

NO. 45207-3-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GERALD MILLER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR

Before the Honorable F. Mark McCauley Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Admission of Gerald Miller's extrajudicial statements concerning "sexual contact" was improper without first establishing the *corpus delicti* of the offense of first degree child molestation.

2. The conviction infringed upon Mr. Miller's Fourteenth amendment right to due process because the evidence was insufficient to prove the elements of the offense.

3. The State failed to produce evidence that Mr. Miller acted for purposes of sexual gratification.

4. Defense counsel was ineffective when he failed to object to the admission of extrajudicial statements under the *corpus delicti* rule.

5. The State failed to prove the aggravating factor of abuse of a position of trust to commit first degree child molestation. (Finding of Fact 3(a), Clerk's Papers at 83.)

6. The State failed to prove the aggravating factor of particular vulnerability to commit first degree child molestation. (Finding of Fact 3(b), CP at 83.)

7. The trial court erred by imposing an exceptional sentence upward on Mr. Miller's minimum of term of incarceration for first degree

child molestation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the State present evidence of the required element of “sexual gratification,” other than Mr. Miller's extrajudicial admissions, to support the conviction for first degree child molestation? Assignments of Error 1, 2, and 3.

2. Did the State establish, beyond a reasonable doubt, each and every element of the offense of first degree child molestation? Assignments of Error 1, 2, and 3.

3. An accused person has a constitutional right to the effective assistance of counsel. Did defense counsel's failure to object to the testimony concerning Mr. Miller's extrajudicial admissions constitute ineffective assistance? Assignment of Error 4.

4. Did the State fail to prove the aggravating factor of Abuse of Trust where the record does not show that Mr. Miller used his position as the victim's father to facilitate the commission of the crime? Assignments of Error 5 and 7.

5. Did the State fail to prove the aggravating factor of “particular vulnerability” where the victim was four years, nine months old

at the time of the offense and the statute pertaining to child molestation in the first degree already contemplates that the victim must be less than twelve years old, and where the record is silent as to the child's level of communication and ability to alert others of abuse? Assignments of Error 6 and 7.

C. STATEMENT OF THE CASE

1. Procedural facts:

The Grays Harbor County Prosecutor charged Gerald Miller with one count of first degree child molestation, contrary to RCW 9A.44.083. Clerk's Papers (CP) at 1-2. In an amended information filed May 30, 2013, the State alleged that the victim, G.M., was particularly vulnerable and that Mr. Miller abused a position of trust in order to facilitate the commission of the molestation. CP at 15-16. RCW 9.94A.535(3)(b), (n).

a. CrR 3.5 hearing

Detective Darrin Wallace of the Cowlitz County Sheriffs Department went to Mr. Miller's workplace in Tumwater, Washington on March 6, 2013, after receiving a report that Mr. Miller had sexually molested his daughter, G.M., on February 19, 2013. 2Report of Proceedings at 4.¹

¹The record of proceedings consists of three volumes:
1RP—May 15, 2013, hearing;
2RP—May 30, 2013 , CrR 3.5 hearing; and

Detective Wallace met with Mr. Miller in an office at the shipping company where Mr. Miller worked. 2RP at 4. Mr. Miller asked whether he needed to have a lawyer. 2RP at 7. Detective Wallace told him that he was not under arrest and that he would not be arrested that day. 2RP at 7.

He told Mr. Miller that his wife had accused him of molesting their daughter, which is why she had left the household with their children approximately two weeks earlier. 2RP at 7-8. Mr. Miller stated that he thought he was under arrest and not free to leave, and denied any sexual abuse of either of his daughters. 2RP at 32, 33. He stated that he asked for an attorney and was told by the detective that he did not need one. 2RP at 34. Although neither of Mr. Miller's daughters had made a disclosure of sexual abuse, Detective Wallace told Mr. Miller that he had interviewed them and both had disclosed to him that he had molested them. 2RP at 8. Det. Wallace stated that he eventually said that he had inappropriately touched the girls. 2RP at 8.

