Supreme Court No. 92022-2
COA No. 71449-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HUBBARD,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Ken Schubert

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND COURT RULES

UNITED STATES SUPREME COURT CASES

A. IDENTITY OF PETITIONER

Kevin Hubbard was the appellant in No. 71449-0-I.

B. COURT OF APPEALS DECISION

Mr. Hubbard seeks review of the decision issued June 22, 2015.

C. ISSUES PRESENTED ON REVIEW

1. Mr. Hubbard was charged with attempted murder for allegedly firing rifle shots at three people after he and many persons were ushered out of the Citrus Lounge nightclub because of a fight in the bar area amongst older men. The State's theory of motive to kill was that Hubbard had been involved in an unrelated, momentary altercation with some individual while exiting, and that he might have been so angered by the incident that he decided to murder three patrons in the parking lot. The jury could easily have disbelieved this strained theory of motive and intent, and found instead that Hubbard merely intended to greatly wound the victims. However, the trial court, reasoning that assault by shooting was not a lesser offense within attempted murder by shooting – because there are myriad hypothetical ways for an actor to take a "substantial step" – refused his request to give the jury the ability to reject attempted murder and then find first degree assault. This analysis of hypothetical ways to commit the lesser crime is inconsistent with double jeopardy

doctrine, which endeavors to answer the question whether an offense is a duplicative sub-set of another by looking to the factual manner in which the greater crime is proved. Where the lesser included question is essentially the same logical endeavor, should this Court hold that lesser included analysis be conducted in the same manner?

2. No one claimed to see the shooter, except Hubbard's prime accuser, James Henderson, who received a misdemeanor instead of 90 years, in return for testifying that Hubbard, not him, was the person – of the two he said could be seen in the video – that did the shooting of the people. But Henderson *never swore to tell the truth*. This violated the State Constitution and Due Process. Should this Court grant review?

D. STATEMENT OF THE CASE

On January 28, 2012, Seattle Police responded to a parking lot across the street from the Citrus Lounge. 6RP 673, 679-87, 719. Officers found three gunshot victims who survived, with serious injuries. 7RP 860-867; 12RP 1473-77; 16RP 1942. Security videotapes appeared to show the incident; one of two unidentifiable persons in the parking lot appears to be aiming a rifle at the victims and shooting – the other person flees the area before or just at the time the shooting begins. 19RP 2396-99. 6RP 719, 728-31; 11RP 1323, 1346-53.

James Henderson was arrested in connection with discovery of the rifle involved. After being told that he was facing 90 years in prison, Henderson stated he was one of the two persons in the grainy video footage, and said Hubbard was the other. 14RP 1822, 1832; 14RP 1817; 21RP 2620-23. According to Henderson's testimony, Mr. Hubbard allegedly used a rifle to shoot the victims multiple times. 21RP 2636-45.

Before the incident, the Citrus club manager confirmed, there had been a fight in the bar area that involved older gentleman, then the other patrons including Hubbard were ushered out. 13RP 1542-51. A security videotape from the interior of Lounge appeared to show that Mr. Hubbard was briefly punched, and Kevin explained to police, when he was interrogated months later, that he had been punched randomly by a Citrus patron after a scuffle had broken out. 23RP 2763-64. Mr. Hubbard simply continued leaving the club. 23RP 2766; Exhibit 105.

E. ARGUMENT

1. LESSER INCLUDED ANALYSIS MUST BE CONDUCTED BASED ON HOW THE GREATER CHARGES ARE FACTUALLY PROSECUTED.

a. <u>Review is warranted</u>. The analysis whether a lesser included offense instruction is proper to be given to the jury is a question that attempts to determine whether a crime is included within another. The

issue, when decided hypothetically rather than in reference to the factual manner in which the greater crime is attempted to be proved, was and has been assessed contrary to the legal analysis of included offenses as part of Double Jeopardy doctrine. The matter is therefore a question that implicates a constitutional question. RAP 13.4(b)(3). And additionally, decisions of this Court and the Courts of Appeal in these two areas of doctrine represent a conflict in how a question that is substantially the same is being addressed. RAP 13.4(b)(1), (2). This Court should take review for those reasons.

b. <u>The lesser offense instructions were requested</u>. Mr. Hubbard requested that the trial court instruct the jury on first degree assault. 22RP 2702-04; CP 165-66, 171-72, 175-78. Counsel argued that "when you consider the facts of this case" the acts committed, under the legal prong of the lesser included analysis, have been merely assaults with a firearm and an intent to cause great bodily harm. Additionally, under the factual prong, there was simply no motive to kill and a jury could rejected attempted murder. 22RP 2705. The trial court stated that as a matter of law there could never be an entitlement to first degree assault instructions in an attempted murder case. 22RP 2705-06.

c. The jury instructions on lesser offenses were legally and factually warranted. In Washington, a defendant is entitled to a lesser-included instruction where the following two conditions are met: (1) "each of the elements of the lesser offense must be a necessary element of the offense charged," and (2) "the evidence in the case must support an inference that the lesser crime was committed." State v. Workman, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978).

Generally a criminal defendant may 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)). Washington statutes, RCW 10.61.003 and RCW 10.61.006, codify these rules in the affirmative.

d. The trial court erroneously denied Mr. Hubbard's request to instruct the jury on the lesser offenses. An instruction on a lesser offense is warranted, *inter alia*, where each element must be proved to establish the greater offense as charged. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d at 447-48.

Assault in the first degree satisfies the legal prong as a lesser included offense of attempted first degree murder, when one examines the offenses as charged in this case. The State alleged that Mr. Hubbard committed three counts of attempted first degree murder by taking a substantial step towards that crime, in the form of shooting. CP 216-178 (Instructions nos. 17, 18, 19); RP 858; RCW 9A.32.030(1); RCW 9A.28.020(1). Mr. Hubbard requested instructions on assault, wherein:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm.

