

NO. 46569-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARCUS MORRISON

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert A. Lewis, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to support the jury's verdict of attempted first degree murder of Aaron Warner.

2. There was insufficient evidence presented to support the jury's verdict of attempted first degree murder of Rena Donnelly.

3. The trial court violated appellant Marcus Morrison's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered convictions against him for two counts of attempted first degree murder because the State failed to present substantial evidence of premeditation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment's Due Process Clause requires the State prove every element of the offense beyond a reasonable doubt. Premeditation is an essential element of attempted first degree murder. Where in its best light the State's evidence established only that Mr. Morrison assaulted the victims impulsively and in "heat of passion," did the trial court err and deprive Mr. Morrison of due process by entering convictions for attempted first degree murder? Assignments of Error No. 1, 2, and 3.

2. To prove attempted first degree murder, the State bears the

burden of proving beyond a reasonable doubt Mr. Morrison acted with premeditated intent. Where the evidence produced by Mr. Morrison showed his ability to premeditate was diminished due to the combination of alcohol and drugs, did the trial court deprive Mr. Morrison of due process in entering convictions for attempted first degree murder? Assignments of Error No. 1, 2, and 3.

C. STATEMENT OF THE CASE

1. Factual and procedural history:

Marcus Morrison dated Rena Donnelly for approximately two months prior to the offenses. 3Report of Proceedings (RP) at 193, 208.¹ He had known her since 2002. 3RP at 190. On November 23, 2013, Mr. Morrison was out with friends, including Ms. Donnelly and Aaron Warner. 2RP at 148-49. Ms. Donnelly had met Mr. Warner approximately one month before the offenses. 3RP at 193. Mr. Warner and Mr. Morrison were close friends and had known each other since they were 19 or 20 years old. 2RP at

¹The record of proceedings consists of five volumes:

1RP—November 25, 2013, December 6, 2013, January 14, 2014, April 22, 2014, May 1, 2014, May 15, 2014, and June 12, 2014;

2RP—June 23, 2014, jury trial;

3RP—June 24, 2014, jury trial;

4RP—June 25, 2014, June 26, 2014, and June 27, 2014, jury trial; and

5RP—July 2, 2014, sentencing.

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The group went to a tavern called the Main Street Station in Battle Ground, Washington to celebrate Mr. Warner's birthday. 3RP at 194, 195. During the evening, Mr. Morrison became concerned that Ms. Donnelly and Mr. Warner were flirting with each other and he became angry with Ms. Donnelly. 3RP at 305. Ms. Donnelly told Mr. Morrison that she did not want to be with him any longer and that their relationship was over. 3RP at 197.

Mr. Morrison became increasingly intoxicated and was involved in an altercation with an ex-boyfriend of Ms. Donnelly's at the bar. 3RP at 197. After the altercation, Mr. Morrison left the tavern. 3RP at 197, 310. Ms. Donnelly and Mr. Warner left the bar together and eventually went to Mr. Warner's house. 3RP at 199. Mr. Morrison called Mr. Warner to find out where they were, and was told by Mr. Warner that he had dropped Ms. Donnelly off at a mutual friend's house in Battle Ground, although she was actually with Mr. Warner at his house. 3RP at 216, 217, 310. Mr. Morrison walked to the mutual friend's house, but did not find either Ms. Donnelly or Mr. Warner at that location. 3RP at 310, 312.

Mr. Morrison then walked to Mr. Warner's house and let himself into

the house, which is routinely left unlocked. 3RP at 312. He went to the guest room, expecting to find Ms. Donnelly alone in the room. The room, however, was unoccupied. 3RP at 312. Mr. Morrison then went to Mr. Warner's bedroom. 3RP at 312, 313. He opened the door and saw Mr. Warner and Ms. Donnelly asleep in Mr. Warner's bed. Mr. Morrison closed the door and went to the garage and obtained a hammer. 3RP at 313. He returned to the bedroom and hit Mr. Warner on the head with the hammer. 3RP at 314. Mr. Warner and Ms. Donnelly were awakened and both started to scream. 3RP at 314. Mr. Morrison hit Mr. Warner with the hammer a second time. 3RP at 200, 328. He then used the hammer to hit Ms. Donnelly's head, knocking her unconscious. 3RP at 201, 218. After he attacked them, he pulled back the covers and saw that they were naked from the waist down. 3RP at 217, 219. Mr. Morrison then left the bedroom and was observed holding the hammer in the hallway by Mr. Warner's roommate, Jon Riggs. 2RP at 110, 3RP at 316. Mr. Morrison left the house and later surrendered to police at his mother's house. 3RP at 272, 316.

