

No. 44365-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BOSWELL,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF CASE 3

D. ARGUMENT 5

1. Double Jeopardy protections do not permit Mr. Boswell’s two convictions of attempted murder 5

 a. The federal and state constitutions prohibit multiple punishments for the same offense 5

 b. The unit of prosecution of an attempt is the intent to commit the act 6

2. The trial court erred in refusing Mr. Boswell’s request to instruct the jury on third degree assault as a lesser included offense of attempted first degree murder as charged in this case..... 9

 a. Due process requires a court provide instructions on lesser offenses where those instructions are supported by the evidence in the case 10

 b. The trial court erroneously denied Mr. Allen’s request to instruct the jury on the lesser offenses..... 10

i. Third degree assault and attempted third degree assault satisfy the legal prong as lesser included offenses of attempted first degree murder 11

ii. The requested lesser included offense was factually supported in this case 16

3. Instructions 11 and 12 omitted an essential element of the crime of attempted first degree murder..... 18

| | |
|--|----|
| a. The State must prove and a jury must find each element of an offense beyond a reasonable doubt..... | 18 |
| b. The court failed to instruct the jury on the necessary elements of attempted first degree murder as charged in Counts 1 and 2 | 18 |
| c. This Court must reverse Mr. Boswell’s convictions..... | 23 |
| E. CONCLUSION..... | 24 |

TABLE OF AUTHORITIES

Washington Constitution

Const. Art. I, § 22 2, 18
Const. Art. I, § 3 18
Const. Art. I, § 9 1, 5

United States Constitution

U.S. Const. amend. V 1, 5
U.S. Const. amend. XIV passim
U.S. Const. amend. VI 2, 18

Washington Supreme Court

In re the Personal Restraint of Orange, 152 Wn.2d 795, 100
P.3d 291 (2004) 15
State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998) 6, 7
State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997) passim
State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000) 6, 9
State v. Bright, 129 Wn.2d 257, 916 P.2d 922 (1996) 17
State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 23, 24
State v. Chhom, 128 Wn.2d 739, 911 P.2d 1014 (1996) 21
State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991) 13, 14
State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) 21
State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150
(2000) 16, 17
State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995) 6
State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984) 20
State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993) 12, 13, 14
State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1998) 10
State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006) 6, 7
State v. Lucky, 128 Wn.2d 727, 912 P.2d 483 (1996) 13, 14
State v. Luther, 157 Wn.2d 63, 134 P.3d 205 (2006) 8
State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) 18, 23
State v. Smith, 115 Wn.2d 775, 801 P.2d 975 (1990) 19
State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997) 21, 22, 23
State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 17
State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) 10

| | |
|---|----------------|
| <i>State v. Tvedt</i> , 153 Wn.2d 705, 107 P.3d 728 (2005)..... | 6, 7 |
| <i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P.2d 1177 (1995)..... | 18, 19, 21, 22 |
| <i>State v. Varnell</i> , 162 Wn.2d 165, 170 P.3d 24 (2007)..... | 7, 8 |
| <i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998)..... | 11 |
| <i>State v. Westling</i> , 145 Wn.2d 607, 40 P.3d 669 (2002)..... | 6, 7 |
| <i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978)..... | 11, 13, 14 |

Washington Court of Appeals

| | |
|--|----|
| <i>State v. Price</i> , 103 Wn. App. 845, 14 P.3d 841 (2000)..... | 19 |
| <i>State v. Reed</i> , 150 Wn. App. 761, 208 P.3d 1274 (2009)..... | 20 |
| <i>State v. Turner</i> , 102 Wn. App. 202, 6 P.3d 1226 (2000)..... | 6 |
| <i>State v. Vangerpen</i> , 71 Wn. App. 94, 856 P.2d 1106 (1993), <i>review granted</i> , 123 Wn.2d 1025 (1994)..... | 19 |

