NO. ___
(COA NO. 58982-6-II)

THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KELLY HRIBAR,

Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Kelly Hribar asks this Court for review.

B. COURT OF APPEALS DECISION

Mr. Hribar seeks review of the Court of Appeals's partly published opinion in *State v. Hribar*, No. 58982-6-II (June 3, 2025).

C. ISSUES PRESENTED FOR REVIEW

1. The jury instructions must be manifestly clear and cannot reduce the prosecution's burden of proof. To be guilty of premeditated first-degree murder, Mr. Hribar had to deliberate for more than a moment in time. The instruction defining premeditation, WPIC 26.01.01, correctly states this requirement. However, it also says any period of deliberation suffices, "however long or short." This allowed the jury to believe it could convict based on premeditation lasting only a moment. The instruction therefore reduced the prosecution's

burden of proof and deprived Mr. Hribar of due process, calling for review. RAP 13.4(b)(3).

2. A judge may not comment on the evidence. A jury instruction is a comment on the evidence if it misstates the law and removes a factual issue from the jury's consideration. Here, WPIC 26.01.01 defines "premeditation" to mean any period of deliberation, "however long or short," contrary to the statutory definition. In effect, the instruction removed from the jury the question whether Mr. Hribar deliberated for more than a moment in time. The trial court violated the constitutional prohibition on comments on the evidence, calling for review. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Mr. Hribar (pronounced KREE bar) believed that Leonard Kowalsky was involved in burning down his trailer in Pe Ell, Washington. RP 836, 838–39, 1010,

1129.[1] He sometimes told others he wanted to hurt or kill Mr. Kowalsky. RP 475–76, 840, 945–46, 951, 1065–66, 1085–86, 1105–06, 1135.

On August 16, 2023, Mr. Hribar went to a mini mart in Pe Ell. RP 761–62. Mr. Hribar saw Mr. Kowalsky drive by, and said "he was going to find" Mr. Kowalsky. RP 765. Mr. Hribar went inside the store, bought a drink, and left. RP 766. As Mr. Hribar exited, Mr. Kowalsky arrived at the store. RP 778. Mr. Hribar drove east out of town on Highway 6. RP 779. Mr. Kowalsky left the store two minutes later. RP 792.

Mr. Hribar drove past Katula Road, where Mr. Kowalsky lived, and backed into a pull-out near a mailbox and some utility boxes. 10/12/23 RP 115–16; Ex. 202 Hribar Pt 1 at 32:02–32:42; Exs. 3, 6–8. A row

[1] Citations to "RP _" without a date are to the trial held October 16–25, 2023.

of tall trees to west of the pull-out obscured Katula Road. Exs. 7, 40. Police later found tire tracks extending deep into the brush, meaning Mr. Hribar backed well off the highway. RP 415, 680, 739; Ex. 104.

Figure 1. An image looking west along Highway 6 toward Pe Ell. Ex. 8. Katula Road is visible just beyond the west end of the south guardrail in the left side of the image. RP 303–04.

Figure 2. Another image west along Highway 6, taken from further east. Ex. 7. The mailbox and utility boxes on the left side of the highway mark the pull-out Mr. Hribar used. RP 346–47.

Figure 3. A photo from the south edge of Highway 6 looking west. Ex. 40. Trees and brush obscure any view of Katula Road from the pull-out. Mr. Kowalsky's car is visible along the north guardrail. RP 388–89.

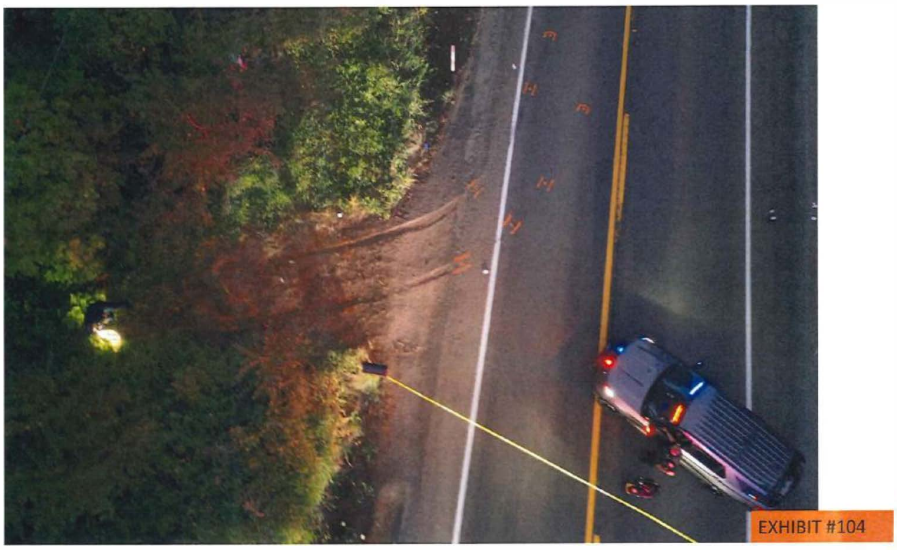


Figure 4. A photo taken by a police drone shows tire tracks extending all the way into the brush, beyond the pictured officer holding a flashlight. Ex. 104.

Rather than go straight home from the mini mart, Mr. Kowalsky happened to continue east on Highway 6. 10/12/23 RP 116; Ex. 202 Hribar Pt 1 at 32:42–34:02. Mr. Kowalsky stopped, turned around, and confronted Mr. Hribar. *Id.* Mr. Hribar believed Mr. Kowalsky intended to return to his house and retrieve a gun. 10/12/23 RP 117; Ex. 202 Hribar pt 1 at 34:20–34:36. Mr. Hribar fired one round at Mr. Kowalsky from his shotgun. 10/12/23 RP 140; Ex. 202 Hribar pt 1

at 58:05–58:24. Mr. Kowalsky appeared to be "trying to grab for something," and Mr. Hribar fired two more rounds. *Id.* Mr. Hribar drove off. 10/12/23 RP 140–41; Ex. 202 Hribar pt 1 at 58:33–59:25. Mr. Kowalsky died of his injuries. RP 457–58.

