

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 OCT -1 AM 11:00

**COURT OF APPEALS  
STATE OF WASHINGTON  
Division One**

**In re Personal Restraint Petition  
of**

Mansour Heidari

No. 63040-7-1

**Petitioner's Supplemental Reply,  
Motion on the Merits—RAP 17.1(b),  
and  
Motion for Accelerated Review  
RAP 18.12**

**I. PARTIES/RELIEF**

Comes now the Petitioner, Mansour Heidari, appearing pro se and pursuant to RAP 17.1(b) moves this court for a *decision on the merits*. Petitioner's Motion on the Merits is appropriate because, the King County Senior Deputy Prosecuting Attorney, Ann Summers, has conceded both grounds raised in Mr. Heidari's PRP, and wrote in conclusion, that "[t]his petition *should be granted* and remanded for resentencing." Prosecutor's Supplemental Reply Brief of Sept. 10, 2009 pg 9 (herein "Pros.Supp.Brf). (My emphasis.)

In addition, Petitioner asks the court to accelerate its decision on the merits, because, a favorable ruling on both grounds will reduce his sentence to 102 months and change his earned early release date ("ERD")

to Jan. 7, 2010. (Attached as Exhibit #1.) To affect a release near the date of Jan. 7, 2010, the Department of Corrections will need to complete two tasks: 1) pre-approve petitioner's housing; and, 2) give a 30 day victim notification. The department will do neither until after resentencing. Therefore, Petitioner requests a decision on or before Nov. 30, 2009 to achieve release after resentencing and a revised ERD of January 2010.

## **II. EXCEPTION TO STATE'S REMAND REQUEST**

Though a decision on the merits is clearly appropriate, Petitioner takes exception to the prosecutor's recommendation that "[t]his Court should remand for entry of judgment as to attempted child molestation in the second degree as to Count IV." Ibid at pg 8. In rebuttal, expressed below, Petitioner claims that State law dictates dismissal for insufficiency of evidence as to Count IV. With Count IV dismissed, the adjusted offender score will be 3 points not 6; on remand a revised sentence for Count I (Rape of a Child) would be 102 months, compared to 162 month sentence imposed.<sup>1</sup>

## **III. ARGUMENT FOR DISMISSAL OF COUNT IV**

### ***A. States Argument on Remand***

The prosecutor, Ms. Summers, argues that "[t]he conduct proven at trial does not establish the completed crime of child molestation in the second degree." Pros.Supp.Brif at pg 7. Ms. Summers then argues "[t]he

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<sup>1</sup> A copy of the Judgment & Sentence is attached to the "State's Response to Personal Restraint Petition." Appendix A.

evidence established the crime of attempted child molestation in the second degree, not the completed crime.” Ibid. In support of this position, the prosecutor cites to State v. Garcia, 146 Wn.App. 821 193 P.3d 181 (2008), and argues that “[a] number of cases have held that when an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proven at trial.” Pros.Supp.Brf at pg 7.

#### A. Petitioner’s Argument for Remand.

In opposition, Petitioner claims that, as a matter of law, this court should not remand for entry of an order for *attempted* second degree Child molestation for several reasons.

1. *CASE LAW*. The prosecutor asserts that State v. Garcia, supra, holds that criminal attempt may be entered by the trial judge. Pros. Supp.Brf. pg 7. However, The Prosecutor’s reliance on Garcia—which was a bench trial—is without merit. First, a careful reading of Garcia, and the cases cited, only support the proposition that a defendant can be found guilty of a lesser included offense where the criminal statute is one of degrees. Second, not one of the cases cited in Garcia address criminal attempt. For example, in State v. Gilbert, 68 Wn.App. 379, 842 P.2d 1029 (1993), the Appellate court found the evidence insufficient on the charge of 1st degree Burglary and remanded for residential burglary. In reaching the court’s opinion, justice Forrest noted:

“We are aware of the Supreme Court’s admonishment that “[i]n general, a remand for simple resentencing on a ‘lesser included offense’ is only permissible when the jury has been explicitly

instructed thereon.” State v. Green, 94 Wn.2d 216, 234, 616 P.2d 628 (1980).

In State v. Miles, 77 Wn.2d 593, 604 (1970), a bench trial, the appellate court vacated 2nd degree assault and remanded for assault in the 3rd degree; in State v. Atterton, 81 Wn.App. 470, 473 (1996), the court held the evidence insufficient for 1st degree theft and remanded for one count of 2nd degree theft. In State v. Robbins, 68 Wn. App. 873 (1993), the court reversed the conviction for possession with intent to deliver on grounds of insufficiency of the evidence and remanded on the lesser included offense of simple possession. Third, the newest case, Garcia does not mention the Supreme Court’s Blakely decision or the principle that only the jury can make factual determinations. Petitioner asserts that entering an order to find the petitioner guilty of an attempt to commit the crime of child molestation would violate both the federal and state constitutions. Art 1, §21 and the 6th Amendment. In sum, none of the cases cited address a remand for entry of an order for criminal attempt to commit the crime.<sup>2</sup> This is reasonable because criminal attempt has two extra elements.

