FILED
Court of Appeals
Division I
State of Washington
1/2/2020 4:46 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
1/7/2020
BY SUSAN L. CARLSON
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No. 98056-0
Court of Appeals No. 78089-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ORN,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4 Nicholas Orn asks this Court to accept review of the opinion of the Court of Appeals in *State v. Orn*, 78089-1-I.

B. OPINION BELOW

Mr. Orn appealed his conviction of attempted first degree murder arguing the trial court's jury instructions and its exclusion of relevant evidence was contrary to this Court precedent and violated his rights under Article I, section 22 and the Sixth Amendment. The Court of Appeals incorrectly affirmed his conviction.

C. ISSUES PRESENTED

1. 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 include each element of the offense in the "to-convict" instruction provided to the jury. This Court has made clear premeditated intent is an essential element of the crime of attempted first

degree murder. Instruction 7, the “to convict” instruction, omitted the element of premeditation. Contrary to this Court’s prior decisions and the constitutional requirement that the “to convict” instruction include every element of an offense, the Court of Appeals wrongly concluded the instruction was proper.

2. The Sixth Amendment to the United States Constitution guarantees an accused person the right to present a defense and meet the charges against him. Here, the trial court barred Mr. Orn from introducing relevant evidence that contradicted the claims of the State’s principle witness. The Court of Appeals concluded the exclusion of relevant evidence does not implicate the right to present a defense unless the trial court excludes the entirety of the defense case.

D. STATEMENT OF THE CASE

Thomas Darling-Seamans, a self-described “pothead,” lived in a garage of the apartment complex where Mr. Orn and Kimberly Boals lived. RP 760-62. As her relationship

with Mr. Orn neared its end, Ms. Boals began a sexual relationship with Mr. Darling-Seamans. RP 369. Ms. Boals gave many of Mr. Orn's belongings to Thomas Darling-Seamans to sell. RP 370.

Ms. Boals claimed Mr. Orn was angry and said he was going to confront Mr. Darling-Seamans to get his belongings back. RP 389-90.

Mr. Darling-Seamans testified he was smoking marijuana in his garage when Mr. Orn quickly opened the door. RP 784-86. Mr. Darling Seamans claimed Mr. Orn was holding a gun and asked "where's my stuff?" RP 787. Mr. Darling-Seamans told the jury Mr. Orn then began shooting him. *Id.*

Ms. Boals testified Mr. Orn returned to the apartment with a gun and said he had shot Mr. Darling-Seamans. RP 393.

The State charged Mr. Orn with one count of attempted first degree murder and one count of first degree assault, each with a firearm enhancement. CP 44-45. A jury convicted Mr.

Orn on both counts. CP 135. The trial court vacated the assault charge.

The Court of Appeals affirmed the conviction.

E. ARGUMENT

1. The trial court erred in refusing to instruct the jury on each element of the crime charged.

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 of an offense 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).

Mr. Orn requested the court include the element of premeditation in the "to convict" instruction. RP 1114-15. The

Court refused claiming that including the element in the "to convict" instruction would be redundant. RP 1116.

A "to-Convict" instruction must include "each and every essential element of the offense charged." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Thus, the only question here, is whether premeditated intent is an essential element of attempted first degree murder.

This Court has twice said premediated intent is an "essential element" of the crime of attempted first degree murder. "[A]ttempted murder in the first degree requires proof of premeditated intent to cause the death of another person. " *In re the Personal Restraint of Borrero*, 161 Wn.2d 532, 540, 167 P.3d 1106 (2007); *State v. Vangerpen*, 125 Wn.2d 782, 785-87, 888 P.2d 1177 (1995). Nonetheless, this Court of Appeals opinion ignores those holdings to conclude premeditated intent is not an essential element of the crime of attempted first degree murder. Opinion at 10-11 The opinion goes so far as to conclude *Vangerpen* did not say

premeditated intent is element of attempted first degree murder. *Id.*

In discussing the facts of the case, *Vangerpen* 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 foregoing, and indeed were not even in dispute in *Vangerpen*, the element at issue was premeditation, and premeditation is an essential element. The Court explicitly says so no fewer than four times.

