

S-23-1012

IN THE
NEBRASKA SUPREME COURT

STATE OF NEBRASKA,
Appellee,
v.
KEVIN T. KILMER,
Appellant.

APPEAL FROM THE DISTRICT COURT
OF CHERRY COUNTY, NEBRASKA

Honorable Judge Mark D. Kozisek, District Judge

BRIEF OF APPELLANT

Respectfully submitted:
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STATEMENT OF THE BASIS OF JURISDICTION

In all cases, criminal and civil, an aggrieved party is entitled to one appeal to an appellate court or to the Supreme Court as may be provided by law. Neb. Const. art. I, § 23. The Court of Appeals or the Supreme Court is the appellate court for district court. Neb. Rev. Stat. § 25-1912 (Reissue 2016). An order must be final to be appealed. Neb. Rev. Stat. § 25-1912 (Reissue 2016). An order which entirely disposes of the whole merits of the case and leaves nothing for the court's further consideration is a final order. *Big John's Billiards, Inc. v. State*, 283 Neb. 496 (2012). In a criminal case, the judgment from which an appellant may appeal is the sentence. *State v. Reames*, 308 Neb. 361 (2021) Neb. Rev. Stat. § 29-1902 (Reissue 2016). The Nebraska Supreme Court has exclusive jurisdiction to hear this appeal. Neb. Const. Art. I, § 23; Neb. Rev. Stat. § 24-204 and 24-1106(1) (Reissue 2016); Neb. Rev. Stat. § 29-2306 (Reissue 2016).

On August 8, 2023, a Cherry County jury found Kevin Kilmer (Kilmer) guilty of one count of first degree murder and guilty of one count of use of a deadly weapon to commit a felony. (T-128). Kilmer was sentenced on November 17, 2023. On count one he received a sentence of life imprisonment. On count two he received a sentence of not less than ten (10) years and no more than fourteen (14) years. Each sentence was ordered to be served consecutive to every other sentence. (T136-139). Kilmer is appealing his convictions. He filed his notice of appeal and application to proceed in forma pauperis and poverty affidavit on December 12, 2021. The district court granted Kilmer's application to proceed in forma pauperis on December 12, 2021.

STATEMENT OF THE CASE

1. Nature of the case

This is a direct appeal following conviction and sentencing for one count of first-degree murder and one count of use of a weapon to commit a felony.

2. Issues actually tried in the court below

The case was tried to a jury. Sentencing was conducted by the trial court.

3. How the issues were decided and what judgment was entered by the trial court

The jury found Kilmer guilty of one count of first-degree murder and one count of use of a weapon to commit a felony. The trial court sentenced Kilmer to life in prison and to no less than ten (10) years and no more than fourteen (14) years. All of the sentences were ordered to be served consecutively. (T136-139)

4. Scope of review

An appellate court's scope of review is to consider assigned errors which are discussed in the brief and plain error on the record. *State v. Paul*, 256 Neb. 669, 677 (1999).

In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Lorello*, 314, Neb. 385 (2023). The relevant question for an appellate court is whether, 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. *State v. Clark*, 315 Neb. 736 (2024).

ASSIGNMENTS OF ERROR

I. There was insufficient evidence submitted to support a jury verdict that Kilmer violated Nebraska Revised Statute § 28-303, murder in the first degree, because a rational trier of fact could not find all elements of the offense charged beyond a reasonable doubt.

PROPOSITIONS OF LAW

1. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an Appellate Court is whether, 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. *State v. Clark*, 315 Neb. 736 (2024).

2. In reviewing a criminal conviction for sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same. *State v. Clark*, 315 Neb. 736 (2024).

3. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *State v. Robinson*, 272 Neb. 582 (2006).

STATEMENT OF FACTS

1. Facts elicited during the trial

On August 23, 2021, the Cherry County Sheriff's Office received a call from a woman named Amanda Schell (aka Amanda Heath), claiming that an old friend named Kevin Kilmer had shown up at her house south of Cody, NE and asked to use her shower. (565:5-13; 568:22). Schell reported that Kilmer told her about smashing a woman named Ruth in the head with an axe, cleaned up, and came over to her house. (569:4-8). Kilmer's reason for doing so was that Ruth had been living with him and his boyfriend Michael -who was not out for multiple reasons- and that she had revealed their relationship to people outside of the household. (582:2-5) She also stated that Kilmer told her that he put the body in a suitcase and left the suit case by the side of the road. (573:12-13) Schell described the van that Kilmer had used to get to her house and provided the license plate to dispatch.

