

66442-5

66442-5

NO. 66442-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL PIATNITSKY,

Appellant.

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KING COUNTY

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that “at no time prior to the conclusion of the interview did the defendant ... state that he desired to remain silent.” CP 313.

2. The trial court erred in omitting from its Findings of Fact and Conclusions of Law on CrR 3.5 Motion the fact that Mr. Piatnitsky said in his recorded statement, “I don’t really feel like talking, Man.”

3. The trial court erred in concluding, “The context of the recorded statement clearly indicates that the defendant was willing to speak with the detectives, just not on tape.” CP 315.

4. The trial court violated Mr. Piatnitsky’s Fifth Amendment right not to incriminate himself by admitting statements he made to detectives in response to questions asked after Mr. Piatnitsky had invoked his right to remain silent.

5. The trial court violated Samuel Piatnitsky’s right to due process by omitting the element of premeditated intent from the to-convict jury instruction for first-degree attempted murder.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If, during a custodial interrogation, a suspect indicates unequivocally that he wishes to remain silent, the Fifth Amendment requires police to “scrupulously honor” that request and cease questioning. Trial courts must grant a motion to exclude statements elicited in violation of this rule. In State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213, rev. denied, 110 Wn.2d 1032 (1988), this Court held that an accused’s statement that he “would rather not talk about” the alleged crime was an unequivocal invocation of the right to remain silent, and that the admission of statements elicited after the invocation constituted reversible error. Did the trial court violate Mr. Piatnitsky’s Fifth Amendment rights by admitting statements he made in response to police questioning after saying “I don’t really feel like talkin’, Man?”

2. To comport with due process, the “to convict” instruction must contain all of the elements of the crime charged, and jurors must not be required to search for an omitted element by referring to other jury instructions. The *mens rea* for first-degree attempted murder is premeditated intent. Did the trial court violate Samuel Piatnitsky’s right to due process by omitting the element of

premeditated intent from the "to convict" instruction for first-degree attempted murder?

C. STATEMENT OF THE CASE

In October of 2008, Samuel Piatnitsky and his friend, Jason Young, were invited to a party at the home of Nicole Crosswhite in Renton. 9/28/10 RP 15-21; 10/28/10 RP 52. Mr. Piatnitsky and his friend took a case of beer and a stack of CDs to the party. 9/27/10 RP 105; 10/28/10 RP 53-55. After a couple of hours, another guest, Jeffrey Manchester, asked Mr. Piatnitsky and Mr. Young to leave. 9/28/10 RP 24. They refused. Mr. Manchester and his friend Shawn Jones then fought with Mr. Piatnitsky and Mr. Young. 9/28/10 RP 24-29. Mr. Manchester kicked Mr. Young in the head and Mr. Jones punched Mr. Piatnitsky in the face. 9/27/10 RP 62; 9/28/10 RP 30-31. Another guest, Mike Boyd, broke a bottle of beer over Mr. Piatnitsky's head. 9/28/10 RP 31.

Mr. Piatnitsky and Mr. Young ran away, leaving their CD's, beer, and a coat behind. 9/27/10 RP 105, 143; 9/28/10 RP 31; 9/29/10 RP 52. They retrieved a gun, and returned to Ms. Crosswhite's apartment complex. 10/7/10 RP 18-19. The partygoers were standing in the parking lot smoking, but most ran inside when Mr. Piatnitsky and Mr. Young returned with the gun.

9/27/10 RP 66-71, 142; 10/6/10 RP 25. Shawn Jones charged Mr. Piatnitsky, and a struggle ensued over the gun. 9/28/10 RP 42, 78. Mr. Young hit Mr. Jones and tried to pull him off of Mr. Piatnitsky, and Mr. Manchester started hitting Mr. Young. 9/28/10 RP 43; 10/20/10 RP 68. Mr. Piatnitsky shot Mr. Jones, then fired two shots toward the door, hitting Mr. Manchester. Ex. 58 at 2; 10/20/10 RP 70. Mr. Jones died, and Mr. Manchester's arm was broken. 9/28/10 RP 47.

