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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 39568-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Terry Coxe,**

Appellant.

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

The Honorable Judges James Lawler and Richard Brosey

**Appellant's Reply Brief**

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## ARGUMENT

### I. **MR. COXE'S CONVICTIONS WERE BASED ON INSUFFICIENT EVIDENCE.**

#### A. Standard of Review

A claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn therefrom. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). Evidence is insufficient unless a rational trier of fact could find the essential elements beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

Proof beyond a reasonable doubt is more than mere substantial evidence (sufficient to persuade a fair-minded, rational person of the truth of the matter), and more than clear, cogent and convincing evidence (substantial enough to conclude that the allegations are highly probable). *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); *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991).

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).

B. The prosecution failed to prove that the touching was for the purpose of gratifying sexual desire.

A conviction for child molestation requires proof of sexual contact. RCW 9A.44.083. “Sexual contact” means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.” Court’s Instructions to the Jury, Instruction No. 9, CP 58.

Touching of intimate body parts is insufficient (by itself) to prove sexual gratification. Instead, the state must produce “some additional evidence of sexual gratification.” *State v. Powell*, 62 Wn.App. 914, 917-918, 816 P.2d 86 (1991). Cases involving an unrelated person with no caretaking responsibilities are the least problematic. *See Id.*, at 917. However, even under such circumstances, additional evidence is required when the touching is either through clothing or of intimate (but not sexual) areas. *Id.*, at 917-918. Respondent erroneously claims that *Powell* does not require additional evidence.<sup>1</sup> Brief of Respondent, pp. 3-4. This is incorrect. However, the additional evidence may be the accompanying circumstances, or the manner in which the touching occurs: if touching is

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<sup>1</sup> According to Respondent, additional evidence is required under *Powell* only if the touching is “equivocal.” Brief of Respondent, p. 4.

unequivocally sexual, the requirement is satisfied. *See Powell*, at 917 (outlining cases).

Mr. Coxe lived with B.K., her mother, and her grandmother. RP (3/17/09) 63-65. The prosecutor acknowledged that he was alone in the house with B.K. at times, and the court found that he was in a position of trust. RP (9/30/08) 79; RP (7/14/09) 14. Accordingly, he was not unrelated and had a caretaking role; thus, at least *some* corroboration is required that the touching was for purposes of sexual gratification. *Powell*. Furthermore, he touched her on the buttocks and on her bare stomach. RP (3/17/09) 40, 68, 96, 136. The state did not present additional evidence establishing sexual gratification.<sup>2</sup>

Respondent erroneously asserts that the circumstances and manner of the touching in this case provided the “additional evidence” required. Brief of Respondent, p. 7. The pertinent circumstances, according to Respondent, are that (1) Mr. Coxe “touched B. twice in close succession although she asked him to stop after the first time,”<sup>3</sup> and that Mr. Coxe

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<sup>2</sup> Respondent cites Mr. Coxe’s ambiguous statements as proof of sexual gratification. Brief of Respondent, pp. 8-9. If his statements provided the necessary proof, Mr. Coxe was denied the effective assistance of counsel, as argued below.

<sup>3</sup> Brief of Respondent, p. 7, citing RP (3/17/09) at 68-69. The cited pages do not support Respondent’s contention; instead, the mother later testified that B.K. had told her this had happened. RP (3/17/09) 92, 95.

“performed the substantially same [sic] touching under her clothes on another occasion.” Brief of Respondent, p. 7. Respondent’s point seems to be that the touching was not inadvertent. But intentional touching is not the sole requirement under the law; the touching must also be for purposes of sexual gratification.

Adults touch children for all sorts of nonsexual purposes: to express affection, to tickle or play, to provide comfort, etc. Mr. Coxe resided with B.K. for several months at the time she made her accusation, and had caretaking responsibilities. RP (3/17/09) 79-124. The record does not establish that he touched her for sexual purposes. In the absence of proof that the touching was for purpose of sexual gratification, Mr. Coxe’s convictions must be reversed and the case dismissed with prejudice. *Smalis, supra*.

