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STATE OF WASHINGTON

NO. 39106-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS NOTARO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty Ann Van Doornink, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Notaro was denied a fair trial when the detectives invaded the province of the jury by offering impermissible opinion evidence as to appellant's credibility.

2. The state failed to prove beyond a reasonable doubt that Mr. Notaro killed Mr. Tarricone with premeditated intent.

Issues Presented on Appeal

1. Was Mr. Notaro denied a fair trial when the detectives invaded the province of the jury by offering impermissible opinion evidence as to appellant's credibility?

2. Did the state fail to prove beyond a reasonable doubt that Mr. Notaro killed Mr. Tarricone?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 25, 2008 , Mr. Notaro was charged with murder in the first degree for a crime allegedly committed in 1978.. CP 1-2. Before trial and after the state rested its case in chief, the defense filed a motion to dismiss the case. CP 63-75, 337-343. The court, Judge Kitty Ann Van Doornink denied the motions. RP 701-02.. Following a jury trial, Mr. Notaro was convicted as charged. CP 411, 413. This timely appeal follows. CP 481-487.

2. SUBSTANTIVE FACTS

Joseph Tarricone disappeared in August 1978. RP 209. Mr. Tarricone, who was divorced, never missed a child support payment, but in the summer of 1978 after making his June payment, never again sent his ex-wife child support payments. RP 377, 379. Gina Chavez, one of Mr. Tarricone's daughters graduated high school in May or June 1978 and spent a week in Alaska with her father in June 1978. RP 382-83. Mr. Tarricone worked as a meat distributor in Alaska. RP 210.

Ms. Chavez returned to Seattle thereafter and saw her father four times during the summer of 1978; the last visit occurred in early or middle August when Mr. Tarricone came to visit his girlfriend Renee Curtiss. RP 385, 387. Ms. Curtiss lived on Canyon Road in Puyallup, WA. RP 212. Ms. Chavez spoke to Mr. Tarricone once a week on the telephone. RP 387. Ms. Chavez was never able to contact her father after the early middle August visit. RP 388. Gypsy Tarricone another daughter of Mr. Tarricone never saw or heard from Mr. Tarricone after June, July or August 1978. RP 209, 224. Dean Tarricone, one of Mr. Tarricone's sons last spoke to his father in May or June 1978. RP 372-73.

On June 4, 2007, Travis Haney was working a job excavating a work site at 104th and Canyon Road in Puyallup. RP 227, 230. During the

excavation he uncovered a garbage bag that contained bones. RP 233. Mr. Haney called 911 and was told to stop digging. RP 239. A Pierce County Sheriff's detective, Jason Tate was called to the scene where he called for the forensic team to identify the bones. RP 263, 341-353. Adam Anderson a forensic examiner could not immediately determine if the bones were human remains. RP 343.

Katherine Taylor a forensic anthropologist with the King County Medical Examiner's office examined the box of bones and determined that they were skeletal remains. RP 663, 668. Ms. Taylor could not determine how long the bones were buried or the age of the remains, but guessed that the remains belonged to a male person over 40 years old. RP 681-83. By examining the bones, Ms. Taylor opined that dismemberment occurred after death and was likely caused by a chain saw. RP 669-71.

One of the skeletal remains was a partial skull bone, including the back of the head. RP 636. There was no evidence of any other trauma except from dismemberment. RP 693. There was no evidence of a bullet wound from the back of the head or from any other of the 48 bones found. RP 315, 319. If someone shot the person in the back of the head, the skeletal remains of the skull would have had evidence of fractures. The medical examiner Eric Kiesel, stated, when a bullet goes through the skull" it fractures- kind of like

a rock hitting a piece of glass.” . . . I did not see any of the telltale signs that would tell that this is from a gunshot wound.” . . . “I do not see evidence of gunshot wound”. RP 326-328.

