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

STATE OF WASHINGTON, RESPONDENT

v.

JIMMY WOODBEE PIERCE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson

No. 15-1-00480-0

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**Brief of Respondent**

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

1. Did the trial court abuse its discretion when it found the two child victims competent, where the defense did not challenge competency, and where the court nevertheless evaluated competency utilizing the five factor test from *State v. Allen*<sup>1</sup>?
2. Did the trial court abuse its discretion when it admitted child hearsay from each of the victims, where its findings are verities on appeal because they are supported by substantial evidence, and where each of the *State v. Ryan*<sup>2</sup> factors supported reliability?
3. Did the trial court abuse its discretion in its juror misconduct ruling, where it questioned the juror about having dozed off, found her response to be credible, and where the juror reported that she closed her eyes for the sake of concentration?
4. Was sufficient evidence introduced to prove the elements of the two crimes of conviction, where

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<sup>1</sup> 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

<sup>2</sup> 103 Wn.2d 165, 175–76, 691 P.2d 197(1984).

each of the child victims testified about the defendant having had sexual contact with them, and where their testimony was supported by other family members and child sexual abuse professionals?

B. STATEMENT OF THE CASE.

1. PROCEDURAL HISTORY.

On February 5, 2015, Appellant Jimmy Woodbee Pierce (the “defendant”) was charged with four counts of first degree child molestation. CP 1-5. Count One alleged a single incident of sexual contact involving victim P.P. when she was eight years old and in daycare at an in-home daycare operated by the defendant’s wife. *Id.* The other three counts involved victim J.F. who was seven years old the time of the abuse and also a daycare attendee. *Id.* Since the victims were under the age of ten both at the time of the incidents and when they were forensically interviewed, the state gave notice that it would seek admission of child hearsay. CP 190, 191.

The case proceeded to trial on August 8, 2016. 1 RP 3<sup>3</sup>. Before jury selection the trial court conducted a four-day, combined child hearsay and child competency hearing. After considering testimony from each of the children, their parents and supporting adults, the trial court gave an oral ruling that each of the children was competent to testify. 2a RP 291-93, 3 RP 421-25. The defendant did not challenge competency. *Id.* The trial court also orally ruled that the child hearsay statements were admissible. 6 RP 567. The court also entered written findings and conclusions as to the child hearsay ruling and an order concerning competency. CP 96-102.

At trial the state called P.P. and J.F. as its primary witnesses. Their testimony was supported by testimony from their parents, from a great aunt, and from two professionals, a forensic child interviewer, and a sexual assault nurse practitioner. CP 197. The defense called the defendant's wife and several parents of other children who had attended the daycare. *Id.* The defendant also testified in his own defense. *Id.*

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<sup>3</sup> The verbatim reports from the trial and pre-trial motion proceedings are contained in nineteen consecutively paginated volumes. The volumes however are not consecutively numbered because a substitute court reporter reported several sessions. Citations in this brief will therefore include the volume and page number but several volume references will be changed for clarity. Those references are as follows: (1) the August 9, 2016 afternoon session will be cited as volume 2A, and (2) The August 10<sup>th</sup> afternoon session will be cited as volume 3A. Furthermore it should be noted that there is no volume 8, and there appear to be two volumes that correspond with volume 15 and that include pages 1537-1693. Those volumes will be cited as volume 15 even though one of them was numbered 7.

Testimony was completed on August 31, 2017. Thereafter, the same day the jury was instructed as to all four counts. CP 115-141, Instructions Nos. 8, 14-16. The jury was also instructed as to a lesser included attempt offense for Count One. *Id.*, Instruction No. 13. The parties gave their closing arguments and on September 6<sup>th</sup> the jury returned guilty verdicts for one count of attempted first degree child molestation as to Count One, and one count of first degree child molestation as to Count Two, plus an aggravating circumstance for Count Two for abuse of trust. CP 107, 109, and 110. The defendant was acquitted of the charges in Counts Three and Four.

## 2. STATEMENT OF FACTS.

During 2013 and 2014 the defendant's wife operated an in home day care in Gig Harbor. 14 RP 1438-39. The daycare, known as Little Bear, was located primarily in the lower level of the defendant's home. 10 RP 892. 14 RP 1468-71. Both of the victims attended the daycare until the summer of 2014. 9 RP 615, 678-79. 11 RP 1076.

Victim P.P. was removed from the daycare before her first disclosure of sexual abuse for several reasons unrelated to sexual abuse. These included (1) that her parents were dissatisfied with the care, and (2) that the defendant believed that P.P.'s father had an affair with the defendant's wife. 9 RP 742-46. Victim J.F. was removed from the

daycare approximately three months later, after a camping trip where P.P. first disclosed sexual abuse. 11 RP 1076-80. J.F. disclosed sexual abuse separately to her great aunt.

At trial the two victims testified in some detail as to the sexual contact. P.P. testified that the defendant had carried her to an upstairs room, threw her on a couch, walked his fingers up her leg like a spider and touched her vagina with two fingers. 9 RP 629-37. When asked if she dreamt the incident, she replied that she had not, saying, “He did it for real.” 9 RP 635.

J.F. also testified saying, “So sometimes he would try bribing me to touch my private part.” 11 RP 1007. She went on to say that the touching was on her “vagina,” the place “where I go pee,” and “under” her clothing on “the skin” and that his fingers “were rubbing.” 11 RP 1008-10. She was challenged as to whether she was “guessing,” but she said guessing is only for “math or reading when you can’t – when you don’t know a word and then you guess what it is.” 1031. She expressly stated that if she did not know the answer to a question it was better to “say I don’t know.” 11 RP 1033. Thereafter she admitted that she was able to remember the particulars of only one particular incident that happened in the defendant’s camper. 11 RP 1042, 1044.

Besides the two victims the state's witnesses included their parents and J.F.'s great aunt, Debra Profitt. Ms. Profitt and her husband were friends with the two victims' families and were present on the camping trip when P.P. first disclosed. 10 RP 911-16. She was also related to several of the witnesses and the defendant in that she was a great aunt to J.F., J.F.'s mother was her niece, and she was also the defendant's wife's sister. 10 RP 889-93.

