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Court of Appeals No. 44365-1-II
Published at _Wn. App. _, 340 P.3d 971 (2014)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BOSWELL,

Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Michael Boswell asks this Court to accept review of the published opinion of the Court of Appeals in *State v. Boswell*, __ Wn. App. __, 340 P.3d 971 (2014).

B. OPINION BELOW

This Court has previously held assault and attempted first degree are the same crime in law and fact when the attempted murder charge is based on assaultive conduct. *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). Contrary to *Orange*, the Court of Appeals in a published opinion concluded assault can never be lesser included offense of attempted first degree murder. Additionally, although this Court in *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995) held premeditated intent is an essential element of the crime of attempted first degree murder the published opinion in this case concludes premeditated intent is **not** an essential element of the crime and thus need not be included in the jury instructions.

C. ISSUES PRESENTED

1. Due process requires a trial court to instruct on an lesser included offense when requested by the defendant, where (1) proof of the greater will also prove the lesser offense, and (2) in the light most

favorable to the defendant, the evidence supports an inference that only the lesser offense was committed. In a prosecution of attempted murder committed by assaultive conduct, assault is a lesser included offense of attempted murder. Did the trial court deny Mr. Boswell due process when it refused to provide the requested instructions on the offenses of third degree assault?

2. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This, in turn, requires a trial court to instruct the jury on each element of the offense. Premeditated intent is an essential element of the crime of attempted first degree murder. Instructions 11 and 12, the "to convict" instructions, omitted the element of premeditation. Did Instructions 11 and 12 relieve the State of its burden of proof?

3. The double jeopardy clauses of the federal and state constitutions bar multiple convictions based upon a single unit of prosecution. The unit of prosecution is the behavior or act which the legislature intends to criminalize. Interpreting the attempt statute, Supreme Court has previously held that the statute's focus is the "bad intent" of the defendant. Where Mr. Boswell acted with a singular

intent to kill another person, do his two convictions for attempted murder violate the double jeopardy provisions of the state and federal constitutions?

D. STATEMENT OF THE CASE

Although Jessica Fix had recently broken up with Mr. Boswell, the two continued to live with Ms. Fix's parents in Yacolt. RP 215, 233.

After she returned from work one night, Mr. Boswell prepared Ms. Fix a meal of pancakes and tea. RP 239. Several hours later Ms. Fix became nauseous and began vomiting. RP 242. Ms. Fix then fell asleep. She awoke to a loud ringing in her ear and found blood on the side of her head. RP 248-49. She saw Mr. Boswell sitting on the other side of the couch holding a gun. RP 249. Mr. Boswell explained he had tried to shoot himself and had inadvertently shot her. RP 250-51.

Ms. Fix took the gun from Mr. Boswell. RP 266. She then took a shower despite Mr. Boswell's pleas that she go to the hospital. RP 266-67, 269. Ms. Fix later drove herself to a Battleground store where she met friends who took her to a hospital. RP 268

Doctors determined the gunshot wound was not life-threatening. RP 351. However, they discovered Ms. Fix had extraordinarily high

liver enzyme levels, indicating she had potentially consumed a substantial amount of acetaminophen. RP 354-56, 506-08. This later condition was potentially life-threatening.

At Ms. Fix's house, police recovered a number of containers for medications containing acetaminophen as well as a mortar and pestle. RP 380-81. Cups taken from the house had traces of acetaminophen. RP 541-43.

Mr. Boswell explained that in an effort to take his own life he had crushed a large number of pills, including Tylenol PM, into a glass. RP 656-57. He then used a second glass as a shaker to help dissolve the medication. *Id.* This apparently left a large amount of the medication in the second glass which was then inadvertently consumed by Ms. Fix. *Id.* In the meantime, Mr. Boswell consumed the medication in his glass and quickly became nauseous. *Id.*

Failing in his first attempt to take his life, Mr. Boswell found a small-caliber decorative handgun. He laid on the L-shaped couch opposite from Ms. Fix. However, as he tried to fire, his arm slipped and he accidentally shot Ms. Fix. RP 671-77.

The State charged Mr. Boswell with two counts of attempted murder, one for the shooting and a second for allegedly attempting to

poison Ms. Fix with acetaminophen. CP 65-66. A jury convicted Mr. Boswell on both counts. CP 87-90.

E. ARGUMENT

1. Because this Court has found they are the "same" offense under the law, assault must be a lesser included offense of attempted first degree murder.

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.

