

66442-5

66442-5

NO. 66442-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL PIATNITSKY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN D. GAIN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court correctly found that Piatnitsky had knowingly and voluntarily waived his right to remain silent when he told the detectives that he would give a written—but not a taped—statement.

2. Whether stare decisis defeats Piatnitsky's claim, that premeditation is an essential element of attempted first degree murder.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Samuel Piatnitsky, with murder in the first degree and attempted murder in the first degree (each with a firearm enhancement), possessing a stolen firearm and unlawful possession of a firearm in the second degree.¹ CP 9-12. After a CrR 3.5 hearing, the trial court concluded that

¹ Piatnitsky stipulated that he was guilty of unlawfully possessing a firearm. 10/18/10RP 75-76.

Piatnitsky's confession was admissible at trial.² The jury convicted Piatnitsky as charged.³ CP 231-38. He appeals. CP 296.

2. SUBSTANTIVE FACTS

a. The Barbecue, Party And The Fight.

On October 18, 2008, Nicole Crosswhite hosted a barbecue at her Renton townhouse, where she lived with her two children (a six-year-old and a six-month-old) and a roommate, Kendra Bonn, and her two children (a two- and a three-year-old). 9/27/10RP 43-44, 46, 130-31, 133. Crosswhite's guests included her sister, Ashley Leonard, and her friend, Jeff Manchester, Bonn and Shawn Jones—Crosswhite's close friend of 14 years.⁴ 9/27/10RP 46-47; 9/28/10RP 14-15, 104.

A little after midnight, Jones called Crosswhite; he had just had an argument with his girlfriend, Amy Davison, and he wanted to

² Below, the State fully discusses the trial court's findings of facts and conclusions of law vis-à-vis Piatnitsky's confession. See § C.1, infra.

³ A co-defendant, Jason Young, pled guilty to murder in the second degree under King County Cause Number 08-1-12941-8 KNT.

⁴ Crosswhite and Jones had grown up and attended the same schools together. 9/27/10RP 45.

go to a casino with Crosswhite.⁵ 9/27/10RP 48, 133. When Crosswhite left her house, her guests were watching television. 9/27/10RP 50.

About an hour and a half later, Crosswhite and Jones returned. Crosswhite did not know two of the people in her house. 9/27/10RP 51, 65. Crosswhite got mad. It was 2 A.M., loud music played and Crosswhite's neighbors lived very close (she lived in a four-plex). Also, Crosswhite's and Bonn's children were upstairs sleeping. 9/27/10RP 52. Crosswhite saw beer, although there had not been any beer in her house when she left. 9/27/10RP 55.

Crosswhite soon learned that the people unknown to her, Jason Young and Samuel Piatnitsky, had been seated at a bus stop in front of her house when she left to pick up Jones. When Bonn, Leonard and Manchester had gone outside to smoke, they heard voices. They walked to the bus stop to see who was there; it was Young and Piatnitsky. 9/27/10RP 134-35; 9/28/10RP 19-22. Manchester knew Young because he was very good friends with Young's twin brother, Alex. 9/28/10RP 20; 9/29/10RP 105.

⁵ It is unclear what time Jones arrived at the barbecue and whether he returned to the home he shared with his girlfriend, Amy Davison, before returning to Crosswhite's house. See 9/28/10RP 105 (Davison said that Jones left around 10:00 P.M. to go to the barbecue).

Manchester invited Young and Piatnitsky to Crosswhite's house.

9/28/10RP 22. Young and Piatnitsky wanted beer. Because they were under age, Leonard and Manchester bought some beer.

9/27/10RP 136.

Crosswhite was uncomfortable because she did not know Young or Piatnitsky. 9/27/10RP 54, 65, 136. Manchester vouched for Young. The other man, Piatnitsky, was Young's friend.

9/27/10RP 54. A few minutes later, two other men, Mike Boyd (who had grown up with Crosswhite), and his friend, Eric Bird, arrived. 9/27/10RP 55; 10/6/10RP 10-11, 16. They had just left a bar and they were drunk. 9/27/10RP 55; 10/6/10RP 15-17.

About five minutes later, Crosswhite told Jones that she wanted Young and Piatnitsky to leave. 9/27/10RP 59, 137. Jones and Manchester exchanged words with Young and Piatnitsky. 9/27/10RP 59-60; 9/28/10RP 24. Piatnitsky told Manchester to shut up; he would not leave until he wanted to. 9/28/10RP 27-29. Then a fight broke out between the four men. 9/27/10RP 61, 138; 9/28/10RP 27-29; 10/6/10RP 21. During the fight, Young was knocked to the ground; Manchester forcefully kicked Young's head. 9/27/10RP 62; 9/28/10RP 30-31. Jones was on top of Piatnitsky. Several times, Jones punched Piatnitsky's face. 9/27/10RP 62;

9/28/10RP 31. The fight did not last long. 9/27/10RP 64, 177-78; 10/6/10RP 22. After Boyd broke a beer bottle over Piatnitsky's head, Young and Piatnitsky ran away. 9/27/10RP 63-64, 138-39; 9/28/10RP 30-31; 10/6/10RP 22-23. Manchester and Jones bragged about how they had whipped Young and Piatnitsky. 9/27/10RP 65.

