

NO. 65619-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC J. CHRISTENSEN,

Appellant.

2019 APR 29 PM 4:31

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

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Substantive Facts</u> .....	3
C. <u>ARGUMENT</u> .....	14
1. THE STATE'S EVIDENCE IS INSUFFICIENT TO PROVE PREMEDITATION .....	14
2. THE TRIAL COURT'S COMMENT ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED CHRISTENSEN A FAIR TRIAL .....	20
3. EVIDENCE THAT CHRISTENSEN WAS A CONVICTED FELON REQUIRED A MISTRIAL .....	28
D. <u>CONCLUSION</u> .....	33

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>Seattle v. Arensmeyer</u> , 6 Wn. App. 116, 491 P.2d 1305 (1971) .....	20
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999) .....	27
<u>State v. Becker</u> , 132 Wn.2d 54, 935 P.2d 1321 (1997) .....	21, 25
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988) .....	31
<u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289, <u>cert. denied</u> , 510 U.S. 944 (1993) .....	27
<u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987) .....	31
<u>State v. Bushey</u> , 46 Wn. App. 579, 731 P.2d 553, <u>review denied</u> , 108 Wn.2d 1014 (1987) .....	18
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996) .....	31
<u>State v. Escalona</u> , 49 Wn. App. 251, 742 P.2d 190 (1987) .....	30, 31
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995) .....	15, 17
<u>State v. Gibson</u> , 47 Wn. App. 309, 734 P.2d 32, <u>review denied</u> , 108 Wn.2d 1025 (1987) .....	18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Giffing</u> , 45 Wn. App. 369, 725 P.2d 445, <u>review denied</u> , 107 Wn.2d 1015 (1986) .....	19
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	17
<u>State v. Hardy</u> , 133 Wn.2d 701, 946 P.2d 1175 (1997).....	31
<u>State v. Johnson</u> , 124 Wn.2d 57, 873 P.2d 514 (1994) .....	30
<u>State v. Lampshire</u> , 74 Wn.2d 888, 447 P.2d 727 (1968) .....	20, 21, 24, 25
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	21, 25
<u>State v. Longworth</u> , 52 Wn. App. 453, 761 P.2d 67 (1988), <u>review denied</u> , 112 Wn.2d 1006 (1989) .....	18
<u>State v. Massey</u> , 60 Wn. App. 131, 803 P.2d 340, <u>review denied</u> , 115 Wn.2d 1021 (1990) .....	18
<u>State v. Ollens</u> , 107 Wn.2d 848, 733 P.2d 984 (1987) .....	17
<u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992) .....	15, 19
<u>State v. Perrett</u> , 86 Wn. App. 312, 936 P.2d 426, <u>review denied</u> , 133 Wn.2d 1019 (1997) .....	31

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995), <u>cert. denied</u> , 518 U.S. 1026 (1996).....	15, 16, 17, 25
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992), <u>review denied</u> , 120 Wn.2d 1022 (1993).....	18
<u>State v. Sargent</u> , 40 Wn. App. 340, 698 P.2d 598 (1985) .....	19
<u>State v. Woldegiorgis</u> , 53 Wn. App. 92, 765 P.2d 920 (1988), <u>review denied</u> , 112 Wn.2d 1012 (1989).....	18
 <u>FEDERAL CASES</u>	
<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).....	14
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).....	14
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) .....	27
 <u>RULES, STATUTES AND OTHER</u>	
ER 404(b) .....	21, 28
RCW 9A.32.020(1) .....	15
RCW 9A.32.030(1)(a).....	14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER (Cont'd)</u>	
U.S. Const. amend. 6.....	1, 27
Wash. Const. art. 1, § 22.....	27
Wash. Const. art. 4, § 16.....	1, 20, 25, 28
Webster's Third New Int'l Dictionary (1993) .....	24
WPIC 4.64.01 .....	22
WPIC 26.01.01 (2010) .....	15

A. ASSIGNMENTS OF ERROR

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

2. The trial court commented on the evidence, thereby violating appellant's constitutional rights under article 4, § 16 of the Washington Constitution.

3. To the extent defense counsel contributed to the comment on the evidence, counsel was ineffective and denied appellant his Sixth Amendment right to effective representation.

