

NO. 50028-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

VERNICE MORRIS,

Appellant.

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

The Honorable F. Mark McCauley, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered an exceptional sentence of 66 months to life for attempted child molestation in the first degree above the standard range of 75 percent of 51 to 68 months.

2. The trial court erred when it entered Finding of Fact 3 in findings and conclusions for exceptional sentence, which states:

That the Defendant used his position of trust to facilitate the commission of the crime.

Clerk's Papers (CP) 176.

3. The trial court erred when it entered Finding of Fact 4 in findings and conclusions for exceptional sentence, which states:

The factor listed in the preceding paragraph constitutes sufficient cause to impose the exceptional sentence.

CP 176.

4. The trial court erred when it entered Finding of Fact 5 in findings and conclusions for exceptional sentence, which states:

The court's oral findings of February 24, 2017, are also incorporated herein by this reference.

CP 176.

5. The trial court erred when it entered Conclusion of Law 3 in the findings and conclusions for exceptional sentence, which states in relevant part:

[T]he facts found by the jury in the special verdict form are substantial and compelling reasons justifying an exceptional sentence for crime of Attempted Child Molestation in the First

Degree.

CP 177.

6. The trial court erred by finding in an order entered February 24, 2017, that the defendant violated a position of trust given his relationship to the family.

CP 154.

7. The trial court erred by finding that in an order entered February 24, 2017, that “there is sufficient facts to warrant an exceptional sentence.”

CP 154.

8. There was insufficient evidence to support the jury’s special verdict that Mr. Morris used a position of trust to facilitate the crimes.

9. The trial court erred in imposing an exceptional sentence where the aggravating factor relied upon is invalidated.

10. The evidence was insufficient to sustain a conviction for attempted child molestation in the first degree as alleged in Count 1.

11. The evidence was insufficient to sustain a conviction for communication with a minor for immoral purposes as alleged in Count 2.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in imposing an exceptional sentence where there was insufficient evidence to support the jury’s special verdict that Mr. Morris used a position of trust to facilitate the crime alleged in

Count 1? Assignments of Error 1-9.

2. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt. To prove an attempt, the State must prove that with the intent to commit the completed offense a defendant took a substantial step towards that commission of the offense. Did the State produce sufficient evidence to convict Mr. Morris of the crime of attempted child molestation? Assignment of Error 10.

3. Where the communicating with a minor for immoral purposes statute requires proof of a communication with the predatory purpose of promoting a minor's exposure to and involvement in sexual misconduct, and where Mr. Morris asked F.S.H. if he could see her "privates", did the State present sufficient evidence to convict him of the crime of communicating with a minor for immoral purposes? Assignment of Error 11.

C. STATEMENT OF THE CASE

1. Procedural facts:

Vernice Morris was charged in Grays Harbor County Superior Court by information filed October 4, 2016, with child molestation in the first degree. Clerk's Papers (CP) 1-2. The State filed an amended information on January 9, 2017, charging Mr. Morris with first degree child molestation (Count 1), and communication with a minor for immoral purposes (Count 2).

CP 94-95. RCW 9A.44.083, RCW 9.68A.090(1). The State further alleged

the aggravating circumstance of abuse of a position of trust. RCW 9.94A.535(3)(n). CP 94-95.

The motion and declaration for arrest warrant alleged that the offenses occurred on or about September 27, 2016, and that the victim, F.S.H., was five years old at the time of the crimes alleged by the State. CP 3-7.

Prior to trial, the court conducted a RCW 9A.44 hearing to determine whether F.S.H.'s statements were admissible under the child hearsay statute. The court took testimony regarding the admissibility of F.S.H.'s hearsay statements to her mother, father, Detective Richard Ramirez of the Grays Harbor County Sheriff's Office, and Lisa Wahl, a nurse at Providence St. Peter Sexual Assault and Child Maltreatment Center. Report of Proceedings (RP) (1/6/17)¹ at 9-103. Reviewing the factors set forth in *State v. Ryan*, 107 Wn.2d 165, 691 P.2d 197 (1984), the court found F.S.H.'s statements met the test for admissible child hearsay under RCW 9A.44.120. RP (1/6/17) at 94-102.

