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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 CONAN ORN,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the jury instructions submitted in this case adequately state the law where the “to convict” jury instruction told the jury that it must find a substantial step toward the commission of murder in the first degree, with an intent to commit that crime, and where other instructions fully defined the elements of premeditated murder?

2. Did the Court of Appeals properly affirm the trial court’s limits on cross-examination where it determined that the trial court did not abuse its discretion in excluding evidence under the evidence rules and where that exclusion was not central to the defendant’s case?

B. FACTS

Thomas Seamans lived in a garage his mother rented in her apartment complex in Kent. RP 530, 759, 762. He worked nights as a warehouse worker. RP 761. He spent his days sleeping and smoking “a lot” of marijuana in his garage home. RP 760, 762.

In June or July of 2016, Seamans met Kimberly Boals, who lived in the same complex with her on-again, off-again boyfriend, Nicholas Orn. RP 764-65. One day Boals asked to share some of Seamans’ marijuana and he agreed because “[s]haring’s caring.” RP 765. Thereafter, Boals returned daily to smoke marijuana and lament the problems in her

relationship with Orn.¹ RP 438, 440. Eventually, Boals and Orn broke up and Boals and Seamans became intimate. RP 767, 768, 771.

Orn moved out of Boals' apartment on July 17, 2016, leaving some property behind. RP 365-66, 368. Boals sold some of the property he left to Seamans, traded it for marijuana, or gave it to Seamans to sell on her behalf. RP 369-73, 390, 772-73. Orn was furious about this and demanded that Seamans return the property on July 18, 2016. RP 372, 384-85, 707, 774. Seamans returned Orn's property, with the exception of an air conditioner for which Seamans signed a promissory note for \$150 to be paid to Orn on August 3, 2016. RP 372-73, 381, 707, 773, 776.

On August 2, 2016, Orn sent Boals a series of texts demonstrating his escalating anger. RP 415-17; Ex. 6. The texts—sent less than two hours before the shooting—show that Orn was fixated on Boals having given his property to Seamans. RP 415. Orn demanded to know what else Boals might have given Seamans, advised Boals to be “gone when I come back there” because “I don't want to hurt you, too,” and expressed that he felt “like going on a fucking rampage right now.” RP 415-17. At 7:45

¹ Boals and Orn both struggled with mental health and addiction to methamphetamines. RP 361-62, 366, 379, 438. They were each suicidal at times, and Orn was involuntarily committed for this reason in July 2016. RP 766. It is not clear from the testimony whether this brief commitment occurred before or after Orn's breakup with Boals. Orn did not pursue a mental defense.

p.m., Orn wrote: “And I don’t even need time to make a decision at this point. I’m certain it is what I’m going to do.” RP 417.

Orn arrived at Boals’ apartment at about 8:30 p.m. and, according to Boals, he was armed, “angry, irrational, not in a good state of mind.” RP 389-90. He sat down to smoke some methamphetamine and load his gun.² RP 390-91. Boals told him to stop or she would call the police. RP 391-92. Orn warned against that, saying “something to the effect of ... I don’t want to hurt you as well ... don’t do that.” RP 392. Orn then walked out the door with the gun in his hands. RP 392.

Orn went to Seamans’ garage and yanked up the door. RP 784. He pointed the gun at Seamans and “asked real quick where’s my stuff at.” RP 784. Seamans had no time to respond before Orn started shooting at him from less than eight feet away. RP 784, 786. Orn fired 11 shots at Seamans even as Seamans said “dude, stop shooting me, that shit hurts.” RP 747, 787. Orn shot Seamans in the face, chest, arm, hand, back, side, and thigh. RP 812-17, 982-86, 988. Incredibly, none of Seamans’ injuries proved life-threatening. RP 977-78, 981. The attack left him with bullets and shrapnel lodged in his body, numerous scars, and permanent nerve damage limiting the function of his hand. RP 551, 561, 814-17.

² The gun was a 10/22 assault rifle with an extended clip. RP 793.

