

FILED
Court of Appeals
Division II
State of Washington
4/21/2020 12:46 PM
NO. 53892-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

RAMIL SERRANO,

Appellant.

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

The Honorable David Mistachkin, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that the defendant committed the crime of first-degree rape of a child against S.S. as alleged in Count 1.

2. The State failed to prove beyond a reasonable doubt that the defendant committed the crime of first-degree child molestation against S.S. as alleged in Count 2.

3. The trial court erred in entering disputed Finding of Fact (FOF) 2. Clerk's Papers (CP) 67.¹

4. The trial court erred in entering disputed FOF 3. CP 67.

5. The trial court erred in entering disputed FOF 4. CP 68.

6. The trial court erred in concluding that there was sufficient evidence to find Mr. Serrano guilty of first degree rape of a child and first degree child molestation. (Conclusion of Law (CL) 2); CP 68.

7. The trial court erred in concluding that the incidents of first degree rape and first degree molestation occurred on multiple occasions. (CL 3); CP 68.

8. The sentencing court erred by imposing legal financial obligations (LFO) of interest accrual in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez* and after enactment of *House Bill 1783*.

¹A copy of the Findings of Fact and Conclusions of Law is attached

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the evidence was insufficient to sustain a conviction for rape of a child in the first degree? Assignments of Error 1, 3, 5, 6, and 7.

2. Whether the evidence was insufficient to sustain a conviction for child molestation in the first degree? Assignments of Error 2, 3, 4, 6, and 7.

3. Do statutory amendments affecting discretionary LFOs require remand to strike the imposition of interest accrual? Assignment of Error 8.

C. STATEMENT OF THE CASE

Ramil Serrano met Pong Jo Sem when they were both working at the Quinault Beach Resort and Casino. ²Report of Proceedings² (RP) at 190. Pong Sem has a six-year-old son and daughter, S.S., both of whom live with her. 1RP at 91. Her children live in a large, main house and Ms. Serrano and his uncle, Danilo Cambronerero, moved into the main house with Ms. Sem and her children and lived with them for about two years. 1RP at 99, 115. Another, smaller house is also on the property. 1RP at 98.

Ms. Sem said that the children played with Mr. Serrano and called him uncle. 1RP at 101. The children were left alone with Mr. Serrano when

hereto as an appendix and can also be found at CP 65-70.

²The record of proceedings consists of the following transcribed hearings: October 22, 2018 (arraignment); October 29, 2018; November 26, 2018, April 22, 2019; 1RP - December 31, 2018, January 7, 2019, January 23, 2019, (bench trial); 2RP - January 24, 2019 (bench trial), February 22,

she went to work at the casino on occasions when her schedule and Mr. Serrano's schedules at the casino did not overlap. 1RP at 102.

Ms. Sem said that in April or May 2018 her husband, who was in the Philippines, thought that he was going to get his visa to come to United States, and she told Mr. Serrano that he and his uncle would have to move out of the house. 1RP at 100. Ms. Sem said that Mr. Serrano may have been mad at her for being asked to move out of the house. 1RP at 103. Later it developed that her husband could not get his visa. 1RP at 100. Ms. Sem said that after Mr. Serrano moved out, she told him that he owed her rent. 1RP at 107.

Mr. Serrano was charged in Grays Harbor County Superior Court on October 12, 2018 with first degree rape of a child, contrary to RCW 9A.44.073, and first-degree child molestation, contrary to RCW 9A.44.083. CP 1-3. The State alleged that during the period between April 1, 2016 and May 31, 2018, Mr. Serrano had sexual intercourse and sexual contact with S.S. CP 1-3. Mr. Serrano waived his right to a jury trial on January 7, 2019. CP 18. The case came on for bench trial on January 23 and 24, 2019, before the Honorable David Mistachkin. 1RP at 15-166, 2RP at 171-221.

In court, S.S. testified that Mr. Serrano was alone with her in her mother's bedroom watching TV and he told her take off her clothes and that he took off his clothes. 1RP at 48-49. S.S. said that Mr. Serrano "put his

2019; and March 1, 2019 (sentencing).

private in my private,” but also stated that he “put his private on my private” and “[o]n my skin.” 1RP at 48, 50, 51, 55-56.