The court conducted a CrR 3.5 motion hearing on January 5, 2017, to determine the voluntariness of Mr. Morris' statements to investigating law enforcement officers. RP (1/5/17) at 2-71.

¹The record of proceedings consists of the following transcribed hearings: January 5, 2017, January 9, 2017, January 10, 2017; 1RP - November 21, 2016, December 19, 2016, December 27, 2016, January 6, 2017 (child hearsay hearing), January 10, 2017 (jury trial, day 1, morning session), 2RP - January 10, 2017 (jury trial, day 1, afternoon session), January 11, 2017 (jury trial, day 2), and February 24, 2017 (sentencing).

Detective Jason Wecker of the Grays Harbor County Sheriff's Office, testified that Mr. Morris was arrested at approximately 5:00 p.m. on October 3, 2017 in Humptulips, Washington and transported him to the Sheriff's Office in Montesano in order to conduct an interview regarding an allegation of child molestation made by F.S.H. RP (1/5/17) at 7, 20. Detective Wecker initially told Mr. Morris that he had an outstanding warrant for driving under the influence of alcohol. RP (1/5/17) at 9. Detective Wecker read Mr. Morris his constitutional warnings pursuant to *Miranda*, and stated that when he asked direct questions about the alleged molestation, Mr. Morris "would look away, or was tough for him to keep eye contact with me" RP (1/5/17) at 12. He stated that Mr. Morris denied touching F.S.H.'s vagina, and he said "no, I don't remember doing anything like that." RP (1/5/17) at 13.

On cross examination, Detective Wecker stated that Mr. Morris said that he was unsure if he was willing to talk to law enforcement. RP (1/5/17) at 21. Detective Wecker prepared part of a written statement for Mr. Morris, which he did not sign. RP (1/5/17) at 16-17. Sgt. Darrin Wallace also asked Mr. Morris questions about the allegation, and stated that Mr. Morris eventually said that he was intoxicated and did not realize what he was doing until after she said stop. RP (1/5/17) at 34. After being booked into the jail, Sgt. Wallace talked to him a second time and subsequently signed a statement that while drinking at his trailer, he touched F.S.H. on her

vagina through her panties, that she told him “no” and pushed his hand away and that he realized what he had done was wrong and that has not touched her since that incident. RP (1/5/17) at 40-41.

Mr. Morris said that he was in shock when told by the officers that he was being questioned about child molestation and said that he thought he was there “for traffic.” RP (1/5/17) at 54. He said he asked and they “just kept on with the questions[.]” RP (1/5/17) at 54-55. He stated that he signed the statement “[t]o get it over with[.]” RP (1/5/17) at 57, 59. The statement was admitted at the hearing as Exhibit 3.

After hearing the testimony, the court ruled that Mr. Morris’ statements were knowingly, voluntarily, and intelligently made, and that he “did not believe his testimony about requesting an attorney[.]” RP (1/5/17) at 70. The judge found that Mr. Morris’ statements were admissible, with the exception of the statement that Detective Wecker started to prepare but did not complete and which Mr. Morris did not sign. RP (1/5/17) at 70.

Subsequent to the child hearsay and CrR 3.5 hearings, findings of fact and conclusions of law were entered on January 10, 2017. CP 96-100, 101-106.

The matter came on for trial on January 10 and January 11, 2017, Judge McCauley presiding. 1RP at 104-211, and 2RP at 216-379.

The jurors were instructed that they could consider the lesser included offense of attempted first degree child molestation in Count 1.