4. The trial court erred when it denied appellant's motion for mistrial based on the improper admission of evidence appellant was a convicted felon.

Issues Pertaining to Assignments of Error

1. Premeditation requires proof that the defendant deliberated before acting on his design to kill. In appellant's case, there were no eyewitnesses to the murder and it was impossible to determine how the victim was killed. While circumstantial evidence can justify a finding of premeditation, the evidence must be substantial. Is the evidence sufficiently substantial in this case?

2. The State contended that appellant's conduct after the murder – his method of disposing of the body – was relevant to premeditation and presented an expert opinion on the subject. The defense challenged the assertion appellant's post-homicide conduct showed premeditation. During the expert's testimony, however, the court instructed jurors that the expert's opinion was in fact relevant and important to whether the crime was premeditated. Was this a judicial comment on the evidence?

3. While defense counsel did not propose the precise language used in the court's improper instruction, counsel participated in crafting the instruction. To the extent this participation contributed to the comment on the evidence, did this deny appellant his right to effective representation?

4. Although the trial court denied a prosecution motion to present evidence that appellant had prior felony convictions, a prosecution witness revealed appellant was a convicted felon. Did this damaging and improper testimony require a mistrial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor's Office charged Eric Christensen with one count of Murder in the First Degree for the

death of Sherry Harlan. CP 236-237. The contested issue at trial was not whether Harlan was murdered or whether Christensen was the murderer. Rather, it was whether the killing had been premeditated. RP<sup>1</sup> 1193, 1217, 1246-1247. Therefore, jurors also were instructed on Murder in the Second Degree. CP 74-76.

Jurors ultimately found the killing had been premeditated and convicted Christensen of Murder in the First Degree. CP 60. The trial court imposed a standard-range 450-month sentence, and Christensen timely filed his Notice of Appeal. CP 1-12, 15-16.

## 2. Substantive Facts.

Eric Christensen and Sherry Harlan met in April 2009 through an on-line community website called “Tagged” and began a romantic relationship. Exhibit 238-A; exhibit 238, at 2.<sup>2</sup> Their housing situation was unstable. They sometimes lived in their cars and spent a few months staying with friends in an apartment. Id.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: the 8 consecutively paginated volumes containing the trial proceedings are referred to by “RP” followed by page number. Volumes containing pretrial and sentencing proceedings are identified by date.

<sup>2</sup> Exhibit 238-A is a recorded interview of Christensen with police detectives. Exhibit 238 is a transcript of that interview. For ease of reference, all citations to the interview hereafter are to the transcript.

By August, however, they were living in a “studio apartment” – a very small house – on property owned by John and Sharon Banks just outside of Goldbar. *Id.* at 3-4; RP 737-739, 754-756, 784-786.

On November 14, Christensen began serving jail time in Snohomish County on outstanding misdemeanor warrants, and the Banks asked Harlan to leave the property. Exhibit 238, at 5-6; RP 740; CP 69. Around this same time, Harlan had a romantic relationship with another man she previously met online, Daniel Young. RP 687-698, 733. The two spent several weekends together in November and December 2009. RP 734. Young provided her with money and gifts, including home furnishings, a laptop computer, and a flat screen television. RP 689-690, 695-705, 732. He also co-signed a lease, allowing Harlan to rent an apartment at the Cedar Creek Apartment complex in Everett, and paid her first and last month’s rent. RP 670-680, 694-695. Harlan referred to Young as her “sugar daddy.” RP 71.

Christensen was released from jail on December 11 and moved back to the Banks’ property. RP 740. Even before his stint in custody, Christensen knew about Young and expressed concern about his relationship with Harlan. RP 787. There was increased friction between Christensen and Harlan when Christensen found

out Young had been providing her with money, gifts, and an apartment in his absence. Exhibit 238, at 9-13; RP 770.

Christensen was upset, depressed, and mentioned suicide. He told a friend that over the years he had been wronged by five different women, including Harlan, and he was going to “get these bitches for it.” RP 772-773. Christensen believed his relationship with Harlan was over and, at one point, vandalized Harlan’s car. RP 705-707, 742-753. On another occasion, he became so upset about the break up, he smashed a computer. RP 753-754.

