NO. 44365-1-II

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

STATE OF WASHINGTON, Respondent

v.

MICHAEL TODD BOSWELL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01910-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. DOUBLE JEOPARDY DOES NOT BAR BOSWELL'S TWO CONVICTIONS FOR ATTEMPTED MURDER

II. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE THE LESSER INCLUDED INSTRUCTION FOR ASSAULT IN THE THIRD DEGREE AS ASSUALT IN THE THIRD DEGREE IS NOT A LESSER INCLUDED OFFENSE IN THIS CASE

III. THE TRIAL COURT DID NOT ERR IN GIVING THE TO CONVICT INSTRUCTIONS FOR ATTEMPTED MURDER IN THE FIRST DEGREE

B. STATEMENT OF THE CASE

The State charged Michael Todd Boswell (hereafter 'Boswell') with two counts of Attempted Murder in the First Degree. CP 65-66. Count 2 alleged it occurred "at a separate time than the acts charged in Count 1." CP 65. The facts supporting these charges were presented at trial as follows:

In November 2011 Ms. Fix lived in Yacolt with her parents and Boswell. RP at 215. Boswell had been living with Ms. Fix since sometime between 2008 and 2009. RP at 219. Ms. Fix was engaged in a romantic relationship with Boswell for a period of time. RP at 220. Ms. Fix told Boswell, within a few weeks prior to November 14, 2011, that she wanted to break up with him. RP at 232-33. Boswell did not want his relationship with Ms. Fix to end and was emotional when she brought the subject up.

RP at 233-34. Ms. Fix again brought the subject of ending their relationship up within a few days prior to November 14, 2011. RP at 235.

Ms. Fix worked the evening of November 13, 2011 to the morning of November 14, 2011. RP at 238. When Ms. Fix got home after working, Boswell offered her peppermint tea. RP at 239. Ms. Fix testified the tea tasted bitter. RP at 240. Ms. Fix became ill, feeling nauseous and vomited. RP at 242. Ms. Fix slept on the couch in the living room that early morning. RP at 244. Ms. Fix awoke to a loud ringing sound in her ears. RP at 248. Ms. Fix saw Boswell was on the other side of the couch from her holding a gun and that she had blood dripping down from her head into her face. RP at 249. After taking a shower, Ms. Fix told Boswell she was leaving the house to go pay her credit cards because she was scared of what he would do if he knew she was going to the hospital. RP at 275. Ms. Fix had a friend take her to the hospital, where she remained for three weeks due to hemorrhaging on her brain and liver failure. RP at 277.

Dr. Ronald Barbosa treated Ms. Fix for her gunshot wound to her head. RP at 345-46. The wound to Ms. Fix's head was consistent with a gunshot wound and could have killed her. RP at 351. Upon running routine tests, the doctor determined Ms. Fix had dramatically high liver enzyme levels. RP at 353. By ruling out other causes, the doctor determined the likely cause of Ms. Fix's liver problems was due to

acetaminophen. RP at 354. This type of thing can be life-threatening. RP at 355.

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

The State alleged Boswell attempted to poison Ms. Fix by putting acetaminophen in her tea after she returned from work on November 14, 2013, thereby attempting to kill her. RP at 856. The State also alleged Boswell attempted to kill Ms. Fix by shooting her in the head with a gun. RP at 858. The jury convicted Boswell of two counts of attempted murder in the first degree. CP 87-90.

C. ARGUMENT

I. DOUBLE JEOPARDY DOES NOT BAR BOSWELL'S TWO CONVICTIONS FOR ATTEMPTED MURDER

Boswell alleges his two convictions for Attempted Murder in the First Degree violate Double Jeopardy as the unit of prosecution for Attempted Murder is the intent to kill someone, and he had a singular intent to take the life of his victim. Boswell's argument is without merit. The unit of prosecution for Attempted Murder is the act; Boswell's two convictions

are not the same in fact and the State relied upon different evidence to support each conviction. Boswell's argument would lead to absurd results if followed.

The Double Jeopardy clause of the Fifth Amendment to the United States Constitution, and article I, section 9 of the Washington State Constitution prohibit the imposition of multiple punishments for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995) and *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995)). When a defendant is convicted of violating a single statute multiple times, the inquiry is "what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute." *State v. Tili*, 139 Wn.2d 107, 113 985 P.2d 365 (1999) (quoting *Adel*, 136 Wn.2d at 634 (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955) and *State v. Mason*, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982), *superseded on other grounds as stated in State v. Elliott*, 114 Wn.2d 6, 16, 785 P.2d 440 (1990)). If the Legislature has defined the scope of a criminal act, then double jeopardy provisions come into play and prevent a defendant from being convicted more than once for just one unit of the crime. *Adel*, 136 Wn.2d at 634.