"'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). If premediated intent is necessary to differentiate first degree attempted murder from second degree attempted murder, and *Vangerpen* and *Borerro* says it is, premediated intent is an essential element of the former. *Recuenco*, 163 Wn.2d at 434. Because it is an essential element the erred in refusing Mr. Orn's request to include it in the "to convict" instruction. *Smith*, 131 Wn.2d at 263.

The conclusion of the Court of Appeals, that premeditation is not an essential element of attempted first degree murder and need not be included in the "to convict" instruction, is contrary to this Court's decisions in *Vnagerpen, Borrero*, and *Smith* and presents an issue of substantial public importance. This Court should grant review under RAP 13.4.

2. The trial court denied Mr. Orn his rights to present a defense and to confront witnesses by refusing to permit him to demonstrate a witness's bias and to impeach the witness.

> I'm just a proactive pothead. . . .I work hard every day, I visit my family, and . . . I just stay proactive in not doing anything out of the question really.

RP 760. This self-description accurately described Mr. Darling-Seaman's fondness for marijuana and his daily use. However, Mr. Darling-Seamans's claim that he simply followed the rules was less accurate.

As the result of a police investigation, and in an effort to avoid criminal charges for trafficking stolen property, Mr. Darling-Seamans had entered an agreement with police to

conduct several undercover purchases of stolen property. RP 15-17. But the jury never heard this evidence.

The court granted the State's pretrial motion limiting this evidence, concluding, that while relevant, it was overly prejudicial for the jury to hear evidence of Mr. Darling-Seaman's involvement in criminal activity. RP 21. The court did permit counsel to engage in a more sterile questioning asking simply whether Mr. Darling-Seamans had an agreement with police. *Id*. Even after Mr. Darling-Seamans told the jury he was a simple law-abiding pothead, the court refused to permit questioning of his prior criminal conduct. RP 821.

The Sixth Amendment guarantees a defendant the right to confront the witnesses against him through cross-examination. *Delaware v. Van Arsdall,* 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986). The more critical a witness is to the state's case the more latitude a defendant enjoys to expose the witness's bias. *State v. Darden,* 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Too, "[t]he right of an

accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn. 2d 713, 720, 230 P.3d 576 (2010).

So long as evidence is "at least minimal[y] relevant" it must be admitted unless the State can establish the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (citing *Darden,* 145 Wn.2d at 622). A court must then balance the State's claimed interest against the defendant's need for the evidence. *Id.*

Here the trial court found the evidence relevant. Thus, the evidence was admissible unless the State could establish its admission would prejudice the fact-finding process. *Jones*, 168 Wn.2d at 720. The State made no such showing.

The State speculated the evidence might place Mr. Darling-Seamans in danger by revealing he worked with police. *Id.* However, by bringing the motion in open court the State had already created a public record that Mr. Darling-

Seamans worked as a confidential informant. Thus, there could be no further concern about the need to maintain the confidentiality of Mr. Darling-Seaman's involvement.

Ignoring its own revelation of the information in a pretrial hearing, the State expressed concern that introduction of the evidence at trial would frustrate the ability of police to use confidential informants. RP 19. First, the State also explained the police had no further intention of using Mr. Darling-Seamans as an informant. Thus, there could be no concern for his confidentiality in future investigations. Second, generalized speculation regarding the future use of informants is hardly the sort of showing of prejudice required to preclude admission of relevant evidence. The State did not identify any potential prejudice much less prejudice to the integrity of the fact-finding process in this case.

Because the evidence was relevant and the State did not identify any overriding prejudice to the fairness of the

proceedings, the exclusion of this evidence violated Mr. Orn's Sixth and Fourteenth Amendment rights.

The Court of Appeals fails to apply the constitutional standard from *Jones*. Instead, the court dismisses *Jones* because it concerned a different type of evidence. Opinion at 15. The court reasons that the constitutional standard only applies where the excluded evidence is a defendant's "entire defense." *Id* at 15-16. By that logic, no constitutional violation arises where a court excludes a substantial portion of the relevant evidence offered by the defendant, so long as a court admits some. Such a ridiculous standard cannot satisfy the Sixth Amendment, and to be sure, *Jones* never said as much.

Here the trial court recognized the evidence was relevant, but excluded it nonetheless. The State has never demonstrated that admission of the evidence would have been prejudicial to the fact finding process. Further, no court ever made such a determination. The opinion is contrary to *Jones* and presents a significant constitutional issue by whittling

away the constitutional standard. This Court should accept review under RAP 13.4.