Chhrick Sumalabe, Ms. Sem’s sister, stated that S.S. made a disclosure of abuse to her. 1RP at 82, 83. Ms. Sumalabe told her sister, Ms. Sem, about the disclosure, and ultimately contacted Aberdeen Police Department. 1RP at 83-84. Ms. Sem stated that Ms. Sumalabe told her that S.S. said that she was abused by Mr. Serrano and that she needed to file a police report about the alleged abuse. 1RP at 104.

Mr. Serrano was taken into custody on October 19, 2018 at his job at the Little Creek Casino and was transported to the Aberdeen Police Department. 1RP at 120, 125-28.

Aberdeen police Detective Jeffrey Weiss initially questioned Mr. Serrano after he was arrest, and he denied molesting S.S. or touching her inappropriately. 1RP at 131. Police questioned him again the following morning. 1RP at 131-33. Mr. Serrano initially denied molesting S.S., and after about 45 minutes he started crying and said that he and S.S. wrestled on the bed and that S.S. would pull down his pajama pants, exposing him, and that S.S. wore thin pajama bottoms and that when she was on top of him, his penis was against her vagina. 1RP at 131-32, 133-34. The recorded interviews played to the court. 1RP at 135-37. Exhibit 3.

Lisa Wahl, a nurse at Providence St. Peter Hospital Sexual Assault Clinic and Child Maltreatment Center, evaluated S.S. on September 27,

2018. 1RP at 144, 153. Ms. Wahl stated that during the examination, S.S. told her that “she was in her house when over ten times put his penis in her vagina, causing her pain when he tried to, what she said, push it in.” 1RP at 155, 156. The recorded interview with S.S. was played to the court. 1RP at 158, 2RP at 173. Exhibit 4.

Ms. Wahl stated that the findings of a genital exam of S.S. were normal. 1RP at 160. Following a blood draw, S.S. tested positive for herpes simplex virus 1, which Ms. Wahl stated was not diagnostic of sexual abuse, but could be the result of skin to skin contact. 1RP at 161-62.

Mr. Serrano, a native of the Philippines, required a Tagalog interpreter for all proceedings. 1RP at 4. Mr. Serrano stated that the grandparents took care of the children when Ms. Sem was not there. 2RP at 191. He stated that the children did not have internet access at the grandparent’s house and that they would come back to the main house to use internet and that he would also cook for the children when Ms. Sem was at work. 2RP at 192. He stated that he would tell Ms. Sem when the children came from the grandparents to the main house. 2RP at 192.

Mr. Serrano testified that the children were horsing around on the top of the bed with him while he was playing “single poker” on his cell phone, and the younger boy jumped on him and then S.S. jumped on him. 2RP at 193. Mr. Serrano said that they pulled down his thermal underwear while playing. 2RP at 193. He was wearing boxers underneath his thermal

underwear. 2RP at 194. He said that S.S. told her “it was bad” for her to do that. 2RP at 194. Mr. Serrano denied that S.S. rubbed her vaginal area against him, denied that he touched S.S. with his penis, and he denied having sexual contact with her. 2RP at 194.

Mr. Serrano said that he and Ms. Sem “broke up” because her husband was expected to arrive from Cambodia, and she asked him to move out of the house. 2RP at 195. He denied that there was a disagreement but said that Ms. Sem believed that he still owed her rent and stated that a second problem developed when Ms. Sem refused to give him a set of license plates that were mailed to her house, and he went to the Aberdeen police over the matter. 2RP at 194-95.

Lois Pacheco dated Mr. Serrano for about seven years, and they lived together during that time. 2RP at 177. She continued to see Mr. Serrano three to four times a week after they broke up. 2RP at 177-78. Ms. Pacheco’s license plates had been mailed to Ms. Sem’s address when she got her car. 2RP at 178. Mr. Serrano sent messages to Ms. Pacheco that Ms. Sem was demanding money from him and that she was holding the license to Ms. Pacheco’s car as “hostage” until he paid her the money that she said he owed her. 2RP at 178. Ms. Pacheco said that they had to contact the Aberdeen police to retrieve her license plates from Ms. Sem. 2RP at 178.

Ms. Pacheco saw Mr. Serrano in public with S.S. and testified that S.S. was “hopping and skipping and they were laughing, and they were all

smiles.” 2RP at 180.

After hearing testimony from nine witnesses, the trial court found Mr. Serrano guilty of the offenses as charged. 2RP at 212-16.

