

No. 39568-1

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

Vs.

TERRY ALFRED COX,

Appellant.

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY  DEPUTY

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Appeal from the Superior Court of Washington for Lewis County

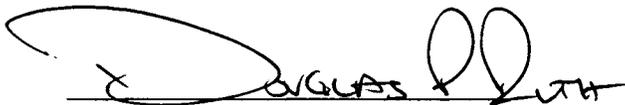
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**Respondent's Brief**

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## STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

## ARGUMENT

Mr. Coxe raises four issues on appeal. In his first, he claims that the evidence offered at trial was insufficient to permit a trier of fact to establish the elements of child molestation. This first argument is without merit. The record adequately substantiates the jury's verdict on the two counts.

### **I. The Evidence at Trial was sufficient to support the jury's verdict.**

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn from it. Salinas, 119 Wn.2d at 201, 829 P.2d 1068. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850(1990). The

reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Circumstantial evidence is given equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Evidence is not insufficient simply because it is "susceptible of innocent explanation." State v. Veliz, 76 Wn.App. 775, 779, 888 P.2d 189, 191 (1995). As further explained below, sufficient evidence was presented in this case to support both convictions.

Mr. Coxe specifically challenges the state's evidence establishing that he touched B. "for the purpose of gratifying sexual desires..." Instructions to the Jury, Supp. CP. Relying upon State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992), he claims that the state's evidence of his touching B. was insufficient to show he acted with this purpose. This argument, however, reads too much into the *Powell* holding and minimizes the state's other evidence.

In *Powell*, the defendant was convicted of one count of first degree child molestation based on the defendant touching the victim on two occasions. On the first, he hugged the ten-year-old

victim around the chest while she was seated in his lap. He also placed his hand on her "front" and on her underpanties, under her skirt, when he lifted her off of his lap. Powell, 62 Wn.App. at 916. On the second occasion, he touched both her thighs on the outside of her clothing while the victim was alone with him in his truck. Id.

In reversing the defendant's conviction, the *Powell* court found this evidence insufficient to support an inference that Powell touched the girl for purposes of sexual gratification. Powell, 62 Wn.App. at 918. The court noted that both incidents of touching were susceptible to an innocent explanation. Powell touched the victim while lifting her off his lap, the touching was fleeting, the victim did not remember how Powell touched her, the girl was clothed on each occasion, and the touches were only to the outside of the clothing. Powell, 62 Wn.App. at 917-18. Based on these facts, the court held that *Powell's* purpose in touching the girl was too equivocal to establish that it was done for sexual gratification. Powell, 62 Wn.App. at 917, 816 P.2d 86.

In making its holding, the *Powell* court observed that in cases where

"the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification."

Powell, 62 Wn.App. at 917. Yet, the holding of the case did not rest on which area *Powell* had touched, the victim's intimate or her primary erogenous areas. Rather, the court's holding rested on the court's conclusion that Powell's purpose was equivocal, in part, because the girl "was clothed on each occasion and the touch was on the outside of her clothes." Powell, 62 Wn.App. at 918.<sup>1</sup> Thus, the holding does not establish that the touching by a defendant of *an intimate area* is not sufficient, by itself, to create an inference that the defendant's purpose was for sexual gratification. See State v. Harstad, 218 P.3d 624, 629 (2009) (reading *Powell* as requiring "additional proof of sexual purpose when clothes cover the intimate part touched.").

In fact, other holdings have taken a broader view of the evidence necessary to establish proof that a defendant's purpose in touching a victim was sexual gratification. These holdings stem from the reason that proof of sexual gratification is required to prove commission of child molestation: to avoid punishing

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<sup>1</sup> Similarly, only one of the holdings that the *Powell* court cites as examples of cases involving "additional evidence of sexual gratification" regard a defendant touching an intimate, but not a primary erogenous, area. In the one case, *In re Adams*, 24 Wn.App. 517, 519-21, 601 P.2d 995 (1979), the court found that both the buttocks and the hips "are sufficiently intimate part of the anatomy that a person of common intelligence has fair notice that the nonconsensual touching of them is prohibited." *In re Adams*, 24 Wn. App. at 520.

inadvertent touching. State v. Gurrola, 69 Wn.App. 152, 157, 848 P.2d 199, *review denied*, 121 Wn.2d 1032 (1993). To determine if an act was made inadvertently or made to obtain sexual gratification, a trier of fact may infer sexual gratification from the nature and circumstances of the act itself. State v. T.E.H., 91 Wn.App. 908, 917, 960 P.2d 441, 446 (1998). "The nature of the act itself shows sexual gratification. The fact-finder ... is entitled to make reasonable inferences based on all the evidence and testimony presented." T.E.H., 91 Wn.App. at 916-917.