United States Supreme Court

| | |
|--|------------|
| <i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... | 18 |
| <i>Beck v. Alabama</i> , 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)..... | 10, 16, 17 |
| <i>Benton v. Maryland</i> , 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)..... | 5 |
| <i>Brown v. Ohio</i> , 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)..... | 7, 15 |
| <i>Ex parte Snow</i> , 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658 (1887)..... | 7, 8 |
| <i>In re Nielsen</i> , 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889)..... | 15 |
| <i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... | 18 |
| <i>Neder v. United States</i> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... | 23 |
| <i>North Carolina v. Pearce</i> , 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)..... | 5 |
| <i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)..... | 18 |
| <i>Schmuck v. United States</i> , 489 U.S. 705, 109 S. Ct. 2091, 103 L. Ed. 2d 734 (1989)..... | 10 |
| <i>State v. Adel</i> , 136 Wn.2d 629, 965 P.2d 1072 (1998)..... | 6, 7 |

Statutes

RCW 10.61.003 10
RCW 10.61.006 10
RCW 9A.08.010 12
RCW 9A.28.020 7, 11, 21
RCW 9A.32.030 11
RCW 9A.36.031 12

A. ASSIGNMENTS OF ERROR

1. Mr. Boswell's two convictions of attempted first degree murder violate the double jeopardy provisions of the Fifth Amendment and Article I, section 9.

2. The trial court's refusal to instruct the jury on a lesser-included offense violated the Fourteenth Amendment.

3. The trial court deprived Mr. Boswell of due process in violation of the Fourteenth Amendment, when the court failed to instruct the jury on the elements of the offense of attempted first degree murder.

4. Instruction 11 omitted an essential element of the crime of attempted first degree murder.

5. Instruction 12 omitted an essential element of the crime of attempted first degree murder

B. ISSUES PERTAINING TO ASSIGNMENTS O ERROR

1. The double jeopardy clauses of the federal and state constitutions bar multiple convictions based upon a single unit of prosecution. The unit of prosecution is the behavior or act which the legislature intends to criminalize. Interpreting the attempt statute, Supreme Court has previously held that the statute's focus is the "bad

intent” of the defendant. Where Mr. Boswell acted with a singular intent to kill another person, do his two convictions for attempted murder violate the double jeopardy provisions of the state and federal constitutions?

2. Due process requires a trial court to instruct on an lesser included offense when requested by the defendant, where (1) proof of the greater will also prove the lesser offense, and (2) in the light most favorable to the defendant, the evidence supports an inference that only the lesser offense was committed. In a prosecution of attempted murder committed by assaultive conduct, assault is a lesser included offense of attempted murder. Did the trial court deny Mr. Boswell due process when it refused to provide the requested instructions on the offenses of third degree assault?

3. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This, in turn, requires a trial court to instruct the jury on each element of the offense. Premeditated intent is an essential element of the crime of attempted first degree murder. Instructions 11 and 12, the “to convict”

instructions, omitted the element of premeditation. Did Instructions 11 and 12 relieve the State of its burden of proof?

C. STATEMENT OF CASE

Although Jessica Fix had recently broken up with Mr. Boswell, the two continued to live with Ms. Fix's parents in Yacolt. RP 215, 233.

After she returned from work one night, Mr. Boswell prepared Ms. Fix a meal of pancakes and tea. RP 239. Several hours later Ms. Fix became nauseous and began vomiting. RP 242. Ms. Fix then fell asleep. She awoke to a loud ringing in her ear and found blood on the side of her head. RP 248-49. She saw Mr. Boswell sitting on the other side of the couch holding a gun. RP 249. Mr. Boswell explained he had tried to shoot himself and had inadvertently shot her. RP 250-51.