The prosecution charged Mr. Kowalsky with one count of first-degree premeditated murder, among other charges. CP 9–10.

The jury instruction defining premeditation said that it "must involve more than a moment in point of time," but also that deliberation for any amount of time is sufficient, "however long or short." CP 27; WPIC 26.01.01.

The jury convicted Mr. Kowalsky. CP 41, 43–44. The trial court imposed a high-end standard-range sentence of 407 months, or almost 34 years. CP 195–96.

E. WHY REVIEW SHOULD BE GRANTED

1. **This Court should grant review because the model premeditation instruction reduces the prosecution's burden contrary to due process.**

The instruction defining premeditation informed the jury Mr. Hribar needed to deliberate for longer than "a moment in point of time," but also deliberation for any duration would suffice, "however long or short." CP 27; WPIC 26.01.01. As a result, lay jurors would believe they could find Mr. Hribar guilty of first-degree murder based on deliberation for any fleeting amount of time. Because WPIC 26.01.01 reduces the prosecution's burden in violation of due process, this Court should grant review. RAP 13.4(b)(3).

The jury instructions must "make the relevant legal standard manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting, *e.g.*, *State v. LeFaber*, 128 Wn.2d

896, 900, 913 P.2d 369 (1996)); Const. art. I, § 3; U.S. Const. amend. XIV, § 1. As jurors are laypersons, the "standard for clarity in a jury instruction" is high—"higher than for a statute." *LeFaber*, 128 Wn.2d at 902, ***abrogated on other grounds***, *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Lawyers and judges learn to use "interpretive tools" to parse ambiguous legal texts, but jurors likely lack these skills. *State v. Weaver*, 198 Wn.2d 459, 466, 496 P.3d 1183 (2021) (quoting *LeFaber*, 128 Wn.2d at 902).

An unclear instruction that permits the jury to convict based on a showing more lenient than the law requires violates Mr. Hribar's right to due process. *Kyllo*, 166 Wn.2d at 863–64; Const. art. I, § 3; U.S. Const. amend. XIV, § 1. In *Kyllo*, the court instructed the jury Mr. Kyllo acted in self-defense if he feared "great bodily harm," instead of correctly saying he need

fear only "injury." *Id.* Because the prosecution only had to prove Mr. Kyllo did not fear "great bodily harm," the instruction reduced the burden of proof. *Id.*; *see also LeFaber*, 128 Wn.2d at 900–01 (instruction requiring actual danger rather than a reasonable belief of imminent harm); *State v. Roberts*, 142 Wn.2d 471, 510–11, 14 P.3d 713 (2000) (instruction that a person is guilty if an accomplice to "a crime" rather than statutory phrase "the crime").

Here, the instruction defining premeditation reduced the prosecution's burden of proof. Instruction 11 allowed the jurors to believe they could convict Mr. Hribar of first-degree murder if he formed the intent to kill in only a moment, or even less, contrary to the law.

Instruction 11 informed the jury 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 11 (emphasis added). The instruction mirrors the pattern instruction. WPIC 26.01.01.

In requiring premeditation to span a period longer "than a moment in point of time," the instruction correctly recites a limitation imposed by statute. RCW 9A.32.020(1). The Legislature enacted this section to depart from the common law, which allowed conviction based on even a moment of deliberation. *State v. Griffith*, 91 Wn.2d 572, 577, 589 P.2d 799 (1979). Shortly after the criminal code took effect, this Court approved an instruction requiring "an appreciable length of time" as "an accurate statement of the law contained in" RCW 9A.32.020. *Id.*

Elsewhere, however, the instruction contradicts the statute by suggesting any period of deliberation is enough, even a moment or less. If the accused formed a "design to kill" after "any deliberation" for any amount of time, "however long or short," the instruction requires the jury to find the killing was premeditated. WPIC 26.01.01. If any period of deliberation, "however . . . short," permits a finding of premeditation, it necessarily follows that deliberation for a mere "moment in point of time" suffices.

The confusion within the instruction extends to the case law. This Court first stated that premeditation "encompasses the mental process of thinking beforehand . . . for a period of time, *however short*," in an opinion that does not so much as mention RCW 9A.32.020. *State v. Brooks*, 97 Wn.2d 873, 876 & n.3, 651 P.2d 217 (1982). Since then, courts routinely cite

the "more than a moment in point of time" and "however short" definitions side by side, without addressing the conflict. *E.g.*, *State v. Scherf*, 192 Wn.2d 350, 398, 429 P.3d 776 (2018); *State v. Hoffman*, 116 Wn.2d 51, 82–83, 804 P.2d 577 (1991); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987).

In fact, the undersigned found only one published opinion that even acknowledges the contradiction—it cites *Brooks* for the "however short" definition, then uses a "***but see***" signal to introduce RCW 9A.32.020(1). *State v. Eggleston*, 129 Wn. App. 418, 432, 118 P.3d 959 (2005).

The Court of Appeals correctly recognized the contradiction within WPIC 26.01.01, but reasoned a lay juror would reach a correct understanding of the law from the instruction as a whole. Slip op. at 10–11. The court acknowledged the final sentence of the

instruction refers to a period of time that need not be "more than" a mere moment. *Id.* at 10. Yet, it also noted the correct statement in the preceding sentence that "[p]remeditation must involve more than a moment in point of time," and the prior sentences defining the word as "thought over beforehand" and requiring "any deliberation." *Id.* at 10–11. In context, the court concluded, the final sentence "reasonably can be understood" as a definition of "moment." *Id.* at 11.

It is not enough that a reasonable juror *could* understand the instruction in a manner consistent with the law. The instruction must be so clear that no rational juror could reach the incorrect, unconstitutional interpretation. *Sandstrom v. Montana*, 442 U.S. 510, 519, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). That is not the case with WPIC 26.01.01.

