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

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STATE OF WASHINGTON,  
Respondent,

v.

VERNICE M. MORRIS,  
Appellant.

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

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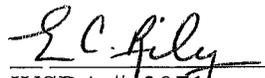
THE HONORABLE F. MARK MCCAULEY, JUDGE

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BRIEF OF RESPONDENT

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## **I. COUNTER STATEMENT OF THE CASE**

### **a. Procedural History**

The Appellant was originally charged by Information filed on October 4, 2016. CP 1-2. The Appellant was originally charged with one count of Child Molestation in the First Degree. CP 1-2. During the pendency of the case, it was discovered that, in addition to touching the child, the Appellant had also asked to see the child's privates on two separate occasions prior to molesting her. On November 20, 2016, the State filed an Amended Information in response to this discovery, charging the Appellant with one count of Child Molestation in the First Degree and one count of Communicating with a Minor for Immoral Purposes. The State further added an aggravating circumstance to each count under RCW 9.94A.535(3)(n), alleging that the Appellant had abused his position of trust, confidence, or fiduciary responsibility to facilitate the crimes. CP 30-35. On January 8, 2017, the State discovered a scrivener's error

in the Amended Information that had been previously filed so filed a second Amended Information to correct that error. The Amended Information corrected the error that the age difference between the Appellant and the child was 36 months rather than 24 months. CP 91-95.

On January 5, 2017, a 3.5 hearing was conducted and the Appellant's statements were found to be admissible. Findings of Fact and Conclusion of Law for the 3.5 hearing were entered on January 10, 2017. CP 96-100. On January 6, 2017, a child hearsay hearing was held and the child hearsay statements were found to be admissible. Findings of Fact and Conclusions of Law for the child hearsay hearing were entered on January 10, 2017. CP 101-106.

The trial commenced on January 10, 2017. The jury instructions included instructions related to the lesser-included crime of Attempted Child Molestation in the First Degree. CP 117-118, 119-120, 123. The Appellant was found guilty on January 11, 2017 on the lesser included crime of Child Molestation in the First

Degree in count 1 and Communicating with a Minor for Immoral Purposes in count 2 with the aggravator on both counts. CP 123-125. The Appellant was sentenced on February 24, 2017 to 66 months to Life on count 1, which was an exceptional sentence, and 364 days on count 2, to run consecutively. CP 153-168. Also on February 24, 2017, the court entered an initial order on the jury's finding that the Appellant had abused a position of trust under RCW 9.94A.535, that the Appellant had violated his position of trust based on his relationship with the family and, as a result, that there were sufficient facts to warrant an exceptional sentence. CP 152. On March 8, 2017, the court entered a final and more formalized Findings of Fact and Conclusions of Law for Exceptional Sentence. CP 175-177.

b. Statement of Facts

On or about September 27, 2016, the alleged victim, then 6 year old F.S., date of birth December 17, 2009, was with Vernice Morris, the Appellant, who was approximately 73 years old. RP Vol. I 201, RP Vol. II 220 and 321. The Appellant lived in a travel trailer on the same property

as where F.S. and her mother were living. RP Vol. I 202, RP Vol. II 221 and 231. F.S.'s mother was the caretaker on the property, cooking breakfast, lunch, and dinner for everyone, including feeding the Appellant three meals a day, cleaning up after everybody, and doing lots of housework and daily chores. RP Vol. I 205, 206. F.S. had no other children or friends on the property to spend time with or play with and the property is rural - on 13 and a half acres and isolated from neighbors with the closest neighbor being two and half miles away. RP Vol. I 202-203. The Appellant had a close relationship with the family and was considered to be a friend of the family with the family having a lot of love and respect for the Appellant prior to the reported abuse. RP Vol. I 205, 206 and RP Vol. II 221-222. F.S. specifically considered the Appellant to be her friend. RP Vol. I 205 and RP Vol. II 221, 232. F.S. often spent time with the Appellant, two or three times a week, and the Appellant was often alone with F.S. both in his trailer and outside on the property. RP Vol. I 206 and RP Vol. II 221-222, 231. In addition to spending time with the Appellant and playing games and learning about magnets with him, F.S. helped the Appellant feed the animals on the property and collected eggs with him. RP Vol. I 206 and RP Vol. II 221, 230, 232. The Appellant

also came over to the family's house on the property for dinner sometimes. RP Vol. II 232.

