

NO. 40692-6-II

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

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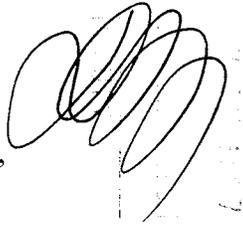
STATE OF WASHINGTON,

Respondent,

v.

CHARLES WALTER NETTLEBECK,

Appellant.



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

The Honorable John A. McCarthy, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's improper admission of irrelevant opinion testimony denied appellant a fair trial.

2. The Court's refusal to give appellant's proposed instruction defining deliberation violated his right to present a defense.

3. The prosecutor's closing argument invited the jury to render a verdict based on emotions and animosity, rather than the evidence.

4. The State failed to prove the aggravating element beyond a reasonable doubt.

Issues pertaining to assignments of error

1. Where the State was permitted to present prejudicial opinion testimony from an expert which was neither within the witness's area of expertise nor helpful to the jury, was appellant denied a fair trial?

2. Appellant was charged with two counts aggravated first degree murder. He admitted killing his wife and stepdaughter, but he presented evidence that his mental illness diminished his capacity to premeditate the acts. Under Washington law, deliberation is an essential component of premeditation. Did the trial court's refusal to give appellant's proposed instruction defining deliberation deny appellant his right to present a defense?

3. During closing argument, the prosecutor speculated as to what was going through appellant's mind after he struck his stepdaughter with an ax, asking whether he took pleasure and felt joy in knowing she was dying. Where the issue at trial was whether he thought over the killings beforehand, not what he thought afterwards, did the prosecutor's appeal to the jury's emotions and animosity toward appellant deny him a fair trial?

4. Where the State failed to prove beyond a reasonable doubt that the killings were part of a common scheme or plan, must appellant's convictions for aggravated first degree murder be reversed?

B. STATEMENT OF THE CASE

1. Procedural History

On March 16, 2009, the Pierce County Prosecuting Attorney charged appellant Charles Nettlebeck with two counts of aggravated first degree murder. CP 1-2; RCW 10.95.020. The case proceeded to jury trial before the Honorable John A. McCarthy, and the jury returned verdicts finding Nettlebeck guilty on both counts and special verdicts finding the murders were committed as part of a common scheme or plan and Nettlebeck was armed with a deadly weapon. CP 45, 47, 49-52. The court sentenced Nettlebeck to life without the possibility of parole, and Nettlebeck filed this timely appeal. CP 63, 71.

2. Substantive Facts

In 1984 Charles Nettlebeck was arrested for assault and committed to Western State Hospital for evaluation and treatment. 7RP<sup>1</sup> 872-73. He was diagnosed with schizophrenia with acute paranoia and mixed personality disorder with dependent and explosive features, and an order of not guilty by reason of insanity was entered. 7RP 834, 876. Nettlebeck was treated with psychotropic medication until February 1985 and counseling once a month for five years after his diagnosis. 7RP 835.

After that Nettlebeck had a series of failed relationships; he was paying child support for a child from one relationship, and another marriage ended in 2003. 6RP 669, 679; 8RP 928. His work history was inconsistent as well, and he never held a job for very long. 7RP 805-06; 8RP 967. Nettlebeck knew a lot of people but did not have close friends. 7RP 778. He was difficult to talk to because he took everything literally, not realizing when people were joking. 7RP 779. He was often inappropriate, and people tended to keep him at arm's length. 7RP 789, 810. Although Nettlebeck met people easily, it did not take long for them to realize there was something different about him, and he was known as Crazy Charles. 7RP 789, 802, 815-16.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP—2/4/10; 2RP—3/15/10; 3RP—3/16/10; 4RP—3/17/10; 5RP—3/18/10; 6RP—3/22/10; 7RP—3/23/10; 8RP—3/24/10; 9RP—3/25 and 29/10, 5/7/10.

Nettlebeck married Barbara Nettlebeck in 2005, and they bought a farm together in 2006, when Barbara sold her home to her daughter Bretta Hawkins. 3RP 158; 5RP 394. Nettlebeck restored automobiles in the garage at the farm, and he spent a considerable amount of time improving the property. 3RP 169; 5RP 430; 7RP 722. Nettlebeck and his wife were having trouble in their relationship by Christmas 2008. 3RP 165-66; 5RP 398. In February 2009, Barbara Nettlebeck arranged for a friend of Hawkins to serve Nettlebeck with divorce papers. 5RP 399. Included with the papers was a restraining order, which, although unsigned, Nettlebeck understood to mean he had to leave the home. 5RP 425; 6RP 679. He packed his belongings in plastic bags and was gone in under an hour. 5RP 405.

