

66766-1

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No. 66766-1-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN STARK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON, FOR KING COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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GREGORY C. LINK
ATTORNEY FOR APPELLANT
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DIVISION ONE
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STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Stark of due process in violation of the Fourteenth Amendment when it enter a verdict on Count I in the absence of sufficient evidence of each element of that charge.

2. The trial court deprived Mr. Stark of due process in violation of the Fourteenth Amendment when failed to instruct the jury on the elements of the offense charged in Count I.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment requires the State prove each element of the offense beyond a reasonable doubt. To prove an attempt, the State must prove that with the intent to commit the completed offense a defendant took a substantial step towards that commission of the offense. Where the State did not prove Mr. Stark had the intent to commit child molestation at the time of the incident forming the basis for Count I, did the State produce sufficient evidence to convict him of the crime of attempted child molestation?

2. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This

in turn, requires a trial court to instruct the jury on each element of the offense. Where a defendant is charged with an attempt the jury must be instructed on the elements of intent and substantial-step, the elements of attempt, and must also receive an instruction delineating the elements of the completed offense. Where the trial court did not instruct the jury on the elements of first degree child molestation as charged in Count I, did the court relieve the State of its burden of proving the offense to the jury beyond a reasonable doubt?

C. STATEMENT OF THE CASE

In December of 2007, C.W., then 14, told members of her family, including an aunt and grandmother, that her step-father, Mr. Stark had touched her inappropriately on numerous prior occasions. RP 256. C.W. told her mother "I think Brian touched me." RP 665. When her mother asked for more details, C.W. said she wasn't sure if she was dreaming or if it really happened. RP 666. According to her claim, the abuse began when she was six and last occurred shortly before the start of the 2006 school year. RP 41, 481. The family did not report the claimed abuse to the police.

About one year later, C.W. renewed her accusations, relaying them to a friend and the friend's mother in December 2008 and January 2009. RP 82-85. RP 82-85, 130-3. Again, neither her friend nor her friend's mother initially acted on C.W.'s claims. However four months later, they brought the information to a High School counselor who in turn relayed the information to police. RP 92, 156-60. The State charged Mr. Stark with one count of attempted first degree child molestation, one count of first degree child molestation, one count of incest, and one count of third degree child molestation. CP 1-5.

At trial C.W. testified that as a result of the counseling she had begun after the allegations were made to the police, she was better able to remember the events at the heart of her claims and things she did not previously remember she know does. RP 302. C.W. testified the first incident of abuse occurred when she was 6 and her family was living in a Renton apartment. RP 210-11. C.W. testified Mr. Stark told her to remove her underwear and spread her legs apart. RP 211. According to C.W. Mr. Stark "just looked." RP 213. Although C.W. testified that on that occasion Mr. Stark did not touch or attempt to touch her that incident nonetheless formed

the basis of the charge of attempted first degree child molestation in Count I. RP 878.

C.W. testified that the abuse continued after the family moved to Spanaway. RP 215-20. Because they occurred outside of King County, those claims were not the subject of the charges in this case. See CP 35.

C.W. testified that the abuse continued when her family purchased and moved into a home in Maple Valley. She described two incidences in particular. First, she alleged that on one occasion Mr. Stark had come into her bedroom removed her pants and engaged in oral sex. RP 231. She also claimed that one evening Mr. Stark took her into a neighboring house, which was still under construction, and put his hands in her pants. RP 241. These allegations were the basis of Counts II and III. CP 878-79.

Finally, C.W. claimed that one afternoon a few days prior to the start of school in 2007, she and Mr. Stark were watching a movie. RP 234. According to C.W., Mr. Stark pinned her to the couch, removed her pants and attempted to have intercourse with her. Id. C.W. testified that this was the last time Mr. Stark attempted to touch her. RP 247. This allegation formed the basis of Count IV. RP 879.

Mr. Stark testified that he had never touched C.W.
inappropriately. RP 781-84

A jury convicted Mr. Stark of all four counts. CP 22-25.

D. ARGUMENT

1. THE STATE DID NOT PROVE EACH
ELEMENT OF MR. STARK'S ATTEMPTED
FIRST DEGREE CHILD MOLESTATION
BEYOND A REASONABLE DOUBT.

a. The State was required to prove the elements of the offenses beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Count I alleged Mr. Stark committed attempted first degree child molestation. But the State's evidence failed to establish that offense.

b. The State did not prove Mr. Stark had the intent to touch C.W. for purposes of sexual gratification during the events forming the basis of Count I. To convict Mr. Stark of the offense the state was required to prove that on that occasion he had the intent to have sexual contact with C.W. and took a substantial step towards that end. CP 46. Specifically, RCW 9A. 28.020(1) provides "a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.44.083(1) defines the offense of child molestation in the first degree in pertinent part as "knowingly [having] 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."

C.W. testified that on one occasion when she was six she stayed home from school after telling her parents she was sick. C.W. testified that she went into her parents' bedroom to tell Mr. Stark she wanted breakfast and climbed into her parents' bed. According to C.W., Mr. Stark told her to remove her underwear and spread her legs apart. C.W. testified that Mr. Stark "just looked."