Ms. Fix took the gun from Mr. Boswell. RP 266. She then took a shower, despite his pleas that she go to the hospital. RP 266-67, 269. Ms. Fix later drove herself to a Battleground store where she met friends who took her to a hospital. RP 268

Doctors determined the gunshot wound was not life-threatening. RP 351. However, they discovered Ms. Fix had extraordinarily high liver enzyme levels, indicating she had potentially consumed a

substantial amount of acetaminophen. RP 354-56, 506-08. This later condition was potentially life-threatening.

At Ms. Fix's house, police recovered a number of containers for medications containing acetaminophen as well as a mortar and pestle. RP 380-81. Cups taken from the house had traces of acetaminophen. RP 541-43.

Mr. Boswell explained that in an effort to take his own life he had crushed a large number of pills, including Tylenol PM, into a glass. RP 656-57. He then used a second glass as a shaker to help dissolve the medication. *Id.* This apparently left a large amount of the medication in the second glass which was then inadvertently consumed by Ms. Fix. *Id.* In the meantime, Mr. Boswell consumed the medication in his glass and quickly became nauseous. *Id.*

Failing in his first attempt to take his life, Mr. Boswell found a small-caliber decorative handgun. He laid on the L-shaped couch opposite from Ms. Fix. However, as he tried to fire, his arm slipped and he accidentally shot Ms. Fix. RP 671-77.

The State charged Mr. Boswell with two counts of attempted murder, one for the shooting and a second for allegedly attempting to

poison Ms. Fix with acetaminophen. CP 65-66. A jury convicted Mr. Boswell on both counts. CP 87-90.

D. ARGUMENT

1. Double Jeopardy protections do not permit Mr. Boswell's two convictions of attempted murder.

a. The federal and state constitutions prohibit multiple punishments for the same offense.

The Double Jeopardy Clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. V; Const. Art. I, § 9. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

The double jeopardy provisions of the state and federal constitutions protect against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*,

490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

b. The unit of prosecution of an attempt is the intent to commit the act.

Focusing on the third of these, the prohibition on multiple punishments, the Supreme Court has said

When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.

State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). A person may not be convicted more than once under the same criminal statute if only one “unit” of the crime has been committed. *State v. Leyda*, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)).

The unit of prosecution is designed to protect the accused from overzealous prosecution. *State v. Turner*, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges. *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct.

2221, 53 L. Ed. 2d 187 (1977) (“The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.”); [*Ex parte Snow*, 120 U.S. 274, 282, 7 S. Ct. 556, 30 L. Ed. 658 (1887)] (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges).

Adel, 136 Wn.2d at 635.

The unit of prosecution, the punishable conduct under the statute, may be an act or a course of conduct. *Tvedt*, 153 Wn.2d at 710. It is determined by examining the statute’s plain language. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007); *Leyda*, 157 Wn.2d at 342; *Westling*, 145 Wn.2d at 610. If the legislature has failed to specify the unit of prosecution in the statute, or if its intent is not clear, the court resolves any ambiguity in favor of the defendant. *Tvedt*, 153 Wn.2d at 711.

RCW 9A.28.020(1) provides, “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.” The Supreme Court has already determined the Legislature’s intent in drafting RCW 9A.28.020, explaining, “[t]he attempt statute focuses on the actor’s criminal intent. . . .” *State v. Luther*, 157 Wn.2d

63, 74, 134 P.3d 205 (2006) (italics in original). The Court explained further, “an attempt conviction results because of the defendant's ‘bad intent’ to commit the crime.” *Id.* at 73.

In Mr. Boswell’s case, the punishable conduct was his singular intent to commit murder of one person, Ms. Fix. Therefore, he could not be convicted of multiple counts of attempted murder of Ms. Fix. If it were otherwise, a person who shoots multiple time in an effort to kill someone could be convicted of multiple counts of attempted murder for each shot fired, as well as for procuring the gun, or driving to the scene of the offense, and lying in wait while there. In short, prosecutors would be free to divide the charge in a nearly endless fashion, the very result the Supreme Court denounced in *Snow*. Nothing in the attempt statute expresses a legislative intent for such a multitude of charges. As *Luther* concluded the “focus[]” is on the person’s intent not his acts.