Police arrested Mr. Piatnitsky, advised him of his constitutional rights, and took him to the precinct. CP 310-11. Mr. Piatnitsky signed a form stating he understood his rights to remain silent and to an attorney, but told the detectives who were interviewing him that he "didn't really feel like talking." Ex. 58 at 1; ex. 56 at 4:48-4:50. The detectives nevertheless proceeded to ask him questions and take a statement from him. Ex. 58; CP 313.

Mr. Piatnitsky was charged with first-degree murder with a firearm, first-degree attempted murder with a firearm, possession of a stolen firearm, and unlawful possession of a firearm. CP 9-12. He moved to suppress the statement he gave to detectives, but the trial court denied the motion. 9/16/10 RP 7-57; 9/20/10 RP 4-61. At trial, both detectives who interviewed Mr. Piatnitsky testified

about the statements he made after saying he didn't really want to talk. 10/7/10 RP 8-45; 10/18/10 RP 12-44. The written statement was also admitted as an exhibit. Ex. 58. Additionally, Jeffrey Manchester and the other partygoers testified regarding the events of that evening, and Mr. Piatnitsky testified in his own behalf. 9/27/10 RP; 9/28/10 RP; 10/6/10 RP; 10/20/10 RP.

Mr. Piatnitsky argued he fired the gun in lawful self-defense. He argued he and Jason returned to the party to retrieve their belongings, taking a gun for their own protection. He did not intend to shoot anyone. He said he did not expect anyone to charge him, and was afraid for his life once Shawn Jones managed to wrestle the gun away from him. 10/20/10 RP 59-70, 114-15; 10/25/10 RP 56-114.

The jury was instructed on several lesser-included offenses for both counts, as well as on the State's burden to disprove self-defense beyond a reasonable doubt. CP 174-230. The to-convict instruction for count 2, first-degree attempted murder, did not include premeditated intent as an element the State had to prove beyond a reasonable doubt. CP 208.

Mr. Piatnitsky was convicted on all counts as charged. CP 231-38. He was sentenced to 600 months' confinement. CP 301.

Additional facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. PIATNITSKY'S FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF BY ADMITTING CUSTODIAL STATEMENTS HE MADE AFTER INVOKING HIS RIGHT TO SILENCE.

a. Once a suspect invokes his Fifth Amendment right to silence, all questioning must cease; any statements obtained in violation of this rule must be suppressed at trial. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Police officers must advise suspects of their Fifth Amendment rights prior to engaging in custodial interrogations. Miranda v. Arizona, 384 U.S. 436, 444, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). Even if a person initially waives his right to silence, he may invoke his "right to cut off questioning" at any time. Id. at 474. This is a "critical safeguard" of the privilege against self-incrimination. Michigan v. Mosley, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (citing Miranda, 384 U.S. at 474). An accused person must invoke his right to remain silent unambiguously. Berghuis v. Thompkins, ___ U.S. ___, 130 S.Ct. 2250, 2260, 176 L.Ed.2d 1098

(2010). Once he does so, "the interrogation must cease." Mosley, 423 U.S. at 101 (citing Miranda, 384 U.S. at 473-74). If an individual's right to cut off questioning is not "scrupulously honored," statements obtained after the individual invoked his right to silence must be suppressed. Mosley, 423 U.S. at 104.

