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STATE OF WASHINGTON
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No. 98056-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ORN,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

It is undisputed that all essential elements of a crime must be included in the “to convict” jury instruction. The elements of first-degree attempted murder are: (1) premeditated intent to kill, and (2) taking a substantial step toward the killing. But over Mr. Orn’s objection, the “to convict” instruction in this case described the mental element as mere “intent” rather than “premeditated intent.” The instruction lowered the burden of proof and violated due process.

The court followed the generic WPIC for attempt crimes, which describes the elements as: (1) intent to commit the crime, and (2) a substantial step toward commission of the crime. But while this WPIC may work for all other attempt crimes, it fails to account for the unique nature of first-degree attempted murder, which is the only crime with a mental state higher than intent. Indeed, this element distinguishes first-degree attempted murder from second-degree attempted murder. In trials for first-degree attempted murder, the “to convict” instruction must include the essential element of premeditation.

In this case, the conviction should be reversed both because of this instructional error and because the trial court violated Mr. Orn’s rights under the Sixth Amendment and article I, section 22 by disallowing cross-examination of the key witness on issues relevant to credibility.

B. ISSUES

1. This Court has repeatedly held the “to convict” jury instruction must include all essential elements of the charged crime, and the failure to include an element lowers the burden of proof and violates due process. The essential mental element for first-degree attempted murder is *premeditated* intent, but the “to convict” instruction told the jury it was mere “intent.” Did the “to convict” instruction violate Mr. Orn’s right to due process?

2. The state and federal constitutions guarantee the accused the right to confront the witnesses against him, and the most important component of this right is the ability to conduct meaningful cross-examination to test witness credibility. A court may not prohibit cross-examination on an issue relevant to credibility unless the State shows a compelling interest to exclude it – meaning the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Did the trial court violate Mr. Orn’s constitutional right to confrontation when it prohibited him from cross-examining the complaining witness about crimes of dishonesty he had recently committed and resolved through an agreement to work for the police?

C. STATEMENT OF THE CASE

Petitioner Nicholas Orn and his girlfriend Kimberly Boals lived in the same apartment complex as complaining witness Thomas Seamans.¹ RP 358. Mr. Orn had mental health issues and was devastated when his girlfriend broke up with him. RP 365-66. After they broke up, Ms. Boals gave much of Mr. Orn's property to Mr. Seamans to sell. RP 370-72. Mr. Orn "was upset because it was obviously without his permission." RP 372.

Ms. Boals provided conflicting statements about what happened next. At one point, she stated Mr. Seamans returned most of the property and promised to pay for one item he kept (an air conditioner). RP 372-73. At another point, she stated she requested return of the property but Mr. Seamans refused, bragged that he was armed with a large steel bar, and "threatened Nick essentially." RP 444-49, 509. Thus, she urged Mr. Orn to seek return of the property himself, but to take his gun when he went because Mr. Seamans was armed. RP 509. Mr. Orn did so, and ended up shooting Mr. Seamans multiple times. RP 505. Ms. Boals did not know "if it was self-defense or if it was protection or, you know, with intent or whatever[.]" RP 505.

¹ Most of the record refers to Thomas Seamans as Thomas Darling-Seamans, but he testified he goes by Thomas Seamans, and his ID card also uses this name. RP 759; Sup. CP 37.

Mr. Orn was immediately arrested, and Ms. Boals found disturbing text messages Mr. Orn had sent earlier that evening stating he felt like going on a “rampage.” RP 416. But subsequent texts indicated he had become “complacent” and decided he did not care. RP 466, 515.

The State charged Mr. Orn with first-degree attempted murder and first-degree assault. CP 44-45. At trial, Mr. Seamans testified he returned most of Mr. Orn’s property and that he did not threaten Mr. Orn with his steel bar before Mr. Orn shot him. RP 772-73, 787. He described himself as a “proactive pothead” who “work[s] hard every day” and doesn’t do “anything out of the question really.” RP 760.