Similar to its interpretation of the focus of the attempt statute, the Supreme Court has held that the unit of prosecution of other inchoate crimes is not the overt acts themselves but rather the mental state that accompanies the act. For example, in *Varnell*, the Court reasoned the unit of prosecution for solicitation to commit murder is not the number of potential victims. Rather, “the language of the

solicitation statute focuses on a person's 'intent to promote or facilitate' a crime rather than the crime to be committed." *Varnell*, 162 Wn.2d at 169.

So too, in *Bobic*, the Court concluded an agreement to commit several different crimes constitutes a single count of conspiracy rather than separate counts for each crime the conspirators agreed to commit. 140 Wn.2d at 263-64. The court reasoned "[a] single agreement to commit a series of crimes by the same conspirators was present here as each crime was only one step in the advancement of the scheme as a whole." *Id.* at 266.

The unit of prosecution in an attempt crime is the intent to commit the crime. Thus, Mr. Boswell could only be convicted of a single count of attempted murder.

2. The trial court erred in refusing Mr. Boswell's request to instruct the jury on third degree assault as a lesser included offense of attempted first degree murder as charged in this case.

Mr. Boswell requested the court instruct the jury on the included offense of third degree assault. RP 780-81. Without confining its analysis to the crimes as charged, and instead relying upon a since abrogated case, the trial court reasoned that an assault can never be a

lesser of attempted murder because attempted murder can be committed without committing a battery. RP 785.

- a. Due process requires a court provide instructions on lesser offenses where those instructions are supported by the evidence in the case.

Generally, a criminal defendant may only be convicted of those offenses charged in the information, or those offenses which are either lesser included offenses or inferior degrees of the charged offense.

Schmuck v. United States, 489 U.S. 705, 717-18, 109 S. Ct. 2091, 103 L. Ed. 2d 734 (1989); *State v. Tamalini*, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) (citing *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1998)). RCW 10.61.003 and RCW 10.61.006 codify this rule.

The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense, violates the Fourteenth Amendment. *Beck v. Alabama*, 447 U.S. 625, 636-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

- b. The trial court erroneously denied Mr. Allen's request to instruct the jury on the lesser offenses.

An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed

(factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

A court reviews *de novo* the legal prong of a request for a jury instruction on a lesser included offense. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The factual prong is reviewed for an abuse of discretion. *Id.* at 771–72.

i. Third degree assault and attempted third degree assault satisfy the legal prong as lesser included offenses of attempted first degree murder.

Examining the offenses as charged in this case, it is clear that both third degree assault and attempted third degree assault are legally lesser-included offenses of attempted first degree murder.

The State alleged Mr. Boswell committed attempted first degree murder by premeditating the intent to kill Ms. Fix and taking a substantial step towards that, specifically shooting her. CP 75 (Instruction 6); RP 858; RCW 9A.32.030(1); RCW 9A.28.020(1). Mr. Boswell requested a lesser instruction on the alternative of third degree assault which provides a person commits third degree assault, when:

With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm

RCW 9A.36.031(1)(d); RP 780. RCW 9A.08.010(2) provides “[w]hen a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly.” Thus, negligence is a lesser included degree of culpability of intent.

As charged, a person who intentionally attempts to kill another with a gun necessarily commits the crime of third degree assault. Without confining its analysis to the crimes as charged, and instead relying upon a since abrogated case, the trial court reasoned that an assault can never be a lesser of attempted murder because attempted murder can in other circumstance be committed without committing a battery. 4B RP 785 (citing *State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993)). *Harris* has been abrogated by subsequent Supreme Court decisions.