But Harlan indicated she wished to salvage the relationship. Exhibit 238, at 12-13. Both Christensen and Harlan were practicing Wiccans. RP 852-856. Christensen had Harlan take a “blood oath,” which required Harlan to promise she would no longer contact Young. The ritual involved Harlan pricking her finger and placing a drop of blood on burning incense. Exhibit 238, at 13-20, 23-24; RP 857-862, 915. Despite the oath, sometime before New Year’s Day, Christensen found text messages on Harlan’s phone indicating she was still in contact with Young. Exhibit 238, at 26-27; RP 915.

Christensen and Harlan spent New Year’s Eve apart. Christensen got extremely intoxicated and sent Harlan an insulting

and profane text message. Exhibit 238, at 28; RP 1001. But things were fine the following day. On the afternoon of January 1, 2010, Harlan texted Christensen, inviting him to her apartment that evening for dinner and a movie. The two met at J.C. Penney, where Harlan worked, and then headed to Harlan's apartment for the night. Exhibit 238, at 29-30; RP 20-23, 940-943, 1003-1004.

There is no indication the couple had anything but a pleasant night together. Exhibit 238, at 30-34. The following morning, Harlan was suffering intestinal problems. *Id.* at 36. Shortly after 7:00 a.m., Christensen walked across the street to a Wal-Mart and purchased, among other items, a laxative for her. RP 810-814, 820-821, 971-972. But while Harlan was in the shower, Christensen located her cell phone and discovered she was still in touch with Young. They had been exchanging text messages that very morning. Exhibit 238, at 35-36; RP 715-723.

Around 8:00 a.m., one of Harlan's neighbors stepped outside her apartment for a smoke and heard Christensen and Harlan arguing. RP 76. Both sounded angry. Christensen said, "you weren't supposed to be with him anymore after I got out" and Harlan responded, "I don't want to be with you anymore." RP 77. Christensen said, "shut the fuck up, you bitch," there was a

moment of quiet, and then the two started yelling at each other again. At that point, the neighbor went back inside her apartment and did not hear anything else. RP 78. There had been similar arguments before. RP 67-68.

Harlan's last text message to Young was sent at 7:45 a.m. She did not reply to his messages thereafter. RP 722-723. Harlan was scheduled to work later that morning, but never showed up. Nor did she show up for work, or respond to text messages or phone calls, the next several days. RP 29-32.

On the evening of January 5, one of Harlan's co-workers went to her apartment to make contact with her. Her car was not in the parking lot and no one answered the door. RP 32-33. She called Christensen, who said he had not seen Harlan since they had a big fight the morning of the 2nd and he did not care if he ever saw her again because she had broken his trust. RP 34-35.

Police were notified that Harlan was missing. RP 33-34. Before officers arrived, someone from maintenance entered Harlan's unit and discovered the overwhelming smell of bleach. Moreover, some of the linoleum flooring and carpet had been removed from the floor. RP 47-48, 56-57. Harlan's dog – Rosco – was also missing. RP 57. A deputy from the Snohomish County

Sheriff's Department responded and determined there was no body on the premises. But the apartment looked like a crime scene, and he called in detectives from the Major Crimes unit. RP 83-85.

Christensen was quickly identified as a suspect in Harlan's disappearance. The following morning, January 6, detectives interviewed him. RP 108-114. Christensen had scratches on his face, arms, and hands. On his right hand, he had medical dressing that held his index finger in an extended position. RP 114. He denied any knowledge of Harlan's whereabouts and told detectives the cut to his hand, and also a puncture wound to his right leg, was the result of a fight with a group of Mexican men who attacked him. Exhibit 238, at 47-59. He also provided an explanation for various scratches, attributing most of them to "briar patches." *Id.* at 53-54.

Christensen was arrested the morning of January 7 and booked into jail. RP 985. That same day, the burned out remains of Harlan's car were found in a rural area of Snohomish County several miles from Highway 2 and Goldbar. Inside the car, where the driver's seat had been located, searchers found Harlan's skull. RP 177-186, 1012-1013.

