

66766-1

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NO. 66766-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN T. STARK,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

CHRISTINE W. KEATING
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES

1. Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Here, the State presented evidence that when C.W. asked Stark (her step-father) for breakfast at age six, he placed her on the bed, removed her underwear, spread her legs and looked at her vagina. Did the State produce sufficient evidence to support Stark's conviction for attempted child molestation in the first degree?

2. A "to convict" instruction must contain all the elements of the charged crime. Here, the jury was instructed on both elements of attempt in accordance with WPIC 100.02, and also provided with two separate instructions that defined and laid out the elements of the underlying crime of child molestation in the first degree. Was the jury properly instructed?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Brian T. Stark was charged by Amended Information with attempted child molestation in the first degree

(domestic violence); child molestation in the first degree (domestic violence); incest in the first degree; and child molestation in the third degree (domestic violence). CP 6-8. A jury trial on those charges commenced on October 7, 2010 before the Honorable Judge Andrea Darvas. 1RP 2.¹

On October 26, the jury returned verdicts of guilty to each of the four counts. 6RP 941; CP 22-25. At sentencing on December 17, 2010, the trial court imposed sentences within the standard range on each count. 7RP 33; CP 54-66.

2. SUBSTANTIVE FACTS

When C.W. was only about five years of age, her mother introduced her to Stark—the man that later became her step-father. 2RP 200-01. At that time, she was living with her mother, Danelle Stark, in her grandparents' home. 5RP 645. However, shortly after her mother met Stark, she discovered she was pregnant with his child; Danelle and C.W. moved in with Stark about a month later. 2RP 201; 5RP 645. After the birth of their child, Danelle and Stark

¹ The Verbatim Report of Proceedings consists of seven volumes, referred to in this brief as follows: 1RP (Oct. 7 and Oct. 14, 2010); 2RP (Oct. 19, 2010); 3RP (Oct. 20, 2010); 4RP (Oct. 21, 2010); 5RP (Oct. 25, 2010); 6RP (Oct. 26-27, 2010); 7RP (Dec. 17, 2010).

married. 2RP 205; 5RP 645. Soon thereafter, the new family moved to an apartment on Benson Hill in Renton. 2RP 202. C.W. recalled being six years of age, in first grade, and having her own room when the family lived in that apartment. 2RP 202. C.W. recalls liking Stark initially, as he would buy her things and take her and her mother out, but that began to change when her brother was born. 2RP 209.

It changed permanently, however, one day when C.W. was six and had stayed home from school. 2RP 210. Her mother was working that day and C.W. recalls going into her parents' bedroom, climbing up on the bed, and telling Stark that she was hungry. 2RP 211. At that point she recalls Stark getting her on her back, pulling up her nightgown, taking off her underwear and spreading her legs. 2RP 211. She then remembers Stark staring at her intimate parts. 2RP 213-14. She is unclear of how or why the incident ended. 2RP 214.

What C.W. does know is that that incident started nearly eleven years of abuse at the hands of Stark—abuse that occurred about four times a week as time progressed. 2RP 210-23, 229-45. At different times he dry humped her, rubbed her bottom and vagina, stuck his finger, and possibly his penis, inside her, and

performed oral sex on her. 2RP 216-22, 229-32, 234-35, 241-45. Oftentimes, during these incidents of abuse, Stark would cover C.W.'s face with a blanket or pillow. 2RP 217, 257. During this time, Stark convinced C.W. not to tell anyone, even threatening to kill her on at least one occasion. 2RP 216, 224, 246.

Nonetheless, as a young child, C.W. tried to tell her mother what was going on, but her mother did not investigate further or take her allegations seriously. 2RP 223-25. Eventually, C.W. was so traumatized by the abuse that she was suffering from bulimia and began cutting herself. 2RP 265-68. Finally, when she was a sophomore in high school, C.W. told her best friend K.J. what had been happening. 2RP 254. One thing led to another, and although no report was made immediately, eventually K.J. and her mother reported the abuse to a high school counselor who in turn reported it to police. 2RP 92-93, 138-43, 159-60, 179-80, 284. The charges in this case followed. At the time of trial, C.W.'s mother had cut off all contact with her and was still living with Stark. 2RP 295.

C. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT STARK'S CONVICTION FOR ATTEMPTED CHILD MOLESTATION IN THE FIRST DEGREE.

Stark maintains that there was insufficient evidence to support his conviction for attempted child molestation in the first degree, the crime charged in count one of the Amended Information, arguing that the State failed to prove that the defendant had the intent to touch C.W. for purposes of sexual gratification during the events forming the basis for the charge. Brief of Appellant at 6. His claim should be rejected. Stark's conviction was predicated on evidence that the defendant laid C.W. on her back in his bed, pulled up her nightgown, removed her underpants, and stared at her vagina. 2RP 210-14; 3RP 306-10; 4RP 580-81, 601-04. It was further predicated on the fact that subsequent to this particular incident, the defendant did, in fact, touch C.W. for the purposes of sexual gratification. CP 23-25.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v.

Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997); State v. Salinas, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is considered equally as reliable as direct evidence. State v. Delmarter, 94 Wn. App. 634, 638, 618 P.2d 99 (1980). An appellate court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

In determining whether there is sufficient evidence, the reviewing court determines not "whether *it* believes the evidence at trial established guilt beyond a reasonable doubt," but whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Green, 94 Wn.2d at 221 (emphasis added); State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107, rev. denied, 141 Wn.2d 1023 (2000).

A person is guilty of the crime of attempt where they take a substantial step toward the commission of a specific crime with the intent of committing that same crime. RCW 9A.28.020; WPIC

100.02; State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995). In this case, that means that to establish the crime of attempted child molestation in the first degree, the State had to prove both the intent to commit first degree child molestation, as well as the taking of a substantial step toward it. Id., CP 43, 46. A substantial step is defined as "conduct that strongly indicates a criminal purpose and that is more than mere preparation." WPIC 100.02. Whether conduct constitutes a substantial step as an element of the crime of attempt is a question of fact for the jury. State v. Price, 103 Wn. App. 845, 143 P.3d 841, rev. denied, 143 Wn.2d 1014, 22 P.3d 803 (2000); WPIC 100.02. Practically speaking, the line between preparation and a substantial step is subjective, and in the eyes of a jury, very often easy to cross.

In State v. Jackson, 62 Wn. App. 53, 56, 813 P.2d 156 (1991), for example, this Court reviewed a claim that the defendant's conviction for attempted second degree rape was based on insufficient evidence, arguing that his actions constituted mere preparation. In that case, the defendant was invited into the home of a fourteen year old girl whose mother he was familiar with. Id. at 55. Once inside, he then asked the girl to get something from

her mother's bedroom, at which point he followed her, and told her to lift up her skirt or he would kill her. Id. He then continued to approach, backing her into a wall. Id. When she screamed, he claimed he was only kidding and left the apartment. Id. The defendant never actually touched the victim or indicated an express desire to have sexual relations. Nonetheless, rejecting the defendant's argument, the court found that although the evidence was slimmer than in other cases, when viewed in a light most favorable to the State, "a jury could have reasonably found beyond a reasonable doubt that Jackson intended to have sexual intercourse with [the victim] and that he took a substantial step toward that goal." Id. at 58.

Here, the evidence established that when C.W. was approximately six years of age, she went to Stark's bedroom on an occasion when her mother was absent from the home. She asked Stark for breakfast and a backrub, and climbed up onto his bed. It was then, in the absence of her mother, that the defendant began what turned into years of sexual abuse of C.W. He placed her on her back, pulled up her nightgown, removed her underwear and

stared at her vagina.² Because of the time between the incident and her report of it and C.W.'s age at the time, she could not recall how the incident ended. 2RP 214.

Even absent specific information as to how the incident ended on this occasion, the evidence is more than adequate to establish attempt. At issue is whether the defendant intended to touch C.W. for the purposes of sexual gratification, and whether he took a substantial step toward that goal. State v. Jackson, 62 Wn. App. 53, 57-58 (1991). Clearly, no actual touching of a victim's intimate parts is necessary to establish that fact. Id. The actions here were clearly not inadvertent, nor were they done with some innocent purpose. Moreover, given the extensive abuse the jury heard followed this incident, they could have reasonably inferred—as they are entitled to do—that the defendant's intent on this particular occasion was to touch the victim for purposes of sexual gratification, but stopped or was thwarted in that attempt for some unknown reason. See State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999).

² Some testimony also indicates that the defendant may have masturbated during this incident and/or covered her face with a pillow and rubbed her thighs. 4RP 580-81, 590-91.

Alternatively, the jury could have found that on this occasion, Stark was taking a substantial step toward an ongoing pattern of sexual abuse that he intended to inflict on C.W., even if he did not intend to touch her on that day. In other words, the jury could have inferred that Stark was essentially grooming C.W. for later abuse and that the actions on that day constituted a substantial step toward that abuse. They may have deemed the lack of actual touching on that occasion irrelevant, finding instead that he took a substantial step toward later touching her sexual or intimate parts for the purposes of sexual gratification.

Stark incorrectly assumes and argues that there had to have been evidence of an actual intent to touch C.W. that was somehow thwarted on that occasion to sustain the charge here. Brief of Appellant at 7. However, there is no legal requirement—and Stark cites no supporting case law—that the substantial step taken toward the commission of a crime coincide in time with the actual or attempted execution of it. See e.g., State v. Gay, 4 Wn. App. 834, 840-42, 486 P.2d 341 (1971), rev. denied (attempted murder conviction sustained where the defendant hired a feigned assassin to kill her husband on a later date). The legal definition of attempt requires intent and an overt act—nothing more and nothing less.