E. CONCLUSION

The opinion of the Court of Appeals is contrary to several decisions of this Court and presents significant constitutional issues. This Court should accept review under RAP 13.4.

Respectfully submitted this 2nd day of January, 2020.

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FILED
12/3/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. NICHOLAS CONAN ORN, Appellant.	No. 78089-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Nicholas Orn, has filed a motion for reconsideration. The State has not filed a response. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied

Judge

FILED
11/18/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. NICHOLAS CONAN ORN, Appellant.	No. 78089-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 18, 2019

SMITH, J. — Nicholas C. Orn appeals his conviction for attempted first degree murder. He argues that the jury was improperly instructed and that the trial court erred by excluding evidence that the victim was involved in a later incident that led to his becoming a confidential informant. In a statement of additional grounds for review, Orn also argues that he was deprived of his right to confront witnesses because the State decided not to call Ian Warmington, one of the detectives who processed the crime scene.

We hold that the jury was properly instructed because the jury instructions, taken as a whole, properly informed the jury of the applicable law, were not misleading, and allowed Orn to argue his theory of the case. We also hold that because the evidence regarding the victim's criminal activities was properly excluded under established evidence rules, its exclusion did not deprive Orn of his right to present a defense or his right to confront witnesses. Finally, we conclude that the State's decision not to call Detective Warmington did not

FACTS

This case arises from a shooting that occurred at the Rock Creek Landing apartment complex in Kent. In May or June of 2016, the victim, Thomas Darling-Seamans, moved in with his mother, Debra Darling, in her apartment unit at the complex. When things became too crowded after a friend of Darling-Seamans' also began staying at Darling's apartment, Darling rented a garage unit at the complex so that "the kids could put their things in the unit." Ultimately, Darling-Seamans and his friend began living in the garage unit. Darling-Seamans converted it into a living space, with sheets dividing the "living room" area at the front of the garage from the beds in the back.

Darling-Seamans, a self-described "proactive pothead[,]"was smoking marijuana in the garage one day with the door open when Kimberly Boals, who lived in the complex with Orn, her boyfriend, walked by and offered to pay Darling-Seamans "a couple dollars for a hit." Darling-Seamans "was like don't even worry about it, come on in, join." After that, Boals visited Darling-Seamans often and "would just cry about her problems and . . . her relationship" with Orn. Although Darling-Seamans and Orn had smoked together "[l]ike once[,]" Darling-Seamans did not know Orn very well: "[W]e were cordial but not friends."

On July 17, 2016, Boals and Orn broke up. Boals later testified that Orn moved out the next day, July 18, 2016. Orn took some of his belongings, left behind other items that were either his or that he and Boals shared, and moved in with his father.

Boals, who was not working at the time, became worried about having

enough money to pay rent. According to her later testimony, Boals, assisted by Darling-Seamans, identified some items in Boals's apartment that she could sell for rent money, and placed them in a blue tote. Boals testified that this happened on July 18, 2016, i.e., the same day that Orn moved out. According to Darling-Seamans, he purchased the items in the tote from Boals for 60 or 70 dollars. Additionally, Boals agreed to give a portable air conditioning (AC) unit to Darling-Seamans in exchange for 40 dollars' worth of marijuana.

Boals and Darling-Seamans went back to Darling-Seamans' garage with the blue tote and the AC unit and "were just chilling" when, a short time later, Orn and his father came to the complex to pick up the rest of Orn's belongings. They discovered Boals and Darling-Seamans in the garage unit, "a bunch of us smoking weed and, you know, the AC unit was there and then the tote." Boals later testified that Orn "was upset because it was obviously without his permission." Darling-Seamans later described Orn as "[p]issed as fuck" and "[s]haking, yelling he wanted his stuff back." Darling-Seamans gave the blue tote to Orn. He also worked out an agreement to keep the AC unit in exchange for paying Orn additional money for it in the future.