Orange makes clear that assault is a lesser included offense of attempted murder. Indeed, *Orange* held the two offenses are the same in law and fact when attempted murder is based on assaultive conduct. 152 Wn.2d at 820. The analysis this Court employed in *Orange* mirrors the legal prong of the lesser-included analysis. *Compare*, *Orange*, 152 Wn.2d at 816-17 (Italics in original) *(*quoting *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) ("The applicable rule is that where *the same act or transaction* constitutes a

violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact* which the other does not."); *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (the legal prong requires each element of the lesser offense must necessarily be proved to establish the greater offense as charged).

Both the *Blockburger* and lesser-included tests include a comparison of elements. But neither analysis can be limited to the generic elements of the greater offense. *Berlin* stated:

> 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. *Orange*, too, rejected *the* reasoning of the Court of Appeals in that case "that, since murder could be attempted by all sorts of "substantial steps" other than assault (e.g., by lying in wait or constructing a bomb), attempted murder does not necessarily include assault." 152 Wn.2d at 818. Yet here, the Court of Appeals resorts to precisely that analysis. Opinion at 11. In doing so the court concluded as a matter of law an assault can never be an included offense of attempted murder. But that ignores the conclusion of *Orange* that in

circumstances such as this, the two offense are in fact the same offense in law.

Application of *Blockburger* led the *Orange* Court to conclude "proof of attempted murder committed by assault will always establish an assault," *Orange*, 152 Wash. 2d at 820. *Orange* plainly answers the question that where, as charged here, attempted murder is premised on assaultive conduct proof of the greater will always prove the lesser. Thus, the legal prong is satisfied. *Harris* is irreconcilable with *Orange*. It is logically impossible for two offenses to be the "same offense" yet at the same time not be an "included offense." The opinion of the Court of Appeals on this score is contrary to *Orange*.

Harris's analysis predates the Court's decision in *Berlin* in which the Court itself recognized its lesser-included analysis had strayed from its original underpinnings. Specifically, *Harris* was decided during a period in which the Court improperly narrowed the legal-prong analysis to focus on whether the lesser was always committed whenever a person committed the great offense. *See, e.g., State v. Curran*, 116 Wn.2d 174, 183, 804 P.2d 558 (1991), *abrogated by, Berlin*, 133 Wn.2d at 548. *Harris* itself termed this the "statutory approach." 121 Wn.2d at 323-24. *Harris* reasoned that because it was

possible under the broader statutory language to commit attempted murder without necessarily committing an assault, an assault could never be a lesser offense of attempted murder. *Harris*, 121 Wn.2d at 321. Four years later, in *Berlin*, the Court recognized that analysis was incorrect.

Berlin rejected the deviation from the *Workman* test employed in *Harris*. While the Court does not cite to *Harris* or for that matter many of its other lesser-offense cases of that era, it is clear that it repudiated the "statutory alternative" on which *Harris* rested. In *Berlin*, this 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(citing *State v. Lucky*, 128 Wn.2d 727, 735, 912 P.2d 483 (1996), *overruled*, *Berlin*, 133 Wn.2d at 548).

> [The] consequence of this rule is that whenever there are alternative means of committing a "greater" crime, there can be no lesser included offense unless the alternative means each overlap to the extent that they are not mutually exclusive.

Lucky, 128 Wn.2d at 735 (*see also*, *Curran*, 116 Wn.2d at 183, *abrogated by*, *Berlin*, 133 Wn.2d at 548). That is precisely the

formulation of the rule *Harris* employed. Indeed, there would have been no reason for *Harris* to use a different to rule, as *Curran* announced that rule two years prior to *Harris*; *Lucky* reaffirmed that it remained the rule three years after *Harris*; and not until four years after *Harris* did the Court repudiate the rule.

Contrary to the analysis in *Harris*, it is no longer relevant whether one might hypothetically commit attempted murder without committing an assault. Instead, the legal prong requires a court determine only whether the assault is an included offense of attempted murder as charged and prosecuted in the case at hand. *Berlin*, 133 Wn.2d at 548.

As set forth, assault is a lesser offense of attempted murder as charged in this case. Because the Court of Appeals reached the contrary conclusion this Court should accept review under RAP 13.4.

2. Contrary to this Court's decision in *Vangerpen*, the Court of Appeals concluded premeditation is not an essential element of attempted first degree murder.

The jury-trial guarantees of the Sixth Amendment and Article I, section 22 of the Washington Constitution, and the Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, section 3 of the Washington Constitution, require the State prove

each element to a jury beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). Thus each element of the offense must be submitted to the jury. *United States v. Gaudin*, 515 U.S. 506, 509-10, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

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). A corollary rule requires the charging document include each essential element of the offense. *Vangerpen*, 125 Wn.2d at 787.