After shooting Seamans, Orn returned to Boals' apartment. RP 393. He told her, "I just shot Thomas like 20 times." RP 393. Boals ran past him out of the apartment, saw Seamans injured, and found a neighbor to call 911 for her. RP 394-407. Seamans was able to get a neighbor to call for help as well. RP 565-69. Numerous officers from the Kent Police Department responded to the scene. Officer Reeves apprehended Orn and Seamans identified him as the shooter. RP 336-42, 651, 652, 654. Following the immediate police investigation, Boals located and turned over Orn's cell phone, seeing Orn's angry text messages from earlier for the first time. RP 412-13; CP 181.

The State charged Nicholas Orn with attempted murder in the first degree and assault in the first degree, both while armed with a firearm. CP 44-45. A jury convicted him as charged. CP 125-28; RP 1202-03. The trial court granted the State's motion to vacate the assault conviction and entered judgment only on the attempted murder and corresponding firearm enhancement. CP 129, 135; RP 1212. A low-end standard range sentence of 240 months was imposed. CP 135-38; RP 1233.

C. ARGUMENT

1. THE JURY WAS PROPERLY INSTRUCTED ON ATTEMPTED MURDER IN THE FIRST DEGREE.

Orn contends that the jury instructions on attempted murder relieved the State of its burden to prove that he acted with premeditated intent to kill. This argument must be rejected. Consistent with the Washington Pattern Instructions – Criminal (“WPIC”) and this Court’s jurisprudence, the to-convict instruction properly advised the jury of the two essential elements of attempted first-degree murder, while separate instructions defined the underlying crime of murder in the first degree and premeditation. These instructions properly required the jury to find that Orn acted with premeditated intent to kill.

a. Relevant Facts.

The State proposed the standard pattern jury instructions related to attempted murder in the first degree. CP 203-08 (WPIC 26.01, 26.01.01, 100.01, 100.02, 110.05). The State’s proposed to-convict instruction for attempted murder in the first degree provided as follows:

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 206. Orn asked the trial court to change the second element of the pattern instruction to “the act was done with the *premeditated* intent to commit murder in the first degree.” RP 1116. The trial court declined, pointing out that adding “premeditated” in the to-convict would be redundant given the instruction defining first degree murder to require premeditation. RP 1116-17. The trial court concluded that Orn’s suggested change “muddies the waters.” RP 1116-17. It elected to give the pattern to-convict instruction, as the State proposed. RP 1118; CP 68 (Instruction 7). Orn objected. RP 1118.

- b. The Jury Instructions Included All Essential Elements Of Attempted First Degree Murder And Required The Jury To Find That Orn Acted With Premeditated Intent.

The State must prove every essential element of a crime beyond a reasonable doubt. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). “Generally, it is sufficient to explicitly instruct the jury that the State must prove beyond a reasonable doubt the statutory elements of the crime.” State v. Imokawa, 194 Wn.2d 391, 397, 450 P.3d 159 (2019); State v. Williams, 162 Wn.2d 177, 187, 170 P.3d 30 (2007) (classification of the felony underlying a bail jumping charge need not appear in the to-convict instruction because it is neither an express nor implied element).

The statutory elements of an attempted crime are: (1) acting with intent to commit a specific crime, and (2) taking a substantial step toward the commission of that crime. State v. Nelson, 191 Wn.2d 61, 71, 419 P.3d 410 (2018); State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) (essential elements of attempted rape do not include the specified degree or the elements of the underlying crime).³ Therefore, the essential elements of attempted murder in the first degree are: (1) acting with intent to commit murder in the first degree, and (2) taking a substantial step toward committing murder in the first degree. State v. Besabe, 166 Wn. App. 872, 883, 271 P.3d 387 (2012); State v. Reed, 150 Wn. App. 761, 208 P.3d 1274, rev. denied, 167 Wn.2d 1006 (2009). The to-convict instruction in this case was taken verbatim from Washington’s attempt statute, RCW 9A.28.020, and WPIC 100.02. CP 68; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02 (4th ed. 2016). Instruction No. 7 includes the two essential elements of attempted murder in the first degree: (1) taking a substantial step toward committing murder in the first degree, and (2) the intent to commit murder in the first degree. CP 68. Instruction No. 10 defines the crime of murder in the first

