

64116-6

64116-6

NO. 64116-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL PETER WARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL HAYDEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

RECEIVED
KING COUNTY
COURT
APR 11 2011
K

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	5
1. THE DEFENDANT'S CONVICTION FOR ASSAULT IN THE FIRST DEGREE (COUNT II), MUST BE VACATED	5
2. CONVICTIONS FOR FELONY HARASSMENT AND ATTEMPTED MURDER DO NOT VIOLATE DOUBLE JEOPARDY	6
3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE CRIME OF ATTEMPTED MURDER IN THE FIRST DEGREE	10
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Blockburger, 284 U.S. 299,
52 S. Ct. 180, 76 L. Ed. 306 (1932)..... 7

Washington State:

In re Burchfield, 111 Wn. App. 892,
46 P.3d 840 (2002)..... 6

In re Orange, 152 Wn.2d 795,
100 P.3d 291 (2004)..... 6, 7, 8, 9, 10

In re Stranger Creek, 77 Wn.2d 649,
466 P.2d 508 (1970)..... 14

State v. Calle, 125 Wn.2d 769,
888 P.2d 155 (1995)..... 7, 9

State v. DeRyke, 149 Wn.2d 906,
73 P.3d 1000 (2003)..... 10, 11, 13, 14

State v. Faagata, 147 Wn. App. 236,
193 P.3d 1132 (2008), rev. granted,
165 Wn.2d 1041 (2009)..... 6

State v. J.M., 144 Wn.2d 472,
28 P.3d 720 (2001)..... 9

State v. Kilburn, 151 Wn.2d 36,
84 P.3d 1215 (2004)..... 9

State v. Mills, 154 Wn.2d 1,
109 P.3d 415 (2005)..... 10

State v. Reed, 150 Wn. App. 761,
208 P.3d 1274, rev. denied,
167 Wn.2d 1006 (2009)..... 10, 13, 14

<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	6
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007).....	6

Statutes

Washington State:

RCW 9.94A.589	2
RCW 9A.28.020	9
RCW 9A.32.030	9
RCW 9A.46.020	8

Other Authorities

11A Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02 (3 rd ed. 2008).....	12
WPIC 26.01.....	12
WPIC 26.01.01.....	12
WPIC 100.01.....	12
WPIC 100.02.....	11, 12
WPIC 100.05.....	12

A. ISSUES PRESENTED

1. The State agrees with the defendant that convictions for attempted murder in the first degree and assault in the first degree, arising out of the same act, violates double jeopardy and one of the convictions must be vacated.

2. When a person verbally threatens to kill another person (felony harassment), and when a person physically attempts to kill the person threatened (attempted murder), are these different acts and thus principles of double jeopardy are not implicated?

3. Under existing Supreme Court and Court of Appeals case law, a "to convict" jury instruction for an attempt crime does not need to include the elements of the specific crime attempted-- those elements being included in the definitional instruction of the crime attempted. Still, the defendant contends that for attempted first-degree murder, the "to convict" jury instruction must include the element of premeditation. Should this Court find that the defendant has not shown existing case law is incorrect and harmful?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was convicted by a jury in count I of Attempted Murder in the First Degree, in count II with Assault in the First Degree, in count III with Felony Harassment, and in count IV with Assault in the Second Degree.¹ CP 88, 91, 94, 96. Counts I and II were based on the same act of attempting to murder/assault Karla Colombini. CP 6-7.

At sentencing, the parties and the court agreed that count I and count II should "merge." CP 101. The court did not score counts I and II against each other, but the court did impose a standard range sentence on each count.² CP 99, 114-31. Specifically, the defendant received a sentence of 230 months on count I, concurrent to a 160-month sentence on count II. CP 101. The defendant received concurrent lesser sentences on counts III and IV. CP 101.

¹ Count IV, the assault in the second degree count, occurred on a separate date than the other offenses and is not being challenged on appeal. Facts regarding this count will not be recited herein.

² Essentially, the court treated counts I and II as if they were the same criminal conduct pursuant to RCW 9.94A.589(1)(a).

2. SUBSTANTIVE FACTS

Karla Colombini and the defendant are both recovering drug addicts who have known and dated each other off and on for many years. 5RP³ 14, 18-20, 26, 31-35. From early on the relationship was marked with violent acts perpetrated against Karla. 5RP 36, 40-42, 44-47, 52-58; 6RP 4-5. Still, Karla would always get back together with the defendant, calling the attraction "an addiction," "emotionally and physically." 6RP 6.