(571:1-3; 22-23) She also provided a detailed description of the clothing he wore when he left her residence. (575:14-20)

The deputy who received Schell's phone call knew Ruth Wittmuss and her van from prior disturbance calls and that she lived in Kilgore. Kilgore is a 45 minute drive from Schell's property. (616:11-14) The deputy arrived at Wittmuss' trailer home in Kilgore and found her van parked outside. Wittmuss' van is a red 2007 Dodge Caravan, with a distinctive white tailgate that made it easily identifiable to multiple witnesses and law enforcement. (617:9-13; 618:4-6) It was well known amongst Wittmuss' associates that she did not allow anyone else to operate or use her vehicle, which is why Kilmer's use of it made multiple parties immediately suspicious. (679:17-21; 694:1-5)

Both Kilmer and a man named Michael Malone lived in the trailer home at 104 Hunt Street in Kilgore with Wittmuss. (641:10-12) It would later come to light that Kilmer was only staying at the trailer home temporarily, because Kilmer and Malone were romantically involved and Malone's landlord, Richard Bauer, would not have approved of their relationship. (641:7-9,13-15; 702:1-3) Wittmuss, Kilmer, and Malone used methamphetamine together for several days preceding Wittmuss' disappearance.

The deputy, after arriving at 104 Hunt Street and observing Wittmuss' van parked outside, spoke with both Malone and Kilmer about Wittmuss' disappearance. (620:1-10) At the time of his initial contact with law enforcement, Kilmer's clothing matched the description provided by Amanda Schell. Kilmer was detained on suspicion that he was involved in Wittmuss' disappearance, but told repeatedly he was not under arrest. He made several statements concerning Wittmuss, but did not make any admissions similar to what Amanda Schell had reported to law enforcement. (1261:7-13). Kilmer testified that everything he told law enforcement was "a bunch of crap." (1261:8-9).

Kilmer was permitted to enter and exit the residence several times during his detention and eventually ran off once the deputy who was escorting him turned around. (621:19-23) He spent the entire night and a good portion of the morning away from law enforcement before ultimately being taken into custody just before noon. (622:9-11) Kilmer was interviewed by Investigators Wegelin and Neumiller with the Nebraska State Patrol at the Cherry County Jail. This interview was suppressed by the trial court because he was not provided proper *Miranda* warnings before the interview. (T40-54)

After Kilmer's first interrogation, investigators located an unattended suitcase just off of a highway north of Kilgore. (593:11-15) A woman's body was located inside of the suitcase with several significant wounds to the back of her skull. (603:7-10) She was later identified as Ruth Ann Wittmuss. (603:11-13) The injuries on her skull were likely caused by a hard, heavy object breaking the skin and bone to exposing the membrane and soft tissue of the brain. (524:7-9, 21-25; 525: 4-9).

During the search of the residence at 104 Hunt Street, investigators located blood spatter in the kitchen on the floors, walls, and cabinets. (633:16-22; 635:19-23) The investigators also found a semi-circle of cracked ceiling between the kitchen and living area. In the front living room was a splitting ax. The blunt side of the head of the axe tested positive for the presence of blood, and Ruth Wittmuss was included as a likely contributor in the resulting DNA analysis. (1137:15-16; 1141:7-8). Investigators returned to the Cherry County Jail to inform Kilmer that Wittmuss' body had been located and that his charges were going to be amended to include First Degree Murder. Kilmer declined to be interviewed another time.

The State's own theory of the case is that Kilmer and Wittmuss had gotten into an argument and attacked her from behind, but no eye witnesses testified to that effect. (1357:1-2). The State argued that attack from behind with an axe alone evinced premeditation. (1357:17-

22). Kilmer testified that he was present for Wittmuss' murder, which is why he was able to describe the blood on his person and her manner of death, but that Malone killed Wittmuss instead. (1264:11-17). The jury rejected this theory and convicted Kilmer on all counts.

2. **Procedural facts**

Kilmer was charged with murder in the first degree and use of a weapon to commit a felony on September 9, 2021. (T4).