RCW 9A.28.020; WPIC 100.02. The jury here reasonably could have found a clear intent to molest C.W. (as evidenced by the other charges of which they convicted Stark), as evidenced by the substantial step taken toward that end.

The jury's finding of guilt for attempted child molestation in the first degree was reasonable, supported by the evidence and all reasonable inferences therefrom, and as such should be affirmed.

2. THE COURT'S INSTRUCTIONS TO THE JURY PROPERLY INFORMED THE JURORS OF THE ELEMENTS OF THE CRIME OF ATTEMPTED FIRST DEGREE CHILD MOLESTATION.

Stark contends that the jury instructions with respect to attempted child molestation in the first degree relieved the State of its burden to prove every element of the crime because they did not include a separate instruction delineating the elements of child molestation in the first degree. Brief of Respondent at 8. The defendant's contention is without merit. In addition to the "to convict" instruction for attempted first degree child molestation which properly identified the elements of that crime, the jury was also provided with a definitional instruction for child molestation in the first degree and an instruction for another count which further

delineated the elements of that offense. CP 36, 40, 46; State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). In instructing a jury, the trial court must ensure that each “to convict” instruction contain all of the elements of the charged crime, as that instruction is the “yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. DeRyke, 149 Wn.2d at 910, citing State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). A jury should not have to look to another instruction to supply a missing element of a charged crime. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010), citing Smith, 131 Wn.2d at 262-63. Where an error in an instruction relieves the State of its essential burden of proving the crime beyond a reasonable doubt, automatic reversal is warranted. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). “However, not every omission of information from a ‘to convict’ jury instruction relieves the State of its burden of proof; only the total omission of essential elements can do so.” Sibert, 168 Wn.2d at 263, citing Brown, 147 Wn.2d at 339.

The crime of attempt includes two elements: attempt to commit a substantive crime and taking a substantial step in the commission of that crime. RCW 9A.28.020; DeRyke, 149 Wn.2d at 910. These elements are embodied in WPIC 100.02. In the “Note on Use” for that WPIC, the Committee states, “If the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime.” WPIC 100.02, Note on Use.

In this case, the trial court properly instructed the jury on the charged crime of attempted child molestation in the first degree. CP 46. Stark does not contend that that instruction was in error. Within that instruction, the jury was told that they specifically had to find that the defendant committed the attempt “with the intent to commit Child Molestation in the First Degree.” CP 46. To that end, they were provided with a definitional instruction of first degree child molestation that was general in nature and not linked to any particular charged count. CP 36. Although that instruction was in paragraph form and did not have each element enumerated, it served to more than adequately inform the jury of the elements of the crime of first degree child molestation as it applied to the charge of attempt. Moreover, were there any question whatsoever, those

same elements were delineated in yet another instruction. CP 40. And although that instruction was specific to count II, the fact that it contained the same elements as in the definitional instruction would have made it abundantly clear to the jury that those were the underlying elements necessary for a conviction on count I. Thus, because the jury was properly instructed on the charged crime *and* provided with multiple instructions informing them of the elements of the underlying crime, there was no error. The State was not relieved of its burden to prove the charge beyond a reasonable doubt and Stark's conviction on count I should be affirmed.

However, even were this Court to find that the trial court erred by not including a separate instruction delineating the elements of child molestation in the first degree as they pertained to count I, any error is clearly harmless. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an [instructional error] does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In that case, the Supreme Court held that whether instructional error is harmless should be analyzed in the context of whether the error complained of in any way contributed

to the verdict issued. Id. at 15. In other words, if the jury would have rendered the same verdict absent any error, such alleged error is harmless.

Here, the evidence of a substantial step toward first degree child molestation was overwhelming as addressed above. Further, the jury was not only properly informed of the elements of attempt, but was also told the elements of the underlying offense in two separate instructions. CP 36, 40. And while one of those instructions related specifically to a different count, the fact that it was identical to the overarching definitional instruction would have made it abundantly clear to the jury what they need find to sustain a conviction. Providing them with a *third* instruction containing those same elements yet again would not have changed the outcome. The jury in this case clearly and repeatedly found the victim credible and Stark's actions criminal. Another identical definition of child molestation was unnecessary. Stark's conviction should be affirmed.

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Stark's conviction for attempted child molestation in the first degree as charged in the first count of the amended information.

DATED this 30th day of January, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
CHRISTINE W. KEATING, WSBA #30821
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRIAN STARK, Cause No. 66766-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

1/30/12

Date