F.S.'s parents were separated and she was living with her mother and had regular visitation with her father during this period of time. RP Vol. I 208, RP Vol. II 221. On or about September 30, 2016, F.S. was picked up by her father from a third party at the KFC parking lot in Aberdeen. RP Vol. II 223. When she got into her father's car, F.S. disclosed to her father that she needed to tell him something. RP Vol. II 223. F.S. told her father that the Appellant had tried to touch and had asked to see her "loochie," which is the word she used for her vagina. RP Vol. II 223. F.S. told her father that she had closed her legs to stop the Appellant from touching her "loochie." RP Vol. II 224. F.S.'s father reported the incident to the Grays Harbor County Sheriff's Office and an investigation ensued. RP Vol. II 225.

In trial, F.S. testified that the Appellant tried to touch her "inappropriate," pointing to her crotch in doing so, while they were alone in his trailer. RP Vol. II 232, 233. F.S. later described in more detail, both with words and actions for the jury, how the Appellant had tried to touch her and that she had closed her legs in response. RP Vol. II 233-234. F.S. also testified that the Appellant had talked to her about wanting

to see her private, but that she had told him no. RP Vol. II 233. F.S. testified that she first told her mom that the Appellant had tried to touch her and that she later told her dad, which was also testified to by the parents at trial. RP Vol. II 234, RP Vol. I 207.

F.S. was forensically interviewed by Detective Ramirez of the Grays Harbor County Sheriff's Office at the Grays Harbor Children's Advocacy Center in Montesano on October 3, 2016. RP Vol. II 246. During the forensic interview of F.S., she stated that the Appellant touched her "private," indicating that this was her vaginal area, while lying down inside the Appellant's trailer. F.S. stated that she told the Appellant no. In the forensic interview, F.S. had demonstrated how the Appellant had touched her, motioning with her index finger in an up and down motion. F.S. also reported that the Appellant had asked to see her "inappropriate," again meaning her vaginal area, a few days prior to the touching on that day in September. F.S. stated that she felt that what the Appellant had done was wrong. Information about the interview and F.S.'s demeanor, statements, and actions during the interview were testified to by Detective Ramirez at trial. RP Vol. II 248-255. There was an audio and video CD recording of F.S.'s interview and a transcript made of the interview. A

copy of the recording was admitted without objection and played at trial with the transcript given as a listening aid. RP Vol. II 256, CP 112.

On October 26, 2016, F.S. was seen at the Providence St. Peter Hospital Sexual Assault Clinic and Child Maltreatment Center for a sexual assault medical evaluation and exam. RP Vol. II 271. F.S. was seen by Sexual Assault Nurse Examiner (SANE) Lisa Wahl. F.S. made further disclosures about the Defendant trying to touch her privates and asking to see her privates. F.S. stated that she told the Defendant no when he asked to see her privates. RP Vol. II 273. There was not a genital exam done in the evaluation because the child elected not to take her pants off. RP Vol. II 274. Ms. Wahl testified at trial and provided this information to the jury.

Following the disclosures made by F.S. during the investigation, deputies, including Detective Wecker and Sergeant Wallace of the Grays Harbor County Sheriff's Office, became involved in the case. Their roles were to arrest and interview the Appellant. RP Vol. II 279. The Appellant was arrested by Sergeant Wallace at his residence, taken into custody, and transported to the Sheriff's Office to be interviewed. RP Vol. II 280, 295. Sergeant Wallace advised the Appellant that he was under arrest and the Appellant simply stated "ok" without asking what he was being arrested

for. RP Vol. II 296. In addition to having probable cause to arrest for the child molestation accusation, the Appellant also had a DUI arrest warrant out of the Grays Harbor County Sheriff's Office so he was taken into custody on the warrant. RP Vol. II 296. Detective Wecker initially interviewed the Appellant. RP Vol. II 281. The Appellant's handcuffs were removed, he was provided with water, and he was allowed to use the restroom during the course of the interview. RP Vol. II 281. Detective Wecker advised the Appellant that he had a DUI warrant for his arrest and that he also wanted to talk to him about some allegations that had been made by F.S. RP Vol. II 281. The Appellant was told that F.S. had accused him of trying to touch her vagina and touching her on the vagina through her underwear. RP Vol. II 292, 299. Sergeant Wallace was also present during the interview. RP Vol. II 298.

