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Division II  
State of Washington  
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NO. 51748-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DONALD KINGSLEY,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLALLAM COUNTY

The Honorable Brian Coughenour, Judge

BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The State presented insufficient evidence to prove the appellant Don Kingsley acted for the purpose of sexual gratification, which is required to prove the essential element of “sexual contact,” necessary to prove first degree child molestation.

2. The trial court erred in imposing an exceptional sentence above the standard range sentence based on the aggravating factor of “abuse of position of trust.” Clerk’s Papers (CP) 46.

3. The trial court erred in entering the following conclusion of law in Appendix 2.4 in support of an exceptional sentence:

The Defendant held a position of trust with the Parkers that included entrusting him with the care of E.S.P. as a babysitter and full access to their home on a regular overnight guest. On the night between August 24 and 25, 2017, the Defendant used this position of trust to facilitate the offense of Child Molestation in the First Degree against E.S.P.

CP 46.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. While sexual gratification is not an explicit element of first-degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification in order to prove the element of “sexual contact,” to prove first degree child molestation. Did the State provide

sufficient evidence to prove the appellant committed the offense for the purpose of sexual gratification? Assignment of Error 1.

2. The prosecution bears the burden of proving an aggravating factor beyond a reasonable doubt. The State was required to establish under RCW 9A.44.073(n) that “[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense” in order to prove the aggravating factor alleged against Mr. Kingsley. Where the Court emphasized Mr. Kingsley’s role as a babysitter for the children when making its findings in support of finding an “abuse of trust,” and where no evidence was presented that Mr. Kingsley was acting in the role of a babysitter at the time of the alleged offense, is the vacation of the aggravating factor and remand for a new sentencing hearing required? Assignments of Error 2 and 3.

**C. STATEMENT OF THE CASE**

**1. Procedural history:**

Don Kingsley was charged by information filed in Clallam County Superior Court with one count of rape of a child in the first degree (RCW 9A.44.073) and one count of child molestation in the first degree (RCW 9A.44.083). Clerk’s Papers (CP) 158. The State alleged that Mr. Kingsley

committed both offenses against E.S.P. (DOB: 4/8/09) on August 24-25, 2018. CP 158. The State alleged that both counts were aggravated by the circumstance that the “[d]efendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. RCW 9.94A.535(3)(n).” CP 158-60.

**a. RCW 9A.44.120/child hearsay hearing**

RCW 9A.44.120 allows admission of certain hearsay statements made by a child. The court heard testimony from four witnesses regarding introduction of child hearsay statements by E.S.P. to her mother Heidi Parker, her father Jeremiah Parker, and to Port Angeles police department Detective Eric Smith pursuant to RCW 9A.44.120. 1Report of Proceedings (RP)<sup>1</sup> (4/25/16) at 35-121. Detective Smith testified that he interviewed E.S.P. on August 25, 2017 after she was brought to the police department by her parents. 1RP at 84. He stated that E.S.P. told him that the previous night, while she and her siblings were at home watching movies, Mr. Kingsley came into the room where she was sleeping and put his hand through the bottom of her shorts and

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<sup>1</sup>The Verbatim Report of Proceedings consists of sequentially paginated hearings. To assist in reference, appellate counsel has cited each volume separately as follows: 1RP (9/8/17), (9/12/17), (9/22/17), (9/29/17), (10/13/17), (10/20/17), (12/1/17), (12/15/17), (12/22/17), (1/17/18, RCW 9A.44.120/child hearsay hearing), (1/19/18, court’s ruling on admission of child hearsay), (1/22/18, bench trial, day 1); 2RP (1/22/18, bench trial, day 1) (1/23/18, bench trial, day 2); 3RP (1/23/18, bench trial, day 2), (2/23/18), (3/8/18), (3/29/18, sentencing).

touched her on her “private parts” and rubbed her. 1RP at 86. He stated that she said that she used her hand and that “she’s showing right around the crotch area[.]” 1RP at 86. Detective Smith said that she said that it happened “in the front and the back” and that after he left the room she moved to a couch in the room next to where her sister was sleeping and covered herself with bedding. 1RP at 86. Detective Smith said that E.S.P. said in the interview that Mr. Kingsley came back into the room and tried to touch her with his hand over the bedding and that she slapped his hand and told him to “go away.” 1RP at 87.