³ The same is true for other inchoate offenses. See State v. Moavenzadeh, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998) (essential elements of a conspiracy are “an agreement to commit a crime and taking a ‘substantial step’ toward the completion of that agreement.”); State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000) (same); State v. Kron, 63 Wn. App. 688, 696, 821 P.2d 1248 (1992) (solicitation).

degree as causing the death of another person with premeditated intent to kill, and Instruction No. 11 defines premeditation. CP 71, 72. These were also pattern instructions. 11 Washington Practice 26.01, 26.01.01 (4th ed. 2016). Thus, Orn’s jury was instructed on the statutory elements of the crime.

Orn contends that the to-convict instruction must include both the essential elements of the charged attempt crime and the essential elements of the crime attempted. This Court has consistently rejected such arguments. In State v. Johnson, this court warned against “conflating the elements of criminal attempt with the elements of the base crime” and reiterated that “[c]riminal attempt has two elements: intent to commit the base crime and a substantial step toward doing so.” 173 Wn.2d 895, 904-05, 270 P.3d 591 (2012); see also State v. Chhom, 128 Wn.2d 739, 742, 911 P.2d 1014, 1016 (1996) (there are two elements of attempt to commit child molestation—a substantial step and intent to commit the act).

For these same reasons, when a defendant is charged with attempt, it is appropriate to provide a to-convict instruction that identifies the crime alleged to have been attempted and lists the two essential elements of attempt (i.e., substantial step and intent to commit the specific crime), with a separate instruction that lists the elements of the crime attempted. DeRyke, 149 Wn.2d at 911 (no error where the to-convict instruction

defined the essential elements of attempt and a different instruction defined first degree rape). Elements of the crime attempted are simply not elements of an attempt crime. The Court of Appeals, too, has recognized that Orn's argument "conflates the intent necessary to prove an attempt with that necessary to prove first degree murder." State v. Reed, 150 Wn. App. at 772. Because the to-convict instruction included the essential elements of attempt, and separate instructions defined premeditated first-degree murder, the instructions adequately stated the law and held the State to its burden. Id. at 772-75. Accord State v. Besabe, 166 Wn. App. at 883.

Orn argues, however, that DeRyke is inconsistent with State v. Vangerpen, 125 Wn.2d 782, 786, 888 P.2d 1177 (1995). He is mistaken. Vangerpen concerned whether the State should 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. There, the State charged the defendant with attempted first-degree murder without alleging in the charging document that he acted with premeditated intent. Id. at 785-86. The case provides no analysis about whether premeditated intent is, in fact, an essential element of attempted first-degree murder, likely because the prosecutor in that case conceded the point at trial. Id. at 785-86, 790. To the extent that

the case can be read to declare that premeditated intent is an essential element of attempted first-degree murder that must be included in a to-convict instruction, it is plainly dicta.⁴

DeRyke was decided several years after Vangerpen and it directly addresses the issue presented here: whether the to-convict instruction for an attempt crime must include the essential elements of the crime attempted. 149 Wn.2d at 910. This Court held that it did not: “An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime.” Id. While it is essential that the to-convict instruction identify the crime attempted, it need not also contain the attempted crime’s elements. Id. at 911. Instead, it is preferable to place those elements in a separate instruction defining the substantive crime. Id. at 911.

⁴ It is also possible that the oversight in Vangerpen stemmed from some confusion vis-à-vis charging documents and jury instructions, and the somewhat illusory provenance of the body of law underlying charging documents. As has been observed, that is a blend of two strands of authority, one strand focusing on statutory elements and the other rooted in facts necessary to prove the crime.

While some of our cases have suggested the information must contain a recitation of each element of the crime to pass constitutional muster, ... other of our cases have strongly indicated the so-called essential elements test is more factually oriented ... [and] requires that a charging document *allege facts supporting every element of the offense...*

State v. McCarty, 140 Wn.2d 420, 432-33, 998 P.2d 296, 303 (2000) (Talmadge, J., dissenting) (contrasting State v. Holt, 104 Wn.2d 315, 704 P.2d 1189 (1985) with State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). Facts showing premeditation are necessary to prove attempted first-degree murder, but premeditation is not an element of the attempt crime.