Before the fight broke out, Bonn overheard Piatnitsky tell Manchester that, in a fight, he would not throw a punch—he would shoot the other person. 9/27/10RP 140, 171.

b. Piatnitsky's And Young's Retaliation.

After the fight, Jones called Davison and asked her to pick him up. 9/27/10RP 66; 9/28/10RP 106. When Davison arrived, the night was winding down. Everyone had gone outside for one last cigarette.⁶ 9/27/10RP 66; 9/28/10RP 36.

There was a rustling in the bushes. 9/27/10RP 68. Piatnitsky emerged with a pump action shotgun, Young by his side. 9/27/10RP 68, 142; 9/28/10RP 39-40. Piatnitsky cocked the gun, pointed it at the group (which was about 10 to 12 feet away from

⁶ At that time, the people present were Crosswhite, Manchester, Bird, Leonard, Bonn, Jones and the four children. 9/28/10RP 35.

him), and said something like, "Do you want to play now" or "You guys want some now?" 9/27/10RP 68, 108, 142, 180; 9/28/10RP 36, 39-40, 117-19. Everyone got quiet. Suddenly, Piatnitsky fired a shot into the air. 9/27/10RP 68, 107, 142; 9/28/10RP 119.

Everyone, except Jones and Davison, fled into the house. 9/27/10RP 70-71, 142, 180; 9/28/10RP 119-20. Crosswhite and Bonn ran upstairs to protect their children. 9/27/10RP 71, 107, 142-43, 181. Davison ran toward the parking lot. 9/28/10RP 119-20, 164. Jones rushed Piatnitsky. 9/28/10RP 119-20.

A struggle ensued. Jones tried to wrestle the gun away from Piatnitsky, as Piatnitsky and Young punched him. 9/28/10RP 37, 119-20, 165. Jones grabbed the shotgun barrel, but he never got control of the shotgun. 9/28/10RP 37, 120-21, 168.

Davison ran back from the parking lot and into the house. She yelled at Manchester to help Jones; Manchester followed Davison outside. 9/28/10RP 37, 42-43, 120-22. Jones got tossed to the ground and lost his grip on the shotgun. 9/28/10RP 44, 123. Davison and Manchester then ran toward the house. 9/28/10RP 123-24. As Jones tried to push himself into a standing position, Piatnitsky shot him. 9/28/10RP 44, 123-24.

When Davison looked back, she saw Piatnitsky point the shotgun at her and Manchester. 9/28/10RP 124-25. From a distance of about seven feet, Piatnitsky shot Manchester. 9/28/10RP 46-47, 125. Manchester fell into the wall by the door. As he got up and started to run, Piatnitsky shot Manchester a second time. 9/28/10RP 46-47.

Manchester raced up the stairs. He screamed, "I've been shot, oh my God." He shouted, "Somebody help me, please." 9/27/10RP 72-74, 127; 9/28/10RP 48, 127; 10/6/10RP 29. Manchester was covered in blood. 9/27/10RP 75-76, 143; 9/28/10RP 128. He collapsed at the top of the stairs. 9/27/10RP 75-76, 143. No one knew where Jones was. 9/27/10RP 75; 9/28/10RP 128-29.

As Bonn applied pressure to Manchester's wounds, she called 911. 9/27/10RP 76, 143-44; 9/28/10RP 127-29. Within minutes, the King County Sheriff's Office responded; the witnesses provided suspect descriptions and first names.⁷ 9/27/10RP 76; 9/29/10RP 72-73. Paramedics rushed to Manchester's aid and

⁷ A "store-front" substation is located across the street from Crosswhite's house. 9/27/10RP 76.

then transported him to Harborview Medical Center.⁸ 9/27/10RP 77; 9/28/10RP 48-49. Before the police transported everybody to the sub-station to give statements, the witnesses gave the police a coat that Young had left behind, so the K-9 unit ("Jetson" and his handler) would have a scent to track.⁹ 9/27/10RP 76-78, 105, 144-45, 173, 184; 9/28/10RP 140; 9/29/10RP 149, 157, 161-62; 10/6/10RP 30.

c. Piatnitsky's And Young's Flight And Arrest.

Jetson tracked Young's scent to the house where Young, his twin brother, Alex, and his parents lived. 9/29/10RP 104, 163-67. Young's stepfather, Steven Russell, had just been awakened by his barking dog. 9/29/10RP 106. Russell saw Young enter his house; Young was alone. 9/29/10RP 106-08. Russell tried to go back to

⁸ Piatnitsky shot Manchester in his shoulder and wrist, which resulted in multiple fractures to his forearm and wrist. Despite surgery to hold his wrist in place with plates and screw, Manchester has decreased sensation in his fingers. Manchester sustained nerve damage (most likely permanent) as a result of his wounds. Manchester still has metal fragments in his forearm and wrists. 9/28/10RP 49-50; 10/12/10RP 125-42. Piatnitsky may have misapprehended the orthopedic surgeon's testimony. Manchester's injuries were more substantial than simply a broken arm. See Br. of Appellant at 4.

