

No. 98056-0

No. 78089-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ORN,

Appellant.

---

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

---

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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

2. Instruction 7 omitted an essential element of the crime of attempted first degree murder.

3. The trial court deprived Mr. Orn of his Sixth Amendment right to present a defense when it barred the admission of relevant evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This, in turn, requires a trial court to instruct the jury on each element of the offense. Premeditated intent is an essential element of the crime of attempted first degree murder. Instruction 7, the “to convict” instruction, omitted

the element of premeditation. Did Instruction 7 relieve the State of its burden of proof?

2. The Sixth Amendment to the United States Constitution guarantees an accused person the right to present a defense and meet the charges against him. Here, the trial court barred Mr. Orn from introducing relevant evidence that contradicted the claims of the State's principle witness. Did the court deprive Mr. Orn of his right to present a defense?

### C. STATEMENT OF THE CASE

Thomas Darling-Seamans, a self-described "pothead," lived in a garage of the apartment complex where Mr. Orn and Kimberly Boals lived. RP 760-62. As her relationship with Mr. Orn neared its end, Ms. Boals began a sexual relationship with Mr. Darling-Seamans. RP 369. Ms. Boals gave many of Mr. Orn's belongings to Thomas Darling-Seamans to sell. RP 370.

Ms. Boals claimed Mr. Orn was angry and said he was going to confront Mr. Darling-Seamans to get his belongings back. RP 389-90.

Mr. Darling-Seamans testified he was smoking marijuana in his garage when Mr. Orn quickly opened the door. RP 784-86. Mr. Darling Seamans claimed Mr. Orn was holding a gun and asked “where’s my stuff?” RP 787. Mr. Darling-Seamans told the jury Mr. Orn then began shooting him. *Id.*

Ms. Boals testified Mr. Orn returned to the apartment with a gun and said he had shot Mr. Darling-Seamans. RP 393.

The State charged Mr. Orn with one count of attempted first degree murder and one count of first degree assault, each with a firearm enhancement. CP 44-45. A jury convicted Mr. Orn on both counts. CP 135. The trial court vacated the assault charge.

#### D. ARGUMENT

**1. The trial court erred in refusing to instruct the jury on each element of the crime charged.**

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

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

b. *Premeditated intent is an essential element of attempted first degree murder.*

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

a person commits first degree attempted murder when, with premeditated intent to cause the death of another, he/she takes a substantial step toward commission of the act.

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

In *Vangerpen*, the information charged the defendant “with intent to cause the death of another person did attempt to cause the death of . . . a human being.” *State v. Vangerpen*, 71 Wn. App. 94, 97, n.1, 856 P.2d 1106 (1993), *review granted*, 123 Wn.2d 1025 (1994). At the close of the State’s case, the defendant objected to the information’s omission of premeditation. *Vangerpen*, 125 Wn.2d at 785. Over a defense objection, the trial court permitted the State to amend the

information to include the element of premeditation. *Id.* at 786. On appeal there was no question that premeditation was an essential element of attempted first degree murder. *Id.* at 789-90. Rather the only issue was whether the trial court erred in allowing amendment of the information to add that element. *Id.* In fact, the State contended that because it was an essential element, the amendment was proper.

In discussing the facts of the case, the Court explained:

The prosecutor inadvertently omitted the **statutory element of premeditation** and therefore, although the charging document purported to charge “attempted murder in the first degree”, the information failed to contain all the essential elements of that crime.

*Id.* at 785 (emphasis added). The Court explained further the “prosecuting attorney agreed that **premeditation** should have been alleged in the charging document and moved to amend the Information to include that **element.**” *Id.*

(Emphasis added.)

The Court stated the issues as:

Should the State be permitted to amend the charging document after the State has rested its case in order to add an **essential element** of the

crime which was inadvertently omitted from the document?

*Id.* at 786 (Emphasis added.).

The State argued:

. . . that the omission of the element of “premeditation” was only a “scrivener's” error and relies on the cases which hold that technical defects can be remedied midtrial. . . . However, omission of an **essential statutory element** cannot be considered a mere technical error.

*Id.* (Emphasis added.)

Two points are made abundantly clear by the foregoing, and indeed were not even in dispute in *Vangerpen*. The element at issue was premeditation, and premeditation is an essential element. The Court explicitly says so no fewer than four times. Nonetheless, another division of this Court opined “*Vangerpen* does not articulate what the essential elements of attempted first degree murder are.” *State v. Boswell*, 185 Wn. App. 321, 337, 340 P.3d 971 (2014), *review denied*, 183 Wn.2d 1005 (2015).<sup>1</sup> Regardless of whether it identified each of the

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<sup>1</sup> The same division held in *State v. Reed*, “to prove only an attempt to commit first degree murder, the State was not required to prove that Reed acted with premeditated intent to commit murder.” 150 Wn. App. 761, 772-73, 208 P.3d 1274, *review denied*, 167 Wn.2d 1006

essential elements of the crime, it is impossible to conclude *Vangerpen* did not identify premeditation as one of those essential elements.

