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Court of Appeals
Division II
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DONALD KINGSLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00352-1

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the conviction for Child Molestation in the First Degree should be affirmed because there was sufficient evidence that Kingsley touched the victim for his personal sexual gratification?
2. Whether the Court should affirm the exceptional sentence based on the aggravating factor of abuse of a position of trust because Kingsley used his position of trust with the family when they were sleeping to gain access to the victim to facilitate the commission of the crimes?

II. STATEMENT OF THE CASE

E.S.P., an eight year old female, was in her bed when Donald Kingsley, a longtime and close family friend and babysitter, entered the bedroom and touched her private parts as she was trying to sleep. RP 194, 218. Kingsley stuck his hand under E.S.P.'s shorts and rubbed and penetrated her private parts and then left the room. RP 200–204, 290. E.S.P. got up to go sleep on the couch with her older sister and Kingsley came in again. RP 204. Kingsley began touching E.S.P.'s again but E.S.P. slapped his hands away and told him to go away. RP 204.

The State charged the defendant with Rape of a Child in the First Degree and Child Molestation in the First Degree, both with special allegations of abuse of a position of trust. CP 158.

Kingsley waived his right to a jury and during the bench trial E.S.P.'s

forensic child interview was admitted in evidence as State's Ex. 1. RP 184. Kingsley's conversation with E.S.P.'s father, recorded by means of a covert wire, was also admitted in evidence as State's Ex. 2. RP 239. Live testimony consisted of E.S.P.'s live testimony. RP 290–93.

The trial court found Kingsley guilty of Rape of a Child in the First Degree, Child Molestation in the First Degree, and guilty of the aggravating factor of abuse of a position of trust. RP 417–18.

On appeal, Kingsley argues that there was insufficient evidence that he touched E.S.P. for purposes of sexual gratification. Kingsley also argues that the court erred by imposing the exceptional sentence upward on the basis that he used his position of trust to aid in committing the crime because he was not technically babysitting on the night in question as the parents were home. Br. of Appellant at 23.

III. ARGUMENT

A. THE CONVICTION FOR CHILD MOLESTATION IN THE FIRST DEGREE IS SUPPORTED BY SUFFICIENT EVIDENCE.

Detective Eric Smith interviewed E.S.P. on Aug. 25, 2017. RP 174, 182. Det. Smith was trained to conduct forensic child interviews and testified as to his qualifications and training. RP 175–78. E.S.P.'s forensic interview was admitted in evidence as State's Exhibit 1. RP 183–84.

E.S.P. told Det. Smith that her babysitter Donnie was touching her

private parts when she was trying to sleep the night before. RP 194. That night, after E.S.P. and her siblings went to bed after watching movies, she got up to use the restroom and then went back to bed. RP 194. Then Donnie came into the bedroom when she was sleeping with her siblings and he started touching her private parts. RP 194. Donnie started messing around with her by sticking his hand in her pants and then moving his hand different ways. RP 202, 203. While Kingsley was rubbing E.S.P. with one hand, E.S.P. said he had his other hand on his own leg. RP 214. E.S.P. said that Donnie was touching both her front and back. RP 215. E.S.P. only had a name for the back and referred to it as “butt.” RP 215.

First, Kingsley moved his hands around E.S.P.’s butt and then he touched her front. RP 216. During the interview, E.S.P. did not have a word for what part of her body was “front” except for “down there.” RP 217. E.S.P. clarified that Kingsley was touching her front under her underwear. RP 218. E.S.P. clarified that Kingsley was rubbing her private parts under her underwear in a way that one would rub a wasp sting. RP 213–14, 226.

E.S.P. said that Donnie then left the room and came back but she had moved to the couch to sleep with her older sister. RP 204, 205. Donnie tried to touch her again and rubbed her over her blanket when she slapped his hand away and told him to go away. RP 205, 228. E.S.P. reported what Kingsley did to her mother the next morning. RP 210.

On Sept. 6, Det. Smith obtained a wire order to authorize the covert recording of a conversation between Mr. Parker (E.S.P.'s father) and Kingsley. RP 230. The conversation was recorded on Sept. 7, 2017, with Mr. Parker wearing a wire. RP 231, 241–42. The recording was marked State's Exhibit 2 and was admitted in evidence. RP 239.