The camping trip took place in August 2014. 9 RP 697. P.P.'s disclosure came up unexpectedly while her mother and Ms. Profitt were engaged in an unrelated conversation about the defendant's health. 9 RP 699-706. P.P. told her mother in Ms. Profitt's presence that the defendant had carried her out of the daycare to an upstairs room. This was upsetting to the adults but at first she did not say anything about sexual contact. Later when P.P.'s mother was asked if the defendant had touched her, "She put her head down, and I think she said, 'No.'" 9 RP 706. Still, later, in private P.P.'s mother asked her daughter again whether the defendant had touched her, hoping that she would say no. 9 RP 706. At that time, "She said, 'Yes.' And I said, 'Where?' And she said, 'My pee-pee,' and pointed." *Id.*

Ms. Profitt also testified about the disclosure. It occurred when she and P.P.'s mother were discussing that the defendant had been in the

hospital. 10 RP 902. P.P. inserted herself into the conversation by saying, "Jimmy took me upstairs and gave me candy." *Id.* Ms. Profitt also explained the significance of that statement and the reaction that the two women had to it: (1) the upstairs was not part of the daycare [*Id.*]; (2) that when they asked about what part of the upstairs, P.P. curled into a fetal position [10 RP 903-04]; (3) that she became distant and would not answer questions about what she meant [*Id.*]; (4) that P.P. wouldn't answer when asked if the defendant touched her [10 RP 905-07]; and (5) that acting playful with the daycare kids was out of character for the defendant [10 RP 906.]. Later she heard the details of the disclosure from P.P.'s father, who had talked privately with his daughter. 10 RP 919.

The father also testified about the same events. After hearing from P.P.'s mother that P.P. had disclosed inappropriate touching by the defendant, the father talked privately with his daughter. 10 RP 836-38. First he calmed her down and reassured her about her mother having been upset. 10 RP 839. Then he testified:

A. I -- I -- I asked her, you know, what was going on. I told her that, you know, her mom, you know, you know how she gets. You know, you're not in trouble. You're not -- you didn't do anything wrong. What -- you know, your mom is just upset. And so I asked her what happened.

Q. And what did she say?

A. She said that Jimmy touched me.

10 RP 840.

P.P. went on to explain to her father that the defendant had carried her upstairs, flipped her onto a couch and then used his fingers to play “spider fingers up her leg” and used “two fingers and then he just touched her private part”, that is “her vagina.” 10 RP 840-41. P.P. also stated that the defendant’s wife was outside at the time attending to their dog’s business and that the defendant shushed her and told her not to tell the defendant’s wife. 10 RP 842.

J.F.’s mother arrived at the camp just after the disclosure. 11 RP 1078-83. After hearing that P.P. had disclosed she decided not to ask questions of her own children because “I didn’t want to know.” 11 RP 1085. This was because the defendant and his wife had shown kindness to her and her daughter. *Id.* She resisted asking even though Ms. Profitt encouraged her to. *Id.*, 10 RP 921. She said, “I didn’t want to think that somebody who meant so much to me could do that.” *Id.*

J.F.’s first disclosure came several days later and not in the company of P.P. or her family. Although J.F.’s mother did not want to talk to J.F. about inappropriate touching, Ms. Profitt felt it was important to do so and explained why: “Because I felt like she had to. You have to

find out. It wasn't that I didn't believe [P.P.]. I wanted to believe more he wouldn't have done it, but it was a question that had to be asked because [J.F.] and [I.F.] are there all the time.” 10 RP 922.

The Monday after the camping trip, during a car ride to the grocery store, Ms. Profitt asked J.F. and her sister if they still liked going to Little Bear. 10 RP 924. In response J.F. told her about several things that she liked and did not like but she also added that the defendant “tickles me and I don’t like it.” *Id.* Ms. Profitt asked if the tickling was on her “back” or her “belly” or her “armpits” or her “knees”, to which J.F. replied “No, on my privates, and I don’t like it.” *Id.* Ms. Profitt told J.F. that such touching was not appropriate but she did not press for further details because, “It wasn’t my place, really. I’m not the parent.” 10 RP 926.

Upon learning from Ms. Profitt that J.F. had disclosed, J.F.’s mother reported the information to Child Protective Services. 11 RP 1092. She did not talk to J.F. directly until later. Her first discussion was on the way to the medical examination, in accordance with instructions from the medical provider and child interviewer. *See* 12 RP 1167. J.F.’s mother noticed her daughters were horsing around and tickling each other and asked if anyone had tickled J.F. before. J.F. replied that “Uncle Jim” had done so “[a] lot” and that “he made her spread her legs.” 11 RP 1097.

She continued to the appointment where J.F. was forensically interviewed and given a medical examination. 11 RP 1099.

The testimony about the medical exam included a full description of the procedure and the reasons for it. J.F.'s history was part of the exam and the nurse practitioner, upon observing that J.F. was reluctant to talk about the sexual contact, asked her several medically related questions such as whether it hurt, when it last happened, and whether she had any worries about her body. 13 RP 1282. J.F. provided answers to those questions. *Id.*

The forensic interviews were much more detailed and were video recorded from start to finish. Trial Exhibits 48 and 49. As with the medical exam, the forensic interviewer gave a full description of the procedures she follows and the reasons for them. 12 RP 1141-76. Her testimony included that her methods were approved by the National Institute of Child Health and Human Development [12 RP 1151], that she was familiar with issues such as (1) "delayed disclosure" [12 RP 1152], (2) difficulty establishing a child's "time frame" [12 RP 1156], (3) lack of emotion during discussion of sexual contact [12 RP 1157-58], (4) "parental reaction" [12 RP 1159], "coaching" [12 RP 1161], (5) "suggestibility" [12 RP 1162], and (6) the precautions taken during the interview to avoid inaccuracy as a result of those issues. After an

extensive description of the interview methods and procedures, the DVD recordings of each of the victims' interviews, Exhibits 48 and 49, were played for the jury. 12 RP 1182, *et.seq.* and 1203, *et.seq.*

The state completed its case with the testimony of a sexual assault detective. The detective began investigating referrals as to both P.P. and J.F. on August 11, 2014. 14 RP 1322. The investigation included an interview of the defendant. Although the defendant gave a statement, the state elected not to introduce the statement.