RCW 9A.36.011(1)(a); CP 165-66, 171-72, 175-78.

As charged in this case, a person who intentionally attempts to kill another by firing a rifle necessarily commits the crime of first degree assault. See RCW 9A.36.011(1)(a). However, the trial court reasoned that first degree assault is categorically not a lesser of attempted murder because an actor can take a substantial step toward committing that crime without assaulting the victims. This is the analysis of State v. Harris, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993). But the Harris analysis predates this Court's decision in State v. Berlin, supra, in which the Court recognized that the Workman lesser-included analysis had

been misinterpreted in prior decisions. Specifically, Harris was decided during a period in which the Court improperly performed the legal prong aspect of the lesser-included analysis by asking whether the lesser crime was necessarily, and 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). State v. Harris termed this the "statutory approach" and the trial court held it was possible to commit attempted murder without necessarily committing an assault, thus an assault categorically could never be a lesser of attempted murder. Harris, 121 Wn.2d at 321. But in Berlin, this Court recognized that this hypothetical, statutory analysis was the incorrect mode of asking the Workman lesser-included question. State v. Berlin concluded that the test employed in Harris was an incorrect application of the original Workman case. Berlin, 133 Wn.2d at 547. It is true that the Berlin Court did not cite specifically to Harris, but the decision plainly repudiated the purely statute-based analysis, of which Harris is an example. Berlin, 133 Wn.2d at 547 (also discussing State v. Lucky, 128 Wn.2d 727, 735, 912 P.2d 483 (1996)).

Thus, contrary to the analysis in Harris, and the trial court's mirroring reasoning below in Mr. Hubbard's case, it is not relevant whether one might hypothetically commit attempted murder without

committing an assault. Instead, the legal prong requires that a court determine simply whether the potential assault is an included offense of attempted murder as charged and prosecuted in the case before it. Berlin, 133 Wn.2d at 548. As noted supra, first degree assault by intentional assault with a firearm is a lesser offense of attempted murder as charged in Mr. Hubbard's three-count case.

Additionally in this case, the requested lesser included offenses were factually supported. The jury's inquiry during deliberations regarding whether Hubbard's use of alcohol affected his ability to "form an intent" strongly suggests the jurors were equivocating on the question of intent. CP 188. In denying the lesser, the trial court did not actually reach the question of the factual prong, because it rejected the requested lesser offense instructions under the legal prong. 22RP 2703 (asking counsel why the court would give lesser offense instructions of assault "when it's not . . . actually an inferior degree of the charged offense.").

This Court should accept review. The present case squarely placed before the trial court the question whether the legal prong of the lesser offense analysis, pursuant to the Double Jeopardy precedent of In re PRP of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), requires looking to how the offenses were charged and proved in the case. That

issue should be assessed on review. Certainly, one can commit attempted murder by, for example, purchasing poison and placing it in the food of a victim before that person sits down to dinner. But that has nothing to do with the facts of this case. Further, "Giving juries th[e option of a proper lesser offense] is crucial to the integrity of our judicial system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that the jury will convict the defendant despite having reasonable doubts." State v. Henderson, ___ Wn.2d ___ (Slip Op. Feb. 26, 2015, at p. 1).

Relying on State v. Boswell, 185 Wn. App. 321, 340 P.3d 971 (2014), review denied, 183 Wn.2d 1005 (2015), the State argued in the Court of Appeals that there is no basis for arguing for assessment of the legal prong of the lesser offense analysis by looking to how the State charges and attempts to prove the greater crime. However, Orange provides precedent because that decision rejected the reasoning of the Court of Appeals below, "that, since murder could be attempted by all sorts of "substantial steps" other than assault (e.g., by lying in wait or constructing a bomb), attempted murder does not necessarily include assault." Orange, 152 Wn.2d at 818.

Specifically, in a Double Jeopardy analysis, Orange held these two offenses are the same in law and fact when attempted murder is based on assaultive conduct. Orange, 152 Wn.2d at 820. That analysis mirrors the legal prong of the *lesser-included* analysis. Compare, Orange, 152 Wn.2d at 816-17 (citing Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) ("The applicable rule is that 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."); State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (the legal prong requires each element of the lesser offense must necessarily be proved to establish the greater offense as charged).

Both the Blockburger and lesser-included tests include a comparison of elements, and neither can be limited to the generic elements. Berlin stated that only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, can both the requirements of constitutional notice and the ability to argue a theory of the case be met. Berlin, 133 Wn.2d at 541. Similar reasoning led the Orange Court to conclude for Double Jeopardy purposes that "proof of

attempted murder committed by assault will always establish an assault." Orange, 152 Wn. 2d at 820.

The question of duplicativeness, and inclusion of an offense within a greater, is the same. Thus the legal prong of the lesser included analysis is satisfied in Mr. Hubbard's case. Harris is irreconcilable with Orange. It is logically impossible for two offenses to be the "same offense" yet at the same time not be an "included offense." The opinion of the Court of Appeals on this score is contrary to Orange.

Harris's analysis should be deemed rejected, because Harris (relied on by the Boswell Court) reasoned that because it was possible under the generic 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, this Court recognized that this analysis was incorrect. It is true that the Berlin case cautioned that the elements comparison for purposes of a lesser offense instruction should not look at alternative means of the statute that were not at issue, thus critiquing an analysis that looked to "the statute as a whole." Boswell, 340 P.3d at 978-79 (citing Berlin, 133 Wn.2d at 548). However, Berlin rejected a failure to look to the offenses as charged and proved, and the Orange

case indicates that the same legal analysis requires looking to the base factual allegations to determine if one offense comprises another. The evolving case law stands for the proposition that 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.

