

68806-5

68806-5

No. 68806-5

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON M.,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The information omitted an essential element of the crime.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Constitution requires that the charging document in a criminal case set forth every essential element of the crime. When the alleged crime includes the element of intent, even if not expressly mentioned in the statute, the charging document must contain that element. The crime of child molestation includes the element of intent to gratify sexual desires. Is the information charging Jason M. with first degree child molestation constitutionally deficient where it did not allege that he acted with the intent to gratify sexual desires?

C. STATEMENT OF THE CASE

The State charged Jason M. with one count of first degree child molestation as follows:

That the respondent, on or about the 8th day of October, 2010, did have sexual contact with K.P. (DOB 03/05/2005), who was less than twelve years old and not married to the respondent and not in a state registered domestic partnership with the respondent, and the respondent was at least thirty-six months older than K.P.; proscribed by RCW 9A.44.083, a felony.

CP 93.

A bench trial followed. Seven-year-old K.P. testified that one day when Jason was babysitting, he pulled down K.P.'s pants and had him sit on top of Jason's lap with K.P.'s bare bottom against Jason's groin. RP 95-97. Jason's pants were on and fully zipped. RP 96-97. According to K.P., the encounter lasted about four seconds. RP 94.

The juvenile court found Jason guilty of first degree child molestation as charged. CP 21.

#### D. ARGUMENT

**The information was constitutionally deficient because it omitted the essential element that the crime was committed with intent to gratify sexual desires**

1. The Constitution requires the charging document set forth every essential element of the crime in order to provide adequate notice to the accused.

It is a fundamental principle of criminal procedure, embodied in the state and federal constitutions, that an accused person must be informed of the criminal charge he is to meet at trial and cannot be tried for an offense not charged. U.S. Const. amend. VI;<sup>1</sup> Const. art. I, § 22;<sup>2</sup> State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). All

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<sup>1</sup> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."

<sup>2</sup> Article I, section 22 provides: "In criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation against him [and] to have a copy thereof."

essential elements of the crime must be included in the information so as to apprise the accused of the charge and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

The judicially approved means of ensuring constitutionally adequate notice is to require a charging document set forth all of the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This “essential elements rule” has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008 ) (citing Vangerpen, 125 Wn.2d at 788).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790.

The constitutional requirement that the information contain every essential element of the crime is not relaxed simply because the challenge is raised for the first time on appeal. For post-verdict challenges, however, the charging document will be construed liberally

and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. But an information cannot be upheld regardless of when the challenge is raised if it does not contain all the essential elements, as "the most liberal possible reading cannot cure it." State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992).

2. The crime of first degree child molestation contains the essential element that the crime was committed with the intent to gratify sexual desires.

The statute defines the crime of first degree child molestation

as:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1). "Sexual contact" is defined by statute as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

RCW 9A.44.010(2).

It is well-settled that the crime of child molestation contains the essential non-statutory element that the act was committed with the

intent to gratify sexual desires. State v. Stevens, 158 Wn.2d 304, 309, 143 P.3d 817 (2006); State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006); State v. Edwards, 169 Wn. App. 561, 568, 280 P.3d 1152 (2012). In order to prove the statutory element of “sexual contact,” the State must prove the defendant acted with a purpose of sexual gratification. Stevens, 158 Wn.2d at 309. “Thus, while sexual gratification is not an explicit element of . . . child molestation, the State must prove a defendant acted for the purpose of sexual gratification.” Id. at 309-10. In other words, purpose—or intent—is an essential *implied* element of the crime that the State must prove beyond a reasonable doubt. French, 157 Wn.2d at 611; Edwards, 169 Wn. App. at 568 (“To prove sexual contact, an element of child molestation, the State must prove a purpose or intent to gratify sexual desires.”).

Although intent is not a statutory element of child molestation, it is nonetheless an essential element that must be contained in the charging document. The essential elements rule requires that the charging document contain *all* essential elements of the crime, whether statutory or non-statutory. Kjorsvik, 117 Wn.2d at 97, 101-02. In particular, if case law establishes that intent is an implied element of the crime—although not mentioned in the statute—the

charging document must allege intent. Id. at 98 (holding that although robbery statute does not expressly contain element of intent, “intent to steal” is essential *implied* element, established in the case law, that must be included in charging document).

Intent to gratify sexual desires is an essential element of first degree child molestation. Stevens, 158 Wn.2d at 309; French, 157 Wn.2d at 611; Edwards, 169 Wn. App. at 568. Therefore, it must be alleged in the charging document. Kjorsvik, 117 Wn.2d at 100.

3. The information was constitutionally deficient because it did not contain the essential element of intent to gratify sexual desires.

