

FILED  
Court of Appeals  
Division II  
State of Washington  
6/6/2018 2:53 PM  
NO. 50918-1-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

JOHN GRIFFIN HEADRICK,  
Appellant.

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

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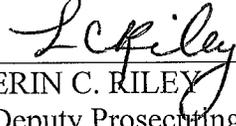
THE HONORABLE STEPHEN E. BROWN, JUDGE

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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 with the crime of Child Molestation in the First Degree on January 25, 2017. CP 1-2. The charge was related to the alleged victimization of a 7 year old friend of his 5 year old daughter. The Court set numerous pre-trial conditions on the Appellant, including that he not have contact with any minor children, which included his 5 year old daughter.

During the pendency of the case, another investigation against the Appellant ensued in March of 2017. That case involved allegations that the Appellant had taken nude photographs of other minor children who were friends of his daughter, which included the allegation that the Appellant had his daughter get naked to encourage the other children to take their clothes off also for the photographs. That case is currently still pending investigation.

Due to the victim's age, a child hearsay hearing was set in this case, originally for April 5, 2017. CP 11. The child hearsay hearing was continued to May 19, 2017 where the Appellant filed a Pro Se Motion to Dismiss with Prejudice. CP 12, 13-21. That motion was denied. On May 23, 2017, the State filed a Memorandum of Authority for the Child

Hearsay and the hearing was conducted on May 25, 2017. CP 46, 22-43. The Court found the child hearsay statements to be admissible for use at trial.

The trial, which was set for June 6, 2017, was confirmed on May 24, 2017. CP 44-45. On June 1, 2018, the State filed its Response to Omnibus, which included the State's witness list. CP 49-51. On June 2, 2018, the State filed its Trial Memorandum. CP 52-69. On June 5, 2017, the day before the trial, the State received information about a new witness who had just come forward with information vital to the case. CP 70-72. The State moved for a continuance, which was granted. CP 70. Also on June 5, 2017, the State filed a Supplemental Response to Omnibus, which disclosed this witness and his anticipated testimony. CP 71-72.

The trial date was rescheduled for July 11, 2017. The case proceeded as scheduled to trial on July 11, 2017 and the Appellant was found guilty as charged on July 12, 2017. CP 77. Following the trial, the Appellant's wife made a verbal plea to the Court to allow contact between the Appellant and his 5 year old daughter. The Court advised it would not consider any alteration of the Appellant's conditions without a written motion. On July 7, 2017, the Appellant's wife filed a letter regarding the condition that the Appellant have no contact with minor children, asking

for the Appellant to be able to have contact with his daughter. CP 87-88. That request was denied.

A Pre-Sentencing Investigation report was submitted on August 10, 2017, which included Additional Conditions of Sentence as an appendix to the judgment and sentence. CP 90-95. On August 18, 2017, the Appellant filed a Motion for Arrest of Judgment. CP 98-102. On September 12, 2017, the Appellant filed an Amended and Supplemental Motion for Arrest of Judgment. CP 103-112. Those motions were addressed and denied. The Appellant was sentenced on September 15, 2017 and received a sentence of Life without the possibility of parole due to his three prior convictions for Child Molestation in the First Degree. CP 113-126. The State admitted certified copies of the Judgement and Sentences for those three prior convictions at sentencing. CP 140. The Judgment and Sentence included the appendix from the Department of Corrections' Additional Conditions of Sentence. CP 113-126.

On September 19, 2017 the Appellant sent a copy of his Amended and Supplemental Arrest of Judgment motions to the presiding judge, requesting a dismissal of his case. CP 144-154. That motion was again addressed and denied.

b. Statement of Facts

In December of 2016, Detective Sergeant Darrin Wallace from the Grays Harbor County Sheriff's Office began investigating a sex offense involving 7 year old, J.L., date of birth April 21, 2009, after J.L. had disclosed that John G. Headrick, the Appellant, had touched her inappropriately. RP 7, 45. The alleged abuse had occurred on or about December 16, 2016 while J.L. was at the Appellant's home at 8 Mitchell Court in Oakville. RP 46. Detective Sergeant Wallace first spoke with J.L.'s mother, Kelsey Badger-Dye. RP 6, 46. Ms. Badger-Dye testified at trial, explaining that she had met the Appellant and his family through a co-worker. RP 6, 7. Ms. Badger-Dye testified that the family included the Appellant, his wife, Shannon, and their 5 year old daughter, E.H. RP 8.

Ms. Badger-Dye testified that she had slowly gotten to know the family by doing play dates at Burger King, going to the park, and the like and that the two girls were like best buds. RP 7, 8. Ms. Badger-Dye testified that the Appellant and his family lived about 15 to 20 minutes away and that the families also communicated almost every week. RP 8, 9. Ms. Badger-Dye described the girls using Facebook messenger to send emoticons back and forth to each other every day, all day. RP 9. Ms.

Badger-Dye testified that the families got along well and that she communicated with either the Appellant or his wife, Shannon, through Facebook messenger. RP 9. Ms. Badger-Dye testified about what she knew about what the Appellant and his wife did for work and that she had no concerns, prior to the reported abuse, about her daughter spending time with the Appellant's family. RP 9. Ms. Badger-Dye identified the Appellant in the courtroom. RP 8.

Ms. Badger-Dye testified that when they got together for playdates, it would just be the Appellant and E.H. RP 10. Ms. Badger-Dye testified that it was decided that J.L. was going to spend the night with E.H. over at the Appellant's home on December 16<sup>th</sup>. RP 10. Ms. Badger-Dye testified that they had known the Appellant's family for about 6 months at the time the sleepover was set up. RP 22-23. Ms. Badger-Dye testified that the details were worked out using Facebook messenger and that she had been told that both parents would be present during the sleepover. RP 10. Ms. Badger-Dye testified that the sleepover would have been J.L.'s first sleepover with anyone who wasn't family and her first time spending the night at E.H.'s house. RP 11. Ms. Badger-Dye stated that she did not have any concerns about J.L. spending the night because she knew how to take care of herself and that she always acted

well. RP 10-11. Ms. Badger-Dye testified that J.L. knew the rules, specifying that the rules meant to be respectful, don't lie, don't steal, listen to what the parents say, don't argue, and those typical type rules. RP 12. Ms. Badger-Dye testified that she dropped J.L. off at the Appellant's house and left very quickly after because one of her other children was sick. RP 11-12.

Ms. Badger-Dye testified that she didn't have any contact with either the Appellant or his wife until it was almost time for J.L. to go home the next day. RP 12. Ms. Badger-Dye testified that she met up with the Appellant at the Chehalis Walmart. RP 13. The Appellant's wife was not there and it was only the Appellant and E.H. with J.L. when she was dropped off. RP 12. Ms. Badger-Dye testified that the Appellant did not tell her anything about J.L. allegedly being sick during the sleepover or that he had to care for J.L. while she was at his house. RP 13, 14. Ms. Badger-Dye testified that he said the girls had stayed up really late giggling and laughing and that was about it. RP 13. Ms. Badger-Dye testified that she noted J.L. immediately came running up to her, grabbed onto her legs, and begging her to go home. RP 14. Ms. Badger-Dye testified that J.L. usually begged for candy at the check-out stand and that sort of thing, but that J.L. said she didn't want anything, that she just

wanted to go, and that she had not wanted to stay, which was not usual or typical for J.L. RP 14. Ms. Badger-Dye testified that J.L. had not told her anything that night and that J.L. had said she was tired and had just gone to bed. RP 15.

