

No. 98056-0

NO. 78089-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS CONAN ORN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DAVID KEENAN

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Was the jury properly instructed as to the crime of attempted murder in the first degree?

2. Did the trial court reasonably preclude the defense from introducing evidence that the victim assisted with undercover police investigations into trafficking of stolen property after the shooting in this case as more prejudicial than probative?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

By amended information, the State charged Nicholas Orn with attempted murder in the first degree and assault in the first degree, both while armed with a firearm. CP 44-45. A jury convicted him as charged. CP 125-28; RP 1202-03. Because the two counts were based on the same incident—the shooting of Thomas Seamans—the trial court granted the State’s motion to vacate the assault conviction and entered judgment only on the attempted murder and corresponding firearm enhancement. CP 129, 135; RP 1212. The trial court imposed a low-end standard range sentence of 240 months. CP 135-38; RP 1233.

## 2. SUBSTANTIVE FACTS.

Thomas Seamans lived in a garage his mother rented in her apartment complex in Kent. RP 530, 759, 762. He worked nights as a warehouse worker. RP 761. He spent his days sleeping and smoking “a lot” of marijuana in his garage home. RP 760, 762.

In June or July of 2016, Seamans met Kimberly Boals, who lived in the same complex with her on-again, off-again boyfriend, Nicholas Orn. RP 764-65. One day Boals asked to share some of Seamans’ marijuana and he agreed because “[s]haring’s caring.” RP 765. Thereafter, Boals returned daily to smoke marijuana and lament the problems in her relationship with Orn.<sup>1</sup> RP 438, 440. Eventually, Boals and Orn broke up and Boals and Seamans became intimate. RP 767, 768, 771.

Orn moved out of Boals’ apartment on July 17, 2016, leaving some property behind. RP 365-66, 368. Boals sold some of the property he left to Seamans, traded it for marijuana, or gave it to Seamans to sell on her behalf. RP 369-73, 390, 772-73. Orn was

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<sup>1</sup> One of the features of Boals’ relationship with Orn was their mutual struggle with mental health and addiction to methamphetamines. RP 361-62, 366, 379, 438. They were each suicidal at times, and Orn was involuntarily committed for this reason in July 2016. RP 766. It is not clear from the testimony whether this brief commitment occurred before or after Orn’s breakup with Boals. Orn did not pursue a mental defense.

furious about this and demanded that Seamans return the property on July 18, 2016. RP 372, 384-85, 707, 774. Seamans returned Orn's property, with the exception of an air conditioner for which Seamans signed a promissory note for \$150 to be paid to Orn on August 3, 2016. RP 372-73, 381, 707, 773, 776.

On August 2, 2016, Orn sent Boals a series of texts demonstrating his escalating anger. RP 415-17; Ex. 6. The texts—sent less than two hours before the shooting—show that Orn was fixated on Boals having given his property to Seamans. RP 415. Orn demanded to know what else Boals might have given Seamans, advised Boals to be “gone when I come back there” because “I don't want to hurt you, too,” and expressed that he felt “like going on a fucking rampage right now.” RP 415-17. At 7:45 p.m., Orn wrote: “And I don't even need time to make a decision at this point. I'm certain it is what I'm going to do.” RP 417.

Orn arrived at Boals' apartment at about 8:30 p.m. RP 389. According to Boals, he was “angry, irrational, not in a good state of mind,” and he brought a gun. RP 390. Orn sat down to smoke some methamphetamine and load the gun. RP 390-91. Boals told him to stop or she would call the police. RP 391-92. Orn warned against that, saying “something to the effect of ... I don't want to

hurt you as well ... don't do that." RP 392. Orn then walked out the door with the gun in his hands. RP 392.