Detective Wecker then read the Appellant his *Miranda* rights and the Appellant stated that he understood his rights. RP Vol. II 281-282. Detective Wecker asked the Appellant if he knew F.S. and the conversation went from there. RP Vol. II 282. The Appellant stated that he knew F.S. and that F.S. and her mother lived on the same property as him with F.S. and her mother in the house and he in a trailer on the property. RP Vol. II 282. The Appellant admitted that F.S. would often

come over during the day, visiting him at his trailer, sometimes more than once a day. RP Vol. II 282. The Appellant initially denied touching F.S., stating that he didn't remember anything like he was being accused of happening. RP Vol. II 282. The Appellant stated that the only time he physically touched F.S. was to move her away from him or around the trailer. RP Vol. 288.

During the interview, the Appellant showed signs of deception anytime Detective Wecker would ask him a direct question about touching F.S. RP Vol. II 283. The Appellant continued to deny and follow the denial up with stating, "I don't remember it that way" or that he just didn't remember. RP Vol. II 283. The Appellant also talked about F.S. being very bright and that she wasn't the type of person who would make up a story like what was being reported. RP Vol. II 285. Sergeant Wallace also spoke with the Appellant during the interview. RP Vol II 283, 299. After speaking with Sergeant Wallace during the interview, the Appellant eventually stated that it was true what F.S. had said, stating that it happened just like F.S. said it did and admitted that he touched F.S. on her vagina through her panties. RP Vol. II 284, 300. Sergeant Wallace thanked the Appellant for being honest, shook his hand, and then left the room so that Detective Wecker could get the Appellant's written

statement, which the Appellant then had difficulty in doing. RP Vol. II 284-285, 300. The Appellant wanted Detective Wecker to simply write out what F.S. had told them for his statement rather than writing down himself what he had done and admitted to. RP Vol. II 285-286, 301.

The Appellant provided a partial statement to Detective Wecker, in which he admitted to having an earlier conversation with F.S., which he believed led to his actions on that day in the trailer with F.S. RP Vol. II 284-285. The Appellant stated that he was talking to F.S. about the pictures of women wearing skimpy bathing suits on the playboy calendar he has in his trailer. The Appellant stated that the pants F.S. was wearing that day were a kind of mesh material, which were see-through, and he could see her panties. RP Vol. II 285. Sergeant Wallace was asked to re-contact the Appellant in order to get a complete written statement. RP Vol. II 286, 301. The Appellant later gave a more detailed statement to Sergeant Wallace in which the Appellant stated that F.S. had been in his trailer about a week or two before and was playing around like little girls do. RP Vol. II 302. The Appellant stated that F.S. began moving around the trailer seductively and that she was always moving around seductively. RP Vol. II 302-303.

The Appellant then stated that he was drinking in order to manage his pain level and felt like he was intoxicated. RP Vol. II 303. The Appellant stated that F.S. had walked up to him and he touched her vagina through her panties. RP Vol. II 303. The Appellant stated that F.S. had said no or stop and had knocked his hand away. RP Vol. II 303. The Appellant stated that he realized what he was doing was wrong and he stopped and that he had not touched her since. RP Vol. II 303. The Appellant completed a written statement, which contained this same confession. RP Vol. II 303.

The Appellant's written statement was admitted into evidence and provided to the jury in deliberations. CP 112. During the interview, both Deputy Wecker and Sergeant Wallace testified that their demeanor was calm and described the interaction as conversational. RP Vol. II 283, 284, Testimony was also presented that the initial interview with the Appellant lasted approximately 1 hour from start to finish and the second interview lasted approximately 30 to 40 minutes. RP Vol. II 286, 311.

