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DIVISION II

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STATE OF WASHINGTON
BY 
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No. 39568-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Terry Coxe,

Appellant.

Lewis County Superior Court Cause No. 08-1-00213-1

The Honorable Judges James Lawler and Richard Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Coxe's convictions infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.
2. The state failed to produce evidence that Mr. Coxe acted for purposes of sexual gratification.
3. Mr. Coxe was denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.
4. Defense counsel was ineffective by failing to object to the admission of Mr. Coxe's statements under the *corpus delicti* rule.
5. The trial court erred by failing to accept Mr. Coxe's waiver of his right to a jury trial.
6. The trial judge erred by considering irrelevant factors in rejecting Mr. Coxe's jury waiver.
7. The trial court erred by imposing an exceptional sentence of 134 months.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for first-degree child molestation requires proof of sexual gratification, which cannot be inferred from brief touching of the "intimate areas" of the body. Here, the prosecution failed to provide additional evidence of sexual gratification beyond brief touching of the stomach and buttocks. Did Mr. Coxe's conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. An accused person has a constitutional right to the effective assistance of counsel. Defense counsel failed to object to the admission of Mr. Coxe's statements under the *corpus delicti* rule. Was Mr. Coxe denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. With the court's consent, an accused person may waive the constitutional right to a jury trial, so long as the waiver is knowing, intelligent, and voluntary. Here, Mr. Coxe knowingly, intelligently, and voluntarily waived his right to a jury trial, and the state did not object to the waiver. Did the trial court abuse its discretion as a matter of law by considering irrelevant factors when rejecting Mr. Coxe's waiver?

4. An exceptional sentence may be reversed if it is "clearly excessive." Under the circumstances of this case, Mr. Coxe received an exceptional sentence that is clearly excessive. Must his sentence be vacated and the case remanded for a new sentencing hearing?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Terry Coxe lived with his wife Myrna in Glenoma. RP (3/18/09) 176-177. Myrna.Coxe's daughter, Eden Kelly, came to live with them when her marriage fell apart in 2006. RP (3/17/09) 80. Ms. Kelly did not work and received public assistance for the support of her three children. RP (3/17/09) 82. Ms. Kelly had an affair with Mr. Coxe. RP (9/30/08) 36, 67-69; RP (3/17/09) 9, 13.

In April and May of 2006, Kelly's daughter B. was in second grade and learning about good and bad touches at school. RP (9/30/08) 21; RP (3/17/09) 29-30, 34-35. On May 10, 2006, Ms. Kelly went to her daughter B.'s school counselor and told her that B. had been molested by Mr. Coxe. RP (3/17/09) 36-37. Sharon Hedlund, the counselor, summoned B. to her office and questioned her. RP (9/30/08) 11; RP (3/17/09) 37. According to Ms. Hedlund, B. said she was sitting on her grandfather's lap looking at pictures on the computer when he put his hand inside her clothes and touched her buttocks. RP (9/30/08) 12. B. said she told him to stop and he did. RP (9/30/08) 12. She also told Ms. Hedlund that it happened again, and that Mr. Coxe stopped again when she asked him to. RP (9/30/08) 12-13.

Mr. Coxe gave a statement to law enforcement, and denied any sexual touching. RP (9/30/08) 35; RP (3/17/09) 130, 138, 141; RP (3/18/09) 155, 156, 158. Mr. Coxe said that he had once rubbed B.'s bare stomach, but stopped because he realized it could be considered inappropriate. RP (3/17/09) 136. The officer told him that he thought Mr. Coxe had a sex addiction; Mr. Coxe responded that he's dealt with "it" his entire life. RP (9/30/08) 42-43; RP (3/17/09) 135-136. He also told the officer that B. was a smart kid and was not coachable, and said that maybe something had happened that he couldn't remember. RP (3/17/09) 136-137.

The state charged Mr. Coxe with two counts of Child Molestation in the First Degree, and later filed a Notice of Aggravating Factor alleging that Mr. Coxe used his position of trust or confidence to facilitate the commission of the offense.¹ CP 39-41; Notice of Aggravating Factor for Purposes of Imposing Exceptional Sentences, Supp. CP. Following a child hearsay hearing, the court admitted B.'s statements to Ms. Kelly and to Ms. Hedlund. RP (9/30/08) 80-87.

¹ The state also originally charged Mr. Coxe with two counts of Incest, but those counts were dismissed with prejudice before trial. RP (3/17/09) 4-5; CP 39-41.

