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**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

No. 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**

The Honorable Mark D. Kozisek, District Judge

BRIEF OF APPELLEE

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Statement of the Case

I. Nature of the Case

This is a direct appeal of Kevin Kilmer’s convictions for First Degree Murder and Use of a Deadly Weapon to Commit a Felony.

II. Issues Before the District Court

The issue before the district court, relevant to this appeal, was the sufficiency of the evidence used to support Kilmer’s First Degree Murder conviction.

III. How the Issues Were Decided in the District Court

Following a jury trial, Kilmer was convicted of First Degree Murder and Use of a Deadly Weapon to Commit a Felony. (T128-31); (1431:14-1432:14).

IV. Scope of Review

“Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, 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, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.” *State v. Turdy*, 315 Neb. 756, 760, 1 N.W.3d 479, 483 (2024).

Propositions of Law

- I. To convict a defendant of First Degree Murder, the State has to show that the defendant “(1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated

malice.” *State v. Cotton*, 299 Neb. 650, 669, 910 N.W.2d 102, 125 (2018).

- II. “The premeditation element requires the State to prove that a defendant formed the intent to kill a victim without legal justification before doing so, but no particular length of time for premeditation is required.” *State v. Cotton*, 299 Neb. 650, 670, 910 N.W.2d 102, 126 (2018).
- III. “[P]urposeful, deliberate, premeditated murder may be proved circumstantially.” *State v. Miranda*, 313 Neb. 358, 368, 984 N.W.2d 261, 271 (2023).
- IV. With respect to the nature or manner of killing, what is required to show premeditation is evidence—usually based upon examination of the victim's body—showing that the wounds were deliberately placed at vital areas of the body. *State v. Escamilla*, 291 Neb. 181, 194–95, 864 N.W.2d 376, 385 (2015).

Statement of Facts

On September 9, 2021, Kilmer was charged by Information (*see* 14:22-16:8) in the District Court of Cherry County in CR21-31 with First Degree Murder, a Class IA Felony, and Use of a Deadly Weapon to Commit a Felony, a Class II Felony. (T4-5). The Information alleged that Kilmer, purposely and with deliberate and premeditated malice, killed Ruth Wittmuss with an axe. (*Id.*).

A jury trial was held on August 1, 2023, through August 8, 2023. At trial, the State called thirteen witnesses to testify.

Amanda Schell Heath (“Schell”) testified that in August of 2021, Kilmer arrived at her house in a van. (564:25-566:4). Kilmer wanted to take a shower at Schell’s house. (568:20-22). Schell testified that she was about to give Kilmer a hug when she saw specks of blood on his arms, face, chest, and legs. (567:15-568:14). Schell asked Kilmer why he had blood on him; Schell testified that Kilmer told her that “he hit a lady, and he seemed really distressed when he said it.” (568:16-19). Schell testified that she tried to clarify what Kilmer meant when he

said that he “hit a lady,” and that Kilmer told her that he hit a lady in the head with an axe. (569:2-18). Kilmer told her the victim’s name was Ruth (Wittmuss). (573:23-25). Schell testified that Kilmer described to her how Wittmuss was yelling, how he hit her, and how she said “ow” and fell to the ground. (570:5-8). Schell also testified that Kilmer described Wittmuss’s injuries, noting that Kilmer “said something about the membrane between the brain and the skull” (570:9-15). Kilmer also told Schell that he placed Wittmuss’s body “in a suitcase and dumped her on the side of the road outside of Kilgore[, Nebraska].” (573:10-17). Schell testified that Kilmer told her that Wittmuss yelled a lot, that she had hit him with a padlock on a string. (572:16-573:3). Kilmer also told her that he had hit Wittmuss in the head with an axe because Wittmuss was making threats and that Wittmuss was going to tell somebody his secret—that he was in a romantic relationship with Michael Malone. (581:5-582:5). Schell testified that she got the license plate number from the vehicle while Kilmer was in the shower, and that she called the police after Kilmer left her house in the van. (570:25-572:2, 576:11-577:1).

Michael Malone testified that, in August of 2021, he was living in Kilgore with Ruth Wittmuss. (921:14-22). Malone testified that Kilmer was visiting him, and that Kilmer had been staying with him for about two weeks before Wittmuss was killed. (923:16-924:8). Malone and Kilmer were in a romantic relationship. (987:5-7, 988:8-18). Malone testified that Kilmer had an obsession with him. (1003:21-25). Wittmuss, Kilmer, and Malone were all using methamphetamine at 104 Hunt Street. (930:14-18).