Orn went to Seamans' garage and yanked up the door. RP 784. He pointed the gun at Seamans and "asked real quick where's my stuff at." RP 784. Seamans had no time to respond before Orn started shooting at him from less than eight feet away. RP 784, 786. Orn fired 11 shots at Seamans even as Seamans said "dude, stop shooting me, that shit hurts." RP 747, 787. Orn shot Seamans in the face, chest, arm, hand, back, side, and thigh. RP 812-17, 982-86, 988. Incredibly, none of Seamans' injuries proved life-threatening. RP 977-78, 981. The attack left him with bullets and shrapnel lodged in his body, numerous scars, and permanent nerve damage limiting the function of his left hand. RP 551, 561, 814-17.

After shooting Seamans, Orn returned to Boals' apartment. RP 393. He told her, "I just shot Thomas like 20 times." RP 393. Boals ran past him out of the apartment, saw Seamans injured, and found a neighbor to call 911 for her. RP 394-407. Seamans was able to get a neighbor to call for help as well. RP 565-69. Numerous officers from the Kent Police Department responded to the scene. Officer Reeves apprehended Orn and Seamans

identified him as the shooter. RP 336-42, 651, 652, 654. Following the immediate police investigation, Boals located and turned over Orn's cell phone, seeing Orn's angry text messages from earlier for the first time. RP 412-13.

**C. ARGUMENT**

1. THE JURY WAS PROPERLY INSTRUCTED ON ATTEMPTED MURDER IN THE FIRST DEGREE.

Orn contends that the jury instructions on attempted murder relieved the State of its burden to prove that he acted with premeditated intent to kill. This argument has been rejected by this Court and fails in this case as well. Consistent with the Washington Pattern Instructions – Criminal (“WPIC”) and this Court’s jurisprudence, the to-convict instruction properly advised the jury of the two essential elements of attempted first degree murder, while separate instructions defined the underlying crime of murder in the first degree and premeditation. These instructions properly required the jury to find that Orn acted with premeditated intent to kill.

a. Relevant Facts.

The State proposed the standard pattern jury instructions related to attempted murder in the first degree. Supp. CP \_\_ (Sub

No. 65, Plaintiff's Proposed Instructions); WPIC 26.01, 26.01.01, 100.01, 100.02, 110.05. The State's proposed to-convict instruction for attempted murder in the first degree provided 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.

Supp. CP \_\_ (Sub No. 65). Orn asked the trial court to change the second element of the pattern instruction to "the act was done with the *premeditated* intent to commit murder in the first degree." RP 1116. The trial court declined to make the change, pointing out that adding "premeditated" in the to-convict would be redundant given the instruction defining first degree murder to require premeditation. RP 1116-17. The trial court concluded that Orn's suggested change "muddies the waters." RP 1116-17. The trial court elected to provide the jury with the pattern to-convict instruction, as the

State proposed. RP 1118; CP 68 (Instruction 7). Orn took exception for the record. RP 1118.

- b. The Jury Instructions Included All Essential Elements Of Attempted First Degree Murder And Required The Jury To Find That Orn Acted With Premeditated Intent.

The State must prove every essential element of a crime beyond a reasonable doubt. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Jury instructions that relieve the State of this burden constitute reversible error. Id.

The essential elements of an attempted crime are: (1) acting with 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, 71, 419 P.3d 410 (2018); State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003). Therefore, the essential elements of attempted murder in the first degree are: (1) acting with intent to commit murder in the first degree, and (2) taking a substantial step toward committing murder in the first degree. State v. Besabe, 166 Wn. App. 872, 883, 271 P.3d 387 (2012); State v. Reed, 150 Wn. App. 761, 208 P.3d 1274 (2009). Because the intent required to commit first degree murder is premeditated intent to kill, the intent required to commit attempted first degree murder is also

premeditated intent to kill. In re Pers. Restraint of Borrero, 161 Wn.2d 532, 540, 167 P.3d 1106 (2007).