The Appellant testified at trial. RP Vol. II 320. In his testimony, the Appellant stated that he had been in the military, working as a military police officer while in the service, and later worked in security predominately. RP Vol. II 321. On cross, the Appellant admitted that he

was familiar with police procedures from his time in the military and that he would know what happens in an interview. RP Vol. II 330. In his testimony, the Appellant discussed the living arrangements and stated that F.S. would come over to visit him in his mobile RV quite often. RP Vol. II 322. The Appellant talked about the things he and F.S. would do together such as draw pictures, investigating things like magnets, and play cards. RP Vol. II 322-323. The Appellant talked about his drinking that day and his medical issues. RP Vol. II 324-325. The Appellant described the police showing up and arresting him, admitting that he had been told what the charges were related to child molestation. RP Vol. II 324, 325. The Appellant claimed that the interrogation had lasted several hours and that the officers were quite often encouraging him to say that he had done something and telling him that they thought he was lying. RP Vol. II 326. The Appellant claimed that he had asked to talk to a lawyer and to talk to the judge, but that his requests were shunned to one side and the officer kept asking him questions. RP Vol. II 326. The Appellant claimed that he finally got irritated he told them to just write the statement and he would sign it because whatever he said wasn't correct. RP Vol. II 326.

The Appellant did not remember there being two interviews and claimed that all of the conversations happened in the original

interrogation. RP Vol. II 327, 328. The Appellant testified that he did not, in fact, touch F.S. inappropriately. RP Vol. II 329. On cross, when asked that, despite the fact that he was in the military police, that he was familiar with police procedures, that he allegedly didn't touch F.S., a statement was written out saying he had touched F.S. and he signed it, agreeing that he had touched her, the Appellant claimed he didn't read the statement, but that he had signed it. RP Vol. II 331.

The Appellant was found guilty of the lesser included crime of attempted child molestation in the first degree in count 1 and guilty of communicating with a minor for immoral purposes in count 2. The jury further found that the Appellant had used his position of trust to facilitate the commission of those crimes. RP Vol. II 376.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

### 1) Trial Court Erred in Imposing an Exceptional Sentence Claim

A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." *Blakely v. Washington*, 542 U.S. 296, 299, 124 S.Ct. 2531, 159 L.Ed.2d.403 (2004); RCW 9.94A.120(2); RCW 9.94A.535. Washington's Sentencing Reform Act lists aggravating factors that justify such a

departure, which it recites to be illustrative rather than exhaustive. *Id.*; RCW 9.94A.390; RCW 9.94A.533. Nevertheless, “[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.” *Id.* (quoting *State v. Gore*, 143 Wash.2d 288, 315-316, 21 P.3d 262, 277 (2001)). When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. *Id.*; RCW 9.94A.120(3); RCW 9.94A.533. A reviewing court will reverse the sentence if it finds that “under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence.” *Id.* at 299-300 (quoting *Gore*, 143 Wash.2d at 315; RCW 9.94A.210(4)). Under RCW 9.94A.585, a sentence outside the standard sentencing range for the offense is subject to appeal by the defendant or the state. RCW 9.94A.585(3). To reverse a sentence which is outside the standard range, the reviewing court must find: (a) either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense or (b) that the sentence imposed was clearly excessive or clearly too lenient. RCW 9.94A.585(4).

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 300 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). RCW 9.94A.533 contains a number of aggravating circumstances to be considered by the jury and imposed by the court, including that the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. RCW 9.94A.533(3)(n). Appellate courts “review a jury's special verdict finding the existence of an aggravating circumstance under the sufficiency of the evidence standard.” *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144, 163 (2011) (citing *State v. Stubbs*, 170 Wash.2d 117, 123, 240 P.3d 143 (2010) and RCW 9.94A.585(4)). “Under this standard, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Id.* (quoting *State v. Yates*, 161 Wash.2d 714, 752, 168 P.3d 359 (2007)).