Premeditated intent is an essential element of the crime of attempted first degree murder. *Id.* at 782; *State v. Price*, 103 Wn. App. 845, 851-52, 14 P.3d 841 (2000). Thus, *Vangerpen* concluded the omission of the element of premeditation from an information violated the essential elements rule could not support a conviction of first degree murder only second degree murder. *Id*

There is no doubt *Vangerpen* concluded premeditation is an essential element of attempted first degree murder as that was the only element omitted in the information.

In discussing the facts of the case, the Court explained:

> The prosecutor inadvertently omitted the **statutory element of premeditation** and therefore, although the charging document purported to charge "attempted murder in the first degree", the information failed to contain all the essential elements of that crime

Id. at 785 (emphasis added). The Court explained further the "prosecuting attorney agreed that **premeditation** should have been alleged in the charging document and moved to amend the Information to include that **element**." *Id.* (Emphasis added.)

The Court stated the issues as:

> Should the State be permitted to amend the charging document after the State has rested its case in order to add an **essential element** of the crime which was inadvertently omitted from the document?

Id. at 786 (Emphasis added.).

The State argued:

> . . . that the omission of the element of "premeditation" was only a "scrivener's" error and relies on the cases which hold that technical defects can be remedied midtrial. . . . However, omission of an **essential statutory element** cannot be considered a mere technical error.

Id. (Emphasis added.)

Two points are made abundantly clear by the forgoing, and indeed were not even in dispute in *Vangerpen*. The element at issue in was premeditation, and that premeditation is an essential element. The Court explicitly says so no fewer than four times. Nonetheless, the Court of Appeals in this cases states "*Vangerpen* does not articulate what the essential elements of attempted first degree murder are." Opinion at 14. Regardless of whether it identified each of the essential elements of the crime, it is impossible to conclude *Vangerpen* did not identify premeditation as one of those essential elements.

Ultimately, the Court of Appeals dismisses *Vangerpen* saying:

> [b]ecause *Vangerpen* addresses whether the language used in the information in that case properly charged the defendant with attempted first degree murder, not what all the essential elements of first degree murder are. . . .

Opinion at 14. This statement looks past the fact that the "language used" omitted the element of premeditation. The Court reversed the first degree murder conviction solely because of the omission of the element of premeditation saying:

> the information alleged only intent to cause death, not premeditation. Therefore, the State failed to charge one of the statutory elements of first degree murder and instead included only the mental element required for second degree murder.

125 Wn.2d 791. If premediated intent is necessary to differentiate first degree attempted murder from second degree attempted murder, and *Vangerpen* says it is, premediated intent is an essential element of the former. "'Elements' are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime." *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).

When *Vangerpen* found the essential elements rule was violated by omission of the element of premeditation in the information, that conclusion undeniably rested upon the predicate conclusion that premeditation is an essential element of attempted first degree murder. Because it is an essential element of the offense, the omission of premeditation from the to-convict instruction was error. *Smith*, 131 Wn.2d at 263,

The Court of Appeals's conclusion that premeditation is not an element, and thus need not be included in the to convict, is contrary to *Vangerpen* and a host of decisions by this Court applying the essential elements rule. Further, the opinion presents a significant constitutional question. Review is proper under RAP 13.4

3. 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)).

The unit of prosecution then is the criminal conduct which the legislature sought to punish. *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). 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). If the legislature has failed to specify the unit of prosecution in the statute, or if its intent is not clear, the court resolves any ambiguity in favor of the defendant. *Tvedt*, 153 Wn.2d at 711.

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.

This 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 Each of the three was adopted as part of a single legislative act. 1975

1st ex.s. c 260.[1] *Luther's* interpretation of the legisaltive intent in drafting the attempt statue is consistent with this Court's interpretation of the intent of the remaining two anticipatory offenses. In each instance, this Court has concluded the unit of prosecution is the intent which accompanies the act and not the overt act that follows.

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. The Court went on to note that as an inchoate crime, all that was needed for conviction was an agreement and a substantial step, no other criminal act was required. *Id.* at 265.

In *State v. Varnell*, the Court found because "the language of the 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

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

victims. 162 Wn.2d 165, 169, 170 P.3d 24 (2007). Because it too was interpreting an inchoate crime, *Varnell* found it particularly important to look to the *Bobic*'s interpretation of the solicitation statute. *Id.* at 170. The Court recognized a

> The fact that no crime is actually committed is no defense under the statute. Both solicitation and conspiracy exist independent of any crimes actually committed pursuant to the agreement of solicitation or conspiracy.

Id, at 170. The same is true of attempt - no crime must be committed and in fact impossibility is not a defense. *Luther*, 157 Wn.2d at 74.

