No. 44365-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BOSWELL,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Double jeopardy protections do not permit Mr. Boswell's two convictions of attempted murder.

The Double Jeopardy Clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. amend. V; Const. Art. I, § 9. These constitutional provisions protect against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

> When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.

State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)).

Determining the unit of prosecution for an offense requires a court to determine legislative intent employing tools of statutory

construction. *State v. Leyda*, 157 Wn.2d 335, 342, 138 P.3d 610 (2006). The Supreme Court has siad:

> We consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent

Anderson v. Department of Corrections, 159 Wn.2d 849, 858, 154 P.3d 220 (2007). Washington law defines three "anticipatory" or inchoate offenses: solicitation, conspiracy and attempt. RCW 9A.28.020; RCW 9A.28.030, RCW 9A.28.040. Each of the three was adopted as part of a single legislative act. 1975 1st ex.s. c 260.[1]

As discussed at length in Mr. Boswell's initial brief, examining cases which have determined the unit of prosecution of other anticipatory offenses is useful starting point. Conviction under each statute requires an intent to achieve some criminal result and an overt or substantial step towards that end. The Supreme Court has already addressed the unit of prosecution for both solicitation and conspiracy. In each instance, the Court concluded the unit of prosecution is the intent which accompanies the act and not the overt act that follows. Thus, in *State v. Varnell*, the Court found because "the language of the

[1] While there have been a few minor amendments to the statutes, no substantive amendments have altered their basic terms.

solicitation statute focuses on a person's 'intent to promote or facilitate' a crime rather than the crime to be committed," the unit of prosecution for solicitation to commit murder is not the number of potential victims. 162 Wn.2d 165, 169, 170 P.3d 24 (2007). Similarly, in *Bobic*, the Court concluded an agreement to commit several different crimes constitutes a single count of conspiracy rather than separate counts for each crime the conspirators agreed to commit. 140 Wn.2d at 263-64. The court reasoned "[a] single agreement to commit a series of crimes by the same conspirators was present here as each crime was only one step in the advancement of the scheme as a whole." *Id.* at 266.

While the Court has not specifically addressed the unit of prosecution of attempt, it has determined the Legislature's intent in drafting RCW 9A.28.020, explaining, "[t]he attempt statute *focuses on the actor's criminal intent. . . .*" *State v. Luther*, 157 Wn.2d 63, 74, 134 P.3d 205 (2006) (italics in original). The Court explained further, "an attempt conviction results because of the defendant's 'bad intent' to commit the crime." *Id.* at 73. The language of the attempt statute mirrors the language in the solicitation and conspiracy statute. *Compare* RCW 9A.28.020(1) ("A person is guilty of [attempt] if, with intent to commit a specific crime, he or she does any act which is a

substantial step toward the commission of that crime"); RCW 9A.28.030(1) ("A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he or she offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime"); RCW 9A.28.040(1) (A person is guilty of conspiracy "when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." In light of the Court's determination that the "focus" of an attempt is "the actor's criminal intent," the common statutory structure of the three anticipatory offenses, and the statutes' common origin in a single legislative act, the unit of prosecution of an attempt is the criminal intent and not the one or more substantial steps towards achieving that end.

The State's response does not cite to, much less address, *Luther*, *Bobic*, or *Varnell*. There is no meaningful basis to distinguish those case here. The unit of prosecution in an attempt crime is the intent to commit the crime. Thus, Mr. Boswell could only be convicted of a single count of attempted murder.

2. The trial court erred in refusing Mr. Boswell's request to instruct the jury on third degree assault as a lesser included offense of attempted first degree murder as charged in this case.

Mr. Boswell requested the court instruct the jury on the included offense of third degree assault. RP 780-81. Without confining its analysis to the crimes as charged, and instead relying upon the since-abrogated case of *State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993), the trial court reasoned that an assault can never be a lesser offense of attempted murder because attempted murder can be committed without committing a battery. RP 785.

In his initial brief, Mr. Boswell offered a lengthy examination of the law concerning the availability of jury instructions. Particularly, Mr. Boswell has demonstrated, and the Supreme Court has readily admitted, the Court misapplied the standard of *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), for a period of years preceding its decision in *State v. Berlin*. 133 Wn.2d 541, 947 P.2d 700 (1997). *Harris* was decided during that period. *Harris* employed the misinterpretation of *Workman* common to other cases of that period.

The State responds that *Harris* purported to apply the *Workman* test because *Harris* cites to *Workman*. Brief of Respondent at 11. Importantly, the cases decided during the same era as *Harris* had not

failed to cite to *Workman*, but simply applied *Workman* incorrectly. Indeed, in *Davis*, *Curran*, and *Lucky*, the three cases expressly overruled by *Berlin*, the Court cited to *Workman* and purported to apply its rule. *State v. Curran*, 116 Wn.2d 174, 183, 804 P.2d 558, 563 (1991) (citing *Workman*); *State v. Davis*, 121 Wn2d 1, 4, 846 P.2d 527 (1993) (same); *State v. Lucky*, 128 Wn.2d 727, 732, 912 P.2d 483 (1996) (same). Citation to *Workman* aside, in *Berlin* it had nonetheless misapplied *Workman*. Thus, it is not enough for the State to point to a citation to *Workman* in *Harris* and from that conclude *Harris* properly applied the *Workman* test.