Ms. Badger-Dye testified that J.L. did not tell her anything about the sleepover until the Appellant and E.H. came to the house in order to pick up J.L. to take her Christmas shopping with E.H. RP 15. Ms. Badger-Dye testified that the Appellant, E.H., and J.L. left and went to McDonalds, but they came back because J.L. said she wasn't feeling well. RP 15-16. Ms. Badger-Dye testified that she mentioned to J.L. that they had planned another sleepover for that upcoming Friday and J.L. got emotional and upset, which was unusual. RP 16. Ms. Badger-Dye testified that J.L. was the type to pack three days ahead of time when she knows there was going to be a sleepover and J.L. had not wanted to go in her room and pack even one thing. RP 16. Ms. Badger-Dye testified that J.L. had then opened up and told her about what had happened during the sleepover. RP 16, 17. Ms. Badger-Dye described that J.L. was very scared when J.L. was telling her what had happened, that she was shaking and nervous. RP 18. Ms. Badger-Dye testified that J.L. was almost in

tears because she was confused and really scared about what had happened. RP 18.

Ms. Badger-Dye testified that J.L. had never disclosed anything like that happening before and that in her experience, what J.L. was sharing with her was not something that a child of her age to know. RP 18. Ms. Badger-Dye testified it was late that day when J.L. had disclosed so they waited until the next day to report what had happened to the Sheriff's Office. RP 18-19. Ms. Badger-Dye testified that J.L. went up to St. Peter's Hospital for an exam and that she was also forensically interviewed. RP 19, 21. Ms. Badger-Dye also testified that she later agreed to do an in-person recorded confrontation with the Appellant. RP 19. Ms. Badger-Dye testified about how the recorded confrontation was set up and what it entailed and described that she was very scared and anxious. RP 20. Ms. Badger-Dye identified a copy of the recorded confrontation, which had been marked as State's Exhibit 1. RP 20-21.

J.L. also testified at trial. RP 24. J.L. testified a little about herself and when asked who her friends were, she identified E.H. as one of her friends. RP 25-26. J.L. testified about only ever having a sleepover with E.H. among her friends. RP 27. J.L. testified about the things she and E.H. did together when they played and she described E.H.'s house,

identifying how many rooms, what types of rooms, and about E.H. having her own room. RP 27-28. J.L. testified about E.H. having older siblings, but that the only people in the house were E.H., her mom, and her dad, the Appellant. RP 28-29. J.L. testified that only E.H., the Appellant, her goldfish, and her dogs were at the house during the sleepover, stating that E.H.'s mom was at work. RP 29-30. J.L. testified that she had liked the Appellant before what happened at the sleepover happened. RP 30. J.L. testified that she had been crying because E.H. had done something mean and that the Appellant had taken her to his bedroom. RP 30.

J.L. testified that after he took her to his room, the Appellant laid her on his bed and pulled her pants, including her underwear, down to her knees. RP 30, 31. J.L. testified that the Appellant took his finger and started picking at her "peepee" and rubbed lotion on her. RP 30. J.L. pointed to her crotch area when asked what part of the body she meant by "peepee." RP 31. J.L. also clarified that her "peepee" was the part of her body used to go pee, which was different from the part where she goes poop. RP 31. J.L. testified that the Appellant was touching her with his hand on her skin and that he was touching her inside. RP 32. J.L. testified that the Appellant was sitting next to her and that he stopped to go get lotion. RP 32. J.L. testified that he rubbed the lotion on her "clams." RP

32. J.L. testified that she was able to go to the bathroom herself, wash herself, and put lotion on herself at the age she was during the sleepover, which was 7. RP 33.

J.L. testified that E.H. was not in the room when the Appellant was touching her and that E.H. was either in the living room or the kitchen at the time this was happening. RP 33. J.L. testified that it hurt and ticked and that she told him to stop. RP 32, 33. J.L. testified that he stopped eventually and that he had stopped because of her telling him to stop. RP 34. J.L. testified that she pulled her pants and that the Appellant pulled them back down, putting the lotion on her at that point. RP 34. J.L. did not recall having a poop accident the day that the Appellant had touched her and she clarified again that the Appellant had touched her where she goes pee and not where she goes poop. RP 38, 40. J.L. testified about getting an exam done and telling a nurse about what had happened. RP 35. J.L. also testified about being recorded and telling someone else about what had happened. RP 35. J.L. also testified on cross that the Appellant had not taken his own pants down. RP 39.

Detective Sergeant Wallace testified at trial about his experience, training, and background. RP 43-45. Detective Sergeant Wallace testified about the recorded confrontation that was done between Ms. Badger-Dye

and the Appellant, including information about recorded confrontations and how they are done. RP 46-50. Detective Sergeant Wallace testified about Ms. Badger-Dye being very nervous and that she was a little scared, too, not knowing how the Appellant was going to react. RP 50. Detective Sergeant Wallace also testified about the Appellant's demeanor during the confrontation, describing him as calm and deflective of the questions. RP 51. Detective Sergeant Wallace testified that the Appellant had admitted to touching J.L., but that he was just checking her glands because she had been sick with diarrhea to make sure she was okay. RP 51. Detective Sergeant Wallace testified that the Appellant had never mentioned treating J.L. for being sick or that he had put any kind of lotion on her during the confrontation. RP 51. Detective Sergeant Wallace identified the copy of the recorded confrontation that had been marked as State's Exhibit 1 and he testified that he had reviewed the recording prior to the trial, having marked it as a true and accurate copy of the recorded confrontation obtained on December 23, 2016 between Ms. Badger-Dye and the Appellant. RP 52.

Exhibit one was admitted into evidence and published to the jury. RP 53, 54. In the recorded confrontation Ms. Badger-Dye told the Appellant that J.L. had told her that he had inappropriately touched her.

The Appellant told Ms. Badger-Dye that that he had “examined her” and “put lotion and felt her glands because she was sick.” The Appellant stated that he didn’t do anything inappropriate and that he treated her like he treats his own daughter and “that’s just weird.” The Appellant stated that he “checked her glands and stomach” and that “if she thinks that’s inappropriate, I’m sorry.” The Appellant went on to say that he does this with his daughter – checks her glands and makes sure she is okay and rubs lotion on her when she is done with her bath. The Appellant told Ms. Badger-Dye that he didn’t do anything inappropriate and that he treats J.L. like his own daughter, with respect, and that he “didn’t touch it inappropriately. I do everything with her like a parent should.” CP 74.

Detective Sergeant Wallace went on to testify about what happened after the recorded confrontation was completed and the deputy’s attempts to arrest the Appellant. RP 56. Detective Sergeant Wallace testified about being able to reach the Appellant by telephone with the help of a neighbor who had his cell phone number. RP 56. Detective Sergeant Wallace testified that the Appellant had told him that he already knew what the deputies wanted to talk to him about and that he had not done anything wrong. RP 56. Detective Sergeant Wallace testified about the Appellant not knowing when he could meet with them and that he had

to be told a bench warrant would be issued for his arrest if he couldn't come up with a time to meet. RP 56. Detective Sergeant Wallace testified that the Appellant then agreed on a time to meet at his house. RP 57. Detective Sergeant Wallace and another Detective arrested the Appellant at his home at that time. RP 57. Detective Sergeant Wallace testified that the Appellant had been home alone with E.H. at the time and it took approximately 40 minutes to get ahold of the Appellant's wife's parent to come pick up E.H. RP 57.