The state was unable to positively identify the human remains, but could not rule out the possibility that they belonged to Joseph Tarricone. RP 317, 565. According to the medical examiner and the forensic examiner from the FBI laboratory, John Stewart, the evidence was insufficient to establish more than an indefinite “presumptive identification”. RP 298-99, 562, 565.

We have some mitochondrial DNA with a comparison to – I believe it was his sister, that was consistent; did not rule him out. Unfortunately, it wasn’t strong enough evidence to say this is him without a doubt.

Id. The mitochondrial DNA matched an African American sample and 2 Caucasian samples from the DNA data base of 5,071 samples. RP 566, 571. The medical examiner agreed that based on the limited and inconclusive scientific evidence of identification of the remains, other medical examiners and forensic scientist would consider the identity of the remains “undetermined”. RP 319.

Nicholas Notaro’s mother Geraldine Hesse rented a house on Canyon Road and 104th beginning June 1978 and for nine months thereafter. RP 411, 413, 415, 423. Ms. Hesse moved in June 24, 1978 with her daughter Renee

Curtiss. RP 422. In 2007, the owner Marilyn Miller decided to tear down the house and build an office building. RP 424.

Nicholas Notaro lived and worked in Healy Alaska in 1978. RP 276. In August, 1978 Mr. Notaro began working as a cook for Shirley Hamel. RP 227. Mr. Notaro had surgery for appendicitis at the end of September 1978. RP 278. After his surgery, Mr. Notaro called Ms. Hamel on September 25, 1978 and told her that he needed to go to Seattle and asked if she could pick up his car at the Fairbanks airport. RP 280, 282, 291. Mr. Notaro contacted her a week later to retrieve his car. RP 283. During an unrelated search of Mr. Notaro's apartment, the Alaska state troopers found an Alaska Airlines boarding pass for Seattle and a check written out to Alaska Airlines from Mr. Notaro's check book dated September 26, 1978. RP 607-08, 610.

The state did not present any evidence that Mr. Notaro was ever in the Seattle area in August or at any time other than one week in late September 1978. All of the evidence presented regarding Mr. Tarricone's disappearance indicated that he disappeared in August 1978.

Arlene Tribbett and Mr. Notaro became friends when they worked together for five years at Winchell's donuts beginning in 1985 or 1987. RP 444-445. Ms. Tribbett told detective Benson that Mr. Notaro told her that he helped his sister kill a man in a home off of Canyon Road. According to Ms.

Tribett, Mr. Notaro told her that he shot the man in the back of the head, and with the help of his mother and sisters, dismembered the body and put the body in bags and buried it under the porch. RP 466, 452. Ms. Tribett told the detective that Mr. Notaro said he killed the man because he was having an affair with his significant other. RP 457. Mr. Notaro told Mr. Tribett that neither his sisters nor his mother knew the man. RP 458. Ms. Tribett stated that this conversation took place in the 1980's. RP 449. Ms. Tribett did not call the police because she did not believe Mr. Notaro's story. RP 448.

Denny Wood and Ben Benson, Pierce County Detectives contacted Mr. Notaro by ruse on March 24, 2008 and conducted an interview under the guise of an end of probation type meeting. RP 466, 514, 516, 533. The detectives taped the majority of the interview which covered areas of Mr. Notaro's place of employment, where he lived, his family members and general information. RP 517, 519. After the detectives learned that Mr. Notaro was very protective of his sisters, they turned off the tape, and told Mr. Notaro that they had probable cause to arrest his sisters for the murder of Mr. Tarricone. RP 469-71, 478, 495, 519, 537-39.

After the detective told Mr. Notaro that his sisters were involved in the murder, Mr. Notaro decided to take full responsibility for the murder. RP 496. Mr. Notaro initially stated that his mother shot Mr. Tarricone because he

would not leave Renee alone. Id. Mr. Notaro said that he helped with the dismemberment and disposal of the body after the fact. RP 480-81. The detective told him that he did not believe him and that mother's called their sons to take care of such things. RP 482. Mr. Notaro then told the detectives that he shot Mr. Tarricone two times in the back of the head because Mr. Tarricone was bothering his sister, repeatedly asking to marry Renee and would not take no for an answer. RP 483, 485. Mr. Notaro indicated that he dug two holes in the ground and buried the body in bags. RP 485-86.

