Case No. 95550-6

IN THE COURT OF APPEALS, DIVISION ONE OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff/Respondent,

vs.

CHRISTOPHER MALAGA,
Defendant/Appellant.

Appeal from the Court of Appeals

Court of Appeals No. 75267-7-I
Superior Court Case No. 14-1-00218-2

AMENDED

MOTION FOR DISCRETIONARY REVIEW TO SUPREME COURT

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IDENTITY OF PETITIONER.

This Petition is filed by Christopher Malaga, Defendant/Appellant in the above entitled case.

CITATION TO COURT OF APPEALS DECISION

Appellant seeks review of *State v. Malaga*, No. 75267-7-1 (Wash. Ct. App. November 27, 2017). A copy of the decision is attached hereto in the Appendix.

ISSUES PRESENTED FOR REVIEW

1. Does sufficiency of the evidence of premeditation require evidence of deliberation?
    a. Can premeditation be proved beyond a reasonable doubt when the evidence consists solely of a text exchange containing no threats or indication of planned physical harm, and the mere presence of a weapon?
    b. Can premeditation be proved beyond a reasonable doubt when the evidence is bases solely on conjecture as to whether any deliberation was done by the Defendant?
    c. Can premeditation be proved beyond a reasonable doubt when there is no evidence of planning or deliberation other than a text message containing no threats and the possession of a gun at the time of crime, but no evidence of the gun before or after?
    d. When evaluating the sufficiency of the evidence beyond a reasonable must the court determine whether the State's evidence satisfies proof beyond a reasonable or may the court rely on conjecture?
2. Does a defendant waive a Constitutional violation of the Confrontation Clause when the evidence is suppressed in a pretrial motion?
3. Can a Constitutional violation of the Confrontation Clause be raised for the first time on appeal?

STATEMENT OF THE CASE

Christopher Malaga came to Washington from New Jersey in December of 2013. VRP at 655, 1196. He had no family in the area and

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moved from place to place, staying with different people he met, as he attempted to pursue a Rap music career. VRP at 944 - 945. On October 17, 2014, Adam Garcia told Malaga he had to leave. The two men argued but there was no indication that anything physical occurred. Malaga left the shed. At "about midnight," Malaga called Bryce Hill who offered to let Malaga sleep on the couch at Hill's parent's home. VRP at 995. At 1:03 a.m., Garcia sent Malaga a text message, beginning a brief conversation as follows:

> Garcia: Yo
> Malaga: What
> Garcia: You
> Garcia: 1Mmmmm
> Garcia: Yo dude I just like men got into it with my baby mama before I got there I was already pissed been drinking my bad.
> Garcia: But the dude with the money so that he could take me back in town if you're still down to do that
> Malaga: I left with all my shit already ...me and you got a problem now
> Garcia: Ok
> Malaga: You could never fuck and you gon' see that ...I just had respect for your mom and your house...all my shit out now let's see you talk that shit
> Garcia: Oh I'm past it but I don't care. It's all up to you. Sorry for it to come down to this.
> Malaga: Hahahaha we gon see

Exhibit 79. Sometime thereafter, Garcia volunteered to find the drugs for a group of friends. Garcia made some calls and eventually located Bryce Hall who was willing to sell him the drugs. VRP at 767, 1265. Garcia had purchased drugs from Hill in the past and still owed him money from prior transactions. VRP at 994. Garcia took Chris Knowles, whom he had just met, and told him that a man named Nick, Nicole, or Nikki would also

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meet them. VRP at 1265-1266; 1267.

The drug meet took place at about 3:00 a.m. Garcia and Knowles saw two men, Hill and another man who was described by Knowles as a "short, fat, Asian guy." VRP at 882, 1135, 1227, 1271. Knowles testified that Garcia did not greet or identify Hill's companion. VRP at 1273. During the cocaine purchase, both Hill and Knowles report hearing a gun being "cocked" or "racked." VRP at 1011, 1275. Knowles testified that the Asian man pulled a gun and pointed it at Gracia's face (VRP at 1288) and that the man "kept saying, 'You trying to jack me" or something along those lines." VRP at 1277. Knowles testified that Garcia responded by saying "No, it's not like that" (*Id.*) and walked aggressively towards the Asian man (VRP at 1279, 1281) and may have claimed to have a gun. VRP at 1015. The man identified as Nico backed away from Garcia. VRP at 1279. It was at this time a single shot was fired striking Garcia in the head. VRP at 1273. Knowles testified that after the gun went off,

> [the shooter] kind of like had this dumbfounded stare on his face. He brought the gun in. He was fiddling with it. I'm guessing he was trying to put it on safe or something. And then they took off running after that.

VRP at 1284. Knowles reports the shooter was surprised by the gun going off and Hill and the Asian man ran off together. Knowles testified the he tried to chase the two men but broke off the chase because the assailant fired two shots at him. VRP at 1288-1289. However, no bullets or casing were found and no other witness reported hearing more than one shot. VRP at 884.