⁹ Earlier in the evening, a King County Sheriff's deputy, saw Young and Piatnitsky at the bus stop in front of Crosswhite's house. Young, Piatnitsky and the deputy recognized one another from when the deputy had been their school resource officer. They all spoke briefly. Young had been wearing the same jacket. 9/29/10RP 30, 33-34.

sleep, but his dog barked again. Russell asked Young if he was alone and Young said that he was. 9/29/10RP 107-08.

Minutes later, Russell was awakened by his barking dog and flashlights in his front yard. 9/29/10RP 108. Russell's yard was filled with police officers who were looking for Young. 9/29/10RP 108. The police wanted everyone in the house (Russell, his wife and their twin sons) to come outside. 9/29/10RP 109; 10/5/10RP 75-76. Russell gave the police consent to search his house. 9/29/10RP 109.

The police officers located Piatnitsky hiding behind a washing machine in a closet. 10/5/10RP 28-30, 78; 10/7/10RP 130-31. The officers ordered Piatnitsky to show his hands and to come out. 10/5/10RP 29, 79; 10/7/10RP 103-32. After Piatnitsky refused to comply, an officer grabbed Piatnitsky and pulled him out. 10/5/10RP 30, 79; 10/7/10RP 131. Piatnitsky continued to combat the officers until they were able to handcuff him. 10/5/10RP 30-33, 80-81.

Another police officer then transported Crosswhite, Bonn and Davison from the precinct to the Russell home. Each woman identified Piatnitsky as the shooter and Young as his accomplice.

9/27/10RP 78-79, 144-45; 9/28/10RP 140-41; 10/5/10RP 34, 163-65.

d. The Investigation.

At the precinct, Piatnitsky provided detectives with a statement.¹⁰ 10/6/10RP 96-105; 10/7/10RP 12-28, 41-43; 10/18/10RP 23-43; Pretrial Ex. 3; Ex. 56, 58.

In sum, Piatnitsky told the detectives that after someone (Boyd) broke a beer bottle over his head, he and Young left to go and get a shotgun, which was hidden at a nearby elementary school.¹¹ 10/7/10RP 18. The gun (a Mossberg pump action) was loaded when they retrieved it. 10/7/10RP 19-20; 10/18/10 RP 37. Piatnitsky said that he and Young returned to Crosswhite's house. When he raised the shotgun, a man (Jones) tackled him. 10/7/10RP 20-21. Young pulled Jones off Piatnitsky. 10/7/10RP 21; 10/18/10RP 37. Piatnitsky shot at Jones as he crawled away.¹² 10/7/10RP 21-23; 10/18/10RP 37. Piatnitsky then said that he

¹⁰ Piatnitsky's statements are discussed fully below in § C.1, *infra*.

¹¹ Piatnitsky admitted that he was with someone when the shotgun was stolen during a car prowl. 10/7/10RP 19.

¹² Although Piatnitsky described Jones as crawling away on all fours, Piatnitsky wanted the detectives to cross out "crawl" and write "scurry" instead. 10/7/10RP 22-23; 10/18/10RP 34, 42; Ex. 58; see also discussion below in § C.1.

aimed the shotgun at a man in the front doorway (Manchester) and fired. 10/7/10RP 24.

Afterward, Piatnitsky and Young fled to Young's house. Piatnitsky gave Young the shotgun to hide. 10/7/10RP 25. When the detectives asked Piatnitsky about hiding from the police, he ended the interview. 10/7/10RP 25; 10/18/10RP 38.

Piatnitsky said that he brought the shotgun back to Crosswhite's house to scare everyone. 10/7/10RP 24; 10/18/10RP 37-38, 42-43. Yet, Piatnitsky never told police that Jones ever possessed or got control of the shotgun. 10/7/10RP 28; 10/18/10RP 42-43. Piatnitsky never said that Jones threatened him with the gun. 10/7/10RP 28.

The detectives returned to the Russell home to execute a search warrant. 10/7/10RP 33; 10/18/10RP 47. In the backyard, there was a dog kennel with fresh footprints leading to it. 10/7/10RP 34. Just inside the kennel door was a Mossberg pump action shotgun with the barrel in the dirt. 10/7/10RP 34; 10/18/10RP 47.

The detectives learned that the shotgun had been stolen from a man, Nicholas Buckeridge, during a prowling of his car, which had been parked in front of his house, about 10 blocks from

Young's house. 10/7/10RP 37-38, 90-91, 103-05; 10/18/10RP 52.

The shotgun was fully operational. 10/14/10RP 35. The forensic firearm examiner noted that the shotgun's muzzle had dirt, grass, and debris in it—like the gun had been plunged into soil.

10/14/10RP 35-36.

Additional forensic testing determined that all four shotgun shells recovered outside Crosswhite's house had been fired from Buckeridge's shotgun. 10/14/10RP 38-49. Additionally, forensic tests established that the muzzle of the shotgun had been greater than 9, but less than 12, feet from the clothing that Jones had worn when he was fatally shot.¹³ 10/14/10RP 50-68. These tests were consistent with the medical examiner's conclusion that Piatnitsky shot Jones from a distance of approximately 9 or 10 feet.

10/5/10RP 123.

e. Piatnitsky's Self-Defense Claim At Trial.