b. The trial court erroneously admitted statements Mr. Piatnitsky made in response to questions police asked him after he invoked his right to silence. In this case, police officers provided Miranda warnings and Mr. Piatnitsky initially waived his Fifth Amendment rights. Pretrial ex. 3 at 1-3; ex. 56; ex. 58 at 1. Detectives Keller and Allen interviewed Mr. Piatnitsky at Precinct Three of the King County Sheriff's Office. CP 310. They turned on a tape recorder and began to readvise Mr. Piatnitsky, but Mr. Piatnitsky said, "I'm not ready to do this, man." Ex. 56; pretrial ex. 3 at 2. Detective Allen responded, "You just told us that you wanted to get it in your own words on tape. You asked us to turn the tape on, remember?" Ex. 56; pretrial ex. 3 at 2. Mr. Piatnitsky said, "I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want ... I don't want to talk right now, man." Ex. 56; pretrial ex. 3 at 2. Detective Keller said, "Okay, but let's go over the rights on tape, and then you can write it down, okay?" Ex. 56; pretrial ex.

3 at 2. Mr. Piatnitsky said, "All right, man." The detective then finished readvising Mr. Piatnitsky of his Miranda rights. Ex. 56; pretrial ex. 3 at 2-3.

After Mr. Piatnitsky signed a waiver form, Detective Allen said, "Are you sure you don't want to do it on tape like you said you did? You want to get it in your own words?" Ex. 56; pretrial ex. 3 at 4. Mr. Piatnitsky said, "yes, sir." Detective Keller tried to confirm that Mr. Piatnitsky wanted to give a statement: "So you'd rather take a written statement, do a written one?" Ex. 56; pretrial ex. 3 at 4.

But Mr. Piatnitsky said, "I don't really feel like talking, man." Ex. 56 at 4:48-4:50. The King County Sheriff's Office transcribed the statement as "Yes. I don't know (unintelligible)." pretrial ex. 3 at 4. This transcription mischaracterizes the statement. Although the statement is somewhat muffled, it is clear Mr. Piatnitsky did not say "yes," and instead indicated that he did not want to talk. Ex. 56 at 4:48-4:50. The trial court erred in relying on the detectives' transcription rather than on the actual statement. In his actual statement, Mr. Piatnitsky invoked his right to silence by saying "I don't really feel like talking, man." Ex. 56 at 4:48-4:50. Indeed, Detective Keller acknowledged at the CrR 3.5 hearing that the

transcript was inaccurate and that Mr. Piatnitsky said “I don’t want to talk.” 9/16/10 RP 41.¹ Thus, the statements Detectives Keller and Allen elicited afterward, as well as the detectives’ testimony about the statements, should have been suppressed.

This Court’s decision in Gutierrez controls. Gutierrez, 50 Wn. App. at 586. There, officers asked the suspect “whether he cared to comment on the narcotics found.” Id. The defendant said, “I would rather not talk about it.” Id. at 588, 589. This Court held the statement was “an unequivocal assertion of his right to remain silent.” Id. at 589. Similarly here, Mr. Piatnitsky’s statement that he did not feel like talking was an unequivocal assertion of his right to remain silent. Because his invocation of his Fifth Amendment right was not “scrupulously honored,” the statements he made afterward should have been suppressed. Mosley, 423 U.S. at 104. The trial court violated Mr. Piatnitsky’s constitutional rights by denying the motion to suppress. Id.

¹ Detective Keller said he interpreted the statement to mean Mr. Piatnitsky did not want to talk out loud, but Mr. Piatnitsky’s own unequivocal statement was that he did not want to talk. 9/16/10 RP 41. When the detectives followed up by trying to get him to say he’d rather write a statement, Mr. Piatnitsky said nothing. Pretrial ex. 3 at 4; ex. 56 at 4:50-5:00.

c. The error prejudiced Mr. Piatnitsky, requiring reversal and remand for a new trial. Constitutional error requires reversal unless the State proves beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Gutierrez, 50 Wn. App. at 589-90. The State cannot make that showing here.