Other subsequent decisions by this Court illustrate that the dicta in Vangerpen was an oversight, and not a holding. For example, in State v. Johnson, this Court held that although “restraint” was an element of unlawful imprisonment, and thus must be included in the charging document and the jury instructions, the definition of “restraint” – including key concepts like lack of consent and without legal authority – need not appear in the charging document or the to-convict instruction because those concepts merely defined and limited the scope of the essential element of restraint. 180 Wn.2d 295, 302, 325 P.3d 135 (2014) (citing State v. Allen, 176 Wn.2d 611, 626-27, 294 P.3d 679 (2013) (constitutional requirement of a “true threat” is not an element of the crime of felony harassment)).

Because the question of elements versus key definitions was not presented to the court in Vangerpen as a contested issue, it might have seemed intuitive that the concept of premeditation was an element of the crime. However, it is apparent from Chhom and DeRyke that there are only two elements in an attempt crime and that subsidiary concepts, like premeditation, are considered definitions, not elements. And the cases of Allen and Johnson reinforce the legal principle that only statutory elements, not definitions, need to appear in a charging document. Orn’s argument, like the argument rejected in DeRyke, conflates statutory

elements with key statutory definitions. In short, the precedents cited above are clear and controlling, and the dicta in Vangerpen is an outlier.

Orn's argument would also require this Court to overrule Chhom, DeRyke, Allen, and Johnson. This Court may overrule precedent only when there has been a clear showing that an established rule is incorrect and harmful or when the legal underpinnings of the precedent have changed or disappeared altogether. Deggs v. Asbestos Corp. Ltd., 186 Wn.2d 716, 727-28, 729, 381 P.3d 32 (2016) (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Orn has not shown that these precedents are clearly incorrect and harmful.

The impact of Orn's proposed rule would be broad and counterproductive. As for cases in the past, were this Court to replace the holding in DeRyke with the dicta from Vangerpen, nearly every conviction for criminal contempt would be in jeopardy since juries have always been instructed consistent with Chhom and DeRyke and the WPIC. There is no principled way to distinguish "premeditation" from any other element of the *underlying* crimes. Thus, any time attempt was charged in the past, Orn's proposed holding would require this Court to find that both the information and the to-convict instruction was error if it did not include all the elements of the underlying crime.

As for crimes to be prosecuted in the future, his proposed holding would require that informations charging attempt crimes include all elements of the underlying crime. It would also demand that the to-convict instruction includes all those concepts. Each document would accordingly grow from a single page to multiple pages. These documents will become cumbersome and confusing. The whole point of the essential elements rule is to avoid confusion. This Court's existing scheme, which requires inclusion of only the essential elements in a to convict instruction, but definitions in other instructions, results in jury instructions which, as a whole, make the law clear to juries.⁵ This Court should apply the reasoning in DeRyke and reject Orn's claim.

Even if this Court were to hold that premeditation should have appeared in the to-convict instruction, any error was harmless beyond a reasonable doubt here. As fully explained in the State's brief below, Orn was angry with and jealous of Seamans, he threatened to go on a rampage, and he immediately thereafter burst in on Seamans and shot him 11 times at close range in a confined space where he had no escape, the bullets hitting Seamans in the face, chest, abdomen, and extremities. Brief of

⁵ For example, this Court has recognized that jury instructions can be clear even if elements and aggravating factors do not all appear in a single to convict instruction. State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002) (bifurcated instructions on the element of one or more prior convictions does not diminish the clarity of the instructions); State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415, 418 (2005) (same).

Respondent, at 11-14. The arguments of both parties made clear that the jury needed to find premeditation in order to convict. Id. Thus, the instructions as a whole plainly told the jury that they needed to find premeditation and there is no reason to believe they failed to make that finding.

2. THE TRIAL COURT EXERCISED SOUND DISCRETION BY LIMITING EVIDENCE THAT THE VICTIM ASSISTED LAW ENFORCEMENT WITH UNRELATED INVESTIGATIONS AFTER HE WAS SHOT BY ORN.

