SUPREME COURT NO. 99070-1

NO. 79792-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MADISON ANTHONY NIELSEN,

Petitioner.

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

The Honorable Mary Roberts, Judge
The Honorable Averil Rothrock, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Madison Anthony Nielsen seeks review of the Court of Appeals' published decision in State v. Nielsen, filed August 31, 2020 ("Op."), which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Where attempt crimes require the highest possible mental state for culpability, and the underlying act of firearm possession is not unlawful, does attempted unlawful possession of a firearm require the State to prove knowledge of illegality?

2. Did the jury instructions, which failed to make this requirement manifestly apparent to jurors, deny the petitioner due process of law?

C. STATEMENT OF THE CASE

1. **Trial testimony: Nielsen expresses belief he can have firearms based on remoteness of prior conviction.**

The State charged Nielsen with attempted first degree unlawful possession of a firearm. CP 1-2, 36-37; RCW 9.41.040(1) (substantive crime); RCW 9A.28.020 (attempt statute). The trial testimony was as follows:

While on duty July 2, 2018, Deputy Scott Allen went to Fall City Firearms. Allen wanted to check on an order he had placed. RP 723, 730, 769-70. Allen had known the owner, Lee Stallman, for several years. RP 730, 734. Stallman is a former police officer. RP 772.

Deputy Allen saw Nielsen in the store. RP 724. Nielsen was accompanied by a woman. RP 727. Allen said hello to Nielsen and mentioned that, as a convicted felon, Nielsen was not supposed to be around firearms. RP 725.[1]

Nielsen told Deputy Allen he had not been convicted of a felony for more than seven years. Therefore, Nielsen believed, he was allowed to have a firearm. RP 725, 728. Nielsen explained that, in any event, he was helping the woman he was with purchase a firearm. RP 727.

Deputy Allen told Nielsen that he believed a judge needed to restore firearm rights. RP 725, 732. Nielsen asked how he could accomplish that. Allen said he would need to hire an attorney. RP 726.

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[1] Deputy Allen testified there is no law preventing felons from entering gun stores. RP 731.

Stallman was busy with other customers, so Allen left the store. RP 726, 733. Nielsen followed Allen out of the store to discuss an unrelated matter. RP 726. Before leaving, Deputy Allen reminded Nielsen that (according to Allen's understanding) Nielsen was not permitted to handle firearms. RP 726.

Stallman also testified. Nielsen and a woman came into his store. RP 738. Nielsen asked about various firearms and briefly handled a few, including a handgun and an AR-style rifle. RP 738, 740, 759-60, 781-82.

Nielsen told Stallman he was not sure if he was permitted to purchase a firearm. RP 738. Stallman gave Nielsen a business card for an organization that helps people restore their firearm rights. RP 738.

After examining the rifle, Nielsen announced, "Okay. We'll buy this one." RP 761, 778. Stallman handed Nielsen the mandatory federal form. The "4473" form consists of several pages, and a customer must fill out the form before purchasing a firearm. RP 761; Ex. 3.

The top of the form states "The information you provide will be used to determine whether you are prohibited from

receiving a firearm." RP 777. Firearm retailers use the information obtained to run a background check on prospective purchasers. RP 775-76, 842. Usually the government will either approve or deny the request within a few minutes; occasionally more time is needed for resolution. RP 843.

Nielsen slid the form to the woman accompanying him. RP 761-62. Stallman, believing Nielsen to be the true purchaser, told Nielsen he would have to fill out the form himself. RP 752, 778.

Nielsen began to fill out the form but filled in only a few spaces before stopping. RP 763-64, 767, 778-80; Ex. 4 (form used by Nielsen). Nielsen told Stallman the woman would return the next day to buy the gun. When Stallman said no, Nielsen suggested that his brother return on the weekend. RP 767-68. Stallman again said no. RP 768. Nielsen and the woman left without any firearm. RP 768.

After Nielsen left, Stallman called Deputy Allen to ask about Nielsen. RP 768, 772. Stallman had overheard Allen talking to Nielsen, as well as the word "felony." RP 768, 783-85.