An abuse of a position of trust may be a proper aggravating factor in some situations. *State v. Grewe*, 117 Wash.2d 211, 216, 813 P.2d 1238 (1991) (quoting *State v. Oxborrow*, 106 Wash.2d at 529, 723 P.2d

1123 (theft by deception); *State v. Creekmore*, 55 Wash.App. 852, 862, 783 P.2d 1068 (1989) (felony murder); *State v. Strauss*, 54 Wash.App. 408, 420-21, 773 P.2d 898 (1989) (rape)). Abuse of a position of trust has been expressly extended to apply to sexual offense cases. *Id.* (quoting *State v. Pryor*, 115 Wash.2d 445, 451, 799 P.2d 244 (1990); *State v. Harp*, 43 Wash.App. 340, 343, 717 P.2d 282 (1986)). In *Grewe*, the Supreme Court of Washington specifically addressed an exceptional sentence under an abuse of trust aggravator on a statutory rape conviction. *Id.* at 218.

The Court in *Grewe* stated that the two factors to be considered in determining whether defendant abused a sufficient position of trust to merit an exceptional sentence are the duration and the degree of the relationship. *Grewe*, 117 Wash.2d 211 at 218 (quoting *State v. Fisher*, 108 Wash.2d 419, 427, 739 P.2d 683 (1987)). In *Fisher*, the defendant sexually assaulted a 5 ½-year-old boy who asked the defendant to accompany him to the rest room. *Id.* The victim testified that either his father or mother usually accompanied him to the rest room. *Id.* However, the victim met the defendant only a few days prior to the incident while swimming in the pool at his grandparents' trailer court. *Id.* We concluded that whether the evidence was sufficient to find the defendant had abused

a position of trust was “a close question.” *Id.* Although we never settled that question, we did suggest,

A relationship extending over a longer period of time, or one within the same household, would indicate a more significant trust relationship, such that the offender's abuse of that relationship would be a more substantial reason for imposing an exceptional sentence.

*Id.* at 219 (quoting *Fisher*, 108 Wash.2d at 427).

In *Grewe*, the Court found that the victim had known defendant for approximately 4 months prior to the crime. *Grewe*, 117 Wash.2d 211 at 219. Furthermore, during that time, the victim was a frequent visitor in defendant's home where she played with defendant's computer and piano. *Id.* Therefore, the Court found that the relationship in *Grewe* exceeded that in *Fisher*. *Id.* The Court further found that based on *Fisher*, this record presents substantial evidence to support the trial court's finding defendant abused a position of trust. *Id.*

The Court in *Grewe* went on to address that the trust between the primary caregiver and the perpetrator may also give rise to a trust relationship subject to abuse, that relationship is secondary to the trust between the perpetrator and the child victim. *Grewe*, 117 Wash.2d 211 at 220. The Court stated that it is the trust between the perpetrator and the victim which renders the victim particularly vulnerable to the crime. *Id.*

(See also *State v. Shephard*, 53 Wash.App. 194, 199, 766 P.2d 467 (1988) (discussed in *State v. Brown*, 60 Wash.App. 60, 75, 802 P.2d 803 (1990)).

Here, the Appellant's standard range of sentencing on the crimes he was found guilty on was 75% of 51 – 68 months to Life on count 1 (38.25 – 51 months) for Attempted Child Molestation in the First Degree and 0 – 364 days on count 2 for Communicating with a Minor for Immoral Purposes. Because the jury also found on both counts that he had abused his position of trust in committing his crimes, this allowed the court to sentence the Appellant to a sentence up to the jurisdictional max, which was life on count 1 and up to a year on count 2. Based on the jury's verdict and his own findings, which were memorialized in written findings of fact and conclusions of law, the judge in this case found substantial and compelling reasons that justified an exceptional sentence and order him to serve 66 months to Life (75% of 88 months to Life for the attempted reduction) on count 1 and 364 days on count 2 to run consecutively. The court's sentence in this case, while certainly above the standard range, is not excessive. The high end of the standard range was 55 months to Life and he was ordered to serve 66 months to Life instead based on the aggravating circumstances found by the jury and supported by the judge.