While the charging period for Count I spanned more than 16 months, CP 6, the State specifically elected the events that formed the basis of the charge. RP 878. The State pointed the jury to the “day when [C.W.] stayed home sick and he looked at her vagina.” RP 878.

There is no evidence that Mr. Stark had any intent or made any effort to have sexual contact with C.W. on that occasion. It was not as if C.W. testified that Mr. Stark was interrupted or otherwise prevented from moving further. Instead the evidence is simply that he did not, and there is nothing to indicate an intent to do more on that occasion than to “look.” The State’s evidence did not establish that Mr. Stark had the intent to have sexual contact with C.W. on that day.

c. The Court must reverse and dismiss Count I. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment’s Double Jeopardy Clause bars retrial of a case where the State fails to prove an element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109

S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove Mr. Stark had the intent to have sexual contact with C.W. the Court must reverse his conviction for Count I.

2. THE TRIAL COURT'S JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN OF PROVING THE ELEMENTS OF ATTEMPTED FIRST DEGREE CHILD MOLESTATION.

a. The state must prove and a jury must find each element of an offense beyond a reasonable doubt. The jury-trial guarantee of the Sixth Amendment and Article I, § 22 of the Washington Constitution, and the Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, section 3 of the Washington Constitution, require the State prove each element to a jury beyond a reasonable doubt. Winship, 397 U.S. at 364; Apprendi, 530 U.S. at 476-77; State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

b. The court failed to instruct the jury on the necessary elements of attempted first degree child molestation as charged in Count I. Where the State alleges a defendant has

committed an attempted crime the jury must find he formed the intent to commit the completed crime and took a substantial towards doing so. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (citing RCW 9A.28.020(1); State v. Chhom, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996)). To ensure the jury understands what it is required to find in addition to a “to convict” instruction setting forth the elements of attempt, a trial court must provide an instruction which delineates the elements of the completed crime. DeRyke, 149 Wn.2d at 911 (citing WPIC 100.02, Note on Use). The Note on use for WPIC 100.02 provides, “If the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime.” The only exception to this requirement is where the attempt is charged as an alternative or lesser offense to the completed offense, as in that case the jury will have already been instructed on the elements of the completed offense. Id.

Here, the jury was instructed on the elements of an attempt. CP 46. However, the jury was not instructed on the elements of first degree child molestation with respect to Count I. Thus, the State was relieved of its burden of proving each element of the offense.

The jury did receive an elements or “to convict” instruction for first degree child molestation with respect to Count III. CP 40 (Instruction 11). However, that instruction stated “To convict the defendant . . . as charged in Count III, each of the following must be proved beyond a reasonable doubt.” (Emphasis added.) CP 40. The jury is presumed to follow its instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Because it specifically limited its application to Count III, the fact that Instruction 11 listed the elements of the offense cannot cure the court’s failure to specifically delineate the elements for purposes of Count I. Moreover, a “jury is not required to search other instructions to see if an additional element should have been included in the instruction defining the crime.” State v. Aumick, 126 Wn.2d. 422, 431, 894 P.2d 1325 (1995). The Court erred in failing provide an instruction to the jury delineating the elements of first degree child molestation for Count I. That failure relieved the State of its burden of proving each element of the offense.

c. This Court must reverse Mr. Stark’s conviction for Count I. The Supreme Court has applied a harmless-error test to erroneous jury instructions. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119

S.Ct. 1827, 144 L.Ed.2d 35 (1999)). However, the Court held “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” Brown, 147 Wn.2d at 339 (citing State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997)). In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. Mills, 154 Wn.2d at 15 n.7, (citing Neder, 527 U.S. at 1; Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

The jury had no reason to know that it must apply the intent and substantial step elements of attempt, to the specific elements of first degree child molestation as charged in Count I. The failure to instruct to the jury on those elements requires automatic reversal. Smith, 131 Wn.2d at 265.

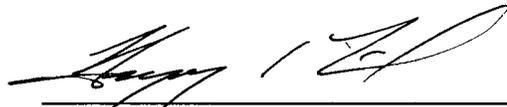
But even if this Court looks to the resulting prejudice, as set forth at length above, the State’s evidence supporting the charge was at best minimal if not actually insufficient. Nonetheless the jury convicted Mr. Stark of that offense. In light of that, the State cannot prove beyond a reasonable doubt that the absence of an instruction delineating the offense for Count I did not contribute to that verdict.

This Court must reverse Mr. Stark’s conviction on Count I.

E. CONCLUSION

For the reasons above this Court must reverse Mr. Stark's conviction of attempted first degree child molestation as charged in Count I.

Respectfully submitted this 24th day of October, 2011.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66766-1-I
v.)	
)	
BRIAN STARK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF OCTOBER, 2011, 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:

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<p>[X] BRIAN STARK 344634 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY</p> <hr/>

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STATE OF WASHINGTON
DIVISION ONE

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF OCTOBER, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710