

NO. 34936-1-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

MONTY S. BURNAM,

Appellant

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Paula Casey, Judge  
Cause No. 04-1-00575-6

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count V, intimidating a witness, from the jury for lack of sufficiency of the evidence that Burnam intended to immediately use force against Mary Sage in an attempt to induce her not to report information relevant to a criminal investigation or the abuse of a minor child where the State assumed the burden to prove this element.
02. The trial court erred in failing to instruct the jury on the definition of the essential element of attempt in the intimidating a witness charge, count V.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in not taking count V, intimidating a witness, from the jury for lack of sufficiency of the evidence that Burnam intended to immediately use force against Mary Sage in an attempt to induce her not to report information relevant to a criminal investigation or the abuse of a minor child where the State assumed the burden to prove this element? [Assignment of Error No. 1].
02. Whether the trial court committed reversible error by failing to instruct the jury on the definition of the essential element of attempt in the intimidating a witness charge? [Assignment of error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Monty Burnam (Burnam) was charged by information filed in Thurston County Superior Court on March 18, 2004, with two counts of rape of a child in the second degree, counts I and II,

two counts of child molestation in the second degree, counts III and IV, and intimidating a witness, count V, contrary to RCWs 9A.44.076, 9A.44.086 and 9A.72.110. [CP 3-4].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 12]. Trial to a jury commenced on May 1, 2006, the Honorable Paula Casey presiding.

The jury returned verdicts of guilty as charged, and Burnam was sentenced to life without the possibility of parole for counts I-IV and within his standard range for count V. [CP 88-92, 204-111].

Timely notice of this appeal followed. [CP 112].

02. Substantive Facts

On January 29, 2004, Olympia police officers John Tupper and Larry Gabor were dispatched to a local apartment on a complaint of “a disturbance that was occurring at that address.” [RP 05/01/06 7, 9]. After Tupper spoke with Mary Sage and briefly encountered Burnam, it was determined there “wasn’t a problem here” and the officers left the scene. [RP 05/01/06 9, 13-14].

Gabor returned to the apartment following a dispatch that a “person had reported her daughter left and was concerned she was running away with” Burnam. [RP 05/01/06 17-19, 21, 26].

F.K., DOB 07/20/90, lived with her mother, Sage, and siblings and Burnam in an apartment beginning November 2003. [RP 05/02/06 5-6]. After that Thanksgiving, F.K. and Burnam, whom F.K. described as approximately 33 years old, started having vaginal sex together, more than 20 times, sometimes in the car or at her mom's apartment or at a neighbor's. [RP 05/02/06 7-8]. And once a day for multiple months she would touch his penis with her hands. [RP 05/02/06 9]. After her mother found out about this relationship,

(Burnam) packed his things and he left. And then he left and my mom called the cops, and then he came back before the police got there. And then I left - - I moved out that day. That's what - - we all just split, you know.

[RP 05/02/06 12].

F.K. initially told the police that nothing had happened. [RP 05/02/06 33]. When she later gave the police a statement on February 10, 2004, she did not want to tell the truth because she did not want Burnam to go away. [RP 05/02/06 14]. She gave the officer some information that was incorrect: "I was not trying to tell the truth." [RP 05/02/06 27].

During cross-examination, F.K. confirmed that once she and Burnam started having sex, they had sex "(a)lmost every day." [RP 05/02/06 25]. "Well, yeah. Every day. Every single day." [RP 05/02/06 25].

When Sage, confronted Burnham after seeing him with his hands down F.K.'s pants on January 29, 2004, Burnam "confessed that there had been something going on since right after Thanksgiving...." [RP 05/02/06 46]. He said, "I'm sorry, I have feelings for her, I'm in love with her, I want to be with her." [RP 05/02/06 46]. "(H)e told me that he was just touching her with his hands and only used his hands and not had sexual intercourse with her actually." [RP 05/02/06 46-47].

F.K.'s sister, Jessica Sage, heard Burnam tell Mary Sage that he was in love with (F.K.) and wanted (F.K.) to come with him." [RP 05/02/06 79]. When Patricia Mencarelli, Mary Sage's sister, spoke with Burnam on the phone in January 2004, he admitted to her that he was in love with F.K. [RP 05/02/06 (afternoon session) 7-10]. Burnam also told Christine Martin, Mary Sage's neighbor, that "(h)e couldn't believe he was having a relationship with a 13-year-old child." [RP 05/02/06 (afternoon session) 33]. In addition, Burnam told Martin that he would put his hand down F.K.'s pants and that she would touch his genitals. [RP 05/02/06 (afternoon session) 33-34].

After F.K. told her mother that she and Burnam "had been having sexual intercourse just since just before Thanksgiving [RP 05/02/06 47](,)" Sage went to grab the phone to call the police and

Burnam grabbed me by the throat and whispered right in my ear. He whispered in my ear: You will take this to your grave, or my homies from Wenatchee will take care of you.

[RP 05/02/06 47].

Sage “felt afraid that he was going to hurt me and my daughter at that point.” [RP 05/02/06 48]. When Burnam asked her

if he could take (F.K.) with him, I said no, have you lost your F’ing mind. He started flipping out, punching holes in the doors, kicking a hole in the kitchen wall, broken doors, holes in the hallway.

[RP 05/02/06 50].

