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Court of Appeals
Division III
State of Washington
5/22/2018 9:01 AM

NO. 35312-5-III

COURT OF APPEALS

STATE OF WASHINGTON
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**JOHN T. MELLGREN,**

Defendant/Appellant.

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# REPLY BRIEF

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## ARGUMENT

A careful analysis of the State's brief leads to the logical conclusion that the Amended Information only charged attempted second-degree murder. Thus, Mr. Mellgren's conviction of attempted first-degree murder must be vacated. No lesser included offense instruction was given to the jury on second degree murder.

> Intent and premeditation are not synonymous. They are separate and distinct elements of the crime of murder in the first degree. RCW 9A.32.030 (1)(a), .050(a). Premeditation is the element that distinguishes first from second degree murder as charged… .

*State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

The State's argument does not hold water when given due consideration. The State's argument confuses attempted first-degree murder with attempted second-degree murder by indicating that premeditation is not a required essential element. In the absence of premeditation, there is merely and intent to kill, which is second degree murder.

"The essential element of premeditation differentiates murder in the first degree from murder in the second degree." *State v. Hummel*, 196 Wn. App. 329, 354, 383 P.3d 592 (2016).

The State's reliance upon *State v. Boswell*, 185 Wn. App. 321, 340 P.3d 971 (2014) actually supports Mr. Mellgren's position. The *Boswell* Court noted at 336:

> … 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 [State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995)], 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.

(emphasis supplied.)

The State's further reliance upon *State v. Reed*, 150 Wn. App. 761, 208 P.3d 1274 (2009) is of no merit. The *Reed* case involved instructional error; not an essential element missing from the Information. The same reasoning applies to *State v. Basabe*, 166 Wn. App. 872, 271 P.3d 387 (2012).

Mr. Mellgren otherwise relies upon the argument contained in his original brief.

DATED this 22nd day of May, 2018.

Respectfully submitted,

s/ Dennis W. Morgan

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**DIVISION III**

**STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br><br>Plaintiff,<br>Respondent,<br><br>v.<br><br>JOHN T. MELLGREN,<br><br>Defendant,<br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | SPOKANE COUNTY<br>NO. 16 1 04007 2<br><br>**CERTIFICATE OF SERVICE** |

I certify under penalty of perjury under the laws of the State of Washington that on this 22nd day of May, 2018, I caused a true and correct copy of the *REPLY BRIEF* and to be served on:

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