In a unit of prosecution analysis, the first step is to analyze the criminal statute. *Adel*, 136 Wn.2d at 635. RCW 9A.32.030 defines Murder in the First Degree as:

> A person is guilty of murder in the first degree when:
> (a) With 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). The unit of prosecution for Murder is per victim as the statute defines the crime occurring when someone "causes the death of such person or a third person." RCW 9A.32.030(1)(a).

Attempt is defined as:

> A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020. From the clear language of the statute, a person commits an attempt to commit a crime once that person has done the act which constitutes a substantial step. For many reasons it is clear the legislature intended to criminalize a substantial step as the unit of prosecution for attempt charges.

Boswell argues he can only be guilty of one count of Attempted Murder in the First Degree because his intent in his two attempts on the victim's life remained the same: to kill her. However, under Boswell's

argument, it's feasible a person could make a dozen attempts on a person's life, over the course of years, and yet only commit one crime. It's possible under Boswell's argument that a person could be charged and convicted of Attempted Murder, serve a prison sentence, be released into the community and take another attempt at killing his same victim, and yet he would not have committed a new crime as his intent remained the same: to kill the victim. This is an absurd result and certainly not what the legislature intended, and does not stem from a logical, plain reading of the statutes involved.

The State has found no cases directly on point to answer this question, nor does Boswell cite to any. However, reviewing cases that discuss the unit of prosecution issue as it applies to other charges is helpful in determining what the unit of prosecution is for Attempted Murder. In *State v. Chouap*, 170 Wn. App. 114, 285 P.3d 138 (2012), the court determined what constituted separate units of Attempting to Elude a Pursuing Police Vehicle. There, the Court found that the defendant was properly convicted of two counts of Attempting to Elude as the defendant was twice pursued by police, the second pursuit separated from time by the first, and the defendant returned to lawful driving in between times. *Chouap*, 170 Wn. App. at 125.

In *State v. Hall,* 168 Wn.2d 726, 230 P.3d 1048 (2010), the Supreme Court goes through a lengthy analysis of what constitutes a unit of prosecution. In *Hall*, the Court found that for witness tampering, the unit of prosecution was attempting to induce a witness to testify, and that could take a minute, 30 minutes or days. *Hall*, 168 Wn.2d at 731. However, the Court went on to discuss possible scenarios when multiple units of prosecution may exist. For example, "if he had been stopped by the State briefly and found a way to resume his witness tampering campaign" or his "attempts to induce [were] interrupted by a substantial period of time, employ[ed] new and different methods of communications, [or] involve[d] intermediaries," multiple units of prosecution may exist. *Id.* at 737-38.

This is the type of situation involved in Boswell's case. Boswell stopped after his initial conduct; he had time to think about his actions, and deliberate and employ a new and different method of attempting to kill the victim. Boswell used two very different methods in attempting to kill the victim: first he tried to poison her; later, after thought and reflection and after a period of time, Boswell tried to shoot the victim in the head, in another attempt to take her life. Clearly, under the attempt statute, an act which is a substantial step towards taking someone's life is the unit of prosecution for the crime. As the Court in *Tili* adopted, "one

should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed." *State v. Tili*, 139 Wn.2d 107, 117, 985 P.2d 365 (1999) (quoting *Harrell v. State*, 88 Wis. 2d 546, 277 N.W.2d 462, 469 (1979)). Here, if Boswell's argument is accepted, then Boswell could serve his sentence for Attempted Murder, find the victim after being released from prison, and again attempt to kill her. As long as he does not succeed in killing her, by his argument, he would not have committed a new crime as he had the same intent in killing her. This is clearly not how the Legislature intended the crime to be punished. Under the attempt statute, it is clear that each attempt is punished separately, and is its own unit of prosecution. Boswell was properly convicted of two counts of Attempted Murder in the First Degree as he did two very distinct, very separate acts, and was properly convicted and punished for each crime he committed. Boswell's two convictions for Attempted Murder in the First Degree should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE THE LESSER INCLUDED INSTRUCTION FOR ASSAULT 3 AS ASSAULT 3 IS NOT A LESSER INCLUDED IN THIS CASE

This court reviews a trial court's decision to given an instruction that rests on a factual determination for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). When determining whether the evidence was sufficient to support giving an instruction, this court views the evidence in the light most favorable to the party requesting the instruction, here, Boswell. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (citing *State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878 (1994), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997)). Only when a trial court's decision is manifestly unreasonable or based upon untenable grounds will this court find it abused its discretion. *State v. Jensen*, 149 Wn. App. 393, 399, 203 P.3d 393 (2009) (citing *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997)).