At trial Nielsen stipulated that he had been convicted of a serious offense in 2012 and that he had received notice that he

was ineligible to possess a firearm. Ex. 1; CP 35; see also CP 180 (related limiting instruction).

2. **Court's instructions and parties' arguments: Jury is told that to convict it need not find Nielsen intended to unlawfully possess a firearm, only that he intended to possess a firearm**.

The trial court instructed the jury that, to convict Nielsen of the charged crime, it must find that Nielsen "did an act that was a substantial step toward the commission of [first degree] unlawful possession of a firearm" and that "the act was done with the intent to commit [first degree] unlawful possession of a firearm." CP 184 (Instruction 16); 11 WASH. PRACTICE: WASH. PATTERN INSTRUCTION: CRIMINAL 100.02 (4th ed. 2016) (WPIC). The trial court instructed the jury that "a 'substantial step' is conduct *that strongly indicates a criminal purpose* and that is more than mere preparation." CP 178 (Instruction 10) (emphasis added); WPIC 100.05.

The court also instructed the jury that "a person commits the crime of [first degree] unlawful possession of a firearm . . . when he has been previously convicted of a serious offense and knowingly owns or has in his possession or control any firearm."

CP 179 (Instruction 11); WPIC 133.01. Further, a person "knows or acts with knowledge" when he is aware of a certain "fact, circumstance or result." However, for the State to prove knowledge, that person need not know that "the fact, circumstance, or result" is unlawful or an element of a crime. CP 181 (Instruction 13); WPIC 10.02. Similarly, the court instructed the jury that "a person acts with intent . . . when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 177 (Instruction 9); WPIC 10.01.

In closing, the State did not argue that Nielsen acted unlawfully by handling guns in Stallman's store with Stallman nearby and supervising. This was consistent with the court's instruction, proposed by the defense, that "[p]ossession is more than passing control." CP 182; see also CP 160 (proposed instruction containing additional language).

Rather, the State argued that Nielsen took a substantial step toward commission of unlawful firearm possession when he, after being told by Allen that he could not purchase a gun, returned to the store, selected a gun, realized he could not

successfully fill out the background check paperwork, and then suggested alternative buyers. RP 893.

The State also highlighted that it was not necessary that Nielsen understand it would be unlawful for him to possess a firearm. He need only intend to possess a firearm. RP 891 (discussing Instruction 9, defining intent).[2] Defense counsel objected that the prosecutor was misstating the law, but the objection was overruled. RP 891.

In contrast, Nielsen argued he went through the process of visiting Fall City Firearms, a licensed firearm retailer, to find out if he could legally possess a firearm. RP 895, 899, 904. That Nielsen went to a legitimate firearm retailer demonstrated that he was attempting to comply with the law. RP 895-96, 899. The State had therefore failed to prove that Nielsen acted with "criminal purpose." RP 903; see CP 178 (Instruction 10, defining "substantial step" in terms of criminal purpose).

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[2] See also RP 894 (arguing that knowledge requirement applied to knowing possession or control, rather than knowledge that possession was unlawful); RP 908 (rebuttal argument that Nielsen in fact knew he was prohibited from possessing a firearm, but that such knowledge *was not required* for a finding of guilt).

During deliberations, the jury submitted a written inquiry asking whether Nielsen began filling out the form before or after he gave it to the woman to fill out. RP 917; CP 189-90. The defense wished to clarify (consistent with the testimony) that Nielsen only began filling out the form afterward, i.e., after Stallman told Nielsen he would need to fill it out himself. The court instructed the jury to refer to their notes and memories. RP 918; CP 189-90.

The jury convicted Nielsen as charged. CP 164.[3]

3. **Appeal and Court of Appeals' decision**

Nielsen appealed, raising the issues identified above, as well as a sentencing-related issue. In a published opinion, the Court of Appeals rejected Nielsen's arguments as to the underlying conviction, Op. at 5-7, but agreed that Nielsen's judgment and sentence must be corrected. Op. at 7-8.

Nielsen now asks that this Court grant review and reverse the Court of Appeals as to the underlying conviction.