Detective Sergeant Wallace described the Appellant as being very quiet and that other than asking some brief questions about what they were going to do with his daughter, the Appellant just sat down and had no conversation with them from the time he was arrested until they took him to the jail. RP 58. Detective Sergeant Wallace identified the Appellant in the courtroom as being the same person he arrested that day. RP 58. Detective Sergeant Wallace testified about interviewing the Appellant at the jail after reading him his rights. RP 59. Detective Sergeant Wallace testified that he told the Appellant what J.L. had said happened and that the Appellant immediately denied that he touched her vagina. RP 59. Detective Sergeant Wallace testified that the Appellant stated that J.L. had diarrhea and that after he brought the girls back from Burger King, he

gave J.L. a bath and put lotion on her like he does with his own daughter and checked her glands. RP 59.

Detective Sergeant Wallace testified that the Appellant eventually admitted that he had made a mistake touching her vagina, but that he didn't do it with intention and that he had not received any sexual gratification from it. RP 60. Detective Sergeant Wallace testified that the Appellant stated that while he was applying the lotion to J.L., he may have accidentally brushed across her vagina while applying the lotion around her vagina. RP 60. Detective Sergeant Wallace testified that the interview lasted approximately 10 to 15 minutes and that the Appellant had not been willing to provide a written statement. RP 62. Detective Sergeant Wallace testified that they cleared with the Appellant at that point and he went on to testify about other actions taken in the case, including setting up the forensic interview and sexual assault evaluation and exam. RP 62, 63. Detective Sergeant Wallace further testified about a letter and statement that the Appellant had written while he was in the jail during the pendency of the case, which had been marked as State's Exhibit 3. RP 63. Detective Sergeant Wallace identified the letter and statement and Exhibit 3 was admitted. RP 64.

Detective Sergeant Wallace testified about the contents of the statement in which the Appellant had stated he had put cream or lotion on J.L. as a preventative measure due to the diarrhea she had to prevent a rash from occurring. RP 65. Detective Sergeant Wallace testified that the information contained in the statement was different from the statements he had previously given in the recorded confrontation and to him at the jail. RP 65. Detective Sergeant Wallace testified that he had only stated he applied some lotion of J.L.'s glands during the confrontation and that he may have brushed her vagina during the statement at the jail, but that this statement was very specific with him stating that he actually touched her vagina definitively. RP 65-66. Detective Sergeant Wallace then testified about receiving information that an inmate at the jail, Mr. Sanchez, wanted to talk to him about a couple of cases. RP 66. Detective Sergeant Wallace testified about Mr. Sanchez telling him about a conversation he overheard between the Appellant and another inmate, William Bryant. RP 67.

Detective Sergeant Wallace testified that in that conversation, Mr. Sanchez stated that the Appellant had talked about his case, stating that he had touched a little girl who had come over for a one-night sleepover and that he had touched her on her vagina and her buttocks. RP 67. Detective

Sergeant Wallace testified that the Appellant had stated due his touching her and fondling these areas, he had discovered that he was making red marks on her private parts and he had used the cream or lotion to cover up and soothe those red areas. RP 67. Detective Sergeant Wallace testified that Mr. Sanchez was not given any deals in exchange for his statement and that Mr. Sanchez had not been promised anything or threatened into giving this information to him. RP 68. Mr. Sanchez also testified at trial about the information he provided about the Appellant. RP 77, 78. Mr. Sanchez testified about walking into the Appellant's cell and overhearing him talking about putting cream or something on a little girl during a sleep over for his daughter after playing with her bottom and her genitals. RP 80. Mr. Sanchez specified that the Appellant had been playing with the girl earlier and had not realized he left marks so he went and put cream on her. RP 80.

Mr. Sanchez testified that the purpose for putting on the cream was to cover it up and that the Appellant had indicated using his hand and fingers to touch the girl. RP 81. Mr. Sanchez also testified that the Appellant had implied using his penis by looking down at this crotch, getting a weird look on his face, and nodding his head up and down while he was talking to Mr. Bryant. RP 81, 85. Mr. Sanchez testified that the

Appellant had stated that he had touched the girl throughout the night, more than once. RP 81. Mr. Sanchez testified that the conversation had occurred in the Appellant's cell and that he had no opportunity other than overhearing that conversation to know any details about the Appellant's case. RP 82. Mr. Sanchez testified that he had never been present for any hearings involving the Appellant and that he had never been in court at the same time as the Appellant. RP 82. Mr. Sanchez further testified that neither Detective Sergeant Wallace nor myself had made any promises or deals with him in exchange for his testimony and he stated that he had wanted to report the information himself. RP 83. Mr. Sanchez testified that he had pled guilty to his felony, that he had received no deals whatsoever, and that he not expected anything for his information. RP 83, 85.

Ms. Judith Presson of St. Peter's Hospital's Sexual Assault Clinic testified at trial related to her SANE evaluation and examination of J.L. RP 96-97. Ms. Presson went through her training and background as well as the process of a SANE evaluation and examination, including how cases are referred, what a SANE entails, and what information she had about J.L.'s case prior to her evaluation and examination. RP 97-103. Ms. Presson identified the purpose of a SANE evaluation and examination was

to find out how the patient is doing medically, emotionally, psychologically, and behaviorally and to address any medical issues they may have. RP 99-100. Ms. Presson also testified that, based on the lapse in time from the abuse to the report, there would not have been DNA or any ability to get any material off of J.L. RP 103. Ms. Presson testified about the process was in J.L.'s case, including the steps taken during the evaluation such as asking her basic questions to make a general evaluation of her and to get an understanding of her home life to address any issues related to health and safety, establishing what words J.L. used for her body parts, and then how she transitioned J.L. to talking about the alleged sexual abuse. RP 104-106.

Ms. Presson testified that she had been asking J.L. about her general health and if she had been to the hospital. RP 107. J.L. stated that she had been at the hospital one time and that it had been for someone touching her private. RP 107. Ms. Presson testified that she used open-ended questions with J.L. to let J.L. tell her what happened. RP 107. Ms. Presson then went through the statements J.L. made during the SANE. RP 108. Ms. Presson testified that J.L. told her that her best friend, E.H.'s dad, John, touched her private. RP 108. Ms. Presson testified that she asked E.H. to tell her about that and J.L. said he put lotion on her body and

touched her peepee with his hands. RP 108. Ms. Presson testified that she asked her clarifying questions about how he touched her and J.L. stated that he used one hand and that he had pulled her pants down to touch her. RP 108. Ms. Presson testified that she asked her how she felt and she said upset because she didn't like people touching her and that only her mom is allowed to touch her private to check if her peepee is okay. RP 108.

Ms. Presson testified that J.L. told her that it happened on Saturday in the daytime while E.H. ate her snack and that it happened in E.H.'s dad's room. RP 108. Ms. Presson testified that J.L. told her more details about the touching, stating that it hurt when the Appellant was touching her and that he had been picking at it. RP 109. Ms. Presson testified that J.L. told her it started when the Appellant picked her up and carried her to his room. RP 109. Ms. Presson testified that J.L. told her that he put her on his bed and he was sitting on his knees on the floor next to the bed. RP 109. Ms. Presson testified that J.L. told her he had never said anything the entire time and that he just sat there doing things. RP 109-110. Ms. Presson testified that J.L. told her that the Appellant's clothes were on and that he didn't have her touch him anywhere. RP 110. Ms. Presson testified that J.L. told her that he stopped after she told him to stop and she ran away after he did. RP 110. Ms. Presson testified that J.L. told her that

he clothes were down by her knees and she had to pull them up. RP 110. Ms. Presson testified that J.L. told her that she did not tell E.H. about what happened. RP 110. When asked about worries she had about her body, Ms. Presson testified that J.L. told her that it hurt at the time and that she was worried about her body because she didn't like getting touched in her special parts and that she wants her own personal space. RP 110.