E.S.P. testified that she was eight years old and in the third grade. 1RP at 105. She told the court that she was sleeping in her bedroom and Mr. Kingsley, whom she called “Donnie,” came into the room and rubbed the blanket that covered her and then he put his finger in her “girl part deep and then he started rubbing it[.]” \_\_1RP at 110. She said that that he left the room and she moved onto the couch and then he came into the room again and she slapped his hand and told him to “go away.” 1RP at 110. E.S.P. said that he did not say anything when he touched her. 1RP at 111. She said that told her mother about what happened the next morning. 1RP at 111.

The court addressed the nine factors<sup>2</sup> delineated in *State v. Ryan*, 103

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<sup>2</sup>The *Ryan* factors include:  
“(1) [W]hether there is an apparent motive to lie; (2) the

Wash.2d 165, 175-76, 691 P.2d 197 (1984) to determine if E.S.P.'s hearsay statements should be deemed reliable.

After hearing testimony and argument of counsel, the court found that E.S.P. was competent to testify as a child witness. 1RP at 147. At a subsequent hearing on January 19, 2018, the court, after consideration of the *Ryan* factors, found that there were strong indicia of reliability by E.S.P. and permitted Jeremiah Parker, Heidi Parker, and Detective Smith to testify as to statements to them by E.S.P. 1RP at 152-54.

## **2. Trial testimony:**

Mr. Kingsley waived jury trial on January 19, 2018, and the court engaged in an colloquy with him regarding voluntariness of his waiver. 1RP at 154-155. The court also found that Mr. Kingsley knowingly and voluntarily agreed to waive a jury determination of the aggravating factor alleged by the

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general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness [;] ... [(6)] the statement contains no express assertion about past fact[;] [(7)] cross examination could not show the declarant's lack of knowledge[;] [(8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)]the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement."

*State v. Borboa*, 157 Wash.2d 108, 121-22, 135 P.3d 469 (2006); (alterations in original) (internal quotation marks omitted) (quoting *v. Ryan*, 103 Wash.2d 165, 175-76, 691

State. 1RP at 155-56; CP 66.

The case came on for bench trial on January 22 and 23, 2018, the Honorable Brian Coughenour presiding. 1RP at 164-200, 2RP at 202-400, 3RP at 402-422.

Heidi and Jeremiah Parker have four children, including their daughter E.S.P., who was born April 8, 2009. 2RP at 282. E.S.P.'s older sister is A.P. and her younger sister is L.P. 2RP at 284, 334. E.S.P. also has a younger brother, J.P. 2RP at 284. The family lives in a two-story house in Port Angeles, Clallam County, Washington. 2RP at 334. Don Kingsley, age thirty, had known Jeremiah Parker for about fifteen years and were very close friends. Through Jeremiah, Mr. Kingsley also met his wife Heidi Parker.

Mr. Parker testified that Mr. Kingsley was "like a brother" to him and that he had known him since he was 14 or 15 years old. 2RP at 349. Ms. Parker stated that Mr. Kingsley had been a roommate with the family off and on for years and that he had acted in the role of babysitter for their children over the years. 2RP at 341. Mr. Kingsley had moved in with the family shortly after meeting them in 2006 and had been with the family through the birth of all four of their children. 2RP at 341. Mr. Kingsley had moved out the month prior to the allegation of molestation by E.S..P. and moved back in with his

mother, but was in and out of the Parkers' house while taking care of his mother. 2RP at 341, 349. He stayed over with the Parkers two to three times a week, and three to four times week he would watch the children during the day while the Parkers were at work. 2RP at 342. Mr. Parker said that Mr. Kingsley was allowed to be in their house when he and his wife were not home and had access to all areas of the house. 2RP at 350.