At sentencing, the court imposed a standard range sentence of 160 months to life for Count 1, and 89 months to life for Count 2, to be served concurrently. 2RP at 212-16; CP 74. The court imposed a \$500.00 crime victim assessment and \$100.00 felony DNA fee. CP 77.

The judgment and sentence stated that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP 78.

Findings of fact and conclusions of law were entered March 1, 2019. CP 65-70.

Mr. Serrano filed timely notice of appeal on March 22, 2019. CP 92.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. SERRANO COMMITTED FIRST DEGREE RAPE AND FIRST-DEGREE MOLESTATION AGAINST S.S.

a. The State bears the burden to prove every element of the offense beyond a reasonable doubt

Mr. Serrano argues that insufficient evidence supports the convictions for rape of a child and child molestation in the first degree.

Mr. Serrano's convictions should be reversed because no reasonable trier of fact could find beyond a reasonable doubt that Mr. Serrano is guilty of rape of a child in the first degree and molestation of a child in the first degree based on the evidence introduced at trial. Specifically, the State failed to produce sufficient evidence to establish that Mr. Serrano engaged in sexual intercourse or had sexual contact with S.S.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const, amend. 14; Const, art. 1, § 3; *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Challenged findings are reviewed for substantial evidence, meaning evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

b. The State presented insufficient evidence of first-degree rape and first degree molestation

To convict Mr. Serrano of first degree rape of a child, the State must prove that he had sexual intercourse with S.S. during a time when S.S. was less than 12 years old and Mr. Serrano was at least 24 months older than S.S. RCW 9A.44.073(1) provides that: “A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.”

RCW 9A.44.010(1)(a) defines sexual intercourse as having its ordinary meaning and occurring upon any penetration, however slight. RCW 9A.44.010(1)(a). Courts have construed the ordinary meaning of sexual intercourse as penetration of the victim's vagina or anus. See *State v. A.M.*, 163 Wn. App. 414, 420, 260 P.3d 229 (2013). A conviction for rape of a child cannot be sustained without evidence of penetration, which is necessary to prove sexual intercourse. See *A.M.*, 163 at 421.

In this case, S.S.’s contradictions are so pronounced, extreme, and confusing that a rational finder of fact could not have found beyond a reasonable doubt that Mr. Serrano committed rape or molestation. In *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992), Division One of this court overturned multiple child rape convictions, in part because of extreme

inconsistencies in the child victim's testimony at trial. *Alexander*, 64 Wn.App. at 157–58. The Court held that there was insufficient evidence to support the jury's verdicts because “the inconsistencies in [the victim's] testimony regarding when the abuse occurred, and whether [some of the] incidents occurred at all, were extreme.” *Id.* at 158. In that case, the child victim directly contradicted herself about whether a bathtub abuse incident ever occurred and whether her abuser used baby oil. *Id.* at 150. Moreover, the victim's testimony as to the relative dates of her abuse contradicted her mother's testimony about times when the victim was around the alleged abuser. *Id.* at 149–50. The Court also held that that the victim's testimony was impermissibly bolstered, the prosecutor's questioning elicited impermissible evidence that the defendant was the abuser, and the prosecutor's attempts to repeatedly instill inadmissible evidence in the juror's minds amounted to misconduct. *Id.* at 153–56. The court reasoned that “[w]e cannot conclude that a rational jury would have returned the same verdict had ... [the] bolster[ed] testimony and the prosecutor's improper remarks been properly excluded.” *Id.* at 158.

The *Alexander* court held that because of the “extreme” inconsistencies in the victim's testimony coupled with other errors, the evidence was “too confused” to allow the jury to find the defendant guilty.

Alexander, 64 Wn.App. at 158.

Here, S.S.'s testimony was inconsistent and extremely contradictory. In particular, the testimony supporting the required element of penetration in Count 1 was extraordinarily inconsistent. Lisa Wahl testified that during the SANE evaluation that S.S disclosed vaginal penetration by Mr. Serrano, and said that it had happened over ten times, that it caused her pain and that it felt "weird." 1RP at 153, 155-56. But Ms. Wahl said that a genital exam of S.S. showed "[n]ormal findings." 1RP at 160. S.S was tested and was positive for herpes simplex virus 1 which Ms. Wahl said was a "nonspecific finding" and that it "does not state diagnostic of sexual abuse." 1RP at 161.

