments That His Jury Trial Rights, Right To A Fair Trial, Confrontation Clause Rights, Presumption Of Innocence And Right To A Fair Trial, And His Public Trial Rights Were Violated Are Without Merit.**

As stated above, the arguments Miller makes in regards to the laundry list of rights he alleges were violated by the courtroom configuration are without merit. Constitutional violations are reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

**a. Miller presents no case law on point for any of the arguments he makes regarding the courtroom configuration.**

“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Dow*, 162 Wn. App. 324, 331, 253 P.3d 476 (2011) (citations and internal quotation marks omitted). All of the arguments made by Miller’s counsel are by analogy and none are directly on point, as Miller acknowledges. Brief of Appellant 13-14, 20-21. All of the analogies presented by Miller are attenuated. Miller cannot turn a minor logistical issue regarding courtroom layout and parlay it into several violations of his constitutional rights.

**b. Miller was not denied his right to a jury trial.**

A defendant is guaranteed a right to a jury trial by the Sixth Amendment of United States Constitution and Article One, section 21, of the Washington State Constitution. It violates the minimal standards of due process for a court to fail to provide the right to a fair trial. *State v. Boiko*, 138 Wn.App. 256, 260, 156 P.3d 934 (2007)(citations omitted).

Miller argues that his alleged inability to see and observe some of the jurors and the juror’s inability to see Miller violated his

right to a jury trial because the jurors were unable to observe Miller's demeanor and he could not see the juror's reactions. Brief of Appellant 14. Miller analogizes his argument with that of an inattentive, sleeping juror. Brief of Appellant 14-17. While it is true that a sleeping juror should be removed by the trial court to ensure the defendant receives a fair trial because such a juror would miss essential portions of a trial, there is no such evidence that any of Miller's jurors suffered from inattentiveness and missed essential portions of the trial. RCW 2.36.110; *State v. Jordan*, 103 Wn. App. 221, 224-30, 11 P.3d 866, *rev. denied* 143 Wn.2d 1015 (2001).

One juror mentioned on the first day of testimony she had a hard time seeing Miller. RP 238. The trial judge immediately moved the table where Miller sat to give the juror a better view. RP 238. At no other time in the trial is there any mention of a juror being unable to see with exception of Miller's attorney's speculation. RP 289-92, 452-54. Contrary to Miller's argument, a juror having difficulty seeing him is not "an insurmountable obstacle analogous with juror inattention, distraction, or physical and personal problems." Brief of Appellant 17. Miller had his case decided by 12 jurors, none of whom indicated any issue with seeing the defendant or being able to make observations in the courtroom after being instructed by the

trial judge to let him know if there were any such issues. RP 291-92, 452-54. Further there is no authority that requires or even suggests Miller must be able to constantly view and monitor all of the jurors. Miller was not denied his right to a jury trial.

**c. Miller's confrontation clause rights were not violated.**

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront adverse witnesses. This right allows the jury to assess the witness's reliability, credibility, and veracity in person. This is important because the determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *Myers*, 133 Wn.2d and 38.

Miller argues the jury has a right to see him and he the jury is contained within his confrontation clause rights. Miller asserts that the jury must be able to see him at counsel table so the jurors can assess his credibility, manner, demeanor, and see Miller's humanity. Brief of Appellant 19-20. Miller also asserts he has the right to see the juror's expressions which is somehow an essential tool Miller requires to possess in order to assist his attorney. Brief of Appellant 20.

There is nothing contained in the confrontation clause that demands that a defendant have the right to confront his or her jury. See U.S. Const. amend. VI. If Miller wanted the jury to assess his credibility he had the option to testify on his own behalf, which he did not exercise. See RP. The right to confront and cross-examine adverse witnesses does not extend to a right of a defendant to be observed by the jurors or for the defendant to observe the jurors. Is Miller suggesting the jurors should base their decision on whether or not to convict him based upon the way he looks or his conduct at counsel table and not the evidence presented to them? Miller's argument in this regard is beyond attenuated and this Court should reject it and affirm his conviction.

**d. Miller was not denied his ability to assist his attorney during his jury trial.**

Miller's equation of his inability to see some of the jurors to an incompetent defendant is ridiculous. Miller argues that his inability to see all of the jurors and the jurors' inability to see Miller somehow affected Miller's ability to assist his attorney in his defense. Brief of Appellant 21-23.

It is prohibited by the Due Process Clause of the Fourteenth Amendment to prosecute a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439, 112 S.Ct.

2572, 120 L.Ed.2d 353 (1992). A person is incompetent if he or she “lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(15). A criminal defendant is presumed competent. *State v. Bastas*, 75 Wn. App. 882, 886, 880 P.2d 1035 (1994).

Miller was present in the courtroom and able to assist his attorney throughout the duration of the trial. See RP. There is no showing by Miller that his alleged inability to see a couple of the jurors actually affected his ability to assist his counsel in any way. The conclusory statement by Miller’s appellate counsel is not sufficient evidence of Miller’s inability to assist his attorney. This Court should reject Miller’s meritless argument and affirm his conviction.