The entire family was home on August 24, 2017. 2RP at 335. Mr. Kingsley stayed at the house that night and was in the house the following morning. 2RP at 335. Ms. Parker stated that Mr. Kingsley was to "babysit for us the morning after." 2RP at 335. Ms. Parker stated that on the night of August 24, the children were all sleeping in the same bedroom, and that A.P. was on a couch and the other three children were sleeping in a bed. 2RP at 336.

The following morning she drove her husband to work and when she returned to the house, E.S.P. told her that she wanted to tell to her something. 2RP at 338. They went into the bathroom and E.S.P. told her mother that Mr. Kingsley had touched her over her clothes in the middle of the night when she was sleeping on the bed, and that she told him "no" and he left. 2RP at 338. She stated that E.S.P. told her that after Mr. Kingsley left the room, she moved from the bed to the couch where her older sister A.P. was sleeping, and that Mr. Kingsley returned to the room and he "went inside" and that she slapped his

hand he left again. 2RP at 338.

After E.S.P. made the accusation to her mother, Ms. Parker first went to her husband's work at Sunset Wire Rope in Port Angeles, leaving the children with Mr. Kingsley. 2RP at 358. After talking with Mr. Parker, she went home and took all four children to her husband's work and told him what E.S.P. had said. 2RP at 340, 2RP at 359.

After discussing the allegations, the Parkers took all four children to the Port Angeles Police Department on August 25, 2017, and were then directed to Healthy Families in Port Angeles. Detective Eric Smith interviewed E.S.P. and her siblings. 1RP at 182-83, 2RP at 340. Later that day Ms. Parker took E.S.P. to Bremerton for a sexual assault examination. 2RP at 340.

The interview of E.S.P. was played to the court. 1RP at 185-229. Exhibit 1. In the interview, she stated that she, her sisters and her brother were watching movies, and then she fell asleep, got up to go to the bathroom, and then when she went back to sleep "Donnie came in to check on us and then he uhm, started touching my private parts." 1RP at 194. She said that Mr. Kingsley "was touching my private parts while I was trying to sleep last night." 1RP at 194. She stated that he put one hand in her shorts under her clothes. 2RP at 203. E.S.P. told Detective Smith that Mr. Kingsley left that room, but that he later woke up to use the bathroom, and when he was done he

came back into the room and “he tried doing it again and I slapped his hand and I said “go away” and then we all went to bed.” 2RP at 204.

Detective Smith also talked to Heidi and Jeremiah Parker and E.S.P.’s siblings. 2RP at 229.

On September 6, 2018 Detective Smith applied for and received an order authorizing recording of communication between Jeremiah Parker and Mr. Kingsley. 2RP at 229-30. Mr. Parker agreed to participate in recording Mr. Kingsley and agreed to initiate contact with him and arrange a time and place to meet with him to discuss the incident. 2RP at 230, 355.

On September 7, 2017, Mr. Parker met with Mr. Kingsley at the Parker house. 2RP at 230-31, 355. Mr. Parker wore a wire recording device supplied by police while he spoke with Mr. Kingsley and the conversation, which lasted approximately an hour, was monitored by Detective Smith and another officer from a car parked near the Parker’s house. 2RP at 233, 235. The recording was admitted as Exhibit 2 and played to the court. 2RP at 241-259.

During the conversation, Mr. Kingsley initially denied having sexual contact with E.S.P. 2RP at 243, 244, 246, 248, 250. Mr. Parker repeatedly told Mr. Kingsley that he believed E.S.P. and continued to remind Mr. Kingsley of how long they had known each other and that he needed to tell the

truth about what happened. 2RP at 247, 249. Mr. Parker told him that if he did not tell him what had happened, he would have no choice but to go to the police. 2RP at 254. After a long discussion, Mr. Kingsley said that “it didn’t happen to any of the other kids” and that it had only happened to E.S.P. 2RP at 253. Mr. Kingsley said “I did touch her. I did not want to hurt anybody or anything. I felt bad about it.” 2RP at 254. When asked by Mr. Parker how he touched E.S.P., Mr. Kingsley said “probably the way that she described.” 2RP at 254. He said that he made “full skin contact” with E.S.P., that he “rubbed her” and when asked if he actually put his hands inside E.S.P., Mr. Kingsley stated “[a] little bit, but I didn’t go very far.” 2RP at 255.

