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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

LUIS A. LANDEROS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred in entering Finding of Fact 10 as follows:
“Millie Morris had never seen the defendant prior to awakening to him lying next to her in her bed.” (CP 100)

2. The court erred in entering Finding of Fact 12 as follows:
“When Millie Morris awoke the defendant was lying next to her in her bed.”
(CP 100)

3. The court erred in entering Finding of Fact 13 as follows:
“The defendant stroked her hair, pushing her head into the pillow.”
(CP 100)

4. The court erred in finding that Ms. Morris is “a single woman alone.” (CP 100) (Finding of Fact 15)

5. The court erred in entering Conclusion of Law 5 as follows:
“The defendant remained in the home for at least one reason, that being his sexual gratification.” (CP 103)

6. The court erred in entering Conclusion of Law 6 as follows:
“On December 19, 2014, the defendant committed the crime of First Degree Burglary with sexual motivation and is found to be guilty of the underlying crime and enhancement.” (CP 103)

7. The court erred in imposing the following condition of community custody: “That you do not enter into romantic/sexual

relationships without the prior approval of your CCO and/or Therapist.”
(CP 97)

II. ISSUES PRESENTED

1. Was there sufficient evidence to establish first-degree burglary, as well as the aggravator of sexual motivation, beyond a reasonable doubt?

2. Is the condition of community custody prohibiting a romantic relationship without the prior approval of a community corrections officer void for vagueness?

3. Is it proper to award the prevailing party costs on appeal?

III. STATEMENT OF THE CASE

Millie Morris lived at 2118 North Lidgerwood with her brother Doug Soapes. RP 60, 62. Their brother, Jerry Soapes, lived next door. RP 62. On December 19, 2015, Doug Soapes came home from work after 5:30 p.m. RP 63-64. He came in through his back slider which was still intact. RP 66. He went to bed at 10:30 p.m. RP 66.

He was woken up by his sister coming into his room, slamming the door and holding it shut, acting hysterical. She said, “There’s a man in my room.” RP 67. He went down the hallway to her bedroom, opened the door, and saw a man with no shirt, white socks, and jeans. RP 68-69. His sister said she did not know him and wanted him gone. RP 69. The man got in his

face, he felt threatened, so he punched him a couple times. RP 69-70. He tried to lead the man out of the house and that is when he saw the back slider was broken out. RP 70. The police then arrived. RP 72.

Jerry Soapes said his sister was at his house from 6:30 p.m. until he walked her home around 1:30 a.m. RP 83, 84, 88. Millie Morris said she came in through the front door and locked it. RP 96. She made a bowl of chili, turned on the television in her bedroom and ate her chili. RP 96. She went to bed with the television on. RP 99.

When she woke up, there was a man she had never seen before in her room. RP 99. He was on her bed. RP 100. She told Officer Collins, who received the call at 7:11 a.m. and arrived at 7:16 a.m., that the man climbed into bed with her and was on top of her. RP 119, 127. She said that he pushed her face into her pillow and said it was okay. RP 127. He was touching her hair, saying, "It's okay. It's okay." RP 102. She pushed him off of her and ran to her brother's room. RP 127.

Officer Collins found a condom on her bed and a condom wrapper on the floor. 128-29. Millie said the condom and wrapper were not there before. RP 107. A dark colored shirt and dark colored sweater were in her room that also had not been there before. RP 111. Officer Collins found a pair of shoes outside and footprints pointed towards the kitchen window.

RP 130, 133. The screen on the kitchen window, which was by the back slider, was pulled open. RP 130.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH FIRST-DEGREE BURGLARY, AS WELL AS THE AGGRAVATOR OF SEXUAL MOTIVATION, BEYOND A REASONABLE DOUBT.