S.S.'s testimony was inconsistent to the point of unreliability, which was one of the issues addressed in *Alexander*. Initially, it should be noted that the interpreters and court had chronic difficulty in hearing and understanding S.S. 1RP at 34, 38, 48, 56, 58, 59, 64, 65, 67, 69. Throughout her testimony, S.S. was at times barely audible, and trial court judge repeatedly stopped S.S.'s testimony to say that he could not hear S.S. and that she needed to speak more clearly and slowly. 1RP at 37, 45, 48-49, 58,59, 63.

The quality of S.S.'s testimony is especially relevant because there was no clear testimony regarding the required element of penetration. When

describing what appeared to be the same incident, S.S.'s testimony was wildly inconsistent, stating variously at times that he started to put his "private" "in" her "private",³ that he put his "private" "in" her "private,"⁴ and also testified that he started to put his "private" was "on" her private,"⁵ that he put his "private" "on" her "private," and "on my skin."⁶

S.S. testified that Mr. Serrano would tell her to take he clothes off and that he would take off his clothes. 1RP at 48. She said that "[h]e would like put his private in my private." 1RP at 48.

The prosecutor asked S.S. to say it louder and the trial court judge then stated:

Counsel, the issue is I can't even hear what she's saying and I'm the fact-finder. And I can't have you repeating her answer because that's most certainly leading and that's going to create a huge issue on appeal, especially as to the most important relevant questions.

1RP at 48-49.

The court said that S.S. would have to clearly pronounce her words and keep her volume up. 1RP at 49.

The court told S.S. that she was in "a safe place" and that "nothing is going to happen to you at all." 1RP at 50. The prosecution then

³1RP at 51.

⁴1RP at 48.

⁵1RP at 50, 51.

⁶1RP at 55.

resumed:

Q: Okay, so if we could go back a little bit. So you were in your mom's room.

A: Yeah.

Q: Okay. And you are watching TV. And if you could tell us-so after-his clothes-he would take his clothes off and you-he told you to take your clothes off. And then what would happen?

A: He started to put his private on my private.

1RP at 50.

The interpreter then stated "interpreter didn't understand," and the court stated that he could not understand either. S.S. was asked to speak up by the prosecutor and said "can you say it again." S.S. said:

A: He started to put his private on my private.

Q: Okay. And when you say private, what do you mean? What body part are you talking about?

A: Like . . .

Q: On yourself, so when you say your private, what part is that?

A: Right here.

Q: Okay, so I see that you're gesturing with your hands to your pelvic vaginal area?

A: Yeah.

Q: Okay. And when you say that he put his private on your private, what do you mean about his private? What area is that?

A: Like-like in.

Q: Okay. I mean what-what body part? What's it used for?

A: Like to-

1RP at 51.

The court reporter then made a clarifying interruption and defense counsel said that they could not hear S.S. 1RP at 51. The prosecutor continued:

Q: So when you say—when you say it was his private, what area on the body is his private?

A: For clothes.

Q: For clothes. What do you mean?

A: Like . . .

Q: Like can you show me on yourself like where his private is, too?

A: (Indicating.)

Q: So you're again gesturing to that same area. Okay. And was-was that- did he actually touch your body with his private?

A: Yeah.

Q: And did he say anything when he was doing this?

A: No.

1RP at 51-52.

S.S.'s testimony at first was that he put his "private" "in" her "private," but when asked to recount what happened in her mother's room, said that he "started" to put his "private" "on" her "private." 1RP at 50. When asked to speak louder, she said the same thing: that she "started" to put his private on her private. 1RP at 51. After another interruption, S.S. said that while in her mother's room with Mr. Serrano, he was touching her with "[h]is private." 1RP at 54. When asked what she meant by "private," S.S. initially said "I forgot," and then was told by the court that there were "are no bad words," and that she would not get in trouble. 1RP at 54-55. The prosecutor then asked if there was another word for the body part, and S.S. shook her head. 1RP at 55. The prosecutor attempted by way of clarifying questions to get S.S. to specify where Mr. Serrano put his "private," and S.S. again alternatively said that he put his "private" "on" her

“private” and also used the word “in”:

Q: So—so what’s another word for that body part? Do you know another word or no?

A: (Shakes head.)

Q: No? Where – like where on his body is that? Can you point to your body to show me where that would be?

A: (Indicating).

Q: So, you’re pointing to this area here?

A: Yeah.

Q: Yeah. Okay. Make sure you’re saying yes and then we can understand you. Okay.

And then what-what did he do with his private?

A: He put it on my private.