Orn claims that the trial court denied his right to confront witnesses and to present a defense by limiting his inquiry into evidence that Seamans had assisted the Kent Police Department (KPD) with undercover investigations into the trafficking of stolen property several months after he was shot. Pet. at 8-12. His argument is premised not on the trial court's exercise of discretion under the evidence rules, but rather on the argument that his constitutional right to a defense necessarily includes the right to tell the jury about this agreement, regardless of what the evidence rules forbid. This argument should be rejected. Orn was allowed to cross-examine on Seamans' association with police; the cross was limited only slightly. Because evidence that he had such an agreement was marginally relevant as to bias, it was properly admitted. However, a broader inquiry was substantially outweighed by the danger

that Orn would simply invite the jury to conclude that Seamans was a criminal, deserving of less protection from the law and the evidence was certainly not central to Orn's defenses at trial. The trial court properly limited evidence to the fact that Seamans had worked or was working with KPD, excluding details of their agreement or Seamans' history.

a. Relevant Facts.

Before trial, the State moved in limine to preclude Orn from delving into Seamans' arrest history and work as an informant for Kent police. RP 15; CP 184-86. The shooting occurred in August 2016, and KPD had finished those portions of its investigation that relied on Seamans' participation by the end of that year. RP 15. Later, in 2017, Seamans was investigated as an accomplice to a person who was using a stolen credit card to purchase a golf cart. RP 15. Thus, Seamans did not begin working for KPD until well after the shooting. RP 16.

The State argued that Seamans' agreement with KPD was irrelevant and collateral to the trial, and that exposing the details of Seamans' work as a confidential informant could compromise ongoing investigations, jeopardize Seamans' safety, and diminish law enforcement's ability to use confidential informants in general. CP 184-86; RP 19-20. Orn argued that Seamans' agreement to work with police was relevant because "the agreement reflects the exact issues that are in

this case concerning Mr. [Seamans], narcotics, property, possession of stolen property, and firearms investigation” and “reflect[s] bias, lack of truthfulness, and bad acts-motive, intent, absence of mistake[.]” RP 20; CP 54. In response to a question from the court, Orn said he was not seeking to admit “the agreement, itself, ... but simply verbal testimony.” RP 20-21.

The trial court essentially granted Orn’s request. It concluded that Seamans’ work for KPD had some relevance as to Seamans’ potential bias, but indicated that any relevance about “the agreement itself or the nature of the agreement or the case” was substantially outweighed by the danger of prejudice and confusion of issues. RP 21-22. Accordingly, the court allowed limited inquiry in order to “get[] out any potential bias of the victim” but “won’t allow anything beyond that.” RP 22. The court suggested an appropriate question would be, “and isn’t it true that since the incident you’ve ... done some work with the Kent Police Department?” RP 21-22. Orn seemed satisfied with this ruling and offered to draft an appropriate question. RP 22.

At the very beginning of Seamans’ direct examination, he was asked to “tell us a little bit about yourself.” RP 760. He responded:

Well, best way to describe myself is I’m a proactive pothead. I -- I work hard every day, I visit my family, and I -- I just stay proactive

in not doing anything out of the question really. I just spend my life, yeah.

RP 760. Seamans did not explain what he meant by “not doing anything out of the question.” He then went on to describe that his ex-girlfriend had cheated on him, so he ended up living in a garage rented by his mother, that he worked as a dishwasher, that he used to clean warehouses, and that he tended to sleep most days, like an owl. RP 760-61.

Before cross-examining Seamans, defense counsel asked the court to expand the scope of inquiry in light of Seamans’ testimony that he was a “proactive pothead” who does not do “anything out of the question.” RP 821. Specifically, Orn proposed to ask Seamans, “Is it true you’ve been arrested by the police and you have a deal, agreement with the police to help them on narcotics, stolen property, firearms in return for nonforwarding of the allegation to the prosecutor, correct?” RP 820. The proposed question differed from what the trial court initially approved by asserting that Seamans had been arrested for something, that his work was in exchange for not being prosecuted, and that his work related to “narcotics, stolen property, [and] firearms.” RP 820.