Defense counsel sought to challenge Mr. Seamans’s credibility by cross-examining him about an agreement he had with the Kent Police Department to do some work for them in exchange for not being charged for crimes of dishonesty he had recently committed. CP 54; Sup. CP 1-37; RP 20-21. Mr. Seamans was involved in a theft and identity-theft scheme and the police had planned to refer him for charges of first-degree possession of stolen property. Sup. CP 1-37; RP 17. The court agreed the evidence was relevant, but granted the State’s motion to exclude it on the grounds that it was prejudicial and confusing. RP 21-22, 822-23.

At the close of evidence, the State proposed a “to convict” jury instruction based on the generic pattern instruction for attempt crimes:

To convict the defendant of the crime of attempted murder in the first degree, as charged in Count I, 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 murder in the first degree; and
- (3) That the act occurred in the State of Washington.

CP 203 (citing WPIC 100.02).

As to the second element, Mr. Orn asked the Court to replace “intent” with “premeditated intent.” RP 1115. The court responded, “I think it’s redundant, right, because it’s -- the definition of murder includes premeditation[.]” RP 1116. Defense counsel explained that if the “to convict” instruction omitted premeditation, “potentially a jury could misconstrue that it’s just intent.” RP 1117. He noted that “premeditated” was “the only thing that distinguishes” first-degree attempted murder from second-degree attempted murder. RP 1117.

The State insisted the court should use the WPIC for attempt crimes generally, and the court did so. RP 1117. The “to convict” instruction stated that the mental element of the crime was mere “intent.” CP 68. The court also instructed the jury on self-defense. CP 78-81.

Mr. Orn was convicted on both counts and the trial court dismissed the assault conviction to avoid double jeopardy. RP 1212-13. The Court of Appeals affirmed the conviction for first-degree attempted murder, ruling the “to convict” instruction need not include the element of premeditation. The court cited its own earlier cases rejecting the argument, dating back to *State v. Reed*, 150 Wn. App. 761, 772-73, 208 P.3d 1274 (2009). In *Reed*, the court opined “the State was not required to prove that Reed acted with premeditated intent” even though he was charged with first-degree attempted murder rather than second-degree attempted murder. *Id.* The court also rejected Mr. Orn’s argument that the trial court’s prohibition on relevant cross-examination violated his Sixth Amendment rights.

D. ARGUMENT

1. The “to convict” instruction for first-degree attempted murder must include the essential element of premeditated intent.

- a. The “to convict” jury instruction must contain all essential elements of the crime.

The “to convict” instruction “must contain all of the elements of the crime because it serves as the ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing *State v. Emmanuel*, 42 Wn.2d 819, 819-20, 259 P.2d 845 (1953)). The failure to instruct the jury as to every

element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); U.S. Const. amend. XIV; Const. art. I, § 3; see *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (“The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

Jurors must not be required to supply an element omitted from the “to convict” instruction by referring to other jury instructions. *Smith*, 131 Wn.2d at 262-63. “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.” *Id.* at 263.

This Court reviews a challenged jury instruction de novo. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

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

“‘Elements’ are ‘[t]he constituent parts of a crime – usu[ally] consisting of the actus reus, mens rea, and causation – that the prosecution must prove to sustain a conviction.’” *State v. Smith*, 155 Wn.2d 496, 502

n.5, 120 P.3d 559 (2005) (quoting Black's Law Dictionary 559 (8th ed. 2004)). To prove first-degree attempted murder, the State must show beyond a reasonable doubt that the defendant, with premeditated intent to cause death, took a substantial step toward commission of that act. *State v. Price*, 103 Wn. App. 845, 852-53, 14 P.3d 841 (2000); RCW 9A.28.020(1); 9A.32.030(1)(a).² In other words, "premeditated intent" is the mens rea and "substantial step" is the actus reus. Thus, premeditated intent is an essential element of the crime. *Smith*, 155 Wn.2d at 502 n.5; *State v. Vangerpen*, 125 Wn.2d 782, 785, 888 P.2d 1177 (1995).