2. KEVIN HUBBARD'S PRIME ACCUSER DID NOT SWEAR TO TELL THE TRUTH AT TRIAL.

a. Review is warranted. The verbatim report of proceedings of October 22, 2013 states, prior to Henderson's direct examination by the State: "(The witness was not sworn in on the record)". 14RP 1717. Review is warranted under RAP 13.4(b)(3) because the Court of Appeals decision presents a significant constitutional question. Conviction upon unsworn testimony violates the fairness principles of Due Process. See U.S. Const. amend. 14 (providing that no state shall "deprive any person of life, liberty, or property, without due process of law"); Wash. Const. art. 1, section 3 (our state's guarantee of Due Process). Further, the State Constitution specifically provides at Article 1, section 6:

> The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom the oath, or affirmation, may be administered.

Const. art. 1, section 6. This Court should grant review.

b. James Henderson was not sworn to tell the truth. The record shows that the trial court failed to obtain a proper oath to tell the truth in the courtroom from witness James "Jesse" Henderson, and violated Washington's Court Rules and the state and federal constitutions. ER 603; U.S. Const. amend. 14; Wash. Const. art. 1, section 3, section 6.

As a matter of court rule, ER 603 requires that witnesses be sworn by an oath in which the witness promises to testify truthfully. ER 603. However, Henderson was not sworn to tell the truth in the tribunal prior to his testimony. The verbatim report of proceedings of October 22, 2013 states, prior to Henderson's direct examination by the State: "(The witness was not sworn in on the record)". 14RP 1717. This was for Henderson's testimony before the jury. 14RP 1716.

Concerningly, the appellate prosecutor filed a "Statement of Supplemental Authorities" just prior to oral argument, and cited the cases of State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014) (citing

State v. Jasper, 174 W.2d 96, 123-24, 271 P.3d 876 (2012), which the State described as meaning that, in the prosecutor's words, "when record is incomplete, appellate court is to presume any facts not inconsistent with the record that could sustain the trial court's ruling; it may not presume the existence of facts for the purpose of finding reversible error." State's Supplemental Authorities (filed May 29, 2015).

Of course, a defendant like Mr. Hubbard would be *prohibited* from relying, to even the slightest degree, on protestations asserting that certain events occurred, if those events were outside the record. See State v. McFarland, 127 Wn.2d 322, 333-35, 899 P.2d 1251 (1995); see also State v. Bugai, 30 Wn. App. 156, 161, 632 P.2d 917 (1981) (noting that appellate courts in direct appeals refuse to consider any "claim . . . based on matters not of record") (dissent of Ringold, J.).

Yet the State convinced the Court of Appeals to rely on the minutes to conclude that Mr. Henderson was sworn to tell the truth during an off the record session in which, prior to his jury testimony, he claimedly was sworn for purposes of identifying his voice on a recording. This claim by the State relies on an assertion of fact that something occurred off the record. Critically, further, the minutes simply are not an accurate description of that court day. Respondent

contended below, and the Court for all practical purposes agreed, that the minutes contradict the affirmative statement in the record that Henderson was not sworn before his testimony to the jury. See BOR, at pp. 13-14 (citing minutes, CP 455); AOB, at p. 14 (citing 14RP 1777).

c. The description of the record was not accurate. Respondent urged that during a brief time in which the jury was absent from the courtroom, Mr. Henderson surely must have been sworn to tell the truth during an unreported recess during the proceedings before his trial testimony, in which Mr. Henderson identified the voice of a witness in Exhibit 57, a recording. BOR, at p. 14 n. 6. But the record, including the Digital Record W941,[1] reflects that the court, after handling other cases, went on the record in the Hubbard matter at 9:14:43 a.m., with the proceedings commencing with a discussion of co-conspirator hearsay. 14RP 1705; CP 455; see DR W941 at time point 9:14:43.

After the recess, which began at 9:28:01, the recorded proceedings indicate that at 9:35:18, the court went back on the record and the prosecutor indicated Mr. Henderson had been played a portion of

[1] On May 6, 2015, following the State's agreement, the Court of Appeals granted Mr. Hubbard's motion to supplement the record on appeal with the digital recording identified in the Superior Court as DR W941. That recording was identified by the Court of Appeals on May 22, 2015, as a CD exhibit.

Exhibit 57 to identify the speakers. Thereafter, the jury entered the courtroom. Upon motion by the prosecutor the court admonished the spectators prior to the taking of evidence, and then questioning of Mr. Henderson commenced with the State's request that he state and spell his name, followed by his direct examination testimony. 14RP 1716-17.

The minutes reflect either an inaccurate notation of minute events, or at best themselves fail to support the State's characterization. The record indicates that the brief recess had ended at 9:35:18 a.m., at which time point the court addressed the deputy prosecutor. 14RP 1716; DR W941 at time point 9:35:18. The jury subsequently entered the courtroom, prompting the court's order to the courtroom to all rise, at precisely 9:36:04 a.m. DR W941 at time point 9:36:04; 14RP 1716. There is no indication of witness James Henderson being sworn.

This was manifest constitutional error. RAP 2.5(a)(3). U.S. Const. amend. 14; Const. art. 1, section 3. The State Constitution specifically provides at Article 1, section 6:

> The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom the oath, or affirmation, may be administered.

Wash. Const. art. 1, section 6. Here, the failure to obtain an oath was a

violation of Due Process and the oath provision. The error was also manifest because of Henderson's pivotal importance. RAP 2.5(a)(3); In re M.B., 101 Wn. App. 425, 3 P.3d 780, review denied, 142 Wn.2d 1027 (2000).

For example, in the case of In re M.B., the Court of Appeals held that the entry of a contempt order against an accused juvenile, on the basis of statements from an unsworn witness, violated the evidence rules and the right to due process of law under the Fourteenth Amendment. Regarding appealability, the Court stated: "R.T.'s counsel did not object to the unsworn testimony. We nonetheless review this issue under the manifest constitutional error doctrine." The Court therefore reached the issue. In re M.B., 101 Wn. App. at 425 (citing RAP 2.5(a)(3) and State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992) (to be manifest, error must be apparently constitutional, be error of the type that causes identifiable prejudice, then deemed constitutional, and found prejudicial)).