The to-convict instruction in this case was taken verbatim from Washington's attempt statute, RCW 9A.28.020, and WPIC 100.02. CP 68; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02 (4<sup>th</sup> ed. 2016). Instruction No. 7 includes the two essential elements of attempted murder in the first degree: (1) taking a substantial step toward committing murder in the first degree, and (2) the intent to commit murder in the first degree. CP 68. Instruction No. 10 defines the crime of murder in the first degree as causing the death of another person with premeditated intent to kill, and Instruction No. 11 defines premeditation. CP 71, 72. These were also pattern instructions. 11 Washington Practice 26.01, 26.01.01 (4<sup>th</sup> ed. 2016).

In essence, Orn contends that the to-convict instruction must include both the essential elements of the charged attempt crime and the essential elements of the crime attempted. That is not so. When a defendant is charged with attempt, it is appropriate to give the jury a to-convict instruction that identifies the crime alleged to have been attempted and lists the two essential elements of attempt (i.e., substantial step and intent to commit the specific

crime), with a separate instruction that lists the elements of the crime attempted. DeRyke, 149 Wn.2d at 911 (no error where the to-convict instruction defined the essential elements of attempt and a different instruction defined first degree rape).

State v. Reed, 150 Wn. App. 761, 208 P.3d 1274, rev. denied, 167 Wn.2d 1006 (2009), is directly on point. There, as here, the to-convict instruction required the jury to find (1) that the defendant intended to commit first degree murder, and (2) that he took a substantial step toward committing first degree murder. Id. at 771-72. Separate instructions mirroring those given in Orn's trial defined first degree murder and premeditation.<sup>2</sup> Id. at 772. Like Orn, Reed argued on appeal that the to-convict instruction should have included the element of premeditated intent to kill. Id. at 769-70. Division Two of this Court rejected the argument, noting that it "conflates the intent necessary to prove an attempt with that necessary to prove first degree murder." Id. at 772. Since the State did not charge Reed with 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."

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<sup>2</sup> Since Orn claimed to have acted in self-defense, the instruction defining first-degree murder in his case included the requirement the killing was not justifiable. CP 71. This distinction is immaterial to the issue presented.

Id. at 773-73. Because the to-convict instruction included the essential elements of attempt, and separate instructions defined first degree murder and premeditation, the jury instructions adequately stated the law and held the State to its burden. Id. at 772-75.

This Division has also addressed and rejected the argument Orn makes in his appeal. In Besabe, this Court confirmed that premeditated intent is not an essential element that must be included in the to-convict instruction for attempted first degree murder. 166 Wn. App. at 883. Citing Reed, this Court reiterated that the two essential elements of attempted murder are that the defendant “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.” Id. Since premeditated intent is not an element of the attempt crime, the trial court did not err by omitting premeditation from the to-convict instruction. Id.

Orn’s jury was provided instructions consistent with DeRyke, Reed, and Besabe. Orn has mostly overlooked these cases. While he acknowledges Reed in a footnote, he appears to suggest this Court should not follow that decision because it fails to cite

State v. Vangerpen, 125 Wn.2d 782, 786, 788 P.2d 1177 (1995).

Vangerpen is a 1995 decision concerning whether the State should 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.

There, the State charged the defendant with attempted first degree murder without alleging in the charging document that he acted with premeditated intent. Id. at 785-86. The case provides no analysis about whether premeditated intent is, in fact, an essential element of attempted first degree murder, likely because the prosecutor in that case conceded the point at trial. Id. at 785-86, 790. To the extent that the case can be read to declare that premeditated intent is an essential element of attempted first degree murder that must be included in a to-convict instruction, it is plainly dicta.

In contrast, DeRyke, which the supreme court decided several years after Vangerpen, addresses the issue presented here: whether the to-convict instruction for an attempt crime must include the essential elements of the crime attempted. 149 Wn.2d at 910. The court held that it did not: “An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime.” Id.

Although it is essential that the to-convict instruction identify the crime attempted, there is no requirement that it also contain the attempted crime's elements. Id. at 911. Instead, it is preferable to set forth those elements in a separate instruction defining the substantive crime. Id. at 911. That is what happened here.