About two weeks later, the morning of August 2, 2016, Orn went to Boals's apartment. According to Boals's later testimony, the two went to the bank, had a meal, and "kind of just had said our good-byes, kind of more mutual, . . . you know, maybe we can be friends." Boals recalled that when the two parted ways that early afternoon, "we were pretty calm. It was kind of like the good-bye, you know, you kind of would want in a relationship, kind of see you around and stay

in contact kind of thing."

Later that evening, around 8:30 or 9:00 p.m., Boals was walking back from the garbage dumpster after throwing some things away when she saw Orn pull up and get out of his car with a rifle. Boals later testified that Orn was "angry, irrational, not in a good state of mind" and that he was acting "totally . . . opposite, like a flip" from the way he had been acting when she saw him earlier that day. Boals testified that Orn was upset and that "he was going to go confront [Darling-Seamans]." Although she could not recall exactly what Orn said, she testified that Orn "had the gun and he was going to at least threaten and/or shoot [Darling-Seamans]." The two ultimately made their way to Boals's apartment. Boals later testified that while they were standing in the kitchen, Orn, who had brought his rifle with him, "put the clip on the gun." Boals testified that she was frightened and threatened to get law enforcement involved. Boals recalled that Orn "didn't seem concerned" or said something to the effect of, "I don't want to hurt you as well, . . . don't do that." Boals recalled threatening again to "call the cops or get help of some kind . . . to stop this from happening[,]" and then Orn walked out the door with his gun. Boals went to the bathroom "because at that point, I mean, I had—there was nothing I could do."

As Boals was finishing up in the bathroom, Orn walked into the doorway and, according to Boals, "had the rifle under his chin and was threatening himself." Boals later testified that she said "don't do that," but that Orn said, "I'm going to do it because I just shot [Darling-Seamans] like 20 times." Boals recalled that she was shocked, ran past Orn out of the apartment, discovered

Darling-Seamans shot and bleeding, and ran to try to get help.

Darling-Seamans, who at the time was working a night shift, later testified that he had been lying the couch in his garage before going to work when, all of a sudden, the door "just kind of yanked open, and . . . I jerked up and saw [Orn] standing there pointing a gun at me as he asked real quick where's my stuff at." Darling-Seamans testified that he stood up, said "dude," and "that was pretty much it." "It was like right when I stood up, it was over. I got hit right here first time, shot me to the side and just littered my whole left side with bullets." Darling-Seamans testified that when the shooting began, he went into "flight" mode and turned around and ran toward the back of his garage while Orn was "still standing there just ping, ping, ping like I'm a little duck, and he was just like on me, on me, on me, on me." Darling-Seamans testified that he tried to take cover underneath a dirt bike in the back of his garage. "I just kind of tucked underneath and I was right by my bed, and I couldn't tell if he came in or not. I was still getting layered with bullets." When the shooting stopped, Darling-Seamans got to his feet, stumbled toward the apartment complex, and banged on a door for help. At least two neighbors called 911, Kent police responded to the scene, and Darling-Seamans was taken to Harborview. Although Darling-Seamans suffered numerous bullet wounds, he survived.

The State charged Orn with one count of assault in the first degree and one count of attempted murder in the first degree. Before trial, the State moved in limine to exclude evidence that Darling-Seamans "was being employed by the Kent Police Department as a confidential informant based upon a completely

unrelated situation." Specifically, the State moved "to exclude defense from introducing any evidence of this arrangement, as well as the underlying alleged criminal activity the victim may be involved in, which led to his agreement with Kent Police." Meanwhile, Orn moved in limine to admit that evidence, arguing that "[s]uch instances of potentially avoidable prosecution by the same police department at issue herein, reflect bias, lack of truthfulness, and bad acts-motive, intent, absence of mistake, and concerns the same subject matter at issue herein, to wit., stolen property, firearms." The trial court ruled that it would allow only "very limited inquiry on this." It explained that although it would not allow any questioning "regarding the agreement itself or the nature of the agreement or the case[,]" it *would* allow defense counsel to ask Darling-Seamans something to the effect of, "'and isn't it true that since the incident you've . . . done some work with the Kent Police Department?'" It reasoned that this limited inquiry was relevant to Darling-Seamans' potential bias.

