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

STATE OF WASHINGTON,

Respondent,

v.

DONALD KINGSLEY,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THERE IS NO FACTUAL BASIS FOR THE TRIAL COURT'S FINDING THAT KINGSLEY ABUSED A POSITION OF TRUST

On review, an appellate court must address three issues: First, the reason for the exceptional sentence must be supported by the evidence in the record and will only be disturbed when it is found to be “clearly erroneous.” Second, the reason must justify a departure from the standard range as a matter of law. Third, the sentence cannot be clearly excessive or clearly too lenient. The standard of review is abuse of discretion. *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995); *State v. Tili*, 148 Wn.2d 350, 358, 60 P.2d 1192 (2003). Only after the court makes that initial determination can the court turn to the follow-up question of whether the defendant’s atypical behavior justifies a departure from the standard range. *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991) (an aggravating factor cannot support an exceptional sentence unless there is a compelling distinction between the crime and others in the same category). Before imposing an exceptional sentence, a court must first determine whether the defendant’s actions are a deviation from the type of behavior normally associated with that type of offense. *Ritchie*, 126 Wn.2d at 397.

The trial court imposed an exceptional sentence based on a finding

of the aggravating factor that appellant Donald Kingsley used a position of trust to facilitate commission of the offenses. The "position of trust" aggravating circumstance is defined as follows:

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 statute establishes two elements. First, the defendant must occupy a "position of trust." Second, the defendant must use his position to facilitate the commission of the current offense.

When analyzing abuse of trust, the focus is on the defendant: Was the defendant (1) in a position of trust and (2) was the position used to facilitate the commission of the offense?

State v. Vermillion, 66 Wn. App. 332, 347, 832 P.2d 95 (1992), review denied, 120 Wn.2d 1030 (1993); see also, *State v. P.B.T.*, 67 Wn. App. 292, 303, 834 P.2d 1051 (1992) ("Washington law is clear that before an abuse of trust can be used as an aggravating factor, the evidence must indicate that the position of trust was used to facilitate the crime."), review denied, 120 Wn.2d 1021 (1993). "Mere opportunity created by a person's position is not enough from which to conclude that the position of trust facilitated the commission of the crime." *P.B.T.*, 67 Wn. App. at 304 (citing *State v. Stuhr*, 58 Wn. App. 600, 663, 794 P.2d 1297 (1990), review denied, 116 Wn.2d 1005 (1991)).

In determining whether the defendant was in a position of trust the

court should look to the duration and degree of the relationship to determine whether the defendant was in a position of trust. *Grewe*, 117 Wn.2d at 218. The court must then determine whether the defendant used that position to facilitate the commission of the crime. *State v. Bedker*, 74 Wn.App. 87, 95, 871 P.2d 673 (1994). *Bedker* involved statutory rape and rape of a child, and the Division One held that "[w]hen analyzing abuse of trust, the focus is on the defendant. The inquiry is whether the defendant was in a position of trust, and further whether this position of trust was used to facilitate the commission of the offense." *Bedker*, 74 Wn.App. at 95.

Here, the record contains no indication that Mr. Kingsley used his role as a family friend to facilitate the crime for which he was convicted; the evidence shows that although he had lived with the family and served a babysitter for E.S.P. in the past, he had moved out of the house and was merely a houseguest at the time of the incident family. 2RP at 341. At the time of the incident, Mr. Kingsley stayed at the house that night and was in the house the following morning, and was expected to babysit the following morning, but at the time of offense Mr. Kingsley was not babysitting E.S.P. 2RP at 335. Mr. Kingsley was sleeping in the living room and the children, including E.S.P., were in a bedroom in the house and there was no testimony that Mr. Kingsley was expected to perform

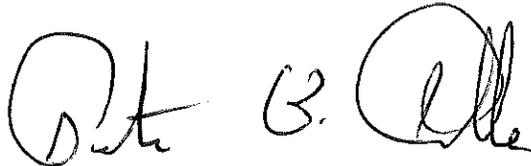
any caretaking role at that time. Mr. Kingsley's relationship with the family allowed him access to the bedroom and opportunity to commit the offenses, but he did not exploit his role as babysitter to commit the crimes alleged by the State. Absent evidence that Mr. Kingsley affirmatively acted to facilitate the crime based on a position of trust, the mere fact of his status as a family friend or the fact that this relationship gave him the opportunity to commit the crime cannot support the trial court's finding.

B. CONCLUSION

Mr. Kingsley's convictions should be reversed and remanded for the reasons stated in the opening brief. In the alternative, the sentence should be reversed and remanded for sentencing within the standard range because the evidence does not to support the special verdict.

DATED: February 13, 2019.

Respectfully submitted,
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Handwritten signature of Peter B. Tiller, consisting of a large 'P' and 'T' followed by 'B. Tiller'.

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CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Appellant to Clerk of Court of Appeals and to Mr. Jesse Espinoza , Deputy Prosecuting Attorney, and mailed copies, postage prepaid on February 13, 2019, to appellant, Doanld Kingsley:

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