In the recorded conversation, Kingsley admitted to Mr. Parker that the prior Thursday when he stayed the night at Mr. Parker's house (RP 242), Kingsley did touch E.S.P. and probably in a way that E.S.P. claimed. RP 254. Mr. Parker pointed out to Kingsley that Kingsley had been "part of the family" 16 plus years. RP 242. Kingsley denied touching E.S.P. at first and claimed he went into their bedroom to get them to quiet down and go to sleep. RP 243–44. Kingsley affirmed that he wanted to continue to be part of the family. RP 244.

Kingsley eventually admitted that he touched E.S.P. "down there" and made full skin contact "down there" and "rubbed" her and put his hands inside her although he didn't go very far. RP 255. Kingsley told Mr. Parker that he did not intend to hurt E.S.P. or anybody and that he felt bad about it. RP 254, 256. Kingsley affirmed that it only happened with E.S.P. and not with any of Mr. Parker's other children. RP 256. Kingsley offered that he would get counseling in order to assure Mr. Parker that it was not going to happen later down the road with someone else's child. RP 256.

At trial, E.S.P. testified consistently with her recorded interview:

That I was covered and then he left the room and he came back later and rubbed on the blanket again in the same spot and then he put his hand underneath the blanket and then started to rub on my private parts and then he stuck his hands inside my pants and stuck it deep inside my girl part and just started rubbing.

RP 290.

E.S.P. clarified again that Kingsley had his hands under her clothes as he touched her skin and penetrated her. RP 291, 292. She also testified that after she moved to the couch to sleep with her sister, Kingsley came back again and tried to touch her until she told Kingsley to go away. RP 293.

1. Sufficient evidence supports a reasonable inference that Kingsley touched E.S.P. for purposes of sexual gratification.

“Sufficiency of the evidence is a question of law that we review de novo.” *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, *any* rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)) (emphasis added); *see also State v. Powell*, 62 Wn. App. 914, 916, 816 P.2d 86 (1991) (citing *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983)).

“When the sufficiency of the evidence is challenged in a criminal

case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Kintz*, at 551 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* “‘Circumstantial evidence and direct evidence are equally reliable’ in determining the sufficiency of the evidence.” *Kintz*, at 551 (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). “In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.” *State v. Dejarlais*, 88 Wn. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wn.2d 939, 969 P.2d 90 (1998).

Additionally, this Court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. J.P.*, 130 Wn. App. 887, 891–92, 125 P.3d 215 (2005).

Here, E.S.P.'s statements make it very clear that Kingsley touched her private parts on her skin under her underwear while she and her siblings appeared to be sleeping. Kingsley rubbed her front private part with his hand under her underwear. Kingsley went insider her and rubbed her. After Kingsley left, E.S.P. got up to sleep on the couch with her older sister. Kingsley came back in the bedroom and was beginning to touch E.S.P. again

when she slapped his hand away and told him to go away.

Kingsley himself admitted that he rubbed E.S.P. down there and went inside her although not very far.

The testimony before the court shows that Kingsley's contact with E.S.P. was clearly not inadvertent as he intentionally exceeded contact over clothing and stuck his hand up E.S.P.'s underwear, making skin contact, and rubbed her private part in front and then went inside. The nature of this act itself may be inferred to be for purposes of Kingsley's sexual gratification.

In *State v. T.E.H.*, cited by Kingsley, T.E.H. argued that the "State must prove that the juvenile understands issues of sex and *enjoyed the act or was sexually stimulated*" in order to prove sexual gratification. 91 Wn. App. 908, 916, 960 P.2d 441 (1998). T.E.H. also argued that "in juvenile cases the court cannot infer 'sexual gratification' from the nature and circumstances of the act itself." *T.E.H.*, 91 Wn. App. at 916 (emphasis added).

The *T.E.H.* Court pointed out that T.E.H.'s argument was incorrect and that "[o]ffenses of child molestation or indecent liberties require a showing of sexual gratification because without that showing the touching may be *inadvertent*." *T.E.H.*, 91 Wn. App. at 916 (citing *State v. Brown*, 78 Wn. App. 891, 895, 899 P.2d 34 (1995) (citing *State v. Gurrola*, 69 Wn. App. 152, 155, 848 P.2d 199 (1993)), *review denied*, 128 Wn.2d 1021, 913 P.2d 815 (1996)) (emphasis added).