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2 The remainder of cases cited in Garcia and Gilbert address only lesser included offenses: State v. Bucknell, 144 Wn.App. 524 (2008) (remand for entry of judgment on the lesser charge of third degree rape); State v. Atterton, 81 Wn.App. 470, 473 (1996) (Insufficient evidence of first degree theft. ... remand for one count of second degree theft.); State v. Maganai, 83 Wn. App. 735 (1996) (Maganai found guilty of attempted first degree rape, [conviction vacated] for first degree attempted rape and remanded for attempted second degree rape); State v. Cobelli, 56 Wn.App 921, 925 (1989) (remand for entry of guilt on the lesser included offense of possession of marijuana); State v. Kovac, 50 Wn.App. 117 (1987) ([a juvenile court conviction]...juvenile conviction for possession with intent to deliver, reversed and remanded for simple possession); State v. Brown, 50 Wn.App. 873 (1988) (court reverses the conviction for first degree criminal trespass and enters a judgment of guilty of second degree criminal trespass); and last State v. Liles, 11 Wn.App. 166 173 (1974) (unlawful possession of heroin with intent to deliver is reversed and remanded for the lesser included offense of unlawful possession of heroin).

*2. CHARGING DOCUMENT.* Even if, arguendo, the judge could make a finding for “criminal attempt” of a crime, the judge could only do so, if criminal attempt was charged in the information. That was not done in this case; the information failed to charge Mr. Heidari with criminal attempt; and thus, no notice was given to him or counsel to defend against criminal attempt. One can only speculate, as to what strategies may have been planned or what witnesses interview, and whether to pursue the defense of abandonment of criminal intent, had defense counsel been given notice of the crime of “criminal attempt to 2nd degree child molestation. As the Court noted in State v. Recuenco, 163 Wn.2d 428, 440. “[a]n accused has a constitutionally protected right to be informed of the criminal charge against him, so he will be able to prepare and mount a defense at trial.” Here, the Prosecutor did not charge in the alternative or give the defendant notice that he would need to defend against the crime of attempted 2nd degree Child Molestation. As a matter of law, this court cannot remand for resentencing for criminal attempt as requested because the crime was not charged and defendant would be prejudiced in not preparing a defense of abandonment of the criminal act.

*3. JURY INSTRUCTIONS.* The court’s jury instructions, numbers 1-24, do not contain an instruction for a “Lesser included crime” (WPIC 4.11) or an instruction for “criminal attempt” (WPIC 100.01), or “substantial step” (WPIC 100.05).<sup>3</sup> The “to convict” instruction (No.19) is also void of any language advising the jury of criminal attempt. Our Supreme Court has held that, it is the law of this state that failure to instruct the jury as to

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<sup>3</sup> A full set of jury instructions are found in the Pros.Supp.Brf. marked as Appendix “D”.

every element of the crime charged is constitutional error. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Furthermore, the Court and the Court of Appeals have repeatedly recognized that attempt consists of two elements: (1) intent, and (2) substantial step. *Id.* The Aumick court then held that “...failure to instruct the jury that intent is an element of attempted rape is an error of constitutional magnitude.”<sup>4</sup> In comparison, 2nd degree Child molestation is a strict liability crime, no intent is necessary, doing the thing is the crime.

In State v. Jackson, 62 Wn.App. 53, 813 P.2d 156 (1991), the State agreed that it was constitutional error to fail to instruct the jury on the elements of an attempt. *Id.* at 59. Citing to State v. Stewart, 35 Wn.App. 552, 555, 667 P.2d 1139 (1983) (holding that intent and substantial step are elements of criminal attempt). Because criminal attempt contains two elements to the crime, not found in the “to convict” instruction for 2nd degree child molestation, the Prosecutor, Ms. Summers, has misapprehended Washington law.

In sum, because the defendant was not charged with criminal attempt, and because there were no jury instructions for the elements of “attempt”, or “substantial step”, this court should not remand for entry of an order of attempted Second degree child molestation. The State has cited no authority where remand was ordered for criminal attempt without criminal attempt having been charged and jury instructions given.

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<sup>4</sup> The Court also went on to hold that the error was not harmless.