Piatnitsky said that after someone smashed a beer bottle over his head, he told Young that it was time to leave. 10/20/10RP 58-59. Later, Young wanted to return to get a jacket that he had

¹³ The medical examiner said that Jones died as the result of a shotgun wound to his chest. 10/5/10RP 138.

left. Piatnitsky told Young that it was not a good idea—people seemed intoxicated and there would be more fighting. 10/20/10RP 59-60, 134.

Young wanted to see whether a gun was in the same location as they had seen people hide it (Piatnitsky knew that he was not supposed to have a gun). 10/20/10RP 62. When they found the gun, they both decided to return, but with the gun as a “barrier” between him and Jason and the people at the party. 10/20/10RP 63-64. Piatnitsky would not have returned without the gun because he was afraid of the people. 10/18/10RP 64.

Young carried the shotgun back to Crosswhite’s house, but just before they arrived, Piatnitsky told Young to give him the gun—Young was drunk and Piatnitsky did not want him to shoot anybody. 10/20/10RP 65. Piatnitsky also did not want to shoot anyone; he just wanted to get his compact disks and Young’s jacket back. 10/20/10RP 61, 65, 87, 114.

When all of the people saw the gun, they all ran inside, except for Jones, who rushed Piatnitsky and tackled him. 10/20/10RP 66-67. Jones grabbed the shotgun and got it completely away from Piatnitsky; Jones then punched Piatnitsky and pushed him to the ground. 10/20/10RP 68, 69. Young pulled

Jones off Piatnitsky. 10/20/10RP 68, 126. Piatnitsky then managed to “loop” his hand around the gun and pull the trigger. 10/20/10RP 68, 124. If Young had not pulled Jones off him, Piatnitsky believes he would have died—Jones would have shot him. 10/20/10RP 68, 126.

Piatnitsky and Young ran to Young’s house.¹⁴ 10/20/10RP 70-71, 141. Piatnitsky fired a couple of shots behind him as he ran to make sure that no one else rushed him or tried to tackle him. 10/20/10RP 70, 137-38. Piatnitsky then gave the shotgun to Young, who hid it somewhere. 10/20/10RP 71-72.

When the detectives told Piatnitsky that someone had died, he was “emotionally wrecked.” 10/20/10RP 90. Piatnitsky did not know that Manchester was also shot until the police told him. 10/20/10RP 72. Piatnitsky did not tell the detectives about his near life and death experience because he panicked. 10/20/10RP 143-44. He became disoriented after he feared losing his life—a fear that continues today. 10/20/10RP 157.

¹⁴ Piatnitsky insisted that he did not hide because he was afraid of the police; he hid because Young told him to. 10/20/10RP 154.

Piatnitsky agreed that if he had not returned with a shotgun to get his things back, Jones would be alive today. 10/20/10RP 128.

C. ARGUMENT

1. THE TRIAL COURT CORRECTLY RULED THAT PIATNITSKY'S CONFESSION WAS ADMISSIBLE.

Piatnitsky challenges the trial court's refusal to suppress the written statement that he signed during his interview with Detectives Keller and Allen. Br. of Appellant at 7-9. Piatnitsky claims that his confession was given after he had invoked his right to remain silent. This, he contends, violated his right against self-incrimination. The State disagrees. Piatnitsky invoked his right to remain silent only after he had acknowledged that he understood his rights, knowingly and voluntarily waived his rights, answered the detectives' questions and provided a written statement. When Piatnitsky then unequivocally invoked his right to remain silent, the interview terminated. The Court should reject Piatnitsky's claim.

a. Facts.

Before Detectives Keller and Allen took Piatnitsky's recorded statement, they confirmed with Piatnitsky that he had been advised

of his Miranda¹⁵ rights. Pretrial Ex. 3, at 1; Ex. 56. Piatnitsky said the only right that he remembered was the right to remain silent; he stated, "That's the one I, I should be doing right now." Pretrial Ex. 3, at 2; Ex. 56; CP 311-12 (Undisputed Finding of Fact 1(p)). Detective Keller immediately reminded Piatnitsky that, "[L]ike we told you, you don't have to talk to us." Pretrial Ex. 3, at 2; Ex. 56; CP 312 (Undisputed Finding of Fact 1(q)).

After Detective Keller started to re-advise Piatnitsky of his rights, Piatnitsky said, "I'm not ready to do this, man ... 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." CP 312 (Undisputed Findings of Fact 1(s) – (v)); Pretrial Ex. 3, at 2; Ex. 56. Detective Keller told Piatnitsky that after the taped advisement of rights, Piatnitsky could write his statement down. CP 312 (Undisputed Finding of Fact 1(t)); Pretrial Ex. 3, at 2. Piatnitsky said, "All right, man." Pretrial Ex. 3, at 2; Ex. 56. Piatnitsky confirmed that he understood each of his Miranda rights and that he could exercise his rights at any time. Pretrial Ex. 3, at 4; Ex. 56; CP 312 (Undisputed Finding of Fact 1(u)). Piatnitsky then signed the "Explanation of Constitutional Rights" form, exhibit 58, and again

¹⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1996).

acknowledged that he understood each of his rights. Ex. 58, at 1; CP 312 (Undisputed Finding of Fact 1(v)).