After Christensen's arrest, one of his friends – Ryan Gesme – came forward and informed police he had helped Christensen

dispose of Harlan's body. RP 905. On January 4 and again on January 5, Gesme drove Harlan's car to various sites not far from where the car was ultimately found. Harlan's body was in multiple pieces. At each site, Christensen hid or buried a body part in dense woods and patches of vegetation where it could not be seen from the road. Gesme did not participate, however, in the subsequent disposal of Harlan's car. RP 263-278, 384-421, 870-903, 919-927. Gesme recalled that there was a block set of knives wedged between the seats of Harlan's car and linoleum, carpet, and a futon cover in the back seat. RP 873. Christensen told Gesme he had killed Harlan because she broke their blood oath. RP 891.

Inside Harlan's burned car, investigators found the remnants of what appeared to be a set of knives. RP 183. Specifically, a large kitchen knife was found on the driver's side of the car near the skull. A group of additional large knives, plus a sharpener, was found together on the passenger side and appeared to be from the same set. RP 199-200, 227-228, 233-235. There were also three knives in the trunk, one with a broken tip. RP 224-225, 229-230. The tip to that knife was found embedded in the skull. RP 225, 499-500.

Detectives learned that on January 3 at 2:30 a.m., Christensen had gone back to the Wal-Mart across from Harlan's apartment. By that time, his hand was bandaged and he purchased, among other items, lighter fluid. RP 814-818, 820-821. Damage inside the car was consistent with the use of lighter fluid as an accelerant and an open flame as the ignition source. Temperatures inside the car likely reached 1,800 to 2,000 degrees Fahrenheit. RP 320.

Gesme took detectives to seven different sites, allowing them to recover significant portions of Harlan's remains, including her torso. RP 263-278, 384-421. Dr. Stanley Adams performed an autopsy on the remains. RP 483, 490. Harlan had been disarticulated (separated at the joints). RP 593. There were three stab wounds to the back, two of which penetrated the chest cavity. RP 507-515. While two of the wounds could have been fatal, it was impossible to determine they caused Harlan's death. RP 529-530. The wounds could have been postmortem. RP 522, 592. Similarly, stabs to the shoulder area could have been postmortem and may have occurred during the disarticulation process. RP 570-571, 593.

The timing and cause of certain bruises – on a hand and wrist – could not be established, either, although based on their similar color, the bruises probably occurred at the same time. RP 563-565, 570. Bruising can occur postmortem, but Dr. Adams believed these were likely antemortum. RP 565-566. Although they were consistent with grab marks, they could have been caused by something else. RP 568, 570. Dr. Adams concluded the bruises were “recent,” but could not even say they occurred within a week of Harlan’s murder. RP 593-594.

Ultimately, Dr. Adams could not say how Harlan died. He listed the cause of death as “homicidal violence of unknown mechanism” and manner of death as “homicide.” RP 584, 586. He could not say the stab wounds to the back caused her death. RP 585. He could not even say that any of the stab wounds – including the wound resulting in the broken knife tip in the skull – was antemortum. RP 595. In fact, the absence of any evidence of “acute hemorrhaging” in the wounds to the torso suggested they were postmortem. RP 595.

Dr. Katherine Taylor, a forensic anthropologist, also examined the remains. RP 596-599. Considerable force was required to embed the knife tip in Harlan’s skull. The tip penetrated

all three layers of bone. RP 603-604. Disarticulation requires time, precision, and patience. RP 659. The disarticulation of Harlan's body was done successfully and skillfully, resulting in nine sections: the head, two arms, the torso, the pelvis, two thighs, and two lower legs. RP 637, 647, 651, 658-659, 664. The skills used by a hunter to disarticulate an animal would translate to disarticulation of a human. RP 664-665.

Dr. Joanne Marzowski, a member of the Washington State Patrol's Crime Scene Response Team, examined Harlan's apartment. RP 1015-1018, 1024. Sections of linoleum and carpet had been removed from the floor. RP 1033-1034, 1038. There were blood stains and tissue found in various locations throughout the apartment. RP 1043-1094. A majority, however, were located in the bedroom, where there was extensive spatter on the walls. RP 1066-1077. Dr. Marzowski concluded there had been "many events" near the center of that room. RP 1079. Given the stains and tissue, she could say a violent event occurred there involving a sharp weapon. RP 1080.