The *T.E.H.* Court also found that the nature of the act itself may show sexual gratification and that the fact finder was “entitled to make reasonable inferences based on all the evidence and testimony presented.” *T.E.H.*, 91 Wn. App. at 917. Accordingly, the *T.E.H.* Court upheld the juvenile court’s inference that T.E.H.’s contact with his younger cousin was for the purpose of sexual gratification based upon the nature of the act itself.

Here, we are not dealing with determining whether a *juvenile* acted for the purpose of sexual gratification as Kingsley is an adult. Moreover, the trial court was entitled to infer a purpose of sexual gratification from Kingsley’s act of sticking his hand under E.S.P.’s underwear and touching both her butt and front side, rubbing her front side, and then entering E.S.P. Kingsley also did this act when he believed the children were sleeping and he wouldn’t be caught.

Furthermore, after leaving temporarily, *Kingsley came back* and began touching E.S.P. again and likely would have continued his abuse if E.S.P. did not slap his hand away and tell him to go away. Kingsley himself showed his reluctance and shame when first denying and then admitting to the facts and only did so because of the close relationship he had with Mr. Parker as “family” over more than 16 years. Kingsley offered that he could enter counseling to make sure it didn’t happen to any more children.

Kingsley cites *State v. Powell*, to support his argument that there was

insufficient evidence that the contact was for purposes of sexual gratification. 62 Wn. App. 914, 916–18, 816 P.2d 86 (1991). *Powell* is distinguishable. In *Powell*, the touching was over the clothing, was susceptible of innocent explanation, the touch was fleeting, and the alleged victim was unable to describe how Powell touched her. *Powell*, 62 Wn. App. at 916–18.

Here, the touching was under the clothing and inside E.S.P., the touching was not fleeting as Kingsley moved his hand up E.S.P.’s leg under her underwear, touched both E.S.P.’s butt and front under her underwear, rubbed her front, entered E.S.P., and he returned during the same night and began a new attempt to touch her again. Kingsley’s conduct was not susceptible to an innocent explanation and there was no claim or evidence showing that the touching was inadvertent.

These facts presented to the trial court were sufficient for a rational fact finder to infer that Kingsley acted with the purpose of sexual gratification. The facts show intentional touching underneath clothing such that it would be unreasonable to infer such contact was inadvertent.

Therefore, this Court should affirm.

B. THE AGGRAVATING FACTOR OF ABUSE OF POSITION OF TRUST IS SUPPORTED BY SUFFICIENT EVIDENCE.

The trial court concluded that Kingsley “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.” CP 46 (emphasis added). This conclusion of law is supported by the court’s findings of fact. CP 45–46. The court found that Kingsley was a family friend of E.S.P.’s parents, Heidi and Jeremiah Parker, for more than 10 years. CP 45. “The Parker’s placed their 4 children, including the victim E.S.P., in the care of the Defendant as a babysitter.” CP 45. The court found that Kingsley babysat the Parker’s children multiple times per week in August 2017. CP 46. The Parker’s even allowed Kingsley to live with the Parkers and he was a regular overnight guest. CP 46. “As a babysitter and overnight guest, the Parkers’ gave the Defendant full access to their Port Angeles home.” CP 46.

The court orally stated its reasons for its findings as follows:

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 defendants 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 vs. Stevens*, 58 Wn. App. 478, 794 P2d. 38 (1990), 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. So, that is the court’s decision, I find not guilty on count one, I find guilty on count two, with the aggravator.

RP 417–18.

1. **The court’s finding that Kingsley had a position of trust with the Parker family and that Kingsley used this position of trust to commit the offense of Child Molestation in the First Degree should be upheld because it is supported by the facts and is not clearly erroneous.**

“Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537. . . . 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).

“To reverse an exceptional sentence, we 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. Law*, 154 Wnh.2d 85, 93, 110 P.3d 717 (2005)).