Detective Keller next read Piatnitsky the "Waiver of Constitutional Rights" section of exhibit 58 and asked Piatnitsky to sign the form if he was willing to talk to the detectives. Detective Keller said, "If you understand [the waiver and] you're willing to talk to us, sign that, and then we'll take a, I'll turn the tape off, and um, I'll, we'll write down a statement." Pretrial Ex. 3, at 3; Ex. 58; CP 312 (Undisputed Finding of Fact 1(v)). Piatnitsky signed the waiver of rights, which stated

I have read the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time. The following statement is made by me freely and voluntarily and without threats or promises of any kind.

Ex. 58, at 1; CP 312 (Undisputed Finding of Fact 1(v)).

Before the detectives stopped the tape recorder, Detective Allen asked Piatnitsky, "Are you sure you don't want to do it on tape like you said you did; you want to get in your own words?" Pretrial Ex. 3, at 4; Ex. 56; CP 313 (Undisputed Finding of Fact 1(w)).

Piatnitsky responded, "Yes, sir." Pretrial Ex. 3, at 4; Ex. 56; CP 313 (Undisputed Finding of Fact 1(w)). Detective Keller confirmed, "So you'd rather take a written statement, do a written one." Pretrial

Ex. 3, at 4; Ex. 56. Piatnitsky said, "Yes, I don't know (unintelligible)¹⁶." Pretrial Ex. 3, at 4. Detective Keller responded, "Okay, it's too hard to talk about; you'd rather write it." Pretrial Ex. 3, at 4; Ex. 56.

During the suppression hearing, Detectives Keller and Allen stated that Piatnitsky had agreed to provide a tape recorded statement, to tell his side of the story, and never invoked his right to remain silent. 9/16/10RP 19; 9/20/10RP 16. Multiple times Piatnitsky told the detectives that he wanted to provide a written statement. 9/16/10RP 41. Detective Keller said that the unintelligible portion of the recording were words to the effect of Piatnitsky did not want to talk on tape or that he did not want to talk out loud. 9/16/10RP 23, 41. Detective Allen said that he interpreted Piatnitsky's remark to mean that he did not want to give a taped statement, but preferred to provide a written statement. 9/20/10RP 17-18. It was not until the end of the written statement that Piatnitsky said, "I'm done talking," at which point the interview terminated. 9/16/10RP 23, 25-26; 9/20/10RP 20; CP 313 (Undisputed Finding of Fact 1(y)).

¹⁶ Piatnitsky claims that the unintelligible portion was actually an invocation of his right to remain silent. Br. of Appellant at 8-9. The State fully addresses this claim below in § C.1.e, infra.

As Detective Allen wrote down Piatnitsky's version of the events, Piatnitsky asked several times to review the statement. 9/16/10RP 27; 9/20/10RP 21-22; CP 313 (Undisputed Finding of Fact 1(x)). After Piatnitsky said that he was done talking, he reviewed the entire statement, requested a few changes (which Detective Allen made and Piatnitsky initialed), and he then signed the corrected statement. Ex. 58, at 1-2; 9/16/10RP 27, 31, 48-49; 9/20/10RP 21-23; CP 313 (Undisputed Findings of Fact 1(x), (z)); CP 315 (Conclusion as to Disputed Facts 3(b), (e)).

Both detectives remembered one change in particular: Piatnitsky had said that when he fired the shotgun, "the guy was trying to *crawl* away from me at the time." Piatnitsky wanted the word "crawl" changed to "scurry" because crawl "didn't sound good to him." 9/20/10RP 23; 9/16/10RP 48-49; Ex. 58, at 2.

After hearing Piatnitsky's tape recorded statement and the detectives' testimony, the trial court found that at no time before the conclusion of the interview did Piatnitsky state that he wished to remain silent. CP 313 (Undisputed Finding of Fact 1(bb))¹⁷; 9/20/10RP 59-61. Viewed in context, the trial court determined that

¹⁷ On appeal, Piatnitsky assigned error to this finding. Br. of Appellant at 1 (Assignment of Error 1).

Piatnitsky “clearly indicate[d] that [he] was willing to speak with the detectives, just not on tape.” CP 315 (Conclusions as to Disputed Facts 3(f)); 9/20/10RP 60. The court said:

I am satisfied that there is no objective evidence that the statements were anything other than knowingly, voluntarily, and intelligently made.

9/20/10RP 60; CP 315 (Conclusion of Law).

b. The Right To Remain Silent And Waiver.

Both the federal and state constitutions guarantee that no person shall be compelled to give evidence against himself. See U.S. CONST. AMEND. V, VIX; WASH. CONST. ART. I, § 9. This privilege against self incrimination precludes the use of any involuntary statement against an accused in a criminal trial. Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L.Ed.2d. 290 (1978). Under Miranda, a custodial statement is voluntary, and therefore admissible, if made after the defendant has been advised of his rights, including the right to remain silent, and then knowingly, voluntarily, and intelligently waives those rights. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). A waiver is voluntary if “it was the product of a free and deliberate choice

rather than intimidation, coercion, or deception.” Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L.Ed.2d 410 (1986). In determining voluntariness, the Court evaluates the totality of the circumstances, including Piatnitsky’s physical and mental condition, his experience, and the conduct of the police.¹⁸ State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984); State v. Broadway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). A waiver may be implied through “the defendant’s silence, coupled with an understanding of his rights, and a course of conduct indicating waiver.” North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L.Ed.2d 286 (1979). The Supreme Court recently stated:

As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afforded.

Berghuis v. Thompkins, ___ U.S. ___, ___, 130 S. Ct. 2250, 2262, 176 L.Ed.2d 1098 (2010) (citing Butler, 441 U.S. at 372-76).

¹⁸ Coercive police activity is a necessary predicate to the finding that a confession was not voluntary. State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008).

c. Standard Of Review.

A reviewing court "will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding." Athan, 160 Wn.2d at 380. The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. Broadaway, 133 Wn.2d at 131.

d. Substantial Evidence Supports The Trial Court's Finding Of Waiver.

The record contains substantial evidence supporting the trial court's determination that Piatnitsky knowingly and voluntarily relinquished his right to remain silent and chose to continue with the interview. First, there is no contention that Piatnitsky did not understand his rights. It is undisputed that on at least three occasions, including on tape, Piatnitsky was advised of his Miranda

rights and he said that he understood his rights. CP 310-12 (Undisputed Findings of Fact 1(e), (l), (p), (r), (s) – (v)); see also Br. of Appellant at 8. Based on Detective Keller’s and Allen’s testimony, and the advisement of rights in the recorded statement and on the explanation of rights form signed by Piatnitsky, there was more than enough evidence in the record to conclude that Piatnitsky understood his Miranda rights.¹⁹ Piatnitsky also knew that he could exercise his rights at any time. Pretrial Ex. 3, at 3; Ex. 56; Ex. 58, at 1.

Second, if Piatnitsky wanted to remain silent, he could have unambiguously invoked his right to remain silent and terminated the interview (indeed, the interview (the written statement) terminated once Piatnitsky unambiguously invoked his right to remain silent).²⁰ Instead, Piatnitsky provided a written statement—a “course of conduct indicating waiver” of the right to remain silent. Butler, 441 U.S. at 373. Piatnitsky does not argue, nor could he, that his

¹⁹ 9/16/10RP at 15-16, 24-25, 41-42; 9/20/10RP 13, 16-17, 27; Pretrial Ex. 3, at 2-3 (when asked if Piatnitsky remembered the rights that another police officer had read to him, Piatnitsky said, “I have a right to remain silent” and seconds later, Detective Keller asked Piatnitsky, “Do you understand that you have the right to remain silent”; Piatnitsky said “Yes”); Ex. 56; Ex. 58, at 1. The first right listed on the explanation of rights form is: “I have the right to remain silent.”

²⁰ See 9/16/10RP 26; 9/20/10RP 19-20; CP 313 (Undisputed Finding of Fact 1(y)).

reference to his right to remain silent as “That’s the one I, I should be doing right now,” is an unequivocal invocation of his right to remain silent. See Berghuis v. Thompkins, 130 S. Ct. at 2259-60) (holding that an accused must invoke his right to remain silent unambiguously).²¹

Third, there is no evidence that Piatnitsky’s statement was coerced. See Burbine, 475 U.S. at 421. Piatnitsky has not challenged the trial court’s finding that neither detective made any promises or threats to him in order to get him to provide a statement. CP 314 (Undisputed Finding of Fact 1(ee)); 9/16/10RP 29-30; 9/20/10RP 20. Also, Piatnitsky signed a waiver of his constitutional rights that said, “The following statement is made by me freely and voluntarily and without threats or promises of any kind.” Ex. 58.

Under these circumstances, Piatnitsky knowingly and voluntarily waived his right to remain silent and made a statement to police. His confession was properly admitted.

²¹ CP 311-12 (Undisputed Finding of Fact 1(p)); Pretrial Ex. 3, at 2.

e. Piatnitsky Did Not Invoke His Right To Remain Silent.

Piatnitsky claims that he invoked his right to remain silent. Br. of Appellant at 8-9. At issue is approximately two seconds of Piatnitsky's recorded statement (4:48 – 4:50). Although Piatnitsky concedes that those two seconds are "somewhat muffled" (transcribed as unintelligible by the King County Sheriff's Office),²² he nevertheless claims "it is clear" he indicated that he did not want to talk.²³ Br. of Appellant at 8.

After Detective Allen asked Piatnitsky if he was sure that he did not want to give a recorded statement, Piatnitsky said, "Yes, sir." Pretrial Ex. 3 at 4; Ex. 56. Detective Keller then confirmed, "So you'd rather take a written statement, do a written one." Pretrial Ex. 3, at 4; Ex. 56. Piatnitsky said, "Yes, I don't know (unintelligible)." Pretrial Ex. 3, at 4. Detective Keller responded, "Okay, it's too hard to talk about; you'd rather write it." Pretrial Ex. 3, at 4; Ex. 56.

Piatnitsky asserts that what he actually said was not unintelligible, but was "I don't really feel like talking, man." Br. of

²² Pretrial Ex. 3, at 4.

