

64116-6

64116-6

No. 64116-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL PETER WARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Hayden

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The entry of convictions for attempted first degree murder and first degree assault violated double jeopardy.

2. The entry of convictions for felony harassment and attempted first degree murder violated double jeopardy.

3. The court's jury instruction 8 failed to include all of the essential elements of attempted first degree murder.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Double Jeopardy Clauses of the United States and Washington Constitutions prohibit a defendant from being twice placed in jeopardy. Multiple punishment for the same offense where the Legislature has not authorized such multiple punishment violates double jeopardy. Here, the State conceded at trial attempted first degree murder and first degree assault were the same offense and should be merged. Did the trial court err in failing to strike the first degree assault conviction as it violated double jeopardy, thus requiring this Court to strike the conviction?

2. During closing argument, the State conceded that Mr. Ward's threat to kill, an essential element of felony harassment, constituted the substantial step required for attempted first degree murder. Did the trial court err in imposing convictions for attempted

first degree murder and felony harassment where imposition of the two convictions violated double jeopardy, thus requiring this Court to strike the felony harassment conviction?

3. All of the elements of the charged offense must be included in the “to-convict” jury instruction. Premeditation is an element of the offense of attempted first degree murder. Did the trial court err when it failed to instruct the jury in the “to-convict” instruction for attempted first degree murder on the elements of premeditation?

C. STATEMENT OF THE CASE

Daniel Ward and Karla Colombini met in June 2007 and lived together in a tempestuous romantic relationship for about six months. 7/30/09RP 28-36. Thereafter, the two would periodically rekindle their relationship. The relationship was fueled by mutual drug and alcohol abuse and involved acts of domestic violence committed by both individuals. 7/30/09RP 36. The two reignited their relationship and terminated it several times over the period of approximately two years.

The relationship ultimately degenerated to the point that on the evening of October 17, 2008, Ms. Colombini was allegedly attacked by Mr. Ward with a box cutter. 8/3/09RP 53-54. Mr. Ward

was subsequently charged with attempted first degree murder, first degree assault, and felony harassment for the October 17, 2008, event, and second degree assault for a prior encounter between Mr. Ward and Ms. Colombini. CP 6-9. Following a jury trial, Mr. Ward was convicted as charged. CP 88-96.

D. ARGUMENT

1. IMPOSITION OF CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER AND FIRST DEGREE ASSAULT VIOLATED DOUBLE JEOPARDY

Prior to trial, the State was allowed to file an amended information. 7/21/09RP 3-4. At that time, the trial court noted the information contained allegations for attempted first degree murder and first degree assault and pondered whether these two counts would merge. *Id.* The prosecutor noted: “No, *I’d concede same course of criminal conduct were he to be found guilty of both.*” 7/21/09RP 4 (emphasis added).

At sentencing, the court merged the two offenses but the two convictions remained in the judgment and sentence. CP 101.

a. Multiple convictions for the same act violate double jeopardy. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” Article I, section 9 of the Washington State Constitution provides that “[n]o person shall ... be twice put in jeopardy for the same offense.” The two clauses provide the same protection. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The Legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the Legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368.

If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.*; see *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same conduct under two different statutes; the *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent*. *Hunter*, 459 U.S. at 368.

In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.*; *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of

the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* “same evidence” test to determine whether the crimes are the same in fact and law. *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

Although he did not raise this issue below, Mr. Ward contends this is a “manifest error affecting his constitutional right to be free from double jeopardy” which he may raise for the first time on appeal. *State v. Bobic*, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); *State v. Turner*, 102 Wn.App. 202, 206, 6 P.3d 1226 (2000). See also *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).

b. Imposition of convictions for attempted murder and first degree assault violated double jeopardy. Imposition of convictions for attempted first degree murder and first degree assault for the same act violated Mr. Ward’s right against double jeopardy.