**e. The right to a public trial was not violated by the courtroom configuration.**

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to a public trial. U.S. Const. amend. IV; Const. art. I, § 22. The Washington State Constitution also requires that “[j]ustice in all cases shall be administered openly and without undue delay.” Const. art. I, § 10. A closure occurs “when the courtroom is

completely and purposefully closed to spectators so that no one may enter and no one may leave.” *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused’s right to a fair trial, the proponent must show a “serious imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

*Bone-Club*, 128 Wn.2d at 258-59. A criminal defendant’s public trial rights are violated if there is a closed proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.3d 1550 (2005).

The public trial requirement is primarily for the benefit of the accused. *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). “[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) (citations omitted). The right to a public trial is closely linked to the defendant’s right to be present during critical phases of the trial. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

Miller argues his inability to see the jurors and the jurors’ inability to see him violated his public trial right. Brief of Appellant 23-25. There was no closure of the courtroom. See RP. The public and Miller were present throughout the trial without limitations. See RP. If the courtroom was not closed and no essential adversary proceedings were conducted behind closed doors then there is no violation of the public trial right. Miller’s argument to the contrary is absurd. This Court should reject Miller’s public trial right violation argument and confirm his conviction.

**f. Miller's right to appear and his presumption of innocence were not violated.**

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to be present during all critical stages of the proceedings. U.S. Const. amend. VI and XIV; Const. art. I, § 22; *Irby*, 170 Wn.2d at 880, citing *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L. Ed.2d 867 (1983). Beyond the right to be present during the presentation of evidence, a criminal defendant also “has the right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (internal quotations and citations omitted).

A criminal defendant has a constitutional right to a fair trial by an impartial jury. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I, § 3; Const. art. I, § 21; Const. art. I, § 22. “The right to a fair trial includes the right to the presumption of innocence.” *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005) (citations omitted). The presumption of innocence is the “bedrock foundation in every criminal trial.” *Gonzalez*, 129 Wn. App. at 900, citing *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L. Ed. 288 (1952). The trial court has a duty to be alert to any

factor which “could undermine the fairness of the fact-finding process.” *Id.*

Miller argues that by being shielded from the view of the some of the jurors it violates his presumption of innocence and his right to appear were violated. Brief of Appellant 25-27. Miller argues that if how he appeared did not matter there would be no rule against a defendant wearing jail garb or being shackled in the presence of the jury. Brief of Appellant 26-27. There is no evidence that the jurors were unable to see Miller, only that one juror had a hard time seeing him the first day of trial.

A criminal defendant is entitled to appear free of shackles and restraints when on trial before the court. *State v. Williams*, 18 Wn. 47, 49, 50 P. 580 (1897). Appearing in shackles may deny a defendant due process because a jury may be more prejudiced against a shackled defendant thereby lowering or reversing the presumption of innocence. *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998), *citing Jones v. Meyer*, 899 F.2d 883 (9<sup>th</sup> Cir. 1990). A defendant’s claim that shackling violated his or her constitutional rights is subject to harmless error analysis. *Hutchinson*, 135 Wn.2d at 888. To succeed on a claim of unconstitutional shackling a defendant “must show the shackling

has a substantial or injurious effect or influence on the jury's verdict." *Id.*

Miller argues that the jurors' inability to clearly view him "must have adversely impacted the juror judgment regarding Miller's presumption of innocence." Brief of Appellant 27. Miller has not, and cannot, show that one juror's difficulty in viewing him on the first day of trial had a substantial or injurious effect or influenced the jury's verdict. As argued above, there was overwhelming evidence that his shooting of Mr. Carson was deliberate and premeditated. Yet somehow one juror's difficulty in viewing Miller made the jurors presume he was somehow guilty? This argument defies logic. If a jury can see a defendant in shackles, where clearly there could be an implication on the presumption of innocence, and the courts can find such a violation harmless, then a possible partially obstructed view of the defendant is at a minimum subject to the same analysis, and in actuality is not a violation of the presumption of innocence.

Miller also argues in this section that when a defendant cannot see a jury and the jurors cannot see the defendant his right to appear is violated. Brief of Appellant 26. Miller was present for his trial and did defend it in person. Const. art. I, § 22; See RP.

Miller could have testified on his own behalf and was able to have witnesses against him appear to him face to face, as required. Const. art. I, § 22. Miller's right to appear was not violated or even implicated by a possible inability of one juror to view him during the first day of trial or Miller's alleged inability to view a couple of the jurors. This Court should affirm Miller's conviction.

#### IV. CONCLUSION

The State presented sufficient evidence of premeditation to sustain the jury's guilty verdict for Murder in the First Degree. Miller did not have any of his rights violated by the configuration of the courtroom and any claim to the contrary is meritless. This Court should affirm Miller's conviction for Murder in the First Degree.

RESPECTFULLY submitted this 12<sup>th</sup> day of December, 2013.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



by: \_\_\_\_\_  
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**LEWIS COUNTY PROSECUTOR**  
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