Ultimately, *Boswell* dismisses *Vangerpen* saying:

[b]ecause *Vangerpen* addresses whether the language used in the information in that case properly charged the defendant with attempted first degree murder, not what all the essential elements of first degree murder are. . . .

185 Wn. App. at 337. This statement looks past the fact that the “language used” in *Vangerpen* was language which omitted the element of premeditation. The Court reversed precisely because of that omission saying:

the information alleged only intent to cause death, not premeditation. Therefore, the State failed to charge one of the statutory elements of first degree murder and instead included only the mental element required for second degree murder.

125 Wn.2d 791. If premediated intent is necessary to differentiate first degree attempted murder from second degree attempted murder, and *Vangerpen* says it is,

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(2009). *Reed* does not cite to, acknowledge, nor attempt to distinguish *Vangerpen*.

premeditated intent is an essential element of the former.

“Elements’ are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime.” *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).

When *Vangerpen* found the essential elements rule was violated by omission of the element of premeditation in the information, that conclusion undeniably rested upon the predicate conclusion that premeditation is an essential element of attempted first degree murder.

This Court must follow directly controlling authority of the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). This Court must follow the conclusion of *Vangerpen* that premeditated intent is an element of attempted first degree murder.

*c. Instruction 7 does not include the element of premeditation.*

Mr. Orn requested the court include the element of premeditation in the “to convict” instruction. RP 1114-15. The

Court refused claiming that including the element in the “to convict” instruction would be redundant. RP 1116.

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

Instruction 7, the “to convict” instruction, provides:

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

(1) That on or about August 2, 2016, the defendant did an act that was a substantial step

toward the commission of murder in the first degree;

(2) That the act was done with the intent to commit the crime of murder in the first degree;

(3) That the acts occurred in the State of Washington. . . .

CP 68. There can be no dispute that the essential element of premeditation is absent from this instruction. Instruction 6, which purports to define the crime of attempted first degree murder, similarly omits the premeditation element. CP 67.

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

The “to-convict” instruction in this case mirrors the initial information in *Vangerpen*. As in that defective information, the instruction omits the requirement that Mr. Orn had premeditated the intent prior to attempting to

commit the crime.<sup>2</sup> If premeditation is an essential element which must be included in the information, it is an essential element which must be included in the to-convict instruction. If a jury need not find the person acted with premeditated intent, the distinction between attempted first degree murder and attempt second degree murder disappears.

Further, by requiring the jury find only that Mr. Orn intended to commit first degree murder, the instruction told the jury it was enough that he intended to premeditate the intent to cause death. But that is not first degree attempted murder. Instead, the instructions are quite similar to the defective instructions at issue in *Smith*, 131 Wn.2d at 262. The instruction there provided in part, the defendant “agreed with [others] to engage in . . . the performance of conduct constituting the crime of Conspiracy to Commit Murder in the First Degree[.]” *Id.* The Court recognized that rather than define conspiracy to commit first degree murder, the

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<sup>2</sup> Indeed, recognizing it is an essential element, the State drafted the amended information in this case to properly allege Mr. Orn “with a premeditated intent to cause the death of another person” did attempt to cause the death of that person. CP 44-45.

instruction defined “the even more inchoate crime of conspiracy to commit conspiracy to commit murder.” *Id.* By requiring only an intent to premeditate the intent at some later time, Instruction 7 omitted an essential element of the crime. By omitting an essential element the instruction relieved the State of its burden of proof.

*d. The Court should reverse Mr. Orn’s conviction.*

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

However, the Court held “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *Brown*, 147 Wn.2d at 339. In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *Mills*, 154 Wn.2d at 15 n.7 (citing *Neder*, 527 U.S. at 1).

The jury had no reason to know that it must find Mr. Orn premeditated the intent to cause another's death before he took a substantial step towards doing so. Neither the purported definition of attempted first degree murder in Instruction 6 nor Instruction 7 contained that requirement. CP 67-68. That omission was not cured by the fact that another instruction defining first degree murder, contained the necessary element. CP 71. Instead, the inclusion of premeditation in the instruction for the completed offense while omitting it from the attempt instruction exacerbates the error by telling the jury the heightened intent is required only for the completed offense. Because the instructions, even read as a whole, omit an essential element of the offense, reversal is required. *Brown*, 147 Wn.2d at 339.