While the Court of Appeals may have arrived at one reasonable reading, it did not explain why any rational lay juror would necessarily reach the same conclusion. Nor is the lower court's reading particularly reasonable. The final sentence of WPIC 26.01.01 simply does not purport to define the "moment in point of time" "more than" which Mr. Hribar needed to deliberate. It sums up the entire instruction by reciting, "The law requires some time, however long or short, in which a design to kill is deliberately formed." CP 27. A rational juror could readily conclude that, if Mr. Hribar formed a design to kill after only a moment, he was guilty of first-degree murder.

However, the Court of Appeals correctly held that this Court's past opinions upholding WPIC 26.01.01 do not control here. Slip op. at 8–9. In these cases, this Court addressed the argument the instruction did not

differentiate premeditated intent from mere intent to kill. *State v. Schierman*, 192 Wn.2d 577, 651–52, 438 P.3d 1063 (2018); *Scherf*, 192 Wn.2d at 400–01; *State v. Clark*, 143 Wn.2d 731, 770–71, 24 P.3d 1006 (2001); *State v. Benn*, 120 Wn.2d 631, 657–58, 845 P.2d 289 (1993); *State v. Rice*, 110 Wn.2d 577, 604, 757 P.2d 889 (1988). It did not address the conflict between "more than a moment" and "however short." Slip op. at 9.

Because a rational juror could read WPIC 26.01.01 to mean they could find Mr. Hribar guilty of first-degree murder if he deliberated for only a moment, contrary to the statute, the instruction reduced the prosecution's burden of proving premeditation. Mr. Hribar's conviction violates due process. *Kyllo*, 166 Wn.2d at 863–64; RAP 13.4(b)(3).

2. This Court should grant review because the premeditation instruction removes a factual issue from consideration, commenting on the evidence.

A judge may not comment on the evidence. Const. art. IV, § 16. An instruction is an improper judicial comment if it misstates the law so as to "resolve[] a contested factual issue" and "relieve[] the prosecution of its burden." *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

A jury instruction that calls on the jury to apply a lesser standard than required is an improper comment. *See State v. Sinrud*, 200 Wn. App. 643, 650–51, 403 P.3d 96 (2017). In *Sinrud*, the court told the jury it must find "substantial corroborating evidence of intent to deliver," and went on to say, "The law requires at least one additional corroborating factor." *Id.* at 649–50 (emphasis omitted). The final sentence was based on cases holding the evidence is sufficient for conviction if

such a factor exists. *Id.* However, juries do not decide whether the evidence is sufficient, but whether the prosecution proved guilt beyond a reasonable doubt. *Id.* at 650–51. In erroneously suggesting evidence of one corroborating factor necessarily established substantial corroborating evidence, the instruction removed the question from the jury and reduced the prosecution's burden. *Id.*

Likewise, here, WPIC 26.01.01 calls on the jury to find premeditation based on a lesser legal standard than the law requires. The instruction correctly recites "[p]remeditation must involve more than a moment in time." WPIC 26.01.01; *see* RCW 9A.32.020(1). But the following sentence says, "The law requires some time, *however long or short*, in which a design to kill is deliberately formed." WPIC 26.01.01 (emphasis added).

A reasonable juror could read these contradictory sentences to mean deliberation for any period of time, even an infinitesimal one, is enough for conviction. The sentence introducing the phrase "more than a moment in point of time" uses the word "must," conveying it states a rule the jury must apply. CP 27. But the following, contradictory sentence begins with the phrase "The law requires," appearing to emphasize its particular importance. CP 27. In concluding by saying "[t]he law requires some time, however long *or short*," the instruction conveys the inaccurate impression that "a moment in point of time" means any trifling amount of time, rendering the phrase meaningless.

In communicating to the jury that any fleeting instant of deliberation is enough for a premeditation finding, WPIC 26.01.01 removed from consideration the factual question of whether Mr. Hribar deliberated

for "more than a moment in point of time." RCW 9A.32.020(1). The instruction commented on the evidence. *Sinrud,* 200 Wn. App. at 650–51.

The Court of Appeals rested on its reasoning a rational juror could read the instruction consistently with the law. Slip op. at 12. As explained above, however, the court identified only one possible reading. *Supra* at 13–15. Because a rational lay juror could also read the instruction to mean only a moment of deliberation was sufficient, removing from the jury's consideration the question whether Mr. Hribar deliberated for "more than" a moment, the instruction is unconstitutional. *Sandstrom*, 442 U.S. at 519.

3. **Whether the premeditation instruction violates the state and federal constitutions makes a difference here because the error is not harmless.**

The prosecution must show beyond a reasonable doubt that the unconstitutional instruction did not

"contribute to the verdict." *State v. A.M.*, 194 Wn.2d 33, 41, 448 P.3d 35 (2019) (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)); *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013); *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). Moreover, a "comment is presumed prejudicial and is only not prejudicial if the record affirmatively shows no prejudice could have resulted." *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

The Court of Appeals did not address whether the constitutional infirmities in WPIC 26.01.01 were harmless beyond a reasonable doubt. Slip op. at 7–12.

The prosecution cannot eliminate the possibility that one or more jurors relied on the erroneously lax definition of premeditation to find Mr. Hribar guilty. The pull-out on Highway 6 where Mr. Hribar parked his truck was beyond Katula Road, where Mr.

Kowalsky lived, and Mr. Hribar likely would never have seen Mr. Kowalsky had he gone straight home from the mini mart. *Supra* at 3–6, Figures 1–4. A reasonable juror could have found Mr. Hribar did not park his truck at that location for the purpose of lying in wait to ambush Mr. Kowalsky.

The only other evidence to suggest Mr. Hribar may have formed premeditated intent after Mr. Kowalsky confronted him was that he paused between some of the shots. 10/12/23 RP 140; Ex. 202 Hribar pt 1 at 58:05–58:24. Had the court properly instructed the jury that premeditation must span "more than a moment," at least one juror may have found this brief interruption in firing did not suffice.

Instruction 11 reduced the prosecution's burden in violation of due process and commented on the evidence. The prosecution cannot show that no

reasonable juror could acquit based on a manifestly clear instruction, and it certainly cannot show the record affirmatively demonstrates a lack of prejudice.