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Law enforcement was able to collected a spent shell casing at the scene of the shooting. VRP at 1156. And the bullet from the body. VRP at 1162. However, no gun was ever located. The officers used a k-9 unit to search for the suspect. VRP at 880, 928, 1131 - 1133 The dog hits on a scent and tracks to the home of Bryce Hill. VRP at 931, 1133. The house and Bryce Hill are well known to the officers, but they take no action and do not even knock on the door. VRP at 931 - 932. However, Det. Hoagland testified they did contact other neighbors. VRP at 395. Based on Knowles description that the shooter was a "fat Asian male" named "Nico, Nick or Nicholus" (VRP at 1134, 1135, 1267), the police identified a match for Nicholus Vazquez.[1] VRP at 1135, 1141. Vazquez was in the area on the night in question. VRP at 1402. Knowles identified Vazquez as the likely shooter from a photo lineup. VRP at 1153, 1154, Exhibit 20. After this line up, Knowles began receiving photographs of Malaga on his cell phone from third parties asking if this was the killer. VRP at 1306. Knowles then changed his identification from Vazquez to Malaga.

Hill was arrested by the police while travelling with his parents. VRP at 961 - 963, 1031, 1108. Hill, who has a criminal record and is well known to the police, was arrested (VRP at 961 - 963, 1031, 1108), and eventually identified Malaga as the person who was with him at the time of the murder. VRP at 1008. This was after Knowles had change his identification (VRP at 1185) and after urging from his parents. VRP at 1035, 967. Hill claims to have been drunk when he identified Malaga as

[1] Vazquez is half Japanese. VRP at 119.

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the shooter. VRP at 1035.

The forensic examiner performed tests on Malaga's clothing for blood, but can find none. VRP at 1375 - 1379. The forensic examiner did find a small red fleck on a ring thought to be blood, but it was too small to find DNA. VRP at 1382, Exhibit 30. If Malaga had been wearing the ring it would have been on his left hand. Exhibit 115. No gun powder residue was found on Mr. Malaga's clothing by tests conducted by the lab. VRP at, 1253, 1364-1365, 1377, 1384. The Detective did visually inspect Malaga's clothes, but did not observe any residue. VRP at 1362. No gun or physical evidence placing Malaga at the scene or connecting him to the murder were ever found. Malaga was interviewed by police, and steadfastly maintained that he was not there that night. Exhibit 133.

Prior to trial, the State succeeding a number of evidentiary items, preventing Malaga from raising them on cross examination. Record at 477 - 497. The case proceeded to trial before a jury. Prior to trial the court suppressed evidence that Vazquez was of Asian descent. VRP at 56-68; Record at 483-485, 491-494 (Order on Motions on Limine, at 7-9, 15 - 18). The trial court also suppressed evidence relating to why law enforcement did not charge Hill for known crimes. VRP at 32 - 40; Record at 481 (Order on Motions on Limine, at 5). The trial court also suppressed evidence relating to an anonymous tip to police that supported Knowles initial identification Malaga and why the police failed to follow up on the tip. VRP at 94 - 97; Record at 497 (Order on Motions on Limine, at 21).

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The defense contested the suppression of evidence. Malaga made no objections to any of the State's remaining evidence and called no witnesses. Malaga was convicted on all counts and now appealed his conviction to the Court of Appeals on constitutional grounds and for insufficiency of the evidence to find premeditation. The Court of Appeals affirmed the conviction ruling that evidence of an argument with no threats or history of violence and mere use of a weapon with no evidence how the weapon came to be in the Defendant's possession, whether he ever had a gun before, or how it disappeared, was sufficient to show deliberation/premeditation beyond a reasonable doubt. Because these ruling are not supported by the facts or the law, Malaga now seeks review by the Supreme Court.

ARGUMENTS

1. *This Court of Appeals erred when it ruled that there was sufficient evidence to convict defendant of premeditated Murder based on conjecture about the meaning of a text message and mere use of a weapon, but no evidence of deliberation or planning.*

The evidence relied upon by the Court of Appeals is insufficient to show premeditation because it does not prove deliberation beyond a reasonable doubt.

The Court of Appeals stated that "Malaga's repeatedly relies on a federal decision by the D.C. Circuit Court of Appeals, but we find this nonbinding authority unpersuasive in light of well developed Washington case law." *Austin v. United States*, 382 F.2d 129, 127 U.S. App. D.C. 180

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(1967) overruling recognized by *U.S. v. Byfield*, 928 F.2d 1163, 289 U.S. App. D.C. 71 (1991). However, *Austin v. United States* is a case that been cited approvingly by Washington courts. The Washington Supreme Court has specifically "adopted view expressed in *Austin v. United States*." *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992); see also *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). The main premise of *Austin v. United States* is that "the crux of the issue of premeditation and deliberation is not the time involved but whether defendant did engage in the process of reflection and meditation." *Austin v. United States*, 382 F.2d 129, 136 (D.C.Cir.1967). This is supported in *Bingham*, which agreed that actual deliberation is an absolute necessity for premeditation. *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986). "Circumstantial evidence can be used where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial." *Id.*, at 824, citing *State v. Luoma*, 88 Wash.2d 28, 558 P.2d 756 (1977). However, "the core responsibility of the court requires it to reflect on the sufficiency of the [State's] case." *Id.*, at 824, citing *Austin v. United States*, 382 F.2d 129, 138-39 (D.C.Cir.1967). Actual "deliberation" is the focus and what must be proven beyond a reasonable doubt to convict a person of premeditated murder in Washington.