Jury Instruction 9, 10, and 11. CP 117.

a. Verdict and sentencing:

The jury found Mr. Morris guilty of attempted first degree child molestation in Count 1 and communicating with a minor for immoral purposes in Count 2. 2RP at 376; CP 123, 124. The jury also found by special verdict that Mr. Morris used a position of trust to facilitate commission of both offenses. 2RP at 376; CP 125, 126. At sentencing, regarding the special verdict, Judge McCauley stated:

I think there should be an enhancement because of the violation of trust. I mean, she was with somebody that as her father said, that really cared about you and that trusted you at that point.

RP (2/24/17) at 8.

The court entered an order on February 24, 2017 finding:

1. The jury found that the defendant violated a position of trust under RCW 9.94A.535.
2. The court finds that the defendant violated a position of trust given his relationship to the family.
3. As a result of that violation, the court finds that there are sufficient facts to warrant an exceptional sentence.

CP 152.

The court entered Findings of Fact and Conclusions of Law for Exceptional Sentence on March 8, 2017. CP 175-77. The court made the following relevant findings:

3. The jury unanimously found beyond a reasonable doubt that the defendant committed Attempted

Child Molestation in the First Degree with the following aggravating factor:

That the Defendant used his position of trust to facilitate the commission of the crime.

4. The factor listed in the preceding paragraph constitutes sufficient cause to impose the exceptional sentence.

5. The court's oral findings of February 24, 2017, are also incorporated herein by this reference.

CP 176.

Mr. Morris had a standard range of 75 percent of 51 to 68 months in Count 1, and an offender score of "0." CP 155. Defense counsel argued for a sentence within the standard range for attempted first degree child molestation. RP (2/24/17) at 5. The State requested an exceptional sentence of 68 months in Count 1. RP (2/24/17) at 7. The Court imposed an exceptional of 66 months (75 percent of 88 months) to life in Count 1, and 364 days in Count 2, to be served consecutively. RP (2/24/17) at 98; CP 157. The court imposed legal financial obligations including \$500.00 victim assessment, and \$100.00 felony DNA collection fee. CP 160-61.

Timely notice of appeal was filed February 24, 2017. CP 170. This appeal follows.

b. Trial testimony:

F.S.H. and her brother lived with their mother Chanise Stallworth in a four bedroom house located on thirteen acres in Grays Harbor County,

Washington. 1RP at 202. The property is located in a rural area and there were no children F.S.H.'s age in the vicinity. 1RP at 204. F.S.H. often played outside and fed animals. 1RP at 204. She liked to play card games and would also visit Mr. Morris, whom she called "Mr. Vince," two or three times a week. 1RP at 206. Mr. Morris, who was 73 at the time of the alleged incident, lived in a travel trailer on the property. 1RP at 204. Ms. Stallworth trusted Mr. Morris and fed him meals each day and permitted F.S.H. go to his trailer to help him feed chickens and ducks and also play cards with him. 1RP at 206.

F.S.H. lived primarily with her mother and stayed with her father, Tommy Hall, every other weekend from Friday until Sunday at 5:00 p.m. 1RP at 205, 2RP at 221.

In late September, 2016, F.S.H. asked her mother if it was bad if Mr. Morris wanted to look at her privates. 1RP at 207. Ms. Stallworth told her that F.S.H. did not need to be over at Mr. Morris' trailer, but took no further action regarding the statement. She stated that after that, F.S.H. "left it alone." 1RP at 207. Ms. Stallworth said that she did not hear anything else regarding her daughter's question until F.S.H. did not return following weekend visitation with Mr. Hall. 1RP at 208. Ms. Stallworth called the police and told them that she had custody of F.S.H. and that she was supposed to be returned at 5:00 p.m. that day. 1RP at 208.

F.S.H.'s father, Tommy Hall, testified that when he picked up his

daughter for visitation, she said that Mr. Morris tried to touch her and that he “asked to see her loochie,” which is the word she uses for her private area. 2RP at 223. Mr. Hall called the police, and F.S.H. was interviewed on October 3, 2016, at the police station. 2RP at 225, 234.