Ms. Presson testified that J.L. was a very sweet child, friendly and talkative when she initially had contact with her and that when she was describing the abuse, J.L. was much more solemn with a subdued affect. RP 104, 112. Ms. Presson testified that J.L. was forthright and serious and was very serious about not liking someone touching her privates. RP 112. Ms. Presson then testified about her findings during the genital exam, noting that there was a bit of redness in the genital area, which was not uncommon in a child. RP 112. Ms. Presson testified that J.L.'s findings were normal, which did not prove or disprove that the sexual abuse happened. RP 113. Ms. Presson went on to explain that could be because there had been an injury, which had sense healed, that there was no injury because of the nature of the touching that occurred, or that no touching happened. RP 113. Ms. Presson testified that she wasn't there so she only knows what she hears from her patient. RP 113. Ms. Presson further

testified that based on the disclosure and her experience that a normal exam was what would have been expected in this case. RP 114. Ms. Presson went on to explain that when a child who hasn't reached puberty tell her that genital contact hurt, it could have been from pressure or friction, but also from contact with the hymen. RP 114. Ms. Presson testified that the hymen of pre-pubertal girls is about as sensitive as the surface of an eyeball so if it is touched, the child objects. RP 114. Ms. Presson further clarified that she had seen J.L. 11 days after the alleged abuse so with that lapse of time, she was not surprised to have no findings given that the vagina heals really rapidly and no redness or scratch from the touching could have been seen after 1 days. RP 115.

Next to testify was Samantha Mitchell, who was the forensic interviewer from the Youth Advocacy Center of Lewis County. RP 117-118. Ms. Mitchell testified about her background and experience and her curriculum vitae was admitted into evidence as State's Exhibit 4. RP 119-120. Ms. Mitchell testified about the procedure for forensic interviews, including the type of questions she uses to elicit information from children in a non-suggestive, non-leading, child-friendly way. RP 120-127. Ms. Mitchell also talked about how J.L. was referred to her and what information she had received about the case prior to speaking with J.L.

RP 128. Ms. Mitchell testified about her interactions with J.L. and about the initial steps of the interview she conducted with J.L. RP 128-130.

Ms. Mitchell then testified that she transitioned into talking about the alleged sexual abuse by asking her if she knew why she was at the center for the interview. RP 131.

Ms. Mitchell testified that J.L. told her that she was there because of a man who was named John and who had touched her peepee. RP 131. When asked to tell her more about it, Ms. Mitchell testified that J.L. told her that she was at her best friend's house and they were having a tea party in the garage. RP 131. Ms. Mitchell testified that J.L. told her that she had started to cry because E.H. had taken some of her food. RP 131. Ms. Mitchell testified that J.L. told her that the Appellant had come in and picked her up, taking her to his bedroom. RP 131. Ms. Mitchell testified that J.L. told her that she told the Appellant no when the Appellant was carrying her to his bedroom, but nothing happened and they continued into the bedroom. RP 131. Ms. Mitchell testified that J.L. told her that the Appellant put her on the bed, then went into the bathroom. RP 131. While in the bathroom, she tried to get up and leave, but the Appellant saw her and came out. RP 131. The Appellant told her no and put his hand on her chest and pushed her back on the bed. RP 131-132. Ms. Mitchell

testified that J.L. that the Appellant took lotion and put it on her belly. RP 132. Ms. Mitchell testified that J.L. told her that her pants and underwear were pulled down to her knees and the Appellant put lotion on her peepee. RP 132.

Ms. Mitchell testified that J.L. told her that her underwear were dirty because she had a poopy accident and there was no toilet paper. RP 132. Ms. Mitchell testified that J.L. had described how he was touching her and putting the lotion on her peepee and that J.L. had also demonstrated how the Appellant had touched her. RP 132. Ms. Mitchell testified about how J.L. had demonstrated the touching and that J.L. had described him going up this way and down this way and on the side. RP 132. J.L. told her that it hurt because the Appellant's hands were dirty and he was doing it really hard. RP 132. Ms. Mitchell testified about going to McDonalds with them and lying to them so she didn't have to go back. RP 133. Ms. Mitchell testified about J.L.'s demeanor during the interview and how J.L. had initially been engaged and leaning forward when she was talking about her horse and things she liked, but that she leaned back, was kind of slumped down, and was not moving around as much during the disclosure portion of the interview. RP 133. Ms. Mitchell testified that the interview had been recorded and identified a

copy of the recorded interview, which was marked as State's Exhibit 7. RP 133-134, 140-141. State's Exhibit 7 was admitted into evidence and the cd was published to the jury. RP 141.

The State rested after Ms. Mitchell's testimony and the defense presented William Bryant as his first witness. RP 146. Mr. Bryant testified that he was the Appellant's cell mate and he claimed that the Appellant had never say said he molested a girl, whether or not Mr. Sanchez was present. RP 150, 152. Mr. Bryant testified that the Appellant spent his time doing legal research and writing a lot during the time he lived with the Appellant and that the Appellant believed he was innocent. RP 151, 152. On cross with the State, Mr. Bryant clarified that there not copies of police reports from any other their cases in the cell and that the only paperwork in the cells was a yellow sheet that had their court dates on it. RP 153. The Appellant also took the stand and testified. RP 154. The Appellant testified about where he was living with his wife and their 5 year old child, E.H. RP 154. The Appellant testified that he later took parenting classes about the treatment of a child as to what was proper or not property. RP 154. The Appellant also testified about learning about property child care from going to his daughter's pediatrician appointments. RP 154-155. The Appellant testified that E.H. was in fairly

good health, that she got all her shots and “normal female issues.” RP 155.

The Appellant described how he met J.L.’s family and how the girls became friends, describing how the age difference wasn’t so much an issue because his daughter was big for her age. RP 155. The Appellant testified that he wasn’t really into their playing together and that they would go off and play and do stuff, girl stuff, together. RP 155. The Appellant described how the sleepover came about, stating that he believed it was his daughter who requested the sleepover. RP 156. The Appellant testified that he had been the one to communicate with J.L.’s parents to make arrangements for the sleepover. RP 156-157. The Appellant described J.L. being dropped off around 4:00 p.m., which was when his wife goes to work and that she works until 12:30 a.m. RP 157. The Appellant described what the girls did, testifying that they were playing in the living room with the television on and that later they went to Burger King. RP 157-158. The Appellant testified that the girls were set up to sleep in the living room and that he told them to go to bed at 8:00 p.m. when he went to bed because he was tired after working a long day. RP 158.