Similarly, the Court of Appeals in State v. Avila, 78 Wn. App. 731, 735, 899 P.2d 11 (1995), although not finding manifest error, stated that the failure to administer a proper oath to a child witness violated ER 603, and the Court left open the possibility that testimony in the absence

of a proper oath could also be error that is not just constitutional, but also manifest, where the record demonstrates identifiable prejudice as required by State v. Lynn. Avila, 78 Wn. App. at 735.

That standard is met in this case. For comparison, the Avila Court stated that Mr. Avila had not shown the prerequisite demonstrable prejudice, where the record allowed the reviewing court to be confident that the failure to obtain a proper oath from the witness did not affect the outcome. Avila, 78 Wn. App. at 738-39; Lynn, 67 Wn. App. at 345 ("manifest" constitutional error is error that shows practical and identifiable consequences in the record). Those assurances in Avila included a witness who had seen the victim, a child, sitting on the defendant's lap in a room while the defendant watched an R-rated movie and had his hand on the child's thigh. Avila, 78 Wn. App. at 738-39.

No similar assurances are present here. The security videocamera footage did not allow the persons involved to be identified, except by Henderson's claim that he was one of the persons and Mr. Hubbard was the other. The DNA evidence from the rifle was so slight as to be inconsequential, ruling out no more than 50 percent of the human population. There was no DNA on the bullets, and no fingerprints on the rifle. None of the victims stated the defendant was the person who shot

them. Henderson's testimony was pivotal and the absence of an oath renders it a nullity as to credence. See Crawford v. Washington, 541 U.S. 36, 52 note 3, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177 (2004) (noting the long-standing prohibition of unsworn testimony in all criminal cases).

Here, James Henderson was the critical accusing witness in the case. He testified that he was one of the two individuals who could be seen in the videos exiting the white Lexus near the Citrus Lounge, and that it was Kevin Hubbard who did the shooting. 14RP 1767-71, 1817. His similar claim to the confidential informant appeared to bolster this accusation, and his assertion that he and Kevin rode together driving south after the shooting appeared to make Kevin look as if he was not telling the truth when he was interrogated by Detective Hughey. 23RP 2770-72. It cannot be said that, had he been required to promise to tell the truth, he would have testified similarly, or at all. Without Henderson's sworn testimony, the outcome would have been different, requiring reversal even under the lesser standard for error under the particular Evidence Rule. This Court should accept review, and reverse Mr. Hubbard's convictions.

F. CONCLUSION

Based on the foregoing, this Court should accept review of the Court of Appeals' erroneous decision and reverse Kevin Hubbard's convictions and sentences.

Respectfully submitted this 21 day of July, 2015.

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Appendix A

COA decision in No. 71449-0-I (June 22, 2015)

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

STATE OF WASHINGTON, Respondent, v. KEVIN RICHARD HUBBARD, Appellant.	)	No. 71449-0-I UNPUBLISHED OPINION FILED: June 22, 2015

VERELLEN, A.C.J. — Kevin Hubbard appeals his convictions for three counts of attempted murder involving a shooting in the parking lot of a downtown nightclub. He contends that a witness testified without being sworn and that the trial court improperly admitted lay testimony about locations of cell phone towers that were activated by his cell phone, excluded other suspect evidence, refused to give a lesser included instruction on first degree assault, and gave an accomplice instruction. Finding no error, we affirm.

FACTS

Late one night in January 2012, police responded to 911 calls reporting several shots fired near the Citrus Lounge, located in the South Lake Union neighborhood of Seattle. Officers encountered a chaotic scene, with a large hostile crowd. Three men had been shot in the parking lot of the Fred Hutchinson Cancer Center across the

street from the Citrus Lounge. The victims were identified as Zealand Adams, Romeo Bone, and Daniel Wilson.

The victims were found near two vehicles: Adams' black Dodge Magnum and a white sports utility vehicle (SUV).[1] Both vehicles had several shotgun holes and several spent assault rifle casings and a few nine millimeter casings were scattered in the parking lot. Police also found a discarded nine millimeter handgun in the bushes near the scene.

Two security cameras posted in the area recorded the shooting. The video images are of poor quality, and individual faces are not discernible. Police were only able to identify the victims and other individuals in the video by their clothing, as described by the victims and one of the suspects.

One of the security videos filmed the parking lot where the Magnum and white SUV were parked. A retaining wall is directly in front of the vehicles and beyond the wall are a line of bushes, a sidewalk, and Yale Avenue. The other video filmed Yale Avenue, on the other side of the bushes bordering the parking lot.

The video from the parking lot shows Bone getting into the driver's seat of the Magnum. Wilson and Adams then walk toward the Magnum. When they reach the rear of the car, a shot is fired, and the bullet hits the ground directly behind them. Adams ducks and runs to the passenger side of the Magnum, behind the white SUV. Wilson tries to take cover on the other side of the white SUV, but the shooting continues. Wilson falls to the ground and eventually crawls to the driver's side of the

[1] The white SUV parked in the lot was a Lexus, but will be referred to simply as the white SUV to avoid confusion with a white Lexus sedan also involved in the crime.

Magnum. A few more shots are fired. Bone emerges from the Magnum, sits on the rear bumper briefly, wanders into the middle of the parking lot, and then collapses. Adams reappears, wounded.

The other video of Yale Street shows a white Lexus sedan drive up Yale Avenue and park. The passenger exits the car first and is joined by the driver. The driver appears to retrieve something from the car after exiting. The two walk together down Yale Avenue and stop behind the bushes. One of them appears to be shooting at the victims. The other person runs back toward the white Lexus sedan.

After the police arrived, all three victims were admitted to Harborview Medical Center with serious injuries. Wilson's injured leg ultimately required amputation.