When, as here, a trial court enters findings of facts and conclusions of law following a bench trial, this court determines whether substantial evidence supports the findings, and, if so, whether the findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *Id.* at 193. If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court, even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 685, 314 P.2d 622 (1957). The logical inferences drawn from the facts of any case are a matter for the finder of fact, here, the trial court. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)

Unchallenged findings of fact are verities on appeal. *Stevenson*, 128 Wn. App. at 193. Conclusions of law are reviewed de novo. *Id.* at 193. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992). All “reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 201. Circumstantial evidence and direct evidence are deemed equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This Court defers to the fact finder’s resolution of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. O’Neal*, 126 Wn. App. 395, 424, 109 P.3d 429 (2005). Given the fact finder’s opportunity to assess witness demeanor and credibility, this Court will not disturb those findings. *State v. Pierce*, 134 Wn. App. 763, 774, 142 P.3d 610 (2006).

Under the Sentencing Reform Act of 1981(SRA), a finding of sexual motivation is an aggravating circumstance that can support an exceptional sentence. When the State charges a nonsex offense crime and “sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder,” RCW 9.94A.835(1) requires the filing of a special allegation of sexual motivation.” ‘Sexual motivation’ means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.” In sum, the State must prove beyond a reasonable doubt that the defendant committed the crime for the purposes of sexual gratification. It must do so with evidence of identifiable conduct by the defendant while committing the offense.

State v. Vars, 157 Wn. App. 482, 493-94, 237 P.3d 378 (2010).

In *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993), the defendant was convicted of second degree burglary with a finding of sexual motivation. The facts are similar to the case at bar. In *Halstien*, the victim had gone to bed late, with nothing out of place in her house, and was awakened around 7:30 a.m. by a noise upstairs. She called out and heard a window open. As she called the police, she noticed a bathroom window was broken out.

When she later went through the house with the police, the only items taken were a box of condoms and a vibrator, which had been next to her bed. The defendant, who was her paperboy, and had been acting inappropriately prior to the break-in, was arrested and confessed. The only issue at trial was whether the burglary was sexually motivated. The trial court concluded that “a primary motive for the burglary was Halstien’s sexual gratification.” *Halstien*, 122 Wn.2d at 114.

The court found that the sexual motivation statute requires evidence of identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification. *Id.* at 120-21.

Contrary to Halstien’s position, the statute does not limit this conduct only to criminal sexual contact. If the underlying crime did include actual sexual contact, the defendant could be charged under one of the sex offense crimes, and the sexual motivation allegation would be superfluous. Reading

in a requirement of sexual contact would undermine the purpose of the statute, which was enacted to fill a perceived gap in the criminal code not covered by existing sex offense crimes and to mandate treatment for such offenders in an effort to prevent them from later committing more serious sex offenses. *See* Task Force on Community Protection, *Final Report to Governor Booth Gardner II-8* (1990).

Id. at 120-21.

Halstien argued the evidence was insufficient for the trial court to find his motive at the time of the burglary was sexual gratification. In reviewing the evidence, the Court of Appeals stated:

Here, Halstien surreptitiously entered the victim's home by breaking and crawling through a bathroom window, explored her house, took a vibrator and a box of condoms from a nightstand next to the bed where she was sleeping, examined several photographs of her, and did not take any of her valuable personal property. These facts alone suggest that sexual gratification was one of Halstien's purposes in committing the burglary. In addition, the nature of his prior contacts with [C.B.] indicated that he had, at minimum, a strong personal interest in her... Regardless of whether Halstien's obsession was properly characterized as "abnormal", or whether his lurking is indicative of sexual motivation, the evidence is sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that sexual gratification was one of Halstien's purposes in committing the burglary.

Id. at 851-52.

The Court found a sufficient quantity of evidence was presented for the trial court to conclude that one of Halstien's motives for committing the burglary was sexual gratification. Using the same analysis, Mr. Landeros' conduct was similarly for the purpose of his own sexual gratification. He

was a stranger, who broke into Ms. Morris' house and entered her bedroom while she slept. He was shoeless and shirtless, on top of her in her bed, touching her hair, with an opened condom on the bed ready for use, when she awoke. His intentions were not princely, only sexual. The trial court ruled correctly.