In early October of 2007, Karla had kicked the defendant out of her apartment after finding out he had cheated on her and that he was using drugs again. 6RP 24-25. Still, Karla missed him, and on October 16, 2007, she invited the defendant over to her place. 6RP 34-35. The two ended up spending the night together. 6RP 38.

The next day started out differently. When the defendant could not get a hold of a woman who was supposed to take him to an appointment, he threw the phone across the room. 6RP 38. He then spent most of the rest of the day sitting on the couch

³ The seven volume verbatim report of proceedings is cited as follows: 1RP--7/14, 7/22, 8/5 & 9/4/09; 2RP--7/21/00; 3RP--7/27/09; 4RP--7/28 & 7/29/09; 5RP--7/30/09; 6RP--8/3/09; 7RP--8/4/09.

drinking high-octane beer. 6RP 39-42. At one point the defendant sent Karla out with her food stamps to buy more beer. 6RP 42.

When Karla returned with the beer, she sensed something was "weird," noticing that there was a butcher knife lying on the counter, two more knives were on the coffee table, and a box cutter was lying by the defendant's feet. 6RP 43. Karla started watching TV, but the two soon began to argue. 6RP 50. Not wanting a fight, Karla asked the defendant to leave. 6RP 51. The defendant asked if he could stay one more night, and because Karla knew he had been staying in his truck, she agreed. 6RP 51-52.

Karla then went into her bedroom and slammed the door behind her. 6RP 52. However, the defendant burst in right on her heels, put her in a headlock and stabbed her in the neck with the box cutter--missing her jugular vein and carotid artery by just one centimeter. 4RP 223-24; 6RP 53. As Karla tried to fight back, the defendant slashed at her multiple times causing severe wounds to the right side of her face (severing a nerve and causing permanent partial paralysis), left ear (causing nerve damage and a loss of sensation), upper left arm (requiring multiple layers of staples and

sutures to close), and multiple other lacerations and abrasions.

4RP 207, 212-18, 227-28; 6RP 54, 59, 71-72.

As the defendant was slashing Karla, he was telling her that he was going to kill her and then himself. 6RP 59. Luckily, Karla was able to grab a lava lamp and strike the defendant with it. 6RP 59. She then took off running and screaming to her neighbor's apartment. 6RP 59, 69. Karla was transported to Harborview where she underwent surgery, and the defendant fled the scene. 4RP 44, 48; 6RP 70.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE DEFENDANT'S CONVICTION FOR ASSAULT IN THE FIRST DEGREE (COUNT II), MUST BE VACATED.

The defendant contends that his convictions for attempted first-degree murder and first-degree assault violate double jeopardy and therefore his first-degree assault conviction must be vacated. The defendant is correct. Convictions for attempted murder and assault, arising from the same act, violate double jeopardy, and the lesser conviction must be vacated. See In re

Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); In re Burchfield, 111 Wn. App. 892, 46 P.3d 840 (2002).

Here, although the sentencing court recognized the issue and found counts I and II "merged," the court entered a judgment and sentence on each count, albeit, the court did not score the offenses against each other. The appropriate remedy for a double jeopardy violation where judgment has been entered on both counts is vacation of the lesser offense, here, the assault in the first degree conviction (count II). See State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007); State v. Faagata, 147 Wn. App. 236, 193 P.3d 1132 (2008), rev. granted, 165 Wn.2d 1041 (2009); State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006).

2. CONVICTIONS FOR FELONY HARASSMENT AND ATTEMPTED MURDER DO NOT VIOLATE DOUBLE JEOPARDY.

The defendant contends that his conviction for felony harassment--his threatening to kill Karla Colombini, and his conviction for attempted first-degree murder--his attempt to kill Karla, punish the same act and thus the two convictions violate double jeopardy. They do not. While the defendant's threat to kill Karla may have evidenced his intent, his words were not a

"substantial step" in his attempt to kill Karla, and his conviction for threatening Karla and his conviction for attempting to kill Karla do not violate double jeopardy.

The state and federal double jeopardy clauses protect against multiple punishments "for the same offense." Orange, 152 Wn.2d at 815. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." Id.

Like here, where the relevant statutes do not expressly reveal legislative intent, reviewing courts turn to the two-part "same evidence" or "Blockburger" test.⁴ This test asks whether the offenses are the same "in law" and "in fact." State v. Calle, 125 Wn.2d 769, 776-77, 888 P.2d 155 (1995). Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Id. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Id.