Detective Benson's job was to determine if Mr. Notaro's confession matched the evidence uncovered during his investigation of the murder. RP 496-97. The confession did not match the evidence as there was no evidence of a gun shot wound to the back of Mr. Tarricone's head. RP 317, 319, 689-92.

Detective Benson admitted that people confess to murders they did not commit for a variety of reasons. RP 497-98.

C. ARGUMENT

1. THE DETECTIVES IMPROPER OPINION TESTIMONY REGARDING APPELLANT'S CREDIBILITY DENIED HIM HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The State offered several improper opinions on the veracity of Mr. Notaro's testimony and statements to detectives. It is improper for a witness to directly or indirectly give an opinion on the credibility of the defendant or a witness. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *State v. Dolan*, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003) (*State v. Jerrels*, 83 Wash. App. 503, 507-08, 925 P.2d 209 (1996)). Moreover, a witness may not give, directly or by inference, an opinion on a defendant's guilt. *State v. Madison*, 53 Wash.App. 754, 760, 770 P.2d 662, review denied, 113 Wash.2d 1002, 777 P.2d 1050 (1989). "Particularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial." *State v. Carlin*, 40 Wash.App. 698, 703, 700 P.2d 323 (1985).

Improper opinion testimony violates 'the defendant's constitutional right to a jury trial and invade{s} the fact-finding province of the jury'. *Dolan* 118 Wn. App. at 329. Infringement on the province of the fact-finder suggests an error of constitutional magnitude. *Demery*, 144 Wn.2d at 759. To be admissible, every opinion must be based on knowledge. ER 701; ER 702; *State v. Kunze*, 97 Wash.App. 832, 850, 988 P.2d 977 (1999), review denied, 140 Wash.2d 1022, 10 P.3d 404 (2000); *Riccobono v. Pierce County*, 92

Wash.App. 254, 268, 966 P.2d 327 (1998). Proper lay opinion is based on personal knowledge. ER 701; *Kunze*, 97 Wash.App. at 850, 988 P.2d 977; *State v. Carlson*, 80 Wash.App. 116, 124, 906 P.2d 999 (1995); Advisory Committee's Note to FRE 701, 56 F.R.D. 183, 281. Proper expert opinion is based on scientific, technical, or specialized knowledge ER 702; *Kunze*, 97 Wash.App. at 850, 988 P.2d 977; *Carlson*, 80 Wash.App. at 124, 906 P.2d 999.

In Mr. Notaro's case, the detectives opinions were not based on either type of knowledge, and thus they were not admissible. *See Kunze*, 97 Wash.App. at 850; *Carlson*, 80 Wash.App. at 124.

Dolan, 118 Wash. App. at 329, is legally and factually on point. In *Dolan*, the defendant was charged with assault of a child in the second degree. *Dolan*, 118 Wash. App. at 326. The Court held the following exchange impermissibly invaded the province of the jury and deprived Mr. Dolan his right to a fair trial .The Court reversed and remanded for a new trial. *Dolan*, 118 Wash. App at 330

[PROSECUTOR:] When you talked to [Batts], was there any indication that she could have done this when you were investigating the case?

[OFFICER:] I don't believe so.^[FN11]

FN11. RP at 192.

The State asked the case worker:

[PROSECUTOR:] ... Why didn't CPS make the mother leave the residence?

....

*329 [CASE WORKER:] ... I didn't feel that the child was at risk with [the] mother, and she wasn't really the person in question.^[FN12]

Dolan, 118 Wash. App at 328-29.

This exchange was sufficiently impermissible to be deemed prejudicial error because the evidence showed that both Dolan and Batts [the accuser] had access to Rollan [victim] at pertinent times, and it was up to the jury, not a witness, to opine on the significance of that fact.