The question, in reviewing an information for the first time on appeal, is whether the element “appears in any form, or by fair construction can be found” on the face of the document. Kjorsvik, 117 Wn.2d at 108. The information must not merely list every element but “must allege sufficient *facts* to support every element.” State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989). If the statutory language does not define the crime sufficiently to apprise the accused of the nature of the accusation, mere recitation of the statutory language in the information is inadequate. Id.

“The information must state the acts constituting the offense in ordinary and concise language.” Id. at 689. The question is whether the elements are set forth “in such a manner as *to enable a person of common understanding to know what is intended.*” Kjorsvik, 117 Wn.2d at 110. It is not fatal to an information if the exact words of a case law element are not used, as long as the words used would reasonably apprise an accused of the element. Id. at 108-09.

In Kjorsvik, the Washington Supreme Court considered whether an information charging the crime of robbery adequately conveyed the non-statutory element of “intent to steal.” Id. at 110-11. The information alleged the accused

did unlawfully take personal property, to-wit: lawful United States currency from the person and in the presence of Chris V. Balls, against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property and in the commission of and in immediate flight therefrom the defendants were armed with and displayed what appeared to be a deadly weapon, to-wit: a knife . . . .

Id. at 96. Applying the stricter standard of review for charging documents challenged for the first time on appeal, the court concluded the information adequately conveyed the “intent to steal” element. Id. at 110-11. Although the information did not explicitly allege intent to steal, the court concluded a person of common understanding would

conclude it was an element of the crime. Id. The court explained, “[i]t is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money.” Id.

Here, by contrast, a person of common understanding would not conclude that intent to gratify sexual desires was an element of the crime charged. The information accused Jason of having “sexual contact” with K.P. CP 93. But the information did not allege that the contact was made with the intent to gratify sexual desires. Id. The information did not allege that the act was committed with *any* intent or purpose. Thus, a person of common understanding would not appreciate that intent to gratify sexual desires was an element of the crime that the State must prove beyond a reasonable doubt. Kjorsvik, 117 Wn.2d at 100.

A person of common understanding would not conclude that the act of “sexual contact” necessarily entails an intent to gratify sexual desires. “Contact” means “union or junction of body surfaces : a touching or meeting.” Webster’s Third New International Dictionary

(1993), at 490. One meaning of “sexual” is “of or relating to the male or female sexes or their distinctive organs or functions.” Id. at 2082. Therefore, a commonplace meaning of “sexual contact” is the touching of sexual organs. It does not necessarily mean the touching is done for the purpose of gratifying sexual desires or for any other purpose. See Seagrave v. State, 802 So.2d 281, 286, 26 Fla. L. Weekly 5481 (Fla. 2001) (applying dictionary definition of “sexual contact” and concluding “the most common usage of the phrase ‘sexual contact’ encompasses the physical touching of a person's sexual body parts”).

In Hammock v. State, 201 Ga. App. 614, 616, 411 S.E.2d 743 (1991), the Georgia court concluded that an indictment accusing Hammock of “perform[ing] an immoral and indecent act” upon a child by “touch[ing] said child’s genital area” was sufficient to allege that the act was done for the purpose of sexual gratification. The words “immoral” and “indecent” are within common understanding. Id. Thus, a person of common understanding would necessarily appreciate that an allegation that an accused touched a child’s genitals in an “immoral” and “indecent” manner necessarily encompasses an allegation that the purpose of the touching was to gratify sexual desires.

Here, by contrast, the information merely alleged that Jason engaged in “sexual contact” with K.P. It did not allege that the contact was “immoral” or “indecent.” It did not allege that the touching was done for a wicked purpose or for any other purpose. A person of common understanding might reasonably conclude that the State was merely alleging that Jason touched the child’s genital area. See Webster’s, supra, at 490, 2082; Seagrave, 802 So.2d at 286. Because the information did not allege the essential element of intent to gratify sexual desires, it did not adequately inform Jason of the nature of the charge and was constitutionally deficient. Kjorsvik, 117 Wn.2d at 101-02.

4. The adjudication must be reversed and the charge dismissed without prejudice.

If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State’s ability to refile the charge. Vangerpen, 125 Wn.2d at 792-93. That is the remedy here.

E. CONCLUSION

Because the information omitted an essential element of the crime, the adjudication must be reversed and the charge dismissed without prejudice.

Respectfully submitted this 5th day of December, 2012.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68806-5-I
	)	
JASON M.,	)	
	)	
Juvenile Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                                                                                     |                   |                                     |
|-----------------------------------------------------------------------------------------------------|-------------------|-------------------------------------|
| [X] SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] JASON M.<br>3802 98 <sup>TH</sup> ST. NE<br>MARYSVILLE, WA 98270                                | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 5<sup>TH</sup> DAY OF DECEMBER, 2012.

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