Rather than rely upon *Luther* or look to this Court's cases defining the legislative intent in drafting the remaining two-thirds of the act which create the attempt statute, the Court of Appeals chooses instead to look at cases defining the unit of prosecution for crimes requiring a completed act. Opinion at 8-10. That reliance misses the fundamental distinction between anticipatory and completed offenses. A completed offenses may always be defined by a criminal act, as without that act there is not crime. An anticipatory offense, by contrast, is criminal not because of any act but rather because of the criminal intent to precedes it. Indeed, an anticipatory offense is criminal even if no other criminal act occurs. *Varnell*, 162 Wn.2d at 170. It is illogical

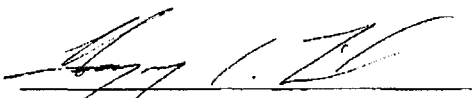
to conclude the unit of prosecution of an anticipatory offense is an act which is not even required for conviction.

There is no meaningful basis to distinguish this case from *Luther*, *Bobic*, or *Varnell*. The opinion in this case is contrary to the Court's opinion I those case. 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. This Court should accept review under RAP 13.4.

E. CONCLUSION

For the reasons set forth above, this Court should accept review of Mr. Boswell's case.

Respectfully submitted this 25th day of February, 2015.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL BOSWELL, Appellant.	No. 44365-1-II ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **December 30, 2014** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Maxa, Lee

DATED this 10th day of February, 2015.

FOR THE COURT:

Worswick J
PRESIDING JUDGE

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DIVISION II
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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL TODD BOSWELL, Appellant.	No. 44365-1-II PUBLISHED OPINION

LEE, J. — A jury found Michael Todd Boswell guilty of two counts of attempted first degree murder. Boswell appeals, arguing that (1) double jeopardy bars his conviction for two counts of attempted murder, (2) the trial court erred by refusing to instruct the jury on attempted third degree assault as a lesser included offense, and (3) the jury instructions on attempted first degree murder omitted an essential element of the crime. Because we hold that the unit of prosecution for attempted murder is based on a course of conduct, Boswell's convictions for two counts of attempted murder do not violate double jeopardy. We further hold that third degree assault is not a lesser included offense of attempted murder and that the jury instructions included all essential elements of attempted first degree murder. Accordingly, we affirm.

FACTS

Boswell and Jessica Fix had been in a romantic relationship. About a month before November 14, 2011, Fix told Boswell that she wanted to end their relationship. Boswell became very upset and was crying, so Fix decided to stay with him. Just prior to November 14, Fix again discussed ending their relationship, but Boswell again became upset and Fix did not end the relationship.

Early in the morning on November 14, Fix returned home from working the prior evening, and Boswell made her peppermint tea. After drinking the tea, Fix became nauseous, began vomiting, and then fell asleep on the living room couch.

Later, Fix woke up with a loud ringing in her ears and blood dripping from her head. She saw Boswell sitting on the opposite side of the couch holding a gun. Fix left the house and went to the hospital. At the hospital, Fix was treated for a brain hemorrhage and liver failure. Doctors determined that Fix's head wound was consistent with a gunshot wound and that her liver failure was caused by an extremely high dose of acetaminophen.

The State charged Boswell with two counts of attempted first degree murder. Count 1 alleged that Boswell "on or about November 14, 2011, with a premeditated intent to cause the death of another person . . . did an act which was a substantial step toward the commission of that crime." Clerk's Papers (CP) at 62. Count 2 alleged that Boswell "on or about November 14, 2011, at a separate time than the acts charged in Count 1, with a premeditated intent to cause the death of another person . . . did an act which was a substantial step toward the commission of that crime." CP at 62.

At trial, Boswell testified that Fix's injuries were caused by his failed suicide attempts. First, Boswell crushed a large amount of Tylenol and methocarbamol in a glass and then used a second glass as a shaker to help dissolve the pills in the liquid. Then, he inadvertently put Fix's tea in the second glass containing a large amount of Tylenol residue. He became ill after consuming the medication he mixed for himself but failed in his suicide attempt. After his failed suicide attempt with the Tylenol, Boswell decided to attempt to take his own life with a gun. Boswell's arm slipped when he attempted to shoot himself, and he accidentally shot Fix in the head.

Boswell requested that the trial court instruct the jury on third degree assault as a lesser included offense of the attempted first degree murder predicated on the shooting. The trial court concluded that third degree assault was not a lesser included offense of attempted first degree murder and did not instruct the jury on third degree assault.