The Washington Supreme Court has held that despite the fact the two offenses have different elements, imposition of separate convictions for attempted first degree murder and first degree assault violate double jeopardy:

Consistent with the result in *Valentine* but applying a more direct application of the *Blockburger* test, we reverse the Court of Appeals and hold that Orange's convictions for first degree attempted murder and first degree assault violated his constitutional protection against double jeopardy. See also *In re Pers. Restraint of Burchfield*, 111 Wn.App. 892, 46 P.3d 840 (2002) (holding that convictions for first degree manslaughter and first degree assault arising out of same gunshot violated double jeopardy). Under the *Blockburger* test, the crimes of first degree attempted murder (by taking the "substantial step" of shooting at Walker) and first degree assault (committed with a firearm) were the same in fact and in law. The two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault.

In re the Personal Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004).

The decision in *Orange* compels the conclusion that the two convictions here violate double jeopardy. Mr. Ward was convicted of stabbing Ms. Colombini with a box cutter, an act which constituted the facts supporting the two convictions. The trial court erred in merging the two offenses instead of finding the two offenses violated double jeopardy.

c. The remedy for a double jeopardy violation where two or more offenses arise from the same conduct is to strike the assault conviction. In *State v. Womac*, the Washington Supreme Court ruled that the proper remedy for a violation of double jeopardy based upon imposition of two or more convictions founded upon the same evidence is to vacate the lesser conviction. 160 Wn.2d 643, 659-60, 160 P.3d 40 (2007). Accord *State v. League*, 167 Wn.2d 671, ___ P.3d ___ (2009) (“When two convictions violate double jeopardy principles, the proper remedy is to vacate the lesser conviction and remand for resentencing on the remaining conviction.”). In *Womac*, the convictions involved were homicide by abuse, second degree felony murder, and first degree assault, all based upon the same act. The trial court ruled the convictions violated double jeopardy but conditionally dismissed them, allowing for reinstatement if the greater verdict and sentence were later set aside. The Supreme Court ruled that only the homicide by abuse conviction could stand and the other two convictions *must* be dismissed. *Id.*

Here, the State argued, and the court agreed, that the two offenses constituted the same criminal conduct. CP 7/21/09RP 4. In fact, the two offenses were not merely same criminal conduct,

they violated double jeopardy and the first degree assault conviction should have been dismissed. This Court should order the assault conviction stricken.

2. THE FELONY HARASSMENT AND ATTEMPTED FIRST DEGREE MURDER CONVICTIONS VIOLATE DOUBLE JEOPARDY

During closing arguments, the State argued that Mr. Ward's threat to kill Ms. Colombini was an element of felony harassment and constituted the substantial step element of attempted second degree murder:

Count 3 is felony harassment. He's charged with threatening to kill her as he is slashing at her, he tells her *I am going to kill you*. He says it. And what we're trying to figure out, well what's he trying to do? What's his intent? What's going on inside his head? Let's ask him, those are his words. I would have said, first he tells her *keep kicking me and I am going to kill you*. That's also the first words out of Karla Colombini's mouth when Michael Searcy opens the door: *He's going to kill me. He's trying to kill me.* With respect to whether or not there's a substantial step towards commission of murder one, that's a substantial step, one centimeter away. The intent is revealed not only in his actions but his own admissions, his own statements.

8/5/09RP 129 (italics in original, emphasis added).

Under RCW 9A.28.020(1), "[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.” A person is guilty of first degree murder as charged when “[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.” RCW 9A.32.030(1)(a). *Borrero*, 161 Wn.2d at 537-538.

A person is guilty of harassment if he knowingly threatens to cause bodily injury immediately or in the future to the person threatened and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i), (b). When the threat to cause bodily injury is a threat to kill, the harassment constitutes a felony. RCW 9A.46.020(2)(b)(ii).