Q: Okay. And to-when you say he put it on your private, what do you mean?

A: Like in.

Q: In. Okay. And was that on your clothes, under your clothes, something else?

A: On my skin.

Q: Make sure you speak up. You can move the microphone closer if you need to. On your skin?

A: (Nods head.)

1RP at 55-56.

Again, S.S.’s testimony is confused and contradictory. She first said that he put his private on her private, and then when asked what she meant, said, “like in,” and then said it was “on her skin.” 1RP at 56.

In addition to the contradictory, unclear, confusing testimony, S.S. did not testify to any details that would be expected in an allegation of rape. She did not use the word “penis” and instead used the word “private,” but did not specify what “private” meant, other than by gesturing to her vaginal

area. 1RP at 51-52. Moreover, S.S. did not describe any act or event that would normally be expected with sexual contact other than it felt “weird.” 1RP at 58. She did not state that he ejaculated, and she denied that his body moved during the alleged incidents. 1RP at 57, 59, 60. S.S. did not know what made him stop. 1RP at 57. She said that Mr. Serrano did not talk to her about not telling anyone. 1RP at 62. S.S. said that the incident she described in her mother’s bedroom happened “[a] lot,” but had no estimate as to how many times it occurred, contrary to the testimony of Ms. Wahl, who said that S.S. said it happened more than ten times. 1RP at 62, 64. She was not able to say when the alleged abuse happened and did not know when Mr. Serrano moved out. 1RP at 65.

The questionable nature of S.S.’s testimony, particularly in conjunction with the repeated admonitions by counsel, the interpreter, and the judge for S.S. speak louder and to enunciate, leave open the question as to the nature of the abuse or whether the alleged acts of rape and molestation even occurred at all. The inconsistencies in S.S.’s testimony reach and surpass the level of those detailed in *Alexander*. Accordingly, the convictions for first degree rape of a child and first degree molestation must be reversed.

c. The State presented insufficient evidence of sexual contact and insufficient evidence of sexual

gratification

Mr. Serrano maintains his innocence and denies having sexual contact with S.S. As argued in Section 1 above, Mr. Serrano asserts there is no clear evidence that he had sexual contact with S.S. As noted earlier, sufficient evidence supports a conviction when, viewed in the light most favorable to the State, a rational fact finder could have found guilt beyond a reasonable doubt. *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 reasonably drawn from the evidence. *Salinas*, 119 Wn.2d at 201.

RCW 9A.44.083(1) defines the crime of child molestation in the first degree and prohibits sexual contact with a person who is under age 12 where the perpetrator is at least 36 months older and not married to the victim. "Sexual contact" is "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 of first-degree child molestation but clarifies the meaning of the term "sexual contact." *State v. Lorenz*, 152 Wn.2d 22, 34–35, 93 P.3d 133 (2004). In the context of first-degree child molestation, the definition of "sexual contact" in RCW 9A.44.010(2) "excludes inadvertent touching or

contact from being a crime.” *Lorenz*, 152 Wn.2d at 34. 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). Division One of the Court of Appeals has held that “[p]roof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification.” *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (quoting *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991)). However, if the contact occurred when clothes covered the intimate part, the court requires additional proof of sexual purpose. *Id.* at 21.

Powell is persuasive authority supporting Mr. Serrano’s argument that the State presented insufficient evidence. In *Powell*, the defendant hugged a child around the chest, touched her groin through her underwear when helping her off his lap, and touched her thighs. *Powell*, 62 Wn. App. at 916. The Court noted that each touch was outside the child’s clothes and was susceptible to an innocent explanation. *Powell*, 62 Wn. App. at 916. The touching was described as “fleeting” and the evidence of the defendant’s purpose was “equivocal.” *Powell*, 62 Wn. App. at 917-18. The *Powell* Court held these contacts were insufficient to show the defendant touched the girl with the intent to gratify his sexual desire. *Id.* at 917–18. The Court

held that proof an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference it was done for sexual gratification. *Id.* at 917. But additional evidence of intent was required when the contact was over the child's clothing. *Id.* The Court noted the evidence against Powell was “equivocal” and only suggested a “fleeting touch” over clothing. *Id.* at 917–18. Because there was no additional evidence aside from the fleeting touches over the child's clothing, such as threats, bribes, or requests not to tell being made, the *Powell* Court reversed the first-degree child molestation conviction. *Id.* at 918.