First, *Harris*'s analysis predates the Court's decisions in *Berlin* in which the Court itself recognized its lesser-included analysis had strayed from its original underpinnings. Specifically, *Harris* was decided during a period in which the Court improperly narrowed the legal-prong analysis to focus on whether the lesser was always committed whenever a person committed the great offense. *See, e.g.*,

State v. Curran, 116 Wn.2d 174, 183, 804 P.2d 558 (1991), *abrogated by, Berlin*, 133 Wn.2d at 548. *Harris* itself termed this the “statutory approach.” 121 Wn.2d at 323-24. *Harris* reasoned that because it was possible under the broader statutory language to commit attempted murder without necessarily committing an assault, an assault could never be a lesser offense of attempted murder. *Harris*, 121 Wn.2d at 321. Four years later, in *Berlin*, the Court recognized that analysis was incorrect.

Berlin rejected the deviation from the *Workman* test employed in *Harris*. While the Court does not cite to *Harris* or for that matter many of its other lesser-offense cases of that era, it is clear that it repudiated the “statutory alternative” on which *Harris* rested. In *Berlin*, the Court described its deviation from *Workman* as erroneously focusing upon “the elements of the pertinent charged offenses as they appeared in the context of the broad statutory perspective, and not in the more narrow perspective of the offenses as prosecuted.” *Berlin*, 133 Wn.2d at 547(citing *State v. Lucky*, 128 Wn.2d 727, 735, 912 P.2d 483 (1996), *overruled, Berlin*, 133 Wn.2d at 548).

[The] consequence of this rule is that whenever there are alternative means of committing a “greater” crime, there can be no lesser included offense unless the alternative

means each overlap to the extent that they are not mutually exclusive.

Lucky, 128 Wn.2d at 735 (see also, *Curran*, 116 Wn.2d at 183, abrogated by, *Berlin*, 133 Wn.2d at 548). That is precisely the formulation of the rule *Harris* employed. Indeed, there would have been no reason for *Harris* to use a different to rule, as *Curran* announced that rule two years prior to *Harris*; *Lucky* reaffirmed that it remained the rule three years after *Harris*; and not until four years after *Harris* did the Court repudiate the rule.

Thus, contrary to the analysis in *Harris*, it is no longer relevant whether one might hypothetically commit attempted murder without committing an assault. Instead, the legal prong requires a court determine only whether the assault is an included offense of attempted murder as charged and prosecuted in the case at hand. *Berlin*, 133 Wn.2d at 548. As set forth, assault is a lesser offense of attempted murder as charged in this case.

Second, and beyond having relied upon a since repudiated analysis, *Harris*' conclusion is at odds with the Court's subsequent decision in *In re the Personal Restraint of Orange*. There, much like its reaffirmation of the *Workman* standard in *Berlin*, the Court took the opportunity to clarify that double jeopardy analysis too must focus on

the offense as charged offense and not simply the generic statutory language. *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 819-20, 100 P.3d 291 (2004) (rejecting lower courts' formulation of "'same elements' test [as] requir[ing] a court to compare a generic element in one offense to a specific element in a second offense"). That is remarkably similar to the Court's statement in *Berlin* that

Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met.

133 Wn.2d at 541. Applying this standard, which mirrors the *Berlin* test, *Orange* concluded that when attempted murder is based on assaultive conduct, the attempted murder and assault are the same offense in law; proof of attempted murder by assaultive conduct will always prove an assault. 152 Wn.2d at 820.

If two offenses, one greater and one lesser, are the same offense, one is by definition an included offense. This is merely the inverse of the long-recognized rule that it "is invariably true" where two offenses are lesser and greater offenses they are by definition the same offense for purpose of double jeopardy. *Brown*, 432 U.S. at 168 (citing, *In re Nielsen*, 131 U.S. 176, 187-188, 9 S. Ct. 672, 33 L. Ed. 118 (1889)).

Indeed, it is impossible to say that one offense is the same offense as another, that is “identical in law,” yet not legally an included offense. Plainly Mr. Boswell could not have been convicted of both attempted murder for shooting Ms. Fix as well as third degree assault for negligently causing harm with the gun. And that is because the latter is a lesser included offense of, indeed, the same offense as, the former.