F.S.H. stated that she went to Mr. Morris’ trailer to play card games and that sometimes he went to her mother’s house to eat dinner. 2RP at 231-32. She stated that while at his trailer, he asked to see her “private,” and she said ‘no.’ 2RP at 233. She said that after that, he tried to touch her and put his hand between her legs, and that she closed her legs and he then sat down and did not touch her. 2RP at 234. She said that she left and told her mother about the incident. 2RP at 234. She said that she also told her father when he picked her up for visitation and they went to the police station and talked to an officer about the incident. 2RP at 235.

F.S.H. was interviewed by Detective Ramirez. 2RP at 249-255. Detective Ramirez stated that during the interview F.S.H. said that “Mr. Vince” tried to touch her “private,” which she called her “loochie.” 2RP at 253. Detective Ramirez said that F.S.H. said that “Mr. Vince” tried to touch her “loochie” one time under her clothing and that this happened while she was lying on the floor at his trailer. 2RP at 253, 254.

F.S.H. said that she told her mother about the incident and that she was upset that mother had not done anything in response. 2RP at 254. She said she told her father as soon as he picked her up for visitation, that her

father called the police and took her to the police station. 2RP at 255. A video of the interview of F.S.H. was played to the jury, who were also provided with a transcript of the interview. 2RP at 260. Exhibit 2.

Lisa Wahl, a Sexual Assault Nurse Examiner at Providence St Peters Sexual Assault and Child Maltreatment Center, examined F.S.H. following the allegation. 2RP at 270-75. Ms. Wahl stated that F.S.H. said that "Mr. Vince" asked to see her private parts and also tried to touch her. 2RP at 273.

Detective Wecker stated that when questioning Mr. Morris, after informing him of the allegations of molestation made by F.S.H., Mr. Morris said "I don't remember it that way" or that he "didn't remember." 2RP at 283. Detective Wecker stated that Mr. Morris "ended up telling Sergeant Wallace that it happened just like [F.S.H.] said it did." 2RP at 284. He did not sign a written statement prepared by Wecker and was later taken to the jail. 2RP at 286.

Sgt. Wallace testified that after Mr. Morris initially denied the allegation, he went to the booking office at the jail and Mr. Morris eventually told him that while drinking alcohol, he touched F.S.H. on the vagina through her panties, that he stopped and that he had not touched her since that time. 2RP at 303.

Seventy three-year-old Vernice Morris denied inappropriately

touching F.S.H. 2RP at 329.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE

When reviewing the imposition of an exceptional sentence, a Court must engage in a three-part analysis, which includes (1) making a factual inquiry to determine whether the record supports the sentencing judge's reasons or the jury's special verdict on the aggravating circumstances under a clearly erroneous standard; (2) determining, as a matter of law, whether the reasons given for imposing the sentence are substantial and compelling; and (3) determining whether the sentence is clearly too excessive or clearly too lenient under the abuse of discretion standard. *State v. Fowler*, 145 Wn.2d 400, 405-06, 38 P.3d 335 (2002). A jury finding of one of the aggravating factors contained in RCW 9.94.535(3) can serve as a substantial and compelling reason to impose an exceptional sentence.

In this case, the jury found by special verdict that Mr. Morris abused a position of trust in the facilitation of the crime, and the trial court imposed an exceptional sentence based upon that finding.

Under RCW 9.94A.535(3)(n), a jury may find an aggravating factor if:

The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

Based on this statute, the trial court entered finding of fact 3 that Mr. Morris “used his position of trust to facilitate the commission of the crime,” and his oral ruling, incorporated in finding of fact 5, that F.S.H. “really cared about [Mr. Morris], “trusted” him, and “loved” him at the time of the offense. RP (2/24/17) at 8.