After leaving his home, Nettlebeck went to his ex-wife's house and asked if he could rent a room, but she turned him down. 6RP 664. Eventually Nettlebeck rented a room at a motel, paying by the week. 5RP 460. He told motel employees that he was going through a nasty divorce, and he really missed being on his farm. 5RP 445, 460, 462, 480.

Nettlebeck sought help from Cindy Mullins, an interviewer with the family support division of the Pierce County Prosecutor's Office. Mullins had worked with Nettlebeck in the past to negotiate a child support settlement, and he wanted to let her know he was no longer living

at the same address. 6RP 673-74. Nettlebeck was particularly concerned about the restraining order, which he noticed was unsigned. 6RP 679. Mullins advised Nettlebeck to see an attorney. 6RP 674. Nettlebeck then made an appointment with his wife's lawyer and talked to her about the restraining order and his desire to remain on the property. 6RP 622, 624-25. After that meeting, Nettlebeck got assistance from another attorney to fill out the responsive pleadings. 6RP 649.

Nettlebeck needed help dealing with the stress he was experiencing concerning the divorce and his ability to survive financially, and he saw a counselor at Good Samaritan Hospital. 7RP 715-16. The counselor felt Nettlebeck suffered from a major depressive disorder of moderate severity; he presented as depressed and anxious, and his affect was sad and flat. 7RP 725, 730-32, 748.

On March 13, 2009, the Nettlebecks had a garage sale to raise money. Nettlebeck handled the pricing and transactions, and people who attended the sale found him to be anxious, odd, edgy and paranoid. 6RP 596; 7RP 768, 772. He seemed to think everyone was trying to rip him off and confuse him. 7RP 765-66.

After the garage sale, Nettlebeck went into the house to talk to Barbara about the divorce. 8RP 903. At some point during the conversation, Nettlebeck grabbed an ax from the kitchen and hit Barbara

twice in the head and once in neck. 5RP 506; 8RP 906. Nettlebeck then walked to the back porch, with the ax still in hand, and hit Hawkins with the ax handle and the blunt end of the ax head. 8RP 908. Barbara Nettlebeck died at the scene. 4RP 246. Hawkins survived for several hours but died at the hospital the next evening. 3RP 162.

Approximately two hours after hitting Hawkins with the ax, Nettlebeck called a friend and left a message on his answering machine. About 20 minutes later, he called 911. 6RP 561, 564. Nettlebeck met police at the gate to the farm and surrendered. 4RP 212-13. He was handcuffed, read his Miranda rights, and placed in the back of a patrol car. 4RP 234, 260, 263.

Nettlebeck told the arresting officer that he and his wife were going through a divorce and he was staying at a motel. He was at the property that day helping with a garage sale, and after the sale they had gotten into an argument and he just lost it. 4RP 264. Nettlebeck said he hurt his wife with an ax and thought she was dead. 4RP 263. He also said he assaulted his stepdaughter, but he did not say why. 4RP 264. When the officer asked Nettlebeck what triggered the assaults, he said he could not explain it. He said he did not black out, but he was afraid and had a break in reality. 4RP 266.

Nettlebeck told the officer that afterwards he walked around the property for about two hours. He rigged a rope in the barn to hang himself, but he was unable to go through with it. 4RP 265. He said he had spray-painted messages on the buildings while he was walking around. 4RP 265. Nettlebeck told the officer several times that he needed help and had gone to Good Samaritan hospital for medication. 4RP 265. He also reported that he had been committed to Western State Hospital in 1984, and that his mother had been committed there too. 4RP 266, 268.

When the lead investigator arrived, Nettlebeck spoke to him as well. He said he and his wife were in the process of divorce, he had been served with a protection order, and he moved out of the home as a result. He was living in motels and running out of money. 1RP 18. Nettlebeck said he was having a tough time dealing with the divorce, and he had tried to get help at Good Samaritan Hospital for stress and anxiety. 1RP 21-22. He explained that he was at the property that day because he and his wife had a garage sale to raise money. 1RP 18. Nettlebeck said that while they were splitting the garage sale proceeds, he lost it and struck his wife in the head with an ax. 1RP 19. He then went onto the back porch, saw his stepdaughter, and struck her too. He said she fell to the ground, but he was not sure if she was dead. 1RP 20. After that, he walked around trying to figure out what to do, and he painted some things on the side of the

house. 1RP 21. Nettlebeck told the officer he did not know the difference between right and wrong. 5RP 549.