Malone testified that Wittmuss and Kilmer had a good relationship initially—until Wittmuss left Kilmer on the side of the road while on “a trip to the reservation” in South Dakota. (931:12-21). Malone witnessed an argument between Wittmuss and Kilmer about three days prior to Wittmuss’s death; Wittmuss had accused Kilmer of stealing something from her. (932:18-933:3, 934:9-15). Following this argument, Wittmuss was not going to allow Kilmer to stay at 104 Hunt

Street any longer—she was going to take Kilmer back to Valentine, Nebraska. (933:5-6, 934:16-935:25, 967:6-7). Malone testified that Wittmuss and Kilmer continued arguing and fighting in the days leading up to Wittmuss’s death. (936:2-11). On August 23, 2021—the day of Wittmuss’s death—Wittmuss told Kilmer that he needed to pack his things to return to Valentine. (938:6-21). Malone testified that Wittmuss had control of the drugs in the house and that she did not allow Kilmer to use drugs that day. (939:6-12).

Malone testified that Wittmuss was going to return Kilmer to Valentine on August 23, 2021. (*See* 941:18-22). Kilmer attempted to explain to Malone that he did not steal anything from Wittmuss and that he did not want to leave Malone and 104 Hunt Street. (941:2-5, 1009:3-17). Malone testified that he “was just reassuring [Kilmer] that [Wittmuss] wouldn’t lie to me and that he had to go.” (1009:17-18). Malone testified that he was not going to try to convince Wittmuss to allow Kilmer to stay. (941:15-17). Malone testified that Kilmer and Wittmuss were both at the house when he left 104 Hunt Street for the day to go to Richard Bauer’s house. (939:24-941:2).

Malone testified that Kilmer eventually pulled up to Bauer’s house alone in Wittmuss’s van—which was unusual because Wittmuss did not let anyone drive her van. (942:22-23, 943:18-24); (*see* 679:7-21, 691:13-14). Malone testified that he initially “thought that [Kilmer] ditched [Wittmuss] on the reservation as payback for ditching him on the reservation.” (942:24-943:3). Malone testified that when he questioned Kilmer about Wittmuss’s whereabouts, Kilmer said that she was at 104 Hunt Street. (943:4-8, 943:25-944:5). When Malone arrived back at 104 Hunt Street, Kilmer was at the house and Wittmuss was not. (944:9-15). Malone testified that he was continuing to question Kilmer about Wittmuss’s whereabouts when officers arrived. (944:16-25).

Cherry County Chief Deputy Sheriff Erick Wickman testified that, on August 23, 2021, Cherry County dispatch had received a call from an individual reporting a murder. (613:5-12). As a result of this

report, Chief Deputy Sheriff Wickman talked to Schell on the phone. (613:13-614:7). After his conversation with Schell, Chief Deputy Wickman and Cherry County Sheriff Rusty Osburn responded to 104 Hunt Street in Kilgore, Nebraska—where Wittmuss lived. (614:17-615:11, 616:7-11, 617:4-19). Chief Deputy Sheriff Wickman and Sheriff Osburn spoke with Kilmer and Michael Malone while at 104 Hunt Street. (619:23-620:16). Chief Deputy Sheriff Wickman testified that, when he entered the house at 104 Hunt Street, he saw blood spatter on the wall. (633:16-634:8); (E46-48). Kilmer eventually fled 104 Hunt Street on foot while Chief Deputy Sheriff Wickman and Sheriff Osburn were present. (621:4-23). Kilmer was found and arrested the following day—August 24, 2021. (622:9-14).

State Trooper Rob Jackson was involved in the investigation into the death of Ruth Wittmuss. (587:10-15, 589:18-21). Trooper Jackson testified that a suitcase was found on the side of the road outside of Kilgore—where Kilmer told Schell that he had left the suitcase. (593:10-594:10). Trooper Jackson testified that Wittmuss's body was inside of the suitcase and that he observed blunt force trauma injuries to the back of her head. (603:3-13).