Here, there was no evidence to establish the essential element of sexual contact. The State presented no forensic evidence of sexual contact with S.S.; the State's case in support of molestation was based on statements of S.S. to police and her statements to Ms. Wahl. Detective Weiss stated that Mr. Serrano said that he and S.S., while he was wearing pajama pants, wrestled on the bed, and that S.S. pulled down his pajama bottoms, exposing him, and that S.S. wore thin pajama bottoms and that when she was on top of him, his penis was against her vagina. 1RP at 133-34. At trial, S.S. said that Mr. Serrano told her to take off her clothes, but no testimony was presented that she in fact complied. 1RP at 48. There is no testimony presented at trial that she was unclothed when he put his “private” on her

“private.” Moreover, there is no conclusive evidence that S.S specifically meant her vagina or anus by “private,” or that she actually meant Mr. Serrano’s penis by using the word “private.”

In addition, there was no evidence of sexual gratification. Mr. Serrano said that they were playing on the mother’s bed and that she pulled down his thermal underwear and that he was wearing boxer shorts underneath, and he told her that it was bad to do that. 2RP at 194. No evidence was presented that he ejaculated, said anything to her, moved his body, or that he told her not to tell to tell or keep a secret. As such, insufficient evidence exists to establish that any touching by Mr. Serrano was for purposes of sexual gratification. The conviction for molestation must be reversed.

2. THE COURT ERRED IN IMPOSING AN INTEREST ACCRUAL PROVISION

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in Engrossed Second Substitute House Bill 1783, which modified Washington's system of LFOs and amended RCW 10.01.160(3) to prohibit trial courts from imposing criminal

filing fees, jury demand fees, and discretionary LFOs on defendants who are indigent at the time of sentencing. LAWS OF 2018, Ch. 269, §§ 6, 9, 17. The amendments to the LFO statutes apply prospectively to cases pending on direct review and not final when the amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

House Bill 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing LAWS OF 2018, Ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”).

Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

In this case, the court imposed a \$500 crime victim fund assessment and \$100 DNA collection fee. CP 77. Shortly after the sentencing hearing the court found Mr. Serrano unable to contribute to the

costs of his appeal while ordering the appeal to proceed solely at public expense. CP 96-97. Thus, the record indicates that Mr. Serrano was indigent under RCW 10.101.010(3) at the time of the sentencing hearing on March 1, 2019.

b. Remand is necessary to strike the interest accrual provision

Mr. Serrano challenges the interest accrual on non-restitution LFOs assessed in Section 4.3 of the judgment and sentence. CP 78. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence in each case states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 78. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090 now provides:

- (1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

See LAWS OF 2018, Ch. 269.

Under RCW 10.82.090(1) and (2)(a) the interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs must be

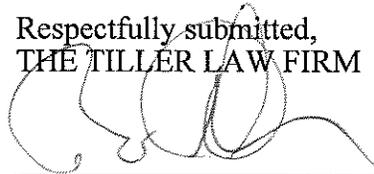
stricken.

E. CONCLUSION

For the reasons stated above, Mr. Serrano respectfully requests this Court reverse both convictions for insufficient evidence and remand for dismissal of the charges. In the alternative, he requests that this case be remanded for resentencing with instructions to strike the interest accrual provision of the judgment and sentence.

DATED: April 21, 2020.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Ramil Serrano

CERTIFICATE OF SERVICE

The undersigned certifies that on April 21, 2020, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Erin Riley, Grays Harbor County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

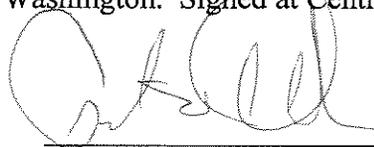
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Mr. Ramil Serrano DOC# 413716
Coyote Ridge Corrections
PO Box 769
Connell, WA 99326

LEGAL MAIL/SPECIAL MAIL

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 April 21, 2020.



PETER B. TILLER-WSBA 20835

APPENDIX A

1 On or about September 5, 2018, Chhrick "Christina" Sumalabe, reported to Aberdeen Police
2 that the victim, her 10-year old niece, S.S., had disclosed to her and her mother that same day that the
3 Defendant had sexually abused her when he had lived in their home. S.S. specifically disclosed that
4 the Defendant had touched her private area.

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6 3.

7 S.S. was referred for a forensic interview and SANE evaluation and examination.

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9 4.