## **II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.**

### **A. Standard of Review**

Claims of ineffective assistance are reviewed *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). To prevail, an appellant must show deficient performance and resulting prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption of adequate

performance is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Id.*, 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.”)

B. Counsel’s deficient performance prejudiced Mr. Coxe.

Respondent apparently concedes that counsel’s failure to object to the admission of Mr. Coxe’s statements constituted deficient performance. Brief of Respondent, pp. 9-13. *See, e.g., In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009) (Failure to argue an issue equates to an apparent concession). Accordingly, reversal is required upon a showing of prejudice. *Reichenbach, supra*.

Before an accused person’s statement may be admitted at trial, the *corpus delicti* of a crime must be proved by independent evidence sufficient to establish a criminal act. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). This independent evidence must establish guilt, and be inconsistent with any hypothesis of innocence. *Id.*,

at 329. In the absence of sufficient 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).

Here, independent evidence did not establish the *corpus delicti* of the charged crimes. When taken in a light most favorable to the state, the independent evidence established that Mr. Coxe touched B.K. on her buttocks, underneath her clothing. RP (3/17/09) 39, 68, 72, 92. Nothing—aside from Mr. Coxe's ambiguous statements—suggested that the touching was for purpose of sexual gratification. The court denied his motions to dismiss for insufficient evidence, citing these ambiguous statements. RP (3/18/09) 174-175, 198-200.

A proper and timely *corpus delicti* objection would have resulted in dismissal. Accordingly, counsel's failure to object denied Mr. Coxe his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *C.D.W.*, *supra*. The convictions must be reversed and the case remanded for a new trial. *Id.*

**III. MR. COXE SHOULD HAVE BEEN ALLOWED TO WAIVE HIS RIGHT TO A JURY TRIAL.**

**A. Standard of Review**

Denial of a jury trial waiver is reviewed for an abuse of discretion. *State v. Jones*, 70 Wn.2d 391, 494 P.2d 665 (1967). 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).

**B. The trial court erroneously refused to accept Mr. Coxe's jury trial waiver.**

Although there is no constitutional right to a bench trial, an accused person may waive the right to a jury trial. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *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). The trial court must exercise discretion in evaluating a waiver. *Jones, supra*. This does not mean that a denial may not be appealed; discretion must be properly

exercised. *Hudson, supra*. Respondent erroneously implies that a trial court may deny a jury waiver on any basis. This is incorrect. The abuse of discretion standard applies. *Id., supra*.

Here the trial court should have accepted the waiver. A trial court's discomfort with assessing credibility in a particular case should not be a basis for denying an unopposed request for a bench trial. Assessing credibility is a core judicial function; a judicial officer should be expected to undertake such determinations. Mr. Coxe's convictions must be reversed. His case must be 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.**

Mr. Coxe's 134-month sentence is "clearly excessive." RCW 9.94A.585. Although any act of child molestation is heinous, the state proved offenses that were less serious than most. Furthermore, Mr. Coxe's abuse of trust was not particularly egregious, and did not warrant a sentence exceeding eleven years. The sentence should be vacated and the case remanded for a new sentencing hearing. RCW 9.94A.585(4)(b).

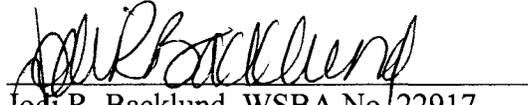
**CONCLUSION**

Mr. Coxe's convictions must be reversed and the case either dismissed with prejudice or remanded for a new trial. In the alternative, Mr. Coxe's sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on March 9, 2010.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

Terry Coxe, DOC #328971  
Washington Corrections Center  
P. O. Box 900  
Shelton, WA 98584

and to:

Lewis County Prosecuting Attorney  
MS:pro01  
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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 March 9, 2010.

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 March 9, 2010.

  
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