Later, after Darling-Seamans testified that he "just stay[s] proactive in not doing anything out of the question really[,]"Orn asked the trial court to reconsider its ruling. Specifically, Orn's counsel requested the court's permission to ask Darling-Seamans, "Is it true you've been arrested by the police and you have a deal, agreement with the police to help them on narcotics, stolen property, firearms in return for nonforwarding of the allegation to the prosecutor, correct?" Orn argued that Darling-Seamans had "open[ed] the door" to this line of questioning when he testified to the effect that he was not doing anything "out of the question." The trial court disagreed and stood by its earlier ruling, explaining

that "I don't think that that opens the door to impeach him on every wrong thing he might have done in his life."

A jury found Orn guilty of both assault in the first degree and attempted murder in the first degree, in each case while armed with a firearm. The court vacated the assault conviction and adjudged Orn guilty of attempted murder in the first degree with a firearm enhancement. Orn appeals.

ANALYSIS

Jury Instructions

Orn argues that reversal is required because the court's to-convict instruction failed to instruct the jury on each element of attempted first degree murder. We disagree.

"The due process clause of the Fourteenth Amendment to the United States Constitution requires that jury instructions adequately convey to the jury that the State bears the burden of proving 'every element of the crime charged beyond a reasonable doubt.'" State v. Imokawa, No. 96217-1, slip op. at 6 (Wash. Oct. 10, 2019), http://www.courts.wa.gov/opinions/pdf/962171.pdf (quoting State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). "When a defendant challenges the adequacy of specific jury instructions informing the jury of the State's burden of proof, we review the challenged instructions de novo in the context of the instructions as a whole." Imokawa, slip op. at 6-7. "'Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his [or her] theory of the case.'" Imokawa, slip op. at 7

(alteration in original) (quoting State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999)).

"Generally, it is sufficient to explicitly instruct the jury that the State must prove beyond a reasonable doubt the statutory elements of the crime." Imokawa, slip op. at 7. To that end, RCW 9A.28.020(1) defines the elements of criminal attempt and provides, "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." In other words, "an attempt crime contains only two elements—[1] intent to commit a specific crime and [2] taking a substantial step toward the commission of that crime." State v. Nelson, 191 Wn.2d 61, 74, 419 P.3d 410 (2018).

Here, the court's to convict instruction, which is consistent with WPIC 100.02, instructed the jury as follows:

> To convict the defendant of the crime of attempted murder in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 2, 2016, 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 as to Count I.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count I.[1]

---

[1] WPIC 100.02 provides:

The court provided another instruction, Instruction No. 10, which defined murder in the first degree: "A person commits the crime of murder in the first degree when, with premeditated intent to cause the death of another person, he or she causes the death of such person . . . ."[2]

The court's instructions were adequate. Specifically, the to-convict instruction set forth both statutory elements of attempt; no elements were missing from the instruction. Additionally, when taken together, the instructions informed the jury of the applicable law, were not misleading, and permitted Orn to argue his theory of the case. To this end, Orn indicated in his trial memorandum that he "anticipates that the evidence presented in trial will include that the Defendant was not acting with premeditated intent or with a design to kill." And his counsel argued at length in closing that the evidence was insufficient to prove that Orn

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> To convict the defendant of the crime of attempted (fill in crime), each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about (date), the defendant did an act that was a substantial step toward the commission of (fill in crime);
> (2) That the act was done with the intent to commit (fill in crime); 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.

11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 100.02, at 434 (4th ed. 2016).

[2] The language omitted from the end of Instruction No. 10 was related to Orn's self-defense claim and is not relevant here.

had the requisite mental state. Therefore, reversal is not required.

Orn disagrees. He contends that premeditation is an essential element of attempted first degree murder. Thus, he argues, the trial court committed reversible error when it omitted premeditation from the to-convict instruction. Orn chiefly relies on State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995), to support his argument, but his reliance on Vangerpen is misplaced for two reasons.

First, Vangerpen did not hold that premeditation is an essential element of attempted first degree murder. Instead, as Orn himself acknowledges, the State conceded in Vangerpen that premeditation was an essential element; therefore, that issue simply was not before the court. See Vangerpen, 125 Wn.2d at 785-86; see also State v. Boswell, 185 Wn. App. 321, 336, 340 P.3d 971 (2014) ("Vangerpen does not articulate what the essential elements of attempted first degree murder are.").