The Appellant claimed that J.L. had diarrhea issues starting the previous night at Burger King, testifying that she kept running to the bathroom. RP 159. The Appellant claimed J.L. had ran to the bathroom three or four times while they were at Burger King. RP 160. The Appellant claimed that he contacted J.L.'s mother on Facebook and told her about J.L. running to and from the bathroom and that J.L. had told him she was having diarrhea. RP 160. Defense then handed the Appellant a Facebook conversation that he had with Ms. Badger-Dye, allegedly from that day, and the Appellant admitted that the conversation was not captured on the print out because it was a video chat. RP 161. The Appellant claimed that J.L.'s diarrhea continued into Saturday and that he then became concerned about being messy because she kept running into the bathroom. RP 161-162. The Appellant testified about the girls having a tea party out in the garage when he overheard them arguing and found J.L. crying. RP 162. The Appellant testified that he was told that E.H. had hit J.L. and that was the reason J.L. was crying. RP 163. The Appellant testified that he told E.H. not to hit and after he calmed them down, J.L. was pulling at herself so he picked her up, carried her into the bedroom to check her out, and put some barrier cream lotion on it. RP 164.

The Appellant testified that he noticed J.L. had some poo on her so he took that off of her, then applied the barrier cream lotion. RP 164. The Appellant testified that the glands he was referring to in the evidence presented were the glands on her neck to see if they were swollen. RP 164. The Appellant testified that he also touched her forehead to see if it was hot and running a fever, just as he had been instructed to do by his daughter's pediatrician. RP 164. The Appellant claimed that the barrier cream was also something he learned about from his pediatrician and that it was prescribed for his daughter. RP 164. The Appellant testified about J.L.'s reaction to him using the barrier cream, stating that when he first was applying it, she was comfortable and then she became uncomfortable so he stopped. RP 165. The Appellant testified that he was concerned about her hygiene as the reason for touching J.L. and claimed that he did not get any sexual enjoyment or satisfaction out of it. RP 165. The Appellant testified that J.L. walked out of the bedroom and went back to playing with E.H. RP 165. The Appellant testified that this happened after his wife had left because she was not there at the time. RP 165. The Appellant claimed that as far as he knew, he never touched her vagina and that it looked like there was just a little bit of poop around that area. RP 166.

Defense then attempted to admit the print out of the Facebook messages that the Appellant had testified did not contain the alleged conversation he had with J.L.'s mother about J.L. having diarrhea. RP 166. The State objected and the Court denied the admission based on evidence rules 801 and 613. RP 166. The Appellant testified that the next time he communicated with the family was later in the week when E.H. wanted J.L. to go Christmas shopping with her. RP 167. The Appellant testified that he and E.H. picked up J.L. and went to McDonalds, but left after 15 or 20 minutes because J.L. said she was sick. RP 167. The Appellant testified that they took J.L. back home. RP 167. The Appellant testified about Ms. Badger-Dye coming to his home about the allegation and stated that he was surprised because he did nothing wrong, did nothing inappropriate, when she accused him. RP 167.

On cross, the State questioned that the Appellant had given several versions about what happened and the Appellant denied that. RP 168. When it was pointed out that he had not mentioned anything about barrier cream to J.L.'s mom, the Appellant stated that he said lotion. RP 168. When it was then pointed out that he never said he put barrier cream on her private area at all, the Appellant stated yes. RP 168. The State then pointed out that when the police were talking to him, he again didn't say

that he put any kind of barrier cream on her vagina or her rear end or anything like that and the Appellant stated yes. RP 168. When it was pointed out with the police he said that he may have brushed her vagina, that he didn't intent to touch it, wasn't trying to touch it, and that he didn't touch it, the Appellant stated, "I said inadvertently." RP 168-169. The Appellant repeated that he said inadvertently when the State pointed out that he said he may have brushed it. RP 169.

The State then pointed out that in this statement that had been intercepted while the Appellant was in jail, the Appellant stated in there that he did touch her vagina and that he put cream on it. RP 169. The Appellant denied making that statement and was provided with a copy of the statement he wrote. RP 169-170. The Appellant stated that his statement says that he put barrier cream around her vagina, not on her vagina and that he thought the State had said on. RP 170. The Appellant stated that this is where barrier cream goes because it's for external use only. RP 170. The State then asked the Appellant a series of questions about being taught do this by his daughter's pediatrician and through the classes he took and the Appellant stated yes. RP 170. The State then asked the Appellant that he was not taught to touch other people's children and the Appellant stated, "It states that if someone is left in your care and

custody you have to provide the proper child care and hygiene.” 170-171.

When the State asked the Appellant if he was a foster parent or had such authority, the Appellant stated no. RP 171.

The State again asked that his pediatrician also did not instruct him to touch other people’s children and the Appellant said no. RP 171.

When the State asked that he did not have permission from J.L.’s parents to give her medicine or to touch her, the Appellant stated, “Not verbally.”

RP 171. The State then stated not at all and the Appellant stated no. RP

171. The State asked that the Appellant had never told her parents that he had put cream on J.L. and the Appellant stated, “No, I didn’t.” RP 171.

The State asked that the Appellant never asked her mom whether he could or not and he stated correct. RP 171. The State asked that he never gave

the cream to J.L., who is 7 years old, to put the cream on herself and the Appellant stated that he did not give it to her. RP 172. The State finally

asked that instead, the Appellant picked up a girl who didn’t belong to

him, put her in his room, took her pants down, and allegedly put cream on her for whatever purpose he said, someone else’s child, and the Appellant

stated yes. RP 172. The Appellant on re-direct was asked if he felt

responsible for other people’s children when they were at his home, the

Appellant stated yes, he did. RP 172. The defense rested at that point and the State did not have any rebuttal witnesses. RP 172-173.

During the break, defense argued to include Assault in the Fourth Degree as a lesser included crime of Child Molestation in the First Degree. RP 174. Defense argued that he was entitled to the instruction if the jury believed that the Appellant engaged in harmful or offensive touching that was not sexually motivate because he would then be guilty of Assault in the Fourth Degree, not Child Molestation. RP 174. The Court advised that, by his own statements, the Appellant had said that any touching was done inadvertently and not intentionally so there was not intentional touching or striking of another person that was harmful or offensive, which is an element of Assault in the Fourth Degree. RP 175. The Court further pointed out that in no way did the Appellant's testimony indicate that anything he had done was harmful or offensive because he claimed he was doing it pursuant to instructions from a pediatrician and his parenting class and that he treated J.L. in the same way he treated his own daughter. RP 175-176. The Court thereafter ruled that the evidence did not establish and was insufficient to instruct to the jury on Assault in the Fourth Degree and that instruction was not included in the jury instructions given to the jury. RP 176.

In closing, the State argued that the only element truly in dispute was related to sexual contact. RP 186-188. The State pointed out details to support that sexual contact occurred between the Appellant and J.L. RP 188-189. The State addressed the Appellant picking up the child, taking her to his bedroom, pulling down her pants to allegedly intrusively inspect her vagina, picking it, and putting cream on her without telling her what he was doing, without asking the child if he could do that, and without having any permission from the parents to do so. RP 189-190. The State pointed out the J.L. had testified that the Appellant had put his finger inside her peepee, not around it, not near it, but in it. RP 190. The State pointed out how J.L. had demonstrated those actions by the Appellant when he was touching her vagina during her forensic interview and that as a child she may not have understood what he was doing in the way that adults do. RP 190. The State further pointed out the J.L. was very clear that the Appellant had touched her peepee where she goes pee, not where she goes poop, where there may have been an issue if that truly was the issue. RP 191.

