

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

STATE OF WASHINGTON, ) NO. 64116-6-I  
 )  
 Respondent, ) DIVISION ONE  
 )  
 v. )  
 ) UNPUBLISHED OPINION  
 DANIEL PETER WARD, )  
 )  
 Appellant. ) FILED: November 15, 2010  
 )

Leach, A.C.J. — Daniel Ward appeals his convictions of attempted first degree murder, first degree assault, and felony harassment.<sup>1</sup> Ward contends, and the State concedes, that his first degree assault conviction violates double jeopardy because he was also convicted of attempted first degree murder based upon the same act. Ward also claims that his conviction for felony harassment violates double jeopardy, asserting that the alleged threat that was the basis for that conviction was also the substantial step for purposes of his attempted first degree murder conviction. Finally, he claims that the attempted murder “to convict” instruction omitted an essential element of the crime. We reverse and remand for vacation of Ward’s first degree assault conviction, but we affirm his remaining convictions because his alleged threat was not the substantial step for

<sup>1</sup> Ward was additionally convicted of second degree assault based on a previous domestic violence incident, but he does not challenge this conviction on appeal.

his attempted murder conviction and the attempted murder “to convict” instruction included all the essential elements of the offense.

### Facts

Daniel Ward and Karla Colombini met sometime in 2007 and became involved in a romantic relationship marked by instability, violence, and drug and alcohol use. Despite multiple incidents of violence directed toward her, Colombini continued to reunite with Ward because “he was like an addiction” for her.

In October 2008, Ward had been staying at Colombini’s apartment, but the couple broke up and Ward moved out. Colombini missed Ward, however, and on October 16 invited him to her apartment. He came and stayed the night.

The next day, on October 17, Ward woke up and tried to call the person scheduled to take him to a clinic for his Methadone treatment. Unable to reach that person, he became upset and threw his phone across the room. Ward then spent the rest of the day sleeping and drinking high-octane beer. At some point, Colombini went to the store for more beer. When she returned, Colombini noticed a butcher knife on the kitchen counter and a couple of knives and a box cutter near where Ward was watching television. These items were not there before she left.

Ward and Colombini eventually started arguing. Colombini asked Ward to leave but then agreed he could stay one more night. Then Colombini went to

her bedroom and closed the door behind her. Ward followed her, entered the room, grabbed Colombini from behind, and stabbed her in the neck with a box cutter, missing her jugular vein and carotid artery by about one centimeter. The two struggled, and Ward continued to stab Colombini, causing multiple injuries. As he stabbed her, Ward told Colombini he was going to kill her and then kill himself. Colombini managed to grab a lava lamp, strike Ward with it, and run to a neighbor's apartment. The neighbor called 911, and Colombini was transported to the hospital where she underwent surgery. Ward fled.

The State charged Ward with attempted murder in the first degree, assault in the first degree, and felony harassment based on the October 17 attack. At trial, Ward testified that Colombini inflicted her injuries on herself because he did not want to be in a relationship with her, stomped on the floor and screamed, smashed the lamp, and ran out of the apartment. He said he left because he knew Colombini would falsely accuse him.

The jury convicted Ward on all counts and found by special verdict that he was armed with a deadly weapon when he committed attempted first degree murder. The sentencing court did not score the attempted first degree murder conviction and first degree assault conviction against each other for purposes of calculating the offender score for those counts, essentially treating the two offenses as the same criminal conduct. The sentencing court imposed a standard range sentence of 230 months on the attempted murder count, plus a

24-month deadly weapon enhancement, and concurrent lesser sentences on the other counts.<sup>2</sup>

#### Double Jeopardy

Ward argues that double jeopardy principles preclude his convictions for first degree assault and felony harassment because he was convicted of attempted first degree murder based on the same incident. Double jeopardy challenges are legal questions we review *de novo*.<sup>3</sup>

Both the state and federal constitutions prohibit multiple punishments for the same offense.<sup>4</sup> Although the State may file multiple charges arising from the same criminal conduct, multiple convictions and punishments offend double jeopardy unless the legislature has clearly provided for separate crimes and punishments.<sup>5</sup>

Our Supreme Court has set forth a multipart test for determining whether multiple punishments arising from the same criminal conduct are allowed. First, we consider any express or implied legislative intent based on the criminal statutes involved.<sup>6</sup> When, as here, the relevant statutes fail to disclose the legislative intent, the court asks whether the two crimes are the same in both fact

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<sup>2</sup> Although the jury found the existence of aggravating factors with respect to the three counts based on the October 17 incident, the State did not request the imposition of an exceptional sentence.

<sup>3</sup> State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007).

<sup>4</sup> State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

<sup>5</sup> State v. Freeman, 153 Wn.2d 765, 770-72, 108 P.3d 753 (2005).

<sup>6</sup> State v. Martin, 149 Wn. App. 689, 698, 205 P.3d 931 (2009).

and law.<sup>7</sup> Offenses are the same in fact when they arise from the same act or transaction and are the same in law when proof of one would also prove the other.<sup>8</sup> Finally, if the degree of one offense is elevated by conduct constituting a separate offense, the merger doctrine may help determine legislative intent.<sup>9</sup>

With respect to Ward's conviction for first degree assault, the parties agree that this case is analogous to In re Personal Restraint of Orange.<sup>10</sup> In Orange, our Supreme Court held that first degree assault and first degree attempted murder were the same offense where the convictions were based on a single gunshot directed at the same victim.<sup>11</sup> Because the substantial step of the attempted murder—shooting at the victim—was the first degree assault (assault committed by firearm) and because the evidence required to support the attempted first degree murder was sufficient to convict Orange of first degree assault, the court concluded the offenses were the same in law and fact.<sup>12</sup>

We accept the State's concession. Here, the substantial step toward the commission of first degree murder was Ward's act of stabbing Colombini with the box cutter. This same conduct constituted the first degree assault. The evidence required to support Ward's conviction for first degree attempted murder was sufficient to support his conviction for first degree assault. Because the two

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<sup>7</sup> Martin, 149 Wn. App. at 698-99.