Assault is by definition a lesser included offense of attempted murder.

ii. The requested lesser included offense was factually supported in this case.

In applying the factual prong, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The instruction should be given “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck*, 447 U.S. at 635). In applying this factual test, if affirmative evidence supports the inference that only the lesser offense was committed, rather than merely the conclusion that the jury might disbelieve the State’s evidence, the instruction must be given. *Fernandez-Medina*, 141 Wn.2d at 456. Importantly, in reaching

this determination the trial court cannot “limit[] its view of the evidence [to that presented by the defense] but must consider all of the evidence that is presented at trial.” *Id.* (citing *State v. Bright*, 129 Wn.2d 257, 269-70, 916 P.2d 922 (1996)).

Viewed in the light most favorable to Mr. Boswell, a jury could readily conclude the shooting was not an intentional attempt to kill Ms. Fix but rather a negligent effort to kill himself which unfortunately harmed Ms. Fix. In fact, that was precisely Mr. Boswell’s testimony. Therefore, the lesser offense was factually supported.

The evidence in the light most favorable to Mr. Boswell supported his requested instructions on the lesser offenses. “A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Mr. Boswell was entitled to the requested instruction. *Fernandez-Medina*, 141 Wn.2d at 461-62. The trial court’s failure to instruct the jury on the lesser offense violated the Fourteenth Amendment. *Beck*, 447 U.S. at 636-38.

3. Instructions 11 and 12 omitted an essential element of the crime of attempted first degree murder.

- a. The State must prove and a jury must find each element of an offense beyond a reasonable doubt.

The jury-trial guarantees of the Sixth Amendment and Article I, section 22 of the Washington Constitution, and the Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, §section 3 of the Washington Constitution, require the State prove each element to a jury beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

- b. The court failed to instruct the jury on the necessary elements of attempted first degree murder as charged in Counts 1 and 2.

Premeditated intent is an essential element of the crime of attempted first degree murder. *State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995). This Court has explained

a person commits first degree attempted murder when, with premeditated intent to cause the death of another,

he/she takes a substantial step toward commission of the act.

State v. Price, 103 Wn. App. 845, 851-52, 14 P.3d 841 (2000) (citing *State v. Smith*, 115 Wn.2d 775, 782, 801 P.2d 975 (1990)).

In *Vangerpen*, the information charged the defendant “with intent to cause the death of another person did attempt to cause the death of . . . a human being.” *State v. Vangerpen*, 71 Wn. App. 94, 97, n.1, 856 P.2d 1106 (1993), *review granted*, 123 Wn.2d 1025 (1994). At the close of the State’s case, the defendant objected to the information’s omission of premeditation. *Vangerpen*, 125 Wn.2d at 785. Over a defense objection, the trial court permitted the State to amend the information to include the element of premeditation. *Id.* at 786. On appeal there was no question that premeditation was an essential element of attempted first degree murder. *Id.* at 789-90. Rather the only issue was whether the trial court erred in allowing amendment of the information to add that element. *Id.* In fact, the State contended that because it was an essential element the amendment was proper.

Despite the plain of holding of *Vangerpen*, and its own decision in *Price*, this Court held in *State v. Reed*, “to prove only an attempt to commit first degree murder, the State was not required to prove that Reed acted with premeditated intent to commit murder.” 150 Wn. App.

761, 772-73, 208 P.3d 1274 (2009). *Reed* does not cite to, acknowledge, nor attempt to distinguish *Vangerpen*. *Reed's* conclusion that premeditated intent is unnecessary to convict a person of attempted first degree murder is contrary to *Vangerpen*. This Court must follow directly controlling authority of the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Thus, this Court must follow the conclusion of *Vangerpen* that premeditated intent is an element of attempted first degree murder.