The defense case included the defendant, his wife and the parents of several other children who had been in the day care. Collectively the witnesses testified that they never saw anything inappropriate happen between the defendant and the children attending the daycare. 14 RP 1366, 1416-19. The defendant also testified and denied sexual contact with either of the victims. 15 RP 1586-89, 1609. On cross, however, he was impeached with his police interview on several points, including that he had admitted tickling girls at the daycare. 15 RP 1595-1600.

The parties presented closing arguments on August 31, 2016. The jury was then excused to deliberate. 15 RP 1685. During deliberations the court responded to an alleged juror misconduct issue.

The issue concerned whether Juror No. 8 had missed certain parts of the proceedings as a result of sleeping. This came up during

deliberations when the jury was allowed to view the forensic interviews in open court rather than in the jury room. 16 RP 1701, *et.seq.* During the viewing the court responded to a concern voiced by the parties that Juror No. 8 may have nodded off. *Id.* On one prior occasion during the trial a similar observation about the same juror was brought to the court's attention. 12 RP 1179. At that time the defense downplayed any concern about the juror actually sleeping: "I did observe Juror Number 8 kind of leaning back, but then I observed her come forward and open her eyes. So I didn't get the impression she was actually sleeping, but I did notice that behavior, and I don't have anything to add." *Id.*

The trial court considered motions by both the prosecution and defense concerning Juror No. 8. The defense moved to disqualify the juror without asking any questions about whether she had in fact fallen asleep. 16 RP 1704. The prosecution requested that Juror No. 8 be asked questions before being discharged. *Id.* The court opted to do so. *Id.*

Outside the presence of the other jurors, Juror No. 8 was tactfully asked if she had fallen asleep. 16 RP 1707. She said that she was listening to the DVD with her eyes closed and that "when my eyes are open, I'm looking at everybody else and seeing what they're doing, and it distracts me from, like, whatever they're actually saying." *Id.* The court

thereupon determined that the juror was credible and denied the motion to disqualify. 16 RP 1708.

The jury returned a guilty verdict for attempted first degree child molestation for the incident involving P.P. CP 161-176. They also returned a guilty verdict for one of the three counts involving J.F. *Id.* On October 14, 2016, at sentencing, the court sentenced the defendant to a mid-range sentence of 66.75 months to life on count one, and 78 months to life on count two. *Id.* P.P. 5 of 13 – 6 of 13. This appeal was timely filed the same day. CP 181.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT THE VICTIMS WERE COMPETENT TO TESTIFY, WHERE COMPETENCY WAS NOT OBJECTED TO, AND WHERE THE TRIAL COURT NEVERTHELESS EVALUATED EACH VICTIM'S COMPETENCY AFTER THEY HAD TESTIFIED IN OPEN COURT, AND AFTER SUPPORTING TESTIMONY FROM THEIR FAMILIES WAS ALSO CONSIDERED.

The trial court ruled that the victims in this case, both of whom were over the age of ten, were competent. The defense did not object and did not argue against competency. 2A RP 291, 3 RP 422. Nonetheless the trial court issued its ruling after analysis of the five-factor competency

test. 2A RP 292-93, 3 RP 425. These rulings were well within the trial court's discretion and should be affirmed.

In Washington trial courts, “[e]very person is competent to be a witness except as otherwise provided by statute or by court rule.” ER 601. *See also* RCW 5.60.020. Competency is presumed for all witnesses including young children at every age. RCW 5.60.050, *State v. C.M.B.*, 130 Wn. App. 841, 845–46, 125 P.3d 211, 213 (2005). A party challenging competency of a child witness bears the burden of proving that the child was not competent by a preponderance of the evidence. *State v. Brousseau*, 172 Wn.2d 331, 341, 259 P.3d 209 (2011), citing *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010).

Competency determinations are particularly entrusted to the discretion of the trial court. “We afford significant deference to the trial judge's competency determination, and we may disturb such a ruling only upon a finding of manifest abuse of discretion.” *State v. Brousseau*, 172 Wn.2d at 340, citing *State v. Leavitt*, 111 Wn.2d 66, 70, 758 P.2d 982 (1988), and *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). “An abuse of discretion occurs when the trial court's decision is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *State v. Cross*, 156 Wn. App. 568, 580, 234 P.3d 288

(2010), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The test for competency has been with us since the 1960's. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021, 1022 (1967). “[T]he test of competency of a young child as a witness consists of the following:

(1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.”

*State v. C.M.B.*, 130 Wn. App. 841, 846, 125 P.3d 211, 213 (2005), quoting *State v. Allen*, 70 Wn.2d at 692. In addition, the entire record may be considered in determining whether a child's trial testimony was properly admitted. *State v. Brousseau*, 172 Wn.2d at 340.

In this case, the trial court conducted a pre-trial competency hearing combined with a child hearsay hearing. Both victim's testified. 1 RP 7 *et.seq.*, 2A RP 277 *et.seq.* The defense did not cross examine the first victim, P.P., [1 RP 27], but did briefly cross examine the second victim [2A RP 321-24]. The cross examination of J.F. did not include any suggestion that JA was lying or making up stories or remembering events

incorrectly. *Id.* The defense attorney accepted her testimony and a short time later declined to argue against competency. 3 RP 422.

Even though there was no challenge to competency, the state nevertheless introduced comprehensive evidence supporting competency. The direct examinations of the two victims included standard questions about people, places and events coinciding with the period of time of the alleged sexual abuse. 1 RP 8-24, 2A RP 298-316. They also testified about their knowledge of the difference between the truth and falsehood and of their commitment to provide truthful testimony. 1 RP 25-27. 2A RP 317-21. Their capacities to imprint accurate memories and answer questions about them were then tested by asking the same questions of the adult witnesses. 1 RP 29-40, 2 RP 189-194, 2 RP 250-58, 2A RP 326-37, 3 RP 341-48. The witnesses also testified about the girl's history of truthfulness. *Id.* The only indication that either victim had been untruthful in the past concerned J.F. and "accidents" during bathroom training. 3 RP 345-48. No other blemish as to either victim's testimonial capacity was introduced.