Mr. Kingsley was taken into police custody on September 7, 2017. 2RP at 276.

E.S.P. said that when this incident occurred, she and her siblings were watching movies together and sleeping in the bedroom. 2RP at 287. She stated that her parents came into the room and told them to go to sleep, and later Mr. Kingsley came into the room and started “rubbing on the blanket” covering her, and the area he touched was below her stomach and above her legs. 2RP at 289-90. She stated that he left the room and later returned and rubbed on the blanket in the same place, and then put his hand underneath the blanket and “started to rub on my private parts and then stuck his hands inside

my pants and stuck it deep inside my girl part and just started rubbing.” 2RP at 290. She said that after he left she moved to the couch, and then he returned a third time and he tried “doing it again when he came in” and she told him to “go away.” 2RP at 290-93. E.S.P. said that she told her mother about the incident in the morning. 2RP at 294.

During her interview with police, E.S.P. did not allege that Mr. Kingsley touched her vagina. 2RP at 317. When asked about her failure to mention that detail, E.S.P. stated that she “didn’t know the policeman and didn’t feel comfortable cuz it was the first time it happened and so I was scared.” 2RP at 317. She also stated that she did not mention “girl parts” to a nurse when being evaluated for suspected sexual assault, she said “[b]ecasue I was not use[d] to everything going on like and I was scared.” 2RP at 318. She said that since the interviews, she had been practicing testimony with her father, stating that “I’ve been going over when I talk with my dad.” 2RP at 319. She stated that her father did not tell her what to say and that she had “been telling him about what happened and he asked me to give detail and tell the truth and so I told him what I was gonna say.” 2RP at 319.

Mr. Kingsley, who was thirty years old at the time of the trial, testified that he had known Jeremiah Parker for about fifteen years and had been best friends with him. 2RP at 365. Mr. Kingsley had regularly been babysitter for

the children, including E.S.P., over the years. 2RP at 366.

Mr. Kingsley was not currently living with the Parkers, although he had lived with the family in the past. He testified that he arrived at the house on the morning of August 24, 2017 and spent a usual day with the children. 2RP at 368. Mr. and Mrs. Parker were both at work during the day and both came home at about 6:00 p.m. 2RP at 368. After they arrived, Mr. Kingsley stayed at the house, playing video game or was on his computer on a couch in the living room. 2RP at 369. The children were watching movies in the living room. 2RP at 370. People in the house started to go to bed at about 11:00 p.m., and he slept on the couch in the living room. 2RP at 370. The children were in a spare bedroom located down the hall from the living room where he was sleeping. Both rooms are on the same floor of the two-story house. 2RP at 371. The Parker's bedroom is located across the hall from the children's bedroom. 2RP at 371.

Mr. Kingsley said that he heard creaking from the children's door during the night and thought it was "whining or screaming" and he went into the room to check on the children and saw that E.S.P. was moving around. 2RP at 373. He stated that he has a niece who has seizures so he went into the room to check on E.S.P. to make sure that she was not having a seizure. 2RP at 373. He said that he put his hand on the upper part of her leg trying to

rouse her to make sure that she was not having a seizure, and she went back to sleep and he left the room. 2RP at 374. He stated that later he heard the door creak again and went into the room to check on the children again. 2RP at 374. He saw that E.S.P. had moved from the bed to the couch in the room and went to check on her and he put his hand on her stomach and she then told him to away and he left the room. 2RP at 374.

Mr. Kingsley stated that later that day Heidi Parker left the house and said that she was going to her husband's work and he thought she was going to take him lunch. 2RP at 376. She returned about 11:30 a.m. and then left again, taking all four children with her. 2RP at 376. She did not return and later he left the house and went to have dinner with his mother. 2RP at 377.

