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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the police obtain the defendant's confession through the use of a deceptive Miranda warning and thus confused him into making statements to the officers.

Prior to trial, the court held a 3.5 hearing to discuss the voluntariness of the Miranda warnings given to the defendant. The first witness called by the State was Officer John Ringo, Vancouver Police Department, indicated that he and his partner, Wally Stefan, went to the defendant's residence for the purposes of talking to him about a murder and an attempted murder that had taken place on or about October 11, 2007. The officers talked to the defendant on November 15, 2007, at his residence.

When they first talked to the defendant, he indicated that he had no problem coming with them to the police station. He indicated "Yeah, sure, no problem." (RP 11). There were no handcuffs or restraints and he was advised that he was free to leave at any time. (RP 12). The officers

testified that they read the defendant his Miranda rights prior to asking him any questions. (RP 12-15). Officer Ringo then described the discussions that they had with the defendant for approximately three hours. Also during that period of time, relatives, at the request of the defendant, came and sat in and talked with the defendant prior to the giving of some of the taped statements.

Q. (Deputy Prosecutor). Okay, All right. After the defendant indicated that he understood his rights and was willing to talk to you, did you start talking to him about the facts of this case?

A. (Officer Ringo). I did.

Q. Okay. All right. Roughly how long did you interview the defendant with Detective Stefan about the facts of this case before the defendant's relatives ended up coming to the department, roughly?

A. Roughly I'd say about three hours.

Q. Okay. All right. So about a three-hour conversation with the defendant.

A. About that, yeah.

Q. All right. Did the defendant indicate at any time that he had any difficulty understanding you during that conversation?

A. No. We actually had a very amiable conversation. Bathroom was available to him. He - - we would stop at any given point and he'd say, I gotta use the bathroom. We'd stop, he'd go use the bathroom.

- (RP 15, L.17 – 18, L.11)

A video tape was made of the defendant's confessions to the shooting and that tape was played for the judge at the time of the 3.5 hearing. (RP 20). Exhibit No. 2 to the 3.5 hearing was the Miranda card that the defendant signed which was discussed on the video tape. (RP 28).

Officer Wally Stefan, Vancouver Police Department, also testified for the State at the 3.5 hearing. He indicated that he recalled that the Miranda rights, both adult and juvenile, were read to the defendant (RP 38) and that the defendant agreed to talk to the officers. (RP 39). He further indicated that the defendant's aunt showed up at the defendant's request and that the defendant and his aunt talked together before it was decided that they would provide a video taped statement. (RP 41-42).

The defendant did not testify at the 3.5 hearing, nor did he testify at trial. (RP 45).

The claim made on appeal is that the juvenile warnings confused the defendant and thus misled him into believing that they could only be used in a juvenile setting. In fact, the defendant, in his brief of appellant on page 16 notes the following:

However, this decision to waive his rights was induced by the false hope of juvenile court jurisdiction that the police planted in him by using an erroneous warning.

The State submits that there is absolutely no evidence in this record to support this type of proposition. The defendant did not testify

nor is there any indication in the record, anywhere, that the defendant was unwilling to voluntarily give a statement to the police. When Officer Ringo testified in front of the jury, he indicated, after Miranda warnings, the defendant was initially denying any knowledge of the shootings. But he finally admitted to the killing. (RP 396-398). But the officer also indicates that before he was making these admissions, the defendant was laughing and joking with the officers. (RP 398). Clearly, these are not the comments or actions of someone who is being misled. Further, the defendant had the opportunity to talk to a loved one, in person, at his request, about whether or not to continue giving a statement to the officers. He was never put in restraints, and never told that he could not leave. Obviously, this changed once he admitted to the murder, but that was clearly spelled out to him, understood by the aunt, and he continued to make a voluntary statement to the officers.