Following the shooting, Detective Benjamin Hughey interviewed the victims. Bone declined to answer any questions. Adams described a fight inside the club and said he got into a physical fight with someone known as "B-12," but did not know who shot him. Wilson did not remember who shot him. Hughey also interviewed Wilson's brother Khris,[2] who said that "he heard 'on the street' that one of the shooters might be called '12' or 'B-12.'"[3] In later interviews, Wilson and Khris both stated that they heard that someone who goes by "Lil Hev" shot Wilson.

Hughey knew "B-12" to be Benjamin Palmer and "Lil Hev" to be Daunte Williams. When shown montages that included Palmer and Wilson, neither of the Wilson brothers identified Palmer, but Wilson identified Williams as someone "he believed" was at the Citrus Lounge on the night of the shooting and that he knew as

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[2] To avoid confusion, Wilson's brother will be referred to by his first name.

[3] Clerk's Papers (CP) at 9.

"Lil Hev."[4] Shown a single picture of Williams, Adams said he thought he recognized Williams as one of the shooters and that he had met him recently as "Lil Hev."

Hughey then contacted Williams. Williams denied having been at the Citrus Lounge that night, provided contact information for an alibi witness, and offered his cell phone records. Those records indicated that a phone owned by Williams was in Tukwila at the time of the shooting.

A confidential informant (CI) also provided information that the suspects in the shooting were James Henderson and Kevin Hubbard. Hughey obtained a search warrant for cell phone records for these suspects and determined that both of their cell phones used a series of cell phone towers beginning near the Citrus Lounge just before the shooting, continuing southbound in the hours that followed. Hughey then arranged for a CI to meet with Henderson and record a conversation. Henderson described the shooting to the CI. Based on that conversation, Hughey determined that Henderson was at the shooting but was not the shooter.

In April 2012, police arrested and federally charged Henderson in connection with the rifle that was used at the Citrus Lounge shooting. The assault rifle and associated magazine used in the shooting were recovered as part of a separate operation involving illegal gun sales conducted by Seattle police and federal agents. Henderson was not associated with the sale of that particular rifle, but Detective Hughey interviewed him after his arrest about the Citrus Lounge shooting. Hughey told Henderson that there was strong evidence tying him to the shooting and

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[4] Id.

eventually gave a statement admitting to his involvement. Henderson stated that he was with Hubbard and that Hubbard was the shooter.

Hughey then arrested and interviewed Hubbard. Hubbard admitted to driving to the Citrus Lounge with Henderson in a white Lexus sedan. Police searched that car and found evidence that a bullet struck the rear bumper of the vehicle at a low angle, consistent with someone shooting from below. Hubbard admitted to participating in a fight inside the club and said that he was punched on his way out of the club, but claimed that before the shooting, he left the club alone to attend the birth of his child in Tacoma.

The State charged Hubbard with three counts of attempted first degree murder with firearm enhancements, and the case proceeded to trial. Over defense objection, the trial court permitted Hughey to testify about the locations of the cell phone towers that Hubbard's and Henderson's phones used following the shooting, without being qualified as an expert. The trial court also excluded evidence relating to the investigation of Williams as a possible suspect in the shooting. Henderson testified against Hubbard, consistent with his statement to Hughey. Adams did not testify. Bone and Wilson testified, but could not identify the shooter or the other person with the shooter. Hubbard did not testify.

The trial court declined to provide a lesser included offense instruction on first degree assault, but gave an instruction on accomplice liability. The jury found Hubbard guilty as charged, and he was sentenced to 913.25 months of confinement. Hubbard appeals.

DISCUSSION

Sworn Testimony

Hubbard first contends that the trial court's failure to swear in Henderson before he testified amounts to reversible error. He points out that before the direct examination of Henderson, the verbatim report of proceedings specifically notes that the witness was not sworn in on the record. He further relies on the audio recording of the proceeding, which does not include Henderson being sworn in.

ER 603 provides:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

But the trial court clerk's minutes unequivocally state that Henderson was sworn. Those minutes state as follows:

9:14:43	Defense motion and argument to suppress hearsay testimony from witness. State's Exhibit 57 .....ID ONLY
9:28:01	Recess
9:35:09	Resume. Jury absent. Witness James Henderson present with counsel, Juanita Holmes. Exhibit 57 played for witness identification.
9:36:36	Court admonishes spectators regarding personal recording of witness testimony. *James Henderson sworn* and examined on behalf of State State's Exhibit 58, 59 .....ADMITTED
10:40:26	Jury absent. Defense objection to State's line of questioning. Court lets previous ruling stand. Argument regarding identification of defendant
10:52:06	Defense Motion for Mistrial—DENIED. Recess

11:20:28 Resume. Direct examination of James Henderson continues[5]

The audio recording clearly reflects that the court took a recess while waiting for Henderson to arrive. When the audio recording recommenced, the prosecutor indicated for the record that Henderson had identified the voice in the recorded conversation contained in exhibit 57 outside the presence of the jury. The jury was then called in, and the State proceeded with direct examination of Henderson.

Hubbard has the burden of establishing that Henderson was not sworn. He notes that the specific time reference on the clerk's minutes indicating Henderson was sworn at 9:36 does not match up with the contents of the audio recording at the audio recording time stamp for 9:36 a.m. But the prosecutor's summary on the audio recording after the recess is consistent with the sequence contained in the clerk's minutes that the court took a recess, Henderson then arrived and identified the voice in the recording outside the jury's presence, the jury was then called in, and the prosecutor began direct examination of Henderson. The reference in the clerk's minutes that he was "sworn" is consistent with the information on the audio recording that the court took a recess, Henderson arrived, and he then testified about the voice identification, which was off the record and outside the presence of the jury. On this record, Hubbard does not establish that the trial court failed to swear in Henderson before he testified.