Mr. Coxe twice sought to waive his right to a jury trial, but two separate judges denied his request. RP (1/6/09) 2-8; RP (3/9/09) 2-4; Waiver of Jury Trial, Supp. CP. At the first hearing, the defense attorney told the court that he had reviewed the decision with his client at length, that it was a well-founded strategic decision, and that evidentiary and legal challenges would be expected at trial. RP (1/6/09) 2-4. Judge Richard Brosey denied the request, noting that the rule left the decision to the court's discretion, and since credibility would be the main issue for trial, Mr. Coxe's case was more appropriate for a jury. RP (1/6/09) 6-8. Mr. Coxe raised the issue of a jury waiver again, and again, his request was denied. RP (3/9/09) 2-4.

At trial, the state presented evidence that Mr. Coxe had put his hand down the back of B.'s pants two or three times, and that he had stopped when she'd asked him to. RP (3/17/09) 39, 68, 72, 92, 95. It was undisputed that his hand did not move inside her clothing. RP (3/17/09) 40, 92, 96. Defense counsel did not raise a *corpus delicti* objection when the state introduced Mr. Coxe's statements to law enforcement. RP (3/17/09) 124-137.

Mr. Coxe moved to dismiss the charge after the state rested its case, arguing that there was no evidence that Mr. Coxe had acted for purposes of sexual gratification. RP (3/18/09) 170-175. The court denied

the motion, and outlined the evidence of sexual gratification as follows:

(1) Mr. Coxe's apparent assent to the officer's suggestion that he had a sex addiction, (2) Mr. Coxe's statement that he stopped rubbing B.'s stomach once because it might have been seen as inappropriate, and (3) his statement that something could have happened that he did not remember. RP (3/18/09) 174-175. After Mr. Coxe rested his case, he moved to dismiss once more, and the court again denied the motion. RP (3/18/09) 198-200.

The jury returned guilty verdicts, and found that Mr. Coxe abused his position of trust. Verdicts, Supp. CP. The court imposed an exceptional sentence of consecutive 67-month terms. CP 20-34; RP (7/14/09) 14. This timely appeal followed. CP 4-19.

ARGUMENT

I. MR. COXE'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, a

rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.² *DeVries*, at 849. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt*, *supra*.

In this case, the prosecution was required to prove that Mr. Coxe had sexual contact with B. Instructions Nos. 10-11, Court's Instructions to the Jury, Supp. CP. Sexual contact means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual

² Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the [reviewing] court to conclude that the allegations are 'highly probable.'" *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991), *citation omitted*.

desires of either party.” Court’s Instructions to the Jury, Instruction No. 9, Supp. CP. Sexual gratification may not be inferred from “touching of intimate parts of the body other than the primary erogenous areas;” in such cases, “courts have required some additional evidence of sexual gratification.” *State v. Powell*, 62 Wn.App. 914, 917-918, 816 P.2d 86 (1991).

Here, the prosecution’s evidence suggested that Mr. Coxe touched B.K. on her buttocks and on her stomach.³ RP (3/17/09) 40, 68, 96, 136. There was no additional evidence establishing that any touching was for the purpose of sexual gratification.⁴ In the absence of such evidence, Mr. Coxe’s convictions must be reversed and the case dismissed with prejudice. *Smalis, supra*.

³ As the Court made clear in *Powell*, these are “intimate” areas rather than sexual areas. *Powell*, at 917 n. 3.

⁴ Indeed, the only evidence the court could cite in denying Mr. Coxe’s motions to dismiss were Mr. Coxe’s own ambiguous statements that he had a sex addiction, and that he felt that rubbing B.K.’s stomach may have been inappropriate. RP (3/18/09) 174-175, 200.

II. IF THE EVIDENCE IS SUFFICIENT FOR CONVICTION, MR. COXE WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO OBJECT UNDER THE *CORPUS DELICTI* RULE.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that,

but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

The *corpus delicti*, or body of the crime, must be proved by evidence sufficient to establish a criminal act. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). Before an accused person’s statement may be admitted into evidence, the *corpus delicti* of the charged crime must be established by independent evidence. *Brockob*, at 328. The independent evidence must be consistent with guilt and inconsistent with a

hypothesis of innocence. *Brockob*, at 329. If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Brockob*, at 329-330.

Where the *corpus delicti* is not established by independent evidence, failure to object to admission of an accused person's statements constitutes ineffective assistance. *State v. C.D.W.*, 76 Wn. App. 761, 764-765, 887 P.2d 911 (1995). Under such circumstances, "the failure to raise the issue of the *corpus delicti* rule... cannot be characterized as a trial strategy;" instead, it is "simply an inexcusable omission on the part of defense counsel." *C.D.W.*, at 764. Furthermore, such deficient performance necessarily prejudices the defendant: in the absence of sufficient independent evidence, the defendant's statements are excluded and the defendant is acquitted. *C.D.W.*, at 764-765.