Mr. Landeros claims Findings of Fact 10 and 12 are not supported by the evidence and must be stricken. His claim is the statement that "Ms. Morris awoke to find Mr. Landeros lying next to [Ms. Morris] in bed" is unsupported. The evidence showed that Ms. Morris awoke to find Mr. Landeros climbing into her bed on top of her. RP 127. It is a reasonable inference that Mr. Landeros was lying next to Ms. Morris. "Next" is defined as "immediately adjacent." *Merriam-Webster's Collegiate Dictionary* 835 (2003). Certainly, being on top of someone qualifies as being "immediately adjacent" to someone. Therefore, Mr. Landeros was lying next to Ms. Morris and the courts finding is supported by the evidence.

Mr. Landeros next claims that Finding of Fact 13, which states in part that "[t]he defendant stroked [Ms. Morris'] hair" is unsupported. Ms. Morris testified she awoke to find the defendant touching her hair. RP 102. He was saying, "It's okay. It's okay." A fact finder is allowed to draw reasonable inferences from the evidence. "Stroke" is defined as "to rub gently in one direction; also : CARESS." *Merriam-Webster's Collegiate*

Dictionary 1237 (2003). “Caress” is defined as “to touch or stroke lightly in a loving or endearing manner.” *Merriam-Webster’s Collegiate Dictionary* 187 (2003). It was reasonable for the court to infer from the evidence, that the defendant’s touching Ms. Morris’ hair, while lying on top of her, saying “It’s okay. It’s okay,” constitutes the defendant “stroking” Ms. Morris’ hair. The finding is supported by the evidence.

Mr. Landeros next claims that Finding of Fact 15, that Ms. Morris is a single woman who lives “alone” is unsupported. The full finding reads, “The totality of the circumstances present as horrifying for a single woman alone in what she thought was the safety of her home and bedroom.” CP 63. The defendant mischaracterizes the finding. A fair reading of it is Ms. Morris was alone in her bedroom, not that she lived alone. The finding is supported by the evidence.

Therefore, Mr. Landeros’ claim that the court erred in entering Conclusions of Law 5 and 6 must be denied. There was ample evidence for the court to conclude Mr. Landeros was not only guilty of First Degree Burglary, but that he committed the crime for his sexual gratification.

B. THE STATE CONCEDES THAT THE COMMUNITY CUSTODY CONDITION SHOULD BE STRICKEN.

In *State v. Dickerson*, 2016 WL 3126480, 194 Wn. App. 1014 (2016), an unpublished decision by this court, this same community custody provision was found to be vague and remanded to the trial court to be stricken.

While this decision has no precedential value, and is not binding on any court, it is cited for such persuasive value as this Court deems appropriate. *See* GR 14.1.¹ The State concedes this provision should be stricken.

¹ GR 14.1:

(a) Washington Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding upon any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

C. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual’s current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis Added).

The trial court determined the defendant to be indigent for purposes of his appeal on July 25, 2017, based on a declaration provided by the defendant. CP 121-24. The State is unaware of any change in the defendant’s circumstances. Should the defendant’s appeal be unsuccessful,

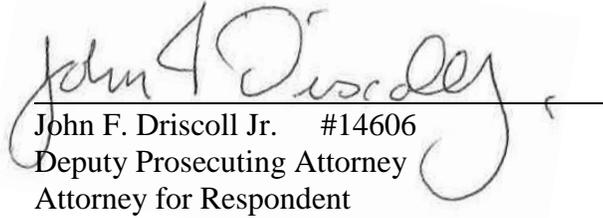
this Court should only impose appellate costs in conformity with RAP 14.2 as amended.

V. CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction.

Dated this 16 day of March, 2018.

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NO. 354784-III

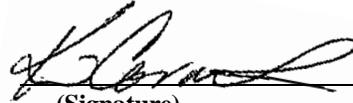
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 16, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Maurina A Ladich and Kristina M. Nichols
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3/16/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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