Abuse of a position of trust is a statutory aggravating factor that cannot be used to support a sentence outside the standard range unless the defendant actually was in a position of trust, and the position of trust was used to facilitate the commission of the offense. *State v. Vermillion*, 66 Wn. App. 332, 832 P.2d 85 (1992), review denied, 120 Wn.2d 1030 (1993). “Whether the defendant is in a position of trust depends on the length of the relationship with the victim, the trust relationship between the primary caregiver and the perpetrator of a sexual offense against a child, the vulnerability of the victim to trust because of age, and the degree of the defendant’s culpability.” *Vermillion*, at 348. When analyzing abuse of trust, the focus is on the defendant. *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673, review denied, 123 Wn.2d 1019 (1994).

In this case, Mr. Morris did not abuse a position of trust. There was

no evidence that Mr. Morris ever baby-sat F.S.H., or that he ever served as a caregiver, or that he was related to them. There was no evidence that F.S.H. resided with the defendant. Instead, the evidence shows that Mr. Morris lived on the property, that he frequently ate meals with Ms. Stallworth and her children, and that F.S.H. visited Mr. Morris at his trailer on numerous occasions.

Mr. Morris was not in a position of trust; the two had not been close for any appreciable period, and he was not a caregiver. See *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) (relationship's duration and degree used to determine whether defendant abused position of trust).

The Legislature has undoubtedly considered the worst case scenario when it imposed the lengthy sentences that result from the seriousness level for this crime. This factor has already been calculated into the standard range sentence and does not support an exceptional sentence. There was no degree of culpability greater than that involved in the commission of the crimes for which Mr. Morris was convicted. The jury's finding does not justify an exceptional sentence based on abuse of trust.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE EACH ELEMENT OF ATTEMPTED FIRST DEGREE CHILD MOLESTATION BEYOND A REASONABLE DOUBT AS ALLEGED IN COUNT 1 AND COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES AS ALLEGED IN COUNT 2

- a. *The State bears the burden to prove every element of the offense beyond a reasonable doubt.*

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as a due process violation. *State v. Hickman*, 135 Wn.2d 97, 954 P. 2d 900 (1998); *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972).

The due process clauses of the federal and state constitutions require the prosecution prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 21, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220- 22, 616 P.2d 628 (1980). Further, when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992).

Evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

- b. *State did not prove Mr. Morris had the intent to touch F.S.H. for purposes of sexual gratification, a required element of attempted first degree molestation of a child*

Mr. Morris was convicted of attempted first degree child molestation in Count 1. CP 123. To convict Mr. Morris of the offense, the State was required to prove that he had the intent to have sexual contact with F.S.H. and that he took a substantial step towards that end. Jury Instruction 11, 12. CP 117-18. Under RCW 9A.28.020, "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." A person does not take a substantial step unless his conduct is "strongly corroborative of the actor's criminal purpose." Mere preparation to commit a crime is not a substantial step. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

RCW 9A.44.083(1) defines the offense of child molestation in the first degree in pertinent part as "knowingly [having] 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."

The legislature defined "sexual contact" as any touching of the sexual

or other intimate parts for the purposes of gratifying sexual desires of either party or a third person. RCW 9A.44.010(2). This definition of "sexual contact" excludes inadvertent touching or contact from being a crime. *State v. Lorenz*, 152 Wn.2d 22, 34, 93 P.3d 133, (2004), citing *State v. Gurrola*, 69 Wn. App. 152, 157, 848 P.2d 199 (1993); *State v. Brown*, 78 Wn. App. 891, 895, 899 P.2d. 34 (1995). Although "sexual gratification" is not an essential element to the crime of first degree child molestation, it is a definition clarifying the meaning of the essential element "sexual contact." *Lorenz*, 152 Wn.2d at 34-35.

In the case at bar, the State failed to produce sufficient evidence that Mr. Morris committed an act that constituted a substantial step toward "sexual contact" with F.S.H. Although F.S.H. said that "Mr. Vince" "wanted to see [her] private" and "got his hand in between my legs," the State did not produce evidence that this constituted an actual attempt at "sexual contact" rather than inadvertent or improper touching not rising to the level of sexual contact. 2RP at 233. Contrary to Sgt. Wallace's testimony that Mr. Morris said, that he reached out and touched her on the vagina through her panties, Mr. Morris denied inappropriately touching her and F.S.H. testified only that he reached between her legs but did not testify that he came into contact with her vagina. 2RP at 303. Exhibit 3.