4. This Court should grant review because the evidence affirmatively disproves premeditation.

The prosecution did not prove beyond a reasonable doubt that Mr. Hribar formed a premeditated intent to kill Mr. Kowalsky. In fact, the evidence affirmatively negates such an inference. This Court should grant review. RAP 13.4(b)(3).

Due process places on the prosecution "the burden of proving all the elements of an offense beyond a reasonable doubt." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); Const. art. I, § 3; U .S. Const. amend. XIV, § 1. This Court may affirm a conviction only if, viewed favorably to the prosecution, the evidence permits a rational factfinder to find all

elements of the offense beyond a reasonable doubt. *Rich*, 184 Wn.2d at 903.

To convict Mr. Hribar of first-degree murder as charged, the prosecution had to prove he acted with premeditated intent to kill Mr. Kowalsky. CP 9, 25; RCW 9A.32.030(1)(a); WPIC 26.02.

The prosecution's theory was that Mr. Hribar parked his pickup truck on the side of Highway 6, "in a place where he could see [Mr. Kowalsky] coming," to ambush Mr. Kowalsky on his return from the Pe Ell mini mart. RP 1356. But the pull-out made no sense as an ambush location because it was further away from the mini mart than Mr. Kowalsky's house. *Supra* at 3–6, Figures 1–4. If Mr. Kowalsky had gone straight home, he would not have passed Mr. Hribar's truck.

Moreover, not only did Mr. Hribar park at a place where Mr. Kowalsky was not certain to pass, but

Katula Road was not even visible from the pull-out. *Supra* at 3–6 Figures 1–4. Far from being "in a place where he could see [Mr. Kowalsky] coming," Mr. Hribar would not have been able to see Mr. Kowalsky turning on to Katula Road. RP 747–48, 1356.

No reasonable juror could conclude Mr. Hribar planned to lie in wait for Mr. Kowalsky at a place well beyond the intersection with Katula Road, from which he could not even see Mr. Kowalsky turn off the highway. *Rich*, 184 Wn.2d at 903. The prosecution did not prove premeditation.

Instead, the only reasonable inference is that, rather than go home, Mr. Kowalsky continued east on Highway 6—perhaps to follow Mr. Hribar. For a reason unrelated to attacking Mr. Kowalsky, Mr. Hribar backed into the pull-out—to turn around and go west, as he told police, or something else. 10/12/23 RP 115–

16; Ex. 202 Hribar Pt 1 at 32:02–32:42. Mr. Kowalsky stopped when he saw Mr. Hribar's truck, turned around to face west, and confronted Mr. Hribar. And Mr. Hribar shot him in a spur-of-the-moment act.

The Court of Appeals discounted this logical impossibility in holding the evidence sufficient for conviction. It reasoned a firefighter's testimony that he saw Mr. Hribar as he drove past Katula Road showed Mr. Hribar would have been able to see Mr. Kowalsky turn off the highway. Slip op. at 15. But the firefighter testified he had passed onto the bridge bordered by guardrails at this point, beyond Katula Road. RP 535. His testimony does not support an inference that Katula Road itself was visible from deep in the brush at the pull-out.

The physical impossibility of ambushing Mr. Kowalsky from the pull-out also negates the other

evidence the Court of Appeals relied on—that Mr. Hribar blamed Mr. Kowalsky for the fire that destroyed his trailer and that he stowed a shotgun in his truck before encountering Mr. Kowalsky that day. Slip op. at 17. Mr. Hribar simply could not have intended to ambush Mr. Kowalsky if he could not see Mr. Kowalsky coming. Br. of App. at 23–28.

The Court of Appeals's reasoning that the time needed to pump the shotgun to reload the chamber between shots is evidence of deliberation is contrary to this Court's precedent. Slip op. at 16. The mere act of killing, even if it "takes an appreciable amount of time," cannot alone sustain a conviction of first-degree murder. *State v. Bingham*, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). Pumping the shotgun would take the same amount of time whether or not Mr. Hribar deliberated on shooting Mr. Kowalsky. Nor does the

other evidence show Mr. Hribar paused for more than a moment between shots. Br. of App. at 28–34.

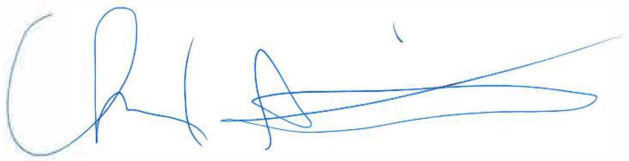
The evidence not only fell short of proof beyond a reasonable doubt, it was logically inconsistent with a finding of premeditation. As a result, Mr. Hribar's conviction violates due process. RAP 13.4(b)(3).

F. CONCLUSION

This Court should grant review.

Per RAP 18.17(c)(10), the undersigned certifies this petition for review contains 3,742 words.

DATED this 27th day of June, 2025.



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 3, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KELLY DAVID HRIBAR, Appellant.	No. 58982-6-II PART PUBLISHED OPINION

MAXA, P.J. – Kelly Hribar appeals his conviction of first degree murder of Leonard Kowalsky.[1] At trial, Hribar admitted to killing Kowalsky but denied that he acted with premeditation.

Hribar and Kowalsky's relationship was antagonistic because Hribar believed Kowalsky had burned down his trailer. Hribar told people that he would kill Kowalsky. After Hribar and Kowalsky encountered each other at a mini mart near Pe Ell, Hribar drove east on State Route (SR) 6. Hribar backed his truck into the brush just past Katula Road, the turnoff to Kowalsky's property. Kowalsky also drove east on SR 6, saw Hribar's truck, and stopped. Hribar then shot Kowalsky three times with a shotgun. Kowalsky died from his injuries.

[1] The jury also convicted Hribar of unlawful possession of a firearm. Hribar does not appeal that conviction.

RCW 9A.32.020(1) states that the premeditation necessary to convict a defendant for first degree murder "must involve more than a moment in point of time." The pattern jury instruction for premeditation states in part, "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." 11 WASHINGTON PRACTICE: PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 26.01.01 (5th ed. 2021) (emphasis added). The trial court gave that instruction as jury instruction 11.

Hribar argues that (1) jury instruction 11 was erroneous because the "some time, however long or short" phrase misstates RCW 9A.32.020(1)'s requirement that premeditation must involve "more than" a moment in point of time; and (2) because jury instruction 11 misstates the law of premeditation, the trial court unconstitutionally commented on the evidence.

We hold that jury instruction 11 accurately stated the law of premeditation and as a result, the trial court did not unconstitutionally comment on the evidence in jury instruction 11. In the unpublished portion of this opinion, we hold that the State presented sufficient evidence for the jury to find that Hribar acted with premeditation and that Hribar's assertions in his statement of additional grounds (SAG) either are meritless or not addressable on direct appeal.

Accordingly, we affirm Hribar's conviction of first degree murder.

FACTS

Hribar lived in Pe Ell in a trailer on another person's property. Kowalsky lived on Katula Road, near its intersection with SR 6 east of Pe Ell.

Around 7:00 PM on August 16, 2023, Trevor Pilz and his son KP heard a loud boom from their house located on SR 6 near its intersection with Katula Road. As the two approached the source of the noise, Trevor saw a vehicle driving at a high speed heading west on SR 6 toward Pe

Ell. He saw Kowalsky lying on the ground, with one leg propped against the open door of his vehicle. He observed that Kowalsky had been shot in the left arm and butt and hip area. Trevor and KP both stated that Kowalsky told them that Hribar had shot him. Kowalsky later died from his injuries.

The State charged Hribar with first degree murder and unlawful possession of a firearm. Hribar conceded that he shot Kowalsky, but he denied that he acted with premeditation. In addition to first degree murder, the trial court instructed the jury on the lesser degree offense of second degree murder.

Trial Testimony

A few months before the murder, Hribar was in a relationship with Sabra Burgess. Burgess was Kowalsky's sister. Hribar lived in a trailer on the property of Leo Baggenstos. In January 2023, Hribar's trailer caught on fire. Hribar's relationship with Burgess ended shortly thereafter.

Baggenstos stated that Hribar blamed Kowalsky and Burgess for the fire at his trailer. Hribar stated to Baggenstos, "It was [Kowalsky]. I'm going to kill him. He did this." Report of Proceedings (RP) at 840. Other witnesses also testified that Hribar blamed Kowalsky for the fire because of his relationship with Burgess. Sam Schouten, a patrol deputy who responded to the trailer fire, stated that Hribar believed Kowalsky did not approve of Hribar and Burgess's relationship and was upset. Rocky Elliott, who arranged a meeting between Hribar and Kowalsky to discuss the incident, stated that Hribar threatened there "would be a payday" with respect to Kowalsky. RP at 945-47. A person named Jerrald Jones stated that he heard Hribar mention killing Kowalsky the day before the murder.

On August 16, 2023, Hribar, Stacey Page, and Hribar's girlfriend Janene Wilson planned to drive to the river. Hribar was driving his pickup truck when it started smoking. Page stated that Hribar believed that Kowalsky had loosened the radiator clamp on his truck. Hribar parked the truck across the street from a mini mart. He walked back to Baggenstos's property to get another vehicle. Baggenstos came and picked up Page and Wilson and brought them back to his property. Hribar was there when they arrived.

At some point before 7:00 PM, Hribar left in a different truck to get his tools from the other truck. Hribar brought along his 12 gauge shotgun.

Melissa Harbin worked at the mini mart in Pe Ell, which is on the road that becomes SR 6. She knew Kowalsky and Hribar as regular customers.

Harbin was standing outside the store and saw Hribar drive into and park at the mini mart. Harbin stated that Hribar was aggravated about his vehicle's radiator and said he thought that Kowalsky had tampered with his vehicle. Harbin stated that Hribar then saw Kowalsky drive in front of the store, and Hribar said that he was going to find Kowalsky after Hribar was done at the store.

Hribar went into the store and purchased a drink from Harbin, and then he headed back outside. At the same time, Kowalsky entered the store and crossed Hribar's path. Harbin could not see whether Kowalsky and Hribar interacted with each other. Harbin observed Hribar drive east on SR 6 in the direction of Kowalsky's house. Kowalsky purchased something and left the mini mart.

Hribar did not testify at trial, but the State played his recorded interview with police for the jury. Hribar stated when he saw Kowalsky in the store, Kowalsky gave him "this look." RP at 113. After leaving the mini mart, Hribar drove east on SR 6. He decided to stop and figure

out how to have a conversation with Kowalsky. He pulled over just past Katula Road. Hribar stated that he wanted "a place where we could just talk, public, open." RP at 115.

Tanner Pilz,[2] a volunteer firefighter, was driving an ambulance east on SR 6 at about the same time. He saw a vehicle that had backed into the brush and parked in a pullout on SR 6 near Katula Road. He testified that from that location, a person could see the Katula Road cutoff.

According to Hribar, Kowalsky drove up behind him and came to a stop near his vehicle. Hribar said that Kowalsky spoke to him in a "threatening manner and tone." RP at 116. Hribar saw Kowalsky back up and turn around, and he thought that Kowalsky was heading toward his house possibly to get a gun. Hribar had the shotgun alongside his truck, and Kowalsky did not see it. Hribar grabbed his pump action shotgun and took three shots that "were not fast." RP at 117. Specifically, he stated that he fired a first shot, and then fired two more shots when Kowalsky appeared to be "trying to grab for something." RP at 140. But Hribar claimed that he was trying to wound Kowalsky, not kill him. Kowalsky fell out of his vehicle, and Hribar drove away.

There was evidence that to fire more than one shot from a pump action shotgun, the shooter must manually cycle new ammunition into the barrel with a pumping action after recovering from the kickback of prior shots.

Kathy Staley lived on SR 6 near Trevor Pilz. After hearing very loud gunfire, Staley went outside to investigate. She saw a truck backed up on a little driveway near her mailbox and a utility box facing SR 6. She saw a man standing outside the truck, and he appeared to be shooting across the roadway. She stated that she could see the man standing there and she

[2] Tanner Pilz is Trevor Pilz's cousin.

"could hear the shots going off." RP at 361-62. From where she stood, trees blocked her view of the road.

Staley was running back toward her house when she heard Kowalsky say, "Help, I've been shot." RP at 350. She started back toward the road and saw the truck leave at a high rate of speed. She saw that Kowalsky had been shot in his arm and torso. Kowalsky told her that Hribar had shot him.

A medical examiner stated that Kowalsky had a near amputation of the left forearm and a fractured hip. Kowalsky also had a penetrating wound to the left buttock that fractured his femur and damaged his bladder and bowel. The medical examiner determined that Kowalsky could have died from any of the multiple gunshot wounds.

Jury Instructions

The parties agreed on jury instructions. Jury instruction 11 was from WPIC 26.01.01, which stated,

> 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.

Clerk's Papers (CP) at 27. Hribar did not object to this instruction.

The trial court instructed the jury on first degree murder and the lesser offense of second degree murder. The jury convicted Hribar of first degree murder and found that he committed murder with a firearm.

Hribar appeals his conviction of first degree murder.

ANALYSIS

A. CHALLENGE TO WPIC 26.01.01

Hribar argues that jury instruction 11 – which was based on WPIC 26.01.01 – was ambiguous and misstated the law on premeditation, which reduced the State's burden of proof and violated his due process rights. He argues that RCW 9A.32.020(1)'s length of time requires for premeditation is longer than what jury instruction 11 required in order to convict him. We disagree.[3]

1. Standard of Review

We review alleged legal error in jury instructions de novo. *State v. Houser*, 196 Wn. App. 486, 491, 386 P.3d 1113 (2016). "Jury instructions are sufficient if, viewed as a whole, they allow the defendant to argue his or her theory of the case and accurately inform the jury of the applicable law." *State v. Wilson*, 10 Wn. App. 2d 719, 727, 450 P.3d 187 (2019). "The jury instructions, read as a whole, 'must make the relevant legal standard manifestly apparent to the average juror.' " *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)).

However, instructing the jury in a manner that relieves the State of its burden to prove every element of a crime beyond a reasonable doubt is a violation of due process and requires automatic reversal. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). And a jury instruction that permits the jury to convict a defendant under a lesser standard than required by law is erroneous. *See Kyllo*, 166 Wn.2d at 863-64 (holding that a jury instruction on self defense

[3] Hribar did not object to the premeditation jury instruction in the trial court. However, the State does not argue that this court cannot consider Hribar's challenges to jury instruction 11 for the first time on appeal. Accordingly, we address Hribar's arguments.

was erroneous because it required a defendant to apprehend a greater degree of harm than required by statute).

Statutory interpretation is a question of law that we review de novo. *State v. Abdi-Issa*, 199 Wn.2d 163, 168, 504 P.3d 223 (2022). The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. *Id.* To determine the legislature's intent, we first look to the plain language of the statute, considering the language of the provisions in question, how the provisions fit within the context of the statute, and the statutory scheme as a whole. *Id.* at 168-69. If a word is not defined in the statute, we can consider dictionary definitions to determine the word's ordinary meaning. *State v. Lake*, 13 Wn. App. 2d 773, 777, 466 P.3d 1152 (2020). We end the inquiry if the plain language of the statute is clear. *Abdi-Issa*, 199 Wn.2d at 169.

2. Legal Principles

RCW 9A.32.020(1) states, "the premeditation required in order to support a conviction of the crime of murder in the first degree must involve *more than a moment in point of time*." (Emphasis added.)

WPIC 26.01.01, the pattern jury instruction on premeditation, and jury instruction 11 stated:

> 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 at 27 (emphasis added).

The Supreme Court repeatedly has held that "WPIC 26.01.01 properly defines 'premeditation,' accurately states the law, and is not misleading." *State v. Schierman*, 192 Wn.2d 577, 651, 438 P.3d 1063 (2018); *see also State v. Scherf*, 192 Wn.2d 350, 400, 429 P.3d

776 (2018); *State v. Clark*, 143 Wn.2d 731, 770-71, 24 P.3d 1006 (2001). And courts have repeated the "however short" language from WPIC 26.01.01 when defining premeditation. *E.g.*, *State v. Gregory*, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006).

But as Hribar points out, the cases upholding WPIC 26.01.01 were decided on the grounds that the pattern instruction clearly distinguishes intent from premeditation. *Schierman*, 192 Wn.2d at 651-52 (holding that the pattern instruction makes abundantly clear the distinction between intent and premeditation); *Scherf*, 192 Wn.2d at 400 (holding that the pattern jury instruction is clear that intent and premeditation are not synonymous); *Clark*, 143 Wn.2d at 770-71 (holding that further challenges to the premeditation on instruction would be frivolous because the instruction clearly delineates between intent and premeditation); *State v. Benn*, 120 Wn.2d 631, 657-58, 845 P.2d 289 (1993) (distinguishing intent and deliberation).

No Washington court has expressly addressed whether WPIC 26.01.01's standard of "some time, however long or short" is inconsistent with RCW 9A.32.020(1)'s standard of "more than a moment in point of time."

3. Analysis

Hribar argues that WPIC 26.01.01's language is inconsistent with RCW 9A.32.020(1)'s definition of premeditation. Accordingly, the issue before this court is whether "some time, however . . . short" comports with RCW 9A.32.020(1)'s requirement that premeditation be for "more than a moment in point of time."

We start with the plain language of the statute. *Abdi-Issa*, 199 Wn.2d at 168-69. "Moment" is defined in the dictionary as a "a minute portion of time" or "a point of time: instant" and "a comparatively brief period of time." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1456 (2002). The word "minute" is defined as "a point or short space of time."

WEBSTER'S at 1440. The word "instant" is defined as "an infinitesimal space of time." WEBSTER'S at 1171. As related to time, "point" is defined as "a particular narrowly limited often critical interval of time singled out as occurring at a precisely indicated moment and having [usually] minimum duration or no relevant duration: exact moment: precise instant." WEBSTER'S at 1749. Under these definitions, a "moment in point of time" unambiguously refers to a minute portion of time, an instant, having a minimum duration. Under RCW 9A.32.020(1), premeditation must involve more than that period of time. In other words, premeditation must involve *more than* a short, brief, or infinitesimal space of time having minimum duration.

The last sentence of WPIC 26.01.01 is consistent with the phrase "moment in point of time" in RCW 9A.32.020(1). That sentence first states that the law requires "some time." This term appropriately reflects the definition of moment; a minute portion of time, an instant, is "some time." Similarly, the term "however short" also reflects the definition of moment. A minute portion of time can be as short as an instant, an infinitesimal space of time.

The potential problem is that the last sentence of WPIC 26.01.01 does not contain the term "more than." That sentence states that the period of time for premeditation can be very short. But it does not state that premeditation requires *more than* this very short period of time.

However, we cannot read the last sentence of WPIC 26.01.01 in isolation. *See Kyllo*, 166 Wn.2d at 864. The first sentence of WPIC 26.01.01 states the primary definition: "Premeditation means thought over beforehand." The second sentence of WPIC 26.01.01 requires "any deliberation." Even the last sentence of WPIC 26.01.01 states that the design to kill must be "deliberately formed." Based on this language, the court in *Scherf* stated, "The standard WPIC accurately states the applicable law – it defines premeditation as more than intent and *requires at least some deliberation*." 192 Wn.2d at 400 (emphasis added). A rational juror would

understand that thinking over something beforehand and deliberation requires *more than* a very short period of time.

WPIC 26.01.01 then states the statutory standard: "Premeditation must involve more than a moment in point of time." And the last sentence follows. The last sentence reasonably can be understood as explaining only the phrase "a moment in point of time"; a moment in point of time can be very short. With this understanding, the last sentence necessarily incorporates the "more than" requirement of the previous sentence. Premeditation requires *more than* some time, however short.

This interpretation is consistent with the long line of Supreme Court cases that have approved of WPIC 26.01.01. *E.g.*, *Schierman*, 192 Wn.2d at 651. We will not adopt an interpretation of WPIC 26.01.01 that contradicts those cases.

Accordingly, we hold that WPIC 26.01.01 does not misstate the law on premeditation, and the trial court did not err in giving jury instruction 11.

B. JUDICIAL COMMENT ON THE EVIDENCE

Hribar argues that because jury instruction 11 misstated the law of premeditation, giving the instruction amounted to an unconstitutional judicial comment on the evidence. We disagree.

Article IV, section 16 of the Washington Constitution prohibits a judge from commenting on the evidence. A trial court makes an improper comment on the evidence if it gives a jury instruction that conveys to the jury its personal attitude on the merits of the case. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). But because a trial court's duty is to declare the law, a jury instruction that does no more than accurately state the law pertaining to an issue is not an improper comment on the evidence. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213

(2015). We review the jury instructions de novo to determine if the trial court has improperly commented on the evidence. *Levy*, 156 Wn.2d at 721.

We hold above that WPIC 26.01.01 is consistent with RCW 9A.32.020(1)'s requirements for premeditation. Because the trial court instructed the jury on an accurate statement of law, it did not unconstitutionally comment on the evidence.

Accordingly, we hold that the trial court did not unconstitutionally comment on the evidence when it gave jury instruction 11.

CONCLUSION

We affirm Hribar's conviction of first degree murder.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion, we address Hribar's argument that the State did not present sufficient evidence to show that he acted with premeditation when he killed Kowalsky and Hribar's SAG claims. We hold that the evidence was sufficient for the jury to find that Hribar acted with premeditation and that Hribar's assertions in his SAG either are meritless or not addressable on direct appeal.

A. SUFFICIENCY OF THE EVIDENCE

Hribar argues that the State did not present sufficient evidence to prove beyond a reasonable doubt that Hribar acted with premeditation in killing Kowalsky. We disagree.

1. Legal Principles

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt

beyond a reasonable doubt. *State v. Bergstrom*, 199 Wn.2d 23, 40-41, 502 P.3d 837 (2022). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence, and we view the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). We defer to the trier of fact's resolution of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Bergstrom*, 199 Wn.2d at 41. And circumstantial and direct evidence are equally reliable. *Cardenas-Flores*, 189 Wn.2d at 266.

RCW 9A.32.030(1) states, "A person is guilty of murder in the first degree when: (a) 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." By contrast, second degree murder is when a person "[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person." RCW 9A 32.050(1)(a).

Under RCW 9A.32.020(1), "the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time." Premeditation requires the " 'deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.' " *Gregory*, 158 Wn.2d at 817 (quoting *State v. Hoffman*, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991)). Circumstantial evidence can prove premeditation if the evidence is substantial and the inferences drawn from the evidence are reasonable. *Gregory*, 158 Wn.2d at 817. But proof of premeditation requires more than the fact that the defendant had an opportunity to deliberate. *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986).

Four characteristics are relevant to proving premeditation: "motive, procurement of a weapon, stealth, and the method of killing." *State v. DeJesus*, 7 Wn. App. 2d 849, 883, 436 P.3d 834 (2019). In addition, in the context of murder with a firearm, Washington courts look to (1) the infliction of multiple wounds or shots, *Gregory*, 158 Wn.2d at 817; (2) a time interval or pause between shots, *State v. Ra*, 144 Wn. App. 688, 704, 175 P.3d 609 (2008); and (3) continued firing after missing a first shot. *Id.*

WPIC 26.01.01 defines the time requirement of premeditation in part as follows: "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." Hribar argues that jury instruction 11, which is based on WPIC 26.01.01, is erroneous. But we have rejected that argument. We therefore analyze Hribar's sufficiency claim under the instruction the trial court gave.

2. Analysis

Hribar argues that the evidence was insufficient for a jury to conclude he acted with premeditation for two reasons: (1) Hribar parked his truck beyond the road to Kowalsky's house, meaning that it is unreasonable to infer that he waited to ambush Kowalsky; and (2) the time between gunshots does not permit a reasonable inference of premeditation. We disagree.

a. Ambushing Kowalsky

Hribar argues that it is unreasonable to infer that he parked his truck along SR 6 to ambush Kowalsky. We disagree.

