

NO. 34936-1-II

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STATE OF WASHINGTON

BY dn

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MONTE S. BURNAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-00575-6

HONORABLE PAULA CASEY, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Considering the evidence in the light most favorable to the State, whether there was sufficient evidence at trial for a rational trier of fact to find it proved beyond a reasonable doubt that the defendant was guilty of intimidating a witness.

2. Whether the defendant's claim of error concerning the lack of a definitional instruction for the term "attempt", as that term was used in setting forth the elements of intimidating a witness, is properly raised for the first time on appeal as a manifest error affecting a constitutional right.

B. STATEMENT OF THE CASE

In the fall of 2003, Mary Sage lived in an apartment within the city of Olympia. Her three children resided with her, including her 13-year-old daughter, F.K., whose date of birth is July 20, 1990. 5-2-06 Trial RP 4-5, 41. In October, Mary met the defendant, Monty Burnam and began a romantic relationship with him. In November, the defendant began living at Mary's apartment with her family. 5-2-06 Trial RP 42. Burnam was approximately 31 years old at that time. 5-2-06 Trial RP 5.

Initially, the defendant slept with Mary in

her bedroom. F.K. was sleeping in the living room. After awhile, the defendant started sleeping in the living room. F.K. was supposed to then sleep in her mother's room, but instead would sleep on a twin-sized bed in the living room or on the floor of that room. 5-2-06 Trial RP 44-45.

By January, 2004, Mary had become concerned about the defendant's relationship with her 13-year-old daughter. The defendant and F.K. spent a lot of time together, went places together, and it seemed to Mary that they would often flirt with each other. 5-2-06 Trial RP 6, 43, 45; Vol. II Trial RP 15.

Mary's sister, Regina Sage, walked into Mary's apartment one morning and observed the defendant and F.K. together, asleep on the bed in the living room. When awakened, the defendant claimed he and F.K. had fallen asleep while watching a movie together. Vol II Trial RP 16. Based on her observations over time, Regina warned Mary that she believed the defendant was "messaging around" with F.K. Vol II Trial RP 19.

During the early morning on January 29, 2004, or on a day shortly before that, Mary came out of her bedroom and observed the reflection of the defendant and F.K. on the microwave, both of whom were in the kitchen at that time. Mary observed that the defendant had his hands down the pants of F.K. 5-2-06 Trial RP 9, 46.

In the early morning of January 29, 2004, an argument erupted between the defendant and Mary Sage. The defendant claimed he was in love with F.K. and wanted F.K. to go away with him. 5-2-06 Trial RP 46. At that time, Mary's older daughter, Jessica, also heard the defendant claim he was in love with F.K. and wanted F.K. to go with him. 5-2-06 Trial RP 79. The defendant admitted that he had been touching F.K. with his hands and using his fingers on her, but asserted that he and F.K. had not actually had sexual intercourse. 5-2-06 Trial RP 46-47.

However, since right after Thanksgiving in 2003, the defendant and F.K. had been frequently engaging in sexual intercourse. The defendant had

penile-vaginal intercourse with F.K., or put his penis into her mouth, or penetrated her vagina with his fingers, on almost a daily basis from late November, 2003 until January 29, 2004. 5-2-06 Trial RP 7-9. During the argument between Mary and the defendant on the morning of January 29th, F.K. intervened and admitted to her mother that the sexual intercourse had been taking place. 5-2-06 Trial RP 47.

The defendant became enraged when F.K. made this disclosure. He began throwing F.K. around and hitting her. This was observed by both Mary Sage and a neighbor, Christine Martin. 5-2-06 Trial RP 10, 47; Vol. II Trial RP 29. He also punched holes into doors and walls. 5-2-06 Trial RP 10, 50,; Vol. II Trial RP 29. The defendant then grabbed a knife, held it to his throat, and threatened to kill himself. 5-2-06 Trial RP 10, 47; Vol. II Trial RP 30.