Mr. Kingsley denied that he put his hand down E.S.P.'s pants or that touched her in a sexual manner or for a sexual purpose. 2RP at 377. He stated that he told Mr. Parker that he had touched E.S.P. during the recorded confirmation on September 7, 2017, and that was that he was under duress and "felt pressured into saying that." 2RP at 377. After denying the allegation seven or eight times during the confrontation, he said that he thought if he told Mr. Parker what he wanted to hear, that "he would leave me alone and that I'd be able to leave the residence." 2RP at 380. He said that Mr. Parker was "agitated" and that "at that point I proceeded to make up a story and to tell it to

him.” 2RP at 378. He said that he did not leave the house at that time because Mr. Parker had threatened to call the police. 2RP at 379.

### **3. Verdict and sentencing:**

The court found Mr. Kingsley guilty of first degree child molestation. 3RP at 418. Citing *State v. Stevens*<sup>3</sup>, the court found that Mr. Kingsley violated a position of trust in commission of the offense. 3RP at 418. The court found Mr. Kingsley not guilty of first degree rape of a child. 3RP at 418. Findings of fact and conclusions of law were not entered regarding the offense. Findings and conclusions were entered at Appendix 2.4 regarding the aggravating circumstance. CP 46. In his oral ruling regarding the aggravating factor, the judge stated:

In regard to then the aggravating circumstance abuse of trust, under the guilty finding on that count II of the information, I also find that the defendant gained access to the child because of his special trust relationship with the family and the parents. He had been long time friends, he had been a babysitter, he had been a trusted person and he used that relationship to have the basically the open door policy that they had for him in regard to their own children and then the victim, as a child, and there's a sufficient relationship of trust established by the defendant's status as a babysitter. That is enough for the court to find that there was abuse of trust in this circumstance and specifically even *State v. Stevens*, [citation omitted], they even--- a babysitter is a person who can have that special relationship that would be an abuse of trust, that would be an aggravating factor under count two of the information.

3RP at 417-18.

At sentencing, the court reiterated this finding:

This is a case where you had a special relationship with the family and clearly had a position of trust. You were both a family member, trusted family member and a babysitter at the same time.

3RP at 447-48.

Mr. Kingsley had an offender score of "0," resulting in a standard range of 51 to 68 months. 3RP at 432. The prosecution requested an exceptional sentence of 84 months. 3RP at 432, 439.

The court entered findings of fact and conclusions of law regarding the aggravator as Appendix 2.4. CP 45-46. The court found the following aggravating factor in support of an exceptional sentence:

The Defendant held a position of trust with the Parkers that included entrusting him with the care of E.S.P. as a babysitter and full access to their home in a regular overnight guest. On the night between August 24 and 25, 2017, the Defendant used this position of trust to facilitate the offense of Child Molestation in the First Degree against E.S.P.

CP 46.

The trial court imposed an exceptional sentence of 70 months. 3RP at 448; CP 30. The court ordered legal financial obligations of \$500.00 crime victim assessment, \$200.00 in court costs and a \$100.00 DNA fee. 3RP at 440; CP 33.

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<sup>3</sup>58 Wash.App. 478, 794 P.2d 38 (1990).

Timely notice of appeal was filed April 19, 2018. CP 14. This appeal follows.

**D. ARGUMENT**

**1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE COURT'S FINDING THAT THE APPELLANT'S ACTIONS WERE FOR HIS SEXUAL GRATIFICATION**

The evidence presented at trial is insufficient to support his conviction for first degree child molestation. Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wash.2d 775, 786, 72 P.3d 735 (2003). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer 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).

First degree child molestation requires proof that that the defendant has, or knowingly causes another person under the age of 18 to have, sexual contact with a person who is less than 12 years old and is not married to the perpetrator,

and that the perpetrator is at least 36 months older than the victim. RCW 9A.44.083(1).