When the police arrived, Sage “was afraid to say anything after what (Burnam) had said to (her).” [RP 05/02/06 51]. So she told the police “everything was fine.” [RP 05/02/06 51]. However, she later called the police and “eventually told him what had happened that night.” [RP 05/02/06 RP 05/02/06 51]. During cross-examination, she admitted that Burnam had “punched the walls before but not to the extent that it was that night.” [RP 05/02/06 69].

Burnham rested without presenting evidence. [RP 05/02/06 (afternoon session) 60].

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D. ARGUMENT

01. THERE IS INSUFFICIENT EVIDENCE THAT BURNAM INTENDED TO IMMEDIATELY USE FORCE AGAINST MARY SAGE IN AN ATTEMPT TO INDUCE HER NOT TO REPORT INFORMATION RELEVANT TO A CRIMINAL INVESTIGATION OR THE ABUSE OF A MINOR CHILD.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The pertinent facts are not in dispute. Sage testified that when she went to the phone to call the police after hearing F.K.’s allegations, Burnam grabbed her and whispered in her ear: “You will take this to your grave, or my homies from Wenatchee will take care of you.” [RP

05/02/06 47]. As argued by the State in closing: “That’s what she testifies that he says into her ear.” [RP 05/03/06 89].

The court instructed the jury that to convict Burnam of intimidating a witness it had to find that Burnam “by use of threat against Mary Sage, a current or prospective witness, attempted to induce Mary Sage not to report the information relevant to criminal investigation or the abuse of a minor child...” [Court’s Instruction 19; CP 84]. Further, the court’s instruction 20 reads: “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.” (Emphasis added). [CP 85].

On appeal, an appellant may assign error to elements added under the

law of the case doctrine. State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 631 (1988) (because the State failed to object to the jury instructions they “are the law of the case and we will consider error predicated on them.” (citations omitted)). Such assignment of error may include a challenge to the sufficiency of the evidence of the added element. Barringer, 32 Wn. App. at 887-88....

State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

If the reviewing court finds insufficient evidence to prove the added element, reversal is required. Lee, 128 Wn.2d at 164; Hobbs, 71 Wn. App. at 425. Retrial following reversal for insufficient evidence is “unequivocally

prohibited” and dismissal is the remedy. State v. Hardesty,  
129 Wn.2d 303, 309, 915 P.2d 1080 (1996)....

State v. Hickman, 135 Wn.2d at 103.

By virtue of its acquiesce to the court’s instructions 19 and 20, the State assumed the burden of proving that Burnam intended to “immediately” use force against Mary Sage.<sup>1</sup> These instructions, to which the State did not object, became the law of the case. See State v. Hickman, 135 Wn.2d at 97. And since the State presented no evidence that Burnam intended to immediately use force against Sage as the court’s instruction 20 required, but only evidence of a conditional threat of harm in the future should Sage speak of F.K.’s allegations, the State failed to meet its burden and Burnam’s conviction for intimidating a witness must be reversed and the case dismissed.

02. THE TRIAL COURT COMMITTED  
REVERSIBLE ERROR BY FAILING TO  
INSTRUCT THE JURY ON THE DEFINITION  
OF THE ESSENTIAL ELEMENT OF ATTEMPT.

A claimed error affecting a constitutional right may be raised for the first time on appeal, and the failure to advise the jury of an element of the crime charged is an error of constitutional magnitude that an appellant may raise for the first time on appeal. RAP 2.5(a)(3);

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<sup>1</sup> RCW 9A.04.110(26) defines “threat” as meaning “to communicate, directly or indirectly the intent: (a) To cause bodily injury in the future to the person threatened....” [Emphasis added]. And while this statute is referenced by RCW 9A.72.110(3)(a)(ii), the intimidating a witness statute, the jury was not provided an instruction of this definition.

State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). A trial court's failure to instruct the jury as to each essential element of a crime is not harmless error. State v. Miller, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997).

As previously mentioned, the jury was instructed that Burnam committed the crime of intimidating a witness in the following manner: “by use of threat against Mary Sage, a current or prospective witness, attempted to induce Mary Sage not to report the information relevant to criminal investigation or the abuse of a minor child...” (Emphasis added). [Court’s Instruction 19; CP 84]. Neither the to-convict instruction nor any other instruction defined the essential element of attempt.

A person “attempts” a prohibited act under the intimidation statute, RCW 9A.72.110(1)(d), if by use of a threat against a current or prospective witness, he or she “does any act which is a substantial step toward the commission of [the] crime.” RCW 9A.28.020(1). Whether conduct constitutes a “substantial step” toward the commission of a crime is a question of fact. State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). Conduct, of course, is not a substantial step “unless it is strongly corroborative of the actor’s criminal purpose.” Workman, 90 Wn.2d at 451.

There can be no conviction for intimidating a witness unless the jury makes a finding that the defendant's conduct constituted a "substantial step" toward the commission of the crime. By omitting this definition of the element of attempt, the trial court prevented the jury from making this determination and in the process committed reversible error.

E. CONCLUSION

Based on the above, Burnam respectfully requests this court to reverse and dismiss his conviction for intimidating a witness.

DATED this 3<sup>rd</sup> day of January 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing same in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 3<sup>rd</sup> day of January 2007.

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