The trial court wisely declined to consider competency as stipulated to. Instead it called for argument from the state and applied the *Allen* test even though the defendant was not contesting competency of either victim. 2a RP 291-93, 3 RP 421-25. At the time the court had

before it testimony from six witnesses. The witnesses included the two victims themselves plus their custodial parents and an aunt. CP 195. The trial court thus had adult yardsticks by which to measure the truthfulness and accuracy to the testimony of the two victims. Under these circumstances there is little room for serious argument that the trial court abused its discretion.

The defendant argues that because P.P.'s recollection of the names of her teachers differed from her mother's that she was not competent. Opening Brief, §C.1, aa. For the sake of argument, even if there was evidence that the daughter got the names and grades mixed up whereas the mother got them right, such discrepancies are not evidence of incompetence. Few adults could rattle off the names of their teachers in each grade in order as P.P. was required to do. Where she gave concrete descriptions of where she was living, which schools and daycares she was attending, where she was living and the layout of the daycare where the sexual abuse occurred, her testimony as to teachers and grades was well within normal limits for any witness and not a sufficient reason to question her testimonial competency. This is all the more evident when the defense, after hearing P.P.'s account and the accounting of the adults, did not see a reason to doubt competency.

The defendant makes a similar argument as to J.F. In 29 pages of transcript, the defendant focuses on a brief exchange concerning guessing the answers in school. Opening Brief, § C.1(bb). As was made clear by J.F. during subsequent questioning by the defense attorney, guessing answers in school had nothing to do with the sexual abuse:

Q Let me ask you, when I asked you about guessing, in terms of whether or not you remember Jimmy touching your private part, why is it that you say that that's not a guess, that's something that you really remember? Can you tell the judge?

A Um, because, um, I remembered it, and it was kind of stuck in my memory.

\* \* \* \*

Q So in terms of what you remember, do you remember it – then you remember it happening once or more than once?

A More than once.

Q Okay. Where? And, like, where did it occur?

A Um, a few times in the house, and once -- and only once in a camper.

2A RP 323-24.

In light of these answers to the defense attorney's questions there can be little doubt that J.F. was not guessing about sexual abuse.

Furthermore she explicitly promised not to guess at answers to the lawyers' questions: "I promise not to make any guesses here in court."

2A RP 321. Under these circumstances the trial court did not abuse its discretion in its competency determination as to J.F.

None of the victims' testimony was challenged on cross examination and they were not impeached or contradicted during cross examination of the adult witnesses. 1 RP 27, 3 RP 421-25. In short there was no reason brought to the attention of the trial court to doubt competency of either victim. Nor is any evident from review of the pre-trial or trial testimony of the witnesses. In this case as in most child sex abuse cases the trial court observed firsthand the child's responses to questions in court and was able to compare their responses both as to content and demeanor with the more relaxed setting of the victims' forensic interviews. There is good reason to defer to the trial court on competency since it is the trial court "who sees the witness, notices his manner, and considers his capacity and intelligence [,] ... matters that are not reflected in the written record for appellate review," and who observed the witness being questioned under oath by experienced trial counsel. *State v. C.M.B.*, 130 Wn. App. 841, 846, 125 P.3d 211, 213 (2005), quoting *State v. Allen*, 70 Wn.2d at 692. In light of the record in this case, including the extensive pre-trial record supplemented by the trial record, there is little room for the argument that the trial court committed a manifest abuse of discretion.

2. THE TRIAL COURT PROPERLY ADMITTED CHILD HEARSAY STATEMENTS FROM THE VICTIMS AFTER FINDING THAT THEY WERE COMPETENT AND THAT THE STATEMENTS BORE SUFFICIENT INDICIA OF RELIABILITY.

The child hearsay statute was first enacted in 1982 and is codified at RCW 9A.44.120. The statute allows for admission of a child's out-of-court statements "describing any act of sexual contact performed with or on the child by another. . . ." *Id.* Advance notice and a pretrial hearing are mandatory. *Id.* The trial court must find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability" and further the child must either testify or be found unavailable. RCW 9A.44.120(1) and (2).

Like the *Allen* competency test, the nine-factor reliability test for child hearsay has been with us for some time. *State v. Ryan*, 103 Wn.2d 165, 175–76, 691 P.2d 197 (1984). The test requires a determination of, "(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness," plus a determination of whether "(1) the statement contains no express assertion about past fact, (2) cross-examination could not show the

declarant's lack of knowledge, (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement." *Id.*, quoting *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982), citing *Dutton v. Evans*, 400 U.S. 74, 88–89, 91 S. Ct. 210, 219, 27 L. Ed. 2d 213 (1970).

The standard of review for a child hearsay ruling is manifest abuse of discretion. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005), *State v. Jackson*, 42 Wn. App. 393, 396, 711 P.2d 1086 (1985) (“A finding that statements are within the statutory child abuse exception should not be reversed absent a showing of manifest abuse of discretion.”). It is also important to bear in mind that not every *Ryan* factor need be satisfied when reviewing the trial court’s exercise of discretion. *State v. Woods*, 154 Wn.2d at 623-24. It is enough that the factors are “substantially met.” *Id.*, citing *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). Furthermore the trial court’s findings are verities on appeal if supported by substantial evidence. *State v. E.J.J.*, 183 Wn.2d 497, 515, 354 P.3d 815, 824 (2015) (“Where challenged findings are supported by substantial evidence, those findings also are binding on appeal.”), *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d

363, 371 (1997) (Findings of fact “will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record.”). “Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation.” *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

In this case the trial court entered findings based on testimony from seven witnesses at the three-day pretrial hearing. Those witnesses provided more than substantial evidence and thus the findings should be considered verities in this appeal. The court also expressly applied the *Ryan* factors, issued an oral ruling [6 RP 567], and entered written findings of fact and conclusions of law. CP 99-102.