Mr. Warner had a fractured skull resulting from two blows to his head, but his injuries did not require surgery. 3RP at 239, 254. He was hospitalized for two to three days. 2RP at 157. Ms. Donnelly required

surgery for a severe skull fracture and brain bleeding as a result of two pieces of the fracture exerting pressure on her brain. 3RP at 202, 242, 256-58.

By information filed November 27, 2013, the Clark County Prosecutor charged Mr. Morrison, *inter alia*, with two counts of attempted first degree murder of Mr. Warner and Ms. Donnelly, contrary to RCW 9A.32.030. Clerk's Papers (CP) 7. The State alleged that the counts were committed while Mr. Morrison was armed with a deadly weapon. CP 7.

Mr. Morrison was evaluated by Dr. Jerry Larsen regarding issues including diminished capacity and voluntary intoxication. Dr. Larsen testified that Mr. Morrison's level of drug and alcohol intoxication would have affected his ability to form intent and would cause the person to act impulsively. 4RP at 369-70. He was also evaluated by Dr. Richard Yocum, who testified on behalf of the prosecution. Dr. Yocum stated that Mr. Morrison had the capacity to form intent. 3RP at 320.

Jury trial in the matter started June 23, 2014, the Honorable Robert Lewis presiding. Mr. Morrison asserted in his defense that his capacity to form the intent necessary to commit the offenses was diminished due to the combination of alcohol and drugs he ingested. 3RP at 321-226.

2. Verdicts, enhancements, and sentence:

The jury found Mr. Morrison guilty of two counts of attempted first degree murder. CP 119, 123. The jury also found a deadly weapon enhancement for each count and that Mr. Morrison demonstrated the aggravating circumstance of lack of remorse. CP 237, 238, 241, 242. The court sentenced Mr. Morrison to 270 months on count I, 240 months on count II, to be served consecutively, and 24 months for each enhancement, for a total commitment of 558 months. SRP at 523.

Timely notice of appeal was filed July 28, 2014. CP 317. This appeal follows.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MORRISON ACTED WITH PREMEDITATION FOR BOTH COUNTS OF ATTEMPTED FIRST DEGREE MURDER

a. The State is required to prove each element of the offense beyond a reasonable doubt

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358,

364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In this case, the appellant argues that the record does not contain substantial evidence on the element of premeditation sufficient to support either convictions for attempted first degree murder.

b. The element of premeditation requires proof of prior deliberation

Mr. Morrison was convicted to two counts of attempted first degree murder. Under RCW 9A.32.030(1)(a), in order to sustain a conviction for first degree murder, the State has the burden of proving beyond a reasonable doubt that a defendant, "[w]ith a premeditated intent to cause the death of another person, . . . causes the death of such person or of a third person."

The required element of premeditation distinguishes first from second degree murder. *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982).

Under RCW 9A.28.020(1), "[a] person is guilty of an attempt commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." Thus, attempted first degree murder requires proof that the defendant not only formed premeditated intent to cause the death of the victim or victims, and also the additional requirement of proof that the defendant took a substantial step toward committing the offense. *State v. Price*, 103 Wn.App. 845, 851, 14 P.3d 841 (2000), *review denied*, 143 Wn.2d 1014 (2001). *See also, State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991) (offense of attempted murder requires the specific intent to kill and any lesser *mens rea* does not suffice).

Premeditation must involve "more than a moment in point of time," and a mere opportunity to deliberate is not sufficient to support a finding of premeditation. RCW 9A.32.020(1); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995). Instead, the element of premeditation is "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however

short." *Pirtle*, 127 Wn.2d at 644, quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). Premeditation can be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. *Pirtle*, 127 Wn.2d at 643; *Gentry*, 125 Wn.2d at 597; *State v. Neslund*, 50 Wn. App. 531, 558, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988).

Premeditation is the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). The premeditation required in order to support a conviction for the crime of attempted murder in the first degree must involve more than a moment of time and, merely because a defendant had the time and the opportunity to deliberate, that is insufficient to support a finding of premeditation. *Bingham*, 105 Wn.2d at 824. Therefore, the State must prove a defendant in fact did deliberate or reflect upon the killing of another before it can sustain a conviction for murder in the first degree.