[3] This was the second trial; Nielsen's first trial ended in a mistrial after the jury deadlocked. RP 497-98; CP 87.

D. REASONS REVIEW SHOULD BE ACCEPTED

1. **Review is appropriate under RAP 13.4(b)(1) and (4)**.

Review is appropriate under RAP 13.4(b)(4) because the issue involves a matter of substantial public interest and represents an important issue of first impression, at least as to this specific offense. Review is also appropriate under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with a prior decision from this Court addressing attempt crimes in the context of analogous offenses. See State v. Johnson, 173 Wn.2d 895, 905-07, 270 P.3d 591 (2012) (where act is not inherently illegal, requiring more than intent to commit the act itself).

2. **Constitutional and procedural considerations**

The State has the burden of proving beyond a reasonable doubt that an accused person committed every act necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); accord U.S. CONST. amend. XIV; CONST. art I, § 22. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential

element need not be proved." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Challenged jury instructions are reviewed de novo. State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003).

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). A jury instruction that relieves the State of its burden to prove every element of the crime is an error of constitutional magnitude. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). Further, where a defendant's right to due process is potentially implicated by erroneous jury instructions, such an error may have "practical and identifiable consequences in the trial," making it reviewable as "manifest" error. Id. at 240.

"An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of the crime charged is erroneous." State v. Nelson, 191 Wn.2d 61, 69, 419 P.3d 410 (2018). Such errors are harmless only if this Court is convinced beyond a reasonable doubt that the jury verdict would have been the same absent the error. Id.

3. **Because the underlying act of firearm possession is lawful, attempted unlawful firearm possession requires knowledge of illegality**.

The underlying act here is lawful—indeed, it is constitutionally protected. Thus, *attempted* unlawful firearm possession requires the actor to have knowledge of the illegality of the act.

"[C]riminal attempt is not a strict liability offense." Johnson, 173 Wn.2d at 907. "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(1) (emphasis added). A substantial step is an act that is "strongly corroborative" of the actor's criminal purpose. State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006).

This Court demands "the highest possible mental state" in this context because "criminal attempt focuses on the dangerousness of the actor, not the act." Johnson, 173 Wn.2d at 905. The mental state required for criminal attempt—specific intent—is the highest mental state required by law. Id.; see RCW

9A.08.010 (defining the four mental states in declining order of seriousness: intent, knowledge, recklessness, and criminal negligence).

To satisfy the intent element of attempted first degree firearm possession, the State was required to prove Nielsen intended to violate the law by possessing a firearm—intended that the possession be unlawful. Despite addressing a different category of crimes, this Court's decision in Johnson makes this clear.

In Johnson, this Court stated the intent required for an attempt crime "is the intent to accomplish the criminal result of the base crime." 173 Wn.2d at 899. Courts "look to the definition of the base crime for the requisite criminal result." Id. This Court went on to explain what this means in the analogous context of sex crimes. Sex crimes are analogous to the crime at issue here because, like possession of a firearm, sexual intercourse alone without some aggravating circumstance is not criminal. For the rape statutes to apply, it is not enough that sexual intercourse occur; rather, the intercourse must occur by "forcible compulsion or [with] an unwilling or incapacitated victim." Id. at 907.

The crimes of first and second degree rape may require the State to prove (1) sexual intercourse (2) by forcible compulsion. RCW 9A.44.040(1); RCW 9A.44.050(1)(a). To commit attempted rape, an individual need not know that it is illegal to engage in sexual intercourse by forcible compulsion. But, analogously, to commit these forms of attempted rape, the actor must complete an act that is strongly corroborative of the actor's intent not just to engage in sexual intercourse—which is not unlawful—but also strongly corroborative of his intent to do so by forcible compulsion. The State must prove intent to engage in both components to prove the actor has acted with criminal purpose. See DeRyke, 149 Wn.2d at 913-14.