A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are elements of the offense charged; and (2) the evidence must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). If it is possible to commit the greater offense without committing the lesser offense, then the latter is not a lesser included crime.

State v. Bishop, 90 Wn.2d 185, 191, 580 P.2d 259 (1978) (citing *State v. Roybal*, 82 Wn.2d 577, 583, 512 P.2d 718 (1973)).

Attempted Murder in the First Degree requires that the defendant have the intent to commit Murder in the First Degree, and do any act which is a substantial step towards the commission of that crime. RCW 9A.28.020(1); 9A.32.030(1)(a). Assault in the Third Degree if, with criminal negligence, the defendant 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). Here, the legal prong of the *Workman* test is not met; one may take a substantial step towards committing murder without committing an assault. *State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993).

"Under Washington law, assault is not a lesser included offense of attempted murder." *State v. Weber*, 159 Wn.2d 252, 266, 149 P.3d 646 (2006) (citing *State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993)). In *Harris*, the Supreme Court applied the *Workman* test and found that each element of first degree assault was not a necessary element of attempted first degree murder. *Harris*, 121 Wn.2d at 321.

Boswell argues that *Harris*'s analysis is no longer good law because of the Supreme Court's opinion in *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). Boswell claims *Berlin* abrogates *Harris*. First, *Berlin*

does not cite to *Harris.* Secondly, *Berlin* affirms the *Workman* test that *Harris* uses and states regarding the *Workman* test, "[t]his has been the test for lesser included offenses and will continue to be the test for lesser included offenses." *State v. Berlin*, 133 Wn.2d at 546. Boswell's interpretation of *Berlin* is incorrect. Boswell states that *Berlin* requires a court to determine "only whether the assault is an included offense of attempted murder as charged and prosecuted in the case at hand." Br. of Appellant, p. 14. It is clear from the reading of *Berlin* that the Court was discussing crimes which involved alternative means, such as Assault in the Second Degree. *Berlin*, 133 Wn.2d at 547. In reiterating the lesser included rule, the Court in *Berlin* stated: "first, each of the elements of the lesser offense must be a necessary element of the offense *charged*; second, the evidence in the case must support an inference that the lesser crime was committed." *Id.* at 548 (citing *Workman*, 90 Wn.2d at 447-48). This is the exact test used by *Harris* in analyzing whether assault is a lesser included of Attempted Murder. *Harris*, 121 Wn.2d at 323. *Harris* relies upon the test set out in *Workman*; *Berlin* relies upon the test set out in *Workman*. Clearly these two cases are not in conflict with one another, and *Berlin* does not abrogate *Harris* as Boswell argues. Further, Boswell's reliance on *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) is misplaced. *Orange* does not engage in a lesser included

analysis and its holding adds nothing to the determination of whether Boswell was properly denied his requested lesser included instruction.

Finally, *Harris* continues to be cited with approval by the Supreme Court and Courts of Appeal. *See State v. Porter*, 150 Wn.2d 732, 737, 82 P.3d 234 (2004); *State v. Weber*, 159 Wn.2d 252, 149 P.3d 646 (2006); *State v. Turner*, 143 Wn.2d 715, 23 P.3d 499 (2001); *State v. Sharkey*, 172 Wn. App. 386, 289 P.3d 763 (2012); *State v. Davis*, 117 Wn. App. 702, 72 P.3d 1134 (2003). It is clear that under the *Workman* test, the elements of assault in the third degree are not necessarily included in Attempted Murder in the First Degree as charged in Boswell's case. The trial court properly denied Boswell's request for a lesser included instruction.

III. THE TRIAL COURT DID NOT ERR IN GIVING THE TO CONVICT INSTRUCTIONS FOR ATTEMPTED MURDER IN THE FIRST DEGREE

Boswell alleges the trial court's instructions to the jury failed to instruct the jury on all the necessary elements of the crimes of Attempted Murder in the First Degree. Boswell improperly relies upon *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995) in making this argument. All the necessary elements were included in the court's instructions to the jury and Boswell's argument fails.