A defendant touches another for the purpose of sexual gratification "If the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching improper." Harstad, 218 P.3d at 628. See also, State v. Wilson, 56 Wn.App. 63, 68, 782 P.2d 224, 228 (1989) (even though defendant was related to victim, jury could consider circumstantial evidence surrounding the touching); State v. Price, 127 Wn.App. 193, 202, 110 P.3d 1171 (2005) (nature of touching – neither fleeting nor inadvertent – established basis for inference that the touching was for sexual gratification although it occurred outside victim's clothes).

In *Harstad*, this court looked at the nature of the defendant's touching to conclude that it occurred for a sexual purpose. In that case, the victim testified that the defendant placed his hand over her underwear, "right by her private place" and that he repeatedly rubbed near the spot. *Harstad*, 218 P.3d at 627. The victim drew on a body diagram that this spot was her upper inner thighs. *Harstad*, 218 P.3d at 628. A jury convicted *Harstad* of child molestation. On appeal, he argued that "the State did not prove the [victims'] upper inner thighs were intimate parts and that the State did not prove his touching was done for the purposes of sexual gratification." *Id.*

After examining the victim's description of the touching, this court quoted *In re Welfare of Adams*: "as with the buttocks, we believe that the hips are a sufficiently intimate part of the anatomy that a person of common intelligence has fair notice that the nonconsensual touching of them is prohibited..." *Harstad*, 218 P.3d at 629 (*quoting Adams*, 24 Wn.App. at 520.) Based on this precedent, this court found that a jury could have found that *Harstad* had acted with a sexual purpose. This court noted that the defendant's repeated rubbing of the victim's thigh supported the jury's conclusion. *Id.* But this court also found that, consistent with

*Adams and Powell*, Harstad's touching of the victim's bare thigh "in turn supports an inference of sexual purpose." *Id.* Because the touching was inside the victim's clothes, the very nature of touching the hips supported the jury's verdict.

Similarly here, the jury could infer that TC acted with a sexual purpose from the very nature and circumstances of his touching of B. The circumstances of the crime distinguish his act from those acts examined in *Powell*. Here, there is no evidence of an equivocal purpose. Mr. Coxe did not touch B. through clothing, and the touching was neither fleeting nor inadvertent. Mr. Coxe touched B. twice in close succession although she asked him to stop after the first time. 3/17/09 RP at 68-69. He also performed the substantially same touching under her clothes on another occasion. 3/17/09 RP at 41, 95. In both cases, B. felt "bad" about the touching and told him to stop, which is the response she had been taught at school to use in response to inappropriate touching. 3/17/09 RP 70-71, 95. In light of these facts, this touching was not "susceptible of innocent explanation." See *Powell*, 62 Wn.App. at 918. There is simply no reason for an adult to slide his hand inside the pants of a child and touch her bare bottom. There was no evidence that on either occasion, Mr. Coxe was even attempting to

lift B. up off his lap. In view of these facts, and in the absence of evidence of caretaking touching, the jury was entitled to draw an inference of sexual purpose from the character of Mr. Coxe's actions. State v. Tilton, 111 Wn.App. 423, 430, 45 P.3d 200 (2002), *vacated on other grounds*, 149 Wn.2d 775, 72 P.3d 735 (2003) (defendant's fondling of victim's penis and his persistence despite victim's attempts to stop him support an inference that the touching was done for sexual gratification.); Price, 127 Wn.App. at 202 (distinguishing *Powell* because the circumstances of Price's touching show it was neither fleeting nor inadvertent); State v. Whesehunt, 96 Wn.App. 18, 24, 980 P.2d 232 (1999) (defendant's action in reaching over a bus seat three times to touch the victim's vaginal area over her body suit was not open to innocent explanation).

Yet, Mr. Coxe's argument fails even if this court finds that the touching of the buttocks requires corroborating proof to establish that it was incidental to gaining sexual gratification. Ample, additional evidence supports the jury's finding that Mr. Coxe touched B. for this purpose. That evidence includes the deputy's testimony that Mr. Coxe acknowledged that he had a sexual addiction which he had been "struggling with all his life." 3/17/09

RP at 135-36. Also, the deputy's testimony that Mr. Coxe told him that "his mind could possibly be blocking the incident" and that the victim is "a very intelligent girl [and] is not prone to being coached..." *Id.* From this evidence, the jury could, independently, conclude that the purpose of Mr. Coxe's actions was to gain sexual gratification. Therefore, the evidence in the record, taken in the light most favorable to the state, is sufficient to support the jury's finding beyond a reasonable doubt.