Accordingly, the Court of Appeals stated:

> To convict Malaga of first degree murder, the State had to prove beyond a reasonable doubt that Malaga acted with the premeditated intent to cause the death of Garcia. Premeditation "must involve more than a moment in time." "[M]ere opportunity

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> to deliberate is not sufficient." 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."
>
> "Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." Motive, procurement of a weapon, stealth, and method of killing are "particularly relevant" factors in establishing premeditation, but sufficient proof of premeditation does not require all four factors. "[P]rocurement of a weapon and stealth 'can be further combined as evidence of planning.'"

State v. Malaga, at 5 - 6 (internal cites omitted). The question is, what evidence is sufficient to prove premeditation beyond a reasonable doubt?

The Court of Appeals stated that "motive and procurement of a weapon is sufficient to submit premeditation to the jury." *State v. Malaga*, at 7. Based on this the court reasoned that there was motive because Malaga said "me and you got a problem now" in a text message after he told Garcia he had moved his things out of Garcia's shed. *State v. Malaga*, at 7; see also Exhibit 79. There were no threats of physical violence and no testimony regarding any physical violence by Malaga prior to the time of the shooting. See, VRP generally. The Court of Appeals then noted that "Malaga brought a concealed gun to a drug deal to which he was not a party." *State v. Malaga*, at 7. Assuming that Malaga was the shooter, there was no evidence that he knew who was going to be at the meeting, no evidence that Malaga ever had a gun prior to that time, no evidence that Malaga knew how to use a gun, and no evidence as to how he got the gun, and no evidence as to why he had a gun. See, VRP generally. Procurement

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of a weapons in a case of premeditation, must be something more than mere possession and use, because all weapons must be in the possession of the assailant at some point. Rather, the purpose must be to further the crime committed. However, none of the fact relied upon in this case shows premeditation to commit murder; there is nothing to show "deliberation" to kill. Such evidence would do away with the requirement of premeditation because a statement that is not a threat, even if open to interpretation, and use of a weapon would exist in almost every case and nothing shows deliberation.

The State must prove premeditation beyond a reasonable doubt. *State v. Hummel*, 196 Wn.App. 329, 338, 383 P.3d 592 (Div. 1 2016); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "[P]remeditation is a separate and additional element to the intent requirement for first degree murder." *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986); see also *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987) citing RCW 9A.32.030(1)(a), RCW 9A.32.050(1)(a); *State v. Brooks*, 97 Wash.2d 873, 876, 651 P.2d 217 (1982). It is defined as "the mental process of thinking before hand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986) citing *State v. Brooks*, at 876, 651 P.2d 217; *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987) citing *State v. Brooks*, 97 Wash.2d at 876, 651 P.2d 217; *State v. Condon*, 182 Wn.2d 307, 343 P.3d 357, 361 (2015); *State v.*

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Pirtle, at 644. It is "the deliberate formation of and reflection upon the intent to take a human life." *State v. Bingham*, at 823 citing *State v. Robtoy*, 98 Wash.2d 30, 43, 653 P.2d 284 (1982); *State v. Condon*, 182 Wn.2d 307, 343 P.3d 357, 361 (2015); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); *State v. Robtoy*, 98 Wash.2d 30, 43, 653 P.2d 284 (1982); *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). This means that there must be some evidence that the defendant thought about and decided to kill the other person. Even when the time "is sufficient to permit deliberation, evidence of actual deliberation must also be presented." *State v. Bushey*, 46 Wn.App. 579, 585, 731 P.2d 553 (Div. 1 1987) citing *Bingham*, at 827, 719 P.2d 109. "The sufficiency of the evidence is a question of constitutional law that [is reviewed] de novo." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). In assessing such sufficiency, the Court will look at the evidence in the light most favorable to the State, but it still must satisfy the proof beyond a reasonable doubt standard. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing, *State v. Green*, 94 Wash.2d 216, 220-22, 616 P.2d 628 (1980).

There are "[f]our characteristics of the crime are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing." *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995) citing *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992); See also *State v. Gentry*, 125 Wn.2d 570, 598-99, 888 P.2d 1105 (1995); *State v. Burkins*, 94 Wn.App. 677, 690, 973 P.2d 15 (Div. 1 1999).

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However, no single element is sufficient to establish premeditation. See, *State v. Hummel*, 196 Wn.App. 329, 383 P.3d 592 (Div. 1 2016). The Washington Supreme court has required multiple indices of premeditation to establish premeditation and relies on four characteristics. *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). The Court of Appeals in this case focused on Motive and procurement of a weapon.

