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Court of Appeals
Division III
State of Washington

No. 31504-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

GARY D. DUGGER,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The trial court erred in failing to include in the “to convict” instruction for assault of a child in the third degree that the defendant was eighteen years of age or older and [P.D.] was under the age of thirteen.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was Mr. Dugger’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the “to convict” instruction omitted the age element, thus relieving the State of its burden to prove every essential element beyond a reasonable doubt?

C. STATEMENT OF THE CASE

Gary Dugger was charged with second degree assault of a child for allegedly causing his 22 month old son, P.D., to suffer burns from being bathed in water that was too hot. CP 11-14; RP¹ 244-45, 396. He was convicted by a jury of the lesser included offense, assault of a child in the third degree. RP 422-30.

The jury was instructed in pertinent part on the charge of second degree assault of a child:

¹ “RP” refers to the verbatim report of proceedings of the trial totaling 435 pages in two volumes.

To convict the defendant of assault of a child in the second degree, as charged in Count 1, the State must prove each of the following elements of the crime beyond a reasonable doubt:

1. That on or about January 27, 2012, the defendant intentionally assaulted [P.D.] and thereby recklessly inflicted substantial bodily harm;
2. That the defendant was eighteen years of age or older and [P.D.] was under the age of thirteen; and
3. That this act occurred in the State of Washington.

CP 37.

The jury was instructed in pertinent part on the lesser included charge of third degree assault of a child

To convict the defendant of assault of a child in the third degree as a lesser degree of the crime charged in Count 1, the State must prove each of the following elements of the crime beyond a reasonable doubt:

1. That on or about January 27, 2012, the defendant caused bodily harm to [P.D.];
2. That the physical injury was caused by an instrument or thing likely to produce bodily harm;
3. That the defendant acted with criminal negligence; and
4. That this act occurred in the State of Washington.

CP 39.

This appeal followed. CP 34-35.

D. ARGUMENT

Mr. Dugger's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the "to convict" instruction omitted the age element, thus relieving the State of its burden to prove every essential element beyond a reasonable doubt.

“The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). Therefore, “a ‘to convict’ [jury] instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *Id.* (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953))).

“Omission of an element relieves the State of its burden to prove every essential element beyond a reasonable doubt.” *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004) (citing *Smith*, 131 Wn.2d at 265).

Courts are not to look to other jury instructions to supply a missing element from a “to convict” jury instruction. *Sibert*, 168 Wn.2d at 311,

230 P.3d 142. “An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *Sibert*, 168 Wn.2d at 312, 230 P.3d 142 (quoting *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). The adequacy of a challenged “to convict” jury instruction is reviewed de novo. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

RCW 9A.36.130(1) provides:

A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen . . .

RCW 9A.36.140(1) provides:

A person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person commits the crime of assault in the third degree as defined in RCW 9A.36.031(1)(d) or (f) against the child.

Here, the jury was correctly instructed that in order to convict the defendant of second degree assault of a child the State had to prove that the defendant was eighteen years of age or older and P.D. was under the age of thirteen. CP 37. However, for the lesser included offense of assault of a child in the third degree the jury was not instructed that the defendant was eighteen years of age or older and P.D. was under the age of thirteen. CP 39. The jury convicted Mr. Dugger of this lesser included offense.

The omission of the age element in the jury instruction for assault of a child in the third degree relieved the State of its burden to prove every essential element beyond a reasonable doubt. Therefore, automatic reversal is required.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted September 13, 2013,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 13, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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