Although rape statutes were discussed, the charged crime in Johnson was attempt to promote commercial sexual abuse of a minor. Lack of knowledge of the victim's age was no defense to the base crime. But, to prove the attempted crime, the State was required to prove "Johnson believed his victims to be minors to prove that he intended to advance or profit from the commercial sexual exploitation of a minor." Id. at 908.

This case does not involve a sex crime, but it does involve a crime that is in many ways analogous. Unlawful possession of a firearm is (1) possession of a firearm accompanied by (2) the existence of a prior disqualifying conviction. RCW 9.41.040(1)(a). To commit the attempted crime, Mr. Nielsen needed to complete an act strongly corroborative of criminal purpose.

But an act that is merely consistent with intent to procure a firearm would not be sufficient, because possession of a firearm is not a crime absent certain circumstances. In other words, Nielsen needed to complete an act that was not only strongly corroborative of his intent to possess a firearm but also strongly corroborative of his intent to do so unlawfully.

Here the Court of Appeals notes that "the . . . circumstance that elevates possession of a firearm to the crime of unlawful possession of a firearm is that the possession be by someone previously convicted of a serious crime," Op. at 7, and thus the State need not prove Nielsen *knew* he was precluded from possessing a firearm. But it appears the Court of Appeals is confusing the completed crime with the attempted crime, which requires criminal purpose. And criminal purpose here requires

knowledge of the disqualification itself—in other words, knowledge that possession would be a crime.[4]

As will be explained, moreover, the trial court's instructions did not make this clear and were therefore inadequate, improperly lowering the state's burden of proof.

4. The jury instructions violated due process because they did not make the applicable law manifestly apparent to the average juror, resulting in a diminished burden of proof.

The jury instructions violated Nielsen's right to due process. "[A] 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." DeRyke, 149 Wn.2d at 910 (quoting Smith, 131 Wn.2d at 263).

In DeRyke, this Court held "a reviewing court may not rely on other instructions to supply the element missing from the 'to convict' instruction." Id. at 910. But this Court also recognized that "[a]n attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the

[4] The Court of Appeals' confusion is perhaps understandable, as the interplay between certain base crimes that do not require intent and attempts to commit those crimes, which do require intent, has confounded courts of this state. See Johnson, 173 Wn.2d at 901-09.

commission of that crime." Id. This Court accordingly held an attempt instruction need not provide the elements of the crime allegedly attempted. Id. at 910-11.

Here, the jury was instructed that, to convict, it must find that Nielsen "did an act that was a substantial step toward the commission of [first degree] unlawful possession of a firearm" and that "the act was done with the intent to commit [first degree] unlawful possession of a firearm." CP 184 (Instruction 16); WPIC 100.02.

On its face, this to-convict instruction might appear sufficient under DeRyke because it stated the two elements of attempt—a substantial step and intent to commit the base crime. However, "[a] to-convict instruction may violate due process if it leaves the jury guessing at the meaning of an element of the crime or relieves the State of the burden of proving an element." State v. Fedorov, 181 Wn. App. 187, 199, 324 P.3d 784 (2014).

"[I]nstructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Irons, 101 Wn. App. 544, 549, 4 P.3d

174 (2000). But instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). An ambiguous instruction that permits erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), overruled on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

The court's instructions, read as a whole, failed to make manifestly clear that the State had to prove Nielsen intended to *unlawfully* possess, rather than simply possess a firearm. In other words, the jury instructions failed to make it manifestly apparent to the average juror that Nielsen needed to know he would be breaking the law by possessing a firearm.

As the jury was instructed here, "a person acts with intent . . . when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 177 (Instruction 9). A person is guilty of first degree possession of a firearm if he "has been previously convicted of a serious offense and knowingly owns or

has in his possession or control any firearm." CP 179 (Instruction 11); see also WPIC 133.01 (pattern instruction); RCW 9.41.040(1)(a) (applicable statute). The jury was also instructed that a person "knows or acts with knowledge" when he is aware of a certain "fact, circumstance or result." However, for the State to prove knowledge, that person need not know that "the fact, circumstance, or result" is unlawful or an element of a crime. CP 181 (Instruction 13); WPIC 10.02 (pattern instruction).