At that point, Mary Sage went to the phone to call the police. The defendant took the phone from her and threw it across the room. 5-2-06

Trial RP 58. The defendant then grabbed Mary by the throat and whispered in her ear: "You will take this to your grave, or my homies from Wenatchee will take care of you." 5-2-06 Trial RP 47. Christine Martin observed the defendant with his hands around Mary's throat, whispering something to Mary, but Christine could not hear what he said. Vol. II Trial RP 30. Mary became afraid that the defendant would hurt her or her daughter. 5-2-06 Trial RP 48.

Christine Martin returned to her apartment and called to report this incident to police. Vol. II Trial RP 31-32.

Olympia Police Officer Tupper was the first to respond. When he arrived and contacted Mary Sage, the defendant was not in the apartment. 5-2-06 Trial RP 51. Mary was still afraid of retaliation from the defendant, and so stated that there had been a disturbance, but that the person had left and everything was all right. 5-1-06 Trial RP 8; 5-2-06 Trial RP 51. As Tupper was leaving, the defendant walked up and they spoke

briefly. 5-1-06 Trial RP 9.

Later that day, F.K. left her mother's home to stay elsewhere. Mary became concerned that F.K. was going to run away with the defendant and so contacted police. 5-2-06 Trial RP 52. Olympia Officer Larry Gabor made contact with Mary in response. 5-1-06 Trial RP 17-18. Mary later learned that F.K. had gone to stay with a woman who was a friend of the family. 5-2-06 Trial RP 15, 52.

Mary's two sisters, Regina Sage and Patricia Mencarelli, came to Mary's apartment later that day. At one point, the defendant called and Patricia answered. She recognized the defendant's voice. Patricia asked the defendant if he had been having a relationship with F.K. The defendant admitted that he had been in a relationship with F.K. for awhile and that he was in love with her. Vol. II Trial RP 7-10.

Also later on that same day, the defendant showed up at Christine Martin's apartment. Vol. II Trial RP at 32. The defendant admitted he had

been having a relationship with F.K. He admitted to putting his hands down her pants and having her touch his genitals. Vol. II Trial RP 33. A few days after that, the defendant again spoke to Martin. He told her that he and F.K. had engaged in what amounted to sexual foreplay in Martin's van. Vol. II Trial RP 35.

Approximately 3-4 days after the incident on January 29, 2004, F.K. went to the residence of the defendant's cousin. The defendant was there. The defendant again had penile-vaginal sexual intercourse with F.K. at that time, and told her he was in love with her. 5-2-06 Trial RP 13. That was the last contact F.K. had with him.

On March 18, 2004, an Information was filed in Thurston County Superior Court Cause No. 04-1-00575-6 charging the defendant with two counts alleging second-degree rape of a child with F.K. as the victim, two counts of child molestation in the second degree with F.K. as the victim, and one count of intimidating a witness, alleging Mary Sage to be the victim. CP 3-4. An arrest warrant

was issued since the defendant's whereabouts were unknown at that time. CP 5-8.

Eventually, the defendant was arrested on the warrant and a jury trial was ultimately held on May 1-3, 2006. The defendant was convicted on all five counts. At sentencing, it was determined that the defendant's criminal history included a conviction for assault in the second degree in 1991 and a conviction for robbery in the first degree in 1995. Pursuant to his convictions for second-degree rape of a child and second-degree child molestation, the defendant was determined to be a persistent offender under RCW 9.94A.570 and 9.94A.030(28) and (32), as in effect at the time the defendant committed the offenses in this case. Therefore, a sentence of life imprisonment without opportunity for release was imposed for each of Counts 1 through 4. For Count 5, a conviction for intimidating a witness, a concurrent standard-range sentence of 90 months in prison was imposed. CP 104-111.

C. ARGUMENT

1. Considering the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find it had been proved beyond a reasonable doubt that the defendant was guilty of intimidating a witness.

The defendant contends that there was insufficient evidence to support the defendant's conviction for intimidating a witness. The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d

850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To convict the defendant of intimidating a witness, the state was required to prove the following elements beyond a reasonable doubt: (1) that on or about January 29, 2004, the defendant, by use of a threat against Mary Sage, a current or prospective witness, attempted to induce Mary Sage not to report information relevant to a criminal investigation or the abuse of a minor child; and (2) that the acts occurred in the State of Washington. Instruction No. 19 in Court's Instructions to the Jury, CP 64-87; RCW 9A.72.110.