Hribar told the mini mart clerk that he was going to find Kowalsky after Hribar was done at the store. The evidence from Hribar himself and from firefighter Tanner Pilz showed that after Hribar left the mini mart, he drove east on SR 6 and then backed into the brush off the

highway just past Katula Road. Hribar admitted that he was waiting for Kowalsky, although he claimed he just wanted to talk with him.

Hribar had been angry at Kowalsky for a length of time before the murder. He thought that Kowalsky had burned down his trailer. Hribar told Leo Baggenstos that he was going to kill Kowalsky because of that. Jerrald Jones stated that he heard Hribar mention killing Kowalsky the day before the murder. A rational juror could infer that Hribar stopped and waited in the brush so he could confront and kill Kowalsky as he had threatened.

Hribar argues that the inference that Hribar was waiting to confront Kowalsky is unreasonable because Hribar parked beyond where Kowalsky would turn on Katula Road to go home and Hribar could not even see Katula Road from where he was parked. But Tanner Pilz testified that someone parked where Hribar did could see the Katula Road intersection. And it can be inferred that Kowalsky could see Hribar as he approached Katula Road because he drove past the road to his house to encounter Hribar. If Kowalsky could see Hribar, Hribar could see Kowalsky. Hribar's argument that he more likely would have parked *before* Katula Road if he intended to confront Kowalsky goes to the weight of the evidence, not its sufficiency.

Resolving reasonable inferences in favor of the State, a rational juror could find beyond a reasonable doubt that Hribar acted with premeditation because he parked in the brush along SR 6 for the purpose of confronting and killing Kowalsky.

b. Time Between Gunshots

Hribar argues that the timing of his three shots cannot support a reasonable inference of premeditation. We disagree.

A time interval or pause between shots is relevant to a finding of premeditation. *Ra*, 144 Wn. App. at 704. Hribar specifically stated that the three shots "were not fast." RP at 117. He

stated that he fired a first shot, and then fired two more shots when Kowalsky appeared to be "trying to grab for something." RP at 140. This statement is evidence of a pause between shots. And to operate the shotgun, Hribar needed to engage in a pumping action between shots in order to fire again. This evidence also shows that there must have been a pause between shots.

In addition, Staley testified that she heard gunfire and went to investigate. She then saw a man who appeared to be shooting across the highway. She saw the man standing there and "could hear the shots going off." RP at 361-62. This testimony is evidence that Hribar fired one shot, and then some time passed before he fired the second and third shots.

Resolving reasonable inferences in favor of the State, a rational juror could find beyond a reasonable doubt that Hribar acted with premeditation because he paused after shooting Kowalsky once and then some time passed before he fired the next two shots.

Hribar admits that Staley's testimony could allow an inference that he paused between shots. However, he argues that this testimony fails to establish premeditation because causation is a requirement under RCW 9A.32.030(1)(a) and the medical examiner testified that either of Kowalsky's gunshot wounds could have caused his death. Therefore, only the first shot may have been the cause of death and not the shots fired after deliberation.

But it is undisputed that Kowalsky was alive after the shooting and that he died later because of his wounds. Viewed in the light most favorable to the State, the evidence shows that both of Kowalsky's wounds contributed to his death.

c. Other Premeditation Factors

As discussed above, four additional characteristics are relevant to proving premeditation: "motive, procurement of a weapon, stealth, and the method of killing." *DeJesus*, 7 Wn. App. 2d at 883.

Hribar had a clear motive to kill Kowalsky – he blamed Kowalsky for burning down his trailer and in fact had threatened to kill Kowalsky. And he procured a weapon – he brought his shotgun with him when he went back to his vehicle. Hribar admits that these two factors support an inference of premeditation. And the manner of killing is discussed above – Hribar fired three shots with a pause after the first shot.

Hribar argues that there was no evidence of stealth because his truck was visible to anyone driving down SR 6. But Tanner Pilz testified that Hribar had parked his truck back into the brush. It can be inferred that even though Kowalsky apparently saw him, Hribar was attempting to hide in the brush until Kowalsky turned onto Katula Road. And Hribar admitted that Kowalsky could not see his shotgun because he had it alongside his truck. It can be inferred that Hribar was hiding the shotgun from Kowalsky.

Resolving reasonable inferences in favor of the State, a rational juror could find beyond a reasonable doubt that Hribar acted with premeditation based on these factors.

d. Summary

A rational juror could find beyond a reasonable doubt that Hribar waited to confront and kill Kowalsky, that Hribar paused for some time after his first shot, and that additional factors supported a finding of premeditation. Accordingly, we hold that the State presented sufficient evidence for the jury to convict Hribar of first degree murder.

B. SAG CLAIMS

Hribar makes three assertions in his SAG. First, Hribar states that the prosecutor's presentation of evidence regarding him driving his truck away from the scene of the crime was a mischaracterization of the evidence. He asserts that he specifically drove around Kowalsky to avoid killing him and he was unaware of the shotgun wound to Kowalsky's hip and buttock area.

But because Hribar does not inform the court of the "nature and occurrence" of any error, this claim is too vague to address. *See* RAP 10.10(c).

Second, Hribar asserts that the trial court or his defense counsel violated his constitutional rights because defense counsel previously represented Kowalsky's sister in criminal matters and asked her to leave the courtroom. The record contradicts Hribar's argument. Hribar's counsel placed on the record that he previously represented Kowalsky's sister because she frequently was in the court system. The trial court specifically asked Hribar if he was aware of this and comfortable with defense counsel continuing to represent Hribar. Hribar stated, "Absolutely. Yeah." RP at 228. The record does not reflect that Kowalsky's sister was asked to leave the courtroom.

Third, Hribar argues that the trial court violated his constitutional rights because the trial judge was Sabra Burgess's cousin and related by marriage to other members of Kowalsky's and Burgess's family. But Hribar's assertions rely entirely on matters outside the record. As a result, we cannot consider them on direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). These assertions are more properly raised in a personal restraint petition. *Id.*

CONCLUSION

We affirm Hribar's conviction of first degree murder.

MAXA, P.J.

We concur:

J.J., J.

GLASGOW, J.

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