Although the State must demonstrate notice to a felon as a preliminary matter, the *completed* crime of unlawful firearm possession does not require the accused to know that possession of the firearm is unlawful. State v. Garcia, 191 Wn.2d 96, 105-06, 420 P.3d 1077 (2018). All the State must prove is that the individual knew he possessed the firearm. Id. at 105.

But the mental state required for criminal attempt—specific intent—is the highest mental state required by law. To satisfy the intent element of *attempted* first degree firearm possession, therefore, the State was required to prove Nielsen intended to violate the law by possessing a firearm. See Johnson, 173 Wn.2d at 907-09; Luther, 157 Wn.2d at 78. The instructions

did not make this clear. Jurors were correctly instructed that to commit the crime, Nielsen needed to engage in "an act that was a substantial step toward the commission of [first degree] unlawful possession of a firearm." CP 184 (Instruction 16). They were instructed that "a 'substantial step' is conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP 178 (Instruction 10). But the court also instructed the jury that "a person acts with intent . . . when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 177 (Instruction 9). The court also instructed jurors that Nielsen need not know that it was illegal for him to possess a firearm. CP 181 (Instruction 13) (for the State to prove knowing possession, Nielsen need not know that "the fact, circumstance, or result" was unlawful or an element of a crime).

From these instructions the State argued that Nielsen need not understand that it would be a crime to possess a firearm. He need only intend to possess a firearm. RP 891, 894, 908. While the intent and knowledge instructions might have been appropriate for the base crime, they were inadequate for a charge

of attempt to commit that crime. See State v. Degfu, noted at 10 Wn. App. 2d 1023, 2019 WL 4635109, at *2-4 (2019) (unpublished decision noting that although instructional error was harmless beyond a reasonable doubt, instructions relating to attempt to commit second degree rape based on victim incapacitation did not adequately convey the specific intent necessary to convict).

The trial court's instructions were incomplete, inadequate, and misleading, leading to a strong possibility the State failed to prove attempt in this case. This Court should grant review and reverse the Court of Appeals.

E. CONCLUSION

This Court should accept review under RAP 13.4(b)(1) and (4) and reverse.

DATED this 25th day of September, 2020.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MADISON ANTHONY NIELSEN, Appellant.	)	No. 79792-1-I DIVISION ONE PUBLISHED OPINION

MANN, C.J. — Madison Nielsen appeals his conviction of attempted unlawful possession of a firearm in the first degree. He argues that the jury instructions given by the trial court failed to instruct the jury that the State needed to prove that Nielsen had the intent to unlawfully possess a firearm. Because the to-convict instruction included both elements of the crime of attempt, and the instructions also correctly defined the underlying crime of unlawful possession of a firearm, we disagree.

Nielsen also argues, and the State concedes, that the judgment and sentence erroneously specifies that the maximum sentence of the crime is 10 years.

We affirm Nielsen's conviction, and remand for the trial court to correct the error in the judgment and sentence and in the no-contact order.

I.

On July 2, 2018, Lee Stallman, the owner of Fall City Firearms, was working when Nielsen and a woman entered the store and asked about the requirements and processes for purchasing a firearm. Because Nielsen was unsure if he was eligible to purchase a firearm, Stallman gave him the business card of an organization that restores firearm rights. King County Sheriff's Deputy Scott Allen then entered the store and began talking to Nielsen. Deputy Allen was aware of Nielsen's prior criminal history, and told Nielsen "you're not supposed to be around firearms. You're a convicted felon." Nielsen disagreed, responding that he was allowed to be around firearms because it had been more than seven years since his last felony conviction. Deputy Allen disagreed and told Nielsen he needed to have a judge restore his right to be around firearms. Deputy Allen warned Nielsen three more times that he should leave the store, and that he should not be handling any firearms. Nielsen told Deputy Allen that he was helping the woman with him purchase a firearm. Deputy Allen ultimately left the premises.