4. *STATE LAW*. The Prosecutor also cites RCW 10.61.003 for authority to enter an order for criminal attempt; however, a plain reading of the statute does not support a judicial fact finding for an attempted crime because the statute is directed solely to the jury, it reads:

“the *jury* may find the defendant not guilty of the degree charged in the ...information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.” (my emphasis.)

The statute empowers the jury, not the trial judge, to decide whether the crime was that of a lesser included offense or an attempt. Importantly, the next statute, RCW 10.61.010, states in relevant part:

“Whenever the *jury shall find* a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.” (my emphasis.)

Read together, both statutes are crystal clear—only the jury can return a verdict of guilty of criminal attempt. In this case, the defendant requested a jury trial; and thus, only the jury can return a verdict finding him guilty of an attempted crime. To hold otherwise, would usurp the defendant’s constitutional right to a jury verdict under Art 1 §21 of the State Constitution. Moreover, granting the trial court authority to find the Petitioner guilty of criminal attempt on remand contradicts a body of law established after the Supreme Court’s decision of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536 159 L.Ed 2d 403 (2004). The essential principle of the Court’s Blakely decision is that “other than the fact of prior convictions, any fact that increases the penalty [finds a person guilty] for a crime beyond the prescribed statutory maximum [or finds one guilty of a crime] must be submitted to a jury, and proved beyond a reasonable doubt.” This principle applies to

sentence enhancements, *a fortiori*, it must hold true for criminal attempt. As our Supreme Court has noted: “[o]ur state constitution provides that “[t]he right of trial by jury shall remain inviolate.” Const. art. I, §21. see State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 934 (2003). Granting the State’s request for remand for finding of criminal attempt would violate the State and federal constitutions and the Supreme Court’s Blakely decision.

#### IV. COST BILL

Petitioner claims cost for this proceeding and submits his cost bill with his supplemental Reply brief.

#### V. CONCLUSION

The Court of Appeals has authority pursuant to RAP 12.2 to “reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require”. Therefore, under the facts of this case, and the legal arguments presented, Mr. Heidari respectfully prays that the court will dismiss count IV for insufficiency of the evidence and remand for resentencing on Count I to the lower seriousness level of XI and at the lower end of the sentence range as occurred in his original sentence.

Respectfully submitted this 29 day of September 2009.



Mansour Heidari, pro se  
Monroe Correction Complex  
P.O. Box 888, TRU C-506  
Monroe, WA.

TODAYS DATE: 9/29/2009

Name: Mansour Heidari,

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**CALCULATION OF RELEASE DATE**


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RCW 9A.44.073

|  |    | INMATE'S<br>figures | D.O.C.'s<br>figures |
|--|----|---------------------|---------------------|
| Sentence date                                    | A. | 11/22/2002          | _____               |
| Sentence in Months                               | B. | 102                 | _____               |
| Sentence converted to days<br>(= months X 30.42) | C. | 3,103               | _____               |
| <b>Jail Time</b>                                 |    |                     |                     |
| Days actually served                             |    | 35                  | _____               |
| Credit for good time                             |    | 5                   | _____               |
| Sub total  | D. | <u>40</u>           | _____               |
| SRA sentence to served (C - D)                   |    | 3063                | _____               |
| Adjustments                                      |    |                     |                     |
| Enhance penalty                                  |    | 0                   | _____               |
| SRA balance of sentence                          | E. | 3,063               | _____               |
| Max. date ( A + E)                               | F. | 4/11/2011           | _____               |
| Good Time Allowable at .15 % G.                  |    | 459                 | _____               |
| adjustment for lost of good time                 |    | 0                   | _____               |
| DAYS TO SERVE AFTER GT Calc.                     |    | 2603                | _____               |

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**Earned Early Release Date 1/7/2010**


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**In re Personal Restraint Petition  
of**

No. 63040-7-1

Mansour Heidari

**COST BILL**

**I. PARTIES/RELIEF**

Comes now the Petitioner, Mansour Heidari, appearing pro se and asks that the following costs be awarded as the prevailing party:

|   |           |
|---|-----------|
| 1. Statutory attorney fees  | \$ 250.00 |
| 2. Preparation of original and one copy of exhibits at \$2.00 per page. | 42.00     |
| 3. Filing fees incurred by the court (paid to the court)                | \$ 250.00 |
|   | <hr/>     |
| Total Requested Costs:  | \$542.00  |

The above items are expenses allowed as costs by rule 14.3, reasonable expenses actually incurred, and reasonably necessary for review. The King County Prosecutor should pay the costs.

9/29/09

Dated

Heidari

Mansour Heidari, pro se  
Monroe Correction Complex  
P.O. Box 888, TRU C-506  
Monroe, WA.