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Court of Appeals  
Division II  
State of Washington  
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NO. 53210-7-II

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

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STATE OF WASHINGTON, Respondent

v.

MARK ANTHONY LUGLIANI, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-01387-9

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

### **I. The sentence was not clearly excessive in light of the aggravating factor and the facts of the case.**

#### **STATEMENT OF THE CASE**

The State charged Lugliani with Child Molestation in the Third Degree and alleged that he abused a position of trust in the commission of the crime. CP 1. Lugliani was a substitute teacher at the school where the victim attended. RP 18-19. When the victim was fifteen years old, Lugliani called her out of her fifth period class and into his room, where he flirted with her, hugged her, kissed her and took her into a closet where he closed the door and pushed her up against a counter in the closet and kissed her, placed his hands under her pants, but over her underwear, touching her vagina and touching her breasts over her bra. RP 19. He pulled out his penis and had the victim grab his penis and manipulate it until he ejaculated. RP 19-20. The victim was scared during this encounter; she is on an IEP (individualized education plan) and suffers from Muscular dystrophy, scoliosis, and Charcot-Marie-Tooth disease. RP 20.

Lugliani entered a guilty plea to Child Molestation in the Third Degree and admitted to the aggravating factor that he used a position of

trust, confidence, or fiduciary responsibility to facilitate the commission of the offense. RP 9.

Lugliani asked for a SSOSA sentence or a standard range sentence instead of the exceptional sentence the State recommended. RP 22. The State recommended an exceptional sentence of 48 months prison and 12 months of community custody. RP 18-20.

The court denied Lugliani's request for a SSOSA sentence. RP 39. Instead, the Court found that 48 months in prison was "appropriately proportionate to the offense in light of the aggravator...." RP 39. The Court noted,

I'm finding in accord, I am exercising restraint, I'll have you know Mr. Lugliani, in terms of what I had available to me, an additional twelve months, but because you've been responsible at this juncture, in terms of pleading guilty and even to the aggravator, I'm reflecting that in the fact that it's – it's only forty-eight months.

RP 40.

Lugliani timely appealed. CP 31.

## **ARGUMENT**

### **I. The sentence was not clearly excessive in light of the aggravating factor and the facts of the case.**

Lugliani argues his sentence was clearly excessive and must be reversed because the trial court did not intend to impose the statutory maximum sentence, but that it did impose such a sentence when the time

on community custody is taken into account. The trial court clearly intended to impose the sentence it imposed and that sentence was well thought-out and was appropriate given the facts of the case and the aggravating factor. Lugliani has not shown the trial court abused its discretion in imposing the sentence it imposed. His claim fails.

A sentencing court may impose a sentence outside the standard range if it finds there are “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.120(2). An exceptional sentence is subject to appellate review as provided in RCW 9.94A.210(4), which provides,

To reverse a sentence which is outside the sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing judge are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.210(4). Lugliani argues the trial court erred in imposing a sentence that was clearly excessive under subsection (b). Under that subsection, this Court reviews the sentence for an abuse of discretion. *State v. Grewe*, 117 Wn.2d 211, 214, 813 P.2d 1238 (1991). An exceptional sentence is clearly excessive only if the court abused its discretion in determining the length of the exceptional sentence. *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986).

In determining whether an exceptional sentence is clearly excessive, we ask whether the trial court abused its discretion by relying on an impermissible reason or unsupported facts, or whether the sentence is so long that, in light of the record, it shocks the conscience of the reviewing court. In other words, we must determine that no reasonable person would adopt the position taken by the trial court.

*State v. Halsey*, 140 Wn.App. 313, 324-25, 165 P.3d 409 (2007) (citing *State v. Ferguson*, 142 Wn.2d 631, 651, 15 P.3d 1271 (2001) and *State v. Ross*, 71 Wn.App. 556, 571-72, 861 P.2d 473, 883 P.2d 329 (1993), *review denied*, 123 Wn.2d 1019, 875 P.2d 636 (1994)). There is significant latitude in sentencing an offender with an aggravating factor. In *State v. Creekmore*, the Court on appeal stated,

Stated otherwise, the ‘clearly excessive prong’ of appellate review under the sentencing reform act gives courts near plenary discretion to *affirm* the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence. This necessarily follows from the lack of legislative definition of ‘clearly excessive’ and from the abuse-of-discretion standard of review.

*State v. Creekmore*, 55 Wn.App. 852, 864, 783 P.2d 1068 (1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990) (emphasis original).

The trial court here did not abuse its discretion in setting Lugliani’s length of confinement at 48 months. It does not “shock[] the conscience.” In *Halsey*, *supra*, the appellate court affirmed an exceptional sentence of 720 months for rape of a child in the first degree, finding that it was not

“clearly excessive.” *Halsey*, 140 Wn.App. at 326. In a multitude of other cases, our Courts have upheld exceptional sentences well above the standard range. For example, in *State v. Branch*, 129 Wn.2d 635, 650, 919 P.2d 1228 (1996), the appellate court affirmed a 48 month sentence for Theft in the First Degree when the standard range was 90 days; in *State v. Oxborrow, supra*, the appellate court affirmed a 10 year sentence that was more than 15 times the standard sentencing range; in *Creekmore, supra*, the Court upheld a sentence of 720 months when the standard range was 144-192 months. These cases show that trial courts have significant discretion in determining the length of an exceptional sentence. The trial court here did not abuse its discretion or do anything that shocks the conscience. Given the facts of Lugliani’s case and the significant abuse of trust he engaged in, the sentence was appropriate.

Lugliani argues almost judicial error – that the trial court intended to give less than the maximum sentence, but actually did impose the maximum sentence. However, the trial court was clear that it considered the maximum sentence as incarceration time, and restrained itself in not giving that maximum sentence in prison. Instead, the court gave a year less than the statutory maximum in prison. The trial court did not commit an error or accidentally impose a sentence it did not intend to impose. Lugliani’s claim fails.

**CONCLUSION**

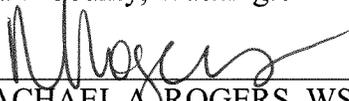
The trial court did not impose a sentence that was “clearly excessive.” This Court should afford the trial court the deference the law calls for and affirm Lugliani’s exceptional sentence.

DATED this 4<sup>th</sup> day of November, 2019.

Respectfully submitted:

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**Transmittal Information**

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