The seven witnesses included the family members of the two victims who testified about the two victims’ separate initial disclosures. That testimony was supported by two professionals, a nurse practitioner and a forensic interviewer. The interviewer conducted separate video-taped interviews of the two victims. 6 RP 509-11, 518-19. The interviewer was trained in state-approved, non-leading, non-suggestive standardized interview methods [6 RP 477-79, 484, 482-91, 503-08], and also testified about specific issues of concern such as coaching [6 RP 491-492], suggestibility [6 RP 492-94], and delayed disclosure [6 RP 495-99].

Following this foundational testimony she turned specifically to victims. As to P.P., the interviewer described particular features of her interview that supported the reliability of her disclosure, including the following:

- Q. You spoke about [P.P.] questioning what had happened to her during the interview. Did she -- did that questioning -- her appearing as if she was questioning herself -- did that continue throughout the interview?
- A. No. It was in the initial substantive portion of the interview. She -- she made a statement, I believe a couple of times, about, you know, that he may have touched but I'm not sure. Something along those lines. And then when we're actually going through the details of what she says occurred, she was clear in her recall that, you know, he touched. He used two fingers, and -- and where he had touched and then he quickly moved his hand -- moved his hand away.

6 RP 514.

The reference to uncertainty was a major component of the defendant's argument against reliability. However, as the foregoing excerpt demonstrates uncertainty did not permeate her disclosure. When it came to providing details such as under the clothing versus over the clothing, or what the defendant's hand did, or what was happening in the environment at the time, P.P. gave the kind of details that supported that she was describing as best she could actual physical contact between the defendant's two fingers and her genitals. 6RP 514-17.

Victim J.F.'s reliability was likewise supported by the interviewer's testimony. In particular the interviewer testified:

Q. Okay. Without going through the whole interview, what do you recall about the level of details [J.F.] was able to provide you with?

A. She provided a lot of detail. She provided specific detail about what she said his finger did and demonstrated the motion. She provided detail as to the specific parts of her vagina where she was touched and -- versus the parts where she was not touched. She provided detail about the sensations and where it hurt more versus where it hurt less. She provided locations, multiple locations.

6 RP 525

The reliability of J.F.'s disclosure was further supported by evidence from her medical exam. The nurse practitioner testified:

And after [a discussion of school and homework], then I asked her if she remembered being here before and she said "yeah." I asked her what she did when she was here before. She said, I was telling someone with pretty blue eyes a lot of stuff, and I asked her what stuff was she telling her, and she said, all I remember is my uncle tickling me in my private.

\* \* \* \*

I asked her if she remembered the last time something happened, and she said, I don't remember the exact date.

I asked her if it was when she was still seven and she said -- she says, for sure I was seven. I asked her if it happened in the summertime. She said "yes."

5 RP 449-50.

The defendant did not cross examine P.P. 1 RP 27. He thus did not directly challenge the accuracy of the memory of the sexual abuse. No impeachment or contradiction was even attempted. Plus with J.F., the cross examination actually contributed support for reliability. J.F. testified as follows in response to the defense attorney's questions about whether she was "guessing":

Q Let me ask you, when I asked you about guessing, in terms of whether or not you remember Jimmy touching your private part, why is it that you say that that's not a guess, that's something that you really remember? Can you tell the judge?

A Um, because, um, I remembered it, and it was kind of stuck in my memory.

\* \* \* \*

Q. So in terms of what you remember, do you remember it -- then you remember it happening once or more than once?

A More than once.

Q Okay. Where? And, like, where did it occur?

A Um, a few times in the house, and once -- and only once in a camper.

Q Do you remember where in the house? I thought you said you didn't remember.

A In a bedroom.

2A RP 323-24.

The two victims were not the only witnesses. A forensic interviewer, a nurse practitioner, and the children's family were also witnesses that supported reliability. Concerning P.P., her parents, provided unchallenged testimony about seven of the nine *Ryan* factors. This testimony provides more than substantial evidence supporting the trial court's findings one through seven. CP 99-102, p. 2. They testified specifically about: (1) factor number two, the general good character of their daughter and of her character for truthfulness [1 RP 30, 46-47, ]; (2) factor number three, the fact that the disclosure statements were heard by multiple people [1 RP 51-56, 68, 73-78, ]; (3) factor number four, the spontaneity shown by P.P. having brought up the sexual abuse out of the blue during her first disclosure on a family camping trip [*Id.* 2 RP 260-61.]; (4) factor number five, their relationship with their daughter and the parental efforts made to protect her and also make sure she was not fabricating [1 RP 73-81, 86, 90. 2 RP 263-65.]; and (5) factor numbers seven and eight, the concrete but age-appropriate description of the abuse which belied any claim of lack of knowledge, or of faulty recollection [1 RP 74-77.].

P.P.'s family was subjected to a targeted challenge by the defense on cross examination. The defense attorney focused on whether (1) the mother's emotional state influenced the disclosure and (2) whether alleged

animosity from the father's toward the defendant gave them an improper motive to cause their daughter to fabricate an allegation of sexual abuse. See 1 RP 40-45, 95-102. 2 RP 238-39. P.P.'s mother contradicted the emotional state allegation by stating that her primary concern during and after the first disclosure on the camping trip was that P.P. was not making a false allegation. 1 RP 76-78, 81-83. P.P.'s father likewise contradicted the defense attorney's improper motive theory by explicitly denying that disputes or animosity with the defendant or his family led to a fabricated sex abuse allegation. 2 RP 240. In short based on the presentation at the pre-trial hearing the trial court had every reason to find P.P.'s hearsay statements reliable and little reason not to.

The same analysis applies to the evidence pertaining to J.F. There was substantial evidence to support all eight of the trial court's findings from the testimony of J.F.'s family supplemented by the nurse practitioner. J.F.'s mother and aunt both testified about her initial disclosure and the surrounding circumstances. That disclosure was the essence of spontaneous because the topic at hand had nothing to do with sexual contact, touching or the like. 2A RP 282, *et.seq.* As to the specific **Ryan** factors the testimony was similar to the testimony about P.P.: (1) factors number one and nine, improper motive could be ruled out because J.F. and her mother were indebted to the defendant and his wife for having

taken them in and given them shelter [2 RP 257. 3 RP 349-50, 362-64.]; (2) factor number two, the general good character of J.F. and of her character for truthfulness was not in serious dispute [2 RP 251-54. 3 RP 345-47.]; (3) factor number three, the fact that the disclosure statements were heard by multiple people was likewise not in dispute [3 RP 365.], (3) factor number four, spontaneity was shown by J.F. having brought up the sexual abuse out of the blue during a car ride [2A RP 282-85.]; (4) factor number five, the relationship of the adults with J.F. and the parental efforts made to protect her also make sure she had an actual memory of the incidents was not in question [3 RP 365-68, 370-72, 377-79.]; and (5) factor numbers seven and eight, an age-appropriate description of the abuse using family terms for J.F.'s anatomy belied any claim of lack of knowledge, or faulty recollection [3 RP 371-72, 378.].

