IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of MANSOUR HEIDARI, Respondent.	))))))))	No. 85653-2 Filed April 19, 2012

ALEXANDER, J.[*]--We granted the State's motion to review a decision of the Court of Appeals in which that court granted Mansour Heidari's personal restraint petition and vacated his second degree child molestation conviction. In doing so, the Court of Appeals declined the State's request to direct entry of a judgment for the lesser included offense of attempted second degree child molestation. We affirm the Court of Appeals.

I

At a jury trial in King County Superior Court, Heidari was found guilty of first degree child rape, second degree child molestation, and third degree child molestation. The Court of Appeals thereafter affirmed the convictions in an unpublished opinion, *State v. Heidari*, noted at 125 Wn. App. 1009, 2005 WL 91696. This court denied review. *State v. Heidari*, 155 Wn.2d 1008, 122 P.3d 912 (2005). Heidari then filed a

[*]Justice Gerry L. Alexander is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

motion in the superior court for relief from the judgment and sentence under CrR 7.8. The superior court referred that motion to the Court of Appeals as a personal restraint petition. CrR 7.8(c)(2).

Heidari argued at the Court of Appeals that the evidence supporting his second degree child molestation conviction was insufficient as a matter of law because his victim had avoided sexual contact with Heidari. The record showed that Heidari's niece, B.Z., testified that when she was in the sixth grade she was playing with her aunt's makeup in Heidari's bedroom when Heidari emerged from the bathroom wearing only a robe.[1] The child said that Heidari sat on the edge of the bed and told her to "come over" here, pulling her leg toward him. *In re Pers. Restraint of Heidari*, 159 Wn. App. 601, 603, 248 P.3d 550 (2011). According to B.Z., Heidari removed his robe, exposing his penis. Heidari then put his hand on B.Z.'s head and tried to press her mouth onto his penis. B.Z. said that she managed to move her head to the side and then ran out of the bedroom. It was clear from her testimony that the child's mouth never touched Heidari's penis.

The State conceded that there was no evidence of "sexual contact"[2] but

[1]Heidari was married to B.Z.'s aunt.

[2]RCW 9A.44.086(1) provided, "A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, *sexual contact* with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." (Emphasis added.) "'Sexual contact'" is defined 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).

contended that the Court of Appeals should direct the superior court to enter a judgment on the lesser included offense of attempted second degree child molestation. As support for its contention, the State cited *State v. Garcia*, 146 Wn. App. 821, 830, 193 P.3d 181 (2008) ("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 proved at trial"). The Court of Appeals declined the State's request, concluding that it lacked the authority to direct the entry of a lesser included offense because the jury had not been instructed on that offense. *Heidari*, 159 Wn. App. at 616. Based on this conclusion, the Court of Appeals granted Heidari's personal restraint petition and vacated his second degree child molestation conviction. The State then filed a motion at this court for discretionary review. We granted the motion.

II

This case concerns the power of an appellate court under 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." We review the interpretation of a court rule de novo. *State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005).

III

The State asserts that the Court of Appeals erred in holding that it lacked the authority to direct the entry of judgment of the lesser included offense of attempted second degree child molestation because the jury was not instructed on that crime.

The Court of Appeals based its decision on our opinion in *State v. Green*, 94 Wn.2d 216, 234, 616 P.2d 628 (1980), where we said, "In general, a remand for simple resentencing on a 'lesser included offense' . . . is only permissible when the jury has been explicitly instructed thereon." On prior occasions, the Court of Appeals has not, however, adhered to our statement in *Green*. Indeed, in one case it dismissed the statement as "dictum, . . . unsupported by any citation to authority" and indicated that "the dispositive issue should *not* be whether the jury was instructed on the lesser included offense, but rather whether the jury necessarily found each element of the lesser included offense in reaching its verdict on the crime charged." *State v. Gilbert*, 68 Wn. App. 379, 384-85, 842 P.2d 1029 (1993) (footnote omitted). Consistent with that view, in *State v. Gamble*, 118 Wn. App. 332, 336, 72 P.3d 1139 (2003), *aff'd in part, rev'd in part on other grounds*, 154 Wn.2d 457, 114 P.3d 646 (2005), after vacating the defendant's felony murder conviction in accordance with *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), the court directed the entry of judgment of the lesser included offense of first degree manslaughter, notwithstanding the fact that the jury had not been instructed on that offense. *See also State v. Brown*, 50 Wn. App. 873, 878-79, 751 P.2d 331 (1988); *State v. Plakke*, 31 Wn. App. 262, 267, 639 P.2d 796 (1982), *overruled on other grounds by State v. Davis,* 35 Wn. App. 506, 667 P.2d 1117 (1983).

It should be noted first that this court did cite authority for our statement in *Green*, including many decisions of the Court of Appeals that preceded the Court of

Appeals' decision in *Gilbert*. But, even if we had not cited authority for our holding, the Court of Appeals is not relieved from the requirement to adhere to it. Furthermore, contrary to the assertion in *Gilbert*, the statement in *Green* that "remand for simple resentencing on a 'lesser included offense' is only permissible when the jury has been explicitly instructed thereon" was not dictum. We say that because it was one of two reasons given for the holding of this court. In *Green*, our court was reviewing a case in which a jury found the defendant guilty of aggravated first degree murder for the stabbing death of an eight-year-old girl. On review, we determined that there was insufficient evidence that the defendant had murdered the girl in the course of kidnapping her. Because the verdict form did not require the jury to find unanimously that the murder had occurred in the course of first degree kidnapping or first degree rape, we were unable to say that the alternative means of first degree rape had been established beyond a reasonable doubt and, therefore, reversed the defendant's conviction.

