No. 82736-2

J.M. JOHNSON, J. (dissenting)—Clear videotape evidence shows Kevin L. Monday Jr. firing numerous shots to strike and kill Francisco Green (a victim who lies dead at the end of the video and is forgotten by the majority today). The jury, which has the sole responsibility to decide guilt and innocence in our justice system, saw the videotape. The video is also available on line to compare the jury's finding of guilt with the reasoning of the majority.[1]

The majority reverses Monday's convictions of murder in the first degree and two counts of assault in the first degree, even though the jury properly (and correctly) considered *all* the evidence and found Monday guilty of these crimes beyond a reasonable doubt. The jurors, moreover, were reminded that they served as officers of the court and had the duty to act

[1] I am happy to allow the videotape to speak for itself: http://www.courts.wa.gov/newsinfo/content/video/827362EvidenceVideo.htm. *Cf. Scott v. Harris*, 550 U.S. 372, 379 n.5, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (Scalia, J., majority opinion).

impartially, without prejudice. I trust that this jury faithfully applied the law provided by the court's instructions to the evidence presented at trial.

By reversing these convictions, the majority not only sets aside controlling legal precedent, it delays or denies justice for the victim, disregarding the constitutional rights of Francisco Green and his family as victims under article I, section 35 of the Washington State Constitution. It is possible to deter any problematic trial conduct without denying justice for Francisco Green and his family. If justice is not equal for all, it is not justice. *Cf.* majority at 14-15. I dissent.

Overwhelming Evidence

1. The Assault Convictions

The evidence supporting Monday's assault convictions is overwhelming. The entire confrontation between Monday and Francisco Green was captured on videotape, which is approximately three minutes in length. The videotape shows Monday raising and aiming his gun directly at Green after 2 minutes and 36 seconds of verbal provocations and escalating scuffles between Monday and Green. The videotape then shows that Monday, after a pause of 3 seconds, shot at Green and kept shooting at him –

a total of 11 times as Green ran away. Monday's bullets struck Green in the left upper back, the lower middle back, the left side of the chest, and the back of the left forearm. Green's left lung was perforated by the shot to the upper back, and his small intestine was perforated five times by the shot to the lower back. Death ensued from the multiple gunshot wounds. The elements of assault[2] were clearly proved beyond a reasonable doubt in this case.

2. The First Degree Murder Conviction

This same videotape evidence supports Monday's murder conviction, including the element of premeditation. Monday shot Green in the back, chest, and arm with 4 out of 11 shots fired from a .40 caliber firearm, as Green ran away, *after* at least 2 minutes and 39 seconds of confrontation and escalated fighting captured on videotape.[3]

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[2] A person is guilty of assault in the first degree if he or she, with the intent to inflict great bodily harm, assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011.

[3] To prove the element of premeditation, the State must show only that the defendant decided to cause the victim's death after deliberating or reflecting for some period. *State v. Gregory*, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006). As we recently affirmed in *Gregory*, premeditation is the "'deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning *for a period of time, however short.*'" *Id.* at 817 (emphasis added) (alteration in original) (quoting *State v. Hoffman*, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991)); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987) (quoting *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982)). There is no fixed or definite length of time between the formation of the intention to kill and the killing

Indeed, the jury found that the totality of the evidence presented at trial supported Monday's murder conviction beyond a reasonable doubt.[4] Although the majority does not think that the videotape alone is dispositive of Monday's murder conviction, it does not follow that the court should substitute its judgment for that of the jury, which properly (and correctly) considered *all* the evidence presented at trial.