A. Motive: The meaning of the text message is speculation

In the current case, the State and Court of Appeals rely on a statement by the defendant that we "got a problem." Exhibit 79. That was made after Malaga moved his belongings at the victim's insistence. There was an argument, but no threats of violence. Exhibit 79; VRP generally. Further, there was no history of violence. See, VRP generally. This is a very weak motive because it would apply to every human being. But even if it is motive, it shows absolutely no planning or deliberation on the part of Malaga. The meaning of Malaga's statement is open to speculation. However, inferences as to premeditation cannot be based on speculation. *State v. Hummel*, 196 Wn.App. 329, 357, 383 P.3d 592 (Div. 1 2016) citing *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013); *see also Jackson v. Virginia*, 99 S.Ct. 2781, 443 U.S. 307, 319, 61 L.Ed.2d 560 (1979) (the trier of fact may draw only reasonable inferences); *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) ("[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case or where there is a

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'total failure of proof of [a] requisite' element." (quoting *Briceno v. Scribner*, 555 F.3d 1069, 1079 (9th Cir. 2009))).

B. To show premeditation the Procurement of a weapon must demonstrate that it was procure for the purpose of furthering the killing

Washington cases dealing with procurement of a weapon demonstrate that mere presence of a weapon is insufficient; there must be evidence that it was intended to be used for the killing. *State v. Tikka*, 8 Wash.App. 736, 509 P.2d 101 (1973) (Planned attack were one assailant grabbed victim from behind and held him while other stabbed the victim to death); *State v. Bridgham*, 51 Wash. 18, 97 P. 1096 (1908) (Defendant had argued with his wife went to his son-in-law's house, retrieved a revolver, then returned to his home and shot his wife); *State v. Holmes*, 12 Wash. 169, 184 - 185, 40 P. 735, 41 P. 887 (1895)(Defendant was beaten in a bar, left the bar, retrieved a gun, then returned to the bar and shot the victim twice); See *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995)(After being fired from restaurant, Defendant obtained a knife and other items, went to the restaurant as it was opening, tied up the workers, beat them to death with a fire extinguisher and cut their throats with the knife); *State v. Burkins*, 94 Wn.App. 677, 973 P.2d 15 (Div. 1 1999)(evidence of common scheme motive to rape women and kill them if they resisted, defendant obtained a gun, obtained a car, drove victim to remote area, shot the victim twice, once in the head at close range). Cases uniformly include evidence of planning and multiple injuries. See, *State v.*

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Gentry, 125 Wn.2d 570, 599 - 600, 888 P.2d 1105 (1995)(multiple locations, struck numerous times with rock procured at different location, motive of rape); *State v. Ollens*, 107 Wash.2d 848, 853, 733 P.2d 984 (1987)(numerous wounds, attack from behind, motive of robbery); *State v. Hoffman*, 116 Wn.2d 51, 62, 804 P.2d 577 (1991) (retrieved gun and set ambush); *State v. Notaro*, 161 Wn.App. 654, 672, 255 P.3d 774 (Div. 2 2011)(lured victim to basement on pretext, shot twice in the back of the head). "An inference of premeditation can be established by a range of proven facts, including procuring a weapon to facilitate the killing, striking the victim from behind, and inflicting multiple wounds or shots." *State v. Notaro*, 161 Wn.App. 654, 672, 255 P.3d 774 (Div. 2 2011) citing *State v. Ra*, 144 Wash.App. 688, 703, 175 P.3d 609 (citing *State v. Allen*, 159 Wash.2d 1, 8, 147 P.3d 581 (2006); *State v. Clark*, 143 Wash.2d 731, 769, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001); *State v. Pirtle*, 127 Wash.2d 628, 644-45, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996); *State v. Hoffman*, 116 Wn.2d at 83. In the current case, the State showed that only one shot was fired. VRP at 677. The only eye witness to the crime testified the shooter "dumbfounded" when the gun went off and may have tried to put the safety on, before fleeing. VRP at 1284.

Neither the motive alleged by the state nor the use of a gun demonstrate deliberation. Even when combined, they still do not show

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proof beyond a reasonable doubt that there was any deliberation/premeditation in this case. The State failed to present evidence to show actual deliberation and guilt may not be based on speculation. The decisions below do not comport with the existing case law in Washington, and do not show premeditation. As a result, the Supreme Court should grant discretionary review of this issue.

Confrontation clause

3. *The Court of Appeals erred in ruling that the defendant had to specifically object based on the confrontation clause violation at trial, because an objection was made prior to trial and it was an issue of constitutional magnitude that can be raised for the first time on appeal*

In it decision, the Court of Appeals relied on *Melendez-Diaz v. Massachusetts* for the proposition that the Defendant had waive his right to appeal his confrontation claim and pretrial suppression of evidence by the trial court. However, *Melendez-Diaz* does not apply in the current case and does not support the position of the Court of Appeals. *Melendez-Diaz* dealt with a situation where "the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity." *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 557 U.S. 305, 174 L.Ed.2d 314 (2009). The trial court allowed the certificates to be admitted, over petitioner's objection, without the creator being called to testify. The Supreme Court reversed the ruling holding that certificates "testimonial statements" and that the "certificates" were "functionally identical to live, in-court