Here, Kingsley argues that there was insufficient evidence of the aggravating factor of abuse of a position of trust because Kingsley was not acting as a babysitter at the time of the offense. Appellant’s Br. at 23–24. Therefore, the case should be analyzed under the first standard of review:

“[U]nder a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence[.]” *France*, 176 Wn. App. at 469.

The test for determining whether evidence is sufficient to support a finding of aggravating circumstances is whether, ““after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.”” *State v. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884 (2011) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

Kingley’s argument fails to grasp the scope of the relationship of trust which the court articulated as its basis for the exceptional sentence. The Parkers trusted Kingsley with far more than with a role as a babysitter. Where a babysitter may have temporary access to children on intermittent occasions, Kingsley was trusted as a *family member* and was frequently an overnight guest with full access to the house and the children. This is supported by Mr. Parker’s and Kingsley’s acknowledgement that Kingsley has been regarded as a family member for about 16 years. RP 242, 244.

This manifestation of trust bestowed upon Kingsley by the Parkers is substantial. Even though Kingsley may not have been acting in the role of a babysitter at the time of the offense, he took advantage of the position of trust conferred upon him to commit the crime while he was trusted as a family

member with full access to the Parker residence as an overnight guest and to their children.

These facts establish a position of trust which exceeds the level of trust found in other cases. For instance, in *State v. Grewe*, the finding of a position of trust was upheld where the victim had known defendant for approximately 4 months prior to the crime, was a frequent visitor in defendant's home where she played with defendant's computer and piano. 117 Wn.2d 211, 219, 813 P.2d 1238 (1991).

Additionally, in *State v. Harding*, the Court of Appeals found that evidence supported the trial court's finding that defendant had abused a position of trust in a rape and burglary case where defendant had worked in an informal capacity at the victim's apartment complex, and had been entrusted with the master key that opened door to victim's apartment. 62 Wn. App. 245, 813 P.2d 1259, *review denied*, 118 Wn.2d 1003, 822 P.2d 287 (1991).

Furthermore, in *State v. Stevens*, the Court of Appeals upheld abuse of trust as an aggravating factor where the defendant used his position of trust as a baby-sitter to facilitate first-degree statutory rape of three-year-old and six-year-old. 58 Wn. App. 478, 794 P.2d 38 (1990), *review denied*, 115 Wn.2d 1025 (1990); *see also State v. Pryor*, 56 Wn. App. 107, 782 P.2d 1076 (1989), *overruled on other grounds by, State v. Ritchie*, 126 Wn.2d 388, 395

(1995).

Here, the Kingsley was trusted with far more than a role as a babysitter. The fact that Kingsley was trusted as a babysitter was but one facet of the Parker's position of trust with the family, as a family member. The facts support the court's finding and is it is therefore not clearly erroneous.

Therefore, this Court should affirm the conviction and the exceptional sentence.

IV. CONCLUSION

Kingsley snuck into E.S.P.'s room where she was sleeping with her siblings. Kingsley stuck his hand up E.S.P.'s underwear and touched E.S.P. on her private parts, skin to skin, and he rubbed and penetrated her with his hand. A jury could reasonably infer from these facts that the Kingsley touched E.S.P. in this manner for purposes of sexual gratification. The contact was deliberate and direct rather than inadvertent and it was not subject to an innocent explanation as he only stopped when E.S.P. slapped his hand away the second time and told him to go away. *T.E.H.*, 91 Wn. App. at 917.

Furthermore, the trial court's finding that Kingsley used his position of trust with the family, established over at least a 10 year period, to commit the crime against E.S.P. was supported by substantial evidence. Therefore, the trial court's imposition of the exceptional sentence based on the

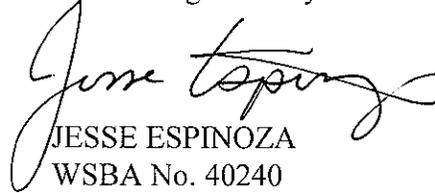
aggravating factor of abuse of trust was not clearly erroneous.

Therefore, this Court should affirm the conviction and the exceptional sentence.

Respectfully submitted this 14th day of January, 2019.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Jesse Espinoza", written in a cursive style.

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Peter B. Tiller on January 14, 2019.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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