Exhibit 132—Videotape Evidence[5]

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necessary to establish premeditation. *State v. Duncan*, 101 Wash. 542, 544, 172 P. 915 (1918). This time may be very brief, even "but a moment." *Id.* The period of time at issue here was, therefore, easily sufficient for the jury to find that Monday deliberately shot and killed Green in light of all evidence and testimony presented in this case. For more cases supporting the jury's finding of premeditation in this case, see *State v. Ortiz*, 119 Wn.2d 294, 311-12, 831 P.2d 1060 (1992) (finding premeditation where multiple wounds were inflicted by a knife and the victim was struck in the face after a prolonged struggle); *Ollens*, 107 Wn.2d at 853 (holding that multiple wounds alone were probative to the inference of premeditation where a weapon was used, the victim was struck from behind and there was evidence of a motive); *State v. Gentry*, 125 Wn.2d 570, 599, 888 P.2d 1105 (1995) (citing *Ollens* and *Ortiz* and detailing other cases in which the evidence was sufficient to establish premeditation); *State v. Rehak*, 67 Wn. App. 157, 164, 834 P.2d 651 (1992) (premeditation existed where victim was shot three times in the head, two after he had fallen to the floor); *State v. Commodore*, 38 Wn. App. 244, 248, 684 P.2d 1364 (1984) (premeditation implied where defendant lingered by the door, proceeded to a room where he knew he would find a gun, and returned to shoot the victim); *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985) (inference of premeditation supported by evidence that victim was struck by two blows to the head, with some interval passing between the blows, while she was lying face down).

[4] 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).

[5] Exhibit 132 was pretrial Exhibit 6. Clerk's Papers (CP) at 278.

Monday's convictions should be affirmed regardless of the test the majority employs to achieve its result. The videotape alone provides sufficient evidence for the jury to convict Monday of assault in the first degree and first degree murder and was shown in its entirety to the jury multiple times throughout the trial. As the court stated in its ruling, to give the jury the option to watch the videotape in the deliberation room, "[T]he jury has seen this thing stop and go multiple times in this case . . . . [I]t was stopped and started and dissected all the way through the trial . . . . I don't see any harm [in giving the jury the option to watch the videotape in the deliberation room]." Verbatim Report of Proceedings (VRP) (May 30, 2007) at 20.

At the beginning of the videotape, Monday is seen lifting up his red shirt in a threatening and provocative manner. Ex. 132 (0:00-0:10). Monday is also heard verbally addressing an individual, likely the victim, while shouting "West Side G . . . ." *Id.* Monday leaves the camera view about 10 seconds into the videotape, and before he reenters the scene, his yelling is heard off-screen as the confrontation continues. *Id.* (0:10-1:33). Monday reenters the scene 1 minute and 33 seconds into the videotape. *Id.* (1:33). At

1 minute and 53 seconds to 1 minute and 55 seconds, Monday is seen cornering an individual wearing a dark shirt, likely the victim, in an entryway and grabbing him. *Id.* (1:53-1:55). The fight quickly escalates. Monday and the individual are seen physically engaged with one another, and Monday pulls the victim out of the entryway. *Id.* (1:55-2:06). Monday pulls at the victim's arms, yells, and repeats the phrase "one on one," clearly demanding a fight. *Id.* The two are briefly separated by observers but are next seen circling each other, as Monday continues to shout and demand "one on one." *Id.* (2:06-2:36). The jury could have considered these events as probative to the issue of premeditation. Monday draws the gun, and the shooting begins soon thereafter. *Id.* (2:36-2:43).

If this were not enough, the last portion of the videotape shows Monday shooting Green numerous times—a total of 11 shots. *Id.* (1:53-2:44). This easily satisfies the State's burden of proof. Monday pulled a gun and started walking toward Green with the gun aimed in Green's direction. *Id.* (2:36). This took several seconds before he started firing. *Id.* (2:36-2:39). Standing still, Monday fired 5 shots at Green, then 6 more as he walked slowly backward. *Id.* (2:39-2:43). After firing all 11 shots, Monday turned

and ran away. *Id.* (2:44). Evidence established that Green was hit in his back, chest, and arm. The total length of the fight, as caught by the videotape, is approximately 2 minutes and 43 seconds, measured from the start of the videotape to the last of the 11 shots fired by Monday.