After Deputy Allen left, Stallman showed Nielsen a couple of handguns and a couple of rifles that Nielsen asked to see. Nielson decided to purchase a Ruger AR-556 semi-automatic rifle. Stallman gave Nielsen the federal background check form required for all firearm transactions. The form stated: "the information you provide will be used to determine whether you are prohibited from receiving a firearm." When Nielsen slid the form over to the woman who was with him, Stallman objected. Stallman testified that as he believed Nielsen was the true purchaser, he recognized this action as a straw purchase, in which someone tries to buy a weapon without having their name

on the paperwork. Stallman would not allow them to purchase the gun and refused to participate in the transaction. Nielsen began filling out the form before saying "I'm not going to do this." Although Nielsen wanted to take the form with him, Stallman insisted on retaining the form per store policy.

Nielsen then offered to have the woman come back tomorrow and purchase the Ruger. After Stallman declined that type of sale, Nielsen offered to have his brother come in and buy the Ruger over the weekend. Stallman again declined to participate in that type of sale. Nielsen continued objecting and getting "a little bit mad." Stallman made it clear that he would not make the sale, and Nielsen and the woman left. Stallman then called Deputy Allen and informed him what had happened because Stallman had overheard him mention "felony" in his conversation with Nielsen.

Nielsen was charged with one count of attempted unlawful possession of a firearm in the first degree. At trial, Nielsen stipulated that he was convicted of a serious offense in 2012 and had received notice that he was ineligible to possess a firearm.

The jury convicted Nielsen as charged. The court imposed a prison based Drug Offender Sentencing Alternative (DOSA) sentence of 15.75 months in custody and 15.75 months of community custody. The court's judgment and sentence specifies that the crime carries a maximum sentence of 10 years, and the court ordered that Nielsen have no contact with Stallman or Fall City Firearms for 10 years. Nielsen appeals.

II.

Nielsen first argues that the trial court's to-convict instruction failed to inform the jury that it must find that Nielsen intended to unlawfully possess a firearm, rather than he intended only to simply possess a firearm. We disagree.

We review jury instructions de novo. Peralta v. State, 187 Wn.2d 888, 895, 389 P.3d 596 (2017). Reviewing courts evaluate challenged instructions within the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The jury instructions "must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." Pirtle, 127 Wn.2d at 656.

A to-convict instruction must contain all of the essential elements of the crime because it serves as a "yardstick" for the jury to measure innocence or guilt. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The crime of attempt contains two essential elements the State has to prove to secure a conviction: (1) intent to commit a specific crime and (2) any act constituting a substantial step toward the commission of that crime. State v. Nelson, 191 Wn.2d 61, 71, 419 P.3d 410 (2018). A to-convict instruction for an attempt crime need not provide all the elements of the crime attempted. State v. DeRyke, 149 Wn.2d 906, 910-11, 73 P.3d 1000 (2003). "If the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime." WPIC 100.02; DeRyke, 149 Wn.2d at 911.

The to-convict instruction provided by the trial court relied on Washington Pattern Jury Instruction (WPIC) 100.2[1], and identified the elements of attempt:

> To convict the defendant of the crime of Attempted Unlawful Possession of a Firearm in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

[1] 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 100.2 (4th ed. 2016) (WPIC).

> (1) That on or about July 2, 2018, the defendant did an act that was a substantial step toward the commission of unlawful possession of a firearm in the first degree;
>
> (2) That the act was done with the intent to commit Unlawful Possession of a Firearm 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 of these elements, then it will be your duty to return a verdict of not guilty.

The jury was also provided the definition of the underlying offense of unlawful possession of a firearm in the first degree, following WPIC 133.01;

> A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and knowingly owns or knowingly has in his possession or control any firearm.

The to-convict instruction contains all of the essential elements of the crime of attempt and the underlying offense was correctly defined in a separate instruction. Indeed, Nielsen concedes that the instructions "might appear sufficient under DeRyke because it stated the two elements of attempt: a substantial step and intent to commit the base crime." Nielson's concession is correct.