²³ The recorded statement has been transmitted to this Court. Counsel for the Respondent has listened to the tape numerous times. Despite Piatnitsky's contrary claim, it is not at all clear what Piatnitsky said.

Appellant at 8 (citing to Ex. 56 at 4:48 – 4:50).²⁴ Piatnitsky thus contends that, because the trial court erred in relying on the detective's transcription (instead of his "actual statement"), the court necessarily erred by finding that at no point before the conclusion of the interview did Piatnitsky state that he desired to remain silent. See CP 313 (Undisputed Finding of Fact 1(bb)).

The Court should reject this claim. The trial court did not exclusively rely on the transcript. The court heard the actual recorded statement and the detectives' sworn testimony. The court then determined that, viewed in context, Piatnitsky "clearly indicate[d] that [he] was willing to speak with the detectives, just not on tape." CP 315 (Conclusions as to Disputed Facts 3(f)); 9/20/10RP 60.

Next, in a footnote, Piatnitsky appears to argue that his mere acquiescence should not be construed as waiver.²⁵ See Br. of

²⁴ See also Br. of Appellant at 1 (Assignment of Error 2). Piatnitsky assigns error to the trial court's omission from its findings "the *fact* that Mr. Piatnitsky said in his recorded statement, 'I don't really feel like talking, Man.'" (Italics added) Yet, defense counsel did not ask the trial court to supplement its oral findings or object to the trial court's written findings. Moreover, the assignment of error assumes facts not in evidence; i.e., the very issue is what, in context, did Piatnitsky say.

²⁵ See Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461 (1938) ("courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and "do not presume acquiescence in the loss of fundamental rights.").

Appellant at 9 n.1 (citing Pretrial Ex. 3, at 4; Ex. 56 at 4:50 – 5:00) (“When the detectives followed up by trying to get him to say he’d rather write a statement, Mr. Piatnitsky said nothing.”). Yet, Piatnitsky’s waiver was not presumed by mere acquiescence—it was based, in part, on his signed waiver and course of conduct inconsistent with an invocation of the right to remain silent.

Piatnitsky’s reliance on State v. Gutierrez²⁶, is misplaced. There, Marvin Warren and Bonifacio Gutierrez were arrested after they were seen leaving a trailer where cocaine and marijuana were later found. Gutierrez, 50 Wn. App. at 585-86. After both men were read their Miranda rights, Warren was asked about the drugs found in the trailer, and he responded that he would rather not talk about it. Id. at 586. At trial, the State called a police officer, who testified that Warren had said he would rather not talk about it. Id. In addition, during cross-examination of Warren, the prosecutor called attention to Warren’s invocation of his right to remain silent and suggested that Warren’s silence inferred guilt. Id. at 588-89. On appeal, the court reversed, holding that Warren’s due process

²⁶ 50 Wn. App. 583, 749 P.2d 213, review denied, 110 Wn.2d 1032 (1988).

rights were violated when the State introduced testimony regarding his post-Miranda assertion of his right to remain silent. Id. at 591.

Here, as explained fully above, Piatnitsky did not say that he would rather not talk *about it*. He said that he would rather not talk about it, but would be willing to provide a *written* statement. He said, "I'm not ready to do this, man ... *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." CP 312 (Undisputed Findings of Fact 1(s) – (v)); Pretrial Ex. 3, at 2; Ex. 56. Then, consistent with his stated preference, Piatnitsky provided the detectives with a written statement.

f. Even If Piatnitsky's Statement Was Inadmissible, Any Error Was Harmless.

Finally, even if the trial court erred by admitting Piatnitsky's statement into evidence, the error was harmless.

Where a voluntary confession is improperly admitted into evidence, its admission may constitute harmless error. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). "A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the

absence of the error.” State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996).

Here, even without Piatnitsky’s confession, the same result would have been reached. After the fatal shooting, the eyewitnesses described Piatnitsky and Young to the police. 9/27/10RP 76; 9/29/10RP 72-73. A K-9 unit tracked Young and Piatnitsky from the crime scene to Young’s parents’ house—about a mile away—where the police found Piatnitsky hiding in a basement closet. 9/29/10RP 104, 163-67; 10/5/10RP 28-30, 78; 10/7/10RP 130-31. The police drove three eyewitnesses to where Young and Piatnitsky had been detained; each eyewitness identified Piatnitsky as the shooter. 9/27/10RP 78-79, 144-45; 9/28/10RP 140-41; 10/5/10RP 34, 163-65.

Most significantly, at trial, witness after witness described how Piatnitsky and Young had been beaten up at the party, only to return, angry and armed. 9/27/10RP 61-62, 65, 68, 142, 180; 9/28/10RP 117-18. Forensic scientists explained that Piatnitsky’s version of the events was unsupported by the evidence. Piatnitsky had shot Jones from a distance of approximately 9 feet, inconsistent with Piatnitsky’s claim that he shot Jones as the two men struggled for control of the shotgun. 10/5/10RP 123;

10/14/10RP 50-68. Shell casings were located within a two-foot space of one another, contradicting Piatnitsky's claim that he was running away while firing the gun. 9/29/10RP 186; 10/12/10RP 59-65.