This Court should apply the reasoning in DeRyke and adhere to the specific holdings in Reed and Besabe to reject Orn's claim.

c. Any Error Was Harmless Beyond A Reasonable Doubt.

Even if the to-convict instruction in this case omitted an essential element of the crime, the error would not require reversal in this case because the instructions, as a whole, required the State to prove that Orn acted with premeditated intent, both parties focused on this aspect of the case in closing argument, and the evidence of premeditation was overwhelming.

A jury instruction that omits an essential element is harmless when it appears beyond a reasonable doubt that the error did not contribute to the verdict. DeRyke, 149 Wn.2d at 912; State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). The reviewing court must be able to conclude beyond a reasonable doubt that the

jury verdict would have been the same absent the error. Brown, 147 Wn.2d at 341 (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

Here, the court's instructions required the jury to find that Orn acted with intent to commit first degree murder, and instructed the jury that first degree murder requires a premeditated intent to kill. CP 68, 71. The instructions also defined premeditation. CP 72. Read as a whole, the instructions accurately and sufficiently convey that the specific intent required to commit attempted first degree murder was premeditated intent to kill.

Moreover, there was no ambiguity about this at trial. In closing argument, the State focused primarily on evidence that Orn acted with premeditated intent to kill. RP 1137-38 ("the evidence beyond a reasonable doubt is that he premeditatedly tried to kill Thomas"); 1140-41 ("Element two, though, also has to be proven beyond a reasonable doubt, and this is premeditation, intent to commit in the first degree with a premeditated intent to cause the death of another person. What does premeditation mean? ..."); 1141-42 ("it's pretty clear that the defendant had premeditated intent to kill Thomas that day. ..."); 1144 ("But that's not the only way premeditation is proven in this case ..."); 1145 ("You got to

remember, premeditation can occur during the event, too. Let's just say for the sake of argument that the defendant just wanted to scare Thomas. ... So I shoot him once. But it doesn't stop. The premeditation, much like the substantial step, is proven over and over again, and we know he's trying to shoot him. We know it because of the amount of times he was hit. ... So that's the second way that he's proved his premeditated intent, I am going to keep shooting until you die."); 1152 (explaining the difference in mental states between count I, attempted murder, and count II, assault in the first degree is "with [the assault], it's not intent to kill, premeditated intent to kill somebody, but just to try to really hurt them[.]"). Further, the defense closing argument focused primarily on rebutting premeditation, repeatedly asking whether each discrete piece of evidence amounted to "a purpose to kill, a design to kill, an aforethought to kill?" RP 1160-61, 1165-66, 1167-68, 1170, 1171, 1175, 1177. Indeed, the defense urged the jury to convict Orn of the assault charge instead of the murder because, in its view, the evidence failed to show premeditation. RP 1176-79.

Further, the evidence of premeditation was explicit and overwhelming. Orn's angry text messages established that he was upset, felt like "going on a fucking rampage right now" during which

he did not “want to hurt [Boals], too,” and, finally, that Orn did not “even need time to make a decision at this point” because “I’m certain it is what I’m going to do.” RP 415-17. In other words, he premeditated. The evidence shows that what he had premeditated was the intent to shoot Seamans: immediately after threatening a rampage, he showed up with a gun, loaded it in front of Boals, told her he was going to confront Seamans, and warned her not to call the police unless “you want me to shoot you, too.” RP 500. Then he burst into Seamans’ garage with the gun and immediately fired 11 bullets at the unarmed man at short range, striking his face, chest, abdomen and extremities. RP 784, 786-87. When he was finished, Orn went back to Boals and announced what he had done, never suggesting that he was attacked or provoked in any way that would justify shooting in self-defense. RP 393, 504.

The evidence at trial firmly established that Orn shot Seamans with premeditated intent to kill. Even if premeditation should have been in the to-convict instruction, the record here demonstrates that any error in its omission was harmless beyond a reasonable doubt. This Court should affirm.