If not for Mr. Piatnitsky's illegally obtained statements, the jury may well have concluded that the State failed to disprove self-defense, or that Mr. Piatnitsky was guilty of one of the lesser-included offenses rather than first-degree murder and attempted murder.² State's witness Jeffrey Manchester testified that Shawn Jones had a hold of the gun when he and Mr. Piatnitsky were struggling. 9/28/10 RP 37. Indeed, he was "pretty sure" Mr. Jones got the gun completely away from Mr. Piatnitsky. 9/28/10 RP 80. The only other witness to the shootings, Amy Davison, also testified that Mr. Jones was holding onto the gun. 9/28/10 RP 122. Mr. Manchester said Mr. Piatnitsky was on his back on the ground and Mr. Jones was on top of him, with at least partial control of the gun, when Mr. Piatnitsky reached up and pulled the trigger. 9/28/10 RP

² The erroneous admission also prejudiced Mr. Piatnitsky as to the possession of a stolen firearm count, because it was only through Mr. Piatnitsky's own statement that the State proved knowledge.

82; 10/19/10 RP 72. This testimony supports a finding of self-defense; in other words, it creates a reasonable doubt as to intent. At a minimum, it creates a reasonable doubt as to premeditation.

But Mr. Piatnitsky's illegally obtained statement was admitted for the jury. In it, he stated that he fired two shots at Mr. Jones while Mr. Jones was "trying to scurry away." Ex. 58 at 2. Detective Keller similarly testified that Mr. Piatnitsky said he shot Mr. Jones two times as Mr. Jones was "crawling away." 10/7/10 RP 21. Detective Keller said Mr. Piatnitsky then told the detectives to change the word "crawl" to "scurry." 10/7/10 RP 22. Detective Allen also testified that Mr. Piatnitsky said he was standing up and Mr. Jones was crawling or scurrying away when Mr. Piatnitsky shot Mr. Jones. 10/18/10 RP 34. Not only did the written statement go back to the jury room, but Detective Keller read the entire statement for the jury at trial. 10/7/10 RP 41. Furthermore, the prosecutor emphasized Mr. Piatnitsky's statements to the detectives during closing argument, particularly the statements about how Mr. Jones was crawling or scurrying away when Mr. Piatnitsky shot him. 10/25/10 RP 23-24, 30. Absent the written statement, the detectives' testimony about the statement, and the prosecutor's argument about the statement, the outcome of the trial may well

have been different. The State cannot prove beyond a reasonable doubt the error did not contribute to the verdict obtained. This court should reverse and remand for a new trial.

2. THE "TO CONVICT" INSTRUCTION FOR FIRST-DEGREE ATTEMPTED MURDER OMITTED AN ESSENTIAL ELEMENT OF THE CRIME, VIOLATING MR. PIATNITSKY'S RIGHT TO DUE PROCESS.

a. A trial court violates a defendant's right to due process if it omits an element from the "to convict" instruction. The "to convict" instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jurors must not be required to supply an element omitted from the "to convict" instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential

element of a crime or if the jury might assume that an essential element need not be proved.” Smith, 131 Wn.2d at 263.

A defendant may raise the issue of a constitutionally defective to-convict instruction for the first time on appeal. RAP 2.5(a)(3); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

b. The “to convict” instruction on count 2 omitted the element of premeditated intent. The State charged Mr. Piatnitsky with first-degree attempted murder for the injuries inflicted on Jeffrey Manchester. CP 10. “[A] person commits first degree attempted murder when, with premeditated intent to cause the death of another, he/she takes a substantial step toward commission of the act.” State v. Price, 103 Wn. App. 845, 851-52, 14 P.3d 841 (2000). In contrast, a person commits only the crime of second-degree attempted murder when, with intent to cause the death of another, he or she takes a substantial step toward commission of the act. RCW 9A.28.020(1); RCW 9A.32.050(1)(a); State v. Worl, 58 Wn. App. 443, 449, 794 P.2d 31 (1990), rev’d on other grounds sub. nom. State v. Barnes, 117 Wn.2d 701, 818 P.2d 1088 (1991). Thus, the only difference between attempted murder

in the first degree and attempted murder in the second degree is that the former requires premeditated intent and the latter requires merely intent.