The State also identified where the Appellant admitted to not having permission or training that allowed or authorized him to touch another person's child, even in the way that he claimed, let alone in the

way that he had. RP 191-192. The State pointed out how the Appellant never told J.L.'s mother that he put cream on J.L. or that he had touched her and, in fact, adamantly denied touching her. RP 192. He told J.L.'s mother that he rubbed lotion on her belly and checked her glands, but that was all. RP 192. The State pointed out that if he truly believed he was simply caring for her, putting barrier cream on because that's what needed to be done and that he should do that, he would have told J.L.'s mother about it. RP 192. That State argued that the only reason not to was because he was trying to cover up what he had done, which was touching her for his own sexual gratification. RP 192-193.

Defense argued that there were many versions about what happened, not from the Appellant, but from other witnesses. RP 196. Defense argued that inconsistencies in J.L.'s testimony and statements were problematic, which he argued included never having said before that the Appellant put his finger inside her and that she said she stayed there two nights when everyone else said it was one night. RP 196-197. Defense argued that her memory was therefore not all that good and not all that clear and that the jury should be looking for what to rely on to convict a man of a horrible crime. RP 197. Defense pointed out that J.L. had said the Appellant was picking at her and that he didn't know, but it

could have been some dried poop. RP 197. Defense admitted that maybe the Appellant used some bad judgment here, but that he was just doing what he would have done to his own daughter who was the same size and overlooked the fact that J.L. was a little more advanced developmentally. RP 197-198. Defense argued that the Appellant just acted in a way that he believed was appropriate. RP 198.

Defense went on to give an example of putting a Band-Aid on someone else's kid if they fall down and cut themselves at your house and that perhaps hindsight is 20/20. RP 198. Defense argued that there was a huge gap, however, between a mistake and a serious crime. RP 198. Defense argued there was no sexual motivation because he was putting barrier cream around her vagina, his own pants stayed on, and that he stopped when she told him to stop. RP 199. Defense argued about Mr. Sanchez having motive to lie because he was trying to get out from under his own crimes and because he was a burglar with a conviction for residential burglary. RP 200-201. Defense also argued that Mr. Sanchez testified that the Appellant had allegedly admitted to touching her multiple times over an extended time. RP 199. Defense conceded that the issue came down to the issue of whether the Appellant acted with sexual motivation when he touched her. RP 201. Defense argued that a lot of

people in the case had jumped to conclusions about what the Appellant's motives were and urged the jury to give the Appellant a fair hearing without being affected by what the police or prosecutor thinks. RP 202.

The State concluded by addressing the points made by defense, starting with Mr. Sanchez's testimony, pointing out that Mr. Sanchez had nothing to gain and he was no longer in custody, yet still appeared to testify. RP 203. The State further pointed out that what Mr. Sanchez testified to overhearing was consistent with J.L. statements in the forensic interview when she said that the Appellant touched her multiple times. RP 203. The State also pointed out that defense alleged that the police somehow forced the Appellant to making him say he touched her vagina and made a mistake touching her vagina, but that the interview only lasted 15 minutes. RP 204. The State acknowledged that the Appellant did certainly use bad judgment as defense argued, but that it was touching a child with sexual motivation because there simply was no other plausible explanation. RP 205. The State argued that the Appellant only came up with the barrier cream theory after he was already arrested and in custody. RP 205. The State pointed out that his statements from the beginning show that he was attempting to hide the fact that he touched J.L. with sexual motivation by first saying he never touched her, then he may have

accidentally touched her, and then to treat her. RP 205-206. The State closed by stating that the Appellant was asking the jury to believe he did something innocent, something that no one else who has or even knows children would do, and that the only person who would touch a child in the way the Appellant did was someone who wants to do it for sexual gratification. RP 206.

## II. RESPONSE TO ASSIGNMENTS OF ERROR

### 1) Trial Court Erred in Refusing to Instruct the Jury on Assault in the Fourth Degree

A trial court should instruct the jury on a lesser included offense if two conditions are met. *State v. Workman*, 90 Wash.2d 443, 447, 584 P.2d 382 (1978). First, under the legal prong, each of the elements of the lesser offense must be necessary elements of the offense charged. *Id.* at 447–48. Second, under the factual prong, the evidence in the case must clearly support an inference that the defendant committed the lesser crime. *Id.* at 448. Under this second prong, a defendant is entitled to a lesser included offense instruction if, construing the evidence in a light most favorable to him, a jury could find the lesser offense was committed instead of the charged offense. *State v. Allen*, 127 Wash.App. 945, 950, 113 P.3d 523 (2005).

The Court of Appeals reviews de novo the legal prong of a request for a jury instruction on a lesser included offense. *State v. Walker*, 136 Wash.2d 767, 772, 966 P.2d 883 (1998). The Court reviews a trial court's refusal to give a requested instruction, when based on the facts of the case, for an abuse of discretion. *Id.* at 771–72. A trial court abuses its discretion if it bases its decision on an erroneous view of the law or applies an improper legal standard. *State v. Kinneman*, 155 Wash.2d 272, 289, 119 P.3d 350 (2005).

The Appellant uses *State v. Stevens* to argue that both the legal and factual prong were met in this case. *State v. Stevens*, 158 Wash.2d 304, 143 P.3d 817 (Supreme Court of Washington, En Banc, 2006). The State concedes that the legal prong is met in this case. In *State v. Stevens*, the Court held that second degree child molestation necessarily includes the elements of fourth degree assault. *State v. Stevens*, 158 Wash.2d at 310–11. Because the only difference between first and second degree child molestation is the respective age of the victim, the holding in *Stevens* would apply here as well.

However, the State does not concede that the factual prong, which is based on the facts of each particular case, was met in the case at hand. The facts in this case are much more in line with the facts in an

unpublished opinion, *State v. Sandru*, in which the Court of Appeals found that a lesser included instruction on Assault in the Fourth Degree in a Child Molestation in the First Degree case was not factually warranted because it would have been inconsistent with the Defendant's own testimony. *State v. Sandru*, 153 Wash.App. 1006 at 2, 2009 WL 3808611 (2009).

In *Sandru*, the Defendant was charged with three counts of Child Molestation in the First Degree for conduct he had with his son, J.S. *State v. Sandru*, 153 Wash.App. 1006 at 1. The conduct included testimony from J.S. that the Defendant made J.S. massage him until J.S.'s hands were "like next to his back private part, his butt," that the Defendant touched J.S.'s private parts when he put J.S. to bed, moving his hand in a circular motion over his penis, and that the Defendant held J.S. next to his body with J.S.'s feet between his legs where J.S. could feel the Defendant's "private part a little" and "his nuts with my legs." *Id.* The Defendant testified at trial in his own defense, denying that he had ever touched J.S. in an inappropriate manner. *Id.* The Defendant was found guilty of one count of first degree child molestation and acquitted on the other two counts. *Id.*

On appeal, the Defendant in *Sandru* argued, as does the Appellant here, that the trial court erred when it denied his request to instruct the jury on the lesser included offense of Assault in the Fourth Degree. *State v. Sandru*, 153 Wash.App. 1006 at 1. Specifically, the Defendant argued that the evidence supported an inference that he touched his son, J.S., without consent and that the touching was offensive. *Id.* Because the Defendant consistently denied the contact that J.S. described, the Court of Appeals found that it would have been inconsistent with the Defendant's own testimony to instruct the jury on Assault in the Fourth Degree. *Id.* The Court went on to point out that Assault in the Fourth Degree necessarily includes either an attempt or threat to touch or an actual touching. *Id.* (quoting *Clark v. Baines*, 150 Wash.2d 905, 908 n. 3, 84 P.3d 245 (2004)). The Court found that, construing the evidence in a light most favorable to the Defendant, a jury could not find fourth degree assault was committed because the Defendant denied ever touching J.S. *Id.*

This is exactly the scenario that was presented at trial and the reasoning given by the trial court in denying the Appellant's request for the lesser included jury instruction for Assault in the Fourth Degree. Here, the Appellant consistently and repeatedly denied any touching, admitting only that he was caring for the child by applying barrier cream *around* her

vagina. Certainly, the Appellant clearly and adamantly denied ever touching the child's vagina. At best, there was a brief admission that he may have inadvertently touched her vagina while putting barrier cream around the child's vagina when he gave his verbal statement to the police. However, the Appellant also told the police very clearly that he didn't do it with intention and he did not received any sexual gratification from it. See RP 60.

At trial, the Appellant testified consistently with this statement, testifying that he never touched her vagina and that he did not get any sexual enjoyment or satisfaction out of touching the child. See RP 165, 170. When asked about his statement to the police, the Appellant adamantly pointed out several times that he told the police he may have *inadvertently* touched the child's vagina, arguing later that the police essentially forced that particular confession since they had already decided the Appellant's guilt and continued to interrogate him until they got something close to what the police believed happened. See RP 70-71, 169-170, 199. Furthermore, the Appellant stated on multiple occasions that his reason for touching the child were out of concern for the child's health and hygiene and nothing more. RP 165.

In light of the Appellant's consistent and continued denials of ever having touched the child's vagina in an inappropriate manner, which would neither be a criminal touching or a touching with criminal intent, a jury could not find that the Appellant had committed Assault in the Fourth Degree. Therefore, there was no abuse of discretion by the trial court in denying the Appellant's request to present the lesser included jury instruction for Assault in the Fourth Degree. The Trial court did not base its decision on an erroneous view of the law and did not apply an improper legal standard. Thus, the trial court's decision to deny the Appellant's request for a lesser included jury instruction for Assault in the Fourth Degree must stand.

2) Abuse of Discretion in Prohibiting Appellant's Contact with his Child as a Sentencing Condition

In *State v. Carr*, which is an unpublished opinion, the issue of a no-contact provision including the defendant's own children was addressed as a post-conviction condition. *State v. Carr*, 176 Wash.App. 1016, 2013 WL 4774135 (2013). Carr argued that the no contact order with children violated his fundamental right to parent his children because there was no evidence that he had ever abused his own children. The Court of Appeals did not agree, stating that the court reviews sentencing

conditions for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Further, a sentencing court abuses its discretion if its decision is manifestly unreasonable, meaning it is beyond the court's authority to impose, or if exercised on untenable grounds or for untenable reasons. *Riley*, 121 Wn.2d at 37; *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010); see *State v. Jones*, 118 Wn.App. 199, 208, 76 P.3d 258 (2003). Sentencing courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 118–19, 156 P.3d 201 (2007). Crime-related prohibitions directly relate to the circumstances of the crime. RCW 9.94A.030(10). The Court stated that it typically upholds sentencing conditions if reasonably crime related. *Riley*, 121 Wn.2d at 36–37.

The Court further stated that sentencing courts must sensitively impose conditions interfering with one's fundamental rights. *Riley*, 121 Wn.2d at 37. Rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights, and we subject any state interference with those rights to strict scrutiny. *State*

*v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

But parental rights are not absolute and may be subject to reasonable regulation. *Corbett*, 158 Wn.App. at 598. A sentencing court may restrict a convicted defendant's fundamental parenting rights “by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children.” *Corbett*, 158 Wn.App. at 598. The Court found that because Carr abused his parenting role by sexually abusing a minor in his care and living in his home, the no contact with minors provision was appropriate. *Corbett*, 158 Wn.App. at 599.

That is exactly the situation here, therefore, the condition to restrict the Petitioner from having contact with his child, whether pretrial or post-conviction, is not a violation of his rights under the facts and circumstances of this case. In addition to the actions in the case at hand, in which the Appellant testified repeatedly about treating this child the same as his own child, there was evidence before the trial court at sentencing that the Appellant was three times previously convicted of molesting multiple other children. The trial court was also aware that the Appellant was under investigation for taking nude photographs of other

children around the same time period as this case, having his own child get naked to make the other children feel comfortable in being photographed without their clothes. Furthermore, the trial court was additionally aware that the Appellant had already had conditions against having contact with minor children from his prior convictions when he had his child and that he had hidden the fact that he had a child at all from the Department of Corrections who was supervising him as a condition of his release on those convictions.

All of these factors made it more than reasonably necessary to further the State's compelling interest in preventing harm and protecting children for the trial court to impose the condition that the Appellant not have contact with minor children to include his own child. Therefore, the trial court's conditions to have no contact with minor age children under 18 years of age, including those related to him, in both the Judgment and Sentence and the Appendix F of Additional Conditions of Sentence must remain in effect.

3) State's Failure to Prove the Elements Claim

Child Molestation in the First Degree

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

- (1) That on or about December 16, 2016, the defendant had sexual contact with J.L.;
- (2) That J.L. was less than twelve years old at the time of the sexual contact and was not married to the defendant;
- (3) That J.L. was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

WPIC 44.21.

Sexual contact means the touching of the sexual or other intimate parts of a person done for the purposes of gratifying sexual desires of either party.

WPIC 45.07.

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.* Furthermore, all reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wash.2d 333, 339, 851 P.2d 654 (1993). Circumstantial evidence is as reliable as direct evidence. *State v.*

*Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). The Court of Appeals defers to the trier of fact regarding a witness's credibility or conflicting testimony. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

Sexual contact, an element of first degree child molestation, is defined as ‘any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.’ RCW 9A.44.010(2). A showing of sexual gratification is required ‘because without that showing the touching may be inadvertent.’ *State v. T.E.H.*, 91 Wn.App. 908, 916, 960 P.2d 441 (1998). The rubbing of an intimate area was sufficient additional proof to establish a sexual purpose. *State v. Harstad*, 153 Wn.App. 10, 22, 218 P.3d 624 (2009). ‘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 Wn.App. 914, 917, 816 P.2d 86 (1991); *State v. Wilson*, 56 Wn.App. 63, 68, 782 P.2d 224 (1989); *State v. Ramirez*, 46 Wash.App. 223, 730 P.2d 98 (1986). But additional evidence of sexual gratification is required ‘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....’ *Powell*, 62 Wn.App. at 917.

Here, the Appellant is alleging that he was in a caretaking role and, therefore, there was no evidence to prove that the contact was for the purpose of sexual gratification. The Appellant identifies himself as a caretaker simply because he was the adult in charge for much of the sleep-over and the primary contact with the parents of the victim when arranging playdates in the past. While that State would agree that the Appellant may have had a supervisor role and that he was entrusted to keep her safe while she was at the family's home, that in no way authorized him to take on every role entrusted to a biological parent or an actual caretaker. The testimony from both the child's mother and the Appellant himself support that he had no authority, no authorization, and no permission to treat the child for any medical purposes or in the manner that he described. Although he claimed that he told the child's mother that the child had diarrhea, the mother testified that he had not communicated with her except to make arrangements to pick up the child after the playdate was over and there was no proof of that conversation provided beyond the Appellant's testimony.