Relevant to the issue before us, we rejected the State's request in *Green* that we remand for sentence on the lesser included offense of first degree murder. In doing so, we stated the following:

> In the case at hand the jury was not instructed on the subject of a "lesser included offense." In general, a remand for simple resentencing on a "lesser included offense" is only permissible when the jury has been explicitly instructed thereon. *Based upon the giving of such an instruction* it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense.

Green, 94 Wn.2d at 234 (citing *State v. Jones*, 22 Wn. App. 447, 454, 591 P.2d 796 (1979); *State v. Martell*, 22 Wn. App. 415, 419, 591 P.2d 789 (1979); *State v. Liles*, 11 Wn. App. 166, 171-73, 521 P.2d 973 (1974); *People v. Codding*, 191 Colo. 168, 551 P.2d 192 (1976); *United States v. Thweatt*, 140 U.S. App. D.C. 120, 433 F.2d 1226, 1234 (1970); *Austin v. United States*, 127 U.S. App. D.C. 180, 382 F.2d 129, 142 (1967)). We went on to say, "In addition, it is clear a case may be remanded for resentencing on a 'lesser included offense' only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense." *Id.* at 234-35. We explained that there was "no such clear disclosure" in the record because it was "impossible to know whether the jury determined unanimously that the element of rape had been established beyond a reasonable doubt." *Id*. at 235. Since neither requirement was met, we held that we could not remand for resentencing on the lesser included offense. The fact that the issue might have been resolved on the basis of the second requirement alone does not mean that the first requirement was mere dictum. As the Court of Appeals recognized below, *Green* dictates the outcome of this appeal.

Moreover, we are unwilling to abandon the rule we adopted in *Green.* *Green* applies only to situations in which the prosecution pursued an "all or nothing" strategy. Thus, the State can easily avoid the force of *Green* by requesting a lesser included offense instruction at trial. On the other hand, jettisoning *Green* would be harmful to defendants because if jurors are not asked to decide the defendant's guilt or innocence on a lesser included offense, the defendant is denied the opportunity of defending

against such a charge and might forgo strategies, arguments, and the presentation of evidence relative to that charge.

Finally, even if we were inclined to overrule our decision in *Green*, it would still be improper to direct the entry of judgment of the lesser included offense of attempted second degree child molestation. That is so because the jury did *not* "necessarily [find] each element of the lesser included offense in reaching its verdict on the crime charged." *Gilbert*, 68 Wn. App. at 385. The crime of attempted second degree child molestation requires proof that the defendant acted "with intent." *See* RCW 9A.28.020(1). Second degree child molestation, however, is a strict liability offense. A person is guilty of that crime "when the person has . . . sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.086(1).

The State points out, however, that we have held that second degree child molestation *implicitly* requires proof of intent. In *State v. Stevens*, 158 Wn.2d 304, 306, 143 P.3d 817 (2006), we observed that "'[s]exual contact' is statutorily defined 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.'" *Id*. at 309 (emphasis added) (quoting former RCW 9A.44.010(2) (2005)). We reasoned, then, that "[i]n order to prove 'sexual contact,' the State must establish that the defendant acted with a purpose of sexual gratification. Thus, while sexual gratification is not an explicit element of

second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification." *Id.* at 309-10. Accordingly, we held that "[i]ntent is relevant to the crime of second degree child molestation because it is necessary to prove the element of sexual contact." *Id*. at 310.

The State equates the intent necessary to commit attempted second degree child molestation with the "purpose of sexual gratification" component of the "sexual contact" element. But proof of that very element was lacking. Here, the State concedes that there was no "sexual contact" because there was no "touching of the sexual or other intimate parts of a person." We are willing for the sake of argument to split the "sexual contact" element, retaining the "purpose of sexual gratification" component while eliminating the unproven component of "touching . . . the sexual or other intimate parts of a person." In that case, we can say that the jury necessarily found that Heidari acted with the "purpose of gratifying [his] sexual desire" with a person "who [was] at least twelve years old but less than fourteen years old and not married to the perpetrator." But for us to say that this is the same as taking a substantial step toward the commission of second degree child molestation with intent to commit that crime would be an improper invasion by this court of the jury's province. *See State v. Symes*, 17 Wash. 596, 599, 50 P. 487 (1897).

Conclusion

In sum, we reaffirm our decision in *Green* and hold that the Court of Appeals properly declined to direct the entry of judgment of the lesser included offense of

attempted second degree child molestation. The Court of Appeals is, therefore, affirmed.

AUTHOR:

Gerry L. Alexander, Justice Pro Tem

WE CONCUR:

Justice Charles W. Johnson

Justice Tom Chambers

Justice Charles K. Wiggins

Justice Susan Owens

Justice Mary E. Fairhurst