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Court of Appeals
Division III
State of Washington
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NO. 35312-5-III

COURT OF APPEALS

STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOHN T. MELLGREN,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

1. When the State failed to include the essential element of premeditation in the charging document, John T. Mellgren was denied his constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22 because he was not fully informed of the nature of the charge against him.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Is premeditation an essential element of attempted first degree murder, and, if so, does its omission from the charging document require reversal of Mr. Mellgren's conviction because it violates the "essential elements" rule?

2. Does the inclusion of the missing element in a jury instruction obviate the need for setting out an "essential element" in the charging document?

3. If the trial court merges two (2) offenses and one of those convictions is reversed on appeal, does this preclude retrial on the conviction that was reversed?

STATEMENT OF THE CASE

Robert Schreiber was severely beaten with a baseball bat on October 7, 2016 outside the Grove Apartments in Cheney, Washington. Three (3) men, later identified as John T. Mellgren, Damian Dunigan and Josh Sonabend, were involved. (RP 285, l. 20 to RP 286, l. 7; RP 290, ll. 18-23; RP 291, ll. 11-13; RP 318, ll. 3-10; RP 564, ll. 4-14; RP 570, ll. 21-25; RP 648, ll. 2-6; RP 777, ll. 11-21)

The incident was precipitated when Mr. Schreiber broke out the window on his second-floor apartment, jumped to the ground, chased Mr. Mellgren's car, jumped on the back of the car and kned out the rear window. Mr. Schreiber then fled to a basketball court where an initial assault occurred. (RP 345, ll. 9-21; RP 346, ll. 19-25; RP 553, ll. 16-25; RP 555, ll. 16-22)

Following the initial assault Mr. Schreiber attempted to seek help from other tenants in the Grove Apartments. He continued to flee through the area. A second assault happened near the gated entryway to the Grove Apartments parking lot. (RP 40, 14-19; RP 294, ll. 7-15; RP 559, ll. 3-4; RP 568, l. 22 to RP 569, l. 11)

Several witnesses observed Mr. Schreiber being struck in the head by a bat. When shown photo montages they were able to identify Mr. Mellgren and Mr. Dunigan as being involved. Both Mr. Mellgren and Mr. Dunigan were acknowledged as having the bat which was used in the assault. (RP 292, ll. 1-5; RP 293, ll. 7-18; RP 295, ll. 7-11; RP 296, ll. 8-17; RP 320, ll. 11-24; RP 361, ll. 16-24; RP 570, ll. 21-25; RP 578, l. 22 to RP 579, l. 13; RP 586, ll. 7-9; RP 626, ll. 3-13; RP 627, ll. 2-13; RP 628, ll. 1-12; RP 629, ll. 15-21; RP 630, ll. 14-17; RP 649, ll. 15-20; RP 657, l. 23 to RP 658, l. 3; Exhibits 95 and 96)

The witnesses also heard one of the men say that Mr. Schreiber had smashed out the back window on the car. This statement was either made by Mr. Mellgren or Mr. Dunigan. (RP 300, ll. 10-13; RP 321, ll. 6-12; RP 574, ll. 3-7; RP 592, ll. 11-14; RP 661, ll. 14-18)

The car with the broken rear window remained in the parking lot. Mr. Mellgren was later identified as the registered owner. He was interviewed at the Cheney Police Department on October 8, 2016. A second interview occurred on October 13, 2016 when he was arrested. (RP 100, ll. 10-14; RP 391, ll. 18-25; RP 717, ll. 20-25)

During the first interview Mr. Mellgren consented to a DNA swab. The shoes he was wearing were seized. When he was arrested on October

13 another pair of shoes were seized. (RP 457, ll. 14-15; RP 460, ll. 10-17; RP 720, ll. 4-13; RP 721, ll. 7-15; ll. 19-20)

DNA swabs were also obtained from Mr. Schreiber. All of the DNA swabs were submitted to the Washington State Patrol Crime Lab (WSPCL). No DNA swabs were ever obtained from Mr. Dunigan or Mr. Sonnabend. (RP 462, ll. 17-22; RP 508, ll. 12-14; RP 510, ll. 11-17; RP 530, l. 15 to RP 531, l. 10)