Kilmer filed several pretrial motions regarding the admission of evidence and other matters. On August 8, 2022, Kilmer filed a motion to suppress statements. A hearing was held on September 15, 2022, in which the Court received evidence on the motion to suppress statements. The Court issued an order on November 26, 2022, granting the motion to suppress in part and overruling in part. (T40-54)

On July 24, 2023, Kilmer filed an objection to the admission of gruesome photographs at trial. (T105-108) On August 2, 2023, a hearing was held in which the Court received evidence and heard arguments as to the admissibility of Exhibit 13, 14, 15, 16, 18, 19, and 20. (465:17-24). The Court sustained the objection to Exhibit 18, and overruled the objections as to Exhibits 13, 14, 15, 16, 19, and 20. (468:1-2; 471:1-2; 473:1-2; 475:12-18)

Jury selection took place in Cherry County on August 1, 2023. The presentation of evidence started on August 2, 2023, and ended on August 7, 2023. The case was submitted to the jury on August 8, 2023, and the jury returned its verdict on that same day. (T113-125; 127-128)

SUMMARY OF ARGUMENT

Kilmer asserts that there was insufficient evidence to convict him of First-Degree Murder. There was not enough evidence submitted for a rational trier of fact to find Kilmer guilty because there was not evidence submitted of Kilmer's intent and premeditation. The evidence, even in the light most favorable to the State, did not support

an inference from the words and acts of Kilmer, nor the circumstances surrounding Wittmuss' death was the product of deliberate and premeditated acts by Kilmer.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE SUBMITTED TO SUPPORT A JURY VERDICT THAT KILMER VIOLATED NEBRASKA REVISED STATUTE § 28-303, FIRST-DEGREE MURDER, BECAUSE A RATIONAL TRIER OF FACT COULD NOT FIND ALL ELEMENTS OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT.

Kilmer asserts that insufficient evidence was submitted to support a jury verdict that Kilmer is guilty of first-degree murder, pursuant to Nebraska Revised Statute § 28-303. When reviewing a criminal conviction for sufficiency of the evidence to sustain a conviction, the relevant question for the appellate court is whether, after viewing all 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. *State v. Lorello*, 314 Neb. 385, 396 (2023). The appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Clark*, 315 Neb. 736, 741 (2024). Even viewing the evidence in the light most favorable to the State, the evidence was insufficient to prove beyond a reasonable doubt that Kilmer committed murder in the first degree.

Nebraska Revised Statute § 28-303 states that: "A person commits murder in the first degree if he or she kills another person (1) purposely and with deliberate and premeditated malice." The term "premeditated" means to have formed a design to commit an act before it is done. *State v. Watt*, 285 Neb. 647, 659 (2013). One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *State v. Robinson*, 272 Neb. 582 (2006). No particular

length of time is required to prove premeditation, just that the intent to kill was formed *before* the act was committed and not simultaneously done with the act that caused the death. *Watt*, at 659.

There is no direct evidence that points to Kilmer's intent to actually kill Ms. Wittmuss, let alone that he premeditated such a killing. So, the fact finder is left to examine the circumstances surrounding the incident. The intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Miranda*, 313 Neb. 358 (2023). "[T]o justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt." *State v. Payne*, 205 Neb. 522 at 532 (2012). Circumstantial evidence in first degree murder cases can include, "location, nature, and number of wounds convicted." *State v. Lynch*, 215 Neb. 528, 533 (1983). The State's evidence, as explained below, was insufficient to prove Kilmer killed another person with deliberate and premeditated malice.

In *State v. Miranda*, the defendant attended a birthday celebration where his estranged wife and new partner were also in attendance. 313 Neb. 358, 363 (2023). When his estranged wife stepped away from the festivities momentarily, the defendant physically assaulted her partner before the defendant was escorted out of the bar. *Id.* His estranged wife and her new partner were escorted out of the back door by the bar's sympathetic owner. *Id.* The defendant, upon learning where the other parties were going, retrieved his firearm from his car. *Id.* He approached the parties with his firearm stretched out in front of him and shot his estranged wife's new partner several times, before he trained his firearm on his estranged wife and repeatedly beat her head against a wall. *Id.*

On appeal, the defendant argued that there was insufficient evidence of premeditation to sustain a conviction for first degree murder. *Id.* at 368. This Court held that the fact that the jury was

provided with the surveillance footage of the defendant approaching the victims with his firearm outstretched in front of him, after having retrieved it from his vehicle, was sufficient to establish that the defendant formed the intent to kill before the act was committed. *Id.*

Similarly, in *State v. Braesch*, 292 Neb. 930 (2016) the defendant had been staying at his parents' home in their basement for a year or two. The defendant had yelled at his mother earlier in the day, which led to the defendant's father telling him to move out within a month. *Id.* The defendant went downstairs to "cool off" before he returned upstairs with a firearm and shot his father several times. *Id.* The trial court found -and the Supreme Court agreed- that the defendant's retreat to the basement to get the gun and then return upstairs was enough evidence to prove premeditation. *Id.* at 952.