It should be noted that in the case of J.F.'s family the defense position in the trial court differed from the approach to P.P. The defendant had only one page of questions for J.F.'s aunt, none of which attacked the J.F.'s truthfulness or the motive for her disclosure. 2A RP 290. With respect to J.F.'s mother the defense insinuated that J.F.'s mother had a motive to cause her daughter to make false allegations due to past disputes with the defendant. 3 RP 380-85. On re-direct J.F.'s mother refuted that allegation:

Q. Did you hold onto this malcontent towards the defendant? Did you hold onto this and put your daughter up to making a disclosure against him?

A. Not at all because my aunt, his wife, that -- she was my best friend. I went to her for everything. I would never do this to them.

3 RP 388.

The family testimony of both victims contributed overwhelming support for the trial court's reliability determination. But it should not be forgotten that the trial court also saw for itself the victims' forensic interviews because they were video recorded. Child Hearsay Exhibits 8, 16, 25, and 26. Thus the court was in an ideal position to make a reliability judgement as to all of the disclosures. It reviewed the brief disclosures from the two girls to family members followed by detailed disclosure to professionals. After seeing for itself the children's account in the children's own words of what was done to them, the trial court made a judgement that almost any rational trier of fact would have made under the same circumstances, it found the child hearsay reliable.

On appeal with respect to P.P., the defendant relies in part on the same claim of improper motive as well as a claim that she was inconsistent in her trial testimony. The importance of consistency is dependent on the circumstances. Where as in this case the allegation is that the sexual abuse was fabricated due to improper motive, the usual

expectation would be that the witnesses would be overly *consistent*. This is because they would be thought to have colluded to bring false charges against the defendant. From that perspective lack of perfect consistency supports rather than hurts reliability. The trial court would not abuse its discretion by rationally concluding that inconsistency did not undermine reliability.

It should also be pointed out that whatever inconsistency there was with P.P. or her family's trial testimony, the differences did not lead to a motion to revisit the child hearsay ruling. In fact the differences are best accounted for by the difference between the presentation of the evidence to a jury versus a judge. In front of the twelve member adult jury, in the unfamiliar environment of the courtroom, P.P. testified about the defendant having touched her vagina by standing up and pointing to where on her body she was touched. 9 RP 629-32. This may not be exactly the same manner in which she testified about the same thing pretrial but it nevertheless supported rather than undermined reliability of the child hearsay.

P.P. also directly confronted the notion that the touching was a dream. She stated categorically that, "He did it for real." 9 RP 635-36. On cross during a mixture of questions about (1) what had happened, versus (2) what she had told the various adults at various times about what

had happened, she admitted having given a variety of statements. *See* 9 RP 667-68, 670-73. It is important to point out that at no time did P.P. testify that the sexual contact did not actually happen. Moreover, any inconsistency in her responses about what she told the adults is accounted for by the two year time span from first disclosure to trial and the difficulty any witness would have in responding to questions about what they said more than a year before as opposed to what happened to them. In short P.P.'s trial testimony did nothing to undermine the reliability of her child hearsay statements.

The defense argument on appeal concerning J.F. is different from the argument about P.P. The defense does not claim there was inconsistency between the pre-trial and trial testimony of J.F. and her family. Instead the defendant relies on alleged improper motive, an argument that was expressly dispelled by J.F.'s mother. The mother testified that her close, loving relationship with the defendant and his wife meant that false accusation was the last thing she would do. 3 RP 386-88. In short the defendant has attacked a single *Ryan* factor as to J.F. with an argument that was specifically contradicted by the testimony. Such an argument does little to undermine confidence in the trial court's exercise of discretion regarding J.F.'s child hearsay.

A final observation concerns corroboration. In J.F.'s case independent evidence in the form of statements given for medical diagnosis was introduced that supported the reliability of the child hearsay. CP 99-102, p.3. Although not required where the victim takes the stand, corroboration certainly supports reliability. In J.F.'s case, she appropriately displayed embarrassment and reluctance to give details when the nurse asked her about sexual abuse as it related to discomfort or injury to the child's body. 5 RP 449-50. The account of those statements not to mention the circumstances in which they were given fully supports reliability of the other hearsay.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS JUROR DISQUALIFICATION RULING, WHERE THE JUROR WAS QUESTIONED OUTSIDE THE PRESENCE OF THE OTHER JURORS, WAS CONSIDERED TO HAVE BEEN CREDIBLE, AND DENIED HAVING FALLEN ASLEEP BUT INSTEAD STATED THAT SHE CLOSED HER EYES FOR THE SAKE OF CONCENTRATION.

RCW 2.36.110 states that a judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of . . . indifference, inattention or any physical or mental defect. . . ." CrR 6.5 includes procedures for discharging an unfit juror both before and after deliberations. The statute

and court rule “place a ‘continuous obligation’ on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit.” *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005), quoting *State v. Jordan*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000).

As any trial judge or trial lawyer knows there are an infinite variety of issues that can arise with trial juries. For this reason trial judges have broad discretion to investigate juror issues. *State v. Elmore*, 155 Wn.2d at 773–75; *State v. Earl*, 142 Wn. App. 768, 775, 177 P.3d 132 (2008). The court need not follow any specific format. *State v. Jordan*, 103 Wn. App. at 229. It is recognized that “the trial judge is faced with a ‘delicate and complex task,’ in that he or she must take care to respect the principle of jury secrecy.” *State v. Elmore*, 155 Wn.2d at 761, quoting *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir.1997)).