The notation in the verbatim report of proceedings and the accompanying audio recording simply indicate that he was not sworn in "on the record." The rule does not

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[5] CP at 455.

require that a witness be sworn in on the record or even in the presence of the jury; it simply requires that it be "by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."[6] And here, it appears there was a reason Henderson was not sworn in before the jury: he needed to first give sworn testimony identifying his voice outside the jury's presence before testifying on direct examination about his recorded conversation. While his testimony outside the presence of the jury was not put on the record, the clerk's minutes adequately establish that he was sworn in before testifying.

Testimony about Cell Phone Towers

Hubbard next contends that the trial court was required to qualify Detective Hughey as an expert before permitting him to testify about the locations of cell towers used by the suspects' phones. We disagree.

"The admissibility of expert testimony lies within the sound discretion of the trial court."[7] ER 702 permits expert testimony as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Detective Hughey's testimony was based on the phone records provided by the cell phone companies, which consisted of call logs, numbers called, ingoing and outgoing calls, duration, time/date stamp of the call, and the cell phone towers that were activated at the beginning and end of each call. The records provided a

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[6] ER 603.

[7] State v. Fagundes, 26 Wn. App. 477, 483, 614 P.2d 190 (1980).

"decipher key" to determine the physical address of each tower. Hughey created Excel spreadsheets summarizing the relevant information from these records.

Hughey supplied the names associated with the phone numbers in the call log, which he obtained from the contact list in Hubbard's phone, and the exact addresses of the towers as provided by the cell phone companies. He then plotted the addresses of those towers on a Google map to visually depict their locations and the time that they were activated by Hubbard's or Henderson's phone.

Before Hughey testified, Hubbard objected to his testimony about the cell phone records on the basis that Hughey was not qualified as an expert. The trial court ruled that Hughey's testimony did not require any expertise because it was simply about the locations of the cell towers that were activated:

> [A]s to the locations of those towers, that's clearly shown on what I think are marked Exhibits 75 and 76 [map created by Hughey], which I—and so simply typing that into a map feature or, you know, something like Google maps is something that anyone can do and I don't think it takes expertise. And simply reflecting what time those towers were used in relation to a cell phone call again I don't think takes any expertise. It's just based on—not to diminish Detective Hughey's role in creating that, but that's just data entry is really all I see that as.[8]

Hughey then testified that, according to the cell phone records, Hubbard's phone activated a cell tower near the Citrus Lounge four minutes before the shooting, his phone activated a tower south of downtown Seattle minutes after the shooting, and minutes after that, it activated a tower farther south, near Tukwila. Hubbard's phone then activated three towers in Renton and continued to activate towers every few

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[8] Report of Proceedings (RP) (Oct. 23, 2013) at 2007. The court did express concern about a line on the map that appeared to show a route and advised the State to make clear to the jury that the line had no significance.

minutes in southward direction, until the phone activated a tower in Tacoma at 2:53 a.m. Henderson's phone also activated a tower near the Citrus Lounge shortly before the shooting and thereafter activated towers in downtown Seattle, south of downtown, and southward.

Hughey testified that the cell phone records could not show where the cell phones were actually located at any point, just that they were "in range" of the tower:

> It does not give you an exact address of a cell phone. This isn't GPS pinging, as the movies might try to make you believe. It just means that the cell phone is within the cellular footprint of that tower, and as you move from one footprint to the next, you move between cell towers.[9]

Hughey also explained that a purple line on the map appearing to connect each of the towers on the map was automatically generated by Google and that it did not indicate the route taken by the phones or have any other meaning.

Hughey further testified that when he confronted Hubbard with the cell phone records indicating that he and Henderson traveled south from the Citrus Lounge together, Hubbard suggested that Henderson probably just left his phone in the car Hubbard was driving. Hughey also testified that the cell phone records showed that Henderson's phone was being used for both incoming and outgoing calls during the time that the records indicated Hubbard's phone was activating towers southward.

Hubbard fails to show the trial court abused its discretion by admitting Hughey's testimony without qualifying him as an expert. Hubbard relies on United States v. Harrell,[10] and United States v. Yeley-Davis,[11] neither of which support his argument.

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[9] RP (Oct. 29, 2013) at 2523.

[10] 751 F.3d 1235 (11th Cir. 2014).

[11] 632 F.3d 673 (10th Cir. 2011).

In Harrell, the court held that the trial court abused its discretion by permitting a detective to testify about the relationship and interaction between cell phones and cell phone towers.[12] Specifically, the detective testified about how a cell tower receives a transmission when someone places or receives a call on a cell phone. He stated that "the phone sends out a signal to the nearest, most of the time, the nearest tower," and that this tower will then call the number the caller is trying to reach.[13] He explained that a cell tower has three sides and that a call will register on the side of the tower where the phone is actually located, although the cell phone is not necessarily right next to the cell tower.

Detective Jacobs testified that he visited the three cell tower locations that had been "hit" by the cell phone number linked to a codefendant. He also created maps which showed the towers, as well as the Walgreens and McDonald's which had been robbed.[14] He testified that the cell phone was in the area of the businesses just prior to the two robberies.[15]

But Harrell did not address the issue presented here, as the court expressly declined to decide whether a witness who testified about cell records must qualify as an expert.[16] Rather, because the State tendered the witness as an expert and the trial court certified him as an expert, permitting him to offer his expert opinion, the issue was whether that witness was indeed qualified as an expert. The court held that he

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[12] Id. at 1242.

[13] Id. at 1243.

[14] Id.

[15] Id.

[16] Id.

was not, and that it was therefore an abuse of discretion to admit the testimony.[17] Here, the State did not tender Hughey as an expert, nor did the trial court certify him as an expert. Thus, Harrell does not apply.