Second, Vangerpen involved a challenge to a charging document, not a challenge to a jury instruction. Vangerpen, 125 Wn.2d at 787. "The rule that a charging document must include all essential elements of a crime is grounded in the constitutional requirement that defendants be informed of the nature and cause of the accusation against them, in addition to due process concerns regarding notice." State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). Meanwhile, "'a to convict instruction must contain all of the elements of the crime because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.'" State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d

1000 (2003) (internal quotation marks omitted) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). In other words, the to-convict instruction ensures "that the jury is not left guessing at the meaning of an element of the crime and that the State is not relieved of its burden of proving each element of the crime." State v. Saunders, 177 Wn. App. 259, 261, 311 P.3d 601 (2013). Therefore, "the fact that a portion of a definition must be included in a[ ] . . . [charging document] does not mean it is essential to a to-convict instruction." Saunders, 177 Wn. App. at 270. Thus, Vangerpen does not control.

Rather, DeRyke is instructive here. In that case, our Supreme Court reiterated that the crime of attempt has only two elements. DeRyke, 149 Wn.2d at 910. It also expressly approved of instructing the jury on attempt using WPIC 100.02 and using a *separate* instruction to set forth the elements of the crime allegedly attempted. DeRyke, 149 Wn.2d at 911. Indeed, the Supreme Court itself later characterized DeRyke as "reiterat[ing] . . . that an attempt instruction *does not have to provide the elements of the crime allegedly attempted.*" Nelson, 191 Wn.2d at 74 (emphasis added). Here, by instructing the jury on attempt through WPIC 100.02 and using a separate instruction to set forth the elements of first degree murder, the trial court followed the same approach expressly approved of in DeRyke. This was not error. Indeed, we have relied on DeRyke to reject exactly the argument that Orn makes here. See, e.g., State v. Jefferson, 199 Wn. App. 772, 809-10, 401 P.3d 805 (2017), rev'd on other grounds, 192 Wn.2d 225, 429 P.3d 467 (2018); Boswell, 185 Wn. App. at 336-37; cf. State v. Reed, 150 Wn. App. 761, 772, 208 P.3d 1274 (2009) (rejecting the same

argument and stating that it "conflates the intent necessary to prove an attempt with that necessary to prove first degree murder.").

As a final matter, Orn reasons that "by requiring the jury find only that Mr. Orn intended to commit first degree murder, the instruction told the jury it was enough that he intended to premeditate the intent to cause death." He contends that as a result, the instruction is similar to the defective instruction in State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997). In Smith, which involved a conspiracy charge, the to-convict instruction should have required the jury to find that the defendant agreed with his alleged co-conspirators *to engage in conduct constituting the crime of first degree murder*. Smith, 131 Wn.2d at 262. Instead, the instruction required the jury to find that the defendant agreed with his alleged co-conspirators "'to engage in . . . the performance of *conduct constituting the crime of Conspiracy to Commit Murder in the First Degree*.'" Smith, 131 Wn.2d at 261 (first alteration added; emphasis added). Our Supreme Court held that this instruction was "constitutionally defective because it purports to be a complete statement of the law *yet states the wrong crime as the underlying crime which the conspirators agreed to carry out*." Smith, 131 Wn.2d at 263 (emphasis added).

The to-convict instruction here did not suffer from the same defect. Rather, it stated the correct crime, i.e., first degree murder, as the underlying crime that Orn allegedly attempted to carry out. Moreover, the instruction in Smith was, as a result of the defect, entirely circular: It instructed the jury to find the defendant guilty of conspiracy if he engaged in conduct constituting

conspiracy. Thus, as the Smith court explained, the instruction "fails to state the law completely and correctly." Smith, 131 Wn.2d at 263. Here, by contrast, the to-convict instruction completely and correctly stated the law. Specifically, it required the jury to find that Orn "did an act that was a substantial step toward the commission of murder in the first degree" and that "the act was done *with the intent to commit murder in the first degree*." When taken together with the definition of murder in the first degree, the instruction required the jury to find that the act was done with the intent to "with a premeditated intent to cause the death of another person, . . . cause[ ] the death of such person." In other words, the jury could not have convicted Orn of attempted *first degree murder* without finding that he intended to cause the death of another person *with premeditated intent to cause the death of another person.* The instruction did not relieve the State of its burden.