The trial court adhered to its pretrial ruling, limiting the inquiry to the fact of the employment relationship between Seamans and KPD. The court reiterated that while that relationship was relevant to Seamans’

potential bias, “I just don’t think that the witness’s testimony that he’s not doing anything out of the question opens the door to impeach him on these other alleged prior bad acts.” RP 822-23. “[T]he issue is the witness’s bias with respect to Kent police and their investigation, not any prior acts by the witness.” RP 823.

During cross examination, defense counsel asked Seamans, “isn’t it true that since this incident, you have actually worked with Kent Police Department?” RP 875. Seamans responded, “Yes.” RP 875. There was no further questioning on the subject and neither party referred to it in closing argument.

b. This Court Should Apply The Standard Of Review Described In State v. Arndt.

There seems to be some confusion as to the standard of appellate review when an appellant claims that an evidentiary ruling violated constitutional rights. Orn claims that any evidence minimally relevant to his defense must be admitted to protect his constitutional rights, unless the State can show the evidence is “so prejudicial as to disrupt the fairness of the fact-finding process at trial,” and that such claims on appeal are reviewed *de novo*. Pet. for Review at 10 (citing State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)). He seems to believe that rulings made under the evidence rules are entitled to no deference. The Court of

Appeals has, in contrast, sometimes applied a test where the constitutional claim is not considered at all once it is determined that evidence is admissible under the rules. State v. Blair, 3 Wn. App. 2d 343, 352, 415 P.3d 1232 (2018).

The State respectfully asks this Court to reject both these approaches and to reaffirm that the standard of review is governed by the two-step analysis set forth in State v. Arndt, 194 Wn.2d 784, 797-98, 814, 453 P.3d 696 (2019). Under Arndt, evidentiary claims are reviewed for an abuse of discretion and excluded evidence violates constitutional rights only under very narrow circumstances.

The Sixth Amendment right of confrontation includes the right to cross-examine witnesses. Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). However, the right to cross-examine adverse witnesses is not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). “The confrontation right and associated cross-examination are limited by general considerations of relevance.” Id. See State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), rev. denied, 154 Wn.2d 1026 (2005). It is well-settled, for example, “that neither party may impeach a witness on a collateral issue; that is, on facts not directly relevant to the trial issue.” State v. Aguirre,

168 Wn.2d 350, 362, 229 P.3d 669 (2010). Further, even where evidence is relevant, it still “may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence.” Darden, 145 Wn.2d at 620 (citing State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). Upon such a showing, the trial court must balance the State’s interest in excluding the evidence against the defendant’s need for the information sought. Id. at 622.

These basic principles were incorporated into a logical test that was applied most recently in State v. Arndt. Arndt claimed that the trial court’s exclusion of defense expert testimony under ER 702 violated her right to a defense. 194 Wn.2d at 797. She argued that such a claim should be reviewed de novo. Id. This Court rejected that argument, reiterating that whether a Sixth Amendment right has been abridged presents a legal question that is reviewed de novo, but the trial court’s evidentiary rulings remain subject to abuse of discretion review. 194 Wn.2d at 797. This Court made clear that review was a two-step process. First, the court is to review a trial court’s individual evidentiary rulings for an abuse of discretion. Id. at 797-98, 812. Second, the appellate court must consider *de novo* the constitutional question of whether these rulings deprived the appellate of a Sixth Amendment right to present a defense. Id. at 814.

This analysis is consistent with precedent. State v. Clark, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017); State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007); State v. Young, 160 Wn.2d 799, 805-06, 161 P.3d 967 (2007). Orn has presented no argument that would justify overruling these precedents, nor could he. His argument for a purely *de novo* standard should be rejected. Also, the approach taken in State v. Blair should also be disapproved as it is inconsistent with Arndt.

- c. The Trial Court Exclusion Of Inadmissible Evidence Was Consistent With The Sixth Amendment And The Right To Present A Defense.