But the to-convict instruction for count 2 listed a *mens rea* of intent, not premeditated intent :

To convict the defendant of the crime of attempted murder in the first degree as charged in count two, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) that on or about October 19, 2008, the defendant did an act that was a substantial step toward the commission of murder in the first degree of Jeffrey Manchester;

(2) that the act was done with the intent to commit murder in the first degree; and

(3) that the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count Two.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count Two.

CP 208 (Instruction 30).

The "to convict" instruction violated Mr. Piatnitsky's right to due process because it used the word "intent" instead of

“premeditated intent,” thus conflating first-degree attempted murder and second-degree attempted murder. Although other instructions explained that premeditation was an element of the completed crime of first-degree murder, this does not make up for its absence from the “to convict” instruction for first-degree attempted murder, because the omission relieved the State of the burden of proving the proper *mens rea*. The “intent” referred to in the “to convict” instruction given by the court is the intent “to accomplish a result which constitutes a crime.” State v. Dunbar, 117 Wn.2d 587, 591, 817 P.2d 1360 (1991) (citing RCW 9A.08.010(1)(a)) (emphasis in original). Premeditation is not a result; death is the result contemplated in a case of attempted murder. Id. at 590 (citing W. LaFave & A. Scott, Criminal Law § 6.2(c) at 500-01 (2d ed. 1986)). Thus, the jury was instructed to find Mr. Piatnitsky guilty if he had the intent to accomplish the death of Jeffrey Manchester and took a substantial step toward causing his death. This describes second-degree attempted murder.

Aumick is instructive. 126 Wn.2d at 430-31. There, the trial court instructed the jury that attempt was defined as “taking a substantial step in the commission of a crime.” Id. at 429. The State argued that although the element of intent was missing from

that instruction, any error was harmless because the instruction defining the base crime included the omitted element. Id. at 430. This Court and the Supreme Court disagreed, stating, “A jury is not required to search other instructions to see if another element should have been included in the instruction defining the crime.” Id. at 431. Similarly here, any argument that “premeditated intent” did not have to be in the “to convict” instruction because it was in the instruction defining the base crime must be rejected.

Alternatively, the instruction was improper because it was nonsensical. If, contrary to law, the “intent” portion of the instruction referred to the entire base crime instead of just the result, then the jury was instructed to convict Mr. Piatnitsky if he intended to form premeditated intent to kill Jeffrey Manchester, and took a substantial step toward doing so. This is just as illogical as the instruction the Supreme Court rejected in Smith, 131 Wn.2d at 262. There, the “to convict” instruction required the jury to find that the defendant agreed with two other people to engage in conduct constituting the crime of conspiracy to commit murder in the first degree. 131 Wn.2d at 262. Although other instructions made it clear that murder itself was the subject crime of the conspiracy charge, the Supreme Court reversed the conviction. Regardless of

the other instructions, the “to convict” instruction itself made no sense: it “described the even more inchoate crime of conspiracy to commit conspiracy to commit murder.” Id.

The “to convict” instruction in this case was similarly absurd: it described the crime of intent to form premeditated intent to commit murder. One cannot “intend to form premeditated intent.” Premeditated intent is the *mens rea* for first-degree attempted murder. Price, 103 Wn. App. at 851-52. As an element of the offense, it should have been included in the “to convict” instruction.

The State may argue the instruction is proper because it is based on the Washington Pattern Jury Instructions (“WPIC’s”) for attempt. But the pattern instruction is generalized; it applies to all attempt crimes and does not address the unique situation presented by a first-degree attempted murder case, where the mens rea is higher than mere intentionality. Trial courts must diverge from the WPIC’s where necessary to provide the correct statement of the law. State v. Kylo, 166 Wn.2d 856, 866, 215 P.3d 177 (2009); State v. Freeburg, 105 Wn. App. 492, 507, 20 P.3d 984 (2001).