Police found the rope Nettlebeck had attempted to use hanging from a cross beam in the barn. 4RP 295. They took photographs of the messages Nettlebeck had spray painted on the buildings, of the blood stains at the scene, of Barbara Nettlebeck's body, and of Hawkins before she was airlifted to the hospital. 4RP 219, 288, 290, 306, 323. Blood evidence was also collected, as were Nettlebeck's cell phone, the rope, items found on the back porch near Hawkins, and the spray paint can Nettlebeck had used. 4RP 324, 348-52.

Nettlebeck was taken to the precinct, where he provided a taped statement. 6RP 582. At the end of the interview, Nettlebeck said he would be better off locked up at Western State Hospital for the rest of his life, where he could get some help. 6RP 583. He reported that his mother had been at Western for five years. 6RP 583.

After Nettlebeck was charged, he was sent to Western State Hospital for an evaluation. He exhibited a general paranoid demeanor with evidence of delusions, and his evaluators had no concerns that he was malingering. 7RP 841, 844, 849, 854; 8RP 891. Although Nettlebeck's symptoms fit within a diagnosis of schizophrenia, the team did not feel he presented sufficient features to reach that conclusion. 7RP 861. Instead,

he was diagnosed with alcohol abuse or dependence and personality disorder, not otherwise specified, with dependent, borderline, and paranoid features. 7RP 850.

In his interviews at Western, Nettlebeck said he was talking to Barbara about the divorce, it got to be too much for him and he snapped. 8RP 904, 906. He did not remember many details of the murders, although he described grabbing the ax and swinging it, and he remembered hitting Hawkins with the ax handle and blunt end of the blade. 8RP 905-06, 908. He said that the stress from not having any money or a place to stay and from Barbara and her attorney were overwhelming him. He was getting more and more depressed, and he snapped and killed them. 8RP 906-07, 909. Nettlebeck said his mood was different from anything he had experienced before, but looking back he knew that his actions were wrong. 8RP 908-09.

Dr. Barry Ward, a member of Nettlebeck's treatment team testified that people with personality disorders have difficulty coping with psychosocial stressors. They are more likely to read threats and mistreatment into situations, and they interpret even the more benign stimuli as threatening. He found that Nettlebeck was experiencing moderate to severe psychosocial stressors leading up to the incident. 7RP 856-57. Despite these diagnoses and circumstances, Ward concluded that

Nettlebeck had the capacity to premeditate, although it was possible his capacity was diminished on the night in question. 7RP 857-59.

Nettlebeck was also evaluated by Dr. Craig Beaver. 8RP 947. In addition to interviewing Nettlebeck, Beaver looked at police reports from the incident and prior psychiatric records for Nettlebeck and his mother, he reviewed the recent evaluation from Western, he spoke to people who knew Nettlebeck, and he administered psychological tests. 8RP 948, 951-54. Like the team at Western, Beaver determined that Nettlebeck was not malingering. 8RP 956.

Beaver diagnosed Nettlebeck with schizophrenia, paranoid type. 8RP 963. In addition, cognitive testing revealed that Nettlebeck has an IQ of 76, which is borderline mentally deficient. 8RP 957. He also has longstanding personality issues: he is not very adaptive and he has a need for attachment but is incapable of achieving that. 8RP 965. Beaver explained that Nettlebeck's limited intellectual abilities, combined with his mental illness, affect his ability to handle stressors. 8RP 957. As long as he has a structured routine, he can function well, although not consistently. 8RP 967. But when he gets stressed, his limited intellectual abilities and psychiatric difficulties collide, and situations that would be stressful for anyone are dramatically overwhelming for him. 8RP 967-68. Thus, the breakup of Nettlebeck's marriage, which was severely disruptive

of his routine, together with his paranoid misperceptions, stressed him beyond his capacity to cope and had a significant impact on his ability to deliberate. 8RP 969-70, 978.