This evidence was sufficient to remove any reasonable doubt that Monday deliberately killed Green. The videotape shows no erratic behavior by Monday during the shooting. Monday appears calm and composed. Premeditation under RCW 9A.32.030(1)(a) does not require an exhaustive analysis of a defendant's alternative course of conduct. Premeditation only requires considering and deciding on a course of conduct. This Monday did, as conclusively shown by the jury's careful review of the videotape evidence. As the jury concluded, the State not only satisfied its burden to prove premeditation beyond a reasonable doubt, it proved each element of the crimes as charged.

Alleged Prosecutorial Misconduct and Harmless Error

I agree that the prosecutor made several problematic expressions over the course of a month-long trial. I do not agree, however, that reversal of Monday's convictions is the appropriate remedy. The convictions should be

affirmed based on the jury's proper application of the law to the evidence, not reversed in the name of deterrence. It is possible to deter any improper trial conduct without delaying or denying justice for Francisco Green and his family and disregarding their constitutional rights under article I, section 35.

Unfortunately, the majority misconstrues what the prosecutor said and does not consider the context of the statements, as our case law requires.[6] This is what prosecutor said:

> [T]he only thing that can explain . . . why witness after witness . . . is called to this stand and flat out denies what cannot be denied on that video is the code. And the code is black folk don't testify against black folk. You don't snitch to police.

VRP (May 30, 2007) at 29. The prosecutor's reference was made in the context of a month-long trial in which several witnesses recanted earlier statements made to police and expressed reluctance to testify. Indeed, the trial court noted, "[V]irtually every lay witness has been very reticent to testify in this case, and the memory of virtually every lay witness has had

[6] *E.g.*, *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); *accord State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (we do not assess "'[t]he prejudicial *effect* of a prosecutor's improper comments . . . by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury."'" (emphasis added) (alteration in original) (quoting *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

significant holes in places where one would not expect . . . ." VRP (May 23, 2007) at 98. Although the statement "black folk don't testify against black folk" without this background is problematic, the prosecutor's broader statement about snitching to the police and the "code" describes a too common occurrence: the unwillingness of individuals (no matter their age or race) to identify by name others who may be involved in crime.[7] The prosecutor's general reference to a "code" was a persuasive point in closing argument before this jury and not misconduct warranting reversal. Even Monday's defense counsel referenced an "unwritten code" and its potential effect on witness testimony.[8]

Second, although the transcript has the prosecutor saying "police" for

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[7] *See*, *e.g.*, Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America's "Wars" on Drugs, Crime, and Gangs*, 46 Am. Crim. L. Rev. 1145, 1147 (2009) (noting that even children who were only suspected of "snitching" have been killed by gang members); Kari Larsen, *Deliberately Indifferent: Government Response to HIV in U.S. Prisons*, 24 J. Contemp. Health L. & Pol'y 251, 257 (2008) ("An inmate 'who snitches or rats . . . violates a strict prison code, subjecting them to severe and violent retribution by the entire inmate community.'" (alteration in original)).

[8] *See e.g.*, VRP (May 30, 2007) at 77-78 ("The State says that Antonio Kidd . . . won't identify [himself] because of the code. [Mr. Kidd was] [w]illing to put himself at personal risk, but, in terms of intervening in this fight, but [sic] there is this unwritten code that he is going to abide by."); *id.* at 78 ("The State would have you believe that the only reason [Nakita Banks] did not identify Kevin Monday as the shooter was because of this code . . . [and] decided that this code is more important than her oath to tell the truth."); *id.* at 78-79 ("[A]gain, this code of silence is something that [DiVaughn Jones] considers more important than looking out for Francisco Green."). *Id.* at 79.

part of Ms. Sykes' direct examination, the transcript has both him *and* Ms. Sykes saying "po-leese." VRP (May 21, 2007) at 146-209; VRP (May 22, 2007) at 2-55. The transcript has the prosecutor saying "po-leese" after the prosecutor had difficulty interacting with Ms. Sykes throughout her direct examination, and the prosecutor said "we'll use your term then" once before in an unfortunate effort to elicit Ms. Sykes' testimony. *See* VRP (May 22, 2007) at 14 (using the word "arguing" instead of "confrontation" in describing the surrounding events).