The State concedes this point: "Because the intent required to commit first degree murder is premeditated intent to kill, the intent required to commit attempted first degree murder is also premeditated intent to kill." Br. of Respondent at 7-8 (citing *In re Borrero*, 161 Wn.2d 532, 540, 167 P.3d 1106 (2007)). Premeditation is the element that distinguishes first-degree attempted murder from second-degree attempted murder, for which the mens rea element is intent. *Vangerpen*, 125 Wn.2d at 791-92. As an essential element, premeditation must be in the "to

² RCW 9A.28.020(1) provides: "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.32.030(1)(a) provides: "A person is guilty of murder in the first degree when: (a) with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person."

convict” instruction for first-degree attempted murder. *See Smith*, 131 Wn.2d at 263.

In *Vangerpen*, the information purported to charge the defendant with first-degree attempted murder but it omitted the essential element of premeditation. *Vangerpen*, 125 Wn.2d at 785. The information was unconstitutional because, like the “to convict” instruction, a charging document must include all essential elements of a crime. *Id.* at 787. The State belatedly tried to fix this violation of the “essential elements rule,” but this Court reversed because the State may not amend the information after resting its case. *Id.* at 789-90. Like the charging document in *Vangerpen*, the “to convict” instruction here improperly omitted the essential element of premeditation.

The Court of Appeals opined that *Vangerpen* is inapposite because it involved a defective information as opposed to a defective “to convict” instruction. Op. at 10-11. But the court acknowledged that the minimum requirements for both are the same: they must include the essential elements of the crime. Op. at 10 (“[A] charging document must include all essential elements of a crime.... Meanwhile, a to convict instruction must contain all of the elements of the crime....”) (citations omitted).

More recently, the Court of Appeals said of *Vangerpen*: “the Washington Supreme Court ... expressly stated that premeditation was an

element of attempted first degree murder *for charging purposes.*” *State v. Murry*, ___ Wn. App. 2d ___, ___ P.3d ___ (No. 35035-5-III, filed 6/4/20) (citing *Vangerpen*, 125 Wn.2d at 791) (emphasis added). But in *Vangerpen*, this Court did not describe premeditation as a new species of element that was only an element for charging purposes. Essential elements must be in *both* the charging document and the “to convict” instruction. *State v. Gonzalez-Lopez*, 132 Wn. App. 622, 624, 132 P.3d 1128 (2006). To the extent either document contains additional information, they need not match. *State v. Porter*, 186 Wn.2d 85, 91, 375 P.3d 664 (2016). But the “to convict” instruction “must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” *Id.* at 93.

- c. The State conflates the degrees of the crime; intent is the mental element for *second-degree attempted murder*.

Although the State acknowledged “the intent required to commit attempted first degree murder is ... premeditated intent to kill,” Br. of Respondent at 7-8, it argued that premeditated intent is *not* an essential element of the crime because the generic attempt statute and generic pattern instruction describe the mens rea as “intent.” Br. of Respondent at 8 (citing RCW 9A.28.020; WPIC 100.02). Relying on *Reed*, the State

insists premeditation may be relegated to definitional instructions. Br. of Respondent at 8-9 (citing *Reed*, 150 Wn. App. at 771-72).

The State is wrong, because a mens rea the State must prove beyond a reasonable doubt is an essential element, and essential elements must be in the “to convict” instruction. *Smith*, 155 Wn.2d at 502 n.5; *Smith*, 131 Wn.2d at 263. “Premeditated intent” is the mens rea the State must prove in a case of first-degree attempted murder; mere “intent” is the mens rea for second-degree attempted murder. *Vangerpen*, 125 Wn.2d at 785, 791-92; *Borrero*, 161 Wn.2d at 540; see also *State v. Feeser*, 138 Wn. App. 737, 741-42, 158 P.3d 616 (2007); RP 1117 (Mr. Orn’s counsel explains this distinction).