There was no evidence of "bloodletting" outside the bedroom; just evidence of attempts to clean and remove evidence. RP 1109-1110. Blood and tissue in the bedroom was consistent

with Harlan being killed and dismembered in that room. RP 1111. But Dr. Marzowski also was unable to distinguish between evidence produced by homicidal violence and evidence produced by the disarticulation process. RP 1111.

At the close of the State's case, defense counsel moved to dismiss the first-degree murder charge, arguing the State had failed to prove premeditation. RP 1168. The motion was denied. RP 1168-1169.

Counsel also focused on premeditation in closing argument, pointing out that it was impossible to determine how Harlan died. Moreover, the murder clearly had not been planned given the circumstances – the two were getting along well in the hours preceding the murder, the murder occurred at Harlan's apartment (rather than some secretive location), it immediately followed a loud and public argument, and there was no evidence of prior planning regarding a killing or disposal of the body. Counsel argued the killing was the product of Christensen's temper, it was not premeditated, and therefore he was merely guilty of Murder in the Second Degree. RP 1218-1247. The jury found otherwise, and Christensen now appeals.

C. ARGUMENT

1. THE STATE'S EVIDENCE IS INSUFFICIENT TO PROVE PREMEDITATION.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

A person is guilty of Murder in the First degree when “[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.]” RCW 9A.32.030(1)(a).

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.

Washington Pattern Jury Instructions, WPIC 26.01.01 (2010); see also RCW 9A.32.020(1) (premeditation “must involve more than a moment in point of time.”).

The State provided no evidence of a plan to kill Harlan the morning of her death. Indeed, Christensen and Harlan had shared an intimate evening together and Christensen had gone to the store that morning seeking a remedy for Harlan’s stomach ailment. Premeditation may be proved with circumstantial evidence, but only “where the inferences drawn by the jury are reasonable and the evidence supporting the jury’s finding is substantial.” State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995).

“[S]tanding alone, multiple wounds and sustained violence cannot support an inference of premeditation.” State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). In determining whether there is sufficient evidence of premeditation, courts look to evidence of four factors: (1) motive, (2) procurement of a weapon, (3) stealth, and (4) method of killing. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

Regarding the first factor, the State provided evidence of a motive for Harlan's murder – her continuing relationship with her “sugar daddy,” which Christensen discovered the morning of January 2.

Regarding the second factor, although a weapon (a knife) was procured at some point, there is no evidence Christensen brought a knife (or any other weapon) to Harlan's apartment. Compare Pirtle, 127 Wn.2d at 644 (killer brings knife from home to scene of murder). And, critically, the State failed to establish that the knife was used to kill Harlan. It was impossible to determine whether stab wounds occurred during the homicide or merely during the disarticulation process. The absence of any evidence of “acute hemorrhaging” in the wounds to the torso suggested the latter. RP 595.

Third, the killing was not stealthy. At least one neighbor heard the two arguing loudly the morning of January 2. And because Christensen had met Harlan at her work the night before, it was no secret the two were together in the hours preceding Harlan's death. There was no attempt to hide this fact, which is inconsistent with premeditation.

Finally, the State simply could not prove the method of killing. This is not a situation where the evidence revealed a prolonged, and therefore premeditated, process of causing the victim's death. The State could not disprove that Harlan died extremely quickly.

In short, the State's evidence of premeditation at Christensen's trial was not substantial. It falls well short of the evidence in other cases deemed sufficient by the Washington Supreme Court. In each of those cases, it was apparent the killing was truly the product of deliberation and reflection. See, e.g., State v. Gregory, 158 Wn.2d 759, 811-812, 817, 147 P.3d 1201 (2006) (victim stabbed multiple times, hands tied behind her back, raped, and throat slashed multiple times); Pirtle, 127 Wn.2d at 644-645 (multiple motives, taking weapon to scene, waiting for opportunity, rendering victims unconscious, cutting victims' throats, and then cutting one victim's throat a second time to finish her off); State v. Ollens, 107 Wn.2d 848, 849-853, 733 P.2d 984 (1987) (robbery motive, use of knife brought to scene, evidence victim struck from behind, numerous defensive wounds, multiple stab wounds, and subsequent slashing of throat).