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testimony" that created a right to cross examination. *Id*. at 2532. The Court of Appeals relied on dicta in *Melendez-Diaz* that came in a footnote. *State v. Malaga*, 75267-7-1, Unpublished Opinion, at 8. That foot note reads: "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2534 n.3, 174 L. Ed. 2d 314 (2009). The Court of Appeals also cited its own decision in *State v. O'Cain* to support its ruling in this case, while acknowledging that "our Supreme Court has never explicitly adopted this approach, the court has never indicated disagreement with the holding from O'Cain." *State v. Malaga*, at 9. In *State v. O'Cain* the Court of Appeals interpreted *Melendez-Diaz* using the same footnote cited in *Melendez-Diaz*. *State v. O'Cain*, 169 Wn.App. 228, 237, 279 P.3d 926 (Div. 1 2012). The court *O'Cain* found that the defendant had waived he confrontation claim when he failed to object to the admission of statements made for medical treatment at trial.[2]

There are two major problems with the Court of Appeals analysis under both cases. First, the dicta in *Melendez-Diaz* deals with the admission of evidence at trial, however, the Defendant's claim arises out of the pre-trial suppression of evidence pursuant to the State's motion. The second problem is that the Defendant did object because he contested the

[2] The O'Cain court also noted that the statements were admissible because "made for the purpose of obtaining medical treatment" and, therefore, "both nontestimonial and inherently reliable." *State v. O'Cain*, at 232.

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suppression of evidence prior to trial. VRP at 1-97; (Order on Motions on Limine). There was no waiver because the evidence was not presented by the State at trial. Further, the mater was properly objected to prior to trial, and the objection was preserved at trial because the defense was prohibited from raising the issues by court order. *Id.* The Court of Appeals' own ruling in this case and in *O'Cain* acknowledges that an objection can be made during or before trial. *State v. Malaga*, at 9, citing *State v. O'Cain*; *State v. O'Cain*, at 232. The issue of Vazquez's racial ancestry was raised in a pretrial hearing on March 1, 2016. VRP at 56-68; Record at 483-485, 491-494 (Order on Motions on Limine, at 7-9, 15 - 18). The State's charging decisions were also addressed. VRP at 32 - 40; Record at 481 (Order on Motions on Limine, at 5). The evidence of the anonymous tip was also suppressed. VRP at 94 - 97; Record at 497 (Order on Motions on Limine, at 21). All of these issues were suppressed "before trial," however, in direct contravention to its own prior ruling in *State v. O'Cain*, and its interpretation of the Supreme Court ruling in *Melendez-Diaz*, the Court of Appeals ruled that Malaga had waived his objection because he failed to object at trial. *State v. Malaga* at 10.

The Court of Appeals cited *State v. Koepke* for the proposition that the Defendant must specifically object on confrontation clause grounds. *Id.*, at 10, citing *State v. Koepke*, 47 Wn. App. 897, 911, 738 P.2d 295 (1987). However, the confrontation clause is a constitutional right that can be raised for the first time on appeal. In *Koepke* the Defendant raised

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his "right to confront witnesses" and the court ruled that "because the alleged error may have affected a constitutional right, Mr. Koepke may raise it for the first time on appeal." *State v. Koepke*, at 911, citing Hieb, 107 Wash.2d at 108, 727 P.2d 239.[3] As a result, the cases cited by the Court of Appeals specifically refute the contention made by the Court of Appeals that a Confrontation Clause violation of this kind is waived. The Court of Appeals ruling on this issue is in direct conflict with prior appellate court decisions and the decisions of the Washington Supreme Court on this issue.

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *State v. McDaniel*, 83 Wn.App. 179, 185, 920 P.2d 1218 (Div. 1 1996) citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Russell*, 125 Wash.2d 24, 73, 882 P.2d 747 (1994), cert. denied, --- U.S. ----, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). This is a fundamental constitutional right. *State v. Spencer*, 111 Wn.App. 401, 410, 45 P.3d 209 (Div. 2 2002) citing *State v. Wilder*, 4 Wash.App. 850, 854, 486 P.2d 319, *review denied*, 79 Wash.2d 1008 (1971); *See Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *Merzbacher v. State*, 346 Md. 391, 413, 697 A.2d 432 (1997); *Ebb v. State*, 341 Md. 578, 590, 671 A.2d 974 (1996). ndeed, "'[t]he main and essential purpose of confrontation is *to secure for*

[3] Further, it is sufficient that mater was objected to prior to trial. *State v. Malaga*, at 9, citing *State v. O'Cain*; *State v. O'Cain*, at 232..

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the opponent the opportunity of cross-examination.'" Of particular relevance here, [w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v. Van Arsdall*, at 678 - 679 (internal cites omitted, emphasis in original). However, "***[b]efore the State may preclude the admission of a defendant's relevant evidence; it must demonstrate a compelling state interest.***" *State v. McDaniel*, 83 Wn.App. 179, 185, 920 P.2d 1218 (Div. 1 1996), (emphasis added).