The *Reed* opinion acknowledged the different mental state requirements of the two crimes, but denied that these required mental states were elements. *Reed*, 150 Wn. App. at 772-73. The court stated, “the State was not required to prove that Reed acted with premeditated intent to commit murder ... the jury had to consider proof of premeditated intent only to determine which degree of attempted murder Reed committed, first degree or second degree attempted murder.” *Id.*³ The court was wrong in stating that a required mens rea is not an element, but

³ In *Reed* the jury was instructed on the lesser offense as an alternative. 150 Wn. App. at 767.

subsequent opinions have simply followed *Reed*.

The WPIC the State relies on is the generic pattern instruction for attempt crimes. WPIC 100.02. Because the mens rea element for all other attempt crimes is intent, Mr. Orn does not take issue with the WPIC in those contexts. But the WPIC must not be used for the unique crime of first-degree attempted murder, as it is the only crime with a mens rea element higher than intent. In circumstances where a WPIC does not comport with the law, the law must control. *See, e.g., State v. Kylo*, 166 Wn.2d 856, 866, 215 P.3d 177 (2009) (reversing because of flawed jury instruction, even though instruction given was a WPIC); *State v. Hayward*, 152 Wn. App. 632, 645-46, 217 P.3d 354 (2009) (same).

In addition to relying on the generic attempt WPIC, the State relies on the generic attempt statute to claim the mens rea element here is mere intent. Br. of Respondent at 8 (citing RCW 9A.28.020). The State is wrong, because one must read the generic attempt statute together with the statute for the crime attempted. *See State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (when construing statutes, courts look at related provisions and the scheme as a whole). Doing so here establishes that for first-degree attempted murder, the mental state element is premeditated intent. RCW 9A.28.020; RCW 9A.32.030; *Borrero*, 161 Wn.2d at 540; *State v. Latham*, 3 Wn. App. 2d 468, 476, 416 P.3d 725 (2018).

If the State is right that mere “intent” is the mens rea element for all attempt crimes, then *there can be no crime* of first-degree attempted murder. This is because the mens rea for the completed crime (premeditation) is incompatible with mere intent. This Court has already held that no completed crime with a mens rea below intent can serve as the base crime for an attempt charge, because the attempt statute requires intent as a minimum mens rea element. *State v. Dunbar*, 117 Wn.2d, 587, 594-95, 817 P.2d 1360 (1991). According to the State in this case, intent is also the maximum mens rea element for attempt crimes. Thus, if the State is correct, premeditated murder may not form the basis for an attempt charge. *See id.* at 590 (“one may not attempt a non-intent crime”). If, on the other hand, first-degree attempted murder can be a crime, then the essential mens rea element of premeditation must be in the “to convict” instruction. *Smith*, 131 Wn.2d at 263.

d. The Court of Appeals relied on inapposite cases instead of following *Vangerpen*, *Smith*, and *Aumick*.

Instead of following *Vangerpen*, the Court of Appeals concluded “the jury was properly instructed because the jury instructions, taken as a whole, properly informed the jury of the applicable law, were not misleading, and allowed [Mr.] Orn to argue his theory of the case.” Op. at 1; *see also* Op. at 9. There are at least three problems with this conclusion.

First, courts do not look at the jury instructions “taken as a whole” if an element is missing from the “to convict” instruction. Contrary to the trial court’s ruling, the jury should not have been required to find an essential element in a definitional instruction. *See* RP 1116 (stating it would be “redundant” to include premeditation in the “to convict” instruction because “the definition of murder includes premeditation”). As this Court emphasized in *Smith*, “The Court of Appeals erred in looking to the other instructions to supply the element missing from the ‘to convict’ instruction. We have held on numerous occasions that jurors are not required to supply an omitted element by referring to other jury instructions.” *Smith*, 131 Wn.2d at 262-63.