Boswell argues that "premeditated intent" is an essential element of the crime of Attempted Murder in the First Degree. This Court has previous found that "premeditated intent" is not an essential element of the crime of Attempted Murder in the First Degree. *State v. Reed*, 150 Wn. App. 761, 772, 208 P.3d 1274 (2009), *review denied*, 167 Wn.2d 1006, 220 P.3d 210 (2009). In *Reed*, the defendant made the exact argument that Boswell currently makes. The defendant in *Reed* argued that the trial court failed to include the premeditation element in the "to convict" instruction, and that this was error. *Id.* This Court in *Reed* found that the defendant conflated the intent necessary to prove an attempt with that necessary to prove Murder in the First Degree; they are not the same. *Id.* Attempted Murder in the First Degree requires the State prove the defendant had the intent to commit Murder in the First Degree. RCW 9A.32.030; 9A.28.020; *Reed*, 150 Wn. App. at 772. The Court in *Reed* also noted that the jury was given the definition of Murder in the First Degree which included premeditated intent. *Reed*, 150 Wn. App. at 773.

Boswell argues that *Vangerpen* is controlling where *Reed* is not. However, the Court in *Vangerpen* addressed a totally separate issue and the issue before the court was not whether the jury instructions were proper. *Vangerpen*, 125 Wn.2d at 787. In *Vangerpen*, the Court

was presented with the issue of whether or not the State could amend its information after it had rested its case. *Vangerpen*, 125 Wn.2d at 787. The court in *Vangerpen* distinctly says, "Jury instructions and charging documents serve different functions." *Id.* at 788. Boswell attempts to use the reasoning behind what is required in a charging document to support his argument that the jury instructions in this case are defective. As simply stated in *Vangerpen*, the two serve different functions and *Vangerpen* should not be used as controlling authority on a separate topic when this Court has already spoken on the issue.

Other Courts have also followed *Reed*'s line of thinking and affirmed cases where identical jury instructions to Boswell's were given. *State v. Embry*, 171 Wn. App. 714, 758, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005, 300 P.3d 416 (2013); *State v. Besabe*, 166 Wn. App. 872, 271 P.3d 387 (2011), *review denied*, 175 Wn.2d 1003, 285 P.3d 884 (2012); *State v. Piatnitsky*, 170 Wn. App. 195, 282 P.3d 1184 (2012), *review granted on limited issues and pending*, 176 Wn.2d 1022, 299 P.3d 1171 (2013). This line of cases controls on this subject. As in *Reed*, a proper jury instruction for attempted Murder in the First Degree follows WPIC 100.01. *Reed*, 150 Wn. App. at 771. In *Reed*, the jury instruction at issue stated,

> To convict the defendant of the crime of Attempted Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1. That on or about the 25th day of March, 2006, the defendant did an act which 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 acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Id. at 771-72. This instruction which this Court approved of in *Reed* is identical to the instructions given at Boswell's trial below. The trial court instructed the jury:

> To convict the defendant of the crime of Attempted Murder in the First Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1. That on or about 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 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.
>
> 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.

CP 80. The instruction for Count 2 was almost identical. CP 81. As in *Reed*, the trial court also included a definition of Murder in the First Degree. CP 75. This instruction also mirrored the instruction given in *Reed*. *See Reed*, 150 Wn. App. at 772; CP 75.

The instructions given in Boswell's trial properly instructed the jury on the elements of the crime and the instructions allowed both parties to argue their theory of the case. As a whole, the instructions told the jury it must find Boswell had the intent to commit Murder in the First Degree, which was defined as "with a premeditated intent to cause the death of another person, he causes the death of such person or of a third person." CP 75. The instructions as a whole properly instructed the jury. Boswell was properly convicted of Attempted Murder in the First Degree. The trial court should be affirmed.

D. CONCLUSION

Boswell was properly convicted of two separate counts of Attempted Murder in the First Degree which reflected the two times he

attempted to take the victim's life. Boswell was not entitled to a lesser included instruction as Assault in the Third Degree is not a lesser included offense of Attempted Murder in the First Degree under the *Workman* test.

And finally, the trial court properly instructed the jury on all essential elements of the crime of Attempted Murder in the First Degree. Boswell received a fair trial and proper verdicts and the trial court should be affirmed in all respects.

DATED this 19th day of November, 2013.

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