Beaver's opinion was that Nettlebeck had diminished capacity which affected his ability to form premeditated intent. 8RP 1024. He noted that premeditate means to deliberate, weigh options, reflect on actions, and form a goal. 8RP 1024. While he found Nettlebeck had the capacity to act intentionally, he did not have the ability, at the time of the murders, to act with premeditation. 8RP 1025. Beaver found that Nettlebeck's description that he snapped was very apt, in that up until that point Nettlebeck had the capacity to act with premeditation. At some point during the conversation with his wife, however, he became completely overwhelmed and lost the capacity to deliberate about his next act. 8RP 1053, 1061. By the time he rigged a rope for a suicide attempt, his capacity for premeditation was restored, and he was able to call the police and surrender. 8RP 1061.

C. ARGUMENT

1. THE IMPROPER ADMISSION OF IRRELEVANT OPINION TESTIMONY DENIED NETTLEBECK A FAIR TRIAL.

Criminal defendants have a due process right to a fair trial measured by reasonable standards, and only a fair trial is a constitutional

trial. U.S. Const., Amend XIV; State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). Here, the court's admission of irrelevant and unfairly prejudicial evidence denied Nettlebeck his constitutional right to a fair trial.

At trial, the State sought to admit a letter written by Nettlebeck's treatment team to the Superior Court judge after his evaluation at Western State Hospital in 1984. 6RP 692-93. The letter expressed the team's opinion that at the time of the 1984 assault Nettlebeck was unable to distinguish right from wrong and had a psychotic break from reality. 7RP 875-76. The State's theory was that Nettlebeck was parroting the language of the letter when he spoke to police after killing his wife and stepdaughter, in an attempt to manufacture an insanity defense. 6RP 697. The court ruled that the letter was not admissible, because the State had not established that Nettlebeck had ever seen the letter or had the information it contained before he talked to the police. 6RP 695-96. Nonetheless, when cross examining Dr. Ward, the prosecutor asked him to describe the opinions expressed in the letter. 7RP 875-76. Then, over defense objection that it was speculative and irrelevant, Dr. Ward gave his opinion that Nettlebeck's statements to the police after he killed his wife and stepdaughter were similar to the language in the letter. 7RP 879.

It is fundamental that evidence which is irrelevant to the issues in a criminal case should not be admitted. Only relevant evidence is admissible at trial. ER 402. Evidence should be allowed only if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Introduction of irrelevant and prejudicial evidence deprives the defendant of a fair trial and can be cause for reversal. ER 403; State v. Pogue, 104 Wn. App. 981, 988, 17 P.3d 1272 (2001).

Dr. Ward’s opinion that the language in the 1984 letter, concluding Nettlebeck was legally insane, was similar to the language Nettlebeck used when he spoke to the police was irrelevant. Both experts testified that Nettlebeck was not legally insane in 2009, and no insanity defense was presented at trial. 8RP 893, 911-12, 1007. Furthermore, as the trial court acknowledged, there was no evidence that Nettlebeck ever saw the letter. 6RP 695-96. Thus, whether Dr. Ward found the language in the letter similar to the Nettlebeck’s language was of no consequence to the issues before the jury, and his opinion should have been excluded.

Moreover, Ward’s opinion was irrelevant and should have been excluded because it did not meet the criteria for admission of expert opinion. Under ER 702, an expert witness may offer opinion testimony

that is helpful to the trier of fact and informed by specialized knowledge, experience, or training. Helpfulness and relevancy are inextricably intertwined. State v. Riker, 123 Wn.2d 351, 364, 869 P.2d 43 (1994). An expert's opinion is irrelevant unless it falls within the witness's area of expertise and covers a subject beyond the jury's capability to decide. Moses v. Payne, 555 F.3d 742, 756 (9<sup>th</sup> Cir. 2009); In re Detention of Pouncy, 144 Wn. App. 609, 624-625, 184 P.3d 651 (2008); State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003); State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999).

Thus, in Farr-Lenzini, this Court held that a police officer's opinion that the defendant was attempting to elude was inadmissible. Although the officer was qualified to testify as an expert on police procedures and vehicle dynamics, there was no evidence he had any specialized training or experience in recognizing the difference between a distracted speeding driver and an eluding driver. Moreover, the jury was capable of deciding whether the driver was attempting to elude without the aid of an expert. Farr-Lenzini, 93 Wn. App. at 461-62.

Here, as in Farr-Lenzini, Dr. Ward's opinion regarding the 1984 letter was irrelevant and inadmissible because it did not meet the criteria for admission of expert testimony. First, there was no evidence indicating Dr. Ward had any specialized training in comparing statements. In

addition, the jury heard both the contents of the letter and Nettlebeck's statements to the police, and it was capable of deciding, without expert assistance, whether the language was similar. There was no need for Dr. Ward's opinion, and the court abused its discretion in overruling defense counsel's objection to it.