In State v. Gentry, 125 Wn.2d at 598-599, the Supreme Court summarized the evidence in several Court of Appeals cases where

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

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

During closing argument at Christensen's trial, the prosecutor placed great emphasis on the possibility Christensen had used a knife he found in Harlan's apartment. Specifically, the State theorized that Christensen used a knife from a set Young recently purchased for Harlan that had been in her kitchen shortly before her death. RP 698-699, 1207-1209, 1217-1218, 1247-1250. The prosecutor conceded the evidence could not establish a knife was in fact used to kill Harlan, but argued the nature of the stab wounds suggested this was the case. RP 1206, 1209.

In State v. Ortiz, procurement of a knife from the premises did support a finding of premeditation. However, this was but one of many pieces of evidence providing sufficient proof of premeditation in that case. Notably, unlike Christensen's case, there was no doubt the knife in question was used to kill the victim. Moreover, the victim also was struck in the face with another object, and she had defensive wounds, indicating a prolonged struggle with her killer. Ortiz, 119 Wn.2d at 297, 312-313.

At Christensen's trial, the State could not establish how Harlan was killed, could not establish a struggle (much less a prolonged one), and could not even establish that a knife was used for anything beyond a postmortem disarticulation. Because the evidence is insufficient to establish premeditation beyond a reasonable doubt, Christensen is guilty of no more than Murder in the Second Degree and his current conviction must be vacated.

2. THE TRIAL COURT'S COMMENT ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED CHRISTENSEN A FAIR TRIAL.

Article 4, § 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076

(2006). Moreover, this constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the trial level is not a prohibition to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

The prosecution repeatedly argued to the court that the time necessary to disarticulate Harlan and the precise method of that disarticulation demonstrated a premeditated crime. RP (5/21/10) 80-82, 151-152; RP 612-613. The defense disputed this assertion, arguing that Christensen's method of hiding his crime after the fact did not necessarily demonstrate the killing had been premeditated. RP (5/21/10) 83; RP 617. The defense position was that premeditation on how to clean up and conceal a murder after the fact did not demonstrate premeditation to commit the murder. RP 619.

During Dr. Katherine Taylor's testimony, defense counsel objected to her expressing her opinion that the disarticulation was skillfully done. Among the objections, counsel argued that jurors might use the evidence in such a way as to violate the prohibition against propensity evidence in ER 404(b). Counsel was also

worried jurors would place too much weight on Dr. Taylor's testimony. RP 611-612.

The State responded it had no intention of suggesting Christensen possessed these skills because of prior criminal conduct. Rather, the skills likely came from his experience as a hunter. RP 613. Consistent with its theory throughout, the State argued the evidence was relevant to premeditation because "a cold, calculated disarticulation flows from a cold, calculated killing, which is, in fact, a premeditated killing." RP 613.

Defense counsel responded that if the court were going to allow the testimony, jurors should be given a limiting instruction "to advise the jury that this evidence is considered for the purpose of - - I guess what [the prosecutor] said, that this was not a hurried or frenzied disarticulation, and that they must not consider it for another purpose." RP 614.

Based on WPIC 4.64.01, the court initially proposed to instruct jurors as follows: "Before this evidence is allowed, the Court advises you that you may consider the opinions of Dr. Taylor only for the purpose of determining whether there was premeditation." RP 615-616. Defense counsel indicated her preference that the instruction identify the purpose as "evidence

that this was not a hurried or frenzied disarticulation” to avoid the court “essentially giving weight to this evidence, that this evidence is evidence of premeditation” and thereby commenting on the evidence. RP 616-617.

The court then proposed, “You may consider the opinions of Dr. Taylor only for the purpose of determining whether premeditation was present.” RP 617.

Defense counsel suggested the court add a line indicating jurors were to consider this evidence with all the other evidence in determining whether there was premeditation “so that there is not some undue weight” to Dr. Taylor’s opinion. RP 618. Counsel again expressed her concern “that a limiting instruction saying you should consider this solely for the purpose of premeditation is a comment on the evidence that it is, in fact, evidence of premeditation.” RP 619. She suggested language similar to that found in the WPIC discussing direct and circumstantial evidence, *i.e.*, one type of evidence is not more valuable than another. RP 619-620.