The State bears the burden of proving premeditation beyond a reasonable doubt. *State v. Lane*, 112 Wn.2d 464, 472, 771 P.2d 1150 (1989).

In cases in which there is evidence that the attempted murder occurred in the heat of passion, it is possible to find the absence of premeditation but the presence of intent. *State v. Bolen*, 142 Wash. 653, 666, 254 P. 445 (1927). In this case, Mr. Morrison submits that the State failed to provide sufficient proof he acted with premeditation when he attacked Ms. Donnelly and Mr. Warner.

- c. **The State proved only that Mr. Morrison acted impulsively in the “heat of passion,” but failed to prove premeditation.**

In support of a lack of premeditation, there is no evidence of prior planning by Mr. Morrison. In assaulting both victims, there was little stealth utilized by Mr. Morrison; he went into the bedroom, apparently unconcerned that Mr. Warner’s roommate was in the house. The State proved only that the assaults were committed by Mr. Morrison, who was undoubtedly enraged by what he viewed as a fundamental betrayal by a close friend and his former girlfriend, and that Mr. Morrison acted in an apparent fit of rage. This is insufficient to prove the assaults were committed with premeditation.

- d. **The Court must reverse and remand with instructions to dismiss both convictions.**

Because there was insufficient evidence to support Mr. Morrison’s convictions for attempted first degree murder, this Court must reverse both convictions with instructions to dismiss. To do otherwise would violate double

jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

2. **IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT THAT MR. MORRISON ACTED WITH INTENT HIS CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER MUST BE REVERSED**

At trial, Mr. Morrison presented the testimony of Dr. Larsen to support the argument that he lacked the ability to act with premeditation or form the intent to commit the offenses because of alcohol and drug intoxication at the time of the incident. 4RP at 355-70.

Dr. Larsen testified regarding the amount of alcohol and various narcotics Mr. Morrison had ingested on the night of the incident. This included thirty milligrams of morphine, four milligrams of Dilaudid, and a significant amount of alcohol. 4RP at 364. Dr. Larsen opined that Mr. Morrison's alcohol level—which he stated was approximately .3 grams per liter—compounded the effects of the morphine and Dilaudid, leading to the possibility of memory loss and impaired cognitive abilities. 4RP at 365. Dr.

Larsen testified that the combination of drugs and alcohol would allow him to walk, talk, and perform other basic functions, but that his cognitive ability would be impaired, which would have impacted Mr. Morrison's ability to premeditate the intent to kill or understand the outcome of his actions. 4RP at 366, 369.

Here, the State failed to prove Mr. Morrison acted with the requisite premeditated intent where the weight of the evidence proved he lacked the capacity to either premeditate the offenses. Dr. Larsen testified about the effects of the drugs in Mr. Morrison's system at the time of the incident and noted that the large amount of alcohol that Mr. Morrison consumed magnified the effects of the drugs. 4RP 364. In addition, the combination of substances would have altered Mr. Morrison's perception of reality, potentially cause memory loss, and impacted his ability to premeditate. 4RP 369.

The end result of this testimony was that Mr. Morrison proved he lacked the ability to premeditate, proof that was not overcome by the State beyond a reasonable doubt. As a result, the jury's verdict is without substantial evidence and should be reversed.

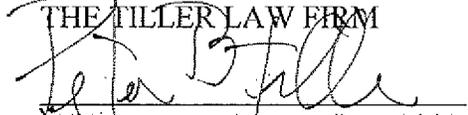
E. CONCLUSION

Based on the above, Mr. Morrison respectfully requests this court to reverse and dismiss his convictions and deadly weapon enhancements.

DATED: January 12, 2015.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on January 12, 2015, that this Opening Brief was sent by JIS link, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and true and correct copies were mailed by first class mail, postage prepaid to Ms. Anne Crusier, Deputy Prosecuting Attorney, Clark County Prosecutor's Office, PO Box 5000, Vancouver, WA 98666 and to the appellant, Mr. Marcus Allen Morrison, DOC #897402, Monroe Corrections Center, P.O. Box 777, Monroe, WA 98272 LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 12, 2014.



PETER B. TILLER

EXHIBIT A

RCW 9A.32.030

Murder in the first degree.

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

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

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

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

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

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

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

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

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