Investigators with the Nebraska State Patrol were involved in further investigation into the death of Ruth Wittmuss. (*See* 713:4-714:23, 770:2-4, 801:1-3, 820:13-21). Investigator Woods testified that he was involved in executing a search warrant at 104 Hunt Street, and that they found the axe used to kill Wittmuss, blood spatter, and bodily tissue. (720:3-722:12, 723:5-724:7, 726:6-741:7, 743:24-744:1, 744:4-20); (E56-110, 186). Investigator Connelly testified that he used luminol to track traces of blood in the house. (785:2-787:23); (E149-55). Investigator Sinnett testified that he executed a search warrant of Ruth Wittmuss's van, where he found blood stains. (807:14-812:22); (E111-26). Investigator Neumiller testified that DNA testing was performed on the axe and on Kilmer's boots. (868:17-20, 869:5-18, 870:19-23).

Danielle Oshlo, a forensic scientist at the Nebraska State Patrol Crime Laboratory, also testified for the State. (1116:4-14). Oshlo performed DNA testing on the axe taken from 104 Hunt Street; the DNA profile taken from the back part of the axe (*see* E163) matches Ruth Wittmuss's DNA profile. (1139:19-1141:8). Oshlo testified that the DNA profile taken from the upper handle of the axe (*see* E163, p.3) also matches Ruth Wittmuss's DNA profile. (1141:9-1142:7). Oshlo testified that Ruth Wittmuss's DNA profile was found in swabs of blood taken from the kitchen counter at 104 Hunt Street, as well as the suitcase her body was found inside of. (1154:1-1158:2). Ruth Wittmuss's DNA profile was also present on Kilmer's boot. (1142:8-1145:21).

Dr. Robert Bowen testified that he performed an autopsy on Ruth Wittmuss on August 25, 2021. (507:7-12, 509:8-13, 510:2-3). Dr. Bowen opined that, with a reasonable degree of medical certainty, Wittmuss's cause of death was blunt force trauma to the head. (536:14-20). Dr. Bowen described Wittmuss's injuries to the back of her head as depicted in Exhibits 14 and 15 and testified that these injuries could be caused by the flat end of an axe. (521:15-525:12, 530:16-18). Dr. Bowen opined that the injuries to the back of Wittmuss's head resulted from multiple blows. (530:19-531:8). Dr. Bowen also described Wittmuss's injury as depicted in Exhibit 20, which is trauma from a separate blow that occurred to the side of Wittmuss's head. (528:10-530:15). Dr. Bowen testified to the extent of Wittmuss's injuries on her face, as depicted in Exhibit 16; also, to the extent of Wittmuss's injuries on her back, as depicted in Exhibits 17 and 19, which he testified would also be caused by blunt force trauma. (518:9-17, 519:6-21, 520:8-24, 525:13-528:9). Dr. Bowen opined that the injuries to Wittmuss's scalp, face, and back were premortem. (543:4-544:14, 559:3-11).

The state rested its case. (1201:6-7). Kilmer called five witnesses to testify; he also testified in his own defense (1243:14). In his defense, Kilmer testified that Malone had killed Wittmuss and that he

witnessed it. (1264:2-17). Kilmer admitted to disposing of Wittmuss's body in the suitcase. (1273:23-1274:14).

Following the defense resting its case (1336:13-14), closing arguments were presented and the matter was submitted to the jury. (1343:19-1400:15). The jury began its deliberations at 10:47 a.m. and returned its verdict at 3:50 p.m. (1420:2, 1430:17). The jury found Kilmer guilty on Count I, First Degree Murder, and guilty on Count II, Use of a Deadly Weapon to Commit a Felony. (T128); (1431:14-23). The district court accepted the jury's verdicts and found Kilmer guilty of First Degree Murder and Use of a Deadly Weapon to Commit a Felony. (T131); (1432:10-14).

Kilmer was sentenced on November 17, 2023. (T136); (1435:1). Arguments were presented to the district court regarding the appropriate sentence to be imposed. (1437:25-1443:10). Kilmer also commented at sentencing. (1443:11-1445:21). The district court sentenced Kilmer to life imprisonment for First Degree Murder, and to a term of 10 to 14 years' imprisonment for Use of a Deadly Weapon to Commit a Felony; the district court ordered the sentences to be served consecutively. (T137); (1446:19-1447:9). This appeal followed.

Argument

I. Kilmer's First Degree Murder conviction was supported by sufficient evidence of premeditation.

In his lone assignment of error, Kilmer assigns that "[t]here 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." (Appellant's Br., p. 5). Kilmer does not contest that he hit Wittmuss in the head with an axe or that Wittmuss died from her wounds; rather, he argues that "[t]he State's evidence [] was insufficient to prove Kilmer killed another person with deliberate and premeditated malice." (*Id.*, p. 11). Kilmer also does not explicitly contest his conviction for Use of a Deadly

Weapon to Commit a Felony. (*Id.*, pp. 10-14). The evidence was sufficient here, and Kilmer's argument to the contrary is meritless.

"Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, 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, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction." *Turdy*, 315 Neb. at 760, 1 N.W.3d at 483.

Kilmer was convicted of First Degree Murder in violation of Neb. Rev. Stat. § 28-303, which provides, in relevant part:

A person commits murder in the first degree if he or she kills another person (1) purposely and with deliberate and premeditated malice...

Neb. Rev. Stat. § 28-303. To convict Kilmer of First Degree Murder, the State had to show that Kilmer "(1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated malice." *State v. Cotton*, 299 Neb. 650, 669, 910 N.W.2d 102, 125 (2018), *disapproved of on other grounds by State v. Avina-Murillo*, 301 Neb. 185, 917 N.W.2d 865 (2018). "The premeditation element requires the State to prove that a defendant formed the intent to kill a victim without legal justification before doing so, but no particular length of time for premeditation is required." *Cotton*, 299 Neb. at 670, 910 N.W.2d at 126. "It is sufficient if an intent to kill is formed before the act is committed and not simultaneously with the act that caused the death." *Id.* "The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed" *Id.*

“Whether premeditation exists depends on numerous facts about how and what the defendant did prior to the actual killing which show he or she was engaged in activity directed toward the killing, that is, planning activity.” *Id.* “[P]urposeful, deliberate, premeditated murder may be proved circumstantially.” *State v. Miranda*, 313 Neb. 358, 368, 984 N.W.2d 261, 271 (2023).

As mentioned above, Kilmer does not contest that he killed Wittmuss, nor does it appear that he contests that he did so purposely. (See Appellant’s Br., pp. 10-14). Kilmer argues that “no rational trier of fact could have found Kilmer committed murder in the first degree beyond a reasonable doubt, [because n]o reasonable jury could have determined any premeditation occurred in the instant case.” (*Id.*, pp. 13-14). This argument fails; the record reflects that the State presented an abundance of evidence supporting its theory that Kilmer committed First Degree Murder.

First, a jury could find that the manner in which Kilmer killed Wittmuss indicated a deliberate and premeditated killing with malice. With respect to the nature or manner of killing, what is required to show premeditation is evidence—usually based upon examination of the victim's body—showing that the wounds were deliberately placed at vital areas of the body. *State v. Escamilla*, 291 Neb. 181, 194–95, 864 N.W.2d 376, 385 (2015) (citing 2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a) at 481 (2d ed. 2003)). Here, the evidence—from the examination of Wittmuss’s body—indicates that Wittmuss’s injuries were to the back of her head. (536:14-20, 521:15-525:12, 530:16-18); (E14-15). This shows that the mortal wounds sustained by Wittmuss were deliberately placed at a vital area of the body.

Second, a jury could have found premeditation based on the number of blows to Wittmuss’s head. “Proof that the killing was effected by multiple [] blows may be sufficient alone, or with other circumstances, to infer deliberation.” 40A Am. Jur. 2d Homicide § 243 (citing *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); *Patton v. U.S.*, 633 A.2d 800 (D.C. 1993); *State v. Strong*, 142 S.W.3d

702 (Mo. 2004); *State v. Chapman*, 359 N.C. 328, 611 S.E.2d 794 (2005); *State v. Brooks*, 249 S.W.3d 323 (Tenn. 2008); *State v. Hoffman*, 116 Wash. 2d 51, 804 P.2d 577 (1991); *Bouwkamp v. State*, 833 P.2d 486 (Wyo. 1992)). Here, Dr. Bowen testified that the injuries to the back of Wittmuss's head resulted from multiple blows. (530:19-531:8). Kilmer himself testified that Wittmuss was struck at least three times in the head with an axe (though he did accuse Malone of wielding said axe; Malone testified that he did not kill Wittmuss (955:23-24)). (1264:8-24). This, when taken in the light most favorable to the State—meaning Kilmer, not Malone, was wielding the axe—supports a finding of premeditation.

Third, a jury could have found premeditation based on the fact that Kilmer attacked Wittmuss from behind. *See, e.g., State v. Allen*, 147 P.3d 581, 584 (Wash. 2006) (“the fact that [the victim] was struck from behind is evidence of [] premeditation”); *State v. McArthur*, 730 N.W.2d 44, 50 (Minn. 2007). Because the cause of death was blunt force trauma to the back of Wittmuss's head, a jury could reasonably infer that Kilmer attacked Wittmuss from behind. This also supports a finding of premeditation.