Second, Mr. Orn’s ability to argue lack of premeditation as a theory of the case is irrelevant. The jury was instructed that statements of counsel are not the law and that the law is in the instructions. CP 61. In *Aumick*, this Court reversed where the element of intent was missing from the “to convict” instruction for attempted rape, even though “intent” was in other instructions and the defendant argued lack of intent to the jury. *Aumick*, 126 Wn.2d at 430-31. This Court stated, “The State also argues that defense counsel was able to argue to the jury its theory that intent is an element of attempt. This contention is without merit.” *Aumick*, 126 Wn.2d at 431. “A jury should not have to obtain its instructions on the law

from arguments of counsel. Indeed, the trial court correctly instructed the jury that it should “[d]isregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.” *Id.*

Finally, contrary to the Court of Appeals’ statement, the instructions *were* misleading. Instead of telling the jury it had to find premeditated intent to cause death, the “to convict” instruction stated the jury had to find “intent to commit first-degree murder.” To the extent the jury was supposed to read in the mens rea element from the definitional instruction for first-degree murder, the instruction made no sense. The Court of Appeals acknowledged, “When taken together with the definition of murder in the first degree, the instruction required the jury to find that the act was done with the intent to ‘with a premeditated intent to cause the death of another person, . . . cause[] the death of such person.’” Op. at 13 (unaltered). This merged instruction is nonsensical in multiple ways, especially in its muddled description of the mens rea (“with the intent to with a premeditated intent . . .”). *Cf. Smith*, 131 Wn.2d at 262 (reversing where instructions described nonsensical crime of “conspiracy to commit conspiracy to commit murder”). The instructions taken together were confusing and misleading, demonstrating the importance of this Court’s rule that all essential elements must be in the “to convict” instruction, with none relegated to definitional instructions.

In reaching its ruling, the Court of Appeals relied on a case that did not involve the omission of an essential element from the “to convict” instruction. Op. at 7-8 (citing *State v. Imokawa*, 194 Wn.2d 391, 450 P.3d 159 (2019)). *Imokawa* addressed an instruction on the State’s burden to disprove a defense. 194 Wn.2d at 397. In such circumstances, “a specific instruction is preferable, but failure to provide one is not reversible per se so long as the instructions, taken as a whole, make it clear that the State has the burden.” *Id.* “[T]he jury need not be instructed as to the State’s burden to prove absence of a defense; it need only be specifically instructed on the essential elements of the crime.” *Id.* at 401.

The Court of Appeals also relied on *DeRyke*, 149 Wn.2d at 910 and *State v. Nelson*, 191 Wn.2d 61, 74, 419 P.3d 410 (2018). Op. at 11-12. These cases are inapposite. They held that the actus reus elements of the completed crime need not be in the “to convict” instruction for attempt crimes, because the actus reus for all attempt crimes is taking a “substantial step” toward the completion of the crime. *Nelson*, 191 Wn.2d at 73-74 (citing *DeRyke*, 149 Wn.2d at 910-11). The acts of the underlying crime are not elements, and therefore may be defined separately, “to inform and educated the jury on what the defendant intended to accomplish.” *Nelson*, 191 Wn.2d at 73.

In contrast, the required mental state *is* an element. *Smith*, 155 Wn.2d 496, 502 n.5. Stated differently, it is not the mental state that is “attempted;” if the person lacks the required mental state to accomplish a result, there is no attempt. That *result* is attempted but not completed, and therefore the acts of the completed crime are not elements of the attempt crime. But the mental state element is completed – one must either intend to accomplish a result which constitutes a crime or, in the case of first-degree attempted murder, act with premeditated intent to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a); RCW 9A.28.020(1); RCW 9A.32.030(1)(a); RCW 9A.32.050(1)(a); *see DeRyke*, 149 Wn.2d at 913 (“Where, as here, the crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result.”).

In *Nelson* and *DeRyke*, the “to convict” instructions properly included the mens rea elements for the attempt crimes at issue. *See Nelson*, 191 Wn.2d at 67 (“intended” in “to convict” instruction); *DeRyke*, 149 Wn.2d at 909 (“intent” in “to convict” instruction). In contrast, in *Aumick*, the proper mental element did not appear in the “to convict” instruction for the attempt crime at issue, and this Court reversed. *Aumick*, 126 Wn.2d at 430-31. Similarly here, the proper mental element did not appear in the “to convict” instruction, and this Court should reverse.