2. THE TRIAL COURT EXERCISED SOUND DISCRETION BY EXCLUDING IRRELEVANT EVIDENCE THAT THE VICTIM ASSISTED LAW ENFORCEMENT WITH INVESTIGATIONS FOLLOWING THE SHOOTING.

Orn claims that the trial court denied his right to confront witnesses and to present a defense by limiting his inquiry into evidence that Seamans had assisted the Kent Police Department (KPD) with undercover investigations into the trafficking of stolen property several months after he was injured in the shooting. Because the relevance of that evidence was marginal and substantially outweighed by prejudice and confusion of the issues, the trial court properly limited the evidence to the fact that Seamans had worked or was working with KPD, excluding details of their agreement.

a. Relevant Facts.

Before trial, the State moved in limine to preclude Orn from delving into Seamans' arrest history and work as a confidential informant for Kent police. RP 15; Supp. CP \_\_ (Sub. No. 61, State's Trial Memo). The shooting occurred in August 2016, and the State represented that KPD had finished those portions of its investigation that relied on Seamans' participation by the end of that year. RP 15. Later, in 2017, Seamans was "caught up in an

incident that occurred over in Kirkland and was contacted by a completely different detective in the Kent Police Department who ... asked him if he would be willing to give some assistance in some investigations that were going to begin later on in the year 2017.” RP 15. Thus, Seamans did not begin working for KPD until well after the shooting. RP 16.

The State argued that Seamans’ agreement with KPD was irrelevant and collateral to the trial, and that exposing the details of Seamans’ work as a confidential informant could compromise ongoing investigations, jeopardize Seamans’ safety, and diminish law enforcement’s ability to use confidential informants in general. Supp. CP \_\_\_ at 8-10; RP 19-20. Orn argued that Seamans’ agreement to work with police was relevant because “the agreement reflects the exact issues in that are in this case concerning Mr. [Seamans], narcotics, property, possession of stolen property, and firearms investigation” and “reflect[s] bias, lack of truthfulness, and bad acts-motive, intent, absence of mistake[.]” RP 20; CP 54.

The trial court concluded that Seamans’ work for KPD had some relevance as to Seamans’ potential bias, but indicated that any relevance about “the agreement itself or the nature of the

agreement or the case” was substantially outweighed by the danger of prejudice and confusion of issues. RP 21-22. Accordingly, the court allowed limited inquiry in order to “get[] out any potential bias of the victim” but “won’t allow anything beyond that.” RP 22. The court suggested an appropriate question would be, “and isn’t it true that since the incident you’ve ... done some work with the Kent Police Department?” RP 21-22.

During Seamans’ direct examination, he described himself as “a proactive pothead.” RP 760. That meant, “I work hard every day, I visit my family, and I – I just stay proactive in not doing anything out the question really. I just spend my life, yeah.” RP 760. Seamans did not explain what he meant by “not doing anything out of the question.”

Before cross-examining Seamans, the defense asked the court to reconsider its ruling in limine in light of Seamans’ testimony. RP 820. Orn argued that evidence about the genesis of Seamans’ agreement with KPD—his arrest for an offense that was never identified on the record—was admissible to impeach Seamans’ claim to be a “proactive pothead” who does not do “anything out of the question.” RP 821. Specifically, Orn proposed to ask 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?" RP 820. The proposed inquiry differed from what the trial court initially approved by asserting that Seamans had been arrested for something, that his work was in exchange for not being prosecuted, and that his work related to "narcotics, stolen property, [and] firearms." RP 820.

The trial court adhered to its pretrial ruling, limiting the inquiry to the fact of the employment relationship between Seamans and KPD. The court reiterated that while that relationship was relevant to Seamans' potential bias, "I just don't think that the witness's testimony that he's not doing anything out of the question opens the door to impeach him on these other alleged prior bad acts." RP 822-23.