The standard of review of a decision whether to discharge a juror is abuse of discretion. *State v. Elmore*, 155 Wn.2d at 778. “An abuse of discretion occurs when the trial court’s decision is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *State v. Cross*, 156 Wn. App. 568, 580, 234 P.3d 288 (2010), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Three steps are included in an abuse of discretion analysis,

“[F]irst, the court has acted on untenable grounds if its factual findings are unsupported by the record; second, the court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; third, the court has acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard.” *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *State v. Bernard*, 182 Wn. App. 106, 118, 327 P.3d 1290, 1296 (2014).

In this case the defendant does not claim the trial court acted on untenable grounds or for untenable reasons. Instead the defense argument is that the court acted unreasonably, that is outside the range of acceptable choices under the circumstances. This claim is not supported by the record.

The record discloses that Juror 8 first came to the trial court’s and the parties’ attention during the testimony of a prosecution witness. The defense voiced its impression and no motion was made nor any other action. The defense position was: “I did observe Juror Number 8 kind of leaning back, but then I observed her come forward and open her eyes. So I didn't get the impression she was actually sleeping, but I did notice that behavior, and I don't have anything to add.” 12 RP 1179.

The next time was during the prosecution's closing argument. Another juror observed the same posture that was commented upon earlier and spoke up. Juror 8 responded, "I'm listening." 15 RP 1661. No motion was made by either party and no action was taken by the trial court. *Id.*

Finally, the same thing happened during deliberations when the jury viewed the child hearsay interview videos. The prosecution proposed that inquiry be made of the juror. 16 RP 1704. The defense proposed discharging the juror without inquiry. *Id.* The trial court opted for making the inquiry but indicated that the motion to discharge was not necessarily denied. *Id.* During the inquiry, the juror acknowledged closing her eyes "slightly longer than blinking, yes." But she also said that, "I'm still listening." 16 RP 1706-07. She further explained:

JUROR NO. 8: Sometimes when my eyes are open, I'm looking at everybody else and seeing what they're doing, and it distracts me from, like, whatever they're actually saying.

THE COURT: So closing your eyes is a means for you to concentrate on what's being said as well?

JUROR NO. 8: Yeah, sometimes because I just see, like, my sight, my thoughts kind of wandering, so I'm not listening to the video.

16 RP 1707.

The trial court found the juror credible and elected not to discharge. 16  
RP 1708.

There can be no abuse of discretion where there is a difference of opinion as to whether the ruling was the right call. *State v. Downing*, 151 Wn.2d 265, 274, 87 P.3d 1169, 1173 (2004) (“While reasonable minds may differ, we cannot say that the trial court’s determination” concerning a continuance was “manifestly unreasonable.”). Here, it is likely that on this record most trial judges would have made the same ruling. The juror was credible and denied inattention. Thus there was no evidentiary support for the defense argument that the juror was unfit “by reason of . . . indifference, [or] inattention. . . .” RCW 2.36.110. The trial court’s resolution of the issue should be affirmed.

4. IN LIGHT OF THE SUFFICIENCY OF THE EVIDENCE STANDARDS, SUFFICIENT EVIDENCE WAS INTRODUCED TO PROVE THE ELEMENTS OF THE TWO CRIMES OF CONVICTION, WHERE EACH OF THE VICTIMS TESTIFIED ABOUT SEXUAL CONTACT BY THE DEFENDANT, AND WHERE THEIR TESTIMONY WAS SUPPORTED BY TESTIMONY FROM OTHER FAMILY MEMBERS AND CHILD SEXUAL ABUSE PROFESSIONALS.

In this case, as in most child sex abuse cases, the natural shyness of children affected the evidence. For adults to discuss sexual contact in open court, in front of an impassive but focused group of 12 to 14 adult

strangers, would be excruciating for most people. How much more would the same hold true for children? It is probably a universal experience that young children are shy around strangers until they are reassured by their parents that the strangers are OK and until they themselves get to know them. For a child to ask for her mother during testimony is the most natural of responses to a terrifying situation. 9 RP 668. The courtroom allows no opportunity for a child to ever become comfortable and thus it comes as no surprise that their descriptions of sexual contact may be less than graphic.

For an appellate court to find there was sufficient evidence for a conviction, it must determine, after viewing the evidence in the light most favorable to the state, whether any rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. *State v. Thereoff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d at 201.

In an insufficiency claim, deference must be paid to the trier of fact which is responsible for determining witness credibility, resolving conflicting testimony, and evaluating the persuasiveness of evidence

presented at trial. Washington Const. art. I, §21. *State v. Furth*, 5 Wn.2d 1, 104 P.2d 925 (1940) (“Courts cannot trench on province of jury upon questions of fact. . .”), *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d at 71, citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987). Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The applicable standard of review requires that the evidence be viewed in the light most favorable to the State, not the defendant. *State v. Green*, 94 Wn.2d at 220-22, *State v. Camarillo*, 115 Wn.2d at 71, and *State v. Carver*, 113 Wn.2d at 604.

In this case P.P. testified that the defendant touched her vagina with his hand after carrying her bodily upstairs and tickling her. 9 RP 628-31. The defendant was not a parent nor was he the child’s usual caregiver at the daycare. There was no testimony that P.P. had a physical or medical condition that required digital examination by an unrelated, non-custodial adult male. Thus when P.P. testified explicitly that he used two fingers to touch her vagina, and that it was wrong and an abuse of trust, from that testimony alone the jury could have found sufficient

evidence to support the count of child molestation related to P.P. 9 RP 633-34.

In this case as with most cases involving children under the age of ten, the forensic child interview provided the jury with a separate account of the sexual contact. Trial Exhibit 48. The jury saw for itself P.P.'s account of what happened while she was in an environment calculated to put her more at ease. Thus when in the interview she said the same thing that she said on the stand, the jury had powerful evidence that her description was truthful, accurate and trustworthy.

The foregoing discussion of course sets aside the other evidence introduced in support of the credibility of P.P.'s description of the sexual contact. Her disclosure during the camping trip contributed to the quantum of proof available to the jury. Under these circumstances it cannot be reasonably argued that the jury was irrational in its decision to convict.