Nielsen continues, however, by asserting that the to-convict instruction also needs to inform the jury that the State needed to prove that Nielsen had the specific intent to "unlawfully possess a firearm, not just possess a firearm." In essence, Nielsen is asking for the instructions to include an element of the crime of unlawful possession of a firearm that simply does not exist. There are two elements of the crime of unlawful

possession of a firearm: (1) the person knowingly possesses a firearm, (2) after having been previously convicted of a serious offense. RCW 9.41.040(1). The crime of unlawful possession of a firearm does not require that the defendant have actual knowledge of the illegality of firearm possession. State v. Minor, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008).

By arguing that he is entitled to an instruction on his unlawful intent, Nielsen is asking for an instruction that adds an additional element to the crime of attempt or unlawful possession of a firearm. He conceded that he committed a prior serious offense, which made his possession of a firearm illegal. Nielsen asks this court to add a third step to the analysis of the crime of attempt, which would require the State to prove that (1) Nielsen had the intent to knowingly possess a firearm, (2) he took a substantial step, and (3) Nielsen knew that it was illegal for him to possess a firearm. There is no case law to support this interpretation.

Nielsen instead attempts to analogize unlawful possession of a firearm with sex crimes, relying primarily on DeRyke and State v. Johnson, 173 Wn.2d 895, 270 P.3d 591 (2012). In DeRyke, our Supreme Court explained that to be convicted of attempted rape in the first degree, the State must prove both the intent to have sexual intercourse (which is not itself criminal conduct), and that the defendant intended the intercourse occur by forcible compulsion. DeRyke, 149 Wn.2d at 913. Similarly, in Johnson, the Supreme Court explained that for attempted child rape, the State must prove both the intent to have sexual intercourse and that the defendant intended the intercourse be with either a child, or that the defendant believe the victim is a child. Johnson, 173 Wn.2d at 908.

Nielsen argues by analogy, that because possession of a firearm, like sexual intercourse, is itself not criminal conduct, to prove attempted unlawful possession of a firearm, the State must prove the intent to possess a firearm and that the defendant intended the possession be unlawful. Nielsen's analogy is wrong. The aggravating circumstance that elevates sexual intercourse to the crime of rape in the first degree is that the sexual intercourse be by forcible compulsion. The aggravating circumstance that elevates sexual intercourse to the crime of child rape is that the sexual intercourse be with a child, or believed child. By analogy, the aggravating circumstance that elevates possession of a firearm to the crime of unlawful possession of a firearm is that the possession be by someone previously convicted of a serious crime. RCW 9.41.040(1).

The jury instructions did not diminish the State's burden of proof.

We affirm Nielsen's conviction.

III.

Nielsen argues next, and the State concedes, that the judgment and sentence erroneously states that the maximum sentence of attempted unlawful possession of a firearm is 10 years, and that the no-contact order is also incorrectly set for 10 years. We agree.

The court may impose no-contact orders as part of a sentence. State v. Armendariz, 160 Wn.2d 106, 119, 156 P.3d 201 (2007). The no-contact order may not exceed the statutory maximum of the crime. Armendariz, 160 Wn.2d at 120. A judgment and sentencing is invalid on its face when the court imposes a sentence

beyond that statutory maximum. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 175-76, 196 P.3d 670 (2008).

First degree unlawful firearm possession is a class B felony, carrying a statutory maximum of 10 years. RCW 9A.20.021(1)(b). An attempt to commit a crime when the crime attempted is a class B felony is a class C felony. RCW 9A.28.020(3)(c). The statutory maximum for a class C felony is five years. RCW 9A.20.021(1)(c).

Here, the court incorrectly stated that attempted unlawful possession of a firearm carries a maximum sentence of 10 years. As a result, the no-contact order that the court imposed on Nielsen, preventing his contact with Stallman and Fall City Firearms, was for 10 years. Because the maximum sentence for attempted unlawful possession of a firearm is in fact five years, both the judgment and sentence and the no-contact order are incorrect.

We affirm Nielsen's conviction. We remand to the trial court to correct the judgment and sentence and the no-contact order.

Mann, C.J.

WE CONCUR:

Brennan, J.

Leach, J.

NIELSEN KOCH P.L.L.C.

September 25, 2020 - 2:53 PM

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