During cross examination, defense counsel asked Seamans, "isn't it true that since this incident, you have actually worked with Kent Police Department?" RP 875. Seamans responded, "Yes." RP 875. There was no further questioning on the subject and neither party referred to it in closing.

b. The Rights To Cross-Examination And To Present A Defense Do Not Entitle The Defendant To Admit Irrelevant, Speculative, Or Confusing Evidence.

The Sixth Amendment right of confrontation includes the right to cross-examine witnesses. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). However, the right to cross-examine adverse witnesses is not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). “The confrontation right and associated cross-examination are limited by general considerations of relevance.” Id. It is well-settled, for example, “that neither party may impeach a witness on a collateral issue; that is, on facts not directly relevant to the trial issue.” State v. Aguirre, 168 Wn.2d 350, 362, 229 P.3d 669 (2010). Further, even where evidence is relevant, it still “may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence.” Darden, 145 Wn.2d at 620 (citing State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). Upon such a showing, the trial court must balance the State’s interest in excluding the evidence against the defendant’s need for the information sought. Id. at 622.

Likewise, a defendant's right to present a defense is not without limitation. "Defendants have the right to present a defense, but do not have the right to introduce evidence that is irrelevant or otherwise inadmissible." State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), rev. denied, 154 Wn.2d 1026 (2005).

Trial court decisions to admit or exclude evidence, including limitations to cross-examination, are reviewed for abuse of discretion. State v. Young, 160 Wn.2d 799, 805-06, 161 P.3d 967 (2007). If the trial court excluded relevant defense evidence, the reviewing court "determine[s] as a matter of law whether the exclusion violated the constitutional right to present a defense." State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017).

- c. The Trial Court Exclusion Of Inadmissible Evidence Was Consistent With The Sixth Amendment And The Right To Present A Defense.

Orn characterizes Seamans' testimony that he does not do "anything out of the question" as a claim to be a "simple law-abiding pothead," and argues that he should have been allowed to impeach that claim with evidence that Seamans had been arrested for something after the shooting and agreed to work with KPD as a

confidential informant to avoid being charged. Brief of Appellant at 14-15.

As an initial matter, Orn's argument depends on a speculative inference: that "anything out of the question" means "anything against the law." But Seamans was never asked and never explained what he meant by "out of the question," and his testimony does not compel the conclusion that Orn advocates. Seamans admitted to having taken illegal drugs (ecstasy) on the night of the shooting, so it is clear that Seamans was not claiming that he always followed the law. RP 795, 859-60. Additionally, his testimony suggested he was principled about certain things; for example, he made sure Boals and Orn had broken up before he had sex with Boals because he would never "disrespect a man." RP 766, 768. Thus, Seamans may have been referring to a personal code when he said he does nothing "out of the question." Because it is not clear what Seamans meant by that remark, any relevance his later arrest for an unknown offense may have had for impeachment on that collateral point was both minimal and speculative.

Even if Seamans' testimony could be understood as a claim to be law-abiding, the State articulated compelling reasons why

admitting the details of Seamans' agreement with KPD would prejudice the State and its witnesses. First, the investigations that involved Seamans as a confidential informant were ongoing. Supp. CP \_\_\_ at 8-10; RP 19. While the general notion of Seamans' work with KPD was in the record, any further inquiry into the details of Seamans' involvement carried the risk of compromising active investigations.

The State was also concerned for Seamans' safety: "If it's made public that he's actually out there in the city of Kent doing ... deals for the police department, he could really put himself at risk." RP 19. The State has a legitimate interest in protecting confidential informants. State v. Casal, 103 Wn.2d 812, 815, 699 P.2d 1234 (1985); see also Roviario v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957) (acknowledging the importance of both criminal discovery and confidential informants and setting forth procedures for protecting both). Indeed, the importance of an informant's identity is reflected by the fact that it is protected from disclosure by CrR 4.7(f), which generally precludes disclosure of that information to the defense. Although the fact that Seamans had worked as a confidential informant for KPD was no longer secret, making public the details of that arrangement, including

what types of cases he worked on, would undoubtedly increase the risk to this witness.