Exclusion of Evidence of Darling-Seamans' Criminal Activities

Orn argues that by excluding evidence of Darling-Seamans' criminal activities underlying his confidential informant arrangement with law enforcement, the trial court deprived him of his Sixth Amendment rights to confront witnesses and to present a defense. We disagree.

We review de novo a claim of denial of Sixth Amendment rights. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). The Sixth Amendment to the United States Constitution guarantees the defendant a right to defend against criminal allegations. State v. Ward, 8 Wn. App. 2d 365, 370, 438 P.3d 588 (2019). It also guarantees the defendant the right to confront and cross-examine

adverse witnesses. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

But these rights are not absolute, and "'[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" State v. Lizarraga, 191 Wn. App. 530, 553, 364 P.3d 810 (2015) (second alteration in original) (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)); see also Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (observing that the Constitution permits judges to exclude evidence under well-established rules of evidence). To that end, we review rulings on the admissibility of evidence for abuse of discretion, and we may affirm such rulings on any basis supported by the record. State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009).

Here, Orn does not analyze whether the trial court abused its discretion under the evidence rules when it excluded evidence of Darling-Seamans' criminal activities. But it did not. Specifically, ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." That said, the trial court has discretion to admit otherwise inadmissible evidence on cross-examination "if the witness 'opens the door' during direct examination and the evidence is relevant to some issue at trial." State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). "For example, when a witness testifies to his good character on direct examination, the opposing party is entitled to make further inquiries on the subject during cross-examination even though that evidence

would otherwise be inadmissible." Stockton, 91 Wn. App. at 40. "But a passing reference to a prohibited topic during direct does not open the door for cross-examination about prior misconduct." Stockton, 91 Wn. App. at 40.

Darling-Seamans' statement that he is a "proactive pothead" who "just stay[s] proactive in not doing anything out of the question really" was at most a passing reference to his character. It does not, as Orn would have us believe, constitute an affirmative statement that he is "law-abiding." Indeed, Darling-Seamans volunteered during his direct testimony that on the night of the shooting he had taken "Ecstasy," a drug he acknowledged was illegal. Thus, the trial court did not abuse its discretion by ruling that Darling-Seamans' testimony did not open the door to the otherwise inadmissible evidence of his criminal activities. There was no evidentiary error here. And because Orn does not argue that the trial court applied an evidentiary rule that was arbitrary or disproportionate to the ends it was designed to serve, there also was no constitutional error. Cf. Holmes, 547 U.S. at 326 ("[T]he Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote.").

Instead of analyzing the trial court's ruling under the evidence rules, Orn argues that "the evidence was admissible unless the State could establish its admission would prejudice the fact-finding process." He relies on State v. Jones to support his argument. But Jones involved the trial court's exclusion of "evidence of extremely high probative value" constituting the defendant's "entire defense." Jones, 168 Wn.2d at 721. Here, Orn sought to introduce evidence of

Darling-Seamans' criminal activities to call his credibility into question; the evidence was not Orn's entire defense. Therefore, Jones is readily distinguishable and does not control.

Statement of Additional Grounds

In a statement of additional grounds for review, Orn alleges that the State "[b]urned" Detective Warmington as a witness by deciding not to call him to testify and then allowing him to be present in the courtroom during another detective's testimony. He alleges further that "[d]efense was made aware of this only after-the-fact" and that "[t]his prevented us from cross-examination of the witness because the prosecut[o]r didn't call on him for examination, and kept [d]efense from calling him . . . due to his being present to [another detective]'s related testimony." Orn argues that, as a result, his right to confront witnesses was violated because he was unable to "confront Detective Warmington's [e]vidence collection, and his [g]raphs presented to the jury."

But the State is not required to call every witness on its list. And the point at which Orn's counsel became aware of the State's decision, as well as whether Detective Warmington was present for another witness's testimony, are matters outside the record that we do not consider in this direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Furthermore, Orn had the opportunity to cross-examine Detective Moore, who handled the evidence collection with Detective Warmington and created the crime scene diagram with Detective Warmington. Therefore, Orn's argument fails.

We affirm.

WE CONCUR:

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. 78089-1-I**, 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 or residence address as listed on ACORDS:

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January 02, 2020 - 4:46 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Nicholas Orn, Appellant

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