10 In the SANE evaluation and examination, S.S. disclosed that the Defendant's penis went into
11 her vagina, stating that her vagina felt weird and that she felt pain on her vagina. S.S. disclosed that
12 the Defendant had put his penis in her vagina on more than 10 occasions and that it happened at night
13 in the family's home. S.S. disclosed that the Defendant told her not to tell. When asked if she had
14 any worries about her body because of what the Defendant had done, S.S. disclosed that she was
15 worried about her period and if her period was somehow affected by the Defendant's actions.

16
17 5.

18 The Defendant was arrested at his place of work at the Little Creek Casino on October 10,
19 2018 and was brought to the Aberdeen Police Department following his arrest.

20
21 6.

22 Detective Weiss of the Aberdeen Police Department interviewed the Defendant on two
23 different occasions. The interviews were audio recorded.

24
25 7.

26 In the Defendant's initial interview, he essentially denied doing anything to S.S. when asked
27 about having a relationship and having sex with her.

8.

1 In the Defendant's second interview, the Defendant continued to deny touching or having
2 intercourse with S.S. Near the end of the interview, however, the Defendant disclosed that he and
3 S.S. would wrestle on the bed upstairs and that S.S. would sometimes pull his pants down, exposing
4 his penis. The Defendant stated that S.S. would wear thin, silk-like bottoms and that his penis would
5 touch her vagina.

6
7 9.

8 The Defendant had been advised of his rights when he was arrested and before both
9 interviews. The Defendant acknowledged that he understood his rights and had not expressed any
10 confusion about his rights at any time during his contact with law enforcement.

11
12 **DISPUTED FACTS**

13
14 1.

15 It was disputed whether or not the defendant had sexual intercourse and/or sexual contact with
16 the victim.

17 **FINDINGS OF THE COURT**

18 1.

19 The Defendant had access to the child and was alone with her on a number of occasions.

20 2.

21 The victim testified credibly that the Defendant had put his penis on the bare skin of her
22 vagina.

23 3.

24 Any one act of the Defendant putting his penis on the bare skin of the victim's vagina was an
25 act of child molestation.
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4.

Based on the credible testimony by the child, the Defendant did also put his penis inside the victim's vagina.

5.

There was no evidence that the child had a reason to fabricate.

6.

There is no connection between the child and the possible dispute the Defendant may have had with her mother.

7.

The decision of the court would likely have been the same even without the Defendant's confession.

8.

The confession was not forced, not obtained under duress, and the interrogation was perfectly proper.

9.

The fact that the Defendant's testimony on the stand was quite different from his statements during the two recorded police interviews further tends to show that the Defendant is not credible.

Based upon the foregoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and subject matter herein.

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2.

Based on the testimony of the victim, there was sufficient evidence to find the Defendant guilty of Rape of a Child in the First Degree and Child Molestation in the First Degree.

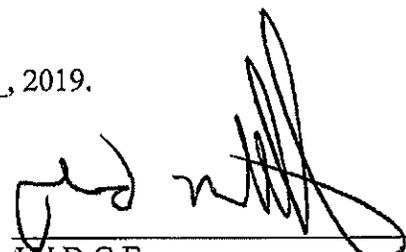
3.

Although only a single count of Rape of a Child in the First Degree and Child Molestation in the First Degree was charged under each count, the State proved beyond a reasonable doubt that the incidents of rape of a child and child molestation occurred on multiple occasions.

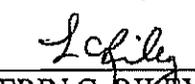
ORDER

IT IS THEREFORE ORDERED that the Defendant is hereby found guilty of Rape of a Child in the First Degree and Child Molestation in the First Degree.

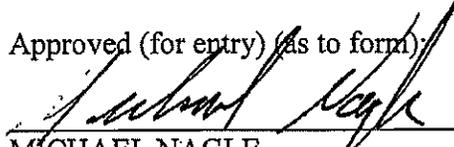
DATED this 1st day of March, 2019.



JUDGE

Presented by:


ERIN C. RILEY
Deputy Prosecuting Attorney
WSBA #43071

Approved (for entry) (as to form):


MICHAEL NAGLE
Attorney for Defendant
WSBA #20657



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THE TILLER LAW FIRM

April 21, 2020 - 12:46 PM

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Appellate Court Case Number: 53892-0
Appellate Court Case Title: State of Washington, Respondent v Ramil Agles Serrano, Appellant
Superior Court Case Number: 18-1-00591-7

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