Reversal is required if there is a reasonable probability that the erroneous admission of evidence materially affected the outcome of the case. Pogue, 104 Wn. App. at 988. Here, although irrelevant, the improperly admitted opinion was extremely prejudicial. The State's theory was that Nettlebeck premeditated the murders and immediately afterwards took deliberate steps to establish a mental defense, including telling the police that he suffered a break from reality and did not know right from wrong. 9RP 1132-34. The prosecutor argued that Nettlebeck had gotten away with his crime in 1984 by asserting a mental defense, and he was trying to do so again. 9RP 1133. In the context of the prosecutor's emotional argument, it is likely the jury disregarded the irrelevance of the 1984 letter to this particular case and relied on the opinion offered by the medical professional who evaluated Nettlebeck at Western State Hospital. See State v. Ciskie, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988) (psychological expert's opinion often unfairly prejudices defendant by creating aura of reliability and trustworthiness). The court's error in

admitting the prejudicial and irrelevant opinion denied Nettlebeck and fair trial, and his convictions should be reversed.

2. THE COURT'S REFUSAL TO GIVE NETTLEBECK'S PROPOSED INSTRUCTION DEFINING DELIBERATION VIOLATED HIS RIGHT TO PRESENT A DEFENSE.

An accused is assured the right to fairly defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The right to present a complete defense is protected by the Sixth and Fourteenth Amendments to the United States Constitution. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). These constitutional protections include the right to present one's own version of the facts and to argue one's theory of the case. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The state constitution protects these rights as well. Wash. Const. art. I, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The court below denied Nettlebeck his right to present a defense by refusing to instruct the jury regarding the definition of deliberation.

After the evidence was presented, the defense proposed an instruction defining deliberation as "to weigh in the mind, to consider the reasons for and against and consider maturely, to reflect upon." 9RP

1091, 1101<sup>2</sup>. Defense counsel argued that the word deliberation was used in the definition of premeditation the court planned to give, but that word itself was not defined. Since the essence of the case was the difference between premeditation and intent, it was important that the jury have all the tools necessary to apply the premeditation instruction. 9RP 1099. The court refused to give the instruction, finding the premeditation instruction was sufficient. 9RP 1103. Defense counsel took exception to the court's ruling. 9RP 1122.

Jury instructions are designed to “furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict, ...to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved.” State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). Jury instructions are only constitutionally sufficient if, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A defendant is entitled to jury instructions embodying his theory of the case if there is evidence to support that theory. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708

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<sup>2</sup> Neither party's proposed instruction were made a part of the Superior Court file, but the court read the defense proposed instruction on deliberation into the record. 9RP 1101.

(1997). A trial court's refusal to so instruct the jury constitutes reversible error. Warden, 133 Wn.2d at 564.

In this case, the court instructed the jury on the meaning of premeditated:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 29 (Instruction No. 10). There is no question this instruction is an accurate statement of the law. But the Washington Supreme Court has also recognized that premeditation involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (quoting State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992); State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); State v. Robtoy, 98 Wn.2d 30, 43, 653 P.2d 284 (1982); State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982)), cert. denied, 516 U.S. 843 (1995). The court's instruction on premeditation does not articulate for the jury the attributes of weighing or reasoning included within the definition. The Defense instruction spells those out clearly.

The defense proposed instruction defining deliberation would have guided the jury in distinguishing between the State's theory and the defense. The State's theory was that Nettlebeck acted with premeditation and thus was guilty of first degree murder. 9RP 1128. The defense did not deny that Nettlebeck acted intentionally but argued he did not premeditate those acts and therefore he was guilty of murder in the second degree. 9RP 1141-42, 1144.

The difference between murder in the first degree and murder in the second degree is the presence or absence of deliberate and premeditated intent. State v. Shirley, 60 Wn.2d 277, 278, 373 P.2d 777 (1962), RCW 9A.32.030; RCW 9A.32.050. "In fact, the idea of deliberation is the distinguishing idea between murder in the first and second degree...." Shirley, 60 Wn.2d at 279 (quoting State v. Rutten, 13 Wash. 203, 212, 43 P. 30, 32 (1895)). Here, the jury was instructed on the meaning of premeditation, but the court did not define the crucial term, deliberation. The defense proposed definition of deliberation was taken from the definition given by the Rutten Court: "to weigh in the mind, to consider the reasons for and against, and consider maturely, to reflect upon." Rutten, 13 Wash. at 212.