Harris explained it was applying the same misapplication as the Court had done in *Curran* and *Davis*, and later in *Lucky*. The Court said:

> The *legal* prerequisite for such an instruction fails, however; the greater offense of attempted murder in the first degree **can be** committed without necessarily committing an assault.

Harris, 121 Wn.2d at 321. It is clear, *Harris* was not examining the offense as charged but was considering other hypotheticals when it concluded it "can be committed" in other ways. In *Berlin*, the Court described its deviation from *Workman* as erroneously focusing upon "the elements of the pertinent charged offenses as they appeared in the context of the broad statutory perspective, and not in the more narrow

perspective of the offenses as prosecuted." *Berlin*, 133 Wn.2d at 547. That is precisely what *Harris* did.

That *Harris* was misapplying *Workman* is readily illustrated by the categorical nature of is conclusion – that assault may never be a lesser included offense of attempted murder. After *Berlin*, the focus is always upon the "offense as charged." Thus, if *Harris* did survive *Berlin*, its holding could be nothing more than that assault was not a lesser of attempted murder as charged in **that** case. It could not preclude assault as a lesser offense in other cases of attempted murder where the substantial step is an assault. As set forth, assault is a lesser offense of attempted murder as charged in this case.

Finally, in his opening brief, Mr. Boswell points to the Court's decision in *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), that attempted first degree murder and assault are the same offense in law; proof of attempted murder by assaultive conduct will always prove an assault. The State simply dismisses *Orange* because "it does not engage in lesser included analysis." Brief of Respondent at 11-12. But, as discussed in Mr. Boswell's prior brief, the same elements test employed in *Orange* mirrors the legal prong of the lesser included analysis. *Orange* made clear the double jeopardy

analysis must focus on the offense as charged and not simply the generic statutory language. 152 Wn.2d at 819-20 (rejecting lower courts' formulation of "'same elements' test [as] requir[ing] a court to compare a generic element in one offense to a specific element in a second offense"). That is remarkably similar to the Court's statement in *Berlin* that:

> Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met.

133 Wn.2d at 541.

The State's effort to brush *Orange* aside misses too much, as it cannot explain how one offense is the same offense as another, that is "identical in law," yet not legally an included offense. Where two offenses are lesser and greater offenses they are by definition the same offense for purpose of double jeopardy. *Brown v. Ohio,* 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (citing *In re Nielsen*, 131 U.S. 176, 187-188, 9 S. Ct. 672, 33 L. Ed. 118 (1889)).

Assault is by definition a lesser included offense of attempted murder.

3. Instructions 11 and 12 omitted an essential element of the crime of attempted first degree murder.

Mr. Boswell contends the trial court erred in omitting an essential element of attempted first degree murder from the "to convict" instructions – Instruction 11 and 12. Specifically, the instructions omitted the essential element of premeditation.

With respect to a "to convict" instruction, "it is the duty of the court to instruct the jury as to each and every essential element of the offense charged." *State v. Emmanuel*, 42 Wn.2d 799, 820-21, 259 P.2d 845 (1953); *accord, State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Premeditated intent is an essential element of the crime of attempted first degree murder. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995); *State v. Price*, 103 Wn. App. 845, 851-52, 14 P.3d 841 (2000). It is undisputed that neither Instruction 11 nor 12 contained the essential element of premeditation.

The State responds that *Vangerpen* does not apply because it addressed the essential elements rule as applied to a charging document as opposed to jury instructions. Brief of Respondent at 13-14. While the State is correct that *Vangerpen* concerned a challenge to the information, that is a distinction without a difference. *Vangerpen* applied the essential element rule which requires the State must "include

in the charging documents the essential elements of the crime alleged." *City of Auburn v. Brooke,* 119 Wn.2d 623, 627, 836 P.2d 212 (1992). That is precisely the same rule that requires the to-convict instruction contain "each and every essential element of the offense charged." *Emmanuel*, 42 Wn.2d at 820-21; *Smith*, 131 Wn.2d at 263.

When *Vangerpen* stated that jury instructions and charging documents serve different functions it did so as a rejection of the state's claim that the omission of an element from the information could be cured by its inclusion in the jury instruction. The Court was certainly not announcing a rule that a separate definition of the "essential elements of the offense" applies at different stages of the proceedings. The essential elements which must be pleaded in the information are the same essential elements which must be proved to a jury beyond a reasonable doubt.

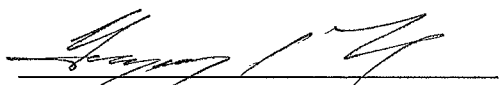
Premeditation is what differentiates first degree and second degree murder, and, by extension, it is what differentiates attempted first degree murder from attempted second degree murder. *Vangerpen* found premeditation is an essential element of attempted first degree murder. This Court must follow directly controlling authority of the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227

(1984). Thus, this Court must follow the conclusion of *Vangerpen* that premeditated intent is an element of attempted first degree murder.

B. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Boswell's convictions.

Respectfully submitted this 10th day of December, 2013.



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	)	NO. 44365-1-II
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	)	
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	)	
Appellant.	)	

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