Detective Wallace wrote a statement regarding Mr. Miller's statement, which he signed. 2RP at 10. Mr. Miller stated that he did not read the statement and that he assumed that the detective was writing down

3RP—June 4, 2013, jury trial, and July 15, 2013, sentencing hearing.

what he told him, which was a denial of the accusation. 2RP at 37, 38. Detective Wallace described the contact with Mr. Miller as “non confrontational.” 2RP at 10.

Mr. Miller was arrested on March 20, 2013 and was questioned by Detective Wallace on March 21 after being advised of his *Miranda* rights.

Mr. Miller requested suppression of any statements he made to law enforcement on March 6, 2013. Mr. Miller's statements were ruled admissible. 2RP at 64-65; CP at 68-69. The court entered findings and conclusions made pursuant to the CrR 3.5 hearing on July 15, 2013. CP at 65-69.

Jury trial in the matter took place June 4, 2013, the Honorable F. Mark McCauley presiding. 3RP at 3-109.

Neither exceptions nor objections to the jury instructions were taken by counsel for the defense 3RP at 52.

c. Verdict and sentence

The jury returned a guilty verdict to the charge of first degree child molestation. CP at 38. The jury found that Mr. Miller abused a position of trust and that the child was particularly vulnerable. CP at 39. The appellant faced a minimum standard range of 51-78 months and a maximum

term of life in prison. The court imposed an exceptional sentence of 180 months to life based on the jury's finding of aggravating factors. 3RP at 122; CP at 70-85.

The court entered the following findings regarding the exceptional sentence:

The jury unanimously found beyond a reasonable doubt that the defendant committed Child Molestation in the First Degree with the following aggravating factors:

- (a) The defendant used his position of trust to facilitate the commission of the offense charged in count 1.
- (b) The defendant knew, or should have known, that the victim was particularly vulnerable or incapable of resistance.

CP at 83.

Timely notice of appeal was filed July 22, 2013. CP at 86-87. This appeal follows.

2. Testimony at trial:

Gerald Miller was watching television in his living room with his wife Regina Miller at their house located in Oakville, Grays Harbor County, Washington on February 19, 2013. 3RP at 21. They were married in 2000 and have two children, L.M. and G.M.² 3RP at 20. L.M. was born

²L.M.'s and G.M.'s full names appear in the transcript, but their initials are used in this brief to protect their privacy.

December 6, 2006, and G.M. was born May 20, 2008. 3RP at 20. Mr. Miller was in a reclining chair and G.M. was sitting on his lap. 3RP at 22. Ms. Miller was sitting on a couch in the living room and L.M. was in a second recliner next to Mr. Miller. 3RP at 22. Ms. Miller testified that while her husband was tickling G.M. she heard laughing and turned her attention from the television and “saw that he had a hold of her leg and his fingertips were up in her vagina area like—going like this at the same time he was tickling her.” 3RP at 23. She stated:

Q: So when you say going like this, it—his hand was moving, is that—

A: Yes, his fingers were moving.

Q: And that was the hand that was in her vaginal area?

A: Yes, his right hand.

Q: And what was he doing with his left hand?

A: He was holding her.

3RP at 23.

Ms. Miller testified that this lasted for one or two seconds. 3RP at 29. She stated that G.M. was wearing pants and a shirt and that Mr. Miller’s hand was over her clothing. 3RP at 23. When asked if it was possible that Mr. Miller was tickling the tops of G.M.’s legs, Ms. Miller stated: “No. He was in her crotch.” 3RP at 23.

Ms. Miller testified that she told G.M. to get down from the reclining chair and to get ready for bed. 3RP at 24. She said that she did not say

anything to her husband because she was “too afraid of what he would do.” 3RP at 23, 24. She waited two days before contacting law enforcement. 3RP at 24. She stated that she waited until her husband got paid so that she would have some money in order to leave the house. 3RP at 24. After leaving the house, the children had an examination at the sexual assault center. 3RP at 25.