Brittany Noll, the forensic scientist who did the DNA testing, determined that blood on the end of the bat belonged to Mr. Schreiber. Blood on Mr. Mellgren's shoes also belonged to Mr. Schreiber. (RP 514, l. 18 to RP 515, l. 6; RP 517, ll. 11-25; RP 518, ll. 3-10; RP 522, ll. 5-15)

A search of Mr. Mellgren's car located the baseball bat and various items of clothing (which did not have any evidentiary value). The bat was submitted to the WSPCL for DNA analysis and fingerprinting. (RP 442, ll. 22-23; RP 444, l. 20 to RP 445, l. 3; RP 486, ll. 12-13; RP 491, ll. 5-10; RP 492, l. 12; RP 615, ll. 11-22)

Mr. Schreiber has no memory of the events. He had a fractured skull, subdural hematomas on both sides of his head, and bruising and lacerations on his head and body. He was not expected to survive. His injuries are permanent. (RP 681, ll. 19-20; RP 685, ll. 18-22; RP 686, ll. 15-22; RP

688, ll. 1-9; ll. 15-19; RP 690, ll. 18-21; RP 698, ll. 12-21; RP 766, l. 24 to RP 767, l. 1)

An Information was filed on October 14, 2016 charging Mr. Mellgren with attempted first-degree murder by means of extreme indifference. There was a deadly weapon enhancement. (CP 1)

An Amended Information was filed on March 31, 2017. It added a second count of first degree assault with a deadly weapon enhancement. The attempted first-degree murder count was changed to premeditation instead of extreme indifference. (CP 72)

Numerous continuances were granted until commencement of trial on April 10, 2017. (CP 21; CP 22; CP 23; CP 24; CP 25)

A motion to sever the defendants trials was filed on April 3, 2017. The trial court initially denied the motion. However, severance was granted on April 10, 2017 since the co-defendant's attorney had lost her voice. (CP 91; RP 47, l. 7 to RP 48, l. 23; RP 58, ll. 6-21; RP 59, l. 20 to RP 60, l. 8; RP 62, ll. 6-10)

Mr. Mellgren's motion to dismiss Count 1 after the State rested its case was denied. (CP 173; RP 780, l. 24; RP 782, l. 22 to RP 796, l. 6)

The jury determined that Mr. Mellgren was guilty of both offenses. The special verdict forms were answered in the affirmative. (CP 218; CP 219; CP 220; CP 221)

The State filed a sentencing brief arguing that Counts 1 and 2 merged. The trial court ordered merger in the Judgment and Sentence. Judgment and Sentence was entered on May 18, 2017. (CP 302; CP 408)

An Order merging Counts 1 and 2 was filed on May 19, 2017. (CP 426)

The trial court entered a mitigated sentence of a hundred and fifty-six (156) months plus the twenty-four (24) month deadly weapon enhancement for a total of one hundred eighty (180) months in prison. Thirty-six (36) months of community custody were imposed. Findings of Fact and Conclusions of Law concerning the exceptional downward sentence were entered on June 20, 2017. (CP 443)

Mr. Mellgren filed his Notice of Appeal on May 23, 2017. (CP 435)

The State cross-appealed the mitigated sentence on June 21, 2017. (CP 446)

SUMMARY OF ARGUMENT

Premeditation is an essential element of the crime of attempted first-degree murder. The State's failure to include the element of premeditation in the Information violated Mr. Mellgren's constitutional right to be informed of the nature of the charge against him.

Inclusion of the missing element in a jury instruction does not remedy the constitutional defect.

The State's sentencing brief arguing that Counts 1 and 2 merge precludes it from retrying Mr. Mellgren if his conviction on attempted first-degree murder is reversed.

Merger and same criminal conduct act to negate the need for retrial.

ARGUMENT

I. FIRST DEGREE MURDER - ESSENTIAL ELEMENTS

Count 1 of the Amended Information states:

COUNT 1: ATTEMPTED MURDER IN THE FIRST DEGREE, committed as follows: That the defendant, John T. Mellgren and Damian C. Dunigan, Jr., as actors and/or accomplices, in the State of Washington, on or about October 08, 2016, with intent to commit the crime of **MURDER IN THE FIRST DEGREE** as set out in RCW 9A.32.030(1)(A), committed an act which was a substantial step toward that crime, by attempting to cause the death of **ROBERT SCHREIBER**, a human being, and the defendants, as actors and/or accomplices, being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.825 and 9.94A.533(4)

RCW 9A.32.030(1) states, in part:

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

Mr. Mellgren contends that the Amended Information is defective in that it did not set forth the “essential element” of premeditation. It simply references the statutory provision which includes premeditation.

The essential elements rule is grounded in the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. ... “[T]he Information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” “We review allegations of constitutional provisions *de novo*.” *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

No essential facts are set forth in Count 1 of the Amended Information. The absence of the “essential element” of premeditation, along with the lack of factual predicates underlying premeditation, detracted from Mr. Mellgren’s ability to mount an appropriate defense and failed to inform him of all elements of the crime of first degree murder.

In *State v. Kjorsvik*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991) the Court adopted the federal standard for reviewing charging documents when an asserted error is first raised on appeal.

We hereby adopt the federal standard of liberal construction in favor of the validity of charging documents where challenges to the sufficiency of a charging document are initially raised after verdict or on appeal, but we further include in that standard both an essential elements prong and an inquiry into whether there was actual prejudice. ...

A close reading of the federal cases shows that the federal standard is, in practice, often applied as a 2-prong test: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

...

The first prong of the test - the liberal construction of the charging document's language - looks to the face of the charging document itself. The second or "prejudice" prong of the test, however, may look beyond the face of the charging document to determine if the accused actually received notice of the charges he or she must have been prepared to defend against.

The element of premeditation is totally absent from the Amended Information. The statutory provision is set forth. Nevertheless, the statutory provision is insufficient to comply with the "essential elements" rule.

"More than merely listing the elements, the Information must allege the particular facts supporting them." *Nonog*, 169 Wn.2d [220,

237 P.3d 250 (2010)] at 226. The mere recitation of a “numerical code section” and the “title of an offense” does not satisfy the essential elements rule. *City of Auburn v. Brooke*, 119 Wn.2d 623, 627, 836 P.2d 212 (1992) ... “[D]efendants should not have to search for the rules or regulations they are accused of violating.” *Id.*

State v. Zillyette, supra, 162-63.

The *Zillyette* Court went on to note at 158-59 that:

“An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.” [Citations omitted.] “[E]ssential elements’ include only those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime.” [Citations omitted.]

“The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.” [Citation omitted.] A secondary purpose for the essential elements rule is to bar “any subsequent prosecution for the same offense.” [Citations omitted.]

Mr. Mellgren is not raising a double-jeopardy argument. He is raising the question of a violation of his constitutional rights under the Sixth Amendment and Const. art. I, § 22.

As recognized in *State v. Commodore*, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984): “Premeditation is a distinct element of the crime of first

degree murder.” ... “For this reason, premeditation cannot simply be inferred from the intent to kill.”

Due to the fact that premeditation is an “essential element” of first-degree murder as alleged in Count 1 of the Amended Information, and due further to the fact that that element is not included in the charging document, the “essential elements” rule has been violated.

The case of *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995) is directly in point. Mr. Vangerpen was charged with attempted first-degree murder. The Information failed to set forth the “essential element” of premeditation. The *Vangerpen* Court ruled at 787:

We have repeatedly and recently insisted that a charging document is constitutionally adequate only if all of essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense. This “essential elements rule” has long been settled law in Washington and is based on the federal and state constitution and on court rule.

Mr. Vangerpen’s conviction was reversed and the case was remanded for a new trial.

Mr. Mellgren asserts that the error in the Amended Information is compounded by the fact that he was charged as both an accomplice and a principal to an attempt.

Where a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result. W. LaFare & A. Scott, *Criminal Law* § 6.2(c), at 500 (2nd ed. 1986). Therefore, in order to serve as a basis for the crime of attempt, a crime defined by a particular result must include the intent to accomplish that criminal result as an element. *Commonwealth v. Griffin*, 310 Pa. Super. 39, 50-51, 456 A.2d 171 (1983); *People v. Foster*, 19 N.Y.2d 150, 153, 225 N.E.2d 200, 278 N.Y.S.2d 603 (1967).

The crime of murder is defined by the result of death, RCW 9A.32.030, and the rule is well established that the crime of attempted murder requires the specific intent to cause the death of another person. Any lesser mental state ... will not suffice.

State v. Dunbar, 117 Wn.2d 587, 817 P.2d 1360 (1991).

The ruling in *Dunbar* further elucidates and supports Mr. Mellgren's argument that the lack of the premeditation element in the charging document deprived him of a fair trial. The State failed to appropriately notify him of each and every element of the charged offense. The lack of factual predicates in the Amended Information highlights the lack of compliance with the "essential elements" rule.

Mr. Mellgren further contends that the jury instructions were inadequate to cure the defect in the Amended Information. Instruction 13, the to-

convict instruction, does not set forth the “essential element” of premeditation. (CP 200; Appendix “A”)

Instruction 15, which defines premeditation, also does not cure the defect. (CP 202; Appendix “B”)

As the *Vangerpen* Court stated at 788:

The instructions in this case properly instructed the jury on all of the elements of the crime of attempted murder in the first degree. However, proper jury instructions cannot cure a defective Information. Jury instructions and charging documents serve different functions.

The *Vangerpen* Court recognized that the challenge to the Information in that case occurred prior to verdict. Thus, it determined that the *Kjorsvik* rule did not apply.

Mr. Mellgren’s challenge is occurring on appeal. It is a constitutional challenge and can be raised for the first time on appeal. RAP 2.5(a)(3)

It is Mr. Mellgren’s position that the failure of the State to set forth the element of premeditation in the Amended Information was prejudicial because it affected his motion to dismiss Count 1. Defense counsel’s argument was concentrated on the lack of intent to kill and did not address the element of premeditation.

Moreover, defense counsel's strategy at trial was directed at eyewitness testimony and misidentification, as well as lack of intent to kill.

Defense counsel also concentrated on Count 2 (first-degree assault) and was able to obtain a lesser included instruction of second-degree assault.

II. FIRST-DEGREE ASSAULT

RCW 9A.36.011(1) defines first-degree assault, in part, as follows:

A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

- (a) Assaults another with a ... deadly weapon or by any force or means likely to produce great bodily harm or death

There can be little doubt that the injuries inflicted on Mr. Schreiber meet the definition of "great bodily harm." "Great bodily harm" is defined in RCW 9A.04.110(4)(c) as follows:

... bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

The jury determined that Mr. Mellgren was guilty of first-degree assault. The trial court merged Counts 1 and 2.

Mr. Mellgren argues that the trial court's determination that the two (2) crimes merged is correct.

Both crimes are intent crimes.

Both crimes involved the probability of death.

Additionally, both crimes constitute the “same criminal conduct.”

The victim was the same. The time and place was the same. Intent was the same - the intent to assault.

Moreover, the first-degree assault furthered the charge of attempted first degree murder. *See: State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

If, indeed, the two (2) offenses constitute the “same criminal conduct” then it is Mr. Mellgren’s position that a reversal of his attempted first-degree murder conviction should not result in a retrial; but entry of a judgment and sentence on first-degree assault only.

The merger of the offenses does not result in the vacation of a conviction.

Furthermore, if the “same criminal conduct” analysis is valid, then the conviction for first-degree assault should preclude a retrial. *See: State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007); *see also State v. Faagata*, 147 Wn. App. 236, 244-48, 193 P.3d 1132 (2008).

CONCLUSION

Mr. Mellgren's attempted first-degree murder conviction must be reversed due to a violation of his constitutional rights under the Sixth Amendment and Const. art. I, § 22.

State v. Vangerpen, supra, constitutes valid precedent to grant Mr. Mellgren's request.

Merger and a same criminal conduct analysis preclude retrial. Mr. Mellgren should be resentenced on Count 2 only.

DATED this 26th day of February, 2018.

Respectfully submitted,

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APPENDIX “A”

INSTRUCTION NO. 13

To convict the defendant, JOHN T. MELLGREN, of the crime of attempted first degree murder, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 8, 2016, the defendant, JOHN T. MELLGREN, did an act that was a substantial step toward the commission of first degree murder;
- (2) That the act was done with the intent to commit first degree murder 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.

APPENDIX “B”

INSTRUCTION NO. 15

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 or of a third person.

NO. 35312-5-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

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

I certify under penalty of perjury under the laws of the State of Washington that on this 26th day of February, 2018, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

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