“Sexual contact” is a statutory element of first degree child molestation. “Sexual contact” means 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). “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, 93 P.3d 133 (2004); *State v. Powell*, 62 Wn. App. 914, 916, 816 P.2d 86 (1991). Offenses of child molestation or indecent liberties require a showing of sexual gratification because without that showing the touching may be inadvertent. *State v. T.E.H.*, 91 Wash.App. 908, 915, 960 P.2d 441 (1998). While sexual gratification is not an explicit element to satisfy the statutory element of sexual contact the State must prove a defendant acted for the purpose of sexual gratification beyond a reasonable doubt. See *State v. Stevens*, 158 Wn.2d 304, 309, 143 P.3d 817 (2006); *State v. Veliz*, 76 Wn. App. 775, 778, 888 P.2d 189 (1995); *Powell*, 62 Wn. App. at 917.

In *Powell*, Division 3 determined there was not sufficient evidence of sexual gratification. 62 Wn. App. at 916. In *Powell*, the victim knew the defendant as Uncle Harry. *Id.* at 916. The defendant hugged a child around the

chest, touched her groin through her underwear when helping her off his lap, and touched her thighs. *Id.*, at 916. The court noted that each touch was outside the child's clothes and was susceptible to an innocent explanation. *Id.*, at 918. The touching was described as “fleeting” and the evidence of the defendant's purpose was “equivocal.” *Id.*, at 917–18. The court determined that the evidence was insufficient to support the inference that the defendant touched the child for the purpose of sexual gratification. *Id.*, at 918.

Here, as was the case in *Powell*, there is insufficient evidence that Mr. Kingsley had contact with E.S.P. for purposes of sexual gratification. According to E.S.P., while she was sleeping, he came into the bedroom and rubbed the blanket, then put his hand up a leg of her shorts. The record suggests it was of a short duration. During the second time he rubbed the blanket she said “go away” and slapped his hand and he stopped his actions and left the room. No threats, bribes, or requests not to tell were made and he did not say anything.

Mr. Kingsley provided an explanation as to why he was in the bedroom. He testified that he heard a squeaking from the living room where he was sleeping that he thought was “whining or screaming” and went into the bedroom to check on the noise. 2RP at 372. He provided an explanation why he touched E.S.P.: he stated that E.S.P. was moving around and because he had

a niece who had seizures, he checked her to make sure she was not having a seizure and moved his hand while on her upper leg to try to wake her up. 2RP at 373. He denied ever touching her under her pants or touching her for sexual gratification. 2RP at 377. The State provided no evidence that Mr. Kingsley made any sexual comments toward her or about her to others or that he said anything during the incident. The totality of the circumstances do not suggest that he touched her for sexual gratification, a requirement to prove the element of sexual contact.

The State failed to prove every element of the charge. Accordingly, this Court should reverse the conviction, and dismiss the charge. See *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (remedy for insufficiency of evidence is reversal with no possibility of retrial).

**2. THE EXCEPTIONAL SENTENCE SHOULD BE REVERSED BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE OF THE AGGRAVATING FACTOR**

If this Court affirms Mr. Kingsley's conviction, it should vacate the exceptional sentence. The SRA provides structure for the sentencing of felony offenders through standard sentence ranges based upon the seriousness of the offense and the defendant's criminal history. *State v. Tili*, 148 Wn.2d 350, 368, 60 P.3d 1192 (2003). The SRA permits the sentencing court to impose a

sentence outside of the standard sentence range only if it finds, considering the purposes of the SRA, “there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535; *Id.* The prosecution bears the burden of proving an aggravating factor beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 305 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); U.S. Const. amends. VI, XIV; Const. art. I, § 3, 21, 22.

To impose an exceptional sentence, the jury—or in this case the court—must find that a charged aggravating factor has been proven beyond a reasonable doubt, and the court must find this aggravating factor presents substantial and compelling grounds to impose a sentence above the standard range. *Stubbs*, 170 Wn.2d at 123; RCW 9.94A.535(3); RCW 9.94A.537(3).

**i. An exceptional sentence based on abuse of a position of trust was clearly erroneous**

The SRA includes non-exclusive lists of aggravating and mitigating factors which may justify an exceptional sentence. RCW 9.94A.535 (1), (2). The reasons for an exceptional sentence “must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense.” *State v. Chadderton*, 119 Wn.2d 390, 395, 832 P.2d 481 (1992) (quoting *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)).