For purposes of the crime of intimidating a witness, the term "threat" is defined as follows:

"Threat" means:

(i) To communicate, directly or

indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in RCW 9A.04.110(25).

RCW 9A.72.110(3)(a). In RCW 9A.04.110(25), as in effect at the time of the offense, the definition of the term "threat" included the following:

"Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; . . .

RCW 9A.04.110(25)(a).

Thus, a threat used to commit the crime of intimidating a witness can involve communicating the intent to cause bodily injury in the future as well as in the present. However, the instruction given to the jury in this case only referred to communicating, directly or indirectly, the intent to use force immediately against a person present at the time. That instruction read as follows:

As used in these instructions, threat also means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time.

Jury Instruction No. 20 in Court's Instructions to

the Jury, CP 64-87.

The State did not object to the giving of Jury Instruction No. 20. Relying upon State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), the defendant contends on appeal that, given the State's failure to object, Instruction No. 20 became the law of the case, and therefore the State was required to prove that the defendant attempted to induce Mary Sage not to report relevant information by means of communicating, directly or indirectly, the intent immediately to use force against any person present at the time. The State agrees that the rule set forth in Hickman is applicable in this case, and that the State's burden at trial was as is now contended by the defendant.

It is then argued by the defendant that the evidence in this case was insufficient for the jury to find that the defendant communicated to Mary Sage a threat of immediate harm to someone present at that time, since the words expressed by the defendant referred to future harm should she

at some point fail to keep his abuse of F.K. a secret. However, the State contends that the defendant's statements and actions directed at Mary Sage, in the context of the defendant's demeanor and actions just prior to his expression of the threat, could have been found by a rational juror, beyond a reasonable doubt, to have indirectly communicated to Mary a threat of immediate harm should she persist in attempting to contact the police at that point in time.

In arguing there was no threat of immediate harm proved in this case, the defendant focuses on the words whispered to Mary: "You will take this to your grave, or my homies from Wenatchee will take care of you". However, the defendant did not just make this statement. Mary had taken hold of the phone to call the police. The defendant wrenched the phone from her and threw it across the room. 5-2-06 Trial RP 58. He then grabbed Mary by the throat with his hands, and only then whispered those words. 5-2-06 Trial RP 47; Vol. II Trial RP 30. Just prior to that point, he had

reacted to F.K.'s disclosure about the sexual intercourse by hitting this 13-year-old child, throwing her to the floor, and throwing her against a washer and dryer. 5-2-06 Trial RP 10, 47; Vol. II Trial RP 29. At the trial, Mary described the defendant during the argument on January 29th as "flipped out", punching and kicking holes in doors and walls. 5-2-06 Trial RP 50. Just before threatening Mary, he had taken hold of a knife and put it to his own throat. 5-2-06 Trial RP 47.

Mary testified that, in this context, she interpreted the defendant as threatening that he would hurt her if she told the police what he had done. She stated she became afraid he would hurt her and her daughter. 5-2-06 Trial RP 48-49. She had been trying to call the police when he grabbed the phone from her. Thus, the defendant's statement and actions reasonably communicated to Mary that if she persisted in her efforts to call the police at that time, the defendant would immediately hurt her and possibly F.K. as well.

As noted above, when there is a challenge to the sufficiency of the evidence, all of the evidence must be considered in the light most favorable to the State, and all reasonable inferences must be made in favor of the State's case. While the defendant's words, considered in a vacuum, may have referred only to future harm, his acts of forcing the phone away from Mary and then grabbing her by the throat indirectly communicated a separate message that she faced immediate harm if she continued her efforts to contact police. Therefore, the evidence was sufficient to prove that the defendant attempted to induce Mary not to report his abuse of F.K. by means of a threat of immediate harm.

2. The defendant has failed to show that the absence of a definitional instruction for the term "attempt", as that term was used in setting forth the elements of intimidating a witness, prejudiced the defendant in any way, much less that it constituted manifest error affecting a constitutional right, and so this claim is not properly brought for the first time on appeal.