⁴ United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

In Orange, the Supreme Court applied the "same evidence" test and determined that attempted murder and assault of the same victim "based on the same shot in the same incident" violated double jeopardy. Orange, at 815, 820. The Court noted that the court of appeals had viewed the "same evidence" test in regards to an attempt crime in too literal a manner when it found that the two crimes required proof of different elements. Specifically, the Court said that the "substantial step" element of attempted murder must be put into a factual context in order to determine whether the evidence required to support a conviction for one charge was sufficient to warrant conviction on the other charge. Orange, at 820-21. Taken in context, the Court held that Orange's firing of a single shot at the victim supported convictions for both attempted murder and assault, the crimes did not require proof of a fact the other did not, and therefore conviction for both offenses violated double jeopardy. Id.

The same is not true here. Evidence supporting felony harassment and attempted murder do not amount to the same offense. Under the statute, felony harassment requires that the perpetrator threaten to kill another person. See RCW 9A.46.020. A conviction for felony harassment does not require that the

perpetrator either act on the threat or even intend to act on the threat. See State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001).

On the other hand, to prove attempted murder, the State must prove that a perpetrator had an actual intent to kill and that the perpetrator "committed an act which was a substantial step towards" the commission of murder. See RCW 9A.28.020; RCW 9A.32.030. There need be no threat ever uttered. It is also clear that merely threatening to kill another person cannot support a charge of attempted murder, otherwise all threats to kill could be charged as attempted murders.⁵

In short, the defendant's act of stabbing Karla would not support a charge of felony harassment. Likewise, the defendant's threat to kill Karla would not support a charge of attempted murder. In other words, "each provision *requires* proof of a fact

⁵ The defendant's reliance on a statement made by the prosecutor in closing argument that the threat was a substantial step is unavailing. See Def. br. at 9. First, taken in context, the prosecutor was discussing whether the defendant possessed the intent to kill, whether when he stabbed Karla, he was really trying to kill her. See 1RP 122-30. The prosecutor was not claiming that the mere uttering of a threat is a substantial step, an act directed towards the killing of another person. Second, double jeopardy is a question of legislative intent. Orange, at 815; Calle, at 777. A prosecutor's statements in closing do not dictate legislative intent or change the court's requirement to discern legislative intent.

which the other does not," and the defendant's double jeopardy argument fails. Orange, at 817 (emphasis added).

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

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

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

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

Here, the "to convict" instruction, and the other instructions, met these requirements. The "to convict" instruction, instructed the jury that to find the defendant guilty they had to find beyond a reasonable doubt:

- (1) That on or about October 17, 2008, 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.

CP 52; WPIC 100.02.

This "to convict" instruction was followed by the concise WPIC definitions for first-degree murder,⁶ premeditation,⁷ attempted first-degree murder,⁸ and substantial step.⁹

The court's instructions follow exactly the recommended course as directed by the note on use per WPIC 100.02. See 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02 note on use 386-87 (3rd ed. 2008). The court's

⁶ The jury was instructed that:

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person.

CP 53; WPIC 26.01.

⁷ The jury was instructed that:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 54; WPIC 26.01.01.

⁸ The jury was instructed that:

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

CP 55; WPIC 100.01.

⁹ The jury was instructed that:

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

CP 56; WPIC 100.05.

instructions also followed exactly the course approved of in DeRyke and Reed.

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

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

In Reed, the Court applied DeRyke to the exact same situation as exists here. Reed was charged with attempted murder in the first degree. Reed, like the defendant here, argued that the

"to convict" instruction needed to contain the element of premeditated intent. Reed, at 769. Completely consistent with DeRyke, the court rejected Reed's argument that anything other than the elements of an attempt crime, the substantial step language and the intent to commit a specific crime, need be included in the "to convict" instruction. Reed, at 771-75.

The "to convict" instruction here follows exactly the specific requirements for a "to convict" instruction in an attempt crime case. The defendant's argument should be rejected. Stare decisis requires the court to adhere to existing case law unless the defendant can make a "clear showing that an established rule is incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). That burden has not been met here.

D. CONCLUSION

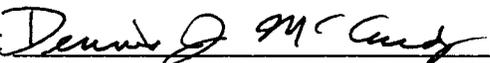
For the reasons cited above, this court should remand this case to the sentencing court for entry of an order vacating count II, Assault in the First Degree. Because the defendant's standard range is not affected, and the sentencing court was aware of and

did intend to "merge" the convictions, actual resentencing is not required.

DATED this 14 day of May, 2010.

Respectfully submitted,

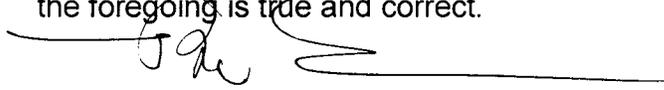
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. WARD, Cause No. 64116-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/14/10
Date

2009 MAY 14 PM 4:25