In the current case, the trial court suppressed evidence needed by the Malaga to properly defend himself and impeach witnesses. This evidence was suppressed through motions in limine brought before trial and ordered by the trial court. VRP at 1-98; Record 477 - 491 (Order on Motions in Limine). The trial court granted the State's motion to "prohibit the defense from inquiring about or referencing alleged acts by Bryce Hill involving the trafficking of illicit drugs, and the buying or selling of firearms." Record at 480. The court also prevented the defense from eliciting testimony regarding the State's failure to charge Hill with these acts. The trial court also excluded evidence of Nicholus Vazquez's Asian ancestry. VRP at 56-68; Record at 483-485, 491-494 (Order on Motions on Limine, at 7-9, 15 - 18). Witness Knowles initially identified the shooter as a short Asian male named Nico. VRP at 710, 1272, 1313. The man initially identified by Knowles met all criteria. VRP at 119, 124, 622,

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1153 - 1154, 1330. When the court suppressed the evidence, it denied the jury of a crucial piece of evidence in assessing the validity of the initial identification and whether the changed identification was valid. The trial court also denied a defense motion to admit evidence of an anonymous informant who had confirmed to the police that Garcia "did have an Asian friend named Nico Vazquez," just as was initially reported by Knowles, which the police failed to follow up on. VRP at 94. The suppression of this evidence prohibited the defense from fully confronting the witnesses regarding their investigation and actions. When the court suppressed this evidence, it deprived Malaga of the ability to properly cross examine the witnesses and expose the infirmities and motives behind his testimony and the State's case, which is error of a constitutional magnitude. *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 475 U.S. 673, 678 - 679, 89 L.Ed.2d 674, 54 U.S.L.W. 4347 (1986); *Delaware v. Fensterer*, 474 U.S. 15, 22, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985). [4]

Because the suppression of the evidence was properly objected to prior to trial and involves a violation of the confrontation clause under the U.S. Const. amend.VI, the issues were not waived, the Supreme Court should grant discretionary review of this matter.

CONCLUSION

Because the State must show proof beyond a reasonable doubt that

[4] Because the jury may not have convicted Malaga if Hill's possible biases and motives for testifying were exposed, the error was not harmless. *State v. Spencer*, 111 Wn.App. 401, 411, 45 P.3d 209 (Div. 2 2002); *State v. McDaniel*, 83 Wn.App. 179, 185 - 186, 920 P.2d 1218 (Div. 1 1996).

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the defendant actually deliberated on the "intent to take a human life" and this proof cannot be based on speculation, the Supreme Court should grant discretionary review. Further, because the Court of Appeals erred in ruling that Malaga waived his Constitutional confrontation claim and could not raise it for the first time on appeal, the Supreme Court should grant discretionary review

DATED this 26th day of March, 2018.

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APPENDIX

1. Decision of the Court of Appeals: *State v. Malaga*, No. 75267-7-1 (Wash. Ct. App. November 27, 2017)

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER MALAGA, Appellant.	)	No. 75267-7-I UNPUBLISHED OPINION FILED: November 27, 2017

VERELLEN, C.J. — Christopher Malaga appeals his conviction of first degree murder with a firearm for the death of Adam Garcia. Malaga contends there was insufficient evidence of premeditation. The State presented evidence that Malaga had time between pulling the gun and shooting Garcia to deliberate on his decision, Malaga had motive, and Malaga brought a concealed gun to the scene. Because a rational jury could find him guilty of the crime charged beyond a reasonable doubt, there was sufficient evidence of premeditation.

For the first time on appeal, Malaga challenges the exclusion of certain evidence as an impermissible limitation of the scope of cross-examination under the confrontation clause. Because Malaga did not specifically object to the exclusions under the confrontation clause at the trial court, he has waived his right to confrontation. He may not raise this challenge for the first time on appeal.

Therefore, we affirm.

FACTS

Between July 2014 and October 2014, Malaga kept his belongings and periodically slept in a shed at the home of Garcia's mother. Around midnight on October 17, 2014, Malaga called Bryce Hill and asked to stay at Hill's parent's house because "he got into an argument with the person he was staying with."[1] Hill agreed and Malaga moved his belongings to Hill's house.

An hour later, Garcia and Malaga had the following text message conversation:

Garcia:	Yo
Malaga:	What
Garcia:	You
Garcia:	1Mmmmm
Garcia:	Yo dude I just like men got into it with my baby mama before I got there I was already pissed been drinking my bad.
Garcia:	But the dude with the money so that he could take me back in town if you're still down to do that
Malaga:	I left with all my shit already . . . me and you got a problem now
Garcia:	Ok
Malaga:	You could never fuck and you gon' see that . . . I just had respect for your mom and your house . . . all of my shit out now let's see you talk that shit

[1] Report of Proceedings (RP) (Mar. 11, 2016) at 995.

Garcia: Oh I'm past it but I don't care. It's all up to you. Sorry for it to come down to this.

Malaga: Hahahaha we gon see [2]

Around the same time, Garcia contacted Hill to purchase cocaine. They agreed to meet at a location in Oak Harbor. Malaga came to the location with Hill and Chris Knowles came to the location with Garcia.

After Garcia and Hill exchanged the cocaine and money, Hill and Knowles heard Malaga rack a gun. Malaga pulled the gun from his pocket, pointed it at Garcia, and the two men exchanged words. Knowles tried to get between the two men, and Malaga briefly pointed the gun at Knowles. Malaga and Garcia continued to argue, and Malaga shot Garcia in the face. Malaga and Hill fled to Hill's parent's house.