Ms. Miller and the children were interviewed by Detective Wallace on February 25, 2013. 3RP at 33, 34. He interviewed Mr. Miller on March 6, 2013. 3RP at 34. This took place at Par Four Transport in Tumwater, where Mr. Miller was employed as a shipping dispatcher. 3RP at 34, 35. Although neither child made an allegation of sexual contact when Detective Wallace talked to them, he told Mr. Miller that “they disclosed that sexual molestation occurred.” 3RP at 36. Det. Wallace testified that Mr. Miller “finally admitted that he did touch his children inappropriately.” 3RP at 37. He stated that Mr. Miller said that they did not need to be medically examined because “he only touched them,” and that this took place over their clothing. 3RP at 37. Detective Wallace stated that Mr. Miller said this took place approximately three times with each of the girls. 3RP at 38. Detective Wallace wrote a statement regarding the abuse, and stated that he

read the statement to Mr. Miller, and that he then signed it. 3RP at 40-41. Exhibit 2.

Gerald Miller testified as the only defense witness. 3RP at 54-70. Mr. Miller stated that on February 19, 2012, G.M. was sitting on his knee and that he was tickling her on her knees, under her arms, and on her neck. 3RP at 56. The rest of the family was also in the living room and L.M. was in a reclining chair next to him. 3RP at 56. He denied touching G.M. on her vagina, either intentionally or inadvertently. 3RP at 56. He denied touching or tickling G.M. above her knee. 3RP at 57. He denied tickling her for sexual gratification, stating that he was just playing with G.M. 3RP at 58. He stated that he told Detective Wallace that he did not touch his children inappropriately and that he would never do anything like that. 3RP at 60. Mr. Miller stated that Detective Wallace wrote out a statement, but that he did not read it to Mr. Miller and that he did not read it himself. 3RP at 61. He stated that he assumed that Detective Wallace was writing down what he had told him, which was that he did not molest or inappropriately touch either child. 3RP at 64.

Kevin Voss testified that he was in the Grays Harbor County Jail with Mr. Miller. 3RP at 80. He stated that Mr. Miller told him that his youngest

daughter would sit in his lap and that he would get an erection and that he would tickle her between her legs. 3RP at 80. Mr. Miller denied that he made the statement to Mr. Voss, and testified that he told Mr. Voss that he was accused of molesting G.M., and that the only contact he had with her was to tickle her on her knees, arms, and neck. 3RP at 85.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. MILLER OF FIRST DEGREE CHILD MOLESTATION, AND HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO OBJECT UNDER THE *CORPUS DELICTI* RULE.

a. The State failed to establish the *corpus delicti* for admission of Mr. Miller's statements

Mr. Miller submits that the State failed to independently establish the elements required to prove "sexual molestation" as defined in RCW 9A.44.083.

The only evidence introduced at trial concerning the required element of "sexual gratification" were statements made by Mr. Miller to Detective Wallace and allegedly made to Jail Inmate Voss. 3RP 40-41, 80-81. The State did not independently establish the *corpus delicti* of the offense of first degree child molestation prior to seeking admission of the extrajudicial

statements.

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.

[C]onfessions or admissions of a person charged with a crime are not sufficient, standing alone, to prove the corpus delicti and must be corroborated by other evidence.

State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). The Legislature has codified a version of the *corpus delicti* rule in cases where the alleged victim is dead or incompetent to testify. RCW 10.58.035. The statute provides in part:

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the

defendant.

RCW 10.58.035(1).

Under this standard, the evidence "must independently *corroborate*, or confirm, a defendant's incriminating statement." *Brockob*, 159 Wn.2d at 328-29 (emphasis in original).

In this case, the prosecution was required to prove that Mr. Miller had sexual contact with G.M. RCW 9A.44.083 states in relevant part:

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, 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.

RCW 9A.44.010(2) defines "sexual contact" 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."

The State's evidence suggested that Mr. Miller touched G.M. over her clothing on her vagina while tickling her. 3RP at 23. The State had Ms. Miller testify. She did not describe any act of sexual gratification; she testified that while the family was watching television after dinner, G.M. was sitting in her husband's lap and he was tickling her. 3RP at

22. She stated that his fingertips of his right hand “were up in [G.M.’s] vagina area like—going like this at the same time he was tickling her” over her clothing. 3RP at 23. She did not testify that he had an erection or otherwise appeared to be touching G.M. for sexual gratification.

The other evidence was a statement by him to Detective Wallace that he “inappropriately” touched G.M. Exhibit 2. Detective Wallace’s written statement, signed by Mr. Miller, stated: “I believe I have touched [L.M. and G.M.] inappropriately three times each. I only touched their vaginas through their clothes and there was never skin to skin contact. I never inserted anything into their vaginas and no medical exam is needed for the two girls. I knew what I was doing was wrong.” 3RP at 40. Ex. 2.

Jail Inmate Voss testified, without defense objection, that Mr. Miller told him that L.M. would sit in his lap and that he would get an erection and that he would tickle her between her legs. 3RP at 80.

The word “inappropriate” does not establish any surrounding circumstances to help a jury determine whether a touch is for purposes of sexual gratification. Moreover, the term “inappropriate” is not contained in the definition of either first degree child molestation or sexual contact. There was no additional evidence establishing that any touching was for the purpose of

sexual gratification or that it was anything other than inadvertent contact while tickling her. In the absence of such evidence, Mr. Miller's conviction must be reversed and the case dismissed with prejudice. If there is insufficient evidence to prove an element, reversal is required and retrial is unequivocally prohibited. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

b. Ineffective assistance of counsel

Defense counsel failed to object to the use of Mr. Miller's extrajudicial admission under the *corpus delicti* rule. The failure to object on this basis constitutes ineffective assistance of counsel.

An individual charged with a crime has the constitutional right to counsel. U.S. Const. amends. 6, 14; Wash. Const. art. 1, § 22. 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. Counsel provides a critical role in ensuring a defendant receives due process of law and that the adversarial process is fair. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel necessarily includes the right to effective assistance of counsel. *Strickland*, 466 U.S. at 685-86; *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978), rev. denied, 90 Wn.2d 1006 (1978).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under *Strickland*, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226.

In reviewing the first prong, courts presume counsel's representation was effective. *Strickland*, 466 U.S. at 689; *Thomas*, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial."

Strickland, 466 U.S. at 687. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Strickland*, 466 U.S. at 698; *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). While the appellate courts presume that defense counsel was not deficient, the presumption is rebutted if there is no possible tactical explanation for counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

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. *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 Ms. Miller saw Mr. Miller touching G.M. briefly---one or two seconds as stated by Ms. Miller---on an intimate area while he was tickling her while the family was watching television. 3RP at 23, 28-29. This Court should conclude that the admission of Mr. Miller's statements was prejudicial. Apart from his statements, nothing suggested that the touching was for purpose of sexual gratification. Had defense counsel properly objected to the admission of Mr. Miller's statements on that basis, the State would have been unable to proceed. Counsel's failure to properly object deprived Mr. Miller of the effective assistance of counsel.

This Court should conclude that the failure of trial counsel to object to admission of the statements was prejudicial. Mr. Miller's conviction should be reversed and the case remanded for a new trial, unless the Court agrees the evidence as to *corpus delicti* was insufficient, as argued in Section 1(a), *supra*.

2. **THE STATE FAILED TO PROVE THE AGGRAVATING FACTORS OF PARTICULAR VULNERABILITY AND ABUSE OF TRUST WHICH WERE USED TO IMPOSE MILLER'S EXCEPTIONAL MINIMUM SENTENCE.**

- a. **Mr. Miller's actions constituted nothing more than the elements of the crime charged and cannot support an exceptional sentence.**

There were no facts by which the trial court could find that Mr.

Miller abused a position of trust to facilitate the molestation of G.M., or that she was particularly vulnerable. Mr. Miller submits that the trial court erred in relying on abuse of trust and particular vulnerability as valid factors justifying an exceptional sentence.

The trial court may impose an exceptional sentence if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Aggravating factors must be determined by a jury under the Sixth Amendment. RCW 9.94A.537; *State v. Borboa*, 157 Wn.2d 108, 118, 135 P.3d 469 (2006), citing, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

A special verdict finding the existence of an aggravating circumstance is reviewed under the sufficiency of the evidence standard. *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144 (2011). The reviewing Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Chanthabouly*, 164 Wn. App. 104, 142-43;

The reviewing Court will reverse an exceptional sentence only if (1) the record does not support the sentencing court's reasons, (2) the

reasons do not justify an exceptional sentence for this offense, or (3) the sentence was 'clearly excessive. RCW 9.94A.585(4).

i Abuse of trust

There were no facts by which the trial court could find that Mr. Miller abused a position of trust to facilitate the commission of the offense. As there were no supporting facts, the trial court erred in relying on abuse of trust as a valid factor justifying an exceptional sentence. The special verdict that the offense constituted an abuse of trust is based solely on the fact that Mr. Miller is G.M.'s biological father.

Abuse of trust is a statutorily authorized aggravating factor. RCW 9.94A.535(3)(n). Case law involving abuse of a position of trust as a basis for an exceptional sentence indicates that this aggravating factor was intended to address situations where a person is dependent on a caregiver either partially or totally, *and that caregiver uses his unique position to facilitate abuse*. In *State v. Grewe*, 117 Wn.2d 211, 220, 813 P.2d 1238 (1991), the Supreme Court held that not every crime committed by a parent against a child involves an abuse of trust. "Washington law is clear that before an abuse of trust can be used as an aggravating factor, the evidence must indicate that the position of trust was used to facilitate the crime." *State v.*

P.B.T., 67 Wn. App. 292, 303, 834 P.2d 1051 (1992) (citing *State v. Stevens*, 58 Wn. App. 478, 500, 794P2d 38, review denied, 115Wn2d 1025 (1990)). "Mere opportunity created by a person's position is not enough from which to conclude that the position of trust facilitated the commission of the crime."

P.B.T., 67 Wn. App. at 304 (citing *State v. Stuhr*, 58 Wn. App. 600, 663, 794 P.2d 1297 (1990), review denied, 116 Wn.2d 1005 (1991)). See also, *State v. Serrano*, 95 Wn. App. 700, 713- 714, 977 P.2d 47 (1999).

In *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673 (1994), a case involving statutory rape and rape of a child, the court held that "[w]hen analyzing abuse of trust, the focus is on the defendant. The inquiry is whether the defendant was in a position of trust, and further whether this position of trust was used to facilitate the commission of the offense."

Here, the record contains no indication that Mr. Miller used his role as G.M.'s father to *facilitate* the crime; the record merely shows that the family was watching television in the living room and that G.M. was sitting in her father's lap while he tickled her. His relationship merely gave him proximity and opportunity to commit the crime. Absent any evidence that Mr. Miller affirmatively acted to facilitate the crime based on a position of trust, the mere fact that of a father-daughter relationship or the fact that this

relationship gave him the opportunity to commit the crime cannot support the special verdict.

The record does not support a finding of abuse of trust and Mr. Miller's sentence should be reversed and remanded for imposition of a standard range sentence.

ii. Particular vulnerability

To prove particular vulnerability the state must prove that: (1) "the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime"). *Gordon*, 172 Wn.2d at 679-80; quoting, *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

To support the aggravating factor, the State must produce evidence other than that contemplated by the statute. "As a general rule, use of the victim's age to justify an exceptional sentence when age constitutes an element of the crime is not warranted because age is already factored into the sentencing guidelines." *State v. Garibay*, 67 Wn.App. 773, 778, 841 P. 2d 49 (1992), (abrogated on other grounds, in *State v. Moen*, 129 W.2d 535, 919 P.2d 69 (1996)), citing *State v. Wood*, 42 Wn.App. 78, 80, 709 P.2d 1209 (1985), review denied, 105 Wn.2d 1010 (1986). The victim's age may only be used to justify an exceptional sentence where the victim's extreme

youth "in fact distinguishes the victim significantly from other victims of the same crime,". *Garibay*, 67 Wn.App. at 779. Child molestation in the first degree, contemplates the age of the victim:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, 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.

RCW 9A.44.083(1) (emphasis added).

Case law indicates that victims as young as 5 and a half can be particularly vulnerable because of extreme youth, *State v. Fisher*, 108 Wn.2d 419, 424, 739 P.2d 683 (1987), but the courts have held that a 7-year-old victim of indecent liberties is not vulnerable in this way. *State v. Woody*, 48 Wn.App. 772, 777, 742 P.2d 133 (1987), review denied, 110 Wn.2d 1006 (1988). On the other hand, a toddler or infant, who is incapable of communicating and is completely dependent on adults is both extremely young and vulnerable. *State v. Berube*, 150 Wn.2d 498, 79 P.3d 1144 (2003). The facts in the present case are in a twilight area where the child is no longer an infant or toddler but not yet ready to start grade school. G.M. was four years, nine months old at the time of the offense. At first her age appears to veer toward that of vulnerability. However, the record is silent as

to her verbal ability, her relationship with her mother or older sibling, or any other circumstances that would shed light on vulnerability that would differentiate her from other children of a similar age. The record does not support a finding of vulnerability that is more pronounced than that of others of her age.

b. Remand for Reversal of Exceptional Sentence.

When an exceptional sentence "is based upon reasons insufficient to justify an exceptional sentence .. the matter must be remanded for resentencing within the standard range." *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). On the other hand, if the trial court states that any single aggravating factor found is sufficient to support the exceptional sentence, then remand for resentencing is unnecessary. *State v. Jackson*, 150 Wn2d 251, 276, 76 P.3d 217 (2003).

In this case, the trial court did not express an intent to impose an exceptional sentence for any one of the aggravating factors should one be found invalid on appeal. Therefore, if this Court finds one aggravating factor to be invalid, remand is necessary to vacate the exceptional sentence. *Jackson*, 150 Wn2d at 276;

F. CONCLUSION

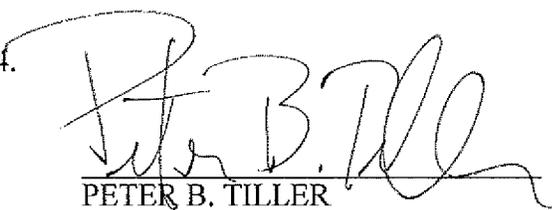
The State failed to prove the *corpus delicti* of the crime of first degree child molestation. In addition, trial counsel's failure to object to the testimony concerning Mr. Miller's extrajudicial admissions to Detective Wallace and Jail Inmate Voss on the basis of the *corpus delicti* rule constituted ineffective assistance of counsel. There was no other evidence of sexual gratification, which is a required element of "sexual contact." RCW 9A.44.010(2), 9A.44.083

Mr. Miller requests that his conviction be reversed and the charge dismissed. Dismissal is required in cases in which the evidence is insufficient. *See: State v. Rodgers*, 146 Wn.2d 55, 60, 43 P.3d 1 (2002). In the alternative, Mr. Miller's conviction should be reversed and the case remanded for a new trial due to ineffective assistance of counsel, unless the Court agrees the evidence as to *corpus delicti* was insufficient.

The exceptional minimum range sentence should be reversed because G.M. was not particularly vulnerable and because the appellant did not abuse a position of trust to facilitate commission of the crime,

///

Washington on April 25, 2014.



PETER B. TILLER

RCW 9A.44.010

Definitions.

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

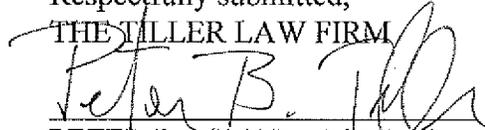
(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

(3) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for

DATED: April 25, 2014.

Respectfully submitted,

THE TILLER LAW FIRM



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Of Attorneys for Gerald Miller

CERTIFICATE OF SERVICE

The undersigned certifies that on April 25, 2014 that this Opening Brief was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia,

dissolution of his or her marriage.

(4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

(8) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(9) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or benefit of a minor; or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(10) "Person with a developmental disability," for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1)(c) or (e) and 9A.44.100(1)(c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically dependent persons at the facility.

(12) "Person with a mental disorder" for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a "mental disorder" as defined in RCW 71.05.020.

(13) "Person with a chemical dependency" for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is "chemically dependent" as defined in RCW 70.96A.020(4).

(14) "Health care provider" for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

(15) "Treatment" for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide.

(16) "Frail elder or vulnerable adult" means a person sixty years of age

or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a perso

RCW 9A.44.083

Child molestation in the first degree.

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, 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.

(2) Child molestation in the first degree is a class A felony.

TILLER LAW OFFICE

April 25, 2014 - 4:47 PM

Transmittal Letter

Document Uploaded: 452073-Appellant's Brief.pdf

Case Name: State v. Gerald Miller

Court of Appeals Case Number: 45207-3

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Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Shirleen K Long - Email: slong@tillerlaw.com