The prosecutor then suggested the following language: “The jury shall give the opinion of Dr. Taylor no more or less weight on the issue of premeditation than any other evidence bearing on that

issue.” RP 620. The court responded, “that would work” and defense counsel did not lodge an additional objection. RP 620-621. The court then instructed jurors as follows:

The State is asking Dr. Taylor to give some opinions. Before this evidence is allowed, the Court advises you that you may consider the opinions of Dr. Taylor only for the purpose of determining whether premeditation was present. You must not consider the opinions of Dr. Taylor for any other purpose. The jury shall give the opinions of Dr. Taylor no more or less weight than other evidence bearing on that issue.

RP 622.

This instruction was a comment on the evidence. As noted above, the purpose of the prohibition against judicial comments is to prevent the jury from being influenced by the court’s opinion of the evidence. Lampshire, 74 Wn.2d at 892. Yet, this limiting instruction told jurors that Dr. Taylor’s testimony could be considered – in fact, only considered – for determining premeditation and that it was evidence “bearing on that issue.” “Bearing” means having a relationship, influence, and significance. Webster’s Third New Int’l Dictionary 192 (1993). Thus, the court inadvertently told jurors this evidence was significant in deciding, and had a relationship to, the issue of premeditation.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (subject of comment “never challenged in any way by defendant”; harmless).

Here, the court’s comment went to a vigorously contested element at Christensen’s trial: whether the killing was premeditated. A defendant’s conduct following a murder *could be* relevant to whether the killing was premeditated. See Pirtle, 127 Wn.2d at 645 (court notes defendant’s post-crime “presence of mind” in disposing of evidence and proceeds of robbery in assessing premeditation). But *jurors*, not judges, are “the sole judges of the value or weight to be given to the testimony of each witness” and are not required to accept an expert’s opinion or give it any weight at all. CP 63. 77.

The trial court obviously was of the opinion the precise process by which Harlan was disarticulated was relevant to premeditation. In denying the defense motion to dismiss the first-degree murder charge at the close of the State's evidence, the court noted the prosecution could argue that "the method of disarticulation of the body after the murder . . . shows premeditation in the killing." RP 1168. And regarding Dr. Taylor's opinion specifically, the court found her opinion had "substantial probative value on the issue of premeditation[.]" RP 615. Unfortunately, the court subsequently provided an explicit statement of this opinion when it expressly told jurors that Dr. Taylor's opinions on the disarticulation process had "bearing" on the question of premeditation. As a consequence, jurors would have been more likely to conclude that Christensen's precise and skillful disarticulation of Harlan supported a finding of premeditation, defense counsel's contrary arguments notwithstanding.

Defense counsel did not propose the precise language ultimately used in the court's instruction. In fact, counsel was appropriately apprehensive about the instruction violating the prohibition against comments on the evidence. But were this Court to conclude otherwise and find that she contributed to the

comment, thereby raising the specter of invited error, reversal would still be appropriate based on ineffective assistance of counsel. See State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (“Review is not precluded where invited error is the result of ineffectiveness of counsel.”).

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

No reasonable attorney would encourage the court to instruct jurors that the testimony of one of the State's expert witnesses was relevant to the only contested element of the State's case. And given the importance of this element, the court's comment on the State's evidence resulted in prejudice by increasing the odds of conviction on premeditated murder.

The court's violation of article 4, § 16 requires a new trial.

3. EVIDENCE THAT CHRISTENSEN WAS A CONVICTED FELON REQUIRED A MISTRIAL.

At trial, the court was careful to ensure Christensen's trial was not tainted by his prior criminal history. A prosecution motion to use evidence of Christensen's prior felony convictions was denied. Supp. CP \_\_\_\_ (sub no. 70, Order on State's Motion to Admit ER 404(B)); RP (5/14/10) 155-161. Moreover, a portion of Christensen's interview with detectives, in which he mentioned that he had served time in another county, was deleted. RP 11-12.