The defendant also makes claim that these Miranda warnings with the juvenile warning, are confusing. He cites absolutely no case law to support this contention. In State v. G.M.V., 135 Wn. App. 366, 373, 144 P.3d 358 (2006), the following information is supplied:

G.M.V. was in custody. She was advised of her Miranda rights. Significantly, she does not contend that her statements were involuntary. Moreover, the prosecutor described the interrogation procedure to satisfy the court that G.M.V.'s statements were voluntary. Accordingly, neither the Fifth

Amendment nor the due process clause of the Fourteenth Amendment were violated. Lopez, 67 Wn.2d at 188-89. If so genuine issue exists as to whether a statement by the defendant was voluntary, the question whether admitting the statement constituted an error of constitutional magnitude does not arise. State v. Williams, 137 Wn.2d 746, 749-50, 975 P.2d 963 (1999).

G.M.V. cites to no authority for the proposition that a juvenile court cannot incorporate a CrR 3.5 inquiry into the fact-finding hearing. The State is required to prove by a preponderance that a defendant affirmatively waived her right to remain silent only when she disputes the voluntariness of a statement. See, e.g., State v. Parra, 96 Wn. App. 95, 100, 977 P.2d 1272 (1999). The record suggests no reason for a separate hearing.

This discussion is further enhanced and clarified by our State Supreme Court in State v. Leaa'Esola Unga, 165 Wn.2d 95, 101-103, 196 P.3d 645 (2008):

The determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel. Fare v. Michael C., 442 U.S. 707, 724-25; 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979); Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Miranda v. Arizona, 384 U.S. 436, 475-77, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Because the Fifth Amendment protects a person from being compelled to give evidence against himself or herself, the question whether admission of a confession constituted a violation of the Fifth Amendment does not depend solely on whether the confession was voluntary; rather, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Thus, both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the

defendant's ability to resist the pressure are important. United States v. Brave Heart, 397 F.3d 1035, 1040 (8<sup>th</sup> Cir. 2005).

Circumstances that are potentially relevant in the totality-of-the-circumstances analysis include the “crucial element of police coercion”; the length of the interrogation; its location; its continuity; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation. Withrow v. Williams, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) (and cases cited therein).

The totality-of-the-circumstances test specifically applies to determine whether a confession was coerced by any express or implied promise or by the exertion of any improper influence. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (abrogating test stated in Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897)). A promise made by law enforcement does not render a confession involuntary per se, but is instead one factor to be considered in deciding whether a confession was voluntary. Fulminate, 499 U.S. at 285; Broadaway, 133 Wn.2d at 132; United States v. LeBrun, 363 F.3d 715, 725 (8th Cir. 2004); United States v. Dowell, 430 F.3d 1100, 1108 (10th Cir. 2005).

Whether any promise has been made must be determined and, if one was made, the court must then apply the totality of the circumstances test and determine whether the defendant's will was overborne by the promise, i.e., there must be a direct causal relationship between the promise and the confession. Broadaway, 133 Wn.2d at 132; *see* State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984); United States v. Walton, 10 F.3d 1024, 1029 (3d Cir. 1993) (“the real issue is not whether a promise was made, but whether there was a causal connection between [the promise] and [the defendant's] statement”).

This causal connection is not merely “but for” causation; the court does “not ask whether the confession would have been made in the absence of the interrogation.” Miller v. Fenton,

796 F.2d 598, 604 (3d Cir. 1986); *see Fulminate*, 499 U.S. at 285. “If the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action.” *United States v. Guerrero*, 847 F.2d 1363, 1366 n.1 (9th Cir. 1988).

A police officer's psychological ploys, such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, “but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.” *Miller*, 796 F.2d at 605; *accord United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir. 1993); *United States v. Durham*, 741 F. Supp. 498, 504 (D. Del. 1990); *State v. Darby*, 1996 SD 127, 556 N.W.2d 311, 320; *State v. Bacon*, 163 Vt. 279, 294-95, 658 A.2d 54 (1995). “The question [is] whether [the interrogating officer's] statements were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess.” *Miller*, 796 F.2d at 605; *see United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir. 1995) (“the proper test is whether the interrogator resorted to tactics that in the circumstances prevented the suspect from making a rational decision whether to confess or otherwise inculcate himself”), *vacated on other grounds*, 517 U.S. 1231, 116 S. Ct. 1873, 135 L. Ed. 2d 169 (1996), *adhered to on remand*, 124 F.3d 205 (7th Cir. 1997).