The "purpose of gratifying sexual desire" is an "ultimate fact" which must be supported by the record to sustain a conviction. *State v. Lorenz*, 152

Wn.2d 22, 32, 93 P.3d 133 (2004) (affirming outcome in *State v. B.J.S.*, 72 Wn. App. 368, 372, 864 P.2d 432 (1994)). More than mere contact is required to show sexual gratification. A purpose of gratification may be inferred from the circumstances of the contact. *State v. T.E.H.*, 91 Wn. App. 908, 916-17, 960 P.2d 441 (1998). For example, sexual gratification may be inferred, even without additional evidence, when an unrelated adult male touches a child's "intimate or sexual parts." *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). But additional evidence of sexual gratification is required if the touching is touching of the sexual part occurs through clothing. *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991).

In this case, sexual gratification may not be inferred merely from the fact of contact. F.S.H. did not state at trial that Mr. Morris touched her vagina; she stated that he "tried to touch" her and that he put his hand between her legs and that she closed her legs and he sat down, and she left shortly after that. 2RP at 233-34. Sgt. Wallace testified that Mr. Morris said that he touched F.S.H. on the vagina through her panties. 2RP at 300. Mr. Morris denied at trial that he had physical contact with F.S.H. or that he touched her inappropriately. 2RP at 327, 329. He stated that he signed the statement prepared by Sgt. Wallace because he became irritated with the questioning by police and that he did not read the statement and told Sgt. Wallace to "just write out what you want, I'll sign it." 2RP at 331.

Equivocal evidence of the type presented here is not sufficient to

support a finding of a sexual gratification purpose beyond a reasonable doubt. *Powell*, 62 Wn. App. at 917. In *Powell*, Division 3 reversed a conviction for child molestation due to insufficient evidence the touching was for purposes of sexual gratification. *Id.* at 918. In that case a fourth grade girl testified that Powell hugged her about the chest, touched her bottom while lifting her off his lap. *Id.* When she told him to stop, he said, “Oops.” *Id.* As Mr. Powell assisted her off his lap, he touched her buttocks and placed his hand on her underpants under her skirt. *Id.* On another occasion, while the girl was alone with Mr. Powell in his truck, he touched both her thighs. *Id.* On each of the occasions Mr. Powell only touched the outside of her clothing. *Id.* The court found the evidence insufficient to show the contact was for purposes of sexual gratification because it was susceptible of innocent explanation. *Id.* Specifically, the court noted the child was dressed, Powell did not request her not to tell, and she “did not remember how he touched her.” *Id.*

“ ‘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 courts 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 (2009) (quoting *Powell*, 62 Wn.App. at 917). The *Harstad* court held that proof of a sexual purpose existed because the defendant rubbed the victim's upper thigh back and forth

while engaging in heavy breathing. 153 Wn.App. at 22–23.

Here, the evidence is more ambiguous than the facts of *Harstad*, and more similar to *Powell*. The evidence of sexual gratification is limited to Sgt. Wallace’s statement that Mr. Morris said that touched her vagina over her panties, which Mr. Morris denied at trial. No evidence suggests that the alleged touching occurred on multiple occasions. *Contra, State v. Whisenhunt*, 96 Wn.App. 18, 24, 980 P.2d 232 (1999) (evidence sufficient where the defendant touched child under her skirt but over her body suit on three separate occasions). The state presented no evidence that Mr. Morris persisted in the face of resistance. No evidence suggests signs of arousal in Mr. Morris, in contrast to *Harstad*, where the defendant engaged in “heavy breathing.”