An attempt to commit a crime consists of two elements: an intent to commit the crime and the taking of a substantial step toward the

commission of that crime. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). However, the defendant in this case was not charged with the crime of attempted intimidation of a witness, but rather with the completed crime of intimidating a witness. That crime is complete if, by means of a threat, the defendant attempts to induce a person not to report relevant information concerning a criminal investigation or the abuse of a child.

In an "apples and oranges" argument, the defendant contends on appeal that the definition of the word "attempt" as used in the elements of the crime of intimidating a witness means taking a substantial step toward the commission of the crime of intimidating a witness. This is nonsensical. Under this argument, the crime of intimidating a witness is committed by taking a substantial step toward the crime of intimidating a witness.

Of course, RCW 9A.72.110, in setting forth the elements of intimidating a witness, says no

such thing. Rather, the statute refers to attempting to induce a person to withhold certain relevant information as an element of this crime. Thus, it would be error to act in accordance with the defendant's argument on appeal and define the word "attempt" in this context as conduct constituting a substantial step toward the commission of the crime of intimidating a witness. If the phrase "substantial step" were to be used at all in defining the word "attempt" in this context, it would have to be expressed as "a substantial step toward inducing another person not to report information relevant to a criminal investigation or the abuse of a minor child".

The taking of such a substantial step is not an element of the crime of intimidating a witness. At best, the phrase "substantial step" could have been proposed as a means of defining the element of attempting to induce Mary Sage to not report information concerning the abuse of F.K. However, the defendant did not propose any

such instruction. Defendant's Proposed Jury Instructions in CP 35-59.

The failure to give a jury instruction cannot be raised for the first time on appeal unless such failure is violative of a constitutional right. State v. Tamalini, 134 Wn.2d 725, 730-731, 953 P.2d 450 (1998). Pursuant to RAP 2.5(a)(3), the defendant must not only assert a constitutional error in this regard but must also show how, in the context of the trial, this alleged error prejudiced a right of the defendant. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant contends that there was error here of a constitutional magnitude because there was a failure to advise the jury of an element of the crime charged. However, no such failure has been identified. The jury in this case was fully informed of the elements of intimidating a witness.

The defendant appears to also argue that the defendant was prejudiced because the jury could

not have understood the import of the term "attempt" regarding the elements of intimidating a witness without a definitional instruction. Putting aside the fact that the definition proposed by the defendant is just plain wrong, there is no argument provided as to why such a definitional instruction was needed. The common definition of the verb "attempt" is to "try to do, make, or achieve". The noun is defined as "an effort or try". WEBSTER'S II: NEW COLLEGE DICTIONARY 72 (1999). The common understanding of the term "attempt" includes an effort made to accomplish the intended goal, and so incorporates the concept of a substantial step. The defendant could not have suffered any prejudice from the use of the term "attempt" without a definitional instruction. There has been no showing of manifest error affecting a constitutional right in this case.

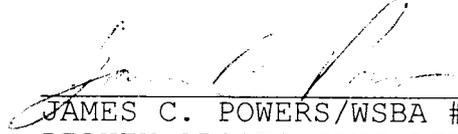
D. CONCLUSION

The defendant on appeal has not challenged his convictions for rape of a child in the second

degree or child molestation in the second degree.
Based on the arguments set forth above, the State
respectfully requests that this court also affirm
the defendant's conviction for intimidating a
witness.

DATED this 29th day of March, 2007.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

COURT OF APPEALS
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BY James C. Powers IN THE COURT OF APPEALS
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STATE OF WASHINGTON)
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COUNTY OF THURSTON)

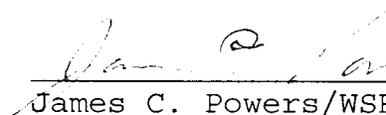
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the
Office of Prosecuting Attorney of Thurston
County; that on the 29th day of March, 2007, I
caused to be mailed to appellant's attorney,
THOMAS E. DOYLE, a copy of the Respondent's
Brief, addressing said envelope as follows:

Thomas E. Doyle,
Attorney at Law
P.O. Box 510
Hansville, WA 98340

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 29th day of March, 2007 at Olympia, WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney