

NO. 49434-5

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ELBER LOPEZ HERNANDEZ, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable G. Helen Whitener

No. 15-1-03599-3

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. In light of the sufficiency of the evidence standards, was sufficient evidence admitted of separate and distinct acts of sexual contact between the victim and the defendant for each charged count?

B. STATEMENT OF THE CASE.

1. *Procedural History.*

On September 9, 2015, Appellant Elber Lopez Hernandez (the “defendant”) was charged with one count of first degree rape of a child and three counts of first degree child molestation. CP 3-5. On June 6, 2016, during the trial the prosecution amended the information to conform to the evidence. CP 50-51. The defendant was thus charged with first degree child molestation in place of the rape count. *Id.* The other three molestation counts were unchanged. *Id.*

The defendant’s trial included six days of testimony. CP 119-21. The state called thirteen witnesses and the defendant two, including the defendant. *Id.* At the close of the evidence, the jury was instructed concerning a separate crime charged in each count and further about the need for unanimity as to “one particular act” being necessary for conviction for each count. CP 59-78, Instruction No.s 10 and 11. After

closing arguments on June 22, 2016, the jury deliberated. 10 RP 984<sup>1</sup>, et. seq. The defendant was convicted as charged of four counts of first degree child molestation. CP 55-58. He was sentenced to a standard range sentence and filed a timely notice of appeal. CP 93, 96-97, 109-110.

2. *Statement of Facts.*

The sexual abuse in this case came to light after the then eleven year old victim disclosed to her mother via text messages. On June 27, 2015, the victim's mother, Maria Farias received a number of disturbing text messages from her daughter, victim D.R., while D.R. was in California visiting her father. 8RP 682, 685. In the messages D.R. revealed that she had been sexually touched by the defendant. 8RP 687, 5RP 432.

D.R. testified at trial about having been intermittently touched by the defendant from the age of four until the disclosure to her mother at age eleven. 5RP 402-420. She provided details of several incidents. She testified that the first time it happened was when she was about four or five years old and living in California. 5RP 402. The defendant was fixing a car in the garage and put her against the car and touched her. *Id.* He told her not to tell anyone. 5RP 402, 438. Thereafter the sexual touching

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<sup>1</sup> The verbatim reports from the trial are contained in volumes separately numbered from two through eleven but without a volume seven. All of the volumes are consecutively paginated. The testimony on Thursday, June 16, 2016, was split into two volumes, one designated volume six and the other (the afternoon session) designated simply with the date. References in this brief will include the volume and page number, or in the case of the June 16, 2016, afternoon session, the date.

continued until she was about eleven years old. 5RP 403.

D.R. testified about other times defendant touched her private parts. The touching was usually with his hand both under and over her clothing. 5RP 405-407. She gave specifics of this digital/vaginal contact and testified that he touched her with his hands on her private part, the part of the body used to go pee, both over her clothes and under her clothes. 5RP 405-406. She detailed that, “he would usually do this he would pick me up from school and he would bring me to his house, and then he would do it either when his son was in the shower . . .” 5RP 407. D.R. also testified that the defendant would do this on his bed and described where his bed was—in the bedroom next to the kitchen. 5RP 407-408. She further detailed that when the defendant would touch her under her clothes, he would take her clothes halfway off to her knees. 5RP 409. Defendant would take her pants and pull them down. 5RP 410. Defendant would stop when his son was done with the shower. 5RP 410. When asked how many times the defendant touched her with his hand under her clothes, D.R. stated it was more than two times. 5RP 406.

D.R. also testified that defendant used his penis to touch her private part with her clothes off. 5RP 417-418. She detailed that this happened on his bed in his bedroom. 5RP 418. She stated the defendant took her clothes off and his clothes were off when he touched her private part with his private part. 5RP 419-420. She recalled this happening one time when she was about nine years old. 5RP 420.

D.R. also testified that defendant made her touch him on his private part. 5RP 442-443. This was when she was about eight or nine years old. *Id.* She could not remember exactly where she was or what part of her body he made her touch him with. 5RP 443. She was pretty sure that happened in the state of Washington. *Id.*

D.R.'s testimony was corroborated by testimony from the adults to whom she disclosed. They included her mother, her father, two step-mothers and a medical provider, forensic child interviewer. 8 RP 686-89, 698-99 731; 6/16/2016 RP 535, et. seq., 584-88, 608-14; and 5 RP 348-49, 354-57. This testimony included references to text messages which were the victim's first means of disclosure. 5 RP 428, et. seq., 8 RP 685, et. seq., 731, et. seq. The victim disclosed the on-going sexual abuse from the safety of being two states away from the defendant to her mother via texting. *Id.*

C. ARGUMENT.

1. WHERE THE VICTIM DESCRIBED PENILE VAGINAL CONTACT, PENILE DIGITAL CONTACT, A FIRST AND LAST INCIDENT, AND CONTACT BOTH UNDER AND OVER THE CLOTHING, SUFFICIENT EVIDENCE OF SEPARATE AND DISTINCT INCIDENTS OF SEXUAL CONTACT WAS INTRODUCED.

The standard for sufficiency of the evidence is well-established. "In a challenge to the sufficiency of the evidence, we must examine the record to determine whether any rational finder of fact could have found

that the State proved each element beyond a reasonable doubt.” *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152, 1156 (2016), citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In an examination of the record, an appellate court is required to view “the evidence in the light most favorable to the State” and thereafter determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Rempel*, 114 Wn.2d 77, 82–83, 785 P.2d 1134 (1990), citing *State v. Green, supra*, and *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). See also *State v. Theroff*, 95 Wn.2d 385, 388, 622 P.2d 1240, 1243 (1980) and *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Ultimately, the standard prescribes that if two or more rational fact finders might differ, the conviction should be affirmed because it is only when no rational trier of fact could have convicted that a claim of insufficiency should be sustained. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

The sufficiency standard also requires that a court apply several presumptions concerning the evidence. First, the defendant “admits the truth of the State's evidence” and all reasonable inferences that can be drawn from it. *State v. Williamson*, 131 Wn. App. 1, 5-6, 86 P.3d 1221 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Second, because a reviewing court may not “determine witness credibility, reweigh the evidence, or supplant [its] judgment for that of the jury,” conflicts in the evidence and the weight to be given the evidence are

to be resolved in the State's favor and consistent with the jury's verdict. *State v. McCreven*, 170 Wn. App. 444, 480, 284 P.3d 793 (2012). See also *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), *State v. Liden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007), and *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Finally, in determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. *State v. Williamson*, 131 Wn. App. at 5-6, and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In sex abuse cases application of the sufficiency standards is complicated by requirements of jury unanimity. “In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed.” *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *overruled on other grounds* by *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

Where “multiple identical counts are alleged to have occurred within the same charging period, the trial court must instruct the jury ‘that they are to find separate and distinct acts for each count.’ ” *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007) (internal quotations omitted), citing *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) and quoting *State v. Noltie*, 116 Wn.2d 831, 846, 809 P.2d 190 (1991).

In this case the jury was properly instructed as to the need for a unanimous verdict. CP 59-78, Instruction No.s 10 and 11. In particular the jury was instructed that, “To convict the defendant on any count of child molestation in the first degree, one particular act of child molestation in the first degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.” CP 59-78, Instruction 11. The jury was also properly instructed as to the elements of each count of child molestation. CP 59-78, Instruction No.s 4-7. And, finally it was properly instructed as to the definition of the key term, sexual contact. CP 59-78, Instruction No. 9. Since the defendant has not assigned error to these instructions, it follows that the issue here is whether, in light of the sufficiency standards, a rational jury could have applied these instructions to the evidence and thereby found the defendant guilty of four separate charges.

This case was about sexual abuse of a child by a non-caretaker adult male. In evaluating sufficiency of the evidence in such cases it is important to bear in mind that proof “that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification although we require additional proof of sexual purpose when clothes cover the intimate part touched.” *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624, 628–29 (2009), quoting *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992).

Furthermore, the “statute defining ‘sexual contact’ makes no distinction between the victim's intimate parts being touched by the accused or the accused's intimate parts being touched by the victim. The touching may be made through clothing and without direct contact between the accused and the victim.” *State v. Jackson*, 145 Wn. App. 814, 819, 824, 187 P.3d 321, 323 (2008). Where the alleged sexual contact is through the clothing or of areas other than primary erogenous zones, particularly where the alleged sexual contact “was ‘fleeting’ and ‘susceptible of innocent explanation’ ”, courts have required additional evidence of sexual gratification. *State v. Price*, 127 Wn. App. 193, 201–02, 110 P.3d 1171, 1175–76 (2005), *aff'd*, 158 Wn.2d 630, 146 P.3d 1183 (2006), quoting *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992).

In this case, evidence of sexual touching and that it was not for a benign purpose was plentiful. In the first place, the defendant denied the touching and thus did not rely on a claim that it was innocent. 10 RP 919-21, 948. Secondly, the defendant threatened to kill the victim, a threat that she took so seriously that her first concern when she made her first disclosure via text message from two states away, was that the defendant would harm her family. 5RP 423. In addition, the defendant denied showing the victim videos of naked girls but acknowledge that it would have been inappropriate to do so. 10 RP 950. *See* 5 RP 438. Combined, these facts support the jury’s determination of sexual contact because there

was little dispute that the touching incidents were for a guilty purpose not an innocent purpose, that is for the sexual gratification of an adult, non-caretaker male. *State v. Price*, 127 Wn. App. at 201–02. The only real question was whether they happened or not.

It would come as no surprise to any trial lawyer or judge who has presided over a child sex abuse case that the victim testified with difficulty. She was twelve and in seventh grade when she took the stand and was thus at an age when she would have known embarrassment and probably shame concerning the things done to her. 5 RP 389. Her credibility was bolstered by age-appropriate behavior while testifying; she unconsciously put her hair over her face as if to hide her embarrassment when the male prosecutor questioned her about the details of the penile vaginal sexual abuse. 5 RP 418. Despite her discomfort, as a result of the prosecutor’s perseverance, she was able to relate specific incidents as to her age, where she was living and the different forms of contact. *See* 5 RP 404-25.

The totality of the time period for the abuse corresponded to the victim’s ages four to eleven. 5 RP 401-04, 468. Her date of birth was April 14, 2004, making her eleven when she disclosed in the summer of 2015 and when the abuse was stopped. 5 RP 389. The timing of her April birthday was just two months before she disclosed. *Id.* Since the last incident occurred at age eleven it had to have occurred just before the California trip, the jury could have rationally found that the last incident of

sexual touching was a separate and distinct act from the others and therefore sufficient for the last count. *State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996) (Sufficient evidence of a separate and distinct act where the victim testified about the “last time” the abuse occurred). Viewed in the light most favorable to the state, there thus needed to be separate and distinct evidence of three other acts.

The defendant does not dispute sufficiency as to the penile vaginal contact related to Count One. Opening Brief, p.8. Furthermore, as to the remaining two counts, he does not contest the time period alleged for them, he merely asserts that the victim “did not provide distinguishing facts” that support separate counts. *Id.* at p.9. This is not correct. The victim was able to distinguish by her age the last incident and was also able to distinguish several other specific incidents and specific types of sexual contact.

In addition to the last count, the victim described three other distinct acts either by incident or by the type of sexual touching. As to the types of sexual touching the victim described four different forms of touching. Most commonly the defendant would touch her with his hand and both over and under her clothing: “Sometimes it was over and sometimes it was under.” 5 RP 406. This description supports an inference by the jury that sometimes the defendant was more intrusive; sometimes he made contact with her skin whereas at other times he would make indirect contact through her clothing. Both are sufficient to support

a molestation charge. *State v. Price*, 127 Wn. App. at 201–02.

In addition to describing separate acts of over the clothing and under the clothing hand to pubic area touching, the victim also described other types of touching in detail. These were even more distinctly different. In one she testified that “um, one time when I was nine, and I can't remember much, but I think like -- I can't remember, but I think it was, like, more than that.” 5 RP 404. She went on after the lunch break to give the details of what must have been extraordinarily traumatic penile vaginal contact without penetration. 5 RP 417-20. That incident took place when she was nine and corresponds to the charging period in Count One. 5 RP 20. CP 59-78, Instruction No. 4.

The victim also described having been made to touch the defendant’s penis. 5 RP 440-42. Although she was less descriptive, and although such touching would have been less traumatic, it nevertheless was an additional incident of sexual contact. The victim described a lengthy period of abuse, she was able to separate out distinct types of sexual contact during the charging period, with the last taking place when she was eleven and before her disclosure.

The penile vaginal contact and the touching of the defendant’s penis were described as distinct incidents as well as distinct types of sexual touching. It should also be noted that the victim described her first sexual touching in similar detail. The first was an incident outside the charging period that happened in a garage in California where she was

pushed up against a car. 5 RP 402-03. After that incident however ,she said that the incidents continued when she moved to Washington until she was eleven, which was in 2015. 5 RP 403.

In this case, the victim was over the age of ten when she disclosed. Thus, child hearsay was not admitted and the direct evidence of the separate and distinct acts of sexual contact came from her testimony. But her direct testimony was supported by circumstantial evidence, including the circumstances of her disclosures to the adults in her life.