Similarly, in *Jerrels*, 83 Wn.App. at 507-08, the Court held that the mother improperly testified that she believed her children were telling the truth when they accused the defendant of sexual abuse and it was for the jury to determine whether the children were credible..

In the instant case, Detective Wood's opinion that Mr. Notaro was not telling the truth was impermissible opinion testimony that invaded the province of the jury. RP 481-82. Detective Benson also impermissibly opined that Mr. Notaro's version of the events surrounding the killing was untrue. RP 521-22. This portion of the testimony of Woods and Benson is as follows:

Prosecutor: When he gave this explanation as to the reason

why he cut up the body, how did you respond?

Detective Wood: I told him I didn't believe him.

RP 481 The defense objection was sustained. Id. The prosecutor again asked:

Prosecutor: And what did you say to him to have him change his story?

Detective Wood: I leaned forward, and I told him I didn't believe him.

RP 481. The trial court overruled defense counsel's objection. Id.

Detective Wood: I told him I didn't believe him. I said, I don't believe your mother was able to put Joseph's body in a freezer by herself if he had such a difficult time pulling it out and taking it upstairs to bury it.

RP 481. The court deferred ruling on defense objections to this question and answer. RP 482.

Detective Wood: I told him I didn't believe that's what mothers did when they have a problem such as the problems they were having. They called their sons, and sons dealt with the problems. Mother's didn't shoot people.

....

Prosecutor: And when he was nodding his head up and down, what did you ask him next?

Detective Wood: I told him to tell the truth. Tell me the story of what happened.

The court overruled the defense objection to this testimony. RP 482.

The court twice overruled the defense objections on both hearsay and impermissible opinion testimony grounds to Detective Benson describing what Detective Wood did not believe about Mr. Notaro's statement. RP 520-21. The trial court overruled Detective Benson again describing to the jury what Detective Wood believed was Mr. Notaro's role in the killing. RP 521-522. The prosecutor again elicited that the detectives believed that Mr. Notaro committed the murder not his mother. RP 522. Defense counsel renewed her objection to impermissible opinion testimony from the detectives. RP 543.

In *Dolan*, the admission of the sheriff's opinion that the mother could not have committed the crime was considered impermissible opinion testimony, just as was the mother's opinion in *Jerrels* that her children were telling the truth. *Dolan*, 118 Wash. App at 328-29; *Jerrels*, 83 Wn.App. at 507-08.

In Mr. Notaro's case, the detectives' opinions were the expression by government officials, sheriff's detectives, that invaded the province of the jury and influenced the jury and thereby denied Mr. Notaro of a fair and impartial trial. *Carlin*, 40 Wash.App. at 703. This testimony was particularly

prejudicial because it came from government officials who have an aura of credibility by virtue of their employment. *United States v. Guitierrez*, 995 F.2d 169, 172 (1993) (“expert testimony of a law enforcement officer, [] often carries an aura of special reliability and trustworthiness.” *Id.* at 613 (internal quotations omitted)).

The admission of the opinion testimony was prejudicial error. A constitutional error is only harmless if the reviewing court is "convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The errors in Mr. Notaro's case were of constitutional magnitude because the circumstantial evidence was not strong enough to permit belief that any reasonable jury would reach the same result absent the error. *Id.*

The evidenced suggested that Mr. Tarricone disappeared in August 1978; that Mr. Notaro was working and living in Alaska at that time; that Mr. Notaro went to Seattle on September 26, 1978 for one week; that a body that could not be ruled out as being Mr. Tarricone's was dismembered and buried; that the body was discovered in 2007 on property where Mr. Notaro's mother and sister lived for 9 months in 1978; that Mr. Tarricone stated that he shot

Mr. Tarricone twice in the head after the detectives said they did not believe that his mother and sisters killed Mr. Tarricone; that there was no evidence of gunshot wounds to the head; that Mr. Notaro wanted to protect his sisters from criminal liability. Without the detectives repeated opinions that the only true story was the version in which Mr. Notaro stated he shot Mr. Tarricone is insufficient to establish guilt particularly because the hard evidence established that it was not possible that anyone shot Mr. Tarricone in the head. As in *Dolan*, to satisfy due process in Mr. Notaro's case, reversal is required.