Additionally, the facts in *Grewe* where the Washington State Supreme Court of Washington found that there was an abuse of trust were nearly identical to the case at hand and are dispositive to this issue. In *Grewe*, the attempted statutory rape victim was an 8 year old girl who lived next door to the defendant. *Grewe*, 117 Wash.2nd 211 at 213. The victim and other neighborhood children often went to the defendant's house to play with his piano and computer. *Id.* On one occasion, when the victim was alone in the house with the defendant, he placed his hand inside the victim's pants and attempted to put his finger into her vagina. The victim hit the defendant in the face and ran away. In the case at hand, the relationship is even closer than that of the relationship between the child and the defendant in *Grewe*.

Here, there was testimony from several witnesses that the child and her family lived on the same property as the Appellant, that he sometimes ate with the family and the mother took care of everyone on the property, including the Appellant, the child often spent time with the Appellant, including being in the Appellant's trailer alone, sometimes several times a day, the child considered the Appellant to be her friend and was her only source of companionship given the isolated nature of the property and the fact that there were no other children in the home or in the area, and there

was a trusting, love and respect relationship with him and the family up until the abuse was reported. Based on the case law, there is really no question that there were sufficient facts presented to the jury to support their finding that there was a position of trust relationship between the child and the Appellant.

Therefore, as the sentence imposed was not excessive and there were sufficient facts presented to support the jury's finding that the Appellant abused a position of trust in committing his crimes, the trial court did not err in imposing an exceptional sentence and the sentence must stand.

2) Insufficient Evidence for Attempted Child Molestation Claim

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green*, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980)). “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 State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977)). “A

claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980)). Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wash.App. 95, 109, 117 P.3d 1182 (2005)).

In *State v. Lorenz*, the Supreme Court of Washington held that “sexual gratification” is not an essential element to the crime of first degree child molestation, but a definitional term that clarifies the meaning of the essential element, “sexual contact.” *State v. Lorenz*, 152 Wash.2d 22, 38, 93 P.3d 133 (2004). The touching may be made through clothing and without direct contact between the accused and the victim. *State v. Jackson*, 145 Wash.App. 814, 819, 187 P.3d 321 (2008). Contact is “intimate” within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. *Id.* Which anatomical areas, apart

from genitalia and breast, are “intimate” is a question for the trier of fact.

*Id.*

Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. *State v. Powell*, 62 Wash.App. 914, 917, 816 P.2d 86 (1991) (See also *State v. Wilson*, 56 Wash.App. 63, 68, 782 P.2d 224 (1989), *review denied*, 114 Wash.2d 1010 (1990); *State v. Ramirez*, 46 Wash.App. 223, 730 P.2d 98 (1986)). However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification. *Id.* (E.g., *State v. Camarillo*, 115 Wash.2d 60, 63, 794 P.2d 850 (1990) (“The defendant then rubbed the zipper area of the boy's pants for 5 to 10 minutes.”); *State v. Johnson*, 96 Wash.2d 926, 639 P.2d 1332 (1982) (evidence an unrelated male with no caretaking function wiped a 5-year-old girl's genitals with a wash cloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by his having her perform fellatio on him); *State v. Wilson, supra* (both incidents occurred where they would not be easily observed, and defendant was only partially clothed; victim of second incident was disrobed); *State v.*

*Brown*, 55 Wash.App. 738, 780 P.2d 880 (1989), *review denied*, 114 Wash.2d 1014, 791 P.2d 897 (1990) (multiple incidents including one in which defendant had victim operate a “penis enlarger”); *State v. Brooks*, 45 Wash.App. 824, 727 P.2d 988 (1986) (whitish liquid found on infant's face, chest, and stomach; stain on infant's rubber booties identified as semen); *In re Adams*, 24 Wash.App. 517, 601 P.2d 995 (1979) (defendant removed victim's pants and was on top of her when discovered).

In this case, the jury was instructed that to convict the Appellant of the crime of Child Molestation in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 27, 2016, the defendant had sexual contact with F.S.;
- (2) That F.S. was less than twelve years old at the time of the sexual contact and was not married to the defendant;
- (3) That F.S. was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

CP 116; WPIC 44.21; RCW 9A.44.083

The jury was further instructed that to convict the Appellant of Attempted Child Molestation in the First Degree, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about September 27, 2016, the defendant did an act that was a substantial step toward the commission of Child Molestation in the First Degree;
- (2) That the act was done with the intent to commit Child Molestation in the First Degree; and
- (3) That this act occurred in the State of Washington.