When police arrived at the scene, Knowles described the shooter as a "fat, short Asian male, mid-20s wearing a black hoodie."[3] Knowles also told police that he heard Garcia mention the name "Nico, Nick, or Nicholus" earlier in the evening. Detective Manuel Silveira identified Nicholus Vazquez from a database search for individuals with a name starting with N and height and weight matching Knowles' description. Later the same day, Knowles identified Vazquez in a photomontage because he "most resembled the guy I saw."[4] The following day, on October 19,

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[2] Ex 79.

[3] RP (Mar. 10, 2016) at 690.

[4] RP (Mar. 14, 2016) at 1154-55.

Knowles received a Facebook message with a picture of Malaga. Knowles contacted the police and stated that the man in the picture was the shooter.

The State charged Malaga with first degree murder, second degree murder, and second degree assault.

Before trial, the court (1) excluded evidence of Hill's other bad acts, (2) limited inquiry into charging decisions concerning Hill, (3) excluded evidence of Vazquez's racial ancestry, and (4) excluded evidence of an anonymous tip to police concerning Vazquez.

The jury found Malaga guilty of first degree murder, second degree murder,[5] and second degree assault. The trial court sentenced Malaga to 443 months of total confinement.

Malaga appeals.

ANALYSIS

I. Sufficiency of the Evidence

Malaga contends there was insufficient evidence of premeditation to sustain a conviction for first degree premeditated murder.

"'The sufficiency of the evidence is a question of constitutional law that we review de novo.'"[6] To determine whether there is sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the State and ask

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[5] Vacated at sentencing.

[6] State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)).

whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[7] "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[8]

To convict Malaga of first degree murder, the State had to prove beyond a reasonable doubt that Malaga acted with the premeditated intent to cause the death of Garcia.[9] Premeditation "must involve more than a moment in time."[10] "[M]ere opportunity to deliberate is not sufficient."[11] 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.'"[12]

"Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial."[13] Motive, procurement of a weapon, stealth, and method of killing are "particularly relevant" factors in establishing premeditation,[14] but

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[7] State v. Elmi, 166 Wn.2d 209, 214, 207 P.3d 439 (2009).

[8] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[9] RCW 9A.32.030(1)(a).

[10] RCW 9A.32.020(1).

[11] State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986)).

[12] State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) (quoting State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987)).

[13] State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999) (citing Pirtle, 127 Wn.2d at 643; Gentry, 125 Wn.2d at 597).

[14] Pirtle, 127 Wn.2d at 644 (quoting State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)).

sufficient proof of premeditation does not require all four factors.[15] "[P]rocurement of a weapon and stealth 'can be further combined as evidence of planning.'"[16]

Malaga's repeatedly relies on a federal decision by the D.C. Circuit Court of Appeals,[17] but we find this nonbinding authority unpersuasive in light of well-developed Washington case law.

Here, when viewed in the light most favorable to the State, the evidence shows that Malaga had time to deliberate and weigh his decision to kill Garcia. Both Hill and Knowles testified that some time passed between Malaga pulling out the gun and shooting Garcia. During this time, Malaga and Garcia exchanged words, Knowles attempted to intervene, and Malaga briefly pointed the gun at Knowles.

In State v. Bingham, our Supreme Court emphasized that "[h]aving the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation."[18] In State v. Ollens, our Supreme Court distinguished Bingham and held opportunity to deliberate combined with evidence

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[15] See Ortiz, 119 Wn.2d at 312-13 (sufficient evidence of premeditation without discussion of motive or stealth); State v. Sherrill, 145 Wn. App. 473, 485, 186 P.3d 1157 (2008) (sufficient evidence of premeditation despite lack of evidence of motive, procurement of a weapon, or stealth).

[16] Hummel, 196 Wn. App. at 355 (quoting Pirtle, 127 Wn.2d at 644).

[17] Austin v. United States, 382 F.2d 129, 127 U.S. App. D.C. 180 (1967) overruling recognized by U.S. v. Byfield, 928 F.2d 1163, 289 U.S. App. D.C. 71 (1991).

[18] 105 Wn.2d 820, 826, 719 P.2d 109 (1986).

of motive and procurement of a weapon is sufficient to submit premeditation to the jury.[19]

Here, there is evidence of premeditation beyond the mere opportunity to deliberate. The evidence shows Malaga had motive. In the text conversation between Malaga and Garcia, Malaga makes it clear that he is unhappy with Garcia when he states "me and you got a problem now."[20] Hill also testified that Malaga told him Garcia kicked Malaga off the property because they had a disagreement.

The evidence also shows Malaga brought a concealed gun to a drug deal to which he was not a party. Malaga contends the State must show the purpose behind procuring the weapon was to commit the murder. But "[t]he planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury."[21] Hill testified that he did not know Malaga had a gun until he pulled it out and pointed it at Garcia. And Malaga did not pull out the gun until the deal between Garcia and Hill was completed.

Viewing the evidence in the light most favorable to the State, a rational jury could have found premeditation beyond a reasonable doubt. Accordingly, we conclude that the State presented sufficient evidence of premeditation to support Malaga's first degree murder conviction.

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[19] 107 Wn.2d 848, 853, 733 P.2d 984 (1987).

[20] Ex. 79.

[21] Bingham, 105 Wn.2d at 827.