2. THE STATE FAILED TO PROVE BEYOND
A REASONABLE DOUBT THE
ESSENTIAL ELEMENT OF
PREMEDITATION.

In order to convict a defendant of a charged crime, the State bears the burden of producing evidence sufficient to prove every element of the offense beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). A conviction unsupported by sufficient evidence violates a

defendant's constitutional right to due process. U.S. Const. amend. 14;¹ *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

In considering a claim of insufficiency of the evidence, an appellate court must determine "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." *Jackson v. Virginia*, 443 U.S. at 323; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

a. Proof of first degree murder requires proof of premeditation.

In order to convict Mr. Notaro, the State was required to prove beyond a reasonable doubt that Mr. Notaro, with premeditated intent caused Mr. Tarricone's death.. CP 1-2; RCW 9A.32.030(1)(a); *State v. Smith*, 115 Wn.2d 775, 782, 801 P.2d 975 (1990). Evidence of an element of a charge is sufficient only if, viewed in the light most favorable to the state, a rational trier of fact could have found that element beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105, *cert. denied*, 116 S.Ct. 131 (1995).

¹The Fourteenth Amendment provides that No person shall be deprived of life,

Specific intent to kill and premeditation are not synonymous, but separate and distinct elements of the crime of first degree murder. See *RCW 9A.32.030(1)(a)*, *.050(1)(a)*; *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). Premeditation has been defined as "the deliberate formation of and reflection upon the intent to take a human life", *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982), and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *Brooks*, at 876. Premeditation must involve more than a moment in point of time. *RCW 9A.32.020(1)*.

State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987).

- b. There was insufficient evidence of premeditation.

Even if this Court deems that there was sufficient evidence of intent to kill, there was no evidence of premeditation. Premeditation is an essential element of murder in the first degree. *RCW 9A.32.030(1)(a)*. 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. Neslund*, 50 Wn. App. 531, 558, 749 P.2d 725, *review denied*, 110 Wn.2d

liberty, or property without due process of law. U.S. Const. amend. 14.

1025 (1988); *Ollens*, 107 Wn.2d at 850. It must involve more than a moment in time. RCW 9A.32.020(1).

Premeditation can be inferred from circumstantial evidence, including evidence of motive, procurement of a weapon, stealth, and the method of killing. *Gentry*, 125 Wn.2d at 598-99; *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). In Mr. Notaro's case there is no evidence that the gun Mr. Notaro purchased in Alaska was used to kill Mr. Tarricone and the motive issue is impossible to evaluate because there were several reasons provided for the killing. There was no stealth and the method of killing is unknown and therefore cannot infer premeditation.

Cases such as *Hoffman*, *supra*, *Ollens*, 107 Wn.2d at 853, and *Neslund*, 50 Wn. App. at 559, represent circumstances in which the factual record contained evidence that would allow the jury to reasonably conclude the defendants each premeditated a killing -- prior threats by the defendant, the bringing of a number of deadly weapons to the scene by the defendant, multiple shots fired by the defendant, the shooting of a victim from behind, and statements clearly indicating premeditation.

Thus in *Hoffman*, 116 Wn.2d at 84-85, premeditation was proved where the defendants brought multiple guns to a location, fired on police officers, and continued to fire as the victims crawled away, coordinating their

gunfire with flares they had brought to illuminate the scene of the shooting. Such conduct is evidence of calculated actions and premeditated intent to kill. *Hoffman*, 116 Wn.2d at 84-85. For further example, evidence showing the victim was shot three times in the head, twice after he had fallen to the ground, supports a finding of premeditation. *State v. Rehak*, 67 Wn. App. 157, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022 (1993).