The mere fact that each statute at issue has an element not found in the other is irrelevant, as *Blockburger* requires “proof of an additional *fact* which the other does not.” *Blockburger*, 284 U.S. at 304 (emphasis added); *Orange*, 152 Wn.2d at 820. Here, the prosecutor conceded that Mr. Ward’s threat to kill was the substantial step necessary for the attempted murder.

Where conviction of a greater crime cannot be had without conviction of the lesser crime, double jeopardy bars prosecution for the lesser crime. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912,

53 L.Ed.2d 1054 (1977) (*per curiam*). Put another way, where the State's proof of the greater crime necessarily requires proof of all of the elements of the lesser crime, double jeopardy bars punishment on the lesser crime. *Illinois v. Vitale*, 447 U.S. 410, 420-21, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). See also *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005) (“[I]f the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary.”). In evaluating whether two offenses contain the same elements, this Court must consider the elements of the offenses “as charged and proved, not merely as the level of an abstract articulation of the elements.” (Emphasis added.) *Freeman*, 153 Wn.2d at 779.

The decision in *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), is extremely relevant to the instant matter and provides this Court with the proper test to apply in finding the convictions for the two offenses violate double jeopardy. The importance of *Dixon* is its application of the test enunciated in *Blockburger, supra*, to the facts of *Dixon*. While there were a myriad of ways of violating the contempt provision of the defendant's release in *Dixon*, the government chose to base its

prosecution on the defendant's arrest for possession of narcotics with intent to distribute. *Dixon*, 509 U.S. 691-92. The Supreme Court had no problem finding the defendant's subsequent conviction for the drug offense violated double jeopardy, finding the drug conviction did not include any element not already contained in the contempt prosecution. *Id* at 698-700. Thus the two offenses, contempt and possession of narcotics, were the same in law and fact under the *Blockburger* test. *Id*.

Here, the threat to kill which constituted the elements of felony harassment constituted the substantial step for the attempted murder. Although there are a myriad of acts which could constitute the substantial step element of attempted murder, the State conceded here that the substantial step was proven by Mr. Ward's threat to kill. Thus, utilizing the *Blockburger* test, and as charged and proved here, entry of convictions for felony harassment and attempted murder violated double jeopardy. This Court should strike the felony harassment conviction. *Womac*, 160 Wn.2d at 659-60.

3. COURT'S INSTRUCTION 8, THE "TO-CONVICT" JURY INSTRUCTION FOR ATTEMPTED FIRST DEGREE MURDER, LACKED THE ESSENTIAL ELEMENT OF PREMEDITATION REQUIRING REVERSAL OF MR. WARD'S CONVICTION

a. All of the elements of the offense are required to be in the "to-convict" instruction. Mr. Ward proposed a to-convict instruction for attempted first degree murder which stated the jury was required to find his intent was premeditated. CP 35. The trial court refused to give Mr. Ward's proposed instruction and Mr. Ward both objected and excepted to the trial court's refusal. 8/5/09RP 112-13.

Under the Fourteenth Amendment to the United States Constitution, the State is required to prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The court's instructions to the jury must clearly set forth the elements of the crime charged. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). In Washington, all of the elements of the crime must be contained in the "to-convict" instruction. *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); *State v. Smith*, 131

Wn.2d 258, 263, 930 P.2d 917 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). “Moreover a reviewing court may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal. *State v. Fisher*, 165 Wn.2d 727, 753-754, 202 P.3d 937 (2009); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). This Court reviews “to convict” instructions *de novo*. *Id.*

In *Oster*, the Supreme Court reaffirmed its prior rulings which held that all of the elements of the crime must be in the “to-convict” instruction. *Oster*, 147 Wn.2d at 147. According to the Court, the rationale behind the rule is that “[t]he jury has a right to regard the ‘to-convict’ instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction.” *Oster*, 147 Wn.2d at 147. The Court recognized an exception to this rule: where the element is prior criminal history. *Id.* In that circumstance, “we recognize a special exception when the element of a crime is prior criminal history and where, as here, only after determining that all of the

other elements of the crime have been proved, the jury is asked by special verdict form to decide, beyond a reasonable doubt, whether or not the accused has committed prior crimes.” *Oster*, 147 Wn.2d at 147.