Because several witnesses recalled events based on whether they occurred before or after Christensen served time in jail in Snohomish County, the trial court ruled that jurors would hear that Christensen was in jail from November 14 to December 11 on a misdemeanor matter. RP (5/21/10) 171-172. But jurors were instructed to consider the evidence "only for the purpose of providing a time line of events [and] . . . not evidence of his guilt of the crime charged." CP 69; see also RP 107 (oral instruction).

Unfortunately, during the testimony of Martha Pickens – one of Harlan's neighbors at the Cedar Creek Apartments – jurors learned that Christensen had additional, serious criminal history.

The following exchange occurred during the prosecutor's direct examination:

Q: Now, once Eric got out of jail in that early part or mid-portion of December, approximately how many times do you think you and he actually had conversations between the two of you?

A: More than twice, I would say; about three or four times. I learned that he had a little toddler girl. I learned he was a felon.

Ms. Kyle: You Honor, I'm going to object and move to strike.

THE COURT: I will sustain the objection to that comment, and the jurors will disregard it.

RP 53-54.

Although the court sustained the objection and told jurors to disregard, Pickens did not drop the subject, adding "That's what he told me." RP 54. Defense counsel objected and the court once again told jurors to disregard the fact Christensen was a convicted felon. RP 54.

Defense counsel moved for a mistrial, noting that a prior felony was considerably different than a misdemeanor and arguing there was no effective method for preventing jurors' consideration of the improper evidence and that any attempt to cure the problem through an instruction would only serve to highlight the evidence. RP

98-99, 102. The motion was denied based on the assumption jurors would heed the court's direction to disregard Christensen's felony status. RP 101-102.

In determining whether a trial irregularity requires a mistrial, this Court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Denial of a motion for mistrial is reviewed for an abuse of discretion. Johnson, 124 Wn.2d at 76. An examination of the above criteria reveals an abuse of discretion here.

First, this error was very serious. Recognizing the inherent prejudice that would result from jurors learning about Christensen's criminal history, the court limited the evidence to his brief stay in jail on a misdemeanor matter, making it clear jurors could only consider the evidence to establish the timing of events.

Evidence relating to a defendant's prior criminal conduct is particularly unfair as such evidence impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden inference . . . ." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316

(1987)), review denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes."). It is now well accepted, by scholars and courts, that the probability of conviction increases dramatically once the jury becomes aware of prior crimes or convictions. See Hardy, 133 Wn.2d at 710-711.

Looking at the second factor -- whether the evidence was cumulative -- this evidence was not cumulative of any properly admitted evidence. It was contrary to the court's efforts to keep Christensen's criminal history from the jury.

Third, the court did tell jurors to disregard Christensen's felony status. But some errors simply cannot be fixed with an instruction. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); Escalona, 49 Wn. App. at 255-56. Given that Pickens twice mentioned Christensen was an admitted felon, this testimony would not have gone unnoticed. Jurors would have been unable to put the evidence out of their minds.

In the absence of these serious irregularities, Christensen had a viable defense to the premeditation element of Murder in the First

Degree. As previously discussed, it was impossible to determine how Harlan died, the act of killing her may have been spontaneous and quick, and there was no evidence the murder had been planned. But once jurors learned that Christensen was a convicted felon, the opportunity for acquittal diminished. Jurors now knew that Christensen had previously been involved in serious criminal conduct. They would have been more likely to conclude that a hardened felon such as Christensen planned, deliberated, and designed the killing.

On this alternative ground, this Court should reverse Christensen's conviction and remand for a new trial.

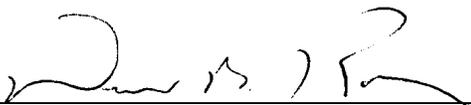
D. CONCLUSION

Christensen's conviction for Murder in the First Degree is not supported by the evidence. It must be vacated. Moreover, even if the evidence were sufficient, Christensen would be entitled to a new trial based on the court's comment on the evidence and the introduction of evidence that Christensen was a convicted felon.

DATED this 29<sup>th</sup> day of December, 2010.

Respectfully submitted,

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65619-8-I
	)	
ERIC CHRISTENSEN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 29<sup>TH</sup> DAY OF DECEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] ERIC CHRISTENSEN  
DOC NO. 725512  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF DECEMBER 2010.

x *Patrick Mayovsky*