The totality-of-the-circumstances analysis also specifically applies in deciding the admissibility of a juvenile defendant's confession. *Fare*, 422 U.S. at 725. Included in the circumstances to be considered are the individual's age, experience, intelligence, education, background, and whether he or she has the capacity to understand any warnings given, his or her Fifth Amendment rights, and the consequences of waiving these rights. *Id.* State courts have a responsibility to examine confessions of a juvenile with special care. *In re Gault*, 387 U.S. 1, 45, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Haley v. Ohio*, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L.

Ed. 224 (1948); Simmons v. Bowersox, 235 F.3d 1124, 1133 (8th Cir. 2001).”

The State submits that there was no coercion, promises or officers’ attempts to confuse this defendant. All indications are that he gave a voluntary statement to the police. The defense has cited no case law to support a different proposition.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error is a claim that there was insufficient evidence to support the concept of premeditation.

By statute, premeditation must involve more than a moment in time. RCW 9A.32.020(1). It is defined as "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." State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991) (footnote omitted). The evidence, whether direct or circumstantial, must support actual reflection or deliberation apart from the commission of the fatal act itself, not merely opportunity to reflect or deliberate. State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). The test for evaluating a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Premeditation may be shown by circumstantial evidence where the jury's inferences are reasonable and substantial evidence supports the jury's verdict. State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). Where the sufficiency of the evidence has been challenged with respect to the element of premeditation, Washington cases hold that a wide range of factors can support an inference of premeditation. *Id.* Motive, procurement of a weapon, stealth, and method of killing are “particularly relevant” factors in establishing premeditation. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). While premeditation cannot be inferred from intent to kill, State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984), it can be inferred from circumstantial evidence, including evidence of motive, procurement of a weapon, stealth, and the method of killing. State v. Gentry, 125 Wn.2d 570, 598-99, 888 P.2d 1105 (1995); State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992).

The planned presence of a weapon necessary to facilitate a killing is adequate evidence for a jury to consider. State v. Griffith, 91 Wn.2d 572, 577, 589 P.2d 799 (1979); State v. Tikka, 8 Wn. App. 736, 742, 509 P.2d 101 (1973). In State v. Massey, 60 Wn. App. 131, 145, 58 Wn. App. 1010, 803 P.2d 340 (1990), the defendant brought the murder weapon, a

gun, with him to the murder site.; see also State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). This fact alone was sufficient to show premeditation.

In Griffith, children were hitting a ball against an outside wall of the defendant's home. 91 Wn.2d at 575. Griffith took the ball from the children, went to his car, and retrieved his gun. Griffith, 91 Wn.2d at 573. He then went inside his home and, when two adults came to retrieve the ball he fatally shot one of them. Griffith, 91 Wn.2d at 574. These events transpired within five minutes. Griffith, 91 Wn.2d at 577. In State v. Elmi, 138 Wn. App. 306, 314, 156 P.3d 281 (2007), affirmed 166 Wn.2d 209 (decided May 21, 2009) the protection order, the heated argument, the transportation of a weapon to the scene, the evidence of people attempting to restrain the shooter, and the number of shots provide sufficient evidence for a rational trier of fact to find premeditation beyond a reasonable doubt. Evidence including prior threats or quarrels and defensive wounds on the victim will support an inference of premeditation. See State v. Millante, 80 Wn. App. 237, 248, 908 P.2d 374 (1995). Other evidence of premeditation includes, but is not limited to, prior threats or quarrels, the planned presence of a weapon, a possible motive for the killing, and defensive wounds on the victim. See Ortiz, at 312; Hoffman, at 82-83;

State v. Neslund, 50 Wn. App. 531, 558-60, 479 P.2d 725, review denied, 110 Wn.2d 1025 (1988).