Defense counsel tried to compensate for the lack of instruction in closing argument, telling the jury that deliberation is weighing the

evidence, considering what is right and wrong, making judgments. He argued that deliberation is the most important word in the instruction on premeditation, and it involves thinking, reflecting, and weighing options. 9RP 1173. Counsel argued that, on the night in question, Nettlebeck's mental illness was exacerbated by the stressors he was facing so that he was unable to form an idea, weigh his options, deliberate. 9RP 1177-79. But the State argued it was not required to prove Nettlebeck balanced his options, only that he deliberately formed the design to kill before he acted on that intent. 9RP 1129.

The trial court's refusal to define the term "deliberation" left the jury without a clear understanding of the law that premeditation requires a weighing of the reasons for and against a course of conduct. Defense counsel was put in the position of having to convince the jury of the law, violating Nettlebeck's right to present a defense. See State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984) (defense attorney should not have to convince the jury what the law is).

An error in instructions is harmless only if it has no effect on the final outcome of the case. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). The error here was not harmless. Both experts agreed that Nettlebeck suffered from a major mental illness and was under moderate to severe stressors at the time of the murders. While Dr. Ward did not

think these circumstances diminished Nettlebeck's capacity to premeditate, he acknowledged that they could have that effect. 7RP 859. Dr. Beaver was convinced that Nettlebeck was incapable of rationally weighing his options at the time he killed his wife and stepdaughter. 8RP 978-79. If the jury had been instructed on the definition of deliberation, it could well have returned a different verdict. The failure to give the proposed definition was reversible error.

3. THE PROSECUTOR'S CLOSING ARGUMENT INVITED THE JURY TO RENDER A VERDICT BASED ON EMOTIONS AND ANIMOSITY, RATHER THAN THE EVIDENCE, AND REVERSAL IS REQUIRED.

As a quasi-judicial officer, a prosecutor is duty bound to act impartially in the interests of justice. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934). A prosecutor who acts as a heated partisan, seeking victory at all costs, violates the duty entrusted to him by the people of the state whom he is supposed to represent. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United

States Constitution and Const. art. 1, § 22 (amend. 10). Reed, 102 Wn.2d at 145. A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor committed misconduct during closing argument when she deliberately aroused the jury's emotions by presenting a highly inflammatory portrait of what she believed went through Nettlebeck's mind after he struck Hawkins. After attacking Nettlebeck's diminished capacity defense, the prosecutor argued that Barbara made a fatal mistake marrying Nettlebeck. She then focused on Hawkins:

Did he find pleasure knowing that she was laying there on the ground alive and suffering and dying? Did he find joy when he...knew that she was dying and he could have called for help, picked up that phone? One phone call would have brought them there. And as minutes turned to hours and her body was dying, what was he thinking?

9RP 1139-40. Defense counsel objected that this argument was improper, but the court overruled the objection. 9RP 1140.

A similar argument was found to be grounds for reversal in Reed. In that case, as here, the defendant was charged with premeditated murder of his wife, and he asserted a diminished capacity defense. In attacking the defense, the prosecutor referred to the psychiatrists who had testified on the defendant's behalf, as well as defense counsel, asking the jury, "Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?" Reed, 102 Wn.2d at 143. The prosecutor went on to call the defendant a liar and manipulator and suggested the death penalty should be reinstated for him. Reed, 102 Wn.2d at 143-44.

The Supreme Court held that the prosecutor's impassioned argument clearly constituted misconduct. The argument attacked the sole defense theory by arousing the jury's emotions and appealing to their prejudices. Reed, 102 Wn.2d at 147. Because the State's evidence of premeditation was not overwhelming, there was a substantial likelihood the prosecutor's misconduct affected the jury's decision, and the Court reversed the defendant's conviction. Reed, 102 Wn.2d 147-48.

Here, as in Reed, the prosecutor's argument was geared toward inciting the jury to render an improper verdict based on emotions and animosity toward Nettlebeck rather than the evidence. As in Reed, the question for the jury was whether Nettlebeck had the capacity to

premeditate the murders, to think over the acts before committing them. Whether he took joy in the results after the acts were committed had no bearing on the jury's decision. Regardless of the heinous nature of a crime, the prosecutor's duty is to ensure a verdict free of prejudice and based on reason. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); State v. Claflin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). The emotional image conjured by the prosecutor served only to inflame the jury, and the argument was improper.