CP 117; WPIC 100.02; RCW 9A.44.083 and RCW 9A.28.020.

Sexual contact was defined for the jury as the touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party. CP 116.

Here, the Appellant has simply ignored testimony and evidence that was presented that proved beyond a reasonable doubt that he acted with intent to commit Child Molestation in the First Degree. The child testified at trial that the Appellant had tried to touch her “inappropriate,” pointing to her crotch in doing so, while they were alone in his trailer. F.S. later described in more detail, both with words and actions for the jury, how the Appellant had tried to touch her and that she had closed her legs in response. F.S. also testified that the Appellant had talked to her about wanting to see her private, but that she had told him no.

In the forensic interview, which was admitted into evidence and played for the jury in trial, the child disclosed that the Appellant tried to touch her “lOOchie” under clothes and twice stated that the Appellant touched her while she was lying on the floor. The child also physically demonstrated how the Appellant had moved her finger in an up and down motion while describing how the Appellant had touched her private. There was further testimony from the SANE nurse examiner at trial in which F.S.’s disclosures during the evaluation were presented. That testimony consisted of further disclosures about the Defendant trying to touch her privates and asking to see her privates.

Additional to the above evidence and testimony, the Appellant himself testified and there was evidence presented about statements he made about his interaction with the child. The Appellant stated that he had been discussing a playboy calendar with F.S. that day. The Appellant described the child’s clothing as being a mesh material and see-through so that he could see her underwear. The Appellant stated that the child had moved around the trailer seductively and that she always moved around seductively. Finally, the Appellant stated that after he had touched her, he knew it was wrong.

From all of the evidence and testimony, the touching or attempted touching was purposeful and not accidental. The Appellant was not a in a care-taking position that would necessitate him to have touched her vagina in any way as might be the case for someone tasked with the duties of changing a baby's diaper or giving a child a bath. Furthermore, the Appellant's own statements provide a clear sexualized overture to his interactions with the child that make it clear that he had sexualized this child and it was his intention was to touch F.S. for his own sexual gratification. There is no other explanation or possible reason otherwise.

The testimony and evidence presented and submitted clearly established that the touching of the sexual or other intimate parts of F.S. was done for the purpose of gratifying the Appellant's sexual desires. The State proved every element of Attempted Child Molestation in the First Degree and the evidence was more than sufficient to convict the Appellant. Therefore, the conviction must stand.

3) Insufficient Evidence for Communication with a Minor for Immoral Purposes Claim

Please see the legal argument in the previous section as to

general sufficiency of evidence legal analysis. As for the specific issue of the insufficiency of evidence to support the finding of guilt for Communicating with a Minor for Immoral Purposes, RCW 9.68A.090 is designed to prohibit “communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” *State v. Hosier*, 157 Wash.2d 1, 9, 133 P.3d 936 (2006) (*quoting State v. McNallie*, 120 Wash.2d 925, 933, 846 P.2d 1358 (1993)). Case law has further interpreted the statute to include communications that may not have been fully understood by the victim(s) so long as the communication illustrates the Defendant’s overall intent to promote children’s exposure to and involvement in sexual misconduct. *Id.* at 13.

In *Schimmelpfennig*, a man stopped his van near a group of young girls. He engaged a 4-year-old girl in conversation, attempting to lure her into his van and asking her in explicit terms to engage in various sexual acts with him. See *State v. Schimmelpfennig*, 92 Wash.2d 95, 594 P.2d 442 (1979). The court affirmed the Defendant's conviction of Communicating with a Minor for Immoral Purposes despite the fact that the young girl was only four years old and likely did not understand the nature of the man's

requests. *Id.* Similarly, in *State v. McNallie*, a man discussed sexual acts with three young girls, ages 10 and 11, and exposed his penis. See *State v. McNallie*, 120 Wash.2d 925, 846 P.2d 1358 (1993). There, the court did not require proof that the girls understood the sexual language when affirming his conviction for communicating with a minor for immoral purposes. *Id.*