In this case, the independent evidence was insufficient to establish the *corpus delicti* of Child Molestation in the First Degree. Even when taken in a light most favorable to the state, the independent evidence only established that Mr. Coxe touched B.K. briefly on an intimate area. RP (3/17/09) 39, 68, 72, 92. Apart from his statements, nothing suggested that the touching was for purpose of sexual gratification.⁵ In fact, when

⁵ As argued elsewhere in this brief, these somewhat ambiguous statements should not be considered sufficient to establish sexual gratification.

Mr. Coxe moved to dismiss and later for a judgment of acquittal, the court denied his motions based on Mr. Coxe's own statements (about sex addiction and his feeling that touching B.K. on the stomach may have been inappropriate). RP (3/18/09) 174-175, 198-200.

Had defense counsel properly objected to the admission of Mr. Coxe's statements, the state would have been unable to proceed. Counsel's failure to properly object deprived Mr. Coxe of the effective assistance of counsel. Accordingly, his convictions must be reversed and his case remanded for a new trial. *C.D.W., supra*.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY REFUSING MR. COXE'S JURY TRIAL WAIVER.

As with any constitutional right, an accused person may waive the right to a jury trial.⁶ *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Under CrR 6.1(a), "Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court." The consent of the court is a matter for the trial court's discretion. *State v. Jones*, 70 Wn.2d 391, 494 P.2d 665 (1967).

⁶ There is no constitutional right to a bench trial. *Singer v. United States*, 380 U.S. 24, 36, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965); *State v. Oakley*, 117 Wn.App. 730, 72 P.3d 1114 (2003), review denied sub nom. *State v. Northeast District Court*, 151 Wn.2d 1007 (2004).

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). Furthermore,

Simply reciting “abuse of discretion” as a standard of review is not helpful. At some point, the judge makes a decision outside the range of acceptable discretionary choices and thereby abuses his or her discretion. The range of those discretionary choices is, therefore, a question of law. For example, on one end, the judge abuse his or her discretion when findings of fact supporting the discretionary decision are not supported by the evidence. And on the other end, the judge abuses his or her discretion if the discretionary decision is contrary to law.

State v. Williamson, 100 Wn.App. 248, 257, 996 P.2d 1097 (2000).

The trial court did not refuse Mr. Coxe’s waiver on the grounds that it was not knowing, intelligent, and voluntary. Nor was the refusal based on any equivocation by Mr. Coxe or objection from the state. Instead the court denied the request for a bench trial because the court was not comfortable with the responsibility of determining credibility and finding facts. This was an abuse of discretion: judges are called upon to determine credibility, find facts, and resolve difficult issues in many contexts. Indeed, such fact-finding is a core judicial function. By refusing

to allow waiver for this reason, the trial court abused its discretion as a matter of law. *Williamson, supra*.

Accordingly, Mr. Coxe's convictions must be reversed and his case remanded to the superior court, with instructions to allow a waiver if Mr. Coxe continues to desire one.

IV. MR. COXE'S 134-MONTH EXCEPTIONAL SENTENCE WAS CLEARLY EXCESSIVE UNDER THE CIRCUMSTANCES OF THIS CASE.

Under RCW 9.94A.585, a reviewing court may reverse a sentence outside the standard range if "the sentence imposed was clearly excessive." RCW 9.94A.585(4)(b). Mr. Coxe's 134-month sentence meets this requirement.

First, considering the range of acts that qualify as child-molestation, Mr. Coxe's offenses are at the less-serious end of the spectrum.⁷ Second, although Mr. Coxe was found to have abused a position of trust, there is nothing in the record suggesting that this abuse of trust was particularly egregious, warranting an 11+ year sentence for this conduct.⁸

⁷ This is not to minimize their wrongfulness, or the potential for impact on B.

⁸ This is not to suggest that abuse of trust is an improper aggravating factor.

Under the circumstances of this case, the length of the exceptional sentence was “clearly excessive.” Mr. Coxe’s sentence must be vacated and the case remanded for a new sentencing hearing. RCW 9.94A.585(4)(b).

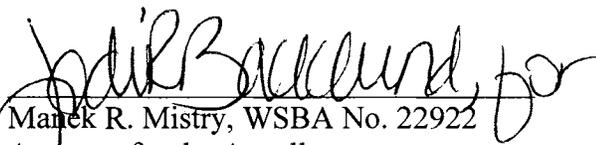
CONCLUSION

For the foregoing reasons, Mr. Coxe’s convictions must be reversed and the case dismissed with prejudice. If the charges are not dismissed, the case must be remanded to the superior court for a new trial.

In the alternative, Mr. Coxe’s sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on November 5, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 5, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 5, 2009.



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