The evidence presented at trial is considerably weaker than the evidence the Court found sufficient but “far from strong” in *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003) (evidence defendant “grabbed” at the child’s private parts and attempted to conceal the act). In this case, because the State failed to produce sufficient evidence Mr. Morris made “sexual contact” for the purpose of gratification with F.S.H., there was insufficient evidence to support his conviction of child molestation.

c. The State failed to present sufficient evidence to establish all the elements of communication with a minor for immoral purposes as alleged in Count 2.

Mr. Morris was charged with communication with a minor for

immoral purposes pursuant to RCW 9.68A.090, which provides in relevant part that “a person who communicates with a minor for immoral purposes ... is guilty of a gross misdemeanor.” CP 118. F.S.H. stated that when at the trial, Mr. Morris “wanted to see my private.” 2RP at 233. During closing, the State argued that the alleged statement was the basis for the allegation of commination with a minor for immoral purposes alleged in count 2. 2RP at 372.

In order to protect the constitutional right to free speech, Washington courts have interpreted the statute to “prohibit communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” *State v. Hosier*, 157 Wn.2d 1, 9, 133 P.3d 936 (2006); *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993); *State v. Aljutilly*, 149 Wn. App. 286, 296, 202 P.3d 1004 (2009). “[A] defendant communicates with a minor under RCW 9.68A.090 if he or she invites or induces the minor to engage in prohibited conduct.” *State v. Jackman*, 156 Wn.2d 736, 748, 132 P.3d 136 (2006); *McNallie*, 120 Wn.2d at 934.

In this case, there is insufficient evidence to support a conclusion that Mr. Morris made the type of communication with F.S.H. with predatory intentions as found in *Hosier* or *McNallie*. In *McNallie*, the Court found that the defendant engaged in conduct prohibited by the statute where he: drove into an apartment complex and stopped near three young girls; asked them if there was anyone in the area who gave “hand jobs;” suggested people could

earn money for giving “hand jobs;” exposed his penis and demonstrated the act; and suggested that he would give money to “anyone” who performed the act. 120 Wn.2d at 926-27, 928, 933-34. In *Hosier*, the Court also affirmed a communication with a minor conviction where the defendant placed sexually explicit and threatening notes fantasizing about sexual contact, on the fence of a daycare center and the lawn of his 13-year-old neighbor’s home. 157 Wn.2d at 4-6.

In this case, Mr. Morris did not encourage or invite F.S.H. or to engage in a particular sexual act, did not offer to engage in a sexual act with F.S.H. Although clearly deeply offense, no reasonable trier of fact could have concluded that his request to see her vagina was made with a serious and actual intent to promote F.S.H.’s involvement in sexual misconduct such as that found in *McNallie* or *Hosier*.

d. The Court must reverse and dismiss Counts 1 and 2.

The State failed to prove all of the elements of the charges. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment’s Double Jeopardy Clause bars retrial of a case where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove Mr. Morris

took a substantial step in furtherance and that he had the intent to have sexual contact with F.S.H. the Court must reverse his conviction for Count 1.

The prosecution also failed to prove the element of communication for immoral purposes charged in Count 2. This Court should reverse Mr. Morris' convictions and dismiss the charges against him. See *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (remedy for insufficiency of evidence is reversal with no possibility of retrial).

3. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Morris does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court imposed fees, including \$500.00 victim assessment, \$450.00 in court costs, and \$100.00 felony DNA collection fee. The trial court found him indigent for purposes of this appeal. CP 206-08. There has been no order finding Mr. Morris's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991

P.2d 615 (2000). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Morris’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

For the foregoing reasons, Mr. Morris respectfully requests this Court reverse his convictions and remand for a new trial. In the alternative, he respectfully requests this Court to remand for resentencing within the standard range.

DATED: October 20, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

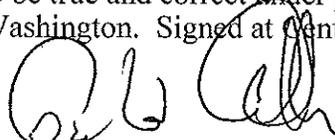
The undersigned certifies that on October 20, 2017, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Katherine Lee Svoboda, Grays Harbor Prosecuting Attorney and 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, Washington on October 20, 2017.



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