Indeed, the amended information in this case properly alleges Mr. Boswell “with a premeditated intent to cause the death of another person” did attempt to cause the death of that person. CP 65-66. But Instructions 11 and 12, the “to convict” instructions, provided only:

To convict the defendant of the crime of Attempted Murder in the First Degree, as charged in Count 1[2], each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 14, 2011[November 13, 2011 or November 14, 2011], 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 the crime of Murder in the First Degree;
- (3) That the acts occurred in the State of Washington. .

..

CP 80-81 (bracketed text pertains to Count 2). There can be no dispute that the essential element of premeditation is absent from these

instructions. Instruction 9, which purports to define the crime of attempted first degree murder, similarly omits the premeditation element. CP 78.

“[B]ecause it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence,” generally the “to convict” instruction must contain all elements of the charged crime. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (internal quotation marks omitted) (quoting *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Where the State alleges a defendant has committed an attempted crime the jury must find he formed the necessary intent to commit the completed crime and took a substantial towards doing so. *DeRyke*, 149 Wn.2d at 910 (citing RCW 9A.28.020(1); *State v. Chhom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996)).

An attempt generally requires that the jury find the person formed the intent necessary to the commit the crime and took a substantial step. *DeRyke*, 149 Wn.2d at 910. First degree murder is unique in that in that it requires a heightened intent - premeditated intent. As *Vangerpen* made clear, premeditated intent is an essential element of the offense of attempted first degree murder.

commit murder.” *Id.* By requiring only an intent to premeditate the intent at some later time, Instructions 11 and 12 omitted an essential element of the crime.

c. This Court must reverse Mr. Boswell’s convictions.

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, the Court held “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *Brown*, 147 Wn.2d at 339 (citing *Smith*, 131 Wn.2d at 265). In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *Mills*, 154 Wn.2d at 15 n.7 (citing *Neder*, 527 U.S. at 1; *Chapman*, 386 U.S. at 24).

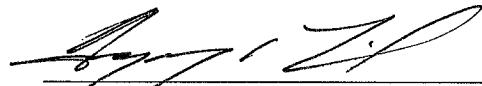
The jury had no reason to know that it must find Mr. Boswell premeditated the intent to cause another’s death before he took a substantial step towards doing so. Neither the purported definition of attempted first degree murder in Instruction 9, nor Instructions 11 or

12, contained that requirement. CP 78, 80-81. That omission was not cured by the fact that t another instruction defining first degree murder, contained the necessary element. CP 75. Instead, the inclusion of premeditation in the instruction for the completed offense while omitting it from the attempt instruction exacerbates the error by telling the jury the heightened intent is required only for the completed offense. Because the instructions, even read as a whole, omit an essential element of the offense, reversal is required. *Brown*, 147 Wn.2d at 339.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Boswell's convictions.

Respectfully submitted this 16th day of July, 2013.



GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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

| | | |
|----------------------|---|----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 44365-1-II |
| v. |) | |
| |) | |
| MICHAEL BOSWELL, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | |
|--|-----|-------------------|
| [X] ANNE MOWRY CRUSER | () | U.S. MAIL |
| CLARK COUNTY PROSECUTOR'S OFFICE | () | HAND DELIVERY |
| PO BOX 5000 | (X) | E-SERVICE VIA COA |
| VANCOUVER, WA 98666-5000 | | PORTAL |
| E-MAIL: prosecutor@clark.wa.gov ; | | |
| | | |
| [X] MICHAEL BOSWELL | (X) | U.S. MAIL |
| DOC #361908 | () | HAND DELIVERY |
| WASHINGTON STATE PENITENTIARY | () | _____ |
| 1313 N 13 TH AVE | | |
| WALLA WALLA, WA 99362 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JULY, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

July 16, 2013 - 4:08 PM

Transmittal Letter

Document Uploaded: 443651-Appellant's Brief.pdf

Case Name: STATE V. MICHAEL BOSWELL

Court of Appeals Case Number: 44365-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:
prosecutor@clark.wa.gov