The victim's testimony about the last incident at age eleven was close in time to when she disclosed. 5 RP 401-04, 468. She only turned eleven two months before the California trip. 5 RP 389. Her eventual disclosures however were consistent with age-appropriate delayed disclosure of sexual abuse. The forensic interviewer, Patricia Mahalu-Stephens, explained that "delayed disclosure, um, has a lot to do with a child's ability to feel safe in their statements, or what we consider reluctance to disclose. So reluctance to disclose could be that they don't feel like they're going to be believed. It could be that they've been threatened. It could be that there is a positive reinforcement for the abuse. And what I mean by that is that maybe somebody's doing something that they like, and that will end if they --if they disclose." 5 RP 348-49.

In this case, the delayed disclosure was attributable to one particular fact that corroborated both the victim's credibility and provided evidence of the defendant's improper motive; the defendant threatened to

kill her if she told anyone. 5 RP 356-57, 423. It was extremely probative that she disclosed first when she was two states away from the defendant in the care of her father and therefore beyond the defendant's reach.

Corroborating testimony from the adults in the eleven year old victim's life included (1) the circumstances of her first disclosure to her mother, Maria Farias, and her mother's wife, Corrina Love, via text messages from the safety of two states away [5 RP 428, et. seq., 8 RP 685, et. seq., 731, et. seq.], (2) the circumstances of subsequent disclosures to the two women [8 RP 686-89, 698-99, 731.], (3) the circumstances of her disclosure to her father, Jaime Delgado, and his wife, Adrianna Barba [6/16/2016 RP 535, et. seq., 584-88, 608-14.], and (4) finally her disclosure to Patricia Mahaulu-Stephens, a witness with over ten years' experience and over 900 forensic interviews to her credit [5 RP 348-49, 354-57.]. Although the content of the hearsay disclosures was not introduced, neither was any contradictory evidence from the disclosures offered to impeach her in-court testimony. In fact, the defense asked the victim directly about her disclosure to Ms. Mahaulu-Stephens and the police and accepted her answers. 5 RP 461.

The defense argument that there was specific evidence of only one type of contact is not well taken. There were in fact four. Two involved the defendant touching the victim with his hand either under or over her clothing on separate occasions, one involved contact between his penis and her vagina, and one involved her having digital contact with his penis.

None of these types of contacts were described as happening all in one event. Instead, the victim described, as best as a seventh grader could, the various types of things the defendant had done to her during approximately seven years of intermittent abuse.

Intermittent sexual abuse over a lengthy period of time is the kind of activity that is inevitably described using terms such as “usually”. While the defendant finds fault with the victim’s use of this term, it should come as no surprise that a child would use the term “usually” to describe intermittent abuse such as happened in this case. The victim used it to describe how the defendant would take advantage of regular after school opportunities to assault her: “Um, he would usually do this -- he would pick me up from school and he would bring me to his house, and then he would do it either when his son was in the shower...(pause.)” 5 RP 407. Such opportunities presented themselves on “more than one occasion” because the defendant’s wife was working and not in the home. *Id.* The defendant’s argument about sufficient evidence surely is not bolstered by the victim’s ability to relate how it was that she came to be alone with the defendant on a regular basis and when he would “usually” assault her.

The defendant does not dispute sufficiency as to the penile vaginal contact alleged as Count One. Opening Brief, p.8. As to the remaining three counts, he also does not contest the time period alleged for them, he merely asserts that the victim “did not provide distinguishing facts” that support separate counts. *Id.* at p.9. This is not correct. As was shown

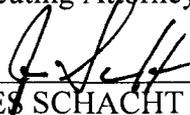
above, the victim described four separate types of contact occurring on separate and distinct occasions and not including the last incident when she was eleven just before her first disclosure. Her testimony is sufficient to sustain all four counts of molestation. The defendant's convictions should be affirmed.

D. CONCLUSION.

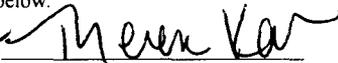
For the foregoing reasons the state respectfully requests that the defendant's convictions and sentence be affirmed as to all four counts. Insofar as the issue of appellate costs is concerned, the state is unlikely to submit a cost bill if it is the prevailing party. The state is confident that if it were to do so this court's commissioner or clerk would appropriately determine whether the defendant has "the current or likely future ability to pay such costs" and award appellate costs accordingly. RAP 14.2.

DATED: Monday, May 22, 2017

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Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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**Appellate Court Case Title:** State of Washington, Respondent v. Elber Lopez Hernandez, Appellant  
**Superior Court Case Number:** 15-1-03599-3

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