In sum, premeditated intent is the essential mental element of the crime of first-degree attempted murder. As such, it must be in the “to convict” instruction for that crime. The “to convict” instruction in this case improperly omitted this essential element, lowering the burden of proof and violating Mr. Orn’s right to due process.

- e. The error is not harmless beyond a reasonable doubt.

Because the error is constitutional, the conviction must be reversed unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Aumick*, 126 Wn.2d at 430. The State argues the omission of the required mental element from the “to convict” instruction is harmless because it presented strong evidence of premeditation, other instructions included premeditation, and the parties discussed premeditation in closing argument. Br. of Respondent at 12-15. But this Court rejected consideration of other instructions or counsel’s argument in its harmless error analysis in *Aumick*, 126 Wn.2d at 430-31 and *Smith*, 131 Wn.2d at 264-65. And while the State presented evidence of premeditation in the form of Mr. Orn’s texts and the number of shots fired, the jury also heard evidence that Mr. Orn had mental health issues, that his goal was not to kill but to retrieve his property, and that Mr.

Seamans was armed and threatened Mr. Orn. This Court should reverse.⁴

2. The trial court violated Mr. Orn’s constitutional right to confront the witnesses against him by prohibiting cross-examination of the key witness on a topic the court conceded was relevant.

The federal and state constitutions guarantee the right of criminal defendants to confront the witnesses against them. U.S. Const. amend. VI; Const. art. I, § 22; *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). This Court reviews a claim under these provisions de novo. *Jones*, 168 Wn.2d at 719.

“The primary and most important component” of the Confrontation Clause “is the right to conduct a meaningful cross-examination of adverse witnesses.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis*, 415 U.S. at 316.

Because limiting a defendant’s cross-examination calls into question the integrity of the fact-finding process, “the right to confront must be zealously guarded.” *Darden*, 145 Wn.2d at 620.

⁴ If this Court reverses only for this instructional error and not for the Confrontation Clause violation, the State may elect to forego retrial on attempted murder and instead request reinstatement of the assault conviction. *See State v. Turner*, 169 Wn.2d 448, 460, 238 P.3d 461 (2010).

The rules of evidence are construed in tandem with this imperative.

State v. McSorley, 128 Wn. App. 598, 612-13, 116 P.3d 431 (2005). ER

608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness

Mr. Orn moved under this rule to cross-examine Mr. Seamans about his agreement to help the Kent Police in exchange for not being prosecuted for crimes of dishonesty he had recently committed. CP 54, RP 17; Sup. CP 1-37 (alleging Mr. Seamans was involved in identity theft and theft, and promising not to refer him for prosecution on first-degree possession of stolen property if he conducted undercover purchases for the police on two other cases). Mr. Orn wanted to cross-examine Mr. Seamans on this agreement to show "bias" and "lack of truthfulness[.]" CP 54; RP 20-21.

The trial court agreed "this evidence is relevant." RP 21. But it disallowed cross-examination on the topic anyway, stating, "it is substantially outweighed by the danger of unfair prejudice or confusion of the issues[.]" RP 21; *see* ER 403. The court ruled Mr. Orn could only ask, "you've done some work with the Kent Police Department?" RP 22. Mr.

Orn sought reconsideration after Mr. Seamans testified he was merely a “proactive pothead” who “works hard every day,” doesn’t “do anything out of the question,” is “not about having issues” and only wants “peace and love in my life[.]” RP 760, 797, 819-23. The court denied the motion. RP 822-23. These rulings violated Mr. Orn’s constitutional rights.

“It is well established that a criminal defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the State’s case.” *McSorley*, 128 Wn. App. at 612-13; *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). Because of the constitutional rights at stake in a criminal trial, relevant evidence may be excluded only “if the State can show a *compelling* interest to exclude prejudicial or inflammatory evidence.” *Darden*, 145 Wn.2d at 621 (emphasis added); Br. of Respondent at 20 (citing same standard). In other words, “if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720.