II. Confrontation Clause

For the first time on appeal, Malaga challenges the exclusion of certain evidence as an impermissible limitation of the scope of cross-examination under the confrontation clause.

We review alleged violations of the confrontation clause de novo.[22] "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."[23] But in Melendez-Diaz v. Massachusetts, the United States Supreme Court acknowledged "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections."[24]

In State v. O'Cain, this court analyzed Melendez-Diaz as it relates to a defendant's ability to raise a confrontation clause challenge for the first time on appeal.[25]

> [I]n Melendez-Diaz, the Supreme Court makes two things clear: (1) a defendant has the obligation to assert the right to confrontation at or before trial, in compliance with applicable trial court procedural rules, and (2) this obligation is part and parcel of the confrontation right itself, the parameters of which are based upon—and dependent upon—defendants being held to their obligation of timely assertion. In short, *the decision clearly establishes that, when a defendant's confrontation right is not timely asserted, it is lost.*[26]

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[22] State v.O'Cain, 169 Wn. App. 228, 234 n.4, 279 P.3d 926 (2012).

[23] State v. Lee, 188 Wn.2d 473, 487, 396 P.3d 316 (2017) (emphasis omitted) (internal quotation marks omitted) (quoting Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed 2d 347 (1974)).

[24] 557 U.S. 305, 129 S. Ct. 2527, 2534 n.3, 174 L. Ed. 2d 314 (2009).

[25] 169 Wn. App. 228, 279 P.3d 926 (2012).

[26] Id. at 240 (emphasis added).

In O'Cain, the defendant raised a confrontation clause challenge to the admission of statements made by an absent witness. This court concluded, "Because [the defendant] did not assert his confrontation clause objection at or before trial, he cannot obtain appellate relief on that claim."[27]

Although our Supreme Court has never explicitly adopted this approach, the court has never indicated disagreement with the holding from O'Cain. In fact, each justice currently serving on our Supreme Court has either authored or joined opinions acknowledging the right to confrontation may be waived.[28]

In O'Cain, this court also recognized ER 103 is a rule the State is allowed to adopt governing the exercise of confrontation clause objections.[29] Pursuant to

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[27] Id. at 232.

[28] State v. Slert, 186 Wn.2d 869, 876, n.3, 383 P.3d 466 (2016) (Justice Gonzalez authored a five-justice majority opinion, joined by Justices Madsen, Fairhurst, Wiggins, and Yu, in which the court listed various rights that may be waived without a full colloquy to assure the waiver is knowing, voluntary, and intelligent, including when the defendant "declines to confront one of the state's witnesses."); In re Adoption of M.S.M.-P., 184 Wn.2d 496, 500, 358 P.3d 1163 (2015) (Justice Gonzalez authored an eight-justice majority opinion, joined by Justices Madsen, Johnson, Owens, Fairhurst, Wiggins, McCloud, and Yu, in which the court analogized the waiver of the litigant's right to an opening hearing with other constitutional rights that may be waived through counsel, including the right to confrontation.) (citing Wilson v. Gray, 345 F.2d 282, 287-88 (9th Cir. 1965); State v. Lui, 179 Wn.2d 457, 527, 315 P.3d 493 (2014) (J. Stephens, dissenting) (Justice Stephens argued the State's burden under the confrontation clause was minimal because the defendant's confrontation right is conditioned on the defendant's timely objection.) (citing Melendez-Diaz, 557 U.S. at 327; State v. Schroeder, 164 Wn. App. 164, 167-68, 262 P.3d 1237 (2011)).

[29] O'Cain, 169 Wn. App. at 242-43 ("As noted in Melendez-Diaz, 'States may adopt procedural rules governing the exercise of such [confrontation clause] objections.' Washington's Evidence Rule (ER) 103 is one such rule.") (alteration in original) (internal citations omitted).

ER 103(a)(1), "Error may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike is made, stating the *specific ground of objection.*"[30] "A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial."[31]

Here, Malaga specifically contends the trial court erred when it (1) excluded evidence of Hill's other bad acts, (2) limited inquiry into the State's charging decisions concerning Hill, (3) excluded evidence of Vazquez's racial ancestry, and (4) excluded evidence of an anonymous tip to police concerning Vazquez. At trial, he did not object to the exclusion or limitation of the forgoing evidence on confrontation clause grounds. Instead, he relied on various evidentiary rules to argue in favor of admissibility. Because Malaga did not specifically object under the confrontation clause, he may not raise that challenge on appeal.

Additionally, as to the evidence of Vazquez's racial ancestry and the anonymous tip, such evidence would necessarily implicate an "other suspect" theory, but Malaga acknowledged at trial and during oral argument in this appeal that this evidence was not offered as other suspect evidence.[32] And notably, he did not show a "train of facts or circumstances" required to connect Vazquez to the

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[30] (Emphasis added.)

[31] State v. Koepke, 47 Wn. App. 897, 911, 738 P.2d 295 (1987).

[32] RP (Mar. 1, 2016) at 63 ("we, the defense, aren't pointing a finger at Nico Vazquez").

crime.[33] The trial court did not abuse its discretion when it excluded such evidence.

Therefore, we affirm.

WE CONCUR:

[33] State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932).

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