The trial court gave the following "to convict" instruction on the attempted first degree murder charge in count 1:

> To convict the defendant of the crime of Attempted Murder in the First Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 14, 2011, the defendant did an act that was a substantial step toward the commission of Murder in the First Degree;
>
> (2) That the act was done with the intent to commit Murder in the First Degree; and
>
> (3) That the act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 80. The "to convict" instruction on the attempted first degree murder charge in count 2 contained the same elements. CP at 81.

The jury found Boswell guilty of both counts of attempted first degree murder. Boswell appeals.

ANALYSIS

A. DOUBLE JEOPARDY

Boswell argues that double jeopardy bars his convictions for two counts of attempted first degree murder because the unit of prosecution for crimes of attempt is the intent to commit the crime and not each substantial step toward committing that crime. We disagree.

The United States and Washington Constitutions prohibit double jeopardy. U.S. CONST. amend. V; WASH. CONST. art 1, § 9. We review alleged double jeopardy violations de novo. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). "The prohibition on double jeopardy generally means that a person cannot be prosecuted for the same offense after being acquitted, be prosecuted for the same offense after being convicted, or receive multiple punishments for the same offense." *Villanueva-Gonzalez*, 180 Wn.2d at 980.

Although Boswell alleges a constitutional error, determining whether Boswell's convictions constitute multiple punishments for the same offense requires determination of legislative intent and presents a question of statutory interpretation. *Villanueva-Gonzalez*, 180 Wn.2d at 980. "The legislature is tasked with defining criminal offenses, and the prohibition on double jeopardy imposes '[f]ew, if any, limitations' on that power.'" *Villanueva-Gonzalez*, 180 Wn.2d at 980 (quoting *Sanabria v. United States*, 437 U.S. 54, 69, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978)).

When a defendant has multiple convictions under the same statutory provision, we determine whether there is a double jeopardy violation by asking "'what act or course of conduct has the Legislature defined as the punishable act.'" *Villanueva-Gonzalez*, 180 Wn.2d at 980 (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). Boswell was convicted of two counts of attempted first degree murder under RCW 9A.28.020 and RCW 9A.32.030. Therefore, we must determine what act or course of conduct the legislature intended as the punishable act under RCW 9A.28.020 and RCW 9A.32.030. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000) (citing *Adel*, 136 Wn.2d at 634), *review denied*, 143 Wn.2d 1009 (2001).

RCW 9A.28.020(1) states:

> A person is guilty of an attempt to commit a crime 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.

And, RCW 9A.32.030 states, in part:

> (1) 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.

Therefore, attempted first degree murder requires (1) intent to commit first degree murder and (2) a substantial step toward committing first degree murder.

Boswell argues that the unit of prosecution for attempted murder is defined by the defendant's intent to commit the murder and relies on cases analyzing the unit of prosecution for other inchoate offenses such as solicitation and conspiracy. Specifically, Boswell relies on *State v. Varnell*, 162 Wn.2d 165, 170 P.3d 24 (2007) (unit of prosecution for solicitation) and *State v. Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000) (unit of prosecution for conspiracy) to support his proposition that a defendant may only be convicted of one count of attempted first degree murder

for every act taken to further the intent to kill a person.[1] These cases, however, do not support Boswell's proposition because the unit of prosecution for solicitation and conspiracy is different than the unit of prosecution for attempted murder.

Varnell and *Bobic* did not determine the unit of prosecution for solicitation and conspiracy based exclusively on the defendant's intent. Rather, they focus on the actual *act* that is necessary to commit solicitation or conspiracy. In *Varnell*, the defendant was convicted of five counts of solicitation to commit murder based on one conversation in which he asked an undercover officer to kill four people. 162 Wn.2d at 167-68. Our Supreme Court reversed, reasoning that the unit of prosecution for solicitation was the act of promoting or facilitating a crime rather than the crime the defendant was soliciting. *Varnell*, 162 Wn.2d at 169. Therefore, the defendant could only be convicted of one count of solicitation based on one conversation regardless of how many crimes the defendant solicited during that conversation. *Varnell*, 162 Wn.2d at 170.

Similarly, in *Bobic* the defendants were convicted of one count of conspiracy for each crime they conspired to commit (conspiracy to commit first degree theft, conspiracy to commit first degree possession of stolen property, and conspiracy to commit first degree trafficking in

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[1] Boswell also relies on *State v. Luther*, 157 Wn.2d 63, 134 P.3d 205, *cert. denied*, 549 U.S. 978 (2006), for the proposition that our Supreme Court has already established that attempt is defined by intent rather than action. But, Boswell's reliance on *Luther* is misplaced. In *Luther*, the court held that there was sufficient evidence to support a conviction for attempted possession of child pornography if the State provided that the defendant believed he was possessing child pornography or clearly intended to obtain child pornography, regardless of whether the State proved that the sexually explicit images were actually children. 157 Wn.2d at 73-74. A large portion of the *Luther* analysis rested on the fact that the defendant's argument was essentially an impossibility defense which the legislature has specifically stated is not a defense to criminal attempt. *Luther*, 157 Wn.2d at 73-74. Therefore, *Luther* provides no guidance in determining the appropriate unit of prosecution for attempted first degree murder.