<sup>8</sup> Martin, 149 Wn. App. at 699.

<sup>9</sup> State v. Kier, 164 Wn.2d 798, 803-04, 194 P.3d 212 (2008).

<sup>10</sup> 152 Wn.2d 795, 820, 100 P.3d 291 (2004).

<sup>11</sup> Orange, 152 Wn.2d at 820.

<sup>12</sup> Orange, 152 Wn.2d at 820.

offenses were the same in law and fact, Ward's convictions for both attempted first degree murder and first degree assault violate double jeopardy. Accordingly, we vacate the lesser conviction of first degree assault.<sup>13</sup>

The same is not true, however, with respect to the felony harassment conviction. This offense has different elements than attempted first degree murder. To convict Ward of felony harassment, the State was required to prove that he knowingly threatened to kill Colombini and placed her in reasonable fear that he would carry out the threat.<sup>14</sup> The State did not have to prove the existence or effect of any threats to prove attempted first degree murder. Instead, it had to prove that with intent to commit first degree murder, Ward committed an act that was a substantial step toward the commission of the crime.<sup>15</sup>

Moreover, the factual predicate of the attempted murder charge was Ward's assault of Colombini with the box cutter. The factual basis for the felony harassment charge was the threat to kill Colombini while he was attacking her. Ward premises his argument upon a claim that the State relied upon Ward's threat as the substantial step toward the commission of murder to prove the attempt charge. This premise is based on a single sentence of the State's closing argument. But Ward misconstrues the State's argument. The State

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<sup>13</sup> Martin, 149 Wn. App. at 701.

<sup>14</sup> RCW 9A.46.020(1)(a), (b), (2)(b)(ii).

<sup>15</sup> RCW 9A.28.020(1); RCW 9A.32.030(1)(a).

asserted that Ward's threat was evidence of his intent. It argued that Ward's action of following Colombini to her bedroom with the box cutter, grabbing her from behind and stabbing her "one centimeter away" from vital veins and arteries constituted a "substantial step towards the commission of the crime." Because the attempted first degree murder charge and the felony harassment charge are not the same in law and fact, they do not constitute the same offense for purposes of double jeopardy.

"To Convict" Instruction

Ward also claims the attempted first degree murder "to convict" instruction failed to include all essential elements of this offense. Specifically, he argues that the court erred in refusing to give his proposed "to convict" instruction which included the element of premeditation.

Because it serves as a "yardstick by which the jury measures the evidence to determine guilt or innocence," the "to convict" instruction must generally contain all elements of the charged crime.<sup>16</sup> We review the adequacy of a "to convict" instruction *de novo*.<sup>17</sup>

"An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime."<sup>18</sup> Here, the

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<sup>16</sup> 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)).

<sup>17</sup> State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

<sup>18</sup> DeRyke, 149 Wn.2d at 910.

“to convict” instruction informed the jury that in order to convict Ward of attempted first degree murder, the State had to prove that he committed an act that was a “substantial step” toward the commission of first degree murder and that the act was done with the intent to commit first degree murder. Additional instructions accurately set forth the elements of first degree murder, including premeditation, and defined “premeditation” and “substantial step.”

The court's instructions follow the notes to WPIC 100.02, which recommend a “to convict” instruction setting forth the essential elements of the attempted crime and a separate instruction delineating the elements of the substantive crime.<sup>19</sup> Our Supreme Court approved this approach in State v. DeRyke,<sup>20</sup> rejecting the defendant's claim that the “to convict” instruction for attempted first degree rape was deficient because it failed to include all of the elements of first degree rape. And subsequently, in State v. Reed,<sup>21</sup> we rejected the argument Ward makes here and held that a “to convict” instruction identical to the instruction given in this case correctly set forth the elements of attempted first degree murder and did not relieve the State of its burden to prove all elements of the charged crime by omitting the element of premeditation. The “to convict” instruction provided to the jury correctly set forth all essential elements of attempted first degree murder.

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<sup>19</sup> See 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02, note on use at 386 (3d ed. 2008).

<sup>20</sup> 149 Wn.2d 906, 911, 73 P.3d 1000 (2003).

<sup>21</sup> 150 Wn. App. 761, 772-73, 208 P.3d 1274 (2009).

Statement of Additional Grounds

In his statement of additional grounds, Ward claims that his attorney engaged in misconduct when he refused to present evidence of incriminating statements made by Colombini during a different court proceeding and lied about the availability of this evidence. Ward further claims the trial court erred in denying his motion for new counsel after he informed the court about this matter.

However, as Ward acknowledged when he made his motion to discharge counsel, his counsel procured the tape recording of the hearing at issue and had the recording transcribed. As the trial court noted, the fact that Ward remembered Colombini's statements differently from how they appeared in the transcription does not establish misconduct or ineffective assistance on the part of his counsel. We conclude that the trial court did not abuse its discretion in denying the motion to discharge counsel.<sup>22</sup>

We remand for vacation of the conviction of assault in the first degree and otherwise affirm.

WE CONCUR:

Elliington, J.

Leach, A.C.J.

Cox, J.

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<sup>22</sup> See State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (decisions on motions to discharge counsel are reviewed for an abuse of discretion).