Fourth, a jury could have found premeditation based on previous difficulty between Kilmer and Wittmuss. “Among the circumstances from which premeditation and deliberation may be inferred are: [] ill will or previous difficulty between the parties[.]” 40A Am. Jur. 2d Homicide § 243. Malone testified that Wittmuss and Kilmer had a good relationship initially—until Wittmuss left Kilmer on the side of the road while on “a trip to the reservation” in South Dakota. (931:12-21). Malone witnessed an argument between Wittmuss and Kilmer about three days prior to Wittmuss's death; Wittmuss had accused Kilmer of stealing something from her. (932:18-933:3, 934:9-15). Malone testified that Wittmuss and Kilmer continued arguing and fighting in the days leading up to Wittmuss's death. (936:2-11). Wittmuss and Kilmer's prior arguments constitute “previous difficulty” and support a finding of premeditation.

Fifth, a jury could have found premeditation based on Kilmer's motive for the killing. Malone and Kilmer were in a romantic relationship, and Malone testified that Kilmer had an obsession with him. (987:5-7, 988:8-18, 1003:21-25). Kilmer had been at 104 Hunt Street for about two weeks before killing Wittmuss. (923:16-924:8). Wittmuss was not going to allow Kilmer to stay at 104 Hunt Street any longer. (933:5-6, 934:16-935:25, 938:6-21, 967:6-7). On the day of Wittmuss's death, she was going to take Kilmer back to Valentine. (938:6-21). Malone testified that Kilmer attempted to explain to Malone that he did not steal anything from Wittmuss and that he did not want to leave Malone and 104 Hunt Street. (941:2-5, 1009:3-17). Malone testified that he "was just reassuring [Kilmer] that [Wittmuss] wouldn't lie to me and that he had to go." (1009:17-18). Malone testified that he was not going to try to convince Wittmuss to allow Kilmer to stay. (941:15-17). Wittmuss was also withholding drugs from Kilmer on the day of her death. (939:6-12). Furthermore, Kilmer told Schell that he had hit Wittmuss in the head with an axe because Wittmuss was making threats and that Wittmuss was going to tell somebody his secret—that he was in a relationship with Michael Malone. (581:5-582:5). A reasonable jury could conclude that this motive was sufficient to support a finding of premeditation.

Sixth and finally, the fact that Kilmer continued hitting Wittmuss after she fell to the ground supports a finding of premeditation. "Among the circumstances from which premeditation and deliberation may be inferred are: [] the dealing of lethal blows after the deceased has been felled and rendered helpless[.]" 40A Am. Jur. 2d Homicide § 243. Here, Schell testified that Kilmer told her how Wittmuss was yelling, how he hit her with the axe, and how she said "ow" and fell to the ground. (570:5-8). Dr. Bowen testified that the injuries to the back of Wittmuss's head resulted from multiple blows. (530:19-531:8). Dr. Bowen also noted that the injuries to Wittmuss's scalp (E20), face (E16), and back (E17, 19) were premortem. (543:4-544:14, 559:3-11). Combining this testimony indicates that Wittmuss fell to the ground after one blow, and Kilmer struck her multiple times

after she had felled and rendered helpless. This also supports a finding of premeditation.

For the sake of completeness, though Kilmer does not contest these elements, the State notes that the evidence was sufficient to support findings that Kilmer (1) killed another person and (2) did so purposely. Dr. Bowen opined that, with a reasonable degree of medical certainty, Wittmuss's cause of death was blunt force trauma to the head. (536:14-20). Kilmer told Schell that he killed Wittmuss with an axe. (569:2-18, 570:9-15, 613:5-12). This, when viewing the facts in the light most favorable to the prosecution, shows that there was sufficient evidence for any rational trier of fact to find Kilmer guilty beyond a reasonable doubt of First Degree Murder.

The evidence was sufficient to convict Kilmer of First Degree Murder here, as the jury could have made a finding of premeditation based on any or all of the foregoing reasons. Additionally, all elements of First Degree Murder are met here. Kilmer's assigned error is without merit.

Conclusion

For the reasons noted above, the appellee respectfully requests that this Court affirm the judgment of the district court.

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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 4,129 words, excluding this certificate. This brief was created using Word Microsoft 365.

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Certificate of Service

I hereby certify that on Monday, June 24, 2024 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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