stolen property). 140 Wn.2d at 256. Again, our Supreme Court focused on the *act* necessary to commit conspiracy—an agreement to engage in a criminal enterprise. *Bobic*, 140 Wn.2d at 265. Therefore, our Supreme Court held that the appropriate unit of prosecution for conspiracy is the agreement to engage in a criminal enterprise, not the number of crimes that could be committed in the course of carrying out that criminal enterprise. *Bobic*, 140 Wn.2d at 265.

Thus, contrary to Boswell's assertion, *Varnell* and *Bobic* do not stand for the proposition that the unit of prosecution for all inchoate crimes is based on the defendant's intent. Rather, they stand for the proposition that the unit of prosecution for inchoate crimes is the act necessary to support the inchoate offense, not the underlying crime.

Boswell argues that if the unit of prosecution for attempt is based on the act rather than the intent, the State will be able to charge a defendant with one count for each substantial step taken toward commission of the crime (e.g., separate counts for each shot fired in an attempt to kill someone or procuring a gun, driving to the scene, waiting at the scene, etc.). But, as the State points out, Boswell's interpretation also leads to an absurd result. Under Boswell's unit of prosecution analysis, a defendant could only ever be charged with one count of attempted murder against one victim, regardless of how many attempts the defendant makes on the victim's life. For example, as the State points out, Boswell could be released from prison, make another attempt on Fix's life, and, as long as he does not succeed, he could not be charged with another count of attempted first degree murder. It is clear that the legislature did not intend such a result. *The Boeing Co. v. Doss*, 180 Wn. App. 427, 437, 321 P.3d 1270 (2014) ("'We do not interpret statutes to reach absurd and fundamentally unjust results.'") (quoting *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994)); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)

(We do not interpret statutes to reach "'absurd results'") (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003)).

Although we agree with Boswell that the unit of prosecution for attempted first degree murder should not allow the State to arbitrarily charge an unlimited number of counts based on each substantial step taken toward the commission of first degree murder, we also agree with the State that Boswell's interpretation cannot be what the legislature intended. Therefore, we adopt the analysis used to determine the unit of prosecution for offenses that involve a continuing course of conduct. Under this analysis, double jeopardy does not bar Boswell's convictions for two counts of attempted first degree murder.

State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010), and *State v. Chouap*, 170 Wn. App. 114, 285 P.3d 138 (2012) provide a reasonable analytical structure to determine the appropriate unit of prosecution for first degree attempted murder. In *Hall*, the defendant was convicted of three counts of witness tampering after calling a witness over 1,200 times in an attempt to convince her not to testify against him. 168 Wn.2d at 729. Our Supreme Court held that the unit of prosecution for witness tampering is the "ongoing attempt to persuade a witness not to testify in a proceeding." *Hall*, 168 Wn.2d at 734. Because the defendant's conduct was continuous, aimed at a single person, and meant to tamper with her testimony in a single proceeding, there was only one unit of prosecution. *Hall*, 168 Wn.2d at 736. However, our Supreme Court noted circumstances in which multiple units of prosecution could be present:

> Our determination might be different if Hall had changed his strategy by, for example, sending letters in addition to phone calls or sending intermediaries, or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign.

Hall, 168 Wn.2d at 737.

In *Chouap*, the defendant was convicted of two counts of attempting to elude a police vehicle based on events that occurred during the same evening. 170 Wn. App. at 118-21. We determined that the defendant's convictions did not violate double jeopardy because the "second pursuit was separated from the first by time, by Chouap's return to lawful driving, and by different pursuing police officers." *Chouap*, 170 Wn. App. at 125.

Reading *Hall* and *Chouap* together, the proper analysis to determine the unit of prosecution for crimes involving a course of conduct is whether there are facts that make each course of conduct separate and distinct. Factors that can be considered in addressing whether each course of conduct is separate or distinct include the method used to commit the crime; the amount of time between the two courses of conduct; and whether the initial course of conduct was interrupted, failed, or abandoned. *Hall*, 168 Wn.2d at 737-38.