**2. The trial court denied Mr. Orn his rights to present a defense and to confront witnesses by refusing to permit him to demonstrate a witness's bias and to impeach the witness.**

I'm just a proactive pothead. . . .I work hard every day, I visit my family, and . . . I just stay proactive in not doing anything out of the question really.

RP 760. This self-description accurately described Mr. Darling-Seaman's fondness for marijuana and his daily use. However, Mr. Darling-Seamans's claim that he simply followed the rules was less accurate.

As the result of a police investigation, and in an effort to avoid criminal charges for trafficking stolen property, Mr. Darling-Seamans had entered an agreement with police to conduct several undercover purchases of stolen property. RP 15-17. But the jury never heard this evidence.

The court granted the State's pretrial motion limiting this evidence, concluding, that while relevant, it was overly prejudicial for the jury to hear evidence of Mr. Darling-Seaman's involvement in criminal activity. RP 21. The court did permit counsel to engage in a more sterile questioning asking simply whether Mr. Darling-Seamans had an agreement with police. *Id.* Even after Mr. Darling-Seamans told the jury he was a simple law-abiding pothead, the court refused to permit questioning of his prior criminal conduct. RP 821.

*a. Mr. Orn had the right to confront Mr. Darling-Seamans.*

The Sixth Amendment guarantees a defendant the right to confront the witnesses against him through cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986). The more critical a witness is to the state's case the more latitude a defendant enjoys to expose the witness's bias. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Too, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn. 2d 713, 720, 230 P.3d 576 (2010).

So long as evidence is "at least minimal[y] relevant" it must be admitted unless the State can establish the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (citing *Darden*, 145 Wn.2d at 622). A court must then balance the State's claimed interest against the defendant's need for the evidence. *Id.*

Here the court found the evidence relevant. Thus, the evidence was admissible unless the State could establish its admission would prejudice the fact-finding process. *Jones*, 168 Wn.2d at 720. The State made no such showing.

The State speculated the evidence might place Mr. Darling-Seamans in danger by revealing he worked with police. *Id.* However, by bringing the motion in open court the State had already created a public record that Mr. Darling-Seamans worked as a confidential informant. Thus, there could be no further concern about the need to maintain the confidentiality of Mr. Darling-Seaman's involvement.

Ignoring its own revelation of the information in a pretrial hearing, the State expressed concern that introduction of the evidence at trial would frustrate the ability of police to use confidential informants. RP 19. First, the State also explained the police had no further intention of using Mr. Darling-Seamans as an informant. Thus, there could be no concern for his confidentiality in future investigations. Second, generalized speculation regarding the

future use of informants is hardly the sort of showing of prejudice required to preclude admission of relevant evidence. The State did not identify any potential prejudice much less prejudice to the integrity of the fact-finding process in this case.

Because the evidence was relevant and the State did not identify any overriding prejudice to the fairness of the proceedings, the exclusion of this evidence violated Mr. Orn's Sixth and Fourteenth Amendment rights.

b. *The court's erroneous exclusion of relevant information requires a new trial.*

A constitutional error during trial court requires reversal unless the reviewing court finds beyond a reasonable doubt that the error "did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967); *Neder*, 527 U.S. at 9.

Mr. Darling-Seamans was the only witness to testify to the circumstances leading up to the shooting. Throughout his testimony he minimized his role in taking and selling Mr. Orn's belongings. He minimized his role in his relationship

with Ms. Boals. Mr. Darling-Seamans cast himself as an easy going pothead and painted Mr. Orn as irrational and angry. The portrait that Mr. Darling-Seamans painted for the jury was contrary to his criminal activity. Had the jury heard of that activity it may well have entertained doubts as to whether Mr. Orn premeditated his acts as opposed to responding to provocation by Mr. Darling-Seamans. The State cannot demonstrate the exclusion of relevant evidence did not contribute to the jury's verdict.

This Court must reverse Mr. Orn's conviction.

E. CONCLUSION

Because the court excluded relevant evidence in violation of Mr. Orn's rights to present a defense and confront witnesses, this Court should order a new trial. A new trial is also required because of the trial court refusal to instruct the jury on each of the elements of the charged crime.

Respectfully submitted this 15<sup>th</sup> day of January, 2019.

A handwritten signature in black ink, appearing to read "Gregory C. Link". The signature is written in a cursive style with a large initial "G" and "L".

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 78089-1-I
v.	)	
	)	
NICHOLAS ORN,	)	
	)	
Appellant.	)	

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SIGNED IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF JANUARY, 2019.



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# WASHINGTON APPELLATE PROJECT

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