In Yeley-Davis, the court held that an agent gave expert testimony when describing how cell towers work.[18] There, the agent explained an apparent discrepancy in the cell phone records which included an unexplained phone call to an unidentified number. The agent testified that the number belonged to a co-conspirator, explaining that a tower may assign a new number if a user travels outside of the user's assigned area.[19] The court concluded that "[t]he agent's testimony concerning how cell phone towers operate constituted expert testimony because it involved specialized knowledge not readily accessible to the ordinary person."[20]

But here, Hughey did not testify about how cell phone towers operate. Rather, he simply testified that he reviewed cell phone records that identified the location of cell towers for each call. Such testimony did not require any specialized knowledge. The trial court did not abuse its discretion by allowing him testify without qualifying him as an expert.

Other Suspect Evidence

Hubbard next challenges the trial court's exclusion of evidence showing that Williams ("Lil Hev") was a possible suspect in the shooting. Hubbard fails to show that

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[17] Id.

[18] 632 F.3d at 684.

[19] Id.

[20] Id.

the trial court's ruling was an abuse of discretion.

This court reviews a trial court's decision to exclude evidence for an abuse of discretion.[21] Criminal defendants have a constitutional right to present a defense consisting of relevant, admissible evidence.[22] A criminal defendant seeking to admit evidence suggesting that another person committed the crime bears the burden of establishing its admissibility.[23] Other suspect evidence is relevant if it tends to connect someone other than the defendant with the crime.[24] "[S]ome combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime."[25] But "a trial court cannot exclude defense-proffered other suspect evidence because of the perceived strength of the State's case."[26]

Here, the other suspect evidence offered by Hubbard consisted of Hughey's investigation of Williams, a possible suspect based on information heard "on the street." Wilson identified Williams as someone "he believed" was at the Citrus Lounge on the night of the shooting, and as a man he knows as "Lil Hev."[27] Adams told Hughey that he thought he recognized him as one of the shooters, but only after hearing the rumor and being shown a single picture of Williams. Williams denied

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[21] State v. Perez-Valdez, 172 Wn.2d 808, 814, 265 P.3d 853 (2011).

[22] State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

[23] State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

[24] State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014).

[25] Id.

[26] Id. at 378.

[27] CP at 9.

being at the scene or even in Seattle that night, and his cell phone records showed that his cell phone was in Tukwila at the time of the shooting.

The court concluded that Hubbard would not be permitted to introduce this other suspect evidence because he had not shown that Williams had taken any steps indicating an intent to commit the crime, noting that it was based purely on rumor. But the court did note that it would be willing to reserve ruling on that issue if the defense had not had a chance to talk to the people involved. Defense counsel responded that he had not yet spoken with Adams, that he was not confident that Adams would testify at all, and acknowledged that the reliability of Adams' statements was questionable, given his refusal to cooperate. The court then ruled it was "essentially granting the State's motion," but left it open if at some point the defense had evidence to warrant revisiting the issue.[28]

Hubbard never revisited the issue and did not present additional statements from Adams or further evidence establishing Williams as a possible suspect. Indeed, Adams did not testify at trial. Thus, other than the "word on the street" that "Lil Hev" was the shooter, the only evidence of Williams' connection to the crime was Adam's subsequent equivocal statement that he "thought" he recognized Williams as one of the shooters. Adams made that statement after initially stating that he did not know the shooter and then being shown a single picture of Williams after he heard the rumor that Williams was the shooter.

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[28] RP (Oct. 3, 2013) at 234.

Without more, Hubbard fails to show that the trial court abused its discretion by concluding that there was not sufficient evidence connecting Williams to the crime to be offered as other suspect evidence. Additionally, as defense counsel acknowledged, the reliability of Adams' statements was questionable. Such evidence is at most speculative, and its exclusion was not an abuse of discretion

Jury Instructions

Hubbard contends that the trial court erred by giving an accomplice instruction because the evidence was insufficient to convict him under that theory. We disagree.

A trial court's decision to give a particular jury instruction is reviewed for an abuse of discretion.[29] Each party is entitled to have the jury instructed on its theory of the case if there is sufficient evidence to support that theory.[30] To determine whether the evidence was sufficient to support the instruction, this court must view the evidence in the light most favorable to the party requesting the instruction.[31]

Consistent with RCW 9A.08.020(3)(a)(i),(ii), the trial court instructed the jury on accomplice liability as follows:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.

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[29] State v. Chase, 134 Wn. App. 792, 803, 142 P.3d 630 (2006).

[30] State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

[31] State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.[32]

Hubbard contends this instruction is not supported by the State's theory that he was either the shooter or the other person with the shooter because there was no accomplice to the shooter. He asserts that the evidence shows that the person who was not the shooter simply ran away when the shooting began and therefore, the State could not prove that person aided or encouraged the shooter. Thus, he contends, there was only a principal and no accomplice and the instruction was improper. The record does not support this contention.

Viewed in the light most favorable to the State, the evidence supports a theory of accomplice liability. Even if the jury did not believe that Hubbard was the shooter, there was evidence that Hubbard was the driver. Henderson testified that Hubbard was the driver, and Hubbard admitted to driving the Lexus sedan to and from the club that evening. The video showed that the driver exited the car and appeared to retrieve something from inside the vehicle. He joined the passenger behind the bushes and then the shooting began. Even if Hubbard was not the shooter, there was sufficient evidence to show that he encouraged and aided the shooting by driving the shooter to and from the scene.

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[32] CP at 215.

Hubbard contends that, even if he were the driver, he was still simply the principal, not an accomplice, because the driver was the shooter. But the evidence is not conclusive that the shooter was in fact the driver, and the jury was not compelled to draw this inference from the facts presented. Hubbard asserts that "[w]hen the shooter, who appears to be the person who had exited the driver's side of the Lexus earlier, begins shooting, the person who was the passenger, 'after the first round's fired, takes two steps, and then runs out of the frame,'" citing Detective Hughey's testimony about what the surveillance video depicts.[33] But this is not an accurate characterization of the testimony.