Here, the Appellant asked to see the victim's inappropriate and/or private, meaning her vagina, prior to touching her. The child in this case did understand the Appellant's request and told him no because she knew what the Appellant had asked for was wrong. The Appellant also touched or at least attempted to touch the victim's vagina and there was evidence presented through his own statements to law enforcement that the Appellant had sexualized his contact with the victim by talking to her about a playboy calendar, discussing how her clothes were see-through, and how the victim had allegedly moved "seductively" and always moved seductively. It is unclear to the State how the Appellant can justify the communication simply because the request wasn't an offer to engage in a sex act with the child and apparently believes that is not sexual misconduct for an adult to ask to see a 6 year old child's vagina. There is no question

that Appellant was communicating with the child for the predatory purpose of promoting the child's exposure to and involvement in sexual misconduct by asking to see her vagina. Therefore, the conviction must stand.

4) State's Failure to Prove the Elements Claim

A challenge under sufficiency of the evidence is reviewed by determining whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidences admits the truth of the State's evidence and any reasonable inferences from it. *Id.*

a) Attempted Child Molestation

To convict the Appellant of Attempted Child Molestation in the First Degree, the State needed to prove the following beyond a reasonable doubt:

- (1) That on or about September 27, 2016, the defendant did an act that was a substantial step toward the commission of Child Molestation in the First Degree;
- (2) That the act was done with the intent to commit Child Molestation in the First Degree; and
- (3) That this act occurred in the State of Washington.

WPIC 100.02; RCW 9A.44.083 and RCW 9A.28.020.

As stated previously, the jury was instructed accordingly and was also provided with a definition for both substantial step and intent/intentional. CP 118.

Here, the State proved that the Appellant took a “substantial step” with the intent of having sexual contact with the alleged victim. Viewed in the light most favorable to the State, the evidence established that the Appellant, after having asked to see the victim’s vagina and told no by the child, put his hand between her legs and either touched or attempted to touch her vagina. Evidence of this was supplied by both the victim, which was supplied by testimony at trial as well as through child hearsay evidence from the forensic interview and SANE evaluation, and by the Appellant himself. There was sufficient evidence for the jury to find that the Appellant committed the crime of Child Molestation in the First Degree as well as the lesser included crime of Attempt Child Molestation in the First Degree. Either way, based on the evidence presented, it is clear that any rational trier of fact could have found the elements of the crime of Attempted Child Molestation in the First Degree beyond a reasonable doubt. Therefore, the conviction must be upheld.

b) Communication with a Minor for Immoral Purposes

To convict the Appellant of Communication with a Minor for Immoral Purposes, the State needed to prove the following beyond a reasonable doubt:

- (1) That on or about September 27, 2016, the defendant communicated with F.S. for immoral purposes of a sexual nature;
- (2) That F.S. was a minor; and
- (3) That this act occurred in the State of Washington.

WPIC 47.06; RCW 9.68A.090(1).

Here, the argument is no different than what has already been argued under section 3 of this response brief. Viewed in the light most favorable to the State, the evidence established that the Appellant, had communicated with F.S., who was a minor, for immoral purposes of a sexual nature. There was sufficient evidence for the jury to find that the Appellant committed the crime of Communication with a Minor for Immoral Purposes and it is that clear any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Therefore, the conviction must be upheld.

5) Imposition of Appellate Costs

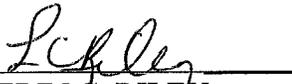
The Respondent defers to the Court regarding any waiver of appellate costs for the Appellate as an indigent defendant. The trial court found the defendant to be indigent in this case and also waived all non-mandatory fees and costs at sentencing. CP 155, 160-161, 167. The Respondent has no information that the Appellant's financial situation has changed since the case was before the trial court.

**CONCLUSION**

For the aforementioned reasons, the State humbly requests that this Court affirm the convictions and the sentence in this case.

DATED this 20<sup>th</sup> day of February, 2018.

Respectfully Submitted,

BY:   
ERIN C. RILEY  
Deputy Prosecuting Attorney  
WSBA # 43071

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