Here, Boswell engaged in two separate distinct courses of conduct in his attempts to take Fix's life. First, he attempted to poison her by crushing pills, mixing them in tea, and giving the tea to her. After this attempt on Fix's life failed, there was a period of time before Boswell engaged in his second course of conduct. Fix was sleeping and Boswell had a period of time to consider his actions after Fix fell asleep. Then Boswell acquired the gun and shot Fix in the head. Because Boswell employed different methods of attempting to kill Fix, the attempts were separated by a period of time and the second attempt began only after the first attempt had failed, Boswell's two convictions properly represent two units of prosecution. Even Boswell's own testimony supports this analysis. Boswell admitted that his first plan to take his own life was limited to using the Tylenol. It was only after that plan failed that Boswell formulated the plan to use the gun. There

was no evidence that Boswell's original plan included using both the Tylenol and the gun as part of one continuous plan.

Using a course of conduct analysis to determine the appropriate unit of prosecution for attempted first degree murder clearly leads to the most sensible result. It prevents the State from arbitrarily charging multiple counts based on each conceivable substantial step leading up to the commission of the crime, and it allows the State to hold defendants accountable for repeated attempts on one victim's life. Based on this analysis, we hold that Boswell's two convictions for attempted first degree murder do not violate the constitutional prohibition against double jeopardy.

B. LESSER INCLUDED OFFENSE

Boswell asserts that the trial court erred by refusing to instruct the jury on third degree assault as a lesser included offense. *State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993), resolves this issue. However, Boswell argues that the rule in *Harris* has been implicitly rejected by subsequent case law applying the *Workman*[2] test to determine lesser included offenses. We disagree.

A defendant is entitled to an instruction on a lesser included offense if two conditions are met:

> First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (internal citations omitted). We review the first element of the test, the legal prong, de novo. *State v. LaPlant*, 157 Wn. App. 685,

[2] *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

687, 239 P.3d 366 (2010). And, we review the second prong of the test, the factual prong, for an abuse of discretion. *LaPlant*, 157 Wn. App. at 687.

In *Harris*, our Supreme Court held that assault is not a lesser included offense of *attempted* murder because, the legal prong of the *Workman* test was not met. 121 Wn.2d at 321. The court explained that under the legal prong "if it is possible to commit the greater offense without committing the lesser offense, the latter is not an included crime." *Harris*, 121 Wn.2d 320 (citing *State v. Bishop*, 90 Wn.2d 185, 191, 580 P.2d 259 (1978)). The court reasoned that, to commit attempted murder, the defendant must take a substantial step toward committing the murder, but that step does not necessarily require the defendant to commit an assault (obviously an element of first degree assault). *Harris*, 121 Wn.2d at 321. *Harris* controls the outcome of this case, and we hold that the trial court did not err by refusing to give Boswell's proposed instruction on third degree assault as a lesser included offense of attempted first degree murder.

Boswell argues that the rule in *Harris* is no longer good law because our Supreme Court has implicitly abrogated the rule announced in *Harris*. Boswell cites primarily to *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997), to support his proposition.

Boswell's reliance on *Berlin* is misplaced. Boswell reads *Berlin* as instructing us to consider the crimes as charged when determining whether a lesser included instruction is appropriate; therefore, the analysis in *Harris* is improper because it categorically states that assault cannot be a lesser included offense of attempted murder. Under Boswell's application of *Berlin*, third degree assault is a lesser included offense of attempted murder in this case because, by shooting Fix in the head, Boswell necessarily committed third degree assault. But Boswell's

analysis is based on a misreading of *Berlin*, a misapplication of the law our Supreme Court articulated in *Berlin*, and a conflation of the two prongs of the *Workman* test.

In *Berlin*, the defendant was charged with second degree murder with intentional murder and felony murder charged as alternative means. 133 Wn.2d at 550. Our Supreme Court held that manslaughter can be a lesser included offense of second degree murder. *Berlin*, 133 Wn.2d at 551. In doing so, the court reaffirmed its adherence to the *Workman* test and clarified the application of the legal prong of the test. *Berlin*, 133 Wn.2d at 548, 550-51.

The court explained that under the legal prong of the *Workman* test, the court examines the statutory elements of the crime charged, not the statute as a whole. *Berlin*, 133 Wn.2d at 548. However, this clarification is relevant only so far as the statute under which the defendant is charged presents alternative means of committing the crime. *Berlin*, 133 Wn.2d at 548. Therefore, the rule under *Berlin* is that when a defendant is charged with an alternative means crime, the court determines whether a lesser included offense instruction is appropriate based on the alternative means charged, not the statute as a whole. 133 Wn.2d at 550 ("We emphasize that both the statutory language of RCW 10.61.006 and the language of *Workman* necessitate that we examine the elements of the offense *charged.*"). Attempt is not an alternative means crime. Therefore, the clarification articulated in *Berlin* does not apply. *Berlin* does not change or undermine the analysis employed by our Supreme Court in *Harris*.