Rather, Detective Hughey testified that once the two suspects exited the car and walked over to the bushes, they became "an intermixed blob" because they were difficult to see from "so far away."[34] He further testified that "[d]uring the actual shooting, you will see *one of the two of them*, after the first round's fired, take a couple steps and then immediately run out of frame while the shooting's still going on."[35] While he later refers to "the passenger" as the one who was running away,[36] the video itself does not conclusively establish that the passenger was in fact the person running away and that the driver was the shooter. Indeed, in opening statements, Hubbard acknowledged that the videotape "will be very unclear, and it will not be enough to pinpoint anybody as the shooter."[37] Thus, the jury was entitled to discredit Hughey's

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[33] Appellant's Br. at 37.

[34] RP (Oct. 29, 2013) at 2490.

[35] Id. (emphasis added).

[36] Id. at 2492, 2494.

[37] RP (Oct. 9, 2013) at 16.

reference to the passenger as the one running away and give more weight to his earlier testimony that the two were an "intermixed blob" once the shooting began and the video simply showed that "one of the two" was the shooter.

Finally, Hubbard challenges the trial court's refusal to give a lesser included offense instruction on first degree assault. A defendant is entitled to an instruction on a lesser included offense if the following two conditions are met, otherwise known as the legal and factual prongs set forth in State v. Workman: "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, evidence in the case must support an inference that the lesser crime was committed."[38] In other words, "if it is possible to commit the greater offense without committing the lesser offense, the latter is not an included crime.[39] In State v. Harris, our State Supreme Court held that assault is not a lesser included offense of attempted murder because the legal prong of Workman has not been met.[40] The Court reasoned that the substantial step required to prove attempted murder does not necessarily require commission of an assault.[41]

Hubbard contends that Harris is no longer good law after State v. Berlin.[42] Hubbard asserts that because Berlin requires that the court consider the crimes as charged when determining whether a lesser included instruction is appropriate, Harris's categorical pronouncement that assault cannot be a lesser included offense of

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[38] 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (citations omitted).

[39] State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993).

[40] 121 Wn.2d 317, 321, 849 P.2d 1216 (1993).

[41] Id.

[42] 133 Wn.2d 541, 947 P.2d 700 (1997).

attempted first degree was improper. Rather, he contends, as proved here, the shootings necessarily proved the assault.

Hubbard misreads Berlin. Berlin did not change the lesser included offense analysis requiring that both legal and factual prongs are met. Rather, in determining the legal prong, Berlin instructed that the alternative means crime be considered as charged, rather than the statutory scheme as a whole.[43] Berlin overruled State v. Lucky, where the Court held that to satisfy the legal prong of Workman, each of the elements of the lesser offense must be a necessary element not only of the offense as charged, but also an element of each alternative means of committing the offense.[44] Harris is consistent with the Berlin holding. Harris, like this case, involved attempted murder, which is not an alternative means crime, and the Court considered first degree murder "[a]s charged in this case."[45] The Court has also acknowledged the viability of Harris after Berlin in State v. Turner, holding that the trial court properly declined to instruct the jury on fourth degree assault as a lesser included offense of attempted first degree murder.[46]

More recently, in State v. Boswell, Division II of this court rejected the same argument advanced here by Hubbard:

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[43] Id. at 548 ("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.").

[44] 128 Wn.2d 727, 732, 912 P.2d 483 (1996).

[45] 121 Wn.2d at 320.

[46] 143 Wn.2d 715, 729-30, 23 P.3d 499 (2001) ("This Court has previously held that assault is not a lesser included offense of attempted murder in the first degree.") (citing Harris, 121 Wn.2d at 321).

> Attempt is not an alternative means crime. Therefore, the clarification articulated in *Berlin* does not apply. *Berlin* does not change or undermine the analysis employed by our Supreme Court in *Harris.*
>
> Furthermore, nothing in *Berlin* stands for the proposition that we are required to examine the elements of the offense based on the alleged facts supporting the charge. Rather, *Berlin* is clear—when examining the legal prong of the *Workman* test we look at the statutory elements of the crime to determine whether each element of the lesser offense is a necessary element of the charged offense. We do not examine the facts underlying the charge unless we reach the factual prong of the *Workman* test. Accordingly, contrary to Boswell's assertion, there is nothing in *Berlin* that supports deviating from the rule or analysis articulated by our Supreme Court in *Harris.* We hold that the trial court did not err in refusing to instruct the jury on third degree assault as a lesser included offense to attempted murder.[47]

Similarly here, first degree assault was not a lesser included offense of attempted first degree murder. The to convict instruction for the crime of attempted murder in the first degree required proof that the defendant did an act that was a "substantial step" toward the commission of first degree murder and that was done with intent to commit first degree murder.[48] The State's theory that the shooting was the substantial step was not part of the elements charged or necessary to convict. Thus, Berlin did not require the trial court to consider how the State sought to prove attempted murder; the court was required only to consider the statutory elements in its analysis of the legal prong of Workman. Under Harris and Turner, the court properly refused to instruct the jury that first degree assault is a lesser included offense of attempted first degree murder.

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[47] 185 Wn. App. 321, 335, 340 P.3d 971 (2014) (citations omitted).

[48] CP at 216.

Hubbard further contends in his reply brief that Harris cannot be reconciled with In re Personal Restraint of Orange, which held that convictions for first degree assault and first degree attempted murder based on the same shooting violated double jeopardy.[49] But Hubbard cites no authority that this double jeopardy analysis applies in deciding whether the Workman legal prong has been met for a lesser included instruction. Accordingly, we reject this argument.[50]

We affirm.

WE CONCUR:

[49] 152 Wn.2d 795, 818-19, 100 P.3d 291 (2004).

[50] Additionally, we note that while Hubbard mentions Orange in a footnote in his opening brief, he did not develop this argument until the reply brief, which is too late to warrant consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71449-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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