Thus, any error in admitting Piatnitsky's statement was harmless.²⁷

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE CRIME OF ATTEMPTED MURDER IN THE FIRST DEGREE.

Piatnitsky contends that his conviction for attempted murder in the first degree must be reversed because the "to convict" instruction did not include the essential element of premeditation. This is incorrect and is contrary to existing case law. See State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); State v. Reed, 150 Wn. App. 761, 208 P.3d 1274, review denied, 167 Wn.2d 1006 (2009). The Court should reject Piatnitsky's claim.

²⁷ Piatnitsky contends that his statement could not have been harmless vis-à-vis the possession of a stolen firearm count. See Br. of Appellant at 10 n.2. The State disagrees. The police located the shotgun during their search of Young's parents' house. The police then tracked down Buckeridge, the man from whom the shotgun had been stolen. 10/7/10RP 34-38. Buckeridge lived about 10 blocks from Young's house. 10/7/10RP 90-91. Buckeridge testified that he did not know either Young or Piatnitsky. 10/7/10RP 110. A jury could easily infer from this evidence that Piatnitsky knew the shotgun had been stolen.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Generally, the “to convict” instruction must contain all elements essential to the conviction. Mills, 154 Wn.2d at 7. This Court reviews the adequacy of a challenged “to convict” instruction de novo. DeRyke, 149 Wn.2d at 910.

The Supreme Court has affirmed that “[a]n attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime.” DeRyke, at 911. The “to convict” instruction need contain only these two elements, with the name of the crime attempted being specific as to the degree of the crime intended, e.g., the crime attempted must be listed as “first-degree rape” as opposed to just “rape.” Id. To complete the instructions, the court must also instruct the jury in a separate instruction regarding the elements of the crime attempted. Id.

Here, the “to convict” instruction, and the other instructions, met these requirements. The “to convict” instruction informed the jury that in order to convict Piatnitsky of attempted first degree

murder, the State had to prove that he committed an act that was a “substantial step” toward the commission of first degree murder and that the act was done with the intent to commit first degree murder. CP 208; WPIC 100.02. This “to convict” instruction was preceded by the concise WPIC definitions for first-degree murder,²⁸ premeditation,²⁹ attempted first-degree murder,³⁰ and substantial step.³¹

The court's instructions follow exactly the recommended course as directed by the note on use per WPIC 100.02. See

²⁸ The jury was instructed that:

A person commits the crime of Murder in the First Degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person unless the killing is justifiable.

CP 185; WPIC 26.01.

²⁹ The jury was instructed that:

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 189; WPIC 26.01.01.

³⁰ The jury was instructed that:

A person commits the crime of Attempted Murder in the First Degree when, with intent to commit that crime, he or she does any act that is a substantial step toward.

³¹ The jury was instructed that:

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

CP 207; WPIC 100.05.

11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY

INSTRUCTIONS: Criminal 100.02 note on use 386-87 (3rd ed. 2008).

The court's instructions also followed exactly the course approved of in DeRyke and Reed.

DeRyke was charged with attempted rape in the first degree. The "to convict" instruction instructed the jury that they had to find beyond a reasonable doubt that DeRyke took a substantial step towards the commission of the crime of rape. The instruction did not state what degree of rape the jury had to find DeRyke intended to commit.

DeRyke claimed the "to convict" instruction was deficient because it did not contain the elements of the crime of rape. The Supreme Court rejected this argument, finding that the "to convict" instruction for an attempt crime need only contain the elements of an attempt crime, the substantial step language and the intent to commit a named specific crime. DeRyke, at 911. The court did find error in the fact that the "to convict" instruction did not specify the degree of the rape crime attempted, but the court found this error harmless because there was only one degree of rape alleged. Id.

In Reed, the court applied DeRyke to the exact same situation as exists here. Reed was charged with attempted murder in the first degree. Reed, like the defendant here, argued that the “to convict” instruction needed to contain the element of premeditated intent. Reed, at 769. Completely consistent with DeRyke, the court rejected Reed’s argument and held that a “to convict” instruction identical to the instruction given in this case correctly set forth the elements of attempted first degree murder and did not relieve the State of its burden to prove all elements of the charged crime by omitting the element of premeditation.³² Reed, at 771-75.

The “to convict” instruction provided to the jury in this case correctly set forth all essential elements of attempted murder in the first degree. CP 208. Stare decisis requires the Court to adhere to existing case law unless the defendant can make a “clear showing

³²Appellate counsel, Ms. Silverstein, has neglected to cite or discuss Reed although she was counsel of record on Reed’s appeal. Much of the opening brief in this case mirrors the appellant’s opening brief in Reed. Compare Reed at 769 (“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” (citing Br. of Appellant at 25)) with Br. of Appellant at 12 (verbatim); compare Reed at 769 (“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” (citing Br. of Appellant at 26)) with Br. of Appellant at 13-14 (verbatim).

that an established rule is incorrect and harmful.” In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). That burden has not been met here. Piatnitsky’s argument should be rejected.

D. CONCLUSION

For the reasons stated above, the State respectfully asks this court to affirm Piatnitsky’s convictions.

DATED this 13 day of September, 2011.

Respectfully submitted,

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