Other states that have the crime of premeditated attempted murder include the element of “premeditated intent” in their

standard to-convict instructions for the offense. See, e.g., Florida Standard Jury Instruction 6.2 (second element of to-convict instruction is "(Defendant) acted with a premeditated design to kill (victim)"); California Criminal Jury Instruction 8.67 (requires special verdict on premeditated intent); Colo. Jury Instr., Criminal 8:01 (*mens rea* of underlying offense must be inserted in to-convict instruction for attempt crimes). For the reasons stated above, Washington should follow suit. This Court should hold that in first-degree attempted murder cases, the "to convict" instruction must include the element of premeditated intent. Because that element was missing from the to-convict instruction in this case, Mr. Piatnitsky's right to due process was violated.

c. The error prejudiced Mr. Piatnitsky. An instructional error is presumed prejudicial. Smith, 131 Wn.2d at 263. It is the State's burden to show that the error was harmless, i.e., that it was trivial, formal, or merely academic, and in no way affected the outcome of the case. Smith, 131 Wn.2d at 264.

Because the omission of an element is constitutional error, the State must prove the error was harmless beyond a reasonable doubt. Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d

889 (2002); Aumick, 126 Wn.2d at 430. In other words, the error is harmless only if the element in question was “supported by uncontroverted evidence.” Neder, 527 U.S. at 18; Brown, 147 Wn.2d at 341. If “the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element,” the error is not harmless. Neder, 527 U.S. at 19.

Here, the State cannot overcome the presumption of prejudice. The “to convict” instruction allowed the jurors to convict Mr. Piatnitsky of first-degree attempted murder if they found he intended Jeffrey Manchester’s death and took a substantial step toward commission of the crime. The instruction relieved the State of the burden of proving premeditated intent, an element that was highly contested below. See State v. Jackson, 62 Wn. App. 53, 60, 813 P.2d 156 (1991) (failure to instruct the jury as to the intent element of a crime can be harmless error only if the defense theory of the case does not involve the element of intent).

Although the State presented evidence of intent through testimony that Mr. Piatnitsky pointed the gun at Jeffrey Manchester and pulled the trigger, the evidence of premeditated intent was weak. Detective Keller, who interviewed Mr. Piatnitsky, said Mr. Piatnitsky’s intention when he returned to the apartment with a gun

was to scare, not to shoot. 10/7/10 RP 24-25. Only after Shawn Jones tackled him did he become afraid and start shooting at people. 10/7/10 RP 42. He told Detective Keller, "I did not mean to take a life." 10/7/10 RP 43. Detective Allen also interviewed Mr. Piatnitsky, and similarly testified that Mr. Piatnitsky told them he took a gun to the apartment only to scare the occupants. 10/18/10 RP 38, 43. Mr. Piatnitsky himself testified at trial that he intended only to scare, but started shooting after Shawn Jones tackled him because he himself was afraid. 10/20/10 RP 64-70. While the jury was entitled to reject Mr. Piatnitsky's self-defense claim, the absence of self-defense does not mean the intent to kill was premeditated.

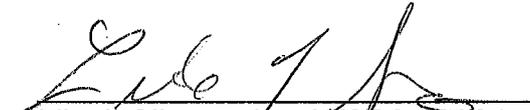
Given the dearth of evidence of premeditated intent, it is clear that "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." Neder, 527 U.S. at 19. Under these circumstances, the failure to include the element of premeditation in the "to convict" instruction was not harmless beyond a reasonable doubt, and the conviction on count 2 should be reversed and the case remanded for a new trial. See Smith, 131 Wn.2d at 266.

E. CONCLUSION

The convictions on counts 1, 2, and 4 should be reversed and the case remanded for a new trial because Mr. Piatnitsky's Fifth Amendment rights were violated by the admission of statements he made to police after invoking his right to silence. Alternatively, the conviction on count 2 should be reversed and the case remanded for retrial on that count because the court omitted the element of premeditated intent from the "to convict" instruction.

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Respectfully submitted,


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