I would agree that the prosecutor's intonation of the word "police" – transcribed as "po-leese" at certain places in the record – was inappropriate and unprofessional. VRP (May 21, 2007) at 146-209; VRP (May 22, 2007) at 2-55. But this does not mean the prosecutor employed racially derogatory language de facto by saying "po-leese" while questioning Adonijah Sykes, or more importantly, that the jury was unable to discount it. We surely cannot conclude that the prosecutor was employing racially derogatory language de facto based on the text of the transcript alone, and the references surely do not justify reversing this jury's murder and assault convictions.

We should hold as the trial court did in its response to the prosecutor's

tone: "[L]et the jury decide . . . . I'm sure they have the ability to do that." VRP (May 22, 2007) at 20. A reasonable jury found Monday guilty beyond a reasonable doubt of murder in the first degree and two counts of assault in the first degree. The trial court could not have overturned the jury's verdict under our civil rules.[9] Neither should this court, given that the jury alone decides guilt and innocence in our criminal justice system. Overturning this jury verdict despite overwhelming evidence is "so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained." Majority at 14.

Third, and perhaps most vexing, the majority fails to honestly apply the holding of tried, tested, and controlling precedent. Appellate courts do not assess "'[t]he prejudicial *effect* of a prosecutor's improper comments . . . by looking at the comments in isolation but by placing the remarks '"in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury."'" *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (emphasis added) (alteration in

[9] "If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim . . . ." CR 50(a)(1)

original) (quoting *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). The majority disregards the context of the total argument. The majority does not look to the issues in the case. The majority does not look to the evidence or to the instructions given to the jury. The majority looks to several comments in isolation.

In contrast, I would look to the context of the argument and the context of a month-long trial in which several witnesses recanted earlier statements made to police and were reluctant to testify. Most importantly, the prosecutor repeatedly referred to the overwhelming videotape evidence throughout his argument.[1] Finally, I would look to the instructions given to the jury and find that this jury's verdict was fair, unbiased, and impartial.[11]

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[1] *E.g.,* VRP (May 30, 2007) at 32 ("Recall, if you will, the video.").

[11] In Instruction 1, the court reminded the jury of its solemn duty to render an impartial verdict:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial . . . . You must apply the law from my instructions to the facts that you decided have been proved, and in this way decided the case . . . you are the sole judges of the credibility of each witness . . . . *As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To ensure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict*.

CP at 171-73 (emphasis added).

This court has employed a specific test for prosecutorial misconduct for at least 40 years: we examine the allegedly improper conduct in the full context of the trial. The conviction will be reversed only if (1) the conduct was improper and (2) there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The defendant carries this burden. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). This is the constitutional test for preserving a defendant's right to trial by an impartial jury, as enshrined in the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. *See id.* at 746-47. We never meddle with such established constitutional protections, unless a compelling showing is made that the current test has failed and is causing harm.

The majority's refusal to thoroughly engage in the second prong of our constitutional analysis is tacit acknowledgment that the defendant was not prejudiced. The corollary of this conclusion is that the jury's verdict was sound.

In Instruction 2, the court reiterated, "each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors." CP at 174. This was done before the court instructed the jury as to the elements of each crime, the presumption of evidence, and so forth. CP at 175-221.

Conclusion

The videotape of Monday repeatedly shooting Mr. Green was shown to the jury and proved beyond a reasonable doubt that Monday deliberately took Green's life. There was abundant other evidence. Even if the prosecutor's comments arguably tainted the jury's impressions of some witnesses, this could not affect the jury's perception of the videotape and other evidence.

This jury properly (and correctly) performed its duty and found Monday guilty beyond a reasonable doubt. The defendant received the fair trial that is constitutionally guaranteed. The majority fails to accord murder victim Francisco Green the dignity and respect he deserves under our constitution. Sadly, the victim's family is sentenced to relive his murder at another trial. I respectfully dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR: