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Division III  
State of Washington  
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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JOHN MELLGREN, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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LAWRENCE H. HASKELL  
Prosecuting Attorney

Larry Steinmetz  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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## **I. RESPONDENT'S ISSUE PRESENTED**

Did the amended information allege all the essential elements of attempted first degree murder so that the defendant was properly informed of the nature of the charge against him?

## **II. STATEMENT OF THE CASE**

### Procedural history.

Damian Mellgren was charged by amended information in the Spokane County Superior Court with attempted first degree murder and first degree assault, involving the same victim, for an event occurring on October 8, 2016. CP 35-36. The case proceeded to trial and the defendant was convicted of both offenses. CP 218-22.

At the time of sentencing, the trial court merged the first degree assault into the attempted first degree murder. CP 426-27. This appeal timely followed. The State had filed a notice of appeal regarding the trial court's imposition of a downward departure at sentencing. However, after review of the relevant case authority and the basis for the trial court's sentence, the State is not pursuing a cross-appeal on that issue.

### Substantive facts.

During the evening of October 7, 2016, the victim, Robert Schreiber, and several friends, had been playing games and consuming alcohol at the Grove Apartments in Cheney. RP 344. At some point during the evening,

Mr. Schreiber became angry, went to his bedroom and locked the door. RP 346.<sup>1</sup> Mr. Schreiber subsequently jumped from the apartment's window, into the Grove Apartment parking lot, and then chased and jumped onto a car, smashing his knee through the rear window of the defendant's vehicle. RP 553. Mr. Schreiber jumped off the car and four individuals inside the car gave chase. RP 554.

Later, there was a loud banging on the Schreiber apartment door.<sup>2</sup> RP 346, 361. An individual with an aluminum baseball bat, asked about the identity of the person who jumped out of the apartment's window, and jumped onto the car. RP 346-47. Subsequently, after midnight, on October 8, 2016, several men, including the defendant, chased Mr. Schreiber as he ran toward the entrance to the Grove Apartments. RP 286-87, 290-91, 341, 647-48. At the time, the defendant was armed with an aluminum baseball bat.<sup>3</sup> RP 291, 296, 299-300, 318, 334, 648. After the group caught up with Mr. Schreiber, the defendant used the metal bat to strike the head of Mr. Schreiber, who had fallen to the ground (cement) on

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<sup>1</sup> Mr. Schreiber resided in the apartment. RP 698. At the time of trial, he had no memory of the event. RP 698.

<sup>2</sup> The person knocking on the apartment door used a baseball bat, which caused damage to the apartment door. RP 347-49.

<sup>3</sup> The bat had silver and orange coloring. RP 293, 318, 576, 656. None of the other men in the group had a baseball bat. RP 591. All strikes with the bat were aimed at Mr. Schreiber's head. RP 597.

a basketball court and laid motionless. RP 292-94, 302, 555, 572, 591, 625-26, 631-32, 649. The defendant was angry and appeared as if he was “chopping wood,” striking Mr. Schreiber four to six times in the head with the bat.<sup>4</sup> RP 293, 295, 571, 576, 591, 597. Several other men were simultaneously kicking Mr. Schreiber.<sup>5</sup> RP 294-95, 555-56, 649. Mr. Schreiber, in a fetal position, tried to protect himself during the beating. RP 320-21, 570. Several people yelled at the defendant to stop, as they believed the defendant was going to kill Mr. Schreiber. RP 574, 595, 650. After the beating, Mr. Schreiber was bloody, and labored breathing and appeared dead. RP 300-01, 322, 337-38, 651. As witnesses approached the victim, the assailants fled the area on foot. RP 307-08, 650. Witnesses heard the defendant and others remark that Mr. Schreiber was assaulted because of the damage to the defendant’s rear window of his car. RP 321, 337, 574, 650.

Mr. Schreiber was transported to the hospital and had major trauma to his head and torso, including abrasions and lacerations about his head and upper torso. RP 684, 686. It was determined that Mr. Schreiber had bleeding between the brain and the skull, which was potentially lethal. RP 688. He

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<sup>4</sup> One witness described the sound of the bat hitting the victim’s head “as if you were playing a baseball game and you hit a baseball with a metal bat, the sound of the two connecting, it’s exactly what it sounded like.” RP 586-87.

<sup>5</sup> During the beating, the men shouted expletives at the victim. RP 300.

also had several deep skull fractures. RP 688. A great deal of force was necessary to cause the skull fractures. RP 688-89. The emergency room doctor initially believed that Mr. Schreiber would have complete brain damage or rapid death. RP 690. Mr. Schreiber would have died without medical intervention. RP 690, 760. During a subsequent surgery, approximately one week later, part of Mr. Schreiber's skull had to be temporarily removed to allow the brain to swell without restriction. RP 764, 768-69. He remained in the hospital for approximately 45 days and was transferred to Saint Luke's Rehabilitation Hospital for approximately one week. RP 701. Because of the beating, Mr. Schreiber suffered permanent vision loss. RP 767.

After the event, law enforcement located the gray Nissan Altima in the Grove parking lot, with damage to the rear window; it was determined the vehicle was registered to the defendant. RP 386, 389-90, 717. The vehicle was towed to a processing facility, impounded, and searched pursuant to a warrant. RP 391-92, 414, 462, 773-74. Two bats, each with observable blood spatter, were located inside the trunk of the defendant's car and were collected by law enforcement. RP 442-44, 462. Law enforcement collected the defendant's shoes, which also had observable blood staining. RP 510, 518-22. A Washington State Patrol DNA scientist

determined Mr. Schreiber was the major contributor<sup>6</sup> of the blood staining on the defendant's shoes and on one of the bats collected from the defendant's car. RP 460-61. *See also* RP 463-64 (victim's DNA collected), RP 513-15, RP 457 (defendant's DNA collected).

The following morning after the incident, on October 8, 2016, the defendant was contacted by a detective and agreed to speak with him.<sup>7</sup> RP 718. The defendant stated that he was at the Cheney Grove Apartments in the back seat with his girlfriend and two other couples, going to another party. RP 718. He observed a male break out an apartment window, jump from the second story, and began chasing his car. RP 718. The male jumped onto his car and kicked out the rear window, and the male then ran off. RP 718.

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<sup>6</sup> The scientist categorized the result as one in one quintillion for both the bat and the shoe. RP 517, 522-24. There was only a trace amount of "other" DNA on the two pieces of evidence. RP 518, 522.

<sup>7</sup> The trial court had previously conducted a CrR 3.5 hearing and determined that the defendant's statements to law enforcement would be admissible at the time of trial. RP 88-133; CP 422-25.

### III. ARGUMENT

#### A. PREMEDITATION CAN BE REASONABLY INFERRED FROM A LIBERAL READING OF THE AMENDED INFORMATION.

##### Standard of review.

An information is constitutionally defective if it fails to list the essential elements of a crime. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The essential elements of a crime are those “whose specification is necessary to establish the very illegality of the behavior charged.” *Id.* at 158. The essential elements rule is grounded in the Sixth Amendment and article I, section 22 of the Washington State Constitution. *Id.* at 158. An appellate court reviews de novo claims that the information omitted essential elements of a charged crime. *State v. Goss*, 186 Wn.2d 372, 376, 378 P.3d 154, 157 (2016); *State v. Campbell*, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995).

In a challenge to the sufficiency of an information, a reviewing court must first decide whether the allegedly missing element is, in fact, an essential element. *See State v. Tinker*, 155 Wn.2d 219, 220, 118 P.3d 885 (2005). If so, and where the defendant challenges, as here, the sufficiency of the information for the first time on appeal, the court must then “liberally construe the language of the charging document in favor of validity.” *Zillyette*, 178 Wn.2d at 161. Liberal construction requires that the court determine whether “the necessary elements appear in any form, or by fair

construction, on the face of the document and, if so,” whether “the defendant [can] show he or she was actually prejudiced by the unartful language.” *Id.* at 162. The information must nonetheless contain, in some form, language that can be construed as giving notice of the essential elements. If it does not, “the most liberal reading cannot cure it.” *State v. Moavenzadeh*, 135 Wn.2d 359, 362-63, 956 P.2d 1097 (1998).

The basis for using a more liberal standard of review is to discourage “sandbagging” – where the defendant recognizes a defect in the information but declines to raise it before trial when a successful objection would result in allowing the State to amend the information. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 101, 812 P.2d 86 (1991).

In the present case, the amended information included, in pertinent part, a charge of attempted first degree murder and a deadly weapon enhancement allegation.

COUNT I: 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 9A32.030(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 9.94A533(4),

COUNT II: FIRST DEGREE ASSAULT, 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, did, with intent to inflict great bodily harm, intentionally assault ROBERT SCHREIBER, with a deadly weapon, or by any force or means likely to produce great bodily harm or death, to-wit: a metal bat, 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),

CP 35 (emphasis in the original).<sup>8</sup>

“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.” RCW 9A.28.020(1). Accordingly, all crimes of attempt contain two elements: intent to commit a specific crime and the taking of a substantial step toward the commission of that crime. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

A person commits the crime of first degree murder when, with premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a). Premeditation is “the deliberate formation of and reflection upon the intent to take a human life” and

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<sup>8</sup> The jury was instructed, in pertinent part, on attempted first degree murder (WPIC 100.01, 100.02), an instruction defining “substantial step” (WPIC 100.05), a definition of a completed first degree murder (WPIC 26.01), a definition of “premeditation” (WPIC 26.01.01), and a definition of “intent” (WPIC 10.01). CP 199-204.

involves “the mental process of deliberation, reflection, weighing or reasoning for a period of time, however short.” *State v. Condon*, 182 Wn.2d 307, 315, 343 P.3d 357 (2015). Premeditation must involve “more than a moment of time.” *Id.* at 315.

Words in the information are read as a whole, construed with common sense, *and include facts which are necessarily implied.* *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010); *Kjorsvik*, 117 Wn.2d at 109. Missing elements may be implied if the language supports such a result. *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992).

Here, the amended information alleges the defendant tried to kill Mr. Schreiber. A liberal reading of the information provides notice that attempting to kill another with a metal bat requires premeditation. After the car window was smashed, the defendant armed himself with a metal bat before confronting Mr. Schreiber. It can be inferred that a metal bat, as a deadly weapon, requires a significant bludgeoning and *repeated* force, aimed at a vital organ, to kill a person, as opposed to a gun or knife, which can kill a person with one shot or blow. It can be further inferred that a metal bat does not have the inherent ability to kill on the first strike; rather successive strikes are required by the individual, who must deliberately decide to heft the bat, swing it, and wait an elapsed time, and decide to swing the bat again to achieve the goal of killing an individual. Such

repetitive action requires thinking beforehand, deliberation, and reasoning. In short, it can be inferred the defendant had to contemplate getting the metal bat, transporting the bat until he found the victim, and repeatedly deciding to strike the victim as the bat is not an inherently deadly weapon.

A similar analogy can be compared to a baseball player. During a game, the player must walk to the dugout, get his or her bat, await his or her turn at the plate, walk to the plate, and deliberately decide whether to swing at the pitch or wait for another. Such decision making requires forethought, planning, and intention. Accordingly, the element of premeditation can be implied on the face of the amended information. In addition, the jury was instructed regarding premeditation, with full knowledge by the defense, and there is no allegation of prejudice, either in the lower court or on appeal.

**B. IN THE ALTERNATIVE, PREMEDITATION IS NOT AN ESSENTIAL ELEMENT WHICH IS REQUIRED TO BE INCLUDED IN THE INFORMATION.**

In *State v. Howard*, 182 Wn. App. 91, 104, 328 P.3d 969 (2014), *review denied*, 143 Wn.2d 1014 (2001), regarding a sufficiency of the evidence claim, the defendant argued that the evidence did not support the “premeditation” element of his conviction for attempted first degree murder. In reviewing the sufficiency of the evidence, this Court, contrary to its early decision in *Hale*, stated: “premeditated intent to cause the death of another is an essential element of the crime of attempted first degree

murder.” *Id.* This Court relied on its earlier decision in *State v. Barajas*, 143 Wn. App. 24, 36, 177 P.3d 106 (2007), *review denied*, 164 Wn.2d 1022 (2008), which cited *State v. Price*, 103 Wn. App. 845, 851-53, 14 P.3d 841 (2000), *review denied*, 143 Wn.2d 1014 (2001), a Division Two case, which found that the crime of attempted first degree murder requires proof that the defendant, with premeditated intent to cause a person’s death, took a substantial step toward the commission of the act. However, the *Price* decision is directly contrary, as discussed below, to *State v. Reed*, 150 Wn. App. 761, 771-72, 208 P.3d 1274 (2009), *review denied*, 167 Wn.2d 1006 (2009), and *State v. Boswell*, 185 Wn. App. 321, 335, 340 P.3d 971 (2014), *review denied*, 183 Wn.2d 1005 (2015), both Division Two opinions, which expressly rejected premeditation as an essential element of attempted first degree murder and *Price* is also contrary to our high court’s opinions in *Smith* and *Harris* and this Court’s opinion in *Hale*, as discussed above.

“Premeditation” is not an essential element which must be included within the information. An analysis begins with Division Two’s opinion in *Reed*, 150 Wn. App. at 771-72, where the court affirmed a conviction for attempted first degree murder based on a “to convict” instruction that stated, “[T]he defendant did an act which was a substantial step toward the commission of Murder in the First Degree” and “[t]hat the act was done

with the intent to commit Murder in the First Degree.” The defendant argued on appeal that the trial court’s failure to include the premeditation element in the “to convict” instruction, even though the Washington Pattern Jury Instruction did not require it, was error. *Id.* at 772. The court in *Reed* noted that this argument “conflates the intent necessary to prove an attempt with that necessary to prove [a completed] first degree murder.” *Id.* Because the State did not charge the defendant with a completed 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.” *Id.*

Later, in *State v. Besabe*, 166 Wn. App. 872, 883, 271 P.3d 387 (2012), the defendant argued that the “to convict” instruction for attempted first degree murder omitted premeditated intent as an essential element of the crime charged. Division One, relying on and agreeing with *Reed*, found that the State is only required to prove that the defendant did an act which is a substantial step toward commission of a first degree murder and that the act was done with intent to commit a first degree murder. *Id.*

The defendant relies on *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995), for the proposition that “premeditation” is an essential element of attempted first degree murder. In that case, the State charged the defendant with attempted first degree murder but inadvertently failed to include premeditation. *Id.* at 785. The trial court allowed the State

to amend the information to add premeditation *after* it had rested its case. *Id.* at 785-86. The amendment changed the charged crime from second degree attempted murder to first degree attempted murder. *Id.* at 791. The Supreme Court reversed holding, after the State has rested it may not amend an information “unless the amendment is to a lesser degree of the same crime or a lesser included offense.” *Id.* at 789. “[A]ny amendment from one crime to a different crime after the State has rested its case is per se prejudicial error (unless the change is to a lesser included or lesser degree crime).” *Id.* at 791. The Supreme Court did not hold that “premeditation” is an essential element of attempted first degree murder.

For instance, this same argument was advanced and disregarded in *Boswell*, 185 Wn. App. at 335, wherein Division Two reaffirmed its holding in *Reed*. In *Boswell*, the defendant argued that the “to convict” jury instructions omitted an essential element of the crime because the jury instruction failed to include the element of premeditation. *Boswell* held that the State was not required to prove that the defendant acted with premeditated intent, only that he attempted to commit murder. *Id.* at 335.

Boswell argued that *Vangerpen* explicitly found premeditation is an essential element of attempted first degree murder. The *Boswell* court disagreed stating:

[in *Vangerpen*], [o]ur 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. 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.”

*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. Therefore, an instruction on attempt is not defective for failing to include the essential elements of the attempted underlying crime. 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.

*Boswell*, 185 Wn. App. at 336-37 (internal citations omitted).

Similarly, *State v. Hale*, 65 Wn. App. 752, 756, 829 P.2d 802 (1992), in an attempted first degree murder prosecution where the defendant challenged the sufficiency of the evidence, this Court held the State is

required to prove the defendant (1) actually intended to take a life; and (2) took a substantial step toward the commission of the act.

The defendant's reliance on *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991), is also misplaced. In that case, the Supreme Court examined first degree murder by extreme indifference to human life under RCW 9A.32.030(1)(b). Ultimately, the *Dunbar* Court held that first degree murder by creation of a grave risk of death requires more than ordinary recklessness and concluded that this crime requires an aggravated or extreme form of recklessness. *Id.* at 594. The Court further observed that only the crime of premeditated murder (as opposed to first degree extreme indifference murder) requires the mental state of intent. *Id.* at 593. *Dunbar* did not discuss or hold that "premeditation" is an essential element of attempted first degree murder.

Here, the attempted first degree murder contains only two specific essential elements. Specifically, intent to commit first degree murder and taking a substantial step toward commission of that crime. The amended information set forth the essential elements of attempted first degree murder. There was no error.

In the event this Court reverses the attempted first degree murder conviction; the remedy is to dismiss without prejudice and allow the State to elect to recharge the defendant with an amended information and retry

him on attempted first degree murder. *See State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010) (“[w]hen an information wholly omits an element, the remedy is to reverse the conviction and dismiss the charge without prejudice to the State refiling the charge); *City of Auburn v. Brooke*, 119 Wn.2d 623, 639, 836 P.2d 212 (1992).

#### IV. CONCLUSION

The defendant has not addressed nor argued that *Besabe*, *Reed*, and *Boswell* are not persuasive authority in this circumstance. This Court should give consideration to<sup>9</sup> and adopt the reasoning of Division One in *Besabe* and Division Two in *Reed* and *Boswell*, reaffirm its own opinion in *Hale*, and hold that premeditation is not an essential element of attempted first degree murder. For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 26 day of April, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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<sup>9</sup> *See Matter of Arnold*, --Wn.2d--, 410 P.3d 1133, 1142 (2018) (“one division of the Court of Appeals should give respectful consideration to the decisions of other divisions of the same Court of Appeals but one division is not bound by the decision of another division”).

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DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOHN MELLGREN,

Appellant.

NO. 35312-5-III

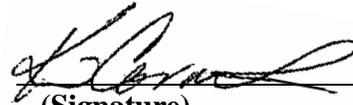
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on April 26, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan  
nodblspk@rcabletv.com

4/26/2018  
(Date)

Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

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