Finally, the State argued that precluding testimony about Seamans' confidential informant arrangement supported law enforcement's ability to use confidential informants in general. "The use of informants in certain areas of enforcement is essential, and the typical informer will make it a condition of cooperation that his identity remain confidential." Casal, 103 Wn.2d at 815 (internal quotation omitted). Even if KPD would not likely continue to use Seamans as an informant, making public any details about their agreement would erode the guarantees upon which police rely in recruiting and successfully utilizing confidential informants. See Casal, 103 Wn.2d at 815.

The State presented several important reasons to limit inquiry about Seamans' work as a confidential informant, and Orn failed to demonstrate how this evidence was actually helpful to his defense. He offered the evidence to impeach Seamans' statement that he does not do "anything out of the question." Not only was evidence about Seamans' post-shooting arrest and relationship with KPD not very useful to impeach such an ambiguous statement, but Orn had (and used) other material with which to impeach

Seamans' credibility. Besides Seamans' testimony that he spends all day smoking marijuana, Orn was able to impeach him with a number of prior inconsistent statements, his use of an illegal drug preceding the shooting, and ostensibly-conflicting testimony about whether Seamans was masturbating when Orn burst into the garage with a gun. RP 830, 833, 836, 840, 859-60, 861, 890. Importantly for his self-defense claim, Orn also established in cross-examination that Seamans had access to a number of objects that could be used as weapons, despite his testimony on direct that there were no weapons in his garage. RP 824-28. Further, Boals' testimony did most of the work in damaging Seamans' credibility before he ever took the stand.<sup>3</sup> Boals testified that Seamans took items from her apartment without permission and would not return them, that Seamans had weapons and had threatened Orn, and that Seamans was a dishonest person. RP 381, 384-85, 469, 447, 491.

Given the record, the trial court reasonably concluded that Orn's interest in admitting evidence that Seamans was arrested for some offense months after the shooting and cooperated with law

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<sup>3</sup> Of course, Boals also confirmed that she decided to testify "to try to help the case for Nick [Orn]." RP 419.

enforcement investigations for a time after that did not outweigh the State's interests in protecting ongoing investigations, the need to protect confidential informants in order to preserve law enforcement's ability to use that tool in general, and the potential risk to Seamans personally.

Further, highlighting evidence of the victim's participation in investigations into trafficking in stolen property and other crimes was likely to mislead or confuse the jury. Orn claimed he shot an unarmed Seamans in self-defense. Seamans' arrest for an unidentified crime might have suggested to the jury that Seamans had a history of violent crime, which could support Orn's claim of self-defense. But the arrest—which was not shown to have been for a violent crime at all—occurred several months after the shooting and thus could have no relevance to the self-defense claim. Further, it was undisputed that Seamans had possession of Orn's property, and there was testimony that he intended to sell it, either for himself or to help Boals make rent. Evidence that Seamans was employed by KPD to make purchases of stolen property might have confused the jury about whether that occurred in this case, or whether the arrest that precipitated his involvement

as a confidential informant stemmed from his conduct in this case, neither of which was true.

As the trial court properly concluded, the evidence that Seamans worked with KPD was relevant to Seamans' potential bias, and that evidence was properly admitted. But evidence that Seamans was later arrested for an unknown offense and details about Seamans' work as a confidential informant was not relevant for any other legitimate purpose. The trial court did not abuse its discretion or violate Orn's constitutional rights by excluding irrelevant evidence. Further, any error in excluding the evidence was harmless beyond a reasonable doubt for the same reasons discussed in section (C)(1)(c), supra.

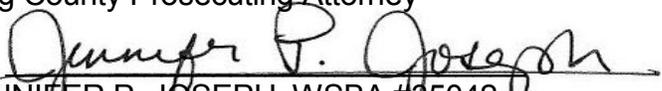
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm.

DATED this 2nd day of April, 2019.

Respectfully submitted,

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No. 7

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.

No. 10

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 unless the killing is justifiable.

No. 11

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.

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