

Workman, J., concurring:

I concur with the holding of the majority, but write this separate opinion to reiterate that the duration of the time period required for premeditation cannot be arbitrarily fixed. Neither the jury instruction approved by the majority, created from our past decisions in State v. Clifford, 59 W. Va. 1, 52 S.E. 981 (1906) and State v. Hatfield, 169 W. Va. 191, 286 S.E.2d 402 (1982) (as amplified by the majority opinion), nor the new instruction approved in the majority opinion¹ affix any specific amount of time which must pass between the formation of the intent to kill and the actual killing for first degree murder cases. Given the majority's recognition that these concepts are necessarily incapable of being reduced formulaically, I am concerned that some of the language in the opinion may indirectly suggest that some appreciable length of time must pass before premeditation can occur.

¹The new instruction is essentially an adoption of the instruction previously offered by the Court in note 7 of Hatfield. See 169 W. Va. at 202, 286 S.E.2d at 410 n.7.

I agree with the majority in its conclusion that our decision in State v. Schrader, 172 W. Va. 1, 302 S.E.2d 70 (1982), incorrectly equated premeditation with intent to kill. However, I must point out that the majority's suggested basis for defining premeditation and deliberation in terms of requiring some "appreciable time elapse between the intent to kill and the killing" and "some period between the formation of the intent to kill and the actual killing which indicates that the killing is by prior calculation and design" may create confusion in suggesting that premeditation must be the deeply thoughtful enterprise typically associated with the words reflection and contemplation. The majority's interpretation may create ambiguity, if not clarified, by adding arguably contradictory factors to the law enunciated by the majority in the approved instruction, as well as the language in the Hatfield and Dodds cases that the majority upholds. See Hatfield, 169 W. Va. at 202, 286 S.E.2d at 410 n.7; see also State v. Dodds, 54 W. Va. 289, 297-98, 46 S.E. 228, 231 (1903).

For instance, nowhere in Hatfield, which upholds the Clifford instruction, is the notion that an "appreciable" amount of time must

The word "reflect" is defined by Webster's as "to think quietly and calmly."

The word "contemplate" is defined by Webster's as "to view or consider

lapse in order for premeditation to occur. Neither is such a suggestion evident from the majority's new instruction, derived from Hatfield:

"The jury is instructed that murder in the first degree consists of an intentional, deliberate and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder."

169 W. Va. at 202, 286 S.E.2d at 410 (quoting 2 Devitt and Blackmar, Federal Jury Practice and Instructions § 41.03, at 214). Finally, even syllabus point five of the majority provides only that "[a]lthough premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing"

Accordingly, it is necessary to make abundantly clear that premeditation is sufficiently demonstrated as long as "[a]ny interval of time [,no matter how short that interval is, lapses]

with continued attention."

between the forming of the intent to kill and the execution of that intent[.]" See Hatfield, 169 W. Va. at 202, 286 S.E.2d at 410 (quoting 2 Devitt and Blackmar, Federal Jury Practice and Instructions § 41.03, at 214).