On appeal the defense argument against sufficient evidence rests on the lack of physical injury and lack of a pinpoint date and time when the incident occurred. P.P. was not examined by the nurse practitioner; given that the sexual contact happened one time and given her description of it, there was a perfectly reasonable basis for her not being examined. *See* 12 RP 1197-98; 13 RP 1268-69. To say that the lack of physical

injury equates to insufficient evidence is to say that any assault that leaves no visible mark is categorically insufficient. No case suggests as much. In fact the opposite proposition has been recognized by the Supreme Court. *State v. Swan*, 114 Wn.2d 613, 623, 790 P.2d 610, 615 (1990) (“In most cases of child sexual abuse, however, there is no direct physical or testimonial evidence.”). Thus the defendant’s argument about physical injury is not well taken.

Likewise the pinpoint date and time argument is unpersuasive. According to the unchallenged jury instructions the jury had to have concluded that the sexual abuse happened “during the period between November 11, 2011, and November 10, 2013. . . .” CP 115-141, Instruction No. 8. The undisputed testimony from P.P. was that her birthday was November 11, 2004, and that the incident happened when she was eight years old and in second grade. 9 RP 608, 627-29. Because P.P. turned eight on November 11, 2012, there is little room for argument that the evidence was insufficient as to time frame. A rational jury could have concluded that even though P.P. had understandable trouble with pinpointing the exact date of an incident that she did not mark on a calendar, there was nevertheless sufficient evidence to prove that the incident happened during the charging period.

It should also be noted that the defendant's approach at trial took a different course. At trial he argued that P.P. was influenced by her parents to fabricate sexual abuse and also that she referred to it as a "dream." 15 RP 1674, *et.seq.* This argument referenced P.P.'s testimony about having thought at one time that she had a dream about the abuse. 9 RP 635. This argument is no more persuasive than the arguments about physical injury or time frame. P.P. was asked specifically whether the abuse was real or a dream and she testified explicitly that the abuse was real:

A. I think that I was confused once.

Q. Okay. Tell us about that.

A. I think I thought that it was a dream.

Q. When did you think that?

A. A couple months after he did it.

Q. And today, here, August 18th, 2016, what is your understanding as to whether he did it for real or it was a dream?

A. He did it for real.

9 RP 635.

In light of this testimony supported by the testimony of the adults and the forensic child interview, there was more than sufficient evidence to convict as to the attempted molestation charge related to P.P. An example of the supporting evidence was from the forensic interviewer's testimony. She was asked about P.P.'s expressions of uncertainty early on in the interview and responded with the following observation:

A. So initially in the interview, you hear her say a few different times that she's not sure if he -- if he touched her private or not, and then when we're kind of going piece by piece through the incident that she is alleging, you then hear her say that he touched it and that he touched it with two fingers and she describes the contact. So, you know, initially, she seems to be uncertain, and then as we go through, we go through the incident, then she says specifically that he touched her.

12 RP 1195-96.

It should also be noted that in closing argument as to Count One, the count related to P.P., the defense attorney conceded that all of the elements had been established beyond a reasonable doubt except for the element concerning whether the sexual contact had in fact occurred. 15 RP 1673-74. This too supports that there was sufficient evidence since P.P. consistently maintained that the contact was an actual event that happened to her.

The same sufficiency analysis supports the charge related to J.F. J.F. testified that the defendant bribed her with candy in order "to touch my private part." 11 RP 1007. She explained that her private part was where she goes pee and said that, "It's a vagina." 11 RP 1008. She could remember it happening at one particular place at the defendant's residence, namely a camper that was located in the backyard near the trampoline. 11 RP 1009, 1044. The touching was under her clothing on

her skin and there was no medical or child care reason for the touching.

11 RP 1009-1015.

From J.F.'s testimony alone, much the same as with P.P., the jury had sufficient evidence from which to rationally conclude that the defendant had sexual contact with J.F. He was no more a caregiver to J.F. than he was to P.P., and although he was related to J.F. as an uncle, he was not a custodial uncle and had no legitimate purpose for touching J.F. under her clothing on her skin. In short J.F.'s testimony alone constitutes sufficient evidence.

As with P.P., J.F.'s testimony was supported by the other witnesses. For example the forensic interviewer and the forensic interview contributed compelling detail about what the defendant did.

Trial Exhibit 49. The interviewer testified that:

- A. Yeah. She provided quite a bit of detail about the specifics of what she's alleging, you know, as to what happened and how her body felt and where it hurt more versus less, and very specific about where the touching was and where it wasn't, and you know, and differentiating even between tickling that she said was done in the past versus the tickling of the private and questioning why the tickling of the private was done because it's not even ticklish, not like the neck and the armpits and things like that. She provided quite a bit of detail.

12 RP 1212.

As with P.P., the defendant conceded in closing argument that all of the elements had been established except whether or not the sexual contact had in fact occurred. 15 RP 1668. He then argued against J.F. having been credible and suggested that she was put up to making false allegations by the adults and that the adults had impure motives and were lying about the events surrounding the disclosure. 15 RP 1672. The defendant pursues a similar argument on appeal. This argument did little damage to the overwhelming weight of the evidence because J.F.'s mother had explained that she had nothing against the defendant or his wife (who was a beloved aunt) and if anything she owed them for having taken her in and given her a place to live. 11 RP 1127.

The two victims gave clear detailed descriptions of sexual contact by the defendant in their forensic interviews. They also made age and circumstance appropriate separate disclosures to the adults in each of their lives. In J.F.'s case a medical diagnosis disclosure was also testified about. Under these circumstances and in light of the sufficiency of the evidence standards, there is little support for the defendant's claim that the jury was irrational in concluding that the defendant was guilty of the two crimes.

D. CONCLUSION.

For the foregoing reasons the defendant's convictions and sentence should be affirmed.

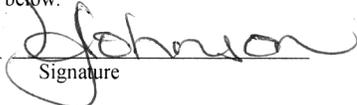
DATED: Friday, December 08, 2017

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

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.

  
12/8/17 \_\_\_\_\_  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**December 08, 2017 - 12:53 PM**

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