## **II. Mr. Coxe Received Constitutionally Effective Representation From His Trial Counsel.**

Mr. Coxe's second claim is that his trial counsel was ineffective. He argues that his counsel's failure to raise a corpus delicti objection to the admission of his statements into evidence prejudiced him and placed the veracity of the trial's outcome in doubt. This argument, too, is without merit.

### **a. Standard of Review.**

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). The right

to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.*

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-pronged test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); *see also* State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 2d 858 (1996). An appellate court is not likely to find ineffective assistance on the basis of one alleged

mistake. State v. Carpenter, 52 Wn.App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. Indeed,

[w]hat decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless . . . for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9<sup>th</sup> Cir. 1995). In other words, the reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Specifically, legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. In re Personal Restraint of Hubert, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007) (citing State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)). Because deciding whether to object is an example of a strategic decision, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel

justifying reversal." State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (1989).

**b. Mr. Coxe's Claim Does Not Satisfy the Second Prong of the Strickland Holding.**

Whether the performance of Mr. Coxe's trial counsel was deficient, it did not prejudice his adjudication. Even if his counsel had objected to the admission of his statements on the basis of the corpus delicti doctrine, the trial court would not have excluded the statements. The statements were corroborated by other evidence.

The corpus delicti doctrine requires proof other than a defendant's statements that a crime was committed. State v. C.M.C., 110 Wn.App. 285, 288, 40 P.3d 690 (2002). This corroborating evidence, however, does not need to establish the elements of the crime beyond a reasonable doubt, or even by a preponderance of the evidence. C.M.C., 110 Wn.App. at 288-89. It is sufficient that the state produce evidence that "would support a logical and reasonable inference" that a crime was committed. State v. Aten, 130 Wn.2d 640, 658, 927 P.2d 210 (1996). In evaluating whether the state has met this burden, a court must look at the state's evidence in the light most favorable to the state. Id.

This evidence may be direct or circumstantial evidence. State v. Lung, 70 Wn.2d 365, 371, 423 P.2d 72 (1967).

As presented in the prior section, the state's evidence establishing the facts of Mr. Coxe's touching of B. on two occasions corroborates Mr. Coxe's statements. Mr. Coxe's actions on those occasions are proof that Mr. Coxe not only touched B. in intimate areas, but did so for the purpose of sexual gratification. Whether this evidence alone is sufficient to convince a trier of fact of Mr. Coxe's improper purpose beyond a reasonable doubt, the evidence is sufficient to support a logical inference that Mr. Coxe acted incidental to his sexual gratification. Mr. Coxe does not argue otherwise.

Based on this corroborating evidence, the state complied with the corpus delicti rule. Because any objection by Mr. Coxe based on this rule could not have succeeded, the failure of Mr. Coxe's counsel to make such an objection was harmless. Thus, his argument fails for want of any prejudice to him. His attorney's failure to object to the testimony was, in fact, reasonable since there was corroborating proof of Mr. Coxe's deviant purpose.<sup>2</sup>

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<sup>2</sup> Additionally, the corpus delicti rule may not apply to proof of sexual gratification. The rule requires the state to produce evidence in addition to an accused's statements sufficient to support a finding *that a crime was committed*. The question of whether a defendant has acted with the purpose of sexual

### **III. The Trial Court Did Not Abuse Its Discretion by Refusing to Grant Mr. Coxe's Jury Trial Waiver.**

Mr. Coxe argues that the trial court abused its discretion when it failed to grant his jury trial waiver and his request for a bench trial. This argument is not supported in the law.

Mr. Coxe cites authority for what it means for a judge to abuse his discretion, but cites neither statute nor precedent creating a right to a bench trial. In fact, there is none. State v. Oakley, 117 Wn.App. 730, 743-44, 72 P.3d 1114 (2003). Criminal trial procedure is not a buffet of procedures and processes that a defendant chooses from in order to fashion the manner of proceeding that will be most advantageous to him. A defendant has only those procedural rights that are constitutionally or statutorily created. Where no such right exists, a court is under no obligation to grant a defendant's wishes for how he wants the trial to proceed.

Here, Mr. Coxe was given the option to exercise his constitutional right to a jury trial. His decision to waive that right

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gratification is distinct from whether the state can establish that the crime of child molestation has been committed. As division one has observed, "While the mens rea is an essential element of the offense, it is separate and distinct from the initial question of whether the body of the crime has been established" State v. C.M.C., 110 Wn.App. 285, 289, 40 P.3d 690, 692 (2002)

does not create a companion right to any other manner of adjudication, unless he establishes that he cannot receive a fair trial. Oakley, 117 Wn.App. at 743-44. Absent that showing, he has no more right to a bench trial than he does to demand that the trial court use a specific oath, that his trial occur in a different venue, or that the trial occur on certain times of the day. Accordingly, it is no more of an abuse of the court's discretion to deny such requests as it is for him to deny a defendant's request for a bench trial.

Thus, the trial court did not abuse its discretion in denying Mr. Coxe's request for a bench trial. A defendant bears the burden of showing both an abuse of discretion by the trial court - that is, its decision was "clearly untenable or manifestly unreasonable" - and that the defendant was prejudiced by having his case heard by a jury. State v. Rupe, 108 Wn.2d 734, 754, 743 P.2d 210, 222 (1987). Mr. Coxe has done neither.

The trial court's decision to, in effect, require a jury trial is not clearly untenable or manifestly unreasonable. As the trial judge expressed, the criminal subject matter of a case can be of such a sensitive nature that a judge can reasonably conclude that a jury of twelve of the defendant's peers is better able to determine guilt.

Certainly, this decision is not an abuse of discretion just because a defendant feels otherwise.

Moreover, Mr. Coxe has failed to establish that he was prejudiced by the decision. He appears to argue that the trial court's decision here was presumptively invalid, but provides no reason that this is so. In the end, Mr. Coxe received his constitutionally mandated right to a trial by jury. Consequently, there is no basis for granting Mr. Coxe relief. As the Supreme Court concluded in State v. Maloney: "There being no showing whatsoever that appellant was prejudiced in any manner in having his cause heard before a jury, nor any indication that the trial court manifestly and untenably abused its discretion in denying his request for a nonjury trial," the appellant's argument that the trial court committed reversible error fails. *Maloney*, 78 Wn.2d 922, 481 P.2d 1, 5 (1971).

#### **IV. Mr. Coxe Received a Reasonable Sentence.**

In conclusion, Mr. Coxe claims that his sentence was clearly excessive under RCW 9.94A.585(4)(b). A sentencing court abuses its discretion in imposing an exceptional sentence if the length of the sentence is "so long that, in light of the record, it shocks the

conscience." State v. Halsey, 140 Wn.App. 313, 324, 165 P.3d 409, 415 (2007). The sentence imposed on Mr. Coxe does not meet this standard.

The trial court imposed the exceptional sentence based upon the "abuse of trust" aggravating factor. The facts of this case exhibit an egregious example of this factor. The defendant was the functional grandfather to the victim and was often a caretaker of her. In addition, the defendant testified that he recognized that he had a sex addiction, yet took no action to address that condition. Further, at the time of sentencing, he had still not taken responsibility for the crime.

The court imposed the low end of the sentence range for each count (67 to 89 months), but imposed the sentences for the two counts consecutively. The total sentence imposed was 134 months (67 months for each count), or roughly fifty percent higher than the top length of the standard range for the crime. This length does not shock the conscience. See State v. Bedker, 74 Wn.App. 87, 102, 871 P.2d 673, 681 (1994).

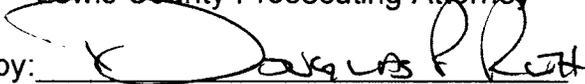
CONCLUSION

For the foregoing reasons, this court should affirm Mr. Coxe's conviction.

RESPECTFULLY submitted this 10 day of February 2010.

MICHAEL GOLDEN  
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by:



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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
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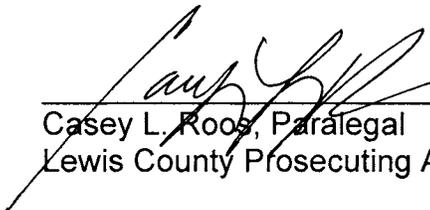
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DEPUTY

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 10, 2010, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund, Esq.  
Manek R. Mistry, Esq.  
203 Fourth Ave E Suite 404  
Olympia WA 98501

DATED this 10<sup>th</sup> day of February 2010, at Chehalis, Washington.

  
\_\_\_\_\_  
Casey L. Roos, Paralegal  
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