At trial, the State called Anthony Tirado, a member of the Norteno gang (RP 330) to testify. Mr. Tirado was in the vehicle that was fired at by the defendant. He testified that as he and the deceased were driving in the car, that the defendant pulled up next to them and gave them what he referred to as a “mean mug”. (RP 333-334). The defendant then drove off in his vehicle and Mr. Tirado and his driver followed at a normal speed. (RP 342). On 26<sup>th</sup> in Vancouver, the defendant turned left and Mr. Tirado and his driver turned right. (RP 343). The defendant immediately stopped his vehicle and Mr. Tirado and the deceased stopped theirs and reversed their car going back towards the defendant’s vehicle. (RP 344). Mr. Tirado testified that as they were doing so he saw someone walking towards them shooting. (RP 346-347). He indicated to the jury that this person who was shooting at their car was advancing towards their vehicle and shooting at them. (RP 348).

Officer John Ringo, Vancouver Police Department, testified in the State’s case in chief. He indicated that the defendant did admit to the killing (RP 398) and they in fact played for the jury the taped confession of the defendant. (RP 404). He was asked in summary, prior to playing

the tape, what the defendant's explanation was and Officer Ringo testified as follows:

Q. (Deputy Prosecutor). All right. All right, so the defendant after a significant period of time ended up admitting that he was the shooter.

Did you ask him then details about what occurred?

A. (Officer Ringo). Correct.

Q. All right. When - - when you first - - after he admitted that he was, in fact, the shooter and you started asking him for detail about what happened, what - - what - - what did he start saying at first that had occurred that, you know, led up to the shooting?

A. His basic statement was that once he agreed or admitted the fact, okay, I was the guy that did the shooting, that he - - let me make sure I'm - - I'm clear on what he said exactly. (Pause; reviewing file.)

Mr. Campos explained to me that he had been in his aunt's car. He had been at the Town Pump gas station. He had been jumped by some Nortenos. Left that area, was followed.

And then going to the intersection of 26th and Fairmont, exited his car at some point. And then told us that he had a .22-caliber revolver in his backpack, told us that he took it out of his - - out of the backpack, put it in his front waistband of his pants.

Told us that he saw the passenger get out of the we - - the Honda, start to walk towards him, yelling at him, waving his arms, and then that he appeared to be angry while he was yelling at him.

Mr. Campos stated that he used his gun to shoot at the car to scare them. Told us that the passenger ran back

to the car, got in, and then he fired the rest of the bullets at the car.

He told us that he did hear the glass break but he didn't know at that time in his initial statement if anybody even hit when he'd shot (sic).

Q. All right. And what did he say he did after he was done shooting?

A. As soon as he was done shooting, he said he got into his car, started it, and drove out to a park in Battle Ground, where he spent some time thinking about what had just taken place.

Said that he returned home and - - from the park, and about a week later he said he drove to Shasta Lake in California, where he threw the gun into a lake where he knew it was deep.

Q. All right. So he said he took the gun down to California and ditched the gun down there in a lake?

A. That's what he told us.

- (RP 400, L.11 – 402, L.8)

The Court's Instructions to the Jury in this matter (CP 144)

included lesser included crimes and also included the concept of self defense. Obviously, the jury did not agree with the lesser charges or with the concept of self defense. The State submits that these clearly were calls for the jury to make. The defendant had also put in evidence prior threats made against him by members of this gang and that he was concerned for his safety because of that. It is also obvious that he fired a large number

of shots into this vehicle (seven shots) and further that he had gone out of his way to arm himself, get out of his car and walk towards the other vehicle walking and shooting while doing so. In a sense, the defendant brought the murder weapon, the gun, with him to the murder site. Further, it could be argued that he had lead them into a secluded neighborhood, anticipating that there would be some type of conflict and knowing, all the while, that he was armed and ready for any type of violence that the victims could inflict.

The State submits that the totality of circumstances in this case clearly demonstrate that there was a sufficient showing of premeditation to allow this issue to go to the jury.

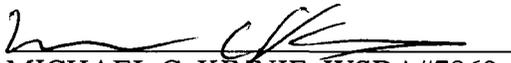
#### IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 5 day of August, 2009.

Respectfully submitted:

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