The factfinder “may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range.” *Id.* (quoting *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991)). “[F]actors inherent in the crime—inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and [that] do not distinguish the defendant’s behavior from that inherent in all crimes of that type—may not be relied upon to justify an exceptional sentence.” *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001).

To reverse an exceptional sentence, a reviewing court must find: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013) (citing RCW 9.94A.585(4)); *State v. Borg*, 145 Wn.2d 329, 336, 36 P.3d 546 (2001).

A court reviews a special verdict finding under the sufficiency of the evidence standard. *Stubbs*, 170 Wash.2d at 123; *State v. Tewee*, 176 Wash.App. 964, 309 P.3d 791 (2013). Whether a particular factor can justify an

exceptional sentence is a question of law the Court reviews de novo. *Stubbs*, 170 Wn2d at 124. Evidence is sufficient if it permits a reasonable fact finder to find each element of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 221–22, 616 P.2d 628 (1980). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Drum*, 168 Wash.2d 23, 35, 225 P.3d 237 (2010).

An exceptional sentence is justified only when the conduct is proportionately more culpable than that inherent in the crime. *Chadderton*, 119 Wn.2d at 398.

Here the court gave Mr. Kingsley an exceptional sentence of 70 months based on a finding that he used a position of trust to facilitate commission of the crime. Abuse of a position of trust is a statutory aggravating factor that cannot be used to support a sentence outside the standard range unless the defendant actually was in a position of trust, and the position of trust was used to facilitate the commission of the offense. *State v. Vermillion*, 66 Wn. App. 332, 832 P.2d 85 (1992), review denied, 120 Wn.2d 1030 (1993).

To establish the abuse of trust aggravating factor, the State must prove 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.535(3)(n). The court found that Mr. Kingsley “gained access to the

child because of his special trust relationship with the family and the parents.”

3RP at 417. The court also noted that based the finding of an aggravating factor on his role as babysitter for the children, citing *State v. Stevens*, 58 Wn.App. 478, 794 P.2d 38 (1990). The *Stevens* court found

this case involves a crime which does fit the language of the exceptional sentence statute: Stevens deliberately used his position of trust to facilitate a knowing performance of acts that constitute the crime of first degree statutory rape. The crimes occurred while Stevens babysat the children: as caretaker, he abused his position of trust by raping them. It is clear under prior appellate decisions that abuse of the role of caretaker properly increases the culpability of the defendant. (citations omitted).

*Stevens*, 58 Wn.App. at 501.

Here, the facts show that the trial court placed particular emphasis that Mr. Kingsley acted as babysitter for the children. The court specifically emphasized Mr. Kingsley’s role as babysitter for the children when announcing the court’s ruling and again during sentencing. 3RP at 417, 448. Although Mr. Kingsley had acted as babysitter for the children many times, he was not acting in a babysitting role as babysitter on the night of August 24-25. Both parents were home at the time of the incident and Ms. Parker stated that he was not scheduled to babysit until later the day on August 25 when both parents went to work. 2RP at 335. Mr. Kingsley was at best a houseguest at the time of the alleged offense and did not rely on any special relationship or access as

babysitter to facilitate the offense other than access to the bedroom due to his presence in the house.

This Court should strike the aggravating factor because Mr. Kingsley was not acting as a babysitter at the time of the offense. The trial court's finding was clearly erroneous and cannot support the exceptional sentence imposed. Therefore, the exceptional sentence must be vacated and this case remanded to the trial court for resentencing.

**E. CONCLUSION**

For the reasons discussed above, this Court should reverse and remand the convictions and order the charge be dismissed with prejudice, or in the alternative, that the exceptional sentence be vacated and the matter be remanded for resentencing within the standard range.

DATED: October 25, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM



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**CERTIFICATE**

I certify that I sent by JIS a copy of the Brief of Appellant to Clerk of the Court, Court of Appeals, Division II and to Jesse Espinoza, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on October 25, 2018, to Donald Kingsley at the following address:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 25, 2018.



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PETER B. TILLER

**THE TILLER LAW FIRM**

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