The trial court allowed Seamans to be cross-examined as to his relationship with the Kirkland Police Department. However, detailed testimony about Seamans' work with police was not relevant, as Orn's counsel originally conceded, and it was certainly not central to Orn's defense, even after Seamans testified. On appeal, Orn says that the testimony was tantamount to a claim to be a "simple law-abiding pothead" who "simply followed the rules." See Brief of Appellant at 14-15; Pet. at 8-9. But these are Orn's words, not the words of the witness. Seamans did not testify that he "simply followed the rules" or that he was "law-abiding." As the trial court recognized, Seamans' statement on direct examination was hopelessly opaque and did not open the door to otherwise prejudicial and inadmissible evidence. RP 822-23. Orn's

argument on appeal depends on an unstated and speculative inference: that “anything out of the question” means “anything against the law.” But Seamans was never asked and never explained what he meant by “out of the question,” and his testimony does not compel the conclusion that Orn advocates.

Even if Seamans’ brief comments could be understood as a claim to be law-abiding, details of the cooperation agreement were hardly central to his defense. Orn’s primary defense was self-defense. CP 47. There is no conceivable basis to argue that a cooperation agreement that post-dates Seamans’ shooting might have advanced this defense. Orn also had other ways to establish this defense, as he elicited in cross-examination that Seamans had access to a number of objects that could be used as weapons, despite his testimony on direct that there were no weapons in his garage. RP 824-28. Besides Seamans’ testimony that he spends all day smoking marijuana, Orn was able to impeach him with a number of prior inconsistent statements, his use of an illegal drug preceding the shooting, and ostensibly-conflicting testimony about whether Seamans was masturbating when Orn burst into the garage with a gun. RP 830, 833, 836, 840, 859-60, 861, 890. Witness Boals, Orn’s former girlfriend, tried to damage Seamans’ credibility by testifying that Seamans took items from her apartment without permission and would not

return them, that Seamans had weapons and had threatened Orn, and that Seamans was a dishonest person. RP 381, 384-85, 469, 447, 491.⁶ Thus, Orn did not need tangential testimony about a cooperation agreement to argue reasonable doubt as to self-defense.

Orn also argued a lack of premeditation. But, likewise, whether *Seamans* later entered into an agreement with police has nothing to do with whether *Orn* premeditated the crime. Thus, the details of the cooperation agreement simply were not central to his defense.

Moreover, the State articulated important reasons why admitting the details of Seamans' agreement with KPD would prejudice the State and its witnesses. The investigations that involved Seamans as a confidential informant were ongoing, so active investigations might be jeopardized. CP 184-86; RP 19. Also, any time an informant's identity is disclosed that informant is at risk of being labeled a "snitch." RP 19. State v. Casal, 103 Wn.2d 812, 815, 699 P.2d 1234 (1985); see also Roviario v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). See also CrR 4.7(f) (generally precluding disclosure of informant identity). Although the fact that Seamans had worked as a confidential

⁶ Of course, Boals also confirmed that she decided to testify "to try to help the case for Nick [Orn]." RP 419.

informant for KPD was no longer secret, making public the details of the arrangement would undoubtedly increase the risk to this witness.

Given the record, the trial court reasonably concluded that Orn's interest in admitting evidence that Seamans was arrested for some offense months after the shooting and cooperated with law enforcement investigations for a time after that did not outweigh the State's interests in protecting ongoing investigations, the need to protect confidential informants in order to preserve law enforcement's ability to use that tool in general, and the potential risk to Seamans personally.

Orn likely hoped that evidence that Seamans was employed by KPD to make purchases of stolen property would engender bias in the jury towards Seamans based on alleged criminal activity. It had very little to do with bias on the part of Seamans. But evidence that Seamans was later arrested for an unknown offense and details about Seamans' work as a confidential informant was not relevant for any other legitimate purpose. The trial court did not abuse its discretion or violate Orn's constitutional rights by excluding irrelevant evidence. Further, any error in excluding the evidence was harmless beyond a reasonable doubt for the same reasons discussed in section (C)(1)(c), *supra*.

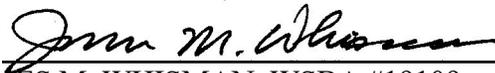
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this court to affirm the decision of the Court of Appeals affirming Orn's conviction for assault in the first degree.

DATED this _____ day of July, 2020.

Respectfully submitted,

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