Additionally, in *State v. Escamilla*, 291 Neb. 181, 193 (2015) evidence of the defendant's arrival at the victim's car with his firearm outstretched was evidence of premeditation: "Thus, there is considerable evidence that Escamilla arrived at the meeting with [victim] with a gun and that over the course of their encounter, if not before, Escamilla formed a design to kill [victim] with no legal justification." *Id.* at 193. The evidence that showed the defendant formed the intent to kill prior to the act itself were his plan to confront the victim with the gun, and his previous statements to his girlfriend regarding the confrontation. *Id.*

Likewise, in *State v. McLemore*, 261 Neb. 452, 465 (2001), the defendant walked 5 miles in the rain to the victim's home with a knife, waiting outside for her, and then abducting her before stabbing her and stashing her body in his car. The defendant's own statements and actions clearly demonstrated he premeditated the murder. *Id.*

In this case, unlike in *State v. Miranda*, there was no evidence of Kilmer retrieving any weapon and returning to the scene of the crime in order to kill the victim. While there was some testimony that Kilmer and Wittmuss had been arguing previously, there was no testimony regarding Kilmer attacking Wittmuss, then being separated from her,

only to return to kill her. Not one individual testified that Kilmer had expressed any intent to kill Wittmuss prior to her death. The State argued in closing that Kilmer attacked Wittmuss from behind and that alone proves premeditation, but there was no testimony from eye witnesses that Kilmer in fact did so, unlike in *Miranda*, where eye witness testimony was used to illustrate the dynamics of the confrontation in order to prove premeditation.

Unlike in *Miranda*, *Braesch*, *McLemore*, and *Escamilla*, there was no evidence that Kilmer brought the axe into the home prior to Wittmuss' death. In contrast to *Braesch and Miranda*, there was no evidence that Kilmer retreated to another room or vehicle immediately preceding the death in order to retrieve the weapon. Here, the axe was recovered by investigators in the same room where the murder took place. While premeditation does not have a specific time period requirement, a defendant cannot premeditate an act simultaneously with the act itself. He must, necessarily, have *some* time in order to form the intent. The State did not prove that Kilmer had that time.

The evidence of Kilmer's hasty attempt to clean the crime scene does not prove premeditation. The State even characterized Kilmer's cleaning of the scene as "a horrible clean job." (1354:25). The evidence of Kilmer's poorly concealed disposal of Wittmuss' body does not prove premeditation. His shower and conversation at Amanda Schell's home do not prove premeditation. These are all hasty, poorly executed actions taken *after* Wittmuss' death. The State, unlike the above-mentioned cases, did not adduce evidence of Kilmer's actions or statements immediately preceding the murder. Because the jury was not presented with evidence of Kilmer's statements or behavior prior to Wittmuss' death, they could not infer premeditation from the circumstances surrounding the murder.

Even viewing the evidence in the light most favorable to the State, no rational trier of fact could have found Kilmer committed murder in the first degree beyond a reasonable doubt. No reasonable jury could have determined any premeditation occurred in the instant

case. No one who testified as a witness against Kilmer knows what actually happened in that trailer house other than the fact that Wittmuss was struck several times with an axe. Thus, Appellant's conviction must be overturned and the case remanded for new trial.

CONCLUSION

For all of the foregoing reasons, Kilmer respectfully requests that his convictions be reversed and his case remanded for a new trial.

Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 3515 words, excluding this certificate. This brief was created using Corel® WordPerfect X9.

/s/ Helen O. Winston
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Nebraska Commission on Public Advocacy

Certificate of Service

I hereby certify that on Friday, May 24, 2024 I provided a true and correct copy of this *Brief of Appellant Kilmer* to the following:

State of Nebraska represented by Michael Thomas Hilgers (24483) service method: Electronic Service to **katie.beiermann@nebraska.gov**

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