In *McSorley*, the defendant was convicted of child luring after a 10-year-old testified the defendant pulled his truck up beside him and ordered him to get in. *McSorley*, 128 Wn. App. at 600. The court prohibited the defendant from cross-examining the child about pranks he had committed where he pretended to need help from passing motorists.

Id. at 602. The Court of Appeals reversed, noting ER 608(b) must be read with the Confrontation Clause in mind. *Id.* at 611-13. So long as the pranks were “not too remote in time,” they were relevant to credibility and could not be excluded. *Id.* at 613-14.

Here, the complaining witness’s alleged crimes of dishonesty were not remote in time – they occurred between the shooting and the trial. Sup. CP 5. Thus, Mr. Orn should have been permitted to cross-examine him about the incidents to show lack of credibility. *McSorley*, 128 Wn. App. at 613-14. The State was wrong in arguing the evidence would only be relevant if it had predated the shooting, RP 15-16, because the question was Mr. Seamans’s credibility *at trial*. And the Court of Appeals erred in ruling the evidence was impermissible propensity evidence under ER 404(b), Op. at 14, where the evidence was not offered to show action in conformity therewith but to show lack of credibility.

Although the Kent Police were no longer working with Mr. Seamans, the prosecutor claimed permitting cross-examination could put Mr. Seamans in danger if it were “made public” that he had been “doing deals for the police department.” RP 19. But this very discussion was on the record in a public trial. And while the State expressed a vague concern about “the sanctity of using [confidential informants] in general,” RP 19, this Court rejected a similar argument in *Darden*, where the defendant

wished to cross-examine a police officer about the precise location of a surveillance post:

The State urges exclusion of this relevant line of testimony based on Sgt. Vandergiessen's general statement referring to the safety of those whose premises he used as an observation post. That is no ground to prevent relevant cross-examination of the State's key witness.

Darden, 145 Wn.2d at 626. Similarly here, the State's vague, unsubstantiated safety concern was no ground to prevent relevant cross-examination of the State's key witness. *See id.*

In *York*, an undercover investigator testified to buying drugs from the defendant. *York*, 28 Wn. App. at 34. The defense sought to cross-examine the investigator about his dismissal from a previous job due to irregularities in his paperwork and general incompetence. *Id.* But the court granted the State's motion in limine to exclude cross-examination on the issue, ruling it was a collateral matter. *Id.* The appellate court reversed under ER 608(b) and the Confrontation Clause, because "[c]redibility was not ... collateral; it was the very essence of the defense." *Id.* at 36. In Mr. Orn's case, too, the credibility of the State's key witness cannot be deemed collateral. The court's prohibition of cross-examination on an issue highly relevant to credibility violated Mr. Orn's fundamental constitutional right to confront the witnesses against him.

Mr. Orn is entitled to a new trial because the State cannot prove beyond a reasonable doubt the error was harmless. *See Jones*, 168 Wn.2d at 724. Defense counsel was only able to ask whether the complaining witness worked with the police – an issue which would not undermine his credibility at all. He should have been permitted to ask whether Seamans was receiving a deal to avoid prosecution for certain crimes of dishonesty. If Mr. Orn had been permitted to challenge Mr. Seamans’s credibility, the jury may have entertained doubts as to whether Mr. Orn shot first as opposed to responding to provocation by Mr. Seamans. Accordingly, this Court should reverse Mr. Orn’s conviction and remand for a new trial.

E. CONCLUSION

This Court should hold the essential element of premeditated intent must be in the “to convict” jury instruction in trials for first-degree attempted murder. It should also hold the court violated Mr. Orn’s constitutional right to confront the witnesses against him when it prohibited relevant cross-examination of the complaining witness.

Respectfully submitted this 2nd day of July, 2020.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 98056-0
 v.)
)
 NICHOLAS ORN,)
)
 Petitioner.)

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