Certainly, even the Appellant admitted that he had never told the mother that he intended to or had put barrier cream on her child's vagina as a result of her allegedly having a medical need for such treatment. The

Appellant did not come up with that theory until he was already in police custody and was being questioned by law enforcement. It is reasonable, therefore, for the jury to have taken a common sense approach to viewing the Appellant's claim that he was merely operating as a caretaker when he touched the child's vaginal area and to have not found that credible, finding instead that the purpose for the touching was sexual gratification. The case law on this issue is fact specific and the details of the Appellant's claim are important. The fact that he allegedly took this action in a caretaking role at a time when the child was not complaining of any vaginal area issue nor was having an issue at that moment is telling. By the child's testimony, both live at trial and during her forensic interview, and the Appellant's own testimony, he picked her up from the garage where the child and his daughter had been having a tea party and were fighting over the food. The Appellant's daughter had apparently taken J.L.'s food and eaten it, causing an argument, and J.L. was crying as a result.

J.L. was not crying because her vaginal area was hurting and she did not say that she needed any assistance with her vaginal area, but for some reason, the Appellant picked J.L. up and took her to his room. He didn't say anything to her. He didn't ask her any questions. He didn't

explain what he was doing. He just took her to his room, away from his daughter to an area where no one else could see what was happening and, again without a word, put J.L. on the bed, pulled her pants and underwear down to her knees, picked at her vagina, touching the inside, and rubbed lotion on her vagina. J.L. described trying to get up and leave and the Appellant pushing her back on the bed and touching her more. J.L. specifically testified that the Appellant had touched her vagina, not her anal area, which would have presumably been the area most affected by diarrhea severe enough to cause redness and a need for cream. J.L. also testified that she was 7 years old and was fully capable of taking care of herself in all hygiene-related functions, including putting lotion on herself had that been needed. The testimony and evidence made it clear that the Appellant had forcibly taken her to an isolated area, touched J.L. on her vagina, and attempted to cover up this fact with the story that he was putting barrier cream on her.

While the Appellant argues that *Powell* applies because there was ‘susceptible of innocent explanation’ for the touching, the actions by the Appellant here do not come close. *Powell*, 62 Wn.App. at 918. Unlike in *Powell*, the touching was not fleeting. It was on her bare skin with her pants and underwear pulled down by the Appellant. J.L. also described

and demonstrated how the Appellant's hands moved when he touched her and testified that his finger's went inside her vagina. Finally, the contact was certainly to a primary erogenous zone. See *Id.*; See also *State v. Antonio*, 103 Wash.App. 1048, 200 WL 1847551 (2000, unpublished) [Defendant was found not be a caretaker, but even if acting in a caretaking role, the evidence was sufficient to support a finding that he touched D.M. for the purpose of sexual gratification because the touching was not fleeting, it was under the swimsuit, Antonio's hands moved around when he touched D.M., and the contact was to the primary erogenous zones]; *State v. Wilson*, 56 Wash.App. 63, 69, 782 P.2d 224 (1989), *review denied*, 114 Wash.2d 1010 (1990) [The purpose of the touching was found to be for sexual gratification because the touching of the girls, one of whom was the Defendant's daughter, occurred in a place where he and the girls would not be easily observed, the Defendant was only partially clothed, and his daughter was undressed]; *State v. T.E.H.*, 91 Wash.App. 908, 916, 960 P.2d 441 (1998) [The conduct could not be claimed to be inadvertent based on the facts that the Defendant forced the child to disrobe, intentionally molested him, and when told to stop, he continued]; *State v. D.R.A.*, 121 Wash.App. 1046, 2, 2004 WL 1102931 (2004, unpublished) [Sexual gratification may be inferred from the nature and

circumstances of the touching... the child's 'reliable and credible' testimony was sufficient to support the trial court's finding that the Defendant's touching and rubbing the child's vaginal area with his hand was sexual contact when the testimony from the child was that while lying on the Defendant's bed, the Defendant put his hand under her clothing and touched her area and that he rubbed her skin until she asked him to stop]. *State v. Price*, 127 Wash.App. 193, 110 P.3d 1171 (2005) [Evidence showed that the touching was neither fleeting nor inadvertent because the child informed her mother that the Defendant had not simply touched her, but had rubbed her vagina and, even assuming that the rubbing took place over the child's clothing, it was of sufficient duration to cause redness and swelling that was still visible after the child was picked from day care and taken home].

Most like the Appellant's case is an unpublished case where the Court of Appeals found that there was no caretaking relationship and that the touching was done for the purpose of sexual gratification because it was not fleeting or otherwise capable of an innocent explanation. *State v. Plant*, 146 Wash.App. 1027, 4, 2008 WL 2974187 (2008, unpublished). In *Plant*, the Defendant argued that the mother considered him to be like a father or an uncle to the child and had entrusted him with the child's

care in the past as a babysitter so his touching was part of caretaking for the child. *Id.* at 3. The child had reported that the Defendant touched her where girls go pee and had demonstrated that the touching had occurred under her clothes by pulling down both her shorts and underwear and pointing to her pubic area. *Id.* at 2. The Defendant claimed he had rubbed the child's belly, legs, and feet to soothe her after she had a nightmare and initially denied touching her public area, but later recalled he had, stating it was possible he mistook the child's vagina for her mother's. *Id.*

When interviewed by police, the Defendant gave different answers as to whether he put his hands inside the child's underwear that ranged from that he had not, that it was possible, and that he might have if he had fallen asleep. *Id.* The Defendant also told police that he had touched the child, stopping at her public area, to test if she had been molested before, but that he received no sexual gratification from the touching. *Id.* The Defendant's counsel argued in closing that the Defendant was under the influence of alcohol, people under the influence of alcohol "do some pretty dumb things," and that the Defendant's plan to test whether she had been molested was not well conceived. *Id.*

The Court of Appeals found that there was no dispute that the touching occurred because the Defendant's defense was that he touched the child to test whether she had been molested. *Id.* at 4. The Court further found that the touch was skin to skin, under her clothing, in an erogenous area, that the touch was not fleeting or otherwise capable of an innocent explanation, and that the Defendant was not the child's caretaker. *Id.* Therefore, the Court, citing *State v. Price* and *State v. Powell*, concluded that a presumption arose that the Defendant's touching was for the purpose of sexual gratification and that there was ample evidence to support the jury's determination that the touching was done for that purpose. *Id.*; *State v. Price*, 127 Wn.App. 193, 202, 110 P.3d 1171(2005), *aff'd*, 158 Wn.2d 630, 146 P.3d 1183 (2006); *State v. Powell*, 62 Wn.App. 914, 917, 816 P.2d 86 (1991).

In addition to the testimony and evidence from the child, the child's mother, and the Appellant that supports the finding that the Appellant touched the child for the purpose of sexual gratification as outlines above, there was additional testimony at trial from Mr. Sanchez that the jury was able to consider. Mr. Sanchez, who by all accounts had no personal interest in the outcome or issues in the case, had no bias or prejudice against the Appellant, and had no access to the facts of the

Appellant's case otherwise, testified about a conversation he overheard between the Appellant and another inmate in which the Appellant described playing with J.L.'s genitals during the sleepover and having to put cream on her to cover up the red marks he caused by touching her. Mr. Sanchez also described the Appellant having a weird look on his face while looking down at his crotch while the Appellant was describing his actions with the child. The addition of this evidence solidifies the jury's finding that the touching was done for the purpose of sexual gratification and the evidence is overwhelming to support that finding. As such, the conviction for Child Molestation in the First Degree must stand.

### III. CONCLUSION

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

DATED this 14th day of June, 2018.

Respectfully Submitted,

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

ECR/lh

**June 06, 2018 - 2:53 PM**

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