The only other exception to this rule established by the Supreme Court is where the “legislature has established a statutory framework which defines a base crime which is elevated to a greater crime if a certain fact is present.” *Mills*, 154 Wn.2d at 10. In that scenario, the court may bifurcate the “elevating fact into a special verdict form.” *Id.*¹

Premeditation was neither evidence of criminal history (*Oster*) nor part of a statutory framework which elevated a base crime where a certain fact is present (*Mills*). The court’s Instruction 8, the “to-convict” jury instruction for attempted first degree murder, omitted the element of premeditation, and as such, under *Oster*, the omission denied Mr. Ward due process.

b. Premeditation is an essential element of attempted first degree murder. First degree murder provides that a person is guilty of the crime when “[w]ith a premeditated intent to cause the

¹ *Mills* involved a charge of felony harassment, the fact the threat was a threat to kill being placed in a special verdict form, of which the Supreme Court approved. *Mills*, 154 Wn.2d at 10.

death of another person, he or she causes the death of such person or of a third person[.]” RCW 9A.32.030(1)(a). A person with the requisite intent is guilty of criminal attempt if “he or she does any act which is a substantial step toward the commission of [the intended] crime.” RCW 9A.28.020(1); *DeRyke*, 149 Wn.2d at 910; *State v. Borrero*, 147 Wn.2d 353, 361-62, 58 P.3d 245 (2002).

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. *State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991), *citing* W. LaFave & A. Scott, *Criminal Law* § 6.2(c), at 500 (2d 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. *Dunbar*, 117 Wn.2d at 590, *citing* *Commonwealth v. Griffin*, 310 Pa. Super. 39, 50-51, 456 A.2d 171 (1983); *and* *People v. Foster*, 19 N.Y.2d 150, 153, 225 N.E.2d 200, 278 N.Y.S.2d 603 (1967).

In *Fisher, supra*, the Court, in assessing whether something was an element which needed to be in the “to-convict,” the looked to Black’s Law Dictionary for the definition of an element:

Black's Law Dictionary defines "elements of crime" as "[t]he constituent parts of a crime--[usually] consisting of the actus reus, mens rea, and causation--that the prosecution must prove to sustain a conviction."

165 Wn.2d at 754, quoting *Black's Law Dictionary* at 559 (8th ed. 2004).

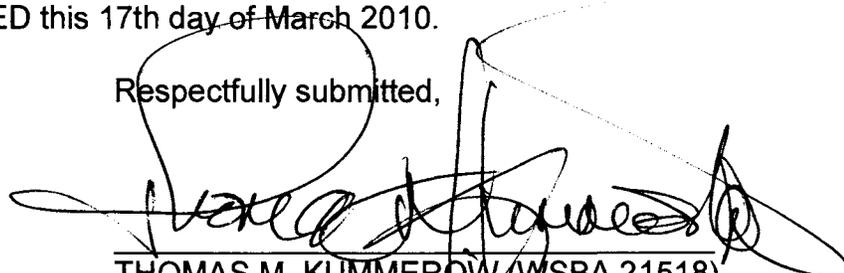
In an attempted first degree murder scenario such as here, premeditation is the *mens rea* which must be proven by the State and is thus, an element of the offense. The court's Instruction 6, the "to-convict" jury instruction for attempted first degree murder, omitted the essential element of premeditation, and as such, under *Mills* and *Oster*, the failure to include this essential element in the "to-convict" instruction was error. *Mills*, 154 Wn.2d at 15.

E. CONCLUSION

For the reasons stated, Mr. Ward submits this Court must reverse his conviction and remand for a new trial and/or remand for resentencing.

DATED this 17th day of March 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64116-6-I
v.)	
)	
DANIEL WARD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF MARCH, 2010.

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