Moreover, as in Reed, the State's evidence of premeditation was not overwhelming. Two experts testified that Nettlebeck suffered from a major metal disorder and was experiencing moderate to severe stressors. Both experts testified that these circumstances could affect his capacity to form premeditated intent, and Dr. Beaver testified it was his opinion that Nettlebeck was incapable of premeditation at the time of the murders. Given this plausible defense to the charge of first degree murder, there is a substantial likelihood the prosecutor's impassioned argument affected the jury's verdict, and reversal is required. See Reed, 102 Wn.2d at 147-48.

4. IN ABSENCE OF PROOF BEYOND A REASONABLE DOUBT OF THE AGGRAVATING ELEMENT, NETTLEBECK'S CONVICTION DEPRIVED HIM OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT.

In every criminal prosecution, due process requires the State to prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980). The aggravating element of aggravated first degree murder is an element of the offense and must therefore be proven beyond a reasonable doubt to a unanimous jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

To convict Nettlebeck of aggravated first degree murder as charged in this case, the State had to prove beyond a reasonable doubt that he committed premeditated murder, there was more than one victim, and the murders were part of a common scheme or plan or the result of a single act. RCW 10.95.020(10). Two murders may be part of a common scheme or plan if there is a nexus between them, such that they are

connected by a larger criminal design. State v. Pirtle, 127 Wn.2d 628, 662, 904 P.2d 245 (1995). For example, in Pirtle, the overarching criminal purpose was robbery. Pirtle, 127 Wn.2d at 663. See also State v. Dictado, 102 Wn.2d 277, 281, 687 P.2d 172 (1984) (killings committed in furtherance of gambling scheme); State v. Grisby, 97 Wn.2d 493, 496, 647 P.2d 6 (1982) (multiple murders committed in revenge for being sold bad quality drugs).

Although there was no dispute that Nettlebeck killed more than one person, the State did not prove the killings were part of an overarching criminal plan. The State's theory was that Nettlebeck was seeking revenge on the people responsible for the breakup of his marriage. The State argued that Nettlebeck felt betrayed and dishonored by his wife, and he felt her daughter was the cause of their marital problems, and therefore they both had to die. 9RP 1131-32. While Nettlebeck's counselor testified that Nettlebeck felt betrayed and dishonored by his wife<sup>3</sup>, and an employee at the motel where Nettlebeck was living believed Nettlebeck blamed Hawkins for the problems in his marriage<sup>4</sup>, there was no evidence that Nettlebeck was interested in revenge. In fact, the evidence showed Nettlebeck was working with his wife to reach a fair property distribution, and they had worked together on the garage sale. 7RP 750; 8RP 973. The

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<sup>3</sup> 7RP 737.

<sup>4</sup> 5RP 463.

State's theory that the killings were connected by a larger criminal design was pure speculation.

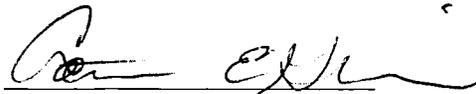
The State failed to prove beyond a reasonable doubt that the killings of Barbara Nettlebeck and Bretta Hawkins were part of an overarching plan to seek revenge for the divorce proceedings. Because the State's evidence failed to establish the aggravating factor by the necessary evidence, Nettlebeck's convictions must be reversed.

D. CONCLUSION

The trial court's improper admission of irrelevant and prejudicial opinion testimony and refusal to give the defense proposed instruction defining deliberation, the prosecutor's misconduct in closing argument, and the State's failure to prove the aggravating factor require reversal of Nettlebeck's convictions.

DATED this 6<sup>th</sup> day of December, 2010.

Respectfully submitted,



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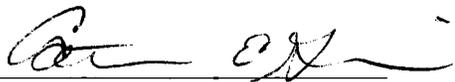
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Charles W. Nettlebeck*, Cause No. 40692-6-II, directed to:

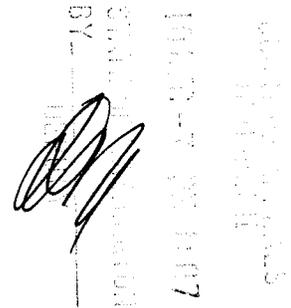
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
December 6, 2010



10/10/10 10:10:10  
BY: [Signature]