By contrast:

[V]iolence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy.

Ollens, 107 Wn.2d at 987, quoting, *Austin v. United States*, 382 F.2d 129, 139 (D.C. Cir. 1967). Also, evidence of strangulation, alone does not support an inference of premeditation. *State v. Bingham*, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). The opportunity to deliberate and premeditate is not sufficient to prove that the defendant did deliberate and premeditate. *Bingham*, 105 Wn.2d at 826.

Moreover, it is inappropriate to let "[t]he facts of a savage [] [beating] generate a powerful drive . . . to crush the crime with the utmost condemnation available". *Bingham*, 105 Wn.2d at 827-28, quoting *Austin*,

382 F.2d at 139. In the instant case, there was no evidence that Mr. Notaro was present for the murder of Mr. Tarricone. Rather, the evidence indicated that Mr. Notaro knew that his sister was having trouble with Mr. Tarricone and Mr. Notaro's mother asked him to come and help deal with the problem, likely after the fact.

Mr. Notaro confessed to killing Mr. Tarricone, but his confession was not supported by any factual or scientific evidence. RP 326-29, 689-92. Mr. Tarricone told the police that he shot Mr. Tarricone in the back of the head two times. RP 483. There was however no evidence of a gunshot wound and both the forensic anthropologist and the medical examiner both testified that such evidence would have been present if Mr. Tarricone was shot in the head. RP 326-29, 689-92. Moreover, by all of the testimony, Mr. Tarricone was killed in the middle of August and Mr. Notaro did not come to Seattle until five weeks later on September 26, 1978. Thus, Mr. Tarricone's confession was not supported by independent evidence; he was likely trying to protect his sisters.

In Mr. Notaro's case, there is insufficient evidence of premeditation or even the act of killing itself. Premeditation can be proved by circumstantial evidence only where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. *State v. Pirtle*, 127

Wn.2d 628, 643, 904 P.2d 245 (1995); *State v. Luoma*, 88 Wn.2d 28, 33, 558 P.2d 756 (1977). Evidence of an opportunity to premeditate does not amount to premeditation. The fact that Mr. Notaro: (1) knew that his sister was having trouble with Mr. Tarricone; (2) traveled from Alaska to Seattle five weeks after Mr. Tarricone disappeared; and (3) confessed to killing Mr. Tarricone in a manner that was impossible based on the hard scientific evidence showing no signs of fracturing or gunshot to the back of the skull, does not allow a reasonable inference of deliberate formation of and reflection upon the intent to take a human life, or of the actual taking of a human life.

c. Dismissal of the attempted murder conviction is required.

A finding of insufficient evidence in support of a verdict necessitates dismissal with prejudice rather than remand for a new trial. U.S. Const. amend. 5; *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996), *review denied*, 138 Wn.2d 1011 (1999). Because the state failed to present evidence beyond a reasonable doubt of the actual killing and of any premeditation, Mr. Notaro's conviction for first degree murder must be reversed.

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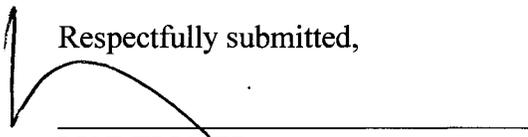
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STATE OF WASHINGTON

D. CONCLUSION

Mr. Notaro respectfully requests this Court reverse his conviction for murder in the first degree for insufficient evidence, or in the alternative, reverse the conviction and remand for a new trial.

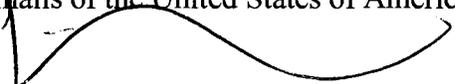
DATED this 19th day of August 2009.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 Nicholas Notaro DOC# 957484 Washington State Penitentiary 1313 13th Avenue Walla, Walla, WA 99362 a true copy of the document to which this certificate is affixed, on August 19, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



Signature