Furthermore, nothing in *Berlin* stands for the proposition that we are required to examine the elements of the offense based on the alleged facts supporting the charge. Rather, *Berlin* is clear—when examining the legal prong of the *Workman* test we look at the statutory elements of the crime to determine whether each element of the lesser offense is a necessary element of the

charged offense. 133 Wn.2d at 550-51. We do not examine the facts underlying the charge unless we reach the factual prong of the *Workman* test. *Berlin*, 133 Wn.2d at 551. Accordingly, contrary to Boswell's assertion, there is nothing in *Berlin* that supports deviating from the rule or analysis articulated by our Supreme Court in *Harris*. We hold that the trial court did not err in refusing to instruct the jury on third degree assault as a lesser included offense to attempted murder.

C. JURY INSTRUCTIONS

Finally, Boswell argues that the "to convict" jury instructions omitted an essential element of the crime because the jury instruction failed to include the element of premeditation.[3] We disagree.

We explicitly rejected this argument in *State v. Reed*, 150 Wn. App. 761, 208 P.3d 1274, *review denied*, 167 Wn.2d 1006 (2009). We held that the essential elements of attempt are (1) the specific intent to commit a crime and (2) a substantial step toward committing that crime. *See Reed*, 150 Wn. App. at 772-73. As we explained:

> Reed's argument conflates the intent necessary to prove an attempt with that necessary to prove first degree murder. The State did not charge Reed with completed first degree murder; thus, to prove only an attempt to commit first degree murder, the State was not required to prove that Reed acted with premeditated intent to commit murder, only that he attempted to commit murder.

Reed, 150 Wn. App. at 772-73. *Reed* is controlling. The jury instruction properly instructed the jury on the essential elements of attempt. *Reed*, 150 Wn. App. at 774-75.

[3] Boswell failed to object to the "to convict" instructions at the trial court. Generally, a party may not raise an issue for the first time appeal. RAP 2.5(a)(3). However, because jury instructions omitting an essential element relieve the State of its burden to prove each element of the crime beyond a reasonable doubt, the error is considered a manifest error affecting a constitutional right that may be raised for the first time on appeal. *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

Boswell asks us to reconsider the decision in *Reed* based on *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995). Boswell alleges that *Vangerpen* explicitly states that premeditation is an essential element of attempted first degree murder. We decline Boswell's request.

In *State v. Vangerpen*, 71 Wn. App. 94, 856 P.2d 1106 (1993), *aff'd*, 125 Wn.2d 782, 888 P.2d 1177 (1995), the defendant was charged with attempted first degree murder by an information that stated:

> [T]he defendant Shane Michael Vangerpen in King County, Washington on or about July 20, 1991, with intent to cause the death of another person did attempt to cause the death of Officer D.C. Nielsen, a human being.

71 Wn. App. at 97 n.1. Our Supreme Court held that the information failed to charge the defendant with attempted first degree murder because acting with the intent to cause a death is second degree murder rather than first degree murder. *Vangerpen*, 125 Wn.2d at 791. In other words, *Vangerpen* states that, because of the specific language contained in the information, the State failed to charge the defendant with attempted first degree murder when the information omitted "one of the statutory elements of first degree murder." 125 Wn.2d at 791.

Vangerpen does not articulate what the essential elements of attempted first degree murder are. Our Supreme Court has clearly established that the essential elements of criminal attempt are an intent to commit a specific crime and a substantial step toward committing that crime. *See, e.g., State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Therefore, an instruction on attempt is not defective for failing to include the essential elements of the attempted underlying crime. *DeRyke*, 149 Wn.2d at 910-11. Because *Vangerpen* addresses whether the language used in the information in that case properly charged the defendant with attempted first degree murder, not what all the essential elements of first degree murder are, *Vangerpen* is not grounds for us to

abandon our decision in *Reed*. Accordingly, Boswell's challenge to the "to convict" instructions fails.

We reject Boswell's contention that the unit of prosecution for attempted first degree murder is defined by the defendant's intent. Instead, we hold that the unit of prosecution for attempted first degree murder is defined by a course of conduct. Under the facts presented here, Boswell's convictions for two counts of attempted first degree murder do not violate double jeopardy. Further, under *Harris*, third degree assault is not a lesser included offense of attempted first degree murder. And, our decision in *Reed* continues to be good law; thus, the "to-convict" instruction did not omit